

BENCHBOOK ON THE ADJUDICATION OF INTERNATIONAL CRIMES



USAID
FROM THE AMERICAN PEOPLE



Supreme
Court



Global
Rights
Compliance

TABLE OF CONTENTS

■ CONTRIBUTORS	1
■ FOREWORD	2
HONORABLE JUDGES!	3
HONORABLE JUDGES!	4
■ INTRODUCTION	5
AIM OF THE BENCHBOOK	6
METHODOLOGY	7
CONTENT	8
SOURCES OF LAW: INTERNATIONAL HUMANITARIAN LAW, INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL CRIMINAL LAW	11
I. International Humanitarian Law	11
A. The International Humanitarian Law Framework	11
B. Classifying Armed Conflicts	12
1. Non-International Armed Conflict	12
2. International Armed Conflict	13
a) Internationalizing a Non-International Armed Conflict	14

b) Occupation	15
c) Occupation by Proxy	16
C. Foundational Principals of International Humanitarian Law	16
1. Combatants vs. Civilians, Military Objectives vs. Civilian Objects	17
a) Combatants and Civilians	17
b) Military Objectives and Civilian Objects	19
2. The Principles of Distinction, Proportionality and Precaution	20
D. International Humanitarian Law Violations	21
II. International Human Rights Law	22
A. International Human Rights Law Framework	22
1. Core International Human Rights Treaties	22
2. Core Regional Human Rights Treaties	23
B. When do Obligations Arise Under International Human Rights Law?	23
1. Jurisdiction and Application of International Human Rights Law During Armed Conflict	23
2. Derogation and Limitation	24
3. Non-State Actors' Obligations	25
C. Fundamental Protections under International Human Rights Law	26
D. The Difference between International Human Rights Law and International Criminal Law	26
III. International Criminal Law	27
A. What is the Difference Between International and Domestic Crimes?	27
1. The Contextual Element(s) of International Crimes	28
2. The Inapplicability of Certain Procedural Limitations when Prosecuting International Crimes	28
B. Investigating and Prosecuting International Crimes	29
1. The International Criminal Court and Ukraine	29
2. Complementarity	30
C. Investigation and Prosecution of the Elements of International Crimes	30
SPECIFIC PROVISIONS DEALING WITH THE PROSECUTION OF PRISONERS OF WAR	32
I. Definition of Prisoners of War	32
II. Rules Dealing with the Prosecution of Prisoners of War	34
A. Prosecution for Participation in the Armed Conflict	35

B. The principle of legality must be upheld at all times (Geneva Convention III, Article 99(1))	36
C. No moral or physical coercion may be exerted on a Prisoner of War to extract a guilty plea (Geneva Convention III, Article 99(2))	37
D. Prisoners of War must be guaranteed the right to a fair trial (Geneva Convention III, Article 84; Customary IHL, Rule 100)	37
E. Prisoners of War must be guaranteed the right to a defence (Geneva Convention III, Article 99(3))	39
F. Prisoners of War may not be confined before trial unless a member of the armed forces of the detaining power would be confined for the same offence (Geneva Convention III, Art. 103)	41
G. Sentences must be pronounced by a competent court in the same manner as applied to members of the armed forces of the detaining power (Geneva Convention III, Article 102)	42
H. Prisoners of War must be guaranteed the right to appeal (Geneva Convention III, Art. 106)	43
III. The war crime of wilfully depriving a Prisoners of War of the rights of fair and regular trial	43

CHAPTER I – SUBSTANTIAL INTERNATIONAL CRIMINAL LAW 45

PART I: INTERNATIONAL CRIMES UNDER UKRAINIAN LAW	46
I. War Crimes.	46
A. Relevant domestic legislation under Ukrainian law: Article 438	47
B. Relevance of international law principles to adjudicate war crimes in Ukraine under Article 438 of the CCU	50
1. Notion and structure of war crimes under international law	50
a) Relationship between international humanitarian law and war crimes	51
b) Identification and classification of war crimes in international law	53
2. Relationship between Article 438 of the CCU and international instruments on war	

crimes	57
a) Article 438 may be interpreted as criminalising only conduct that amounts to war crimes under international law	58
b) Applicability of international criminal law instruments: whether Article 438 of the CCU can be read in conjunction with the ICTY and ICC Statutes and practice	61
C. Definition of War Crimes under international law and applicability under article 438 of the CCU	65
1. Introduction	65
2. Contextual Elements of War crimes	66
a) Introduction	66
b) Definition of the contextual elements of war crimes	67
i. The conduct of the perpetrator took place in the context and was associated with an armed conflict	67
ii. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict	72
3. Underlying Acts of War Crimes applicable under Article 438 of the CCU	72
a) Introduction	72
b) War crimes against Persons	76
i. Wilful killing (ICTY Statute, Article 2(a); ICC Statute, Article 8(2)(a)(i))	76
ii. Offences of Mistreatment: Torture or Inhuman Treatment, including Experiments and Mutilation, as well as Wilfully Causing Great Suffering or Serious Injury (ICTY Statute, Article 2(b)-(c); ICC Statute, Articles 8(2)(a)(ii)-(iii), 8(2)(b)(x))	83
iii. Committing outrages upon personal dignity, in particular humiliating and degrading treatment (ICTY Statute, Article 3; ICC Statute, Article 8(2)(b)(xxi))	116
iv. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity (ICC Statute, Article 8(2)(xxii))	122
v. Compelling service in hostile forces/Compelling participation in military operations (ICTY Statute, Article 2(e); ICC Statute, Articles 8(2)(a)(v), 8(2)(b)(xv))	157
vi. Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities (ICC Statute, Article (8)(2)(b)(xxvi))	165
vii. Wilfully Depriving a Prisoner of War or Other Protected Person of the Rights of Fair and Regular Trial (ICTY Statute, Article 2(f); ICC Statute, Article 8(2)(a)(vi))	175
viii. Declaring abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party (ICC Statute, Article 8(2)(b)(xiv))	184
ix. Unlawful deportation or transfer (ICC Statute, Article 8(2)(a)(vii); ICTY Statute Article 2(g))	189

x.	Unlawful confinement (ICC Statute, Article 8(2)(a)(vii); ICTY Statute Article 2(g))	198
xi.	Taking of hostages (ICTY Statute, Articles 2(h) and 3; ICC Statute, Article 8(2)(a)(viii))	204
xii.	The transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory (ICC Statute, Article 8(2)(b)(viii))	213
c)	War Crimes against Property	224
i.	Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly (ICTY Statute, Article 2(d); ICC Statute, Article 8(2)(a)(iv))	224
ii.	Pillaging a town or place, even when taken by assault (ICTY Statute, Article 3(d), ICC Statute, Article 8(2)(b)(xvi))	234
iii.	Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war (Article 8(2)(b)(xiii) of the ICC Statute)	242
d)	War Crimes of Attacks on Prohibited Targets	253
i.	Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities (ICC Statute, Article 8(2)(b)(i); ICTY Statute, Article 3)	253
ii.	Intentionally directing attacks against civilian objects, that is, objects which are not military objectives (ICC Statute, Article 8(2)(b)(ii); ICTY Statute, Article 3)	266
iii.	Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated (ICC Statute, Article 8(2)(b)(iv); ICTY Statute, Article 3)	272
iv.	Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives (ICTY Statute, Article 3; ICC Statute, Article 8(2)(b)(v))	283
v.	Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives (ICC Statute, Article 8(2)(b)(ix))	288
e)	War Crimes by Employment of Prohibited Means and Methods of Warfare	297
i.	Killing or wounding a hors de combat (ICTY Statute, Article 3; ICC Statute, Article 8(2)(b)(vi))	297
ii.	Making improper use of distinctive signs (ICC Statute, Article 8(2)(b)(vii))	305
iii.	Killing or wounding treacherously individuals belonging to the hostile nation or army (ICC Statute, Article 8(2)(b)(xi))	313
iv.	Declaring that no quarter will be given (ICC Statute, Article 8(2)(b)(xii))	320

v.	Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations (ICTY Statute, Article 3; ICC Statute, Article 8(2)(b)(xxiii))	324
vi.	Employment of poison or poisoned weapons, prohibited gases, liquids, materials or devices (ICTY Statute, Article 3(a); ICC Statute, Articles 8(2)(b)(xvii)-(xviii))	330
vii.	Employment of prohibited bullets (ICTY Statute, Article 3(a), ICC Statute, Articles 8(2)(b)(xix)).	335
viii.	Intentionally using starvation of civilians as a method of warfare (ICC Statute, Article (8)(2)(b)(xxv))	338
ix.	Unlawful Infliction of Terror on Civilians (ICTY Statute, Article 3)	345
f)	War Crimes against Humanitarian Personnel and Operations	353
i.	Intentionally directing attacks against personnel or objects involved in a humanitarian assistance or peacekeeping mission entitled to the protection under IHL (ICC Statute, Article 8(2)(b)(iii)).	353
ii.	Intentionally directing attacks against objects and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law (ICC Statute, Article 8(2)(b)(xxiv)).	362
II.	Crime of Aggression.	367
A.	Relevance of international law principles to adjudicate the crime of aggression in Ukraine under Article 437 of the Criminal Code of Ukraine	367
1.	Aggression Under International Law	367
a)	Notion of the Crime of Aggression under International Law	367
i.	UN Charter: Prohibition of the Use of Force	368
ii.	Charters and Practice of the Nuremburg and Tokyo Tribunals	369
iii.	UNGA Resolution 3314 "Definition of Aggression"	370
iv.	ICC Statute.	372
v.	Customary International Law.	373
b)	Relationship between Article 437 of the CCU and international instruments on the crime of aggression	374
i.	Applicability of ICL instruments and practice: whether Article 437 can be read in conjunction with the ICC Statute and Elements of Crimes	375
ii.	Article 437 criminalises conduct which amounts to the crime of aggression under international law	376
B.	Definition of the Crime of Aggression under International Law and applicability to Article 437 of the CCU.	381
1.	Introduction	381
2.	Elements of the Crime of Aggression	383
a)	Definition of the Crime of Aggression (Objective Elements)	383
i.	Invasion or attack by the armed forces of a State (Article 8bis(2)(a)).	391
ii.	Bombardment or the Use of Any Weapons (Article 8bis(2)(b)).	392
iii.	Blockade of Ports or Coasts (Article 8bis(2)(c)).	392

iv. Attack on the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State (Article 8bis(2)(d))	392
v. Violations of conditions of presence in a territory	392
vi. Allowing territory to be used for an act of aggression (Article 8bis(2)(f))	393
vii. Sending armed bands, groups, irregulars, or mercenaries (Article 8bis(2)(g))	393
b) Definition of the crime of aggression (subjective elements)	394
III. Genocide	397
A. Relevance of international law principles to adjudicate genocide in Ukraine under Article 442 of the Criminal Code of Ukraine	397
1. Genocide under international law	397
a) Notion and structure of genocide	397
i. Identification and classification of genocide in international law	397
b) Relationship between Article 442 of the CCU and the international instruments on genocide	399
i. Applicability of international criminal law instruments: whether Article 442 of the CCU can be read in conjunction with the ICTY and ICC Statutes and practice	399
B. Definition of the crime of genocide under international law and applicability under article 442 of the CCU	400
1. Common Elements of Genocide	401
a) Introduction	401
b) Definition of the common elements of genocide	402
i. The Victim(s) Belong to a Particular National, Ethnic, Racial or Religious Group	402
ii. The Perpetrator Intended to Destroy, in Whole or in Part, that National, Ethnic, Racial or Religious Group, as Such	403
iii. The Conduct took Place in the Context of a Manifest Pattern of Similar Conduct Directed Against that Group or was Conduct that Could Itself Effect such Destruction	406
2. Underlying Acts of Genocide	407
a) Killing members of the group (Genocide Convention, Article 2(a); ICC Statute, Article 6(a); ICTY Statute, Article 4(2)(a); ICTR Statute, Article 2(2)(a))	408
i. Applicability under Article 442	408
ii. Definition of Killing Members of the Group (Objective element)	409
iii. Definition of Killing Members of the Group (Subjective element)	410
b) Causing Serious Bodily or Mental Harm (Genocide Convention, Article 2(b); ICC Statute, Article 6(b); ICTY Statute, Article 4(2)(b); ICTR Statute, Article 2(2)(b))	411
i. Applicability under Article 442	411
ii. Definition of Serious Bodily or Mental Harm (Objective element)	412

iii.	Definition of Causing Serious Bodily or Mental Harm (Subjective element)	414
c)	Inflict Conditions of Life calculated to Bring about Physical Destruction (Genocide Convention, Article 2(c); ICC Statute, Article 6(c); ICTY Statute, Article 4(2)(c); ICTR Statute, Article 2(2)(c)).	415
i.	Applicability under Article 442	415
ii.	Definition of Inflicting Conditions of Life (Objective elements)	416
iii.	Definition of Certain Conditions of Life (Subjective element)	418
d)	Genocide by Imposing Measures Intended to Prevent Births (Genocide Convention, Article 2(d); ICC Statute, Article 6(d); ICTY Statute, Article 4(2)(d); ICTR Statute, Article 2(2)(d))	420
i.	Applicability under Article 442	420
ii.	Definition of Imposing Measure Intended to Prevent Births (Objective elements)	421
iii.	Definition of Imposing Measure Intended to Prevent Births (Subjective element)	422
e)	Genocide by Forcibly Transferring Children (Genocide Convention, Article 2(e); ICC Statute, Article 6(e); ICTY Statute, Article 4(2)(e); ICTR Statute, Article 2(2)(e))	423
i.	Applicability under Article 442	424
ii.	Definition of Forcibly Transferring Children (Objective elements)	424
iii.	Definition of Forcibly Transferring Children (Subjective element)	425
IV.	Crimes Against Humanity	427
A.	Relevance of international law principles to adjudicate crimes against humanity in Ukraine	427
1.	Crimes against humanity under international law	427
a)	Notion and structure of crimes against humanity	427
i.	Identification and classification of crimes against humanity in international law	427
b)	Applicability of international criminal law on crimes against humanity to the Ukrainian domestic legal system.	431
B.	Definition of Crimes against Humanity under international law	431
1.	Introduction	431
2.	Contextual Elements of Crimes against Humanity.	432
a)	Introduction	432
b)	The Conduct was Committed as Part of a Widespread or Systematic Attack Directed Against a Civilian Population	433
i.	There was an Attack Directed Against a Civilian Population	433
ii.	The Attack was Widespread or Systematic.	434
iii.	The Attack was Committed Pursuant to or in Furtherance of a State or Organisational Policy to Commit such an Attack	436
iv.	The Individual Conduct was Committed as Part of the Attack	437
c)	The Perpetrator Knew that the Conduct was Part of or Intended the	

Conduct to be Part of a Widespread or Systematic Attack Directed Against a Civilian Population	438
3. Underlying Acts of Crimes against Humanity	439
a) Introduction	439
b) Crime against Humanity of Murder (ICC Statute, Article 7(1)(a); ICTY Statute, Article 5(a); ICTR Statute, Article 3(a); SCSL Statute, Article 2(a))	439
i. Applicability under Ukrainian Law	440
ii. Definition of Murder (Objective element)	440
iii. Definition of Murder (Subjective element)	441
c) Crime Against Humanity of Extermination (ICC Statute, Article 7(1)(b); ICTY Statute, Article 5(b); ICTR Statute, Article 3(b); SCSL Statute, Article 2(b))	443
i. Applicability Under Ukrainian Law	443
ii. Definition of Extermination (Objective elements)	444
iii. Definition of Extermination (Subjective element)	447
d) Crime against Humanity of Enslavement (ICC Statute, Article 7(1) (c); ICTY Statute, Article 5(c); ICTR Statute, Article 3(c); SCSL Statute, Article 2(c))	448
i. Applicability under Ukrainian Law	448
ii. Definition of Enslavement (Objective element)	449
iii. Definition of Enslavement (Subjective element)	451
e) Crime against Humanity of Deportation and Forcible Transfer (ICC Statute, Article 7(1)(d); ICTY Statute, Article 5(d); ICTR Statute, Article 3(d); SCSL Statute, Article 2(d))	452
i. Applicability under Ukrainian Law	452
ii. Definition of Deportation or Forcible Transfer (Objective elements)	453
iii. Definition of Deportation and Forcible Transfer (Subjective element)	456
f) Crime against Humanity of Imprisonment (ICC Statute, Article 7(1)(e); ICTY Statute, Article 5(e); ICTR Statute, Article 3(e); SCSL Statute, Article 2(e))	458
i. Applicability under Ukrainian Law	458
ii. Definition of Imprisonment (Objective elements)	459
iii. Definition of Imprisonment (Subjective element)	461
g) Crime against Humanity of Torture (Convention against Torture, Articles 1 and 2; ICC Statute, Article 7(1)(f); ICTY Statute, Article 5(f); ICTR Statute, Article 3(f); SCSL Statute, Article 2(f))	462
i. Applicability under Ukrainian Law	462
ii. Definition of Torture (Objective element)	465
iii. Definition of Torture (Subjective element)	466
h) Crime against Humanity of Rape (ICC Statute, Article 7(1)(g)-1; ICTY Statute, Article 5(g); ICTR Statute, Article 3(g); SCSL Statute, Article 2(g))	468
i. Applicability under Ukrainian Law	468
ii. Definition of Rape (Objective elements)	469
iii. Definition of Rape (Subjective element)	473

i) Crime against Humanity of Sexual Slavery (ICC Statute, Article 7(1)(g)-2; SCSL Statute, Article 2(g))	474
i. Applicability under Ukrainian Law	474
ii. Definition of Sexual Slavery (Objective elements)	475
iii. Definition of Sexual Slavery (Subjective elements)	476
j) Crime against Humanity of Enforced Prostitution (ICC Statute, Article 7(1)(g)-3; SCSL Statute, Article 2(g))	477
i. Applicability under Ukrainian Law	478
ii. Definition of Enforced Prostitution (Objective elements)	478
iii. Definition of Enforced Prostitution (Subjective elements)	479
k) Crime against Humanity of Forced Pregnancy (ICC Statute, Article 7(1)(g)-4; SCSL Statute, Article 2(g))	480
i. Applicability under Ukrainian Law	480
ii. Definition of Forced Pregnancy (Objective elements)	481
iii. Definition of Forced Pregnancy (Subjective elements)	483
l) Crime against Humanity of Enforced Sterilization (ICC Statute, Article 7(1)(g)-5)	485
i. Applicability under Ukrainian Law	485
ii. Definition of Enforced Sterilization (Objective elements)	486
iii. Definition of Enforced Sterilization (Subjective elements)	486
m) Crime against Humanity of Sexual Violence (ICC Statute, Article 7(1)(g)-6; SCSL Statute, Article 2(g))	487
i. Applicability under Ukrainian Law	487
ii. Definition of Sexual Violence (Objective elements)	488
iii. Definition Sexual Violence (Subjective elements)	491
n) Crime against Humanity of Persecution (ICC Statute, Article 7(1)(h); ICTY Statute, Article 5(h); ICTR Statute, Article 3(h); SCSL Statute, Article 2(h))	492
i. Applicability under Ukrainian Law	493
ii. Definition of Persecution (Objective elements)	493
iii. Definition of Persecution (Subjective elements)	499
o) Crime against Humanity of Enforced Disappearance (Convention for the Protection of all Persons from Enforced Disappearance; ICC Statute, Article 7(1)(i))	501
i. Applicability under Ukrainian Law	503
ii. Definition of Enforced Disappearance (Objective elements)	503
iii. Definition of Enforced Disappearance (Subjective elements)	507
p) Crime against Humanity of Apartheid (Convention on the Suppression and Punishment of the Crime of Apartheid, Article I; ICC Statute, Article 7(1)(j))	510
i. Applicability under Ukrainian Law	510
ii. Definition of Apartheid (Objective elements)	511
iii. Definition of Apartheid (Subjective elements)	514
q) Crime against Humanity of Other Inhumane Acts (ICC Statute, Article 7(1)(k); ICTY Statute, Article 5(i); ICTR Statute, Article 3(i); SCSL Statute, Article 2(i))	516
i. Applicability under Ukrainian Law	516

ii. Definition of Other Inhumane Acts (Objective elements)	517
iii. Definition of Other Inhumane Acts (Subjective elements).	519

PART 2: OTHER ASPECTS OF SUBSTANTIAL INTERNATIONAL CRIMINAL LAW APPLICABLE IN THE CONTEXT OF DOMESTIC PROCEEDINGS 521

I. Modes of liability	521
A. Relevance of International Law Principles to Adjudicate Modes of Liability Under the Criminal Code of Ukraine.	521
B. Modes of Liability under the CCU	522
C. Modes of Liability Under International Criminal Law.	524
1. Notion and Structure of Modes of Liability Under International Criminal Law.	524
a) Identification and Classification of Modes of Liability Under International Law.	524
2. Applicability of international law principles on modes of liability to the adjudication of international crimes under Ukrainian law.	526
D. Definition of the Modes of Liability under the CCU and ICL	528
1. Principal and Co-Principal Liability	529
a) Applicability under the CCU.	529
b) Principal Liability under International Law	530
i. Direct Perpetration (Alone or Jointly with Others)	530
ii. Perpetration Through Others Not Criminally Liable.	530
2. Liability for Groups of Persons, Organised Groups and Criminal Organisations	532
a) Applicability under the CCU.	532
b) Liability for Persons acting in Groups or through Organisations in International Criminal Law.	533
i. ICTY/ICTR: Joint Criminal Enterprise.	533
ii. ICC: Control Theory	537
3. Accessory Liability.	542
a) Applicability under the CCU.	542
i. Organising	543
ii. Abetting (CCU, Article 27(4)).	546
iii. Acting as an accessory (CCU, Article 27(5)).	547
b) Accessory Liability under international law.	548
i. Planning.	548
ii. Instigating, soliciting, inducing	551
iii. Aiding and Abetting	553
iv. Other contribution to crimes	556
4. Ordering the commission of a war crime as a form of perpetration under Article 438 of the CCU	559
a) Applicability under the CCU.	559

b) Ordering under International Law	560
5. Command responsibility	562
a) Applicability under the CCU	565
b) Command responsibility under international law	568
6. Incitement to Genocide	572
a) Applicability under the CCU	572
b) Incitement to Genocide Under International Law	573
II. Defences	574
A. Defences under the CCU	574
1. Notice of intent to raise defences	577
2. Self-Defence	578
3. Necessity and duress	581
a) Necessity	582
b) Duress	583
4. Superior Orders	586
a) The origin and legal nature of the order/instructions	588
b) “Manifest” unlawfulness	590
c) The accused’s knowledge of the unlawfulness of the order	591
d) Defence of mistake and superior orders	592
5. The principle of legality	593
B. Defences under ICL that are not explicitly included in the CCU	595
1. Mistake of fact and mistake of law	595
a) Mistake of fact	596
b) Mistake of law	598
2. Defences embedded in the elements of international crimes	601
3. Consent	606
a) Consent and Sexual Violence Cases	607
i. Consent under the CCU	607
ii. Consent under ICL	607
4. Linkage to the accused	610

CHAPTER II – PROCEDURAL ASPECTS 611

INTRODUCTION	612
PART I: TRIALS <i>IN ABSENTIA</i> – FAIR TRIAL STANDARDS	613
I. Ukrainian National Law Concerning Trials in absentia	613
A. Grounds for Special Pre-Trial Investigation	613
B. Serving a Person with a Notice of Suspicion and Conducting Criminal Proceedings against such a Person	614
C. Grounds for and Specifics of the Special Judicial Proceedings	617
D. Assigning a Defender for the Accused as part of the Trial in absentia	618
E. Actions of the Court in the Instances when the Accused who was Absent Appeared or was Delivered to the Court, and Right to Appeal	619
II. International legal standards for trials in absentia	621
A. Introduction	621
B. Trials in absentia under International Human Rights law applicable in Ukraine	621
1. There is a Right to be Present at one’s own Trial	621
2. Waiver and Notice	622
3. The Right to be Defended by Counsel is Guaranteed in Trials in absentia	623
4. The Right to a Fresh Determination of the Legal and Factual Merits of a Charge ...	623
C. Trials in absentia before the Special Tribunal for Lebanon	625
D. Conclusion	627
PART 2: THE ASSESSMENT OF DIGITAL EVIDENCE	628
I. Ukrainian National Law concerning the admissibility and assessment of digital evidence	628
A. Admissibility of Evidence	628
B. Evaluation of Evidence	629
C. Origin/Source of Evidence	630
D. Expert Conclusions	635
II. International legal standards concerning the admission and assessment of digital evidence	636

A. Introduction	636
B. What is Digital Evidence?	637
C. International Standards on Digital Evidence	638
1. There are no International Law Standards on Admission or Assessment of Digital Evidence Binding on Ukraine	638
2. International Criminal Tribunals Assess Digital Evidence According to the Same Practice as they do all Non-Oral Evidence	639
a) Relevant rules of evidence before international tribunals	639
b) International criminal law judicial decisions assessing non-oral evidence, including digital evidence	641
i. Intercepts	641
ii. Video	644
iii. Aerial Imagery	646
iv. Mobile Communications Records and Cellular Site Information	646
v. WikiLeaks Documents	648
c) Additional Factors for Assessing Online Open Source Evidence	649
i. Originality/provenance	650
ii. Source analysis	650
iii. Content Analysis	651
iv. Technical analysis	652
v. Chain of Custody and Storage	653
D. Conclusion	655
PART 3: PREVENTING REVICTIMISATION IN CRIMINAL PROCEEDINGS	658
I. Ukrainian Law Standards Relevant to Preventing Revictimisation in Criminal Proceedings	658
A. Admissibility and Acceptability of Witness Questioning at the Stage of Pre-Trial Proceedings in Criminal Proceedings	658
1. A Short Discussion of Relevant Legislative Provisions of the CPC of Ukraine	658
2. A brief discussion of relevant court decisions	662
a) The approach of the Supreme Court to applying part 2 of Article 97 of the CPC	662
b) The approach of the Supreme Court to applying Article 225 of the CPC	663
c) The approach of the Supreme Court to applying Article 615 of the CPC	664
B. The possibility to testify via video connection	665
1. A short discussion of relevant legislative provisions of the CPC of Ukraine	665
2. A brief discussion of relevant court decisions	666
C. Other witness safeguarding measures	667
1. A short discussion of relevant legislative provisions of the CPC of Ukraine	667

2. A brief discussion of relevant court decisions.	671
D. Judicial control over the witness's interrogation.	672
1. A short discussion of relevant legislative provisions of the CPC of Ukraine	672
II. International law and standards relevant to preventing revictimisation in criminal proceedings	674
A. Introduction	674
B. What is Revictimisation?	675
C. International legal standards relevant to preventing revictimisation.	675
1. Relevant jurisprudence of the European Court of Human Rights.	676
2. Other international guidelines	682
3. International Criminal Tribunals and Revictimisation	684
a) Witnesses and Victims before the ICTY	684
b) Witnesses and victims before the ICC.	686
D. Conclusion	689

CHAPTER III – JUDGEMENT DRAFTING IN INTERNATIONAL CRIMES CASES..... 690

PART 1: THE NATURE AND CONTENT OF JUDGEMENTS	691
PART 2: THE INTRODUCTORY SECTION OF THE JUDGEMENT (ARTICLE 374(2) OF THE CPC)	693
PART 3: THE REASONING SECTION OF THE JUDGEMENT	694
I. Requirements of Article 374(3) of the CPC.	694
II. Specific aspects regarding the assessment of the evidence	696
III. Specific aspects of the reasoning relevant for the adjudication of war crimes	696
A. War crimes subsumed in Article 438 of the CCU.	697
B. Legal elements of war crimes	699

PART 4: THE OPERATIVE PART OF THE JUDGEMENT (ARTICLE 374(4) OF THE CPC)	701
PART 5: TRIAL IN ABSTENTIA (ARTICLE 374(5) OF THE CPC).	703
PART 6: SEPARATE OPINION OF A JUDGE (ARTICLE 375 OF THE CPC)	704

ANNEXES705

ANNEX 1: GLOSSARY OF TERMS AND DEFINITIONS APPLICABLE TO CRIMINAL PROCEEDINGS CONCERNING INTERNATIONAL CRIMES	706
--	------------

ANNEX 2: GLOSSARY OF CASE LAW DATABASES AND OTHER ONLINE RESOURCES.	714
I. Practice of International Criminal Tribunals and Other Courts.	714
II. Other Online Resources Concerning International Criminal Law and International Humanitarian Law.	715

ANNEX 3: TABLE OF AUTHORITIES	717
I. Conventions and Instruments (chronological)	717
II. Jurisprudence (alphabetical: tribunal name, case name)	720
A. International Criminal Court.	720
B. Other International Criminal Tribunals	726
C. Other International and Regional Jurisdictions	736
D. Domestic Cases, including WWII Cases.	740
III. Other Key Sources and Publications (alphabetical).	742

CONTRIBUTORS

This Benchbook on the adjudication of international crimes under Ukrainian domestic law was developed through collaboration between Ukrainian judges and international and Ukrainian experts. The methodology and content of this Benchbook have been developed in partnership with the National School of Judges of Ukraine and the Supreme Court of Ukraine. The proposed methodology and content were discussed with and approved by justices of the Supreme Court as well as judges of appellate and first-instance courts. The drafting of the Benchbook was conducted by Ukrainian judges and international experts from UpRights, Global Rights Compliance (GRC) (supported by MATRA-Ukraine Project) under the overall guidance and support of the USAID Justice for All Activity.

This publication was made possible by the support of the American people through the United States Agency for International Development (USAID) under Justice for All Activity. The author's views expressed in this publication do not necessarily reflect the views of USAID or the United States Government.

This document is prepared within the MATRA project "Strengthening Ukraine's Capacity to Investigate and Prosecute International Crimes" funded by the Dutch Ministry of Foreign Affairs. The Project is a joint initiative of the T.M.C. Asser Institute and Global Rights Compliance. The views expressed in it are those of the author(s) alone.

© USAID Justice for All Activity

© Global Rights Compliance

 **FOREWORD**

HONORABLE JUDGES!

You are holding a judge's Benchbook containing materials for hearing cases of international crimes — the most serious and heinous acts that no one could have imagined being committed in Ukraine just a few years ago.

The unprovoked armed aggression against Ukraine has become a real challenge for the entire State and for the domestic justice system. In these difficult times, the National School of Judges acted as a platform for a broad inter-judicial dialogue on managing the wartime court work and hearing new categories of cases brought about by a large-scale war. In this context, we have revised the priorities of judicial education in favor of focusing on international crimes, including war crimes, as well as on criminal offenses against the foundations of national security.

In order to strengthen the capacity of judges to consider cases of war crimes, the National School of Judges of Ukraine, in cooperation with its international partners, has launched a comprehensive plan for judicial education comprising numerous webinars, workshops, training sessions, and other events, has set up a system of individual counseling for judges before whom relevant proceedings are pending, and has initiated the preparation of auxiliary materials for judges, such as guidelines, memos, collections of documents, and handbooks for judges on topical issues of criminal proceedings in war crimes cases.

This publication, intended to help judges properly administer justice in war crimes, cases was among the most notable efforts in this regard. It is the first time indeed that Ukraine and its national judicial system have faced the problem of prosecuting perpetrators of war crimes. Dozens of thousands of criminal proceedings have been registered, each requiring accurate conduct classification, proper collection and recording of evidence, and a fair trial and justification of the court's decision.

By expressing my sincere gratitude to the representatives of the USAID Justice for All Activity and the authors of this publication, I rest confident that it will provide answers to numerous questions arising in the course of the administration of justice and will help fulfill the tasks of the criminal justice system in considering this extremely important category of cases.

Mykola ONISHCHUK

Rector of the National School of Judges of Ukraine

HONORABLE JUDGES!

This Benchbook builds on a judicial needs assessment completed by the USAID Justice for All Activity, which recommended preparing an on-demand educational and skill development tool written for judges that is focused on guaranteeing the fair and impartial adjudication of international crimes. Subsequently, it is designed to provide you with materials and guidelines based on the most relevant practices of international courts and tribunals together with an analysis of Ukrainian laws and related caselaw. This truly unique publication was developed by experienced Ukrainian judges along with national and international experts in international law in close cooperation with the Supreme Court and National School of Judges of Ukraine to support you and your decision-making processes in considering cases involving international crimes.

As international law provides that the bulk of criminal cases must be handled at the domestic level in line with criteria set out by international humanitarian law, international criminal law, and international human rights law, it is vitally important to support the adjudication of international crimes at the national level, including strengthening the legal framework, building the capacity of judges, and reinforcing the administration and management of cases by courts. Accordingly, this Benchbook forms part of a holistic approach to uphold international and European standards, while ensuring accountability for international crimes.

Since adjudicating international crimes further requires specialized knowledge, the introduction of this Benchbook supports developing the necessary expertise to effectively consider cases, forming part of a set of demand-driven and tailored teaching materials. Moreover, it serves as a knowledge resource on the application of substantive international law within the Ukrainian context that will ultimately contribute to drafting high-quality, well-reasoned judgments in international crimes cases. In this regard, I would like to express my deep appreciation to the authors for their contributions and the Supreme Court and National School of Judges of Ukraine for their partnership in preparing this first of its kind publication.

David VAUGHN

Chief of Party of the USAID Justice for All Activity

INTRODUCTION

AIM OF THE BENCHBOOK

1. This Benchbook is designed to assist Ukrainian judges in the fair and effective adjudication of international crimes under Ukrainian domestic law in accordance with international norms and domestic law and procedure. The Benchbook in particular collects and analyses materials which are designed to assist judges in cases which involve war crimes, genocide and the crime of aggression.
2. While governed by Ukrainian national law, the adjudication of cases related to the ongoing armed conflict requires judges to interpret offences from the Criminal Code of Ukraine (CCU) that are, in essence, international crimes enumerated in international law. In particular, “Planning, preparation and waging of an aggressive war” under Article 437 of the CCU corresponds to the crime of aggression, while “Violation of the rules and customs of war” under Article 438 of the CCU and “Genocide” under Article 442 of the CCU reflect, respectively, war crimes and genocide.
3. The Benchbook sets out in detail the applicability of international crimes under Ukrainian national law. It further compiles relevant international legal sources, including international treaties, judicial decisions and academic commentaries to provide a comprehensive overview of the crime of aggression, war crimes and genocide. This analysis is designed to assist judges in the interpretation and application of the relevant domestic offences.
4. In addition, while, the current Ukrainian legislation does not criminalize crimes against humanity, the benchbook anticipates the possibility that Ukrainian judges may be called upon the adjudication of the crime in the near future. As a result, a section providing guidance on the interpretation of crimes against humanity was also incorporated in the Benchbook.
5. The Benchbook also addresses the practice of international criminal jurisdictions and relevant human rights treaty bodies in relation to additional key topics, including modes of liability, defenses in criminal law, and some discrete procedural issues. While strictly speaking, the treatment of these topics under international law may not be directly applicable to domestic proceedings, these sections are designed to provide useful guidance to judges on the interpretation of relevant domestic provisions.
6. The methodology and content of this Benchbook have been developed in partnership with the National School of Judges of Ukraine and the Supreme Court of Ukraine. The proposed methodology and content were discussed with and approved by Justices of the Supreme Court as well as judges of appellate and first-instance courts. The drafting of the Benchbook was conducted by Ukrainian judges and international experts from UpRights and Global Rights Compliance (GRC), supported by MATRA-Ukraine Project, under the overall guidance and support of the USAID Justice for All Activity.

METHODOLOGY

7. The Benchbook has been created to provide judges with a clear and structured framework to apply international law relevant to international crimes in accordance with international and domestic law provisions. It is primarily based on analysis of relevant international instruments and international criminal tribunals and courts. Specific emphasis has been devoted to explaining how the relevant international sources and instruments may be applied at the domestic level or may be used to interpret national provisions in the context of cases involving international crimes.
8. At the international level, international crimes have been part of the focus of international criminal courts and tribunals, including, *inter alia*, the Nuremberg Tribunal, the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC), and the International Criminal Court (ICC). Over the course of the last 70 years, the practice of these international criminal jurisdictions have clarified the classification, scope, and relevant legal elements of international crimes incorporated into the national legislation of Ukraine. In providing analysis relevant to the domestic adjudication of cases related to international crimes, the **Benchbook** incorporates grey boxes throughout the text that contain extracts from relevant caselaw. Further, footnotes contain links to the full text of the respective law and judgements of relevant courts and tribunals. As a practical tool, the Benchbook also includes throughout the text yellow boxes which summarize complex issues of law and blue boxes containing practical case studies.
9. The Benchbook further outlines, where appropriate, commentary from leading academics and experts which elaborates and clarifies on the nature and applicability of international crimes. This content is included to supplement gaps in the jurisprudence of international criminal tribunals or international human rights courts concerning international crimes.
10. In addition, the Benchbook highlights any discrepancies or fragmentation in international practice. For example, where there is a noticeable difference between customary international law and the framework of the International Criminal Court.

CONTENT

11. The Benchbook is composed of three main sections: (1) Introduction; (2) Substantial international criminal law (Chapter 1); and (3) Procedural Aspects (Chapter 2).
12. **Introduction**. This section provides an overview of the **Introduction, Sources of Law**: applicable to the armed conflict in Ukraine. More specifically, it discusses the general framework and the applicability of **I. International Humanitarian Law**; **II. International Human Rights Law** and **III. International Criminal Law**. In addition, the introduction offers a presentation of the **Specific Provisions Dealing with the Prosecution of Prisoners of War** under international humanitarian law.
13. **Chapter 1 – Substantial international criminal law – Part 1 – International Crimes under Ukrainian Law** – contains an analysis of four international crimes: **I. War Crimes**; **II. Crime of Aggression**; **III. Genocide**; and **IV. Crimes Against Humanity** according to the practice of international courts and tribunals in the context of the corresponding domestic provisions of the CCU. In doing so, it outlines the specific methodology used to interpret relevant Ukrainian criminal provisions and the applicability of international law.
14. The Benchbook adopts a specific structure designed to assist judges to analyse each enumerated international crime, which includes:
 - A yellow box containing an explanation, or algorithm, summarising the main elements of each crime and/or underlying acts.
 - The applicability of the relevant international framework under the Ukrainian domestic law.
 - Discussion of the objective elements of the crime.
 - Discussion of the subjective elements of the crime.
 - Discussion of the common or contextual elements of the crime (when relevant).
15. **Chapter 1 – Substantial international criminal law – Part 2 – Other Aspects of substantial international criminal law applicable in the context of domestic proceedings** – provides a comparative analysis of Ukrainian national law and international criminal law concerning: **I. Modes of liability** and **II. Defences** in cases related to international crime. The subsections concerning the CCU and Ukrainian national law have been compiled by Ukrainian legal experts with the assistance of Ukrainian judges. Subsections concerning international criminal law and practice have been compiled by international experts with an emphasis on those aspects that can be used as guidance to interpret and apply relevant domestic law.
16. **Chapter II – Procedural Aspects**. This section provides a comparative analysis of Ukrainian national law and international criminal law on three discrete procedural issues, namely: Part 1 – **Trials in absentia – Fair Trial Standards**; Part 2 – **The Assessment of Digital Evidence**; and Part 3 – **Preventing Revictimisation in Criminal Proceedings**. Procedural aspects for the adjudication of international crimes mostly rely on provisions from the national legislation. Taking into consideration numerous Ukrainian resources on criminal proceedings applicable to all crimes under the CCU,

the Benchbook addresses several specific aspects of procedure for the adjudication of international crimes under domestic legislation. These three specific issues have been selected by Justices of the Supreme Court and judges of appellate and first instance courts as those most relevant because they illustrate specificities in the adjudication of international crimes under Ukrainian domestic law compared to other crimes of the CCU. The subsections concerning Ukrainian national law have been compiled by Ukrainian judges, while international experts have drafted the relevant subsections concerning international law. It is important to recall that international practice concerning these issues are not directly applicable in Ukraine but should be used as a guidance to interpret and apply relevant domestic law. In addition, the subsections on international law also include relevant caselaw of the European Court of Human Rights in light of the direct applicability of the the European Convention of Human Rights within the Ukrainian domestic framework.

17. **[Chapter III – Judgement Drafting in International Crimes Cases](#)**. This section provides an overview of the relevant provisions of the Criminal Procedural Code of Ukraine related to written verdicts and put them in the context of adjudicating international crimes cases, specifically war crimes under article 438 of the CCU. It further explains the connections between the relevant sections of the Benchbook and the various parts of the verdict.
18. Finally, the Benchbook includes three annexes:
 - **[Annex 1 – Glossary of terms and definitions applicable to criminal-proceedings concerning international crimes](#)** provides judges with a list of terms and their definition to assist judges navigating some of the concepts used in the Benchbook.
 - **[Annex 2 – Glossary of case law databases and other online resources](#)** – contains a list and short description of existing resources containing the practice of international criminal tribunals as well as other online resources relating to international criminal law, international humanitarian law and international human rights law relevant in the context of the Benchbook.
 - **[Annex 3 – Table of authorities](#)** – contains a full list of the international instruments and case law quoted in the Benchbook.

EXAMPLE – HOW TO USE THE BENCHBOOK?

Where to go in the Benchbook when dealing with proceedings involving war crimes

- When facing a criminal case that involves a war crime, there are numerous resources contained in [Chapter 1, Part 1, Section I. “War crimes”](#).
- The Prosecutor is likely to charge an accused with reference to specific war crime identified under international law, by reference to the Statute of the International Criminal Court or by reference to article 438 of the CCU. However it is referenced, judges will be able to identify the relevant criminal conduct that qualifies as a war crime under [Chapter 1, Part 1, Section I.C.3. “Underlying acts of war crimes applicable under article 438 of the CCU”](#). This section presents the most up to date list of the generally accepted war crimes under international criminal law and is primarily based on article 8 of the ICC Statute. Judges can on this basis identify the relevant sub-sections that addresses the war crime(s) they are seized to adjudicate.
- Each sub-section on a specific war crime is self-standing and will provide the information necessary for a judge to adjudicate the particular crime. Each sub-section includes the following elements:
 - **A yellow box** containing an algorithm summarizing the applicability and the main elements of each crime and/or underlying acts.
 - **The applicability of the international framework under article 438 of the CCU.** This section explains how a particular war crime can be considered criminalised under Article 438. In particular, it addresses how specific criminal conduct may be: (1) a violation of the rules and customs of war recognised by international treaties ratified by Ukraine; and (2) recognised under international law as a war crime.

There is also further elaboration in the Benchbook on (1) why war crimes under international law can be considered criminalised under Article 438 of the CCU; and (2) why judges can rely on the law and practice of international criminal tribunals and in particular the ICC. This can be found under [Chapter 1, Part 1, Section I.B. “Relevance of international law principles to adjudicate war crimes in Ukraine under article 438 of the CCU”](#).

- **Definition of the objective elements of the war crime.** This section provides judges with a discussion on the *actus reus* of the particular war crime according to the framework and practice of relevant international criminal tribunals, in particular the ICTY and the ICC.
- **Definition of the subjective elements of the war crime.** This section provides a discussion on the *mens rea* of the particular war crime according to the framework and practice of the relevant international criminal tribunal, in particular the ICTY and the ICC. However, the general part of the CCU identifies subjective elements that apply to crimes (Articles 23, 24 and 25 of the CCU). It will be necessary for judges to consider the relevance of the subjective elements in the general part of the CCU when considering the elements of the war crime.
- **Definition of the contextual elements of war crimes.** This element is common and required for all war crimes. This sub-section lists the contextual elements that needs to be established for a war crime to be proven. Further analysis on each of them can then be found under [Chapter 1, Part 1, Section I.C.2. “Contextual elements of war crimes”](#).

SOURCES OF LAW: INTERNATIONAL HUMANITARIAN LAW, INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL CRIMINAL LAW

19. This section will provide an overview of the different international legal regimes applicable to the armed conflict in Ukraine. More specifically, it will discuss when international humanitarian law (IHL), international human rights law (IHRL) and international criminal law (ICL) are applicable and their governing frameworks.

I. International Humanitarian Law

20. IHL, also known as the law of war, is the body of law that seeks to limit the effects of armed conflict for humanitarian purposes.¹ It is only applicable during armed conflicts, including situations of occupation.²

A. The International Humanitarian Law Framework

21. IHL is comprised of two branches: (1) the **Hague Law**, which regulates how damage or injury may be inflicted on the enemy, i.e., the conduct of hostilities,³ for example, by banning a range of inhumane methods of neutralising the enemy;⁴ and (2) the **Geneva Law**, which protects civilians and those no longer participating in the armed conflict,⁵ with the bottom-line being that one can never deliberately target civilians.⁶ These two treaty-based branches overlap with, and are supplemented by, a vast body

¹ ICRC, '[What is International Humanitarian Law?](#)', July 2004, p. 1.

² Its applicability is triggered by the existence of the factual circumstances irrespective of any formalities such as a declaration of war. For the criteria needed to determine the existence of an armed conflict, see, Sassoli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar, 2019, pp 169, 176, 180, 183.

³ Two conferences were held in 1899 and 1907 in The Hague whereby a series of conventions were adopted, including: [Hague Regulations of 1899 and 1907](#); [Convention for the Protection of Cultural Property in the Event of an Armed Conflict](#); [Convention on the Prohibition of Biological Weapons](#); [Convention prohibiting Certain Conventional Weapons](#); [Convention prohibiting Chemical Weapons](#); [Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction](#). For details, see Melzer, *International Humanitarian Law: A Comprehensive Introduction*, ICRC, 2016, pp 79-80.

⁴ See e.g., [Additional Protocol I](#), Article 35(2); ICRC, Customary IHL Database, [Rule 70](#).

⁵ Four Geneva Conventions (GC) were adopted in 1949. Geneva Conventions I to III primarily address the treatment of fallen soldiers in various scenarios: armed conflict in the field ([Geneva Convention I](#)), armed conflict at sea ([Geneva Convention II](#)), and prisoners of war ([Geneva Convention III](#)). The rules therein reflect the roots of IHL, namely the protection of soldiers. [Geneva Convention IV](#) concerns the protection of civilians in time of war. During the Second World War, the protection in the Hague Regulations were found insufficient for the protection of the civilians, which led to the adoption of [Geneva Convention IV](#) in 1949. All four Geneva Conventions are universally ratified and uncontentious. Notably, the third article in the four conventions are identical. Whilst the Geneva Conventions are almost exclusively concerned with war between states, **Common Article 3** is the only provision applicable to non-international armed conflicts, protecting persons not taking active part in hostilities against: any violence to life or person, taking of hostage, outrages upon dignity, arbitrary sentence of execution, and denial of care. The Geneva Conventions are supplemented by three additional protocols relating to the protection of victims of international armed conflict ([Additional Protocol I](#)) and non-international armed conflict ([Additional Protocol II](#)), and the adoption of an additional ICRC emblem, the red crystal, which is free from any religious and cultural connotation as compared to the red cross and red crescent ([Additional Protocol III](#)). See also, Melzer, *International Humanitarian Law: A Comprehensive Introduction*, ICRC, 2016, p. 17.

⁶ [Additional Protocol I](#), Articles 48, 51(2); [Additional Protocol II](#), Article 13; ICRC, Customary IHL Database, [Rule 1](#).

of customary IHL,⁷ which is binding on all States regardless of whether they are bound by a treaty obligation to the same effect.⁸ Ukraine and the Russian Federation are State Parties to the treaties setting out both the Hague Law and the Geneva Law.⁹

B. Classifying Armed Conflicts

22. IHL distinguishes between international and non-international armed conflicts. This classification will affect which laws apply to the situation and which war crimes are applicable.

1. Non-International Armed Conflict

23. A non-international armed conflict (NIAC) involves “*protracted* armed violence between governmental authorities and *organised* armed groups or between such groups within a State”.¹⁰ The applicable IHL includes Common Article 3 to the Geneva Conventions, Additional Protocol II and all relevant customary IHL. To establish the war crimes outlined in Articles 8(2)(c) and 8(2)(e) of the ICC Statute, a NIAC must exist.

24. Two elements must be satisfied to establish the existence of a NIAC: (1) the non-state armed group(s) involved in the armed conflict must be sufficiently **organised**,¹¹ and (2) the hostilities must have reached a certain level of **intensity**,¹² which can be established by evaluating the following indicia, among others: the seriousness and frequency of attacks; the type and number of armed forces deployed; the group’s ability to control territory over a period of time; and the effect of the violence on the civilian population.¹³

⁷ As part of their mission to promote IHL, ICRC maintains a compilation of Customary IHL, condensing the established practices into numerated rules accompanied by commentary as well as a collection of related practices. It is taken by this Benchbook as the main source for customary norms in IHL. See, ICRC, [Customary IHL Database](#), 2009.

⁸ Customary law is a set of rules derived from consistent conduct of States (state practice) acting out of the genuine belief that the law — as opposed to, e.g. courtesy or political advantages — required them to act that way (*opinio juris*). ICJ, *North Sea Continental Shelf*, [Judgement](#), paras 71-74, 77. See also, Sassoli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar, 2019, p. 46.

⁹ ICRC, ‘[Treaties, State Parties and Commentaries: Ukraine](#)’; ICRC, ‘[Treaties, State Parties and Commentaries: Russian Federation](#)’.

¹⁰ ICTY, *Tadic Interlocutory Appeal Decision*, para. 70; ICTY, *Tadic Trial Judgement*, para. 562; ICTY, *Haradinaj et al. Trial Judgement*, para. 37. See also, the Ukrainian Military Manual, which defines a NIAC as “prolonged and intense armed clashes on the territory of the state between government armed forces and organized armed formations or between organized armed formations”: ‘[Instructions on the procedure for implementing the norms of international humanitarian law in the Armed Forces of Ukraine](#)’, 2018, Section 2, para. 40.

¹¹ ICC, *Ongwen Trial Judgement*, para. 2685; ICC, *Ntaganda Trial Judgement*, paras 704-705; ICC, *Lubanga Trial Judgement*, para. 537; ICC, *Katanga Trial Judgement*, para. 1186; ICC, *Bemba Trial Judgement*, paras 134-136; ICTY, *Haradinaj et al. Trial Judgement*, para. 60. See also, ICTY, *Boskoski et Tarculovski Appeal Judgement*, paras 19-24; ICTY, *Boskoski and Tarculovski Trial Judgement*, paras 199-203; ICTY, *Limaj et. al. Trial Judgement*, paras 94-134.

¹² [ICRC Commentary to Geneva Convention III \(2020\)](#), Article 3, paras 421, 455; [ICC Statute](#), Article 8(2)(f); ICC, *Ntaganda Trial Judgement*, para. 703; ICTY, *Tadic Trial Judgement*, para. 562; ICTR, *Akayesu Appeal Judgement*, para. 620; ICTY, *Kordic and Cerkez Appeal Judgement*, para. 341; ICTY, *Limaj et. al. Trial Judgement*, para. 84; ICTY, *Boskoski and Tarculovski Trial Judgement*, para. 175. See also, ICC, *Bemba Trial Judgement*, para. 137; ICC, *Katanga Trial Judgement*, para. 1187; ICC, *Lubanga Trial Judgement*, paras 534-536, 538.

¹³ ICTY, *Boskoski and Tarculovski Appeal Judgement*, paras 19-24; ICC, *Ntaganda Trial Judgement*, paras 716-717; ICC, *Ongwen Trial Judgement*, para. 2684; ICC, *Lubanga Trial Judgement*, para. 538; ICC, *Katanga Trial Judgement*, para. 1187; ICC, *Bemba Trial Judgement*, para. 137; ICC, *Al Mahdi Trial Judgement*, para. 49; ICTY, *Mrksic et al. Trial Judgement*, para. 407; ICTY, *Haradinaj et al. Trial Judgement*, para. 49; RULAC Geneva Academy, ‘[Non-international armed](#)

25. NIACs are distinguished from situations of internal disturbances and tensions, such as riots or isolated and sporadic acts of violence, which are not subject to IHL.¹⁴ In situations where multiple non-state armed groups are fighting against the government's armed forces at once, the actions of all the armed groups can be considered together when assessing whether the intensity criterion has been met.¹⁵

2. International Armed Conflict

26. An International armed conflict (IAC) occurs when one or more States have recourse to armed force against another State, regardless of the reason or the intensity.¹⁶ The applicable IHL includes all four Geneva Conventions, Additional Protocol I and all relevant customary IHL. In order to establish the war crimes outlined in Articles 8(2) (a) and 8(2)(b) of the Rome Statute, an IAC must exist.

27. Resort to armed force includes the unilateral use of force by one State against another, even if the latter does not or cannot respond by military means.¹⁷ This includes situations where the armed forces of one State violate the conditions of an agreement to be in the territory of the other State.¹⁸ The use of armed force against that State's armed forces, territory, civilian population/objects or infrastructure would constitute an IAC.¹⁹

28. IACs do not require a specific level of intensity or duration to be reached,²⁰ nor is there a requisite threshold for casualties or how many members of the armed forces need

[conflict](#)' (last updated 11 September 2017).

¹⁴ ICTY, *Haradinaj et al. Trial Judgement*, para. 38; ICC, *Bemba Decision on the Confirmation of Charges* para. 231; ICC, *Lubanga Decision on the Confirmation of Charges*, para. 173; ICTY, *Dordevic Trial Judgement*, para. 1522; ICTY, *Tadic Trial Judgement*, para. 562; ICTY, *Haradinaj et al. Trial Judgement*, para. 38; ICC, *Lubanga Trial Judgement*, para. 538; ICTY, *Boskoski and Tarculovski Trial Judgement*, para. 185.

¹⁵ See, ICC, *Katanga Trial Judgement*, paras 1212-1217; ICC, *Bemba Trial Judgement*, paras 661-662; ICRC, '[Syria: ICRC and Syrian Arab Red Crescent Maintain Aid Effort amid Increased Fighting](#)' (17 July 2012). However, see, *contra*: ICC, *Lubanga Trial Judgement*, para. 543 ("there were a number of simultaneous armed conflicts in Ituri and in surrounding areas within the DRC, involving various different groups. Some of these armed conflicts, which included the UPC, involved protracted violence.").

¹⁶ [ICRC Commentary to Geneva Convention I \(2016\)](#), Article 2, para. 218. See also, ICTY, *Tadic Interlocutory Appeal Decision*, para. 70 ("an armed conflict exists whenever there is resort to armed force between states"); ICC, *Ongwen Trial Judgement*, para. 2683; ICC, *Katanga Trial Judgement*, para. 1173; ICC, *Bemba Trial Judgement*, para. 128. See also, the Ukrainian Military Manual, which defines an IAC as "any conflict between two or more states with the use of armed forces": '[Instructions on the procedure for implementing the norms of international humanitarian law in the Armed Forces of Ukraine](#)', 2018, Section 2, para. 33.

¹⁷ [ICRC Commentary to Geneva Convention III \(2020\)](#), Common Article 2, paras 256, 269, 276; [ICRC Commentary to Geneva Convention II \(2017\)](#), Common Article 2, para. 245; [ICRC Commentary to Geneva Convention I \(2016\)](#), Common Article 2, para. 223.

¹⁸ UNGA Res [3314 \(XXIX\)](#) (14 December 1974), Article 3. See also, [Res RC/Res.6](#), Amendments to the Rome Statute of the International Criminal Court on the crime of aggression (11 June 2010).

¹⁹ [ICRC Commentary to Geneva Convention III \(2020\)](#), Common Article 2, para. 257.

²⁰ [ICRC Commentary to Geneva Convention III \(2020\)](#), Common Article 2, paras 269-277. See also, ICTY, *Tadic Interlocutory Appeal Decision*, para. 70; ICTY, *Celebici Trial Judgement*, para. 184 (see also, para. 208); ICC, *Katanga Trial Judgement*, para. 1173; ICC, *Bemba Trial Judgement*, para. 128. Akande, [Classification of Armed Conflicts: Relevant Legal Concepts](#), in E. Wilmschurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, 2012, p. 13; Sassoli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar, 2019, p. 170. For an opposing view, according to which an IAC must meet a certain threshold of intensity, see, International Law Association, '[Final Report on the Meaning of Armed Conflict in International Law](#)' (2010).

to participate.²¹ As such, the isolated use of armed force by one State against another or unilateral use of armed force without resistance may still amount to an IAC.²²

29. An IAC may also exist where the armed confrontation involves non-military State agencies (i.e., *de jure* or *de facto* organs of the State, not private persons²³), such as paramilitary forces or border guards, where they are engaged in armed violence displaying the same characteristics as that involving State armed forces.²⁴ Situations that are the result of a mistake or an individual's *ultra vires* acts (i.e., acts taken in excess of one's power and authority not endorsed by the State), would not amount to an IAC.²⁵
30. Finally, the act that triggers an IAC must be of a *hostile* nature "in order to overcome the enemy or force it into submission, to eradicate the threat it represents or force it to change its course of action".²⁶ Where a State consents, or explicitly requests, the use of force on its territory by another State, an IAC would not exist provided that the intervention stays within the limits delineated by the consenting State and the consent is not withdrawn.²⁷ When an IAC is established, IHL and the relevant rights and obligations thereunder become applicable on the whole of the territories of the States Party to the armed conflict.²⁸

a) Internationalizing a Non-International Armed Conflict

31. In addition to an IAC involving two States, a NIAC may become internationalised when:²⁹
 - a State *directly intervenes* using their armed forces on the territory of another State in support of one or more non-state armed groups against the local government. The armed confrontation between the intervening State and the territorial State will be an IAC while the NIAC between the local government and the armed group(s) continues to exist in parallel;³⁰ or

²¹ [ICRC Commentary to Geneva Convention III \(2020\)](#), Common Article 2, paras 269-277; [ICRC 2016 Commentary to Geneva Convention I](#), Common Article 2, paras 236-244 *citing* at fn. 70 – Digest of United States Practice in International Law (1981–1988), Vol. III, 1993, p. 3456 (“Some States, for example, have considered that an international armed conflict triggering the application of the Geneva Conventions had come into existence after the capture of just one member of their armed forces”); [ICRC 1958 Commentary to Geneva Convention IV](#), Common Article 2, pp 20–21.

²² [ICRC Commentary to Geneva Convention III \(2020\)](#), Common Article 2, paras 275-277.

²³ [ICRC Commentary to Geneva Convention III \(2020\)](#), Common Article 2, para. 262; ICC, *Bemba Decision on the Confirmation of Charges*, para. 223; ICC, *Bemba Trial Judgement*, paras 654-656.

²⁴ [ICRC Commentary to Geneva Convention III \(2020\)](#), Common Article 2, paras 259, 261.

²⁵ [ICRC Commentary to Geneva Convention III \(2020\)](#), Common Article 2, para. 274. This analysis, which involves the scope of application of IHL, must be distinguished from the situation of attribution in the context of State responsibility, where the State is responsible for the *ultra vires* acts of its organs. *See*, [ICRC Commentary to Geneva Convention III \(2020\)](#), Common Article 2, para. 274.

²⁶ [ICRC Commentary to Geneva Convention III \(2020\)](#), Common Article 2, para. 258. *See also*, Grignon, *The beginning of application of international humanitarian law: A discussion of a few challenges*, International Review of the Red Cross, 2014, pp 146-147.

²⁷ [ICRC Commentary to Geneva Convention III \(2020\)](#), Common Article 2, para. 292 (*see also*, paras 290-291, 293)..

²⁸ ICTY, *Kordic and Cerkez Appeal Judgement*, para. 321; ICTY, *Tadic Interlocutory Appeal Decision*, para. 70.

²⁹ ICTY, *Tadic Appeal Judgement*’, para. 84; ICC, *Ntaganda Trial Judgement*, para. 726; ICC, *Ongwen Trial Judgement*, para. 2686; ICC, *Lubanga Trial Judgement*, para. 541; ICC, *Katanga Trial Judgement*, para. 1177; ICC, *Lubanga Decision on the Confirmation of Charges*, para. 209.

³⁰ [ICRC Commentary to Geneva Convention I \(2016\)](#), para. 264; ICC, *Ntaganda Trial Judgement*, para. 726; ICC, *Ongwen Trial Judgement*, para. 2686; ICC, *Lubanga Trial Judgement*, para. 541; ICC, *Katanga Trial Judgement*, para. 1177; ICC,

- a State *indirectly intervenes* by exercising ‘overall control’ over the non-state armed group(s) participating in the NIAC (i.e., the armed group(s) ‘act on behalf of’ the intervening State). This will fully transform the NIAC into an IAC between the intervening State (acting through a non-state armed group) and the territorial State.³¹ To be considered under a State’s ‘overall control’, the controlling State must have “a role in organising, coordinating or planning the military actions of the [non-state armed] group, in addition to financing, training and equipping or providing operational support to that group”.³²

b) Occupation

32. IACs also include situations of occupation,³³ which occur when territory is placed under the ‘effective control’ of a foreign State’s army and extends only to the territory where such control has been established and can be exercised.³⁴ This is the case even if the occupation meets no armed resistance and there is no fighting.³⁵ ‘Effective control’ will be established if the following three cumulative conditions are met:³⁶ (1) the foreign State’s armed forces are physically present in a foreign territory without consent; (2) the local government has been or can be rendered substantially or completely incapable of exerting its powers; and (3) the foreign State’s forces are able to exercise authority over the territory in lieu of the local government. When *all three* conditions are met, the geographical scope of the application of the law of occupation extends throughout the entire area over which the Occupying Power exercises ‘effective control’.³⁷
33. Justification given by an Occupying Power for its occupation — for example, that it is ‘liberating’ the inhabitants of the occupied territory — does not change the legal classification of the situation as an occupation.³⁸ Importantly, classifying a territory as ‘occupied’ does not confer sovereignty to the occupier.³⁹ Indeed, it is “an uncontested

Lubanga [Decision on the Confirmation of Charges](#), para. 209; ICC, *Tadic* [Appeal Judgement](#), para. 84; ICTY, *Prlic et al. Trial Judgement*, para. 525; [ICRC Commentary to Geneva Convention III \(2020\)](#), Article 3, para. 438. Note, this only occurs where the State intervenes on the side of the non-State armed forces against the territorial State. Where the State intervenes in support of the territorial State against the non-State armed forces, the armed conflict remains non-international in character. See, ICC, *Ongwen* [Trial Judgement](#), para. 2686.

³¹ [ICRC Commentary to Geneva Convention III \(2020\)](#), Article 3, para. 440. See e.g., ICTY, *Tadic* [Appeal Judgement](#), para. 84; ICTY, *Kordic and Cerkez* [Trial Judgement](#), para. 79.

³² ICTY, *Tadic* [Appeal Judgement](#), para. 137. See also, ICC, *Lubanga* [Trial Judgement](#), para. 541; ICC, *Katanga* [Trial Judgement](#), para. 1178; ICC, *Bemba* [Trial Judgement](#), para. 130; ICC, *Ongwen* [Trial Judgement](#), para. 2687.

³³ [ICC Elements of Crimes](#), fn. 34; ICC, *Gbagbo* [Decision on Confirmation of Charges](#), para. 542; ICC, *Lubanga* [Decision on the Confirmation of Charges](#), para. 212; ICTY, *Tadic* [Interlocutory Appeal Decision](#), para. 70.

³⁴ [Hague Regulations 1907](#), Article 42; ICJ, [Construction of a Wall Advisory Opinion](#), paras 78-79; ICJ, [Armed Activities Judgement](#), para. 172; [ICRC Commentary to Geneva Convention III \(2020\)](#), Common Article 2, para. 336.

³⁵ [ICRC Commentary to Geneva Convention III \(2020\)](#), Common Article 2, paras 318-324, esp. paras 318-322. See also, ICRC, [Occupation and International Humanitarian Law: Questions and Answers](#), 2004.

³⁶ [ICRC Commentary to Geneva Convention III \(2020\)](#), Common Article 2, paras 338, 340. See also, Dinstein, *The International Law of Belligerent Occupation*, 2nd Edition, Cambridge University Press, 2019, pp 35-54; Benvenisti, *The International Law of Occupation*, 2nd Edition, Oxford University Press, 2012, pp 43-51; ICRC, ‘Occupation and Other Forms of Administration of Foreign Territory’, [Expert Meeting Report](#), 2012, pp 16-35; ICJ, [Armed Activities Judgement](#), para. 173. ICTY, *Naletilic et Martinovic* [Trial Judgement](#), para. 217.

³⁷ [ICRC Commentary to Geneva Convention III \(2020\)](#), Common Article 2, paras 341-343, 348-351..

³⁸ See, Dinstein, *The International Law of Belligerent Occupation*, 2nd Edition, Cambridge University Press, 2019, para. 105; ICJ, [Armed Activities Judgement](#), para. 173.

³⁹ See, Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Inter-*

principle of international law” that unilateral annexation of an occupied territory by the Occupying Power has no legal validity and is considered null and void.⁴⁰

c) Occupation by Proxy

34. In addition to ‘classic’ belligerent occupation, a State can also be considered an Occupying Power in situations in which a territory is controlled by non-state armed forces acting on behalf of, and controlled by, that State (i.e., ‘occupation by proxy’).⁴¹ Occupation by proxy will be established where the foreign State exercises indirect ‘effective control’ over the territory in question by virtue of the effective control exercised by proxy armed forces.⁴² As such, the foreign State would be considered the Occupying Power provided that it exercises ‘overall control’⁴³ over these proxy armed forces.⁴⁴

C. Foundational Principles of International Humanitarian Law

35. Regardless of the characterisation of the armed conflict (i.e., NIAC or IAC), the principles of distinction, proportionality and precaution are foundational to the application of IHL,⁴⁵ and are the cornerstone of many war crimes.⁴⁶

action with International Human Rights Law, Brill | Nijhoff, 2009, p. 42; Dinstejn, *The International Law of Belligerent Occupation*, 2nd Edition, Cambridge University Press, 2019, para. 161 (citing Oppenheim, *The Legal Relations between an Occupying Power and the Inhabitants*, 1917; Fleck (ed), *The Handbook of International Humanitarian Law*, 2nd Edition, Oxford University Press, 2008; Israel Supreme Court, [Beit Sourik Village Council Judgement](#), para. 27.

⁴⁰ See, [Geneva Convention IV](#), Article 47; [Additional Protocol I](#), Article 4, para. 172; Sandoz, et al. (eds), [Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949](#), International Commission of the Red Cross, 1987, para. 172. See also, Dinstejn, *The International Law of Belligerent Occupation*, 2nd Edition, Cambridge University Press, 2019, p. 44; Fleck (ed), *The Handbook of International Humanitarian Law*, 2nd Edition, Oxford University Press, 2008, p. 273; UNSC Res 662 (9 August 1990) UN Doc S/RES/662 (1990). For example, both the UNSC and the ICJ have held that Israel’s purported unilateral annexation of East Jerusalem (occupied territory) is without any legal effect. See, [UNSC Res 252](#) (21 May 1968) UN Doc S/RES/252; UNSC Res 478 UN Doc S/RES/478 (1980) (20 August 1980); ICJ [Construction of a Wall Advisory Opinion](#), para. 78; Dinstejn, *The International Law of Belligerent Occupation*, 2nd Edition, Cambridge University Press, 2019, para. 63. See also, Israel Supreme Court, [Beit Sourik Village Council Judgement](#), para. 27.

⁴¹ See e.g., [ICRC Commentary to Geneva Convention III \(2020\)](#), Common Article 2, para. 363; ECtHR, [Loizidou v. Turkey Judgement](#), para. 52; ECtHR, [Cyprus v. Turkey Judgement](#), para.77; ICTY, [Prlic et al. Appeal Judgement \(Vol. I of III\)](#), para. 322; ICTY, [Naletilic and Martinovic Trial Judgement](#), paras 213-214; ICTY, [Blaskic Trial Judgement](#), paras 149-150.

⁴² [ICRC Commentary to Geneva Convention I \(2016\)](#), Common Article 2, para. 329; [ICRC Commentary to Geneva Convention III \(2020\)](#), Common Article 2, para. 363 (see generally, [ICRC Commentary to Geneva Convention III \(2020\)](#), Common Article 2, Occupation by proxy, paras 362-366).

⁴³ ICRC, ‘Occupation and Other Forms of Administration of Foreign Territory’, [Expert Meeting Report](#), 2012; Diakonia IHL Centre, ‘[Occupation](#)’; Gilder, [Bringing Occupation into the 21st Century: The Effective Implementation of Occupation by Proxy](#), Volume 13, Utrecht Law Review, 2017, pp 60-81; Gal, [Unexplored Outcomes of Tadić: Applicability of the Law of Occupation to War by Proxy](#), Volume 12, Journal of International Criminal Justice, 2014, pp 59–80; Bartels, [The Classification of Armed Conflicts by International Criminal Courts and Tribunals](#), Brill, 2020, pp 608-609.

⁴⁴ [ICRC 2016 Commentary to Geneva Convention I](#), Common Article 2, para. 329; [ICRC Commentary to Geneva Convention III \(2020\)](#), Common Article 2, para. 363.

⁴⁵ Sassoli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar, 2019, pp 347, 360, 365; [ICRC, Customary IHL Database](#), Rules [1](#), [7](#), [14](#), [15-21](#).

⁴⁶ For example, grave breaches/serious violations under Article 8(2)(a)/8(2)(c) of the ICC Statute must be committed against protected persons and other war crimes rely on these principles, e.g., [ICC Statute](#), Articles 8(2)(b)(i)/8(2)(e)(i), 8(2)(b)(ii) and 8(2)(b)(ii).

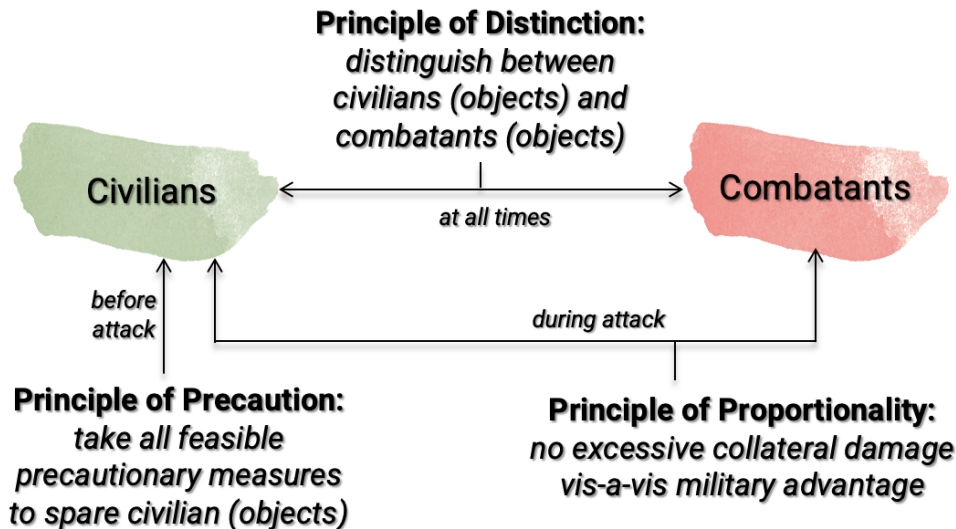


Figure 1: Foundational Principles of IHL

36. Prior to examining these principles, it is necessary to understand the difference between combatants and civilians during armed conflict.

1. Combatants vs. Civilians, Military Objectives vs. Civilian Objects

37. IHL makes a fundamental distinction between combatants and civilians/civilian property (i.e., objects).⁴⁷

a) Combatants and Civilians

38. In a classic IAC, **combatants** are members of the armed forces of the warring States,⁴⁸ or non-military individuals in self-defense groups against invaders.⁴⁹ The term ‘combatants’ also includes members of militias or volunteer corps forming part of a State’s

⁴⁷ [Additional Protocol I](#), Articles 52 to 56 protect civilian objects by prohibiting attacks against civilian and cultural objects and property, places of worship and objects indispensable to the survival of the civilian population. Also, attacks on works or installations containing dangerous forces that may cause damage to the natural environment and threaten the health or survival of the population are prohibited (see also, [Additional Protocol II](#), Articles 14 and 15). Also protected is the right to receive assistance: civilians are entitled to receive food, medical supplies, clothing, bedding and means of shelter. Relief actions are therefore foreseen in [Additional Protocol I](#), Articles 69-70. There is also an extra protection granted to the following categories of civilians: civilian populations in occupied territories ([Geneva Convention IV](#), Articles 47-78; [Additional Protocol I](#), Articles 68-71); civilian detainees in occupied territories ([Geneva Convention IV](#), Articles 64-78); civilians belonging to a Party to the armed conflict ([Additional Protocol I](#), Articles 72-75); civilian internees ([Geneva Convention IV](#), Articles 79-135); foreigners, refugees and stateless persons ([Geneva Convention IV](#), Articles 35-46); women and children ([Additional Protocol I](#), Articles 76-78); wounded and sick persons ([Geneva Convention IV](#), Articles 13-26; [Additional Protocol I](#), Articles 8-31); medical personnel, installations and means of transportation and relief and humanitarian personnel ([Geneva Convention IV](#), Articles 20-23, 59-63; [Additional Protocol I](#), Articles 12, 15, 71).

⁴⁸ [Geneva Convention III](#), Article 4A(1), (2), (3); [Additional Protocol I](#), Article 44(3). For detailed analysis of each sub-paragraph, see Sassoli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar, 2019, p. 252; Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 3rd Edition, Cambridge University Press, 2016, pp 52-54; [ICRC Commentary to Geneva Convention III \(2020\)](#), para. 1042 regarding [Geneva Convention III](#), Article 4.

⁴⁹ [Geneva Convention III](#), Article 4(A)(6). For detailed analysis, see, Watts, *Who Is a Prisoner of War*, Oxford University Press, 2015, p. 907.

armed forces,⁵⁰ e.g., the Russian National Guard. It excludes medical and religious personnel,⁵¹ but includes all people working for an armed force, even if their tasks are not directly linked to hostile activities, e.g., production and shipment of weapons, construction of infrastructure, etc.⁵² If captured, ‘combatants’ are entitled to prisoner of war (POW) status and are immune from prosecution for lawful participation in hostilities.⁵³

39. Technically, ‘combatant’ status exists only in the context of an IAC. In NIACs, members of the non-state armed groups engaged in hostilities (e.g., the members of the Donetsk/Luhansk People’s Republic (D/LPR), sometimes referred to as ‘fighters’,⁵⁴ are not entitled to POW status and can be prosecuted for their participation in hostilities.⁵⁵ ‘Fighters’ are, however, still entitled to humane treatment upon capture.⁵⁶
40. **Civilians** are everyone else,⁵⁷ i.e., anyone who is not a member of: (1) the armed forces; (2) a militia or volunteer corps of such armed forces; or (3) an organised group under a command responsible for the conduct of its subordinates, including organised resistance movements and other small armed groups.⁵⁸ Civilians enjoy general protection against the dangers arising from hostilities, i.e., they cannot be targeted.⁵⁹
41. A civilian **directly participating in hostilities** temporarily loses their protection under IHL and becomes a lawful target for attack⁶⁰ (i.e., the civilian may be directly attacked as if they were a combatant).⁶¹ To determine whether certain conduct amounts to direct participation, the act must: (1) be likely to adversely affect the military operations/capacity of a party to an armed conflict or to inflict death, injury or destruction on protected persons/objects; (2) have a direct causal link to the harm likely to result;

⁵⁰ [Geneva Convention III](#), Article 4A(2). For militias or volunteer corps to fall under this provision (i.e., to be considered “members of the armed forces of a Party to the conflict”) they must have been formally incorporated into the armed forces, which is determined by the domestic law of the State in question. See, [ICRC Commentary to Geneva Convention III \(2020\)](#), para. 979.

⁵¹ [Additional Protocol I](#), Article 43(2).

⁵² ICRC, ‘[Direct participation in hostilities: questions & answers](#)’, 2009.

⁵³ See, [Additional Protocol I](#), Article 44; Crawford, *The Treatment of Combatants and Insurgents under the Law of the Armed Conflict*, Oxford University Press, 2010, p. 52.

⁵⁴ See, Kleffner, *From “Belligerents” to “Fighters” and Civilians Directly Participating in Hostilities: On the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference*, *Netherlands International Law Review*, 2004, p. 322; Pejic, *Unlawful/Enemy Combatants: Interpretations and Consequences*, Nijhoff, 2007, pp 335-336.

⁵⁵ Sassoli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar, 2019, p. 277; Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 3rd Edition, Cambridge University Press, 2016, pp 45-46.

⁵⁶ Common Article 3 to Geneva Conventions; [Additional Protocol II](#), Articles 4 and 5. See, Pejic, [Procedural Principles and Safeguards for Internment/ Administrative Detention in Armed Conflict and Other Situations of Violence](#), Volume 87, *International Review of the Red Cross*, 2005, p. 389; Hill-Cawthorne, *Detention in Non-International Armed Conflict*, Oxford University Press, 2016, p. 82.

⁵⁷ [Additional Protocol I](#), Article 50(1).

⁵⁸ [Geneva Convention III](#), Articles 4A(1)-(3) and (6); [Additional Protocol I](#), Articles 43(1), 50(1).

⁵⁹ [Additional Protocol I](#), Article 50(1).

⁶⁰ [Additional Protocol I](#), Article 51(3); Mezler, [Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law](#), ICRC, 2009, p. 70.

⁶¹ Mezler, [Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law](#), ICRC, 2009, p. 20; ICRC, ‘[How Does Law Protect in War](#)’.

and (3) be specifically designed to directly cause the harm in support of a Party to the armed conflict to the detriment of another.⁶²

	Combatant	Fighter	Civilians	Civilians DPH
Hostilities	participate ⁶³		no right to participate, but retain their civilian status if they do ⁶⁴	
	lawful targets ⁶⁵		cannot be deliberately targeted ⁶⁶	temporarily lose protection and become a lawful target ⁶⁷
Captured	POW status ⁶⁸	humane treatment ⁶⁹	should not have been detained and must be released ⁷⁰	can be detained if conditions are met ⁷¹
Prosecution for participation?	immune from prosecution, unless they breach IHL ⁷²	may face prosecution ⁷³	N/A	may face prosecution ⁷⁴

Table 1: Participants in an Armed Conflict

b) Military Objectives and Civilian Objects

42. **Military objectives** are limited to “those objects which by their nature, location, purpose or use make an effective contribution to military action *and* whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time,

⁶² ICRC, ‘[How Does Law Protect in War](#)’; Mezler, [Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law](#), ICRC, 2009, p. 20.

⁶³ [Additional Protocol I](#), Articles 43(2) and 48; Mezler, [Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law](#), ICRC, 2009, p. 27.

⁶⁴ [Additional Protocol I](#), Article 51(3).

⁶⁵ [Additional Protocol I](#), Article 43(2); Mezler, [Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law](#), ICRC, 2009, p. 36.

⁶⁶ [Additional Protocol I](#), Articles 48 and 51(2).

⁶⁷ [Additional Protocol I](#), Article 51(3); Mezler, [Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law](#), ICRC, 2009, p. 70.

⁶⁸ [Geneva Convention III](#), Article 4(A); [Additional Protocol I](#), Article 44(1); ICRC, Customary IHL Database, [Rule 106](#).

⁶⁹ Common Article 3 to Geneva Conventions; [Additional Protocol II](#), Articles 4-5. *See also*, J. Pejic, ‘[Procedural Principles and Safeguards for Internment/ Administrative Detention in Armed Conflict and Other Situations of Violence](#)’, 2005, 87 *International Review of the Red Cross* 375, p. 389; L. Hill-Cawthorne, *Detention in Non-International Armed Conflict* (OUP 2016), p. 82.

⁷⁰ [Geneva Convention IV](#), Articles 42, 78.

⁷¹ Civilians may only be interned for “(imperative) security reasons”. [Geneva Convention IV](#), Articles 41-43, 68, 78-135; [Additional Protocol I](#), Article 75. Regarding the thresholds, *see*, Hill-Cawthorne, *Detention in Non-International Armed Conflict*, Oxford University Press, 2016, p. 42.

⁷² Crawford, *The Treatment of Combatants and Insurgents under the Law of the Armed Conflict*, Oxford University Press, 2010, p. 52.

⁷³ Sassoli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar, 2019, p. 277.

⁷⁴ Sassoli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar, 2019, p. 277.

offers a definite military advantage”.⁷⁵ Both criteria must be met simultaneously.⁷⁶ In other words, if either of these criteria are *not* met then the object is civilian.

43. **Civilian objects**, which are protected from attack, are defined as an object which is not a military objective.⁷⁷ Civilian objects temporarily lose their protection for such time as they are classified as military objectives.⁷⁸ Consequently, it must be established that the targeted object was not a military objective at the precise time of the attack.⁷⁹ If there is any doubt as to the status of a civilian object it should be presumed that this object maintains its civilian status.⁸⁰
44. Where an object serves both military and civilian functions (i.e., is a **dual-use object**), it may qualify as a military objective and can be legally targeted. Typical dual-use objects are transport systems such as roads and railways,⁸¹ but can also include, e.g., a power station supplying electricity to a military base and a hospital.⁸² However, if the effect on civilian objects and the civilian population exceeds the anticipated military advantage, the attack would violate IHL.⁸³
45. The distinction between military objectives and civilian objects is part of customary IHL and applies in both NIACs and IACs.⁸⁴

2. The Principles of Distinction, Proportionality and Precaution

46. The **Principle of Distinction** requires that civilians and civilian objects be distinguished from combatants (or ‘fighters’) and military objectives (*see above*).⁸⁵ Attacks may only be directed against the latter.⁸⁶ All parties to the armed conflict must adhere to this principle at all times. However, the lawfulness of an attack does not depend solely on distinction and must be analyzed with the help of the principle of proportionality.
47. The **Principle of Proportionality** prohibits the launching of an attack against a lawful military target “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be

⁷⁵ [Additional Protocol I](#), Article 52(2) (emphasis added). *See also*, MICT, [Karadzic Appeal Judgement](#), 20 March 2019, para. 488; ICTY, [Mladic Trial Judgement \(Vol III\)](#), para. 3257.

⁷⁶ Sandoz, et al. (eds), [Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949](#), International Commission of the Red Cross, 1987, para. 2018. *See also*, Triffterer and Ambos (eds), [Rome Statute of the International Criminal Court: A Commentary](#), 3rd edn, C.H. Beck, Hart, Nomos, 2016, p. 363

⁷⁷ [Additional Protocol I](#), Article 52(1). *See also*, ICTY, [Mladic Trial Judgement \(Vol III\)](#), para. 3257.

⁷⁸ ICC, [Katanga Trial Judgement](#), para. 893.

⁷⁹ ICC, [Katanga Trial Judgement](#), para. 893.

⁸⁰ [Additional Protocol I](#), Article 52(3); ICC, [Abu Garda Decision on the Confirmation of Charges](#), para. 89, fn. 131.

⁸¹ Bring, [International Humanitarian Law After Kosovo: Is Lex Lata Sufficient?](#), *Nordic Journal of International Law*, 2002, p. 42.

⁸² Shue and Wippman, [Limiting Attacks on Dual-Uses Facilities Performing Indispensable Civilian Functions](#), *Cornell International Law Journal*, 2002, pp 563-566.

⁸³ [Additional Protocol I](#), Articles 51(5)(b) and [57\(2\)\(a\)\(iii\)](#); ICRC, Customary IHL Database, [Rule 14](#). *See below*, para.47.

⁸⁴ ICRC, Customary IHL Database, [Rule 8](#). For dual-purpose objects, *see*, Melzer, [International Humanitarian Law: A Comprehensive Introduction](#), ICRC, 2016, p. 92.

⁸⁵ [Additional Protocol I](#), Articles 48, 51(2), 52(2); [Additional Protocol II](#), Article 13(2); [ICRC, Customary IHL Database](#), Rules 1 and 7.

⁸⁶ [Additional Protocol I](#), Articles 48, 51(2), 52(2); [Additional Protocol II](#), Article 13(2); [ICRC, Customary IHL Database](#), Rules 1 and 7.

excessive in relation to the concrete and direct military advantage anticipated”.⁸⁷ In cases where civilian and non-civilian individuals and/or objects mingle, the legality of an attack will be determined by an assessment of compliance with the proportionality principle.

48. The **Principle of Precautions in attack** requires that the belligerents take all **feasible** precautionary measures to spare the civilian population, civilians/objects in the course of military operations.⁸⁸ Precautions include, among other things, the choice of the means and methods of warfare;⁸⁹ the assessment of the effects of the attack;⁹⁰ the suspension of an attack;⁹¹ and the provision of effective advance warning.⁹²
49. Feasibility assesses whether the measure is “**practicable or practically possible**” taking into account all the contemporaneous circumstances, including those relevant to the success of a military operation.⁹³ Such factors include “time, terrain, weather, capabilities, available troops and resources [and] enemy activity”.⁹⁴
50. If effective, the precautionary measures may change the calculation of proportionality and may render an otherwise impermissible attack lawful. But if the damages cannot be sufficiently mitigated, a Party to the armed conflict must suspend or cancel the attack.⁹⁵

D. International Humanitarian Law Violations

51. Certain violations of IHL are war crimes.⁹⁶ Violations can be perpetrated by a wide range of entities including: military personnel; government members; party officials and administrators; members of organised armed groups; and civilians.⁹⁷ IHL violations can be categorized into ‘simple violations’, ‘serious violations’ and ‘grave breaches’, based on the gravity of the offence. Simple violations are sanctioned primarily by the domestic court or court-martial system and the other two are the focus of international criminal courts and tribunals.⁹⁸ These are considered in more detail in [Chapter 1, Part I, Section I.B.1. “Notion and structure of war crimes under international law”](#).

⁸⁷ [Additional Protocol I](#), Article 51(5)(b); ICRC, Customary IHL Database, [Rule 14: Proportionality in Attack](#).

⁸⁸ [Additional Protocol I](#), Article 57(1).

⁸⁹ [Additional Protocol I](#), Article 57(2)(a)(ii); ICRC, Customary IHL Database, [Rule 17: Choice of Means and Methods of Warfare](#).

⁹⁰ [Additional Protocol I](#), Article 57(2)(a)(iii); ICRC, Customary IHL Database, [Rule 18: Assessment of the Effects of the Attacks](#).

⁹¹ [Additional Protocol I](#), Article 57(2)(b); ICRC, Customary IHL Database, [Rule 19: Control during the Execution of Attacks](#).

⁹² [Additional Protocol I](#), Article 57(2)(c); ICRC, Customary IHL Database, [Rule 20: Advance Warning](#).

⁹³ Sandoz *et al.* (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, International Commission of the Red Cross, 1987, para. 2198 regarding [Additional Protocol I](#), Article 57.

⁹⁴ International Law Association Study Group, ‘[The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare \(Final Report\)](#)’ (2017) 93 *Stockton Center for the Study of International Law*, p. 38.

⁹⁵ [Additional Protocol I](#), Article 57(2)(b); ICRC, Customary IHL Database, [Rule 19: Control during the Execution of Attacks](#).

⁹⁶ ICRC, Customary IHL Database, [Rule 156: Definition of War Crimes](#).

⁹⁷ See e.g., *United States v. Carl Krauch, et al.* Judgement; *United States v. Wilhelm von Leeb, et al.* Judgement; IMT for the Far East, [Judgement](#); IMT, [Trial of the Major War Criminals before the International Criminal Tribunal Volume I – Judgement](#).

⁹⁸ [ICC Statute](#), Article 8; [ICTY Statute](#), Article 1; [ICTR Statute](#), Article 1; [SCSL Statute](#), Article 1(1); [Nuremburg Charter](#),

II. International Human Rights Law

52. Human rights are granted to all individuals.⁹⁹ At their core, human rights are designed to safeguard the dignity of people and their fundamental freedoms, such as the right to life, freedom from torture, the right to freedom of speech, the right to a fair trial and the right to non-discrimination (equality before the law).
53. In essence, human rights law protects the individual from the power of the State. States become obligated to respect the human rights of individuals within their jurisdiction when they ratify international human rights treaties and integrate them into their domestic legislation.¹⁰⁰ The norms that arise from such treaties are collectively referred to as international human rights law (IHRL). IHRL allows the individual to seek redress when a State fails to uphold their rights, thus providing an avenue for victims toward justice and accountability.
54. During situations of armed conflict and occupation, IHRL remains applicable alongside IHL.¹⁰¹ This means that IHRL continues to apply throughout the territory of Ukraine, including those territories occupied by the Russian Federation.

A. International Human Rights Law Framework

1. Core International Human Rights Treaties

55. The ‘founding documents’ of IHRL are generally seen as the UN Charter and the Universal Declaration of Human Rights (UDHR).¹⁰² Over time, the human rights defined in the UDHR have been further developed and codified in nine ‘core’ international human rights treaties and their optional/additional protocols.¹⁰³ These instruments are voluntarily signed/ratified by States¹⁰⁴ who undertake legal obligations to implement the provisions of those instruments, and to report periodically to the respective treaty bodies mandated to monitor State compliance with those obligations.¹⁰⁵

Article 6(b); [Tokyo Charter](#), Article 5(b).

⁹⁹ [European Convention on Human Rights](#), Article 1.

¹⁰⁰ Human rights obligations may also be derived from ‘customary international law’, which is not examined in this Chapter as the vast majority of human rights obligations can be derived from well-ratified treaty provisions.

¹⁰¹ ICJ, [Nuclear Weapons Advisory Opinion](#), para. 25. *See also*, ICJ, [Construction of a Wall Advisory Opinion](#), para. 106; UN Human Rights Committee (HRC), ‘General Comment 29: Article 4: Derogations during a State of Emergency’, [CCPR/C/21/Rev.1/Add.11](#), 31 August 2001, para. 3.

¹⁰² OHCHR, [Manual on Human Rights Monitoring](#), 2011, HR/P/PT/7/Rev1, p. 5.

¹⁰³ OHCHR, [The Core International Human Rights Treaties](#), p. 6; OHCHR, [The Core International Human Rights Instruments and their Monitoring Bodies](#). Additional protocols often broaden or reinforce the obligations contained within a treaty. They are not standalone agreements, and work in conjunction with the treaty to which they are appended. Among the nine ‘core’ IHRL treaties are the: [International Convention on the Elimination of All Forms of Racial Discrimination](#); [International Covenant on Economic, Social and Cultural Rights](#); [International Covenant on Civil and Political Rights](#); and [Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment](#).

¹⁰⁴ OHCHR, [The Core International Human Rights Instruments and their Monitoring Bodies](#).

¹⁰⁵ All treaties except the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment require periodic reporting. *See*, OHCHR, [The Core International Human Rights Treaties](#).

2. Core Regional Human Rights Treaties

56. In addition to the core IHRL treaties, there are also several important regional human rights treaties (and additional protocols). Most relevant for Ukraine is the European Convention on Human Rights (ECHR), and its additional protocols, to which Ukraine is a party.¹⁰⁶ While the Russian Federation was a Party to the ECHR, on 16 March 2022, the Russian Federation was expelled from the Council of Europe (CoE),¹⁰⁷ which means that, from 16 September 2022, the Russian Federation will no longer be a High Contracting State Party to the ECHR.¹⁰⁸ Nonetheless, the European Court of Human Rights (ECtHR) will continue to deal with individual and inter-State applications directed against the Russian Federation in relation to alleged violations which have occurred and may occur up until 16 September 2022 (*see below*).¹⁰⁹
57. Ukraine has lodged four inter-State applications against the Russian Federation before the ECtHR in relation to its actions in Ukraine since 2014, which are currently pending before the Court.¹¹⁰

B. When do Obligations Arise Under International Human Rights Law?

1. Jurisdiction and Application of International Human Rights Law During Armed Conflict

58. The primary international legal frameworks that regulate situations of armed conflict are IHL and IHRL. Generally, IHL regulates the obligations of warring Parties during armed conflicts including situations of occupation,¹¹¹ while IHRL regulates the responsibility of States towards persons under their jurisdiction in times of peace.¹¹² Nevertheless, IHL and IHRL apply concurrently during situations of armed conflict and occupation,¹¹³ and States have extraterritorial jurisdiction over violations of IHRL occurring outside of their territory if certain conditions are met.¹¹⁴
59. According to the International Court of Justice (ICJ), IHRL instruments are applicable extraterritorially, particularly in occupied territories (i.e., territories under the effec-

¹⁰⁶ Council of Europe, [Protocols Amending the Text of the Convention](#).

¹⁰⁷ Council of Europe, [‘Russia ceases to be a Party to the European Convention of Human Rights on 16 September 2022’](#), 23 March 2022.

¹⁰⁸ Committee of Ministers, [‘Resolution CM/Res\(2022\)3 on the legal and financial consequences of the cessation of membership of the Russian Federation in the Council of Europe’](#), 23 March 2022.

¹⁰⁹ Council of Europe, [‘Russia ceases to be a Party to the European Convention of Human Rights on 16 September 2022’](#), 23 March 2022.

¹¹⁰ *See*, ECtHR, [Ukraine v. Russia \(re Crimea\)](#); ECtHR, [Ukraine and the Netherlands v. Russia](#); ECtHR [Ukraine v. Russia \(VIII\)](#); and ECtHR [Ukraine v. Russia \(X\)](#).

¹¹¹ Common Article 2 to the Geneva Conventions; ICRC Advisory Service, [‘What is International Humanitarian Law?’](#), 2004.

¹¹² *See*, Kold, *The Relationship between International Humanitarian Law and Human Rights Law: A Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions*, International Review of the Red Cross, 1998. *See also*, Henckaerts and Nohle, *Concurrent Application of International Human Rights Law and International Humanitarian Law*, Human Rights and International Legal Discourse, 2007.

¹¹³ *See e.g.*, ICJ, [Nuclear Weapons Advisory Opinion](#), para. 25; ICJ, [Construction of a Wall Advisory Opinion](#), para. 106; *Hostages trial*, Law Reports of Trial of War Criminals, Vol. III, UN War Crimes Commission, 1949, London, p. 55; ICJ, [Armed Activities Judgement](#), para. 216.

¹¹⁴ ICJ, [Armed Activities Judgement](#), para. 216; ICJ, [Construction of a Wall Advisory Opinion](#), paras 107-113.

tive control of a foreign State).¹¹⁵ The ECtHR has also confirmed the extraterritorial application of the ECHR on the basis of, *inter alia*, ‘effective control’.¹¹⁶ In sum, States will have jurisdiction where they exercise effective ‘authority and control’ over an individual (e.g., by placing them in detention),¹¹⁷ or over a territory (i.e., within their own borders and areas where they exercise *effective control* outside these borders, e.g., as an Occupying Power).¹¹⁸

60. Accordingly, as Occupying Power in ‘effective control’ over Crimea and parts of Ukraine, the Russian Federation is bound by the human rights obligations enshrined in: (1) the IHRL treaties that it has ratified/acceded to, as they apply extraterritorially in the areas under its effective control; and (2) the IHRL treaties that have been ratified/acceded to by Ukraine, pursuant to the Russian Federation’s IHL obligation to respect the laws in force in occupied territory and the territorial nature of human rights protections.¹¹⁹

2. Derogation and Limitation

61. In situations where a State is unable to meet its IHRL obligations, it may ‘limit’ or ‘derogate from’ these obligations, thereby modifying the extent to which it may be held responsible for a human rights violation.
62. During exceptional situations of (actual or imminent) serious public emergencies, such as armed conflict, States may derogate from (i.e., suspend) their IHRL obligations under certain treaty provisions to the extent strictly required by the exigencies of that situation.¹²⁰ States must notify the other States Parties to the instrument concerned at the time of derogation.¹²¹ However, derogation cannot extend to all human rights as there are some ‘non-derogable’ human rights, such as the right to life.¹²²
63. On 5 June 2015, in relation to Crimea and Donbas, Ukraine officially gave notice of its decision to derogate from its obligations under the ICCPR and ECHR,¹²³ according to

¹¹⁵ ICJ, [Armed Activities Judgement](#), para. 216; ICJ, [Construction of a Wall Advisory Opinion](#), paras 107-113.

¹¹⁶ See e.g., ECtHR, [Loizidou v. Turkey Preliminary Objections Judgement](#), paras 62-64; ECtHR, [Cyprus v. Turkey Judgement](#), para. 77; ECtHR, [Ilaşcu and others v. Moldova and Russia Judgement](#), paras 330-331; ECtHR, [Jalaloud v. the Netherlands Judgement](#), para. 139; ECtHR, [Catan and others v. Moldova and Russia Judgement](#), paras 103-107; ECtHR [Issa and others v. Turkey Judgement](#), para. 69. For a different approach to the extraterritorial application of the ECHR, see, ECtHR, [Banković v. Belgium Decision on Admissibility](#), paras 61 and 80; ECtHR, [Ukraine v. Russia \(re Crimea\)](#), paras 315-337.

¹¹⁷ See e.g., ECtHR [Jalaloud v. the Netherlands Judgement](#), para. 154; ECtHR, [Öcalan v. Turkey Judgement](#), para. 91; ECtHR [Issa and others v. Turkey Judgement](#), para. 71; HRC, ‘General Comment No. 35 (Article 9): Liberty and Security of Person’ (16 December 2014) CCPR/C/G/35.

¹¹⁸ See e.g., ECtHR, [Loizidou v. Turkey Preliminary Objection](#), para. 62; ECtHR [Loizidou v. Turkey Judgment](#), paras 52-57; ECtHR, [Cyprus v. Turkey Judgement](#), para. 77; ICJ, [Construction of a Wall Advisory Opinion](#), para. 112.

¹¹⁹ [Hague Regulations 1907](#), Article 43; [Geneva Convention IV](#), Article 64.

¹²⁰ [International Covenant on Civil and Political Rights](#), Article 4; [European Convention of Human Rights](#), Article 15; HRC, ‘[CCPR General Comment No. 29, Article 4: Derogations During a State of Emergency](#)’ (31 August 2001) CCPR/C/21/Rev.1/Add.11, para. 4. See also, [Constitution of Ukraine](#), Article 64.

¹²¹ [International Covenant on Civil and Political Rights](#), Article 4(1).

¹²² [International Covenant on Civil and Political Rights](#), Article 4; [European Convention of Human Rights](#), Article 15; [American Convention on Human Rights](#), Article 57; HRC, ‘[CCPR General Comment No. 29, Article 4: Derogations During a State of Emergency](#)’ (31 August 2001) CCPR/C/21/Rev.1/Add.11, para. 15.

¹²³ See, [Declaration of the Verkhovna Rada of Ukraine on Derogation from Certain Obligations under the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedom; Derogation contained in a Note verbale from the Permanent Representation of Ukraine](#) (5 June 2015),

which it placed on the Russian Federation the full responsibility to respect IHL and IHRL in the annexed and temporarily occupied territories of Ukraine.¹²⁴ However, to the extent that Ukraine's declaration could be interpreted as an attempt to derogate from the non-derogable rights enshrined in the ICCPR and ECHR, the validity of the declaration could be questioned.

64. After Ukraine declared a state of emergency and martial law on 23 February 2022,¹²⁵ it gave notice of its decision to derogate from certain rights enshrined in the ICCPR and the ECHR for the duration of martial law in relation to the remainder of its territory; however, none of these rights include non-derogable rights.¹²⁶ The Russian Federation has not (officially) derogated from its human rights obligations in relation to its occupation of Crimea or its recent invasion of Ukraine.¹²⁷
65. Limitation, on the other hand, refers to the placing of restrictions on human rights, which is rendered lawful because they are necessary to achieve legitimate public aims, such as those relating to, e.g., morality, public order or public safety.¹²⁸ The issue of whether a particular limitation is lawful will depend upon whether it satisfies the criteria contained within the 'limitation clause' of the human rights instrument in question, i.e., whether it was: (1) prescribed by law; (2) implemented in pursuance of a clear and legitimate aim; and (3) a necessary and proportionate means to achieve that aim.¹²⁹

3. Non-State Actors' Obligations

66. With regard to IHRL, it is generally accepted that, at a minimum, non-state actors exercising government-like functions or *de facto* control over territory/population "must respect and protect the human rights of individuals and groups".¹³⁰ The D/LPR

registered at the Secretariat General on 9 June 2015.

¹²⁴ [Declaration of the Verkhovna Rada of Ukraine on Derogation from Certain Obligations under the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedom](#), paras 1, 2; [Derogation contained in a Note verbale from the Permanent Representation of Ukraine](#) (5 June 2015), registered at the Secretariat General on 9 June 2015, paras 1, 2.

¹²⁵ Ministry of Justice of Ukraine, '[Communication Regarding derogation measures](#)' (29 April 2022). See also, OHCHR, '[Update on the human rights situation in Ukraine Reporting period: 24 February – 26 March](#)', para. 5.

¹²⁶ Ukraine notified the UN Secretary-General of its waiver of obligations under Articles 12, 13, 17, 19, 20, 21, 22, 24 and 25 of the [International Covenant on Civil and Political Rights](#); Articles 8, 9, 10, 11 and 14 of the ECHR; Articles 1-3 of the Additional Protocol to the ECHR; and Article 2 of Protocol No. 4 to the ECHR. It also notified of derogation from Articles 3, 8(3), 9, 12, 13, 17, 19, 20, 21 and 24-27 of the [International Covenant on Civil and Political Rights](#); Articles 4 (paragraph 3), 8, 9, 10, 11, 13, 14, 16 of the ECHR; Articles 1, 2 of the Additional Protocol to the ECHR; and Article 2 of Protocol No. 4 to the ECHR. See, [Note verbale No. 4132/28-110-17626 of 1 March, amended and replaced with note verbale No. 4132/28-194/600-17988 of 4 March](#). See also, OHCHR, '[Update on the human rights situation in Ukraine Reporting period: 24 February – 26 March](#)', para. 5.

¹²⁷ See e.g., Council of Europe, '[Reservations and Declarations for: Russian Federation](#)' (between 05/05/1949 and 13/04/2022); Milanovic, [The Russia-Ukraine War and the European Convention on Human Rights](#), Lieber Institute, 2022

¹²⁸ [International Covenant on Civil and Political Rights](#), Articles 12(3), 22.

¹²⁹ [International Covenant on Civil and Political Rights](#), Article 19(3); HRC [General Comment No. 31](#), para. 6; UN General Assembly, '[Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression](#)' (7 September 2012) A/67/357, para. 41.

¹³⁰ OHCHR, '[Joint Statement by independent United Nations human rights experts* on human rights responsibilities of armed non-State actors](#)', [Press Release](#) (25 February 2021) (citing Harvard Law School's Program on International Law and Armed Conflict, [Armed non-State Actors and International Human Rights Law: An Analysis of the Practice of the U.N. Security Council and U.N. General Assembly](#), Briefing Report with Annexes, June 2017 (PILAC found that,

have exercised *de facto* control over parts of Donbas since 5 September 2014 (and 18 February 2015 in Debaltseve).¹³¹ Accordingly, the D/LPR are required to ensure that they do not violate the human rights of those located in the areas of Donbas under their control and must also prevent others from breaching IHRL in those areas.¹³²

C. Fundamental Protections under International Human Rights Law

67. Certain fundamental human rights protections are common to international and regional human rights treaties and are also guaranteed under the constitution of Ukraine. While these rights will not be elaborated on in this section, they are briefly outlined in the table below.

Core Right	International Human Rights Conventions	European Convention on Human Rights	The Constitution of Ukraine
Right to life	Article 6 ICCPR	Article 2 ECHR	Article 27 of the Ukrainian Constitution
Right to freedom from torture	Article 7 ICCPR Article 2 CAT	Article 3 ECHR	Article 28 of the Ukrainian Constitution
Right to equality	Article 26 ICCPR Article 2 ICERD Article 2 CEDAW	Article 14 ECHR	Article 24 and 26 of the Ukrainian Constitution
Right to liberty and security of person	Article 9 ICCPR	Article 4 ECHR	Article 29 of the Ukrainian Constitution
Right to freedom of expression	Article 19 ICCPR	Article 10 ECHR	Article 34 of the Ukrainian Constitution
Right to a fair trial	Article 14 ICCPR	Article 6 ECHR	Article 55 of the Ukrainian Constitution

Table 2: Common Fundamental Rights Protections

D. The Difference between International Human Rights Law and International Criminal Law

68. IHRL and ICL are two substantively different legal frameworks. IHRL focuses on the responsibility of States (rather than individuals) for actions amounting to violations of human rights. The protections ensured by IHRL apply at all times, including during

between 1948 and 2017, 125 resolutions of the UNSC, 65 resolutions of the UNGA and more than 50 presidential statements of the UNSC dealt with the human rights responsibilities of armed non-State actors); Geneva Academy, 'Human Rights Obligations of Armed Non-State Actors', Annex (the Geneva Academy identified 33 relevant resolutions of the Human Rights Council adopted between 2008 and 2015). *See also*, Hessbruegge, [Human Rights Violations Arising from Conduct of Non-State Actors](#), Buffalo Human Rights Law Review, 2004, pp 9-10.

¹³¹ *See*, GRC, [International Law and Defining Russia's Involvement in Crimea and Donbas](#), 2022, Section 6.3.1 Do the DPR and/or LPR exercise effective control over territory.

¹³² *See*, Murray, *Practitioners' Guide to Human Rights Law in Armed Conflict*, Oxford University Press, 2016, pp 18-19.

peacetime,¹³³ social disturbances, sporadic violence, internal strife¹³⁴ and situations of armed conflict.¹³⁵

69. ICL, on the other hand, focuses on the ‘individual criminal responsibility’ of persons who perpetrate certain criminal acts (i.e., genocide, war crimes, crimes against humanity and the crime of aggression). Unlike IHRL, ICL only applies in specific contexts, which vary between the four substantive crimes. These ‘contextual elements’ will ‘trigger’ the application of ICL and transform what might otherwise be a domestic criminal offence (e.g., murder) into an international crime (e.g., the war crime of wilful killing).¹³⁶
70. While ICL will apply in certain contexts as a special rule, it does not displace IHRL, which remains applicable as a general, constantly applicable set of rules.¹³⁷ This gives rise to the possibility of overlap and interplay between these regimes, both of which must therefore be interpreted harmoniously and concurrently so as to ensure legal certainty and fill any gaps in the legal protection afforded to victims.¹³⁸ In cases of armed conflict between these regimes, special rules (i.e., ICL) will usually apply instead of general ones (i.e. IHRL), albeit only as far as is necessary in order to remedy any inconsistency between them.¹³⁹

III. International Criminal Law

71. ICL is the branch of law that deals with the prosecution of international crimes, which are comprised of the four ‘core’ crimes: (1) war crimes; (2) crimes against humanity; (3) genocide; and (4) aggression.¹⁴⁰

A. What is the Difference Between International and Domestic Crimes?

72. Many of the individual acts criminalised under these four international crimes involve acts that may also be criminalised under a State’s domestic criminal law¹⁴¹ such as murder, rape or torture.¹⁴² However, despite this commonality, international crimes

¹³³ OHCHR, ‘[Manual on Human Rights Monitoring](#)’, 2011, HR/P/PT/7/Rev1, p. 3.

¹³⁴ OHCHR, ‘[Manual on Human Rights Monitoring](#)’, 2011, HR/P/PT/7/Rev1, p. 3.

¹³⁵ OHCHR, ‘[Manual on Human Rights Monitoring](#)’, 2011, HR/P/PT/7/Rev1, p. 3.

¹³⁶ HRC ‘[General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant](#)’ (26 May 2004) CCPR/C/21/Rev.1/Add.13, para. 18. See also, [ICC Statute](#), Article 8(2)(i).

¹³⁷ ICJ, [Construction of a Wall Advisory Opinion](#), para. 106; HRC ‘[General Comment No. 36 \(2018\) on Article 6 of the International Covenant on Civil and Political Rights on the Right to Life](#)’ (30 October 2018) CCPR/C/GC/36, para. 70. See also, OHCHR, ‘[Manual on Human Rights Monitoring](#)’, 2011, HR/P/PT/7/Rev1, Chapter 5.

¹³⁸ ECtHR, *Hassan v. The United Kingdom* [Judgement](#), paras 35-37, 77, 101.

¹³⁹ These considerations also apply to the inter-compatibility of IHRL and IHL. See, Milanovic, [The Soleimani Case and the Last Nail in the Lex Specialis Coffin](#), *Opinio Juris*, 2020; Milanović, *The Lost Origins of Lex Specialis: Rethinking the Relationship between Human Rights and International Humanitarian Law*, Cambridge University Press, 2016, pp 78-117; Milanović, [The Interplay Between Human Rights and Humanitarian Law](#), *Opinio Juris*, 2007.

¹⁴⁰ [ICC Statute](#), Articles 6 (Genocide), 7 (Crimes against humanity), 8 (War crimes) and 8bis (Crime of aggression).

¹⁴¹ Durkheim *The Division of Labor in Society*, New York: The Free Press, 1997, p. 60, cited in C. Stahn, *Critical Introduction to International Criminal Law*, Cambridge University Press, 2020, p. 17; Cryer, et al. (eds), *An Introduction to International Criminal Law and Procedure*, 3rd Edition, Cambridge University Press, 2015, p. 227.

¹⁴² See e.g., [ICC Statute](#), Articles 6-8bis; C. Stahn, *Critical Introduction to International Criminal Law*, Cambridge University Press, 2020, p. 17; Cryer, et al. (eds), *An Introduction to International Criminal Law and Procedure*, 3rd Edition, Cambridge

differ from domestic criminal offences in three primary respects: (1) their contextual element(s); (2) their international character; and (3) the inapplicability of certain procedural limitations.

1. The Contextual Element(s) of International Crimes

73. The main distinguishing factor between international and domestic crimes is the context that must exist in order for ICL to apply. War crimes, for example, can only be committed in the context of an ongoing armed conflict,¹⁴³ while crimes against humanity can only be committed as part of a “widespread or systematic attack against a civilian population”.¹⁴⁴ These ‘contextual elements’ ‘trigger’ the application of ICL and transform what might otherwise be a domestic criminal offence (e.g., murder) into an international crime (e.g., the war crime of wilful killing or the crime against humanity of murder).¹⁴⁵
74. Context is fundamentally important when prosecuting international crimes because it gives rise to ICL and demands an analysis of the context, scale and patterns of violence that make up organised criminality. This, in turn, can form the starting point for assessing responsibility in chains of command to include higher level perpetrators capable of incurring responsibility for coordinating or facilitating international crimes, notwithstanding their physical or organisational remoteness from the actual perpetration of those crimes.

2. The Inapplicability of Certain Procedural Limitations when Prosecuting International Crimes

75. Given its focus on systemic, organised criminality, ICL has a range of legal and procedural mechanisms that differ from domestic criminal law, which make it easier to hold high-level perpetrators accountable. These include:
- *immunity*: State officials who may enjoy immunity from criminal prosecution before the domestic authorities of other States (e.g., because of their current or previous rank within the political structure of a State¹⁴⁶) do not enjoy such immunity before international tribunals when they are being prosecuted for international crimes;¹⁴⁷
 - *statute of limitations*: before international tribunals and in most States, statutory limitations that ordinarily limit the timeframe within which domestic crimes may be prosecuted do not apply to international crimes.¹⁴⁸ This enables the effective

University Press, 2015, p. 79.

¹⁴³ [ICC Elements of Crimes](#), Article 8.

¹⁴⁴ [ICC Statute](#), Article 7.

¹⁴⁵ [ICC Statute](#), Articles 7(1)(a), 8(2)(i); HRC ‘[General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant](#)’ (26 May 2004) CCPR/C/21/Rev.1/Add.13, para.18.

¹⁴⁶ [Vienna Convention on Diplomatic Relations](#).

¹⁴⁷ ICJ, [Democratic Republic of Congo v. Belgium Judgement](#), para. 61; ICC, [Al-Bashir Appeal Judgement](#), paras 1-11.

¹⁴⁸ Both the UN and the Council of Europe have adopted conventions that render statutory limitations inapplicable to genocide, crimes against humanity and war crimes. See, [ICC Statute](#), Article 29; Kok, ‘Statutory Limitations in International Criminal Law’, *Journal of International Criminal Justice*, 2008, as cited in C. Stahn, *Critical Introduction to International Criminal Law*, Cambridge University Press, 2020, p. 18.

prosecution of crimes committed in the past,¹⁴⁹ which is extremely important given that international criminal prosecutions are often unfeasible in the immediate term, either because it is impossible to apprehend the perpetrators,¹⁵⁰ or because the existence or extent of the crimes is covered up and/or not discovered until later.¹⁵¹

B. Investigating and Prosecuting International Crimes

1. The International Criminal Court and Ukraine

76. Although neither the Russian Federation or Ukraine have signed the ICC Statute, the ICC has jurisdiction over any war crimes, crimes against humanity and genocide allegedly committed in Ukraine by virtue of two declarations submitted by the Ukrainian government, which invited the ICC Prosecutor to investigate violations that allegedly occurred during the Euromaidan protests between 21 November 2013 and 22 February 2014 and violations committed on the territory of Ukraine from 20 February 2014 onwards.¹⁵²
77. In December 2020, the then-ICC Prosecutor confirmed there was reasonable grounds to proceed with an investigation into the situation in Ukraine.¹⁵³ On 2 March 2022, the ICC Prosecutor announced that he had proceeded to open an investigation into the Situation in Ukraine on the basis of referrals received from a number of State Parties to the Rome Statute.¹⁵⁴ However, this does not apply to the crime of aggression.¹⁵⁵

¹⁴⁹ Recall that the principle of non-retroactivity under international law requires that the conduct in question be criminalised by *some* source of law that was previously applicable to the individual and was sufficiently foreseeable to them at the time the alleged offence was committed. Therefore, there is no violation of ‘non-retroactivity’ if the individual was bound by some prior source of law, such as customary international law, general principles of law, an applicable treaty or even domestic law, that criminalised the same conduct and applied the same or a less severe punishment. See, Spiga, *Non-Retroactivity of Criminal Law: A New Chapter in the Hissene Habre Saga*, *Journal of International Criminal Justice* 2011, p.16; Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, *Georgetown Law Journal*, 2008, pp 158-172; Souza Diaz, *The Retroactive Application of the Rome Statute in Cases of Security Council Referrals and Ad Hoc Declarations*, *Journal of International Criminal Justice*, 2018, pp 66-67. See also, Juratowitch, *Retroactive Criminal Liability and International Human Rights Law*, Volume 75, *British Yearbook of International Law*, 2005, pp 340-341.

¹⁵⁰ Radovan Karadzic, for example, was indicted on 25 July 1995, yet successfully evaded arrest until 21 July 2008. See, ICTY, ‘[Case Information Sheet: Radovan Karadzic](#)’.

¹⁵¹ There are countless examples of perpetrators attempting (often successfully) to cover up the true extent of their crimes. Amongst the most infamous, however, was the efforts to disguise the extent of the killing in Srebrenica by initially dumping bodies in mass graves, and later moving these bodies through multiple ‘secondary’ grave sites in order to prevent identification and further cloud the ability of the investigative authorities to establish the extent of the crimes. See, ICTY, ‘[Facts about Srebrenica](#)’.

¹⁵² Declaration Lodged by Ukraine under Article 12(3) of the Statute (9 April 2014) (Ukraine First Declaration); Declaration of the Verkhovna Rada of Ukraine ‘[On the Jurisdiction of the International Criminal Court](#)’ (Ukraine Second Declaration). Based on these Declarations, the ICC’s jurisdiction in Ukraine extends to events from 21 November 2013 for an indefinite period and includes prosecutions for any war crime, crime against humanity or genocide falling under the ICC Statute.

¹⁵³ ICC, ‘[Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination in the situation in Ukraine](#)’ (11 December 2020).

¹⁵⁴ ICC, ‘[Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 State Parties and the Opening of an Investigation](#)’ (2 March 2022).

¹⁵⁵ [ICC Statute](#), Article 15*bis*.

2. Complementarity

78. Although ICL is generally known for its prosecution of high-level perpetrators within international courts and tribunals,¹⁵⁶ international crimes are primarily intended to be prosecuted at the domestic level.¹⁵⁷ Under the ICC Statute, this is reflected in the principle of ‘complementarity’, according to which the ICC is expressly intended to be ‘complementary’ to national criminal jurisdictions,¹⁵⁸ acting only as “a court of last resort” where States Parties are unable or unwilling to investigate and prosecute perpetrators of international crimes over which they have jurisdiction.¹⁵⁹ In relation to Ukraine, complementarity means that, while the ICC has opened an investigation into the crimes committed in Ukraine since 2014, the Ukrainian Office of the Prosecutor General also has a key role to play in investigating and prosecuting perpetrators of crimes against humanity and war crimes that have been perpetrated throughout the armed conflict.

C. Investigation and Prosecution of the Elements of International Crimes

79. International crimes can be prosecuted in a number of jurisdictions, including: Ukraine itself, at the ICC and in third States by virtue of universal jurisdiction.
80. Pursuant to the Criminal Code of Ukraine (CCU), domestic courts in Ukraine have jurisdiction over war crimes, genocide and the crime of aggression;¹⁶⁰ however, as the CCU currently stands, it does not include crimes against humanity. That said, Draft Bill 7290, which has not yet passed into law, proposes amendments to the CCU that would bring, among other changes, crimes against humanity under the jurisdiction of Ukrainian courts if, and when, either enters into force.¹⁶¹
81. The ICC also has jurisdiction over any war crimes, crimes against humanity and genocide allegedly committed in Ukraine from 21 November 2013 onwards by virtue of two declarations submitted by the Ukrainian government.¹⁶²
82. Finally, third States, i.e., those not directly affected by the armed conflict, may also prosecute individuals for the commission of serious crimes, including war crimes,

¹⁵⁶ Cryer *et al.* (eds), *An Introduction to International Criminal Law and Procedure*, 3rd Edition, Cambridge University Press, 2015, p. 4.

¹⁵⁷ Cryer *et al.* (eds), *An Introduction to International Criminal Law and Procedure*, 3rd Edition, Cambridge University Press, 2015, pp 70, 79-82.

¹⁵⁸ [ICC Statute](#), preamble paras 4 and 6, Article 1.

¹⁵⁹ ICC, [‘About the ICC’](#). See also, Vanderbilt Law School, [‘International Criminal Court serves as a “court of last resort”](#) (6 April 2010).

¹⁶⁰ [CCU](#), Articles 437, 438, 442.

¹⁶¹ Draft Bill [‘On Amendments to Certain Legislative Acts of Ukraine Concerning the Implementation of Norms of International Criminal and Humanitarian Law’](#) of 27 December 2019, No. 2689, Articles 437, 438, 442, 442-1; Draft Bill [‘On amendments to the Criminal Code of Ukraine and the Criminal Procedure Code of Ukraine’](#) of 15 April 2022, No. 7290, Articles 437, 438, 442, 442-1.

¹⁶² Declaration Lodged by Ukraine under Article 12(3) of the Statute (9 April 2014) (Ukraine First Declaration); Declaration of the Verkhovna Rada of Ukraine [‘On the Jurisdiction of the International Criminal Court’](#) (Ukraine Second Declaration). Based on these Declarations, the ICC’s jurisdiction in Ukraine extends to events from 21 November 2013 for an indefinite period and includes prosecutions for any war crime, crime against humanity or genocide falling under the Rome Statute.

crimes against humanity and genocide,¹⁶³ through the exercise of universal jurisdiction.¹⁶⁴ Universal jurisdiction enables “a state to bring criminal proceedings in respect of certain crimes irrespective of the location of the crime and the nationality of the perpetrator or the victim” provided that the State in question has granted their own courts the ability to exercise universal jurisdiction over the relevant crimes.¹⁶⁵ For example, Germany is currently investigating several hundred potential Russian war crimes in Ukraine through the use of universal jurisdiction.¹⁶⁶

83. Regardless of whether an alleged perpetrator is investigated and prosecuted domestically or internationally, to establish individual criminal responsibility for international crimes, the following core, internationally accepted elements of international crimes must be established beyond a reasonable doubt:¹⁶⁷

- *the contextual elements of international crimes (if applicable)*: elements that relate to the circumstances in which the crime must be committed, or be part of;
- *the physical elements (actus reus) of the crime*: elements that relate to the conduct/omission of the perpetrator, the consequences of such conduct and the circumstances in which they occurred;
- *the mental elements (mens rea) of the crime*: elements that relate to the mindset/intent of a perpetrator in committing the crime;¹⁶⁸ and
- *modes of liability*: principles that relate to the means by which a perpetrator is linked to, and held responsible for, criminal conduct.¹⁶⁹

84. These are discussed in detail in the following chapters of the Benchbook.

¹⁶³ [The Princeton Principles on Universal Jurisdiction](#), Princeton University Program in Law and Public Affairs, 2001, p. 29 Principle 2(1).

¹⁶⁴ OHCHR, ‘[Prosecution initiatives](#)’, UN Doc HR/PUB/06/4 *Rule of Law Tools for Post-Conflict States*, 2006, pp 29-30.

¹⁶⁵ Philippe, [The principles of universal jurisdiction and complementarity: how do the two principles intermesh?](#), *International Review of the Red Cross*, 2006, pp 377, 379.

¹⁶⁶ Justice Info, ‘[Germany Probing Several Hundred Possible Ukraine War Crimes](#)’, 18 June 2022.

¹⁶⁷ [ICC Elements of Crimes](#).

¹⁶⁸ See, [ICC Statute](#), Article 6.

¹⁶⁹ [ICC Statute](#), Articles 25, 28; Cryer *et al.* (eds), *An Introduction to International Criminal Law and Procedure*, 3rd Edition, Cambridge University Press, 2015, p. 353.

SPECIFIC PROVISIONS DEALING WITH THE PROSECUTION OF PRISONERS OF WAR

85. This introductory section addresses the rules related to the prosecution of Prisoners of War (POWs) for international crimes. Under IHL, the rules on the prosecution of POWs are provided for in the Geneva Convention III of 1949 relative to the Treatment of Prisoners of War,¹⁷⁰ and customary international law.¹⁷¹ In addition, willfully depriving a POW of the rights of a fair and regular trial is grave breach of the Geneva Conventions,¹⁷² a war crime under Article 8(2)(a)(vi) of the ICC Statute, and Article 438 of the CCU.¹⁷³
86. This section will: 1) set out the definition of POWs under international law; 2) explain Ukraine's obligations relating to the prosecution of POWs under IHL and customary international law; and 3) discuss the war crime of wilfully depriving a POW of the rights of fair and regular trial.

I. Definition of Prisoners of War

87. The definition of POW is set out in Article 4 of the Geneva Convention III:

GENEVA CONVENTION III, [ARTICLE 4](#)

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

1. Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
 - a) that of being commanded by a person responsible for his subordinates;
 - b) that of having a fixed distinctive sign recognizable at a distance;
 - c) that of carrying arms openly;
 - d) that of conducting their operations in accordance with the laws and customs of war.
3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

¹⁷⁰ [Geneva Convention III](#).

¹⁷¹ See ICRC, Customary IHL Database, [Rule 106: Conditions of POW Status](#) on the definition of POWs under customary IHL; ICRC, Customary IHL Database, [Rule 100: Fair Trial Guarantees](#) on the right to a fair trial under customary IHL.

¹⁷² [Geneva Convention III](#), Article 130; [Geneva Convention IV](#), Article 147.

¹⁷³ See below, [Chapter 1, Part I, Section I.C.3.b](#).vii “Wilfully Depriving a Prisoner of War or Other Protected Person of the Rights of Fair and Regular Trial (ICTY Statute, Article 2(f); ICC Statute, Article 8(2)(a)(vi))”.

4. Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.
5. Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.
6. Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

88. This definition has been incorporated into Ukrainian legal system.¹⁷⁴ This is also the definition of a POW under customary international law.¹⁷⁵
89. The term ‘**fallen into the hands of the enemy**’ refers to persons captured by the armed forces of the opposing Party to the armed conflict.¹⁷⁶ The term also covers those who are taken into enemy control following surrender or mass capitulation.¹⁷⁷ The enemy forces must exercise “some level of physical control or restraint over the person”.¹⁷⁸ In such situations, the opposing party – who captured the POW – becomes known as the ‘detaining power’.¹⁷⁹
90. The first category of POW is members of the armed forces of a Party to an armed conflict, including members of militias or volunteer corps forming part of those forces.¹⁸⁰ In Ukraine, as with international armed conflicts more generally, most POWs are likely to fall into this category.¹⁸¹ It includes “all members of the armed forces regardless of their function or the service they provide”.¹⁸² In Ukraine, this may include any Russian Federation military personnel, as well as members of private militias forming part of the regular armed forces.
91. Military or volunteer corps forming part of the armed forces must have been “formally incorporated” into the armed forces and placed under the responsible command of such forces, in order for its members to acquire POW status upon capture.¹⁸³ That said, members of other militias and volunteer corps not formally incorporated into, but otherwise belonging to, a Party to the armed conflict will still benefit from POW status provided the four conditions set out in Article 4(2) are fulfilled.¹⁸⁴

¹⁷⁴ Resolution of the Cabinet of Ministers of Ukraine of April 5, 2022 No. 413: On approval of the Procedure for Detention of Prisoners of War.

¹⁷⁵ ICRC, Customary IHL Database, [Rule 106: Conditions of POW Status](#).

¹⁷⁶ [ICRC Commentary of 2020 Geneva Convention III](#), Article 4, para. 960.

¹⁷⁷ [ICRC Commentary of 2020 Geneva Convention III](#), Article 4, para. 960.

¹⁷⁸ [ICRC Commentary of 2020 Geneva Convention III](#), Article 4, para. 961.

¹⁷⁹ [ICRC Commentary of 2020 Geneva Convention III](#), Article 4, para. 961.

¹⁸⁰ [Geneva Convention III](#), Article 4.

¹⁸¹ [ICRC Commentary of 2020 Geneva Convention III](#), Article 4, paras 975-976.

¹⁸² [ICRC Commentary of 2020 Geneva Convention III](#), Article 4, para. 978.

¹⁸³ [ICRC Commentary of 2020 Geneva Convention III](#), Article 4, para. 979.

¹⁸⁴ [Geneva Convention III](#), Article 4(2); [ICRC Commentary of 2020 Geneva Convention III](#), Article 4, para. 980.

92. As explained in the following sections, Ukraine has certain obligations in respect to the treatment of POWs, including in their prosecution for international crimes.

I. Rules Dealing with the Prosecution of Prisoners of War

93. This section discusses the rules relating to the prosecution of POWs for international crimes.¹⁸⁵ It is imperative that judges uphold these rules during trials for the following reasons:

- Ukraine is bound by the provisions of Geneva Convention III as a High Contracting Party,¹⁸⁶ and by all rules of customary IHL.¹⁸⁷ Failure on the part of judges to fully implement these rules could lead to the State responsibility of Ukraine under international law for failing to observe treaty obligations.¹⁸⁸
- Wilfully depriving a POW of the rights of a fair and regular trial is a war crime under Article 8(2)(a)(vi) of the ICC Statute and Article 438 of the CCU. Grave breaches of any of the following rules may therefore lead to individual criminal responsibility.¹⁸⁹

94. The rules pertaining to the prosecution of POWs are set out in Geneva Convention III (Chapter III) and customary international law. The following sub-sections will examine each rule and provide guidance for judges on how the rules should be implemented in practice, in particular:

- i. POWs may not be prosecuted for participation in the hostilities;
- ii. The principle of legality must be upheld at all times;
- iii. No physical or mental coercion may be exerted on a POW in order to extract a guilty plea;
- iv. POWs must be guaranteed the right to a fair trial;
- v. POWs must be guaranteed the right to a defence;
- vi. POWs may not be confined before trial unless a member of the armed forces of the detaining power would be confined for the same offence;
- vii. Sentences must be pronounced by a competent court in the same manner as applied to members of the armed forces of the detaining power; and
- viii. POWs must be guaranteed the right of appeal.

¹⁸⁵ This includes war crimes, the crime of aggression and the crime of genocide, as set out in [CCU](#), Articles 438, 437, and 442 respectively.

¹⁸⁶ ICRC, '[International Humanitarian Law Databases: Ukraine](#)'.

¹⁸⁷ Customary international law is a source of law binding on all states. See [Statute of the International Court of Justice](#), Article 38(b).

¹⁸⁸ [Vienna Convention on the Law of Treaties](#), Article 26: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith". Breach of a treaty or customary international law obligation leads to State responsibility under international law, see International Law Commission, '[Draft Articles on the Responsibility of States for Internationally Wrongful Acts](#)', Article 2: "There is an internationally wrongful act of a State when conduct consisting of an act or omission: (a) is attributable to that State under international law; and (b) constitutes a breach of an international obligation of the State".

¹⁸⁹ [Geneva Convention III](#), Article 130. See ICC [Elements of Crimes](#), Article 8(2)(a)(vi).

A. Prosecution for Participation in the Armed Conflict

95. The fundamental difference between POWs and non-POWs is that the former may not be prosecuted for direct participation in hostilities.¹⁹⁰ In order to amount to ‘direct participation’ in hostilities, an act must fulfil the following criteria:¹⁹¹
- i. the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury or destruction on protected persons or objects;
 - ii. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which the act constitutes an integral part; and
 - iii. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the armed conflict and to the detriment of another.
96. Put simply, a POW may not be prosecuted for killing or wounding enemy military personnel or destroying enemy military objects prior to their capture.¹⁹²
97. However, POWs *must* be tried if they are alleged to have committed grave breaches of the Geneva Conventions or other war crimes prior to capture.¹⁹³ Geneva Convention III also sets out detailed rules for the application of judicial and disciplinary measures in respect of offences committed by POWs after they fall into enemy hands.¹⁹⁴ The Convention stipulates that a POW “shall be subject to the laws, regulations and orders in force in the armed forces of the Detaining Power”.¹⁹⁵ This means that POWs can be subject to same legal and disciplinary punishments as members of the armed forces of the detaining power would be subject to for the same offence. Since the focus of this Section is the rules applicable specifically when POWs are prosecuted for international crimes committed prior to capture, the rules concerning legal and disciplinary sanctions shall not be discussed any further.
98. The following section sets out the international law rules applicable when adjudicating an international crimes trial involving a POW.

¹⁹⁰ [ICRC Commentary of 2020 Geneva Convention III](#), Introduction, para. 20; [Additional Protocol I](#), Article 44; E. Crawford, *The Treatment of Combatants and Insurgents under the Law of the Armed Conflict*, Oxford University Press, 2010, p. 52.

¹⁹¹ N. Mezler, [‘Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law’](#) (ICRC, May 2009); ICRC Online Casebook ‘How Does Law Protect in War’, [‘Direct participation in hostilities’](#).

¹⁹² I. Issar, [‘On trial: the Third Geneva Convention and judicial guarantees for prisoners of war’](#) (ICRC- Humanitarian Law & Policy blog, 23 June 2022). *See also* ICRC, [‘Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law’](#), 2008, 90 *International Review of the Red Cross* 991, p. 1017

¹⁹³ [Geneva Convention III](#), Article 129.

¹⁹⁴ [Geneva Convention III](#), Articles 82-108.

¹⁹⁵ [Geneva Convention III](#), Article 82(1).

B. The principle of legality must be upheld at all times (Geneva Convention III, Article 99(1))

GENEVA CONVENTION III, [ARTICLE 99\(1\)](#)

No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed.

99. According to this rule, a POW can only be prosecuted for an international crime if the crime was provided for under the domestic criminal law of the detaining power or international law at the time it was committed. In Ukraine, war crimes, the crime of aggression, and the crime of genocide are all criminalised under the CCU.¹⁹⁶ POWs may therefore be prosecuted for these offences in Ukraine. Where the international crime is based in treaty law, that treaty must be binding on both the detaining power and the power on which the POW depended at the time of commission.¹⁹⁷ Both Ukraine and the Russian Federation are States Parties to, and bound by, the Geneva Conventions and Additional Protocol I.¹⁹⁸ Customary international law crimes may be relied upon provided the rule is “clear and unambiguous”.¹⁹⁹
100. With respect to domestic law, the applicable law must be reasonably foreseeable and accessible to the accused POW, at the time the alleged offence was committed.²⁰⁰ This means that, at the time of commission, the POW “knew or should have known that he would be subject to punishment if caught”.²⁰¹ This reflects the international human rights law principle (the principle of legality) that “[n]o one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed”.²⁰²

¹⁹⁶ CCU, Articles 438, 437, and 442 respectively.

¹⁹⁷ ICRC [Commentary of 2020 Geneva Convention III](#), Article 99, para. 3960.

¹⁹⁸ ICRC, ‘[International Humanitarian Law Databases: Ukraine](#)’; ICRC, ‘[International Humanitarian Law Databases: Russian Federation](#)’.

¹⁹⁹ ICRC [Commentary of 2020 Geneva Convention III](#), Article 99, para. 3960.

²⁰⁰ ICRC [Commentary of 2020 Geneva Convention III](#), Article 99, para. 3962.

²⁰¹ US National Military Tribunal, Justice case [Judgement](#), pp 977-978.

²⁰² UDHR, Article 11(2). See also ICCPR, Article 15(2): “Nothing in this Article shall prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognized by the community of nations”.

C. No moral or physical coercion may be exerted on a Prisoner of War to extract a guilty plea (Geneva Convention III, Article 99(2))

GENEVA CONVENTION III, [ARTICLE 99\(2\)](#)

No moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused.

101. This rule prohibits any form of moral or physical coercion being applied towards a POW to force them to admit guilt.²⁰³ This is a central aspect of the right to a fair trial.²⁰⁴ In the context of a criminal trial, methods of ‘coercion’ are acts designed to deprive or impair the ability of the accused to exercise free will and autonomy.²⁰⁵ Wilfully depriving a prisoner of war or protected person of the rights of fair and regular trial is a grave breach of Geneva Convention II and Geneva Convention IV,²⁰⁶ as well as Additional Protocol I.²⁰⁷ It further constitutes a war crime under Article 8(2)(vi) of the ICC Statute.²⁰⁸
102. This rule is heavily linked to the presumption of innocence, which must be afforded to POWs accused of international crimes in accordance with Ukrainian²⁰⁹ and international law.²¹⁰ POWs may not be compelled to testify against themselves.²¹¹ The ICC has observed that “[i]n practice, the right not to be compelled to testify against oneself ... seeks to ensure that confessions obtained under duress or by coercion or subterfuge cannot be used at trial in disregard of the expressed will of the accused to remain silent”.²¹²

D. Prisoners of War must be guaranteed the right to a fair trial (Geneva Convention III, Article 84; Customary IHL, Rule 100)

103. The right to a fair trial is protected under customary international humanitarian law,²¹³ and Ukrainian law.²¹⁴ Article 84(2) of Geneva Convention III further stipulates that “[i]n no circumstances whatever shall a prisoner of war be tried by a court of any kind

²⁰³ [ICRC Commentary of 2020 Geneva Convention III](#), Article 99, para. 3965.

²⁰⁴ [Geneva Convention III](#), Articles 102-108. See also [ECHR](#), Article 6; [ICCPR](#), Article 14(1).

²⁰⁵ [Body of Principles for the Protection of All Persons under Any form of Detention or Imprisonment](#), 9 December 1988, General Assembly Resolution 43/173, Principle 21(2).

²⁰⁶ [Geneva Convention III](#), Article 130; [Geneva Convention IV](#), Article 147

²⁰⁷ [Additional Protocol I](#), Article 85(4)(e).

²⁰⁸ [ICC Statute](#), Article 8(2)(a)(vi). See [See below, Chapter 1, Part I, Section I.C.3.b.vii](#) “Wilfully Depriving a Prisoner of War or Other Protected Person of the Rights of Fair and Regular Trial (ICTY Statute, Article 2(f); ICC Statute, Article 8(2)(a)(vi))”.

²⁰⁹ [Constitution of Ukraine](#), Article 62; [CCU](#), Article 2(2).

²¹⁰ [ICRC Commentary of 2020 Geneva Convention III](#), Article 99, para. 3970. See [ECHR](#), Article 6(2): “Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law”; [ICCPR](#), Article 14(2).

²¹¹ ECtHR, *Saunders v. the United Kingdom*, [Judgement](#), para. 68; ECtHR, *Bykov v. Russia*, [Judgement](#), para. 92.

²¹² ICC, *Katanga Trial Judgement*, para. 1529.

²¹³ ICRC, Customary IHL Database, [Rule 100: Fair Trial Guarantees](#).

²¹⁴ [CPC](#), Article 21(1).

which does not offer the essential guarantees of independence and impartiality”.²¹⁵ Judges are responsible for ensuring these essential guarantees. A judge or court is ‘independent’ where it is “not subject to external authority and has complete freedom in decision-making”.²¹⁶ ‘Impartiality’ has two components, one objective and one subjective: (1) judges must not allow their judgement to be influenced by personal bias or prejudice; and (2) the court must appear impartial from the perspective of the objective observer.²¹⁷

104. Although not explicitly mentioned in Geneva Convention III, a fundamental component of the right to a fair trial is that judgements should adequately state the reasons on which they are based.²¹⁸ It must be clear from the decision of the court that the essential issues of the case have been addressed,²¹⁹ and that an explicit reply has been given in response to the arguments that are decisive for the outcome of the case.²²⁰ A reasoned judgement is imperative if the right to appeal is to be effective.²²¹
105. The ICRC Commentary notes that ensuring independence and impartiality in the context of POW trials presents unique challenges: “Judges will be required to sit in judgment against enemy military personnel, and the Detaining Power must therefore take particular care to guard against any bias or conflict of interest that may arise”.²²² As an essential safeguard of impartiality, there can be no review of decisions in POW trials by the military authorities.²²³ In Ukraine, POWs charged with war crimes are tried in the same criminal courts as civilians, and decisions are not subject to review by the military.²²⁴
106. More specific rules regarding the rights and means of defence for POWs are provided in Articles 99(3) and 105 of Geneva Convention III, discussed below.

²¹⁵ [Geneva Convention III](#), Article 84(2).

²¹⁶ ICTR, *Nahimana et al.* [Appeal Judgement](#), para. 19.

²¹⁷ ICTY, *Furundzija* [Appeal Judgement](#), paras 189-191, ICTY, *Celebici* [Appeal Judgement](#), paras 682-684, and ICTY, *Galic* [Appeal Judgement](#), paras 37-41; and ICTR, *Akayesu* [Appeal Judgement](#), paras 203-207, ICTR, *Rutaganda* [Appeal Judgement](#), paras 39-41, and ICTR, *Nahimana et al.* [Appeal Judgement](#), paras 47-50.

²¹⁸ See ECtHR, *Moreira Ferreira v. Portugal (No. 2)*, [Judgement](#), para. 84; HRC *Henry v. Jamaica*, [Communication No. 230/87](#), para. 8.4; HRC, ‘General Comment 32: Article 14: Right to equality before courts and tribunals and to a fair trial’, [CCPR/C/GC/32](#), 23 August 2007, para. 49: “The right to have one’s conviction reviewed can only be exercised effectively if the convicted person is entitled to have access to a duly reasoned, written judgement of the trial court[...]”.

²¹⁹ ECtHR, *Boldea v. Romania*, [Judgement](#), para. 30.

²²⁰ ECtHR, *Moreira Ferreira v. Portugal (No. 2)*, [Judgement](#), para. 84.

²²¹ See below, para. [117](#).

²²² [ICRC Commentary of 2020 to Geneva Convention III](#), Article 84, para. 3614.

²²³ ECtHR, *Findlay v. United Kingdom*, [Judgement](#), para. 77; P. Rowe, ‘The trial of prisoners of war by military courts in modern armed conflicts’ in C. Harvey, J. Summers and N. White (eds) *Contemporary Challenges to the Laws of War*, Cambridge University Press, 2014, pp 313, 320.

²²⁴ Resolution of the Cabinet of Ministers of Ukraine of April 5, 2022 No. 413: On approval of the Procedure for Detention of Prisoners of War, paras 20-1: “In case a prisoner of war has a status of a participant in criminal proceedings, it is guaranteed that he can enjoy the relevant rights envisaged by the Criminal Procedure Code of Ukraine”.

E. Prisoners of War must be guaranteed the right to a defence (Geneva Convention III, Article 99(3))

GENEVA CONVENTION III, [ARTICLE 99\(3\)](#)

No prisoner of war may be convicted without having had an opportunity to present his defence and the assistance of a qualified advocate or counsel.

107. This rule sets out the fundamental principle that no POW can be “convicted without having had the opportunity to present their defence”.²²⁵ Article 99(3) sets out the general rule. The specific rights and means of defence POWs must be granted are set out in Article 105 of Geneva Convention III.

GENEVA CONVENTION III, [ARTICLE 105](#) – RIGHTS AND MEANS OF DEFENCE

The prisoner of war shall be entitled to assistance by one of his prisoner comrades, to defence by a qualified advocate or counsel of his own choice, to the calling of witnesses and, if he deems necessary, to the services of a competent interpreter. He shall be advised of these rights by the Detaining Power in due time before the trial.

Failing a choice by the prisoner of war, the Protecting Power shall find him an advocate or counsel, and shall have at least one week at its disposal for the purpose. The Detaining Power shall deliver to the said Power, on request, a list of persons qualified to present the defence. Failing a choice of an advocate or counsel by the prisoner of war or the Protecting Power, the Detaining Power shall appoint a competent advocate or counsel to conduct the defence.

The advocate or counsel conducting the defence on behalf of the prisoner of war shall have at his disposal a period of two weeks at least before the opening of the trial, as well as the necessary facilities to prepare the defence of the accused. He may, in particular, freely visit the accused and interview him in private. He may also confer with any witnesses for the defence, including prisoners of war. He shall have the benefit of these facilities until the term of appeal or petition has expired.

Particulars of the charge or charges on which the prisoner of war is to be arraigned, as well as the documents which are generally communicated to the accused by virtue of the laws in force in the armed forces of the Detaining Power, shall be communicated to the accused prisoner of war in a language which he understands, and in good time before the opening of the trial. The same communication in the same circumstances shall be made to the advocate or counsel conducting the defence on behalf of the prisoner of war.

The representatives of the Protecting Power shall be entitled to attend the trial of the case, unless, exceptionally, this is held ‘in camera’ in the interest of State security. In such a case the Detaining Power shall advise the Protecting Power accordingly.

²²⁵ [ICRC Commentary of 2020 Geneva Convention III](#), Article 99, para. 3976.

108. ‘Assistance by one of his prisoner comrades’ must be distinguished from ‘defence’, which must be provided by qualified advocate or counsel.²²⁶ ‘Assistance’ in this context “encompasses a variety of activities that would help a prisoner of war against whom proceedings have been instituted”, which can include “serving as an intermediary between the accused and their advocate or counsel, assisting in the proceedings or providing the accused with interpretation services”.²²⁷ Judges must be mindful that a POW may never be tried without the assistance of legal counsel.²²⁸ The right to defence is also protected under Article 20 of the Criminal Procedure Code (CPC).²²⁹
109. With respect to the right of a POW to call witnesses, the ICRC Commentary to Article 105 accepts that guaranteeing this right is not simple where a POW is on trial for a crime committed before capture.²³⁰ Fellow soldiers will likely not be able to attend trial to give evidence, unless they themselves are POWs.²³¹ Judges should consider whether evidence can be admitted by written or video statement, or through the use of communications technology.²³²
110. Finally, POWs may not be tried *in absentia*.²³³ Even though trials *in absentia* are generally provided for under Ukrainian law,²³⁴ they “cannot be justified for prisoners of war, who are in the custody of the Detaining Power and whose presence at trial can therefore be ensured”.²³⁵

²²⁶ [ICRC Commentary of 2020 to Geneva Convention III](#), Article 105, para. 4082.

²²⁷ [ICRC Commentary of 2020 to Geneva Convention III](#), Article 105, para. 4082.

²²⁸ [Geneva Convention III](#), Article 105. This right is protected by statutes of international criminal tribunals: [ICC Statute](#), Article 67(1); [ICTY Statute](#), Article 21(4); [ICTR Statute](#), Article 20(4); [SCSL Statute](#), Article 17(4). It is also guaranteed in European and International human rights treaties: [ICCPR](#), Article 14(3)(d); [ECHR](#), Article 6(3)(c).

²²⁹ [CPC](#), Article 20 (Right to defense).

²³⁰ [ICRC Commentary of 2020 to Geneva Convention III](#), Article 105, para. 4095.

²³¹ [ICRC Commentary of 2020 to Geneva Convention III](#), Article 105, para. 4095.

²³² [ICRC Commentary of 2020 to Geneva Convention III](#), Article 105, para. 4095.

²³³ [Additional Protocol I](#), Article 75(4); [ICRC Commentary of 2020 to Geneva Convention III](#), Article 105, para. 4103.

²³⁴ [CPC](#), Article 323(3).

²³⁵ [ICRC Commentary of 2020 to Geneva Convention III](#), Article 105, para. 4103. For more detailed discussions in this regard, see below, [Chapter 2, Part I, Section I. “Ukrainian National Law concerning Trial *in absentia*»](#).

- F. Prisoners of War may not be confined before trial unless a member of the armed forces of the detaining power would be confined for the same offence (Geneva Convention III, Art. 103)

GENEVA CONVENTION III, [ARTICLE 103](#) – JUDICIAL INVESTIGATIONS AND CONFINEMENT AWAITING TRIAL

7. Judicial investigations relating to a prisoner of war shall be conducted as rapidly as circumstances permit and so that his trial shall take place as soon as possible. A prisoner of war shall not be confined while awaiting trial unless a member of the armed forces of the Detaining Power would be so confined if he were accused of a similar offence, or if it is essential to do so in the interests of national security. In no circumstances shall this confinement exceed three months.
8. Any period spent by a prisoner of war in confinement awaiting trial shall be deducted from any sentence of imprisonment passed upon him and taken into account in fixing any penalty.
9. The provisions of Articles 97 and 98 of this Chapter shall apply to a prisoner of war whilst in confinement awaiting trial.

111. Article 103(1) sets out the general rule that investigations into alleged war crimes committed by POWs are to be carried out as rapidly as possible, and that the accused must not be held in pre-trial confinement, unless any of the exceptions discussed below are applicable.²³⁶ This rule is reflected in Article 28(5) of the CPC which provides that “[e]veryone shall have the right for a charge to be subject of a trial within the shortest possible time”.²³⁷

112. Article 197 of the CPC concerns pre-trial detention. In terms of the duration of pre-trial detention, the CPC states that the investigating judge must rule on the validity of pre-trial detention every sixty days.²³⁸ The maximum duration of detention under the CPC must not exceed six months for crimes of small or medium gravity, or twelve months for especially grave crimes.²³⁹ If International crimes are considered *especially grave* by judges POWs could be detained for up to 12 months under this provision. Although Article 103(1) states that POWs must not be confined while awaiting trial, there is an exception to this rule where “a member of the armed forces of the Detaining Power would be so confined if he were accused of a similar offence, or if it is essential to do so in the interests of national security”.²⁴⁰ Judges must therefore ensure that the pre-trial confinement of POWs is governed by the same rules as would apply to Ukrainian nationals accused of the same offence.

113. Article 103 also provides that a POW may be held in pre-trial confinement where it is essential to do so “in the interests of national security”.²⁴¹ Whereas States are granted

²³⁶ [Geneva Convention III](#), Article 103(1).

²³⁷ [CPC](#), Article 28(5). See also subparagraphs (4) and (6) of the same Article.

²³⁸ [CPC](#), Article 197(1).

²³⁹ [CPC](#), Article 197(3).

²⁴⁰ [Geneva Convention III](#), Article 103(1).

²⁴¹ [Geneva Convention III](#), Article 103(1).

a high margin of appreciation to interpret ‘national security’, the exception will only apply where the continued confinement is “absolutely necessary” or “fundamental” to the national security interest in question.²⁴²

G. Sentences must be pronounced by a competent court in the same manner as applied to members of the armed forces of the detaining power (Geneva Convention III, Article 102)

GENEVA CONVENTION III, [ARTICLE 102](#) – JUDICIAL PROCEDURE: CONDITIONS FOR VALIDITY OF SENTENCE

A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.

114. This means that a POW belonging to the the Russian Federation armed forces may only be tried, convicted, and sentenced for an international crime by the courts that have the jurisdiction to try members of the Ukrainian armed forces for the same crime.²⁴³ As stated above, POWs charged with international crimes in Ukraine are tried in the civilian criminal justice system, as with members of the Ukrainian armed forces.²⁴⁴ Reference to the “same courts” prohibits the detaining power from establishing a court solely to pronounce judgements on POWs, which could be susceptible to arbitrary use by the detaining power.²⁴⁵
115. When sentencing a POW for international crimes, judges must apply the normal sentencing rules applicable to the crime, as set out under the CCU.²⁴⁶ Moreover, judges must apply any mitigating or aggravating circumstances in the same manner in which they would be applied to a member of the Ukrainian armed forces under the same circumstances.²⁴⁷
116. In addition, when sentencing a POW for an international crime, judges must adhere to Article 103(2) of Geneva Convention III, which stipulates that: “Any period spent by

²⁴² [ICRC Commentary of 2020 to Geneva Convention III](#), Article 103, para. 4033.

²⁴³ [ICRC Commentary of 2020 to Geneva Convention III](#), Article 102, para. 4008.

²⁴⁴ Resolution of the Cabinet of Ministers of Ukraine of April 5, 2022 No. 413: On approval of the Procedure for Detention of Prisoners of War, paras 20-1.

²⁴⁵ [ICRC Commentary of 2020 to Geneva Convention III](#), Article 102, para. 4010.

²⁴⁶ According to Article 438 of the [CCU](#), war crimes shall be punishable by imprisonment for a term of eight to twelve years. When accompanied by murder, the term shall be ten to fifteen years, or life imprisonment. For discussion on the interplay between between Article 438 and Chapter XIX of the CCU supplemented by the Order of the Ministry of Defence № 164 of 23 March 2017 and IHL in relation to the possible difference of situation between members of the Ukrainian Armed Forces and POWs, see below, [Chapter 1, Part I, Section I.A. \(“Relevant domestic legislation under Ukrainian law: Article 438”\)](#).

²⁴⁷ The rules on the imposition of punishment are set out in Articles 65-73 of the [CCU](#).

a prisoner of war in confinement awaiting trial shall be deducted from any sentence of imprisonment passed upon him and taken into account in fixing any penalty”.²⁴⁸

H. Prisoners of War must be guaranteed the right to appeal (Geneva Convention III, Art. 106)

GENEVA CONVENTION III, ARTICLE 106 – APPEALS

Every prisoner of war shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition from any sentence pronounced upon him, with a view to the quashing or revising of the sentence or the reopening of the trial. He shall be fully informed of his right to appeal or petition and of the time limit within which he may do so.

117. Under Article 42(4)(6) of the CCU, individuals convicted of a crime have the right to appeal the verdict. In order to ensure compliance with Article 106 of Geneva Convention III, judges must guarantee that POWs convicted of international crimes are afforded the same right of appeal and are fully informed of that right in a language they understand, including “all the necessary information for appellate proceedings to be launched correctly and in a timely manner”.²⁴⁹
118. Article 106 of Geneva Convention III makes clear that the right to appeal must be guaranteed, “with a view to the quashing or revising of the sentence or the reopening of the trial”.²⁵⁰ In other words, when a POW is appealing against a conviction for international crimes, judges must be prepared to deliver the following outcomes:
- i. Quash the verdict. This means reject the original judgement as invalid;²⁵¹
 - ii. Revise the sentence; or
 - iii. Reopen the trial.

II. The war crime of wilfully depriving a Prisoners of War of the rights of fair and regular trial

119. Failure to adhere to any of the above-discussed rules in the context of criminal proceedings against a POW could lead to criminal liability. ICC Statute Article 8(2)(a)(vi), and Article 438 of the CCU, prohibit the war crime of wilfully depriving a POW or other protected person of the rights of fair and regular trial in an international armed conflict.²⁵²

²⁴⁸ [Geneva Convention III](#), Article 103(2).

²⁴⁹ [ICRC Commentary of 2020 to Geneva Convention III](#), Article 105, para. 4161.

²⁵⁰ [Geneva Convention III](#), Article 106.

²⁵¹ [ICRC Commentary of 2020 to Geneva Convention III](#), Article 106, para. 4157.

²⁵² [ICC Statute](#), Article 8(2)(a)(vi). The ICC Statute also criminalises, in non-international armed conflicts, the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognised as indispensable under Article 8(2)(c)(iv). The war crime of denying a fair trial is also prohibited in the following international legal instruments: [ICTY Statute](#),

120. The elements are discussed at length in [Chapter 1, Part I, Section I.C.3.b.vii](#) “Wilfully Depriving a Prisoner of War or Other Protected Person of the Rights of Fair and Regular Trial (ICTY Statute, Article 2(f); ICC Statute, Article 8(2)(a)(vi))”. Judges should be aware that POWs fall under the definition of ‘protected persons’ under the Geneva Conventions.²⁵³ Denial of any of these rights and obligations towards POWs in the context of an international armed conflict could lead to criminal responsibility.

ECCC, CASE 002/02 JUDGEMENT

2629. The Closing Order charges the Accused with wilfully depriving a prisoner of war or a civilian the rights of fair and regular trial as a grave breach of the Geneva Conventions at S-21 as a result of the alleged wilful deprivation of the rights of a fair and regular trial to Vietnamese prisoners of war and civilians. S-21 cadres deprived the protected persons of the right to be judged by an independent and impartial court, the right to be informed of their charged offence, the rights and means of a defence, protection against collective punishment, the presumption of innocence, the right of appeal, and protection from a sentence without judgement pronounced by a competent court.

2630. The Chamber has found that the Vietnamese prisoners who entered S-21 were not provided any opportunity to defend themselves following their arrest, were deprived of any semblance of a fair trial and were forced to confess that they were spies before being killed. All Vietnamese soldiers and civilian who entered S-21 were labelled as spies and considered enemies. The fate of these prisoners was a foregone conclusion as they were all ultimately subject to execution. The Chamber recalls that prisoners were given no access to lawyers or judges throughout their detention as S-21 and were eventually executed without a trial. As found above, all Vietnamese who entered S-21 were killed in a deliberate and systematic manner following their interrogation. The Chamber is therefore satisfied that both the *actus reus* and the *mens rea* of this offence are established. Accordingly, the Chamber finds that wilfully depriving a prisoner of war or a civilian the rights of fair and regular trial as a grave breach of the Geneva Conventions is established at S-21 Security Centre.

Article 2(f); [SCSL Statute](#), Article 3(g); [ECCC Law](#), Article 6.

²⁵³ ICRC, [Protected Persons](#); [Geneva Convention I](#), Articles 13, 14, 24-29; [Geneva Convention II](#), Articles 12, 13, 36, 37; [Geneva Convention III](#), Articles 4, 33; [Geneva Convention IV](#), Article 4.

CHAPTER I – SUBSTANTIAL INTERNATIONAL CRIMINAL LAW

PART I: INTERNATIONAL CRIMES UNDER UKRAINIAN LAW

I. War Crimes

SUMMARY – SCOPE AND INTERPRETATION OF ARTICLE 438 OF THE CCU

- Article 438 of the CCU sets out and governs the applicability and adjudication of war crimes in Ukraine. It criminalises violations of international humanitarian law under Ukrainian Law. Article 438 of the CCU contains both specifically enumerated offences and two general references:
 - Article 438 explicitly lists the specific offences of: “Cruel treatment of prisoners of war or civilians”, “Deportation of civilian population for forced labor”, “Pillage of national treasures on occupied territories” and “Murder”; and
 - Article 438 also contains two general references to the “Use of methods of the warfare prohibited by international instruments” and “Other violations of the laws or customs of war recognised by international treaties the binding nature of which has been approved by the Verkhovna Rada (Parliament) of Ukraine”.
- The formulation of Article 438 of the CCU is not explicit about its scope and content. In particular, the general references of “Use of methods of the warfare prohibited by international instruments” and “Other violations of the laws or customs of war recognised by international treaties the binding nature of which has been approved by the Verkhovna Rada (Parliament) of Ukraine” do not explicitly set out the specific conduct prohibited and the respective legal elements.
- This section of the Benchbook assists in interpreting the scope and content of Article 438 of the CCU taking into account the nature and content of IHL provisions. This section suggests:
 - **Scope – Article 438 only criminalises serious violations of IHL amounting to war crimes and not all violations of IHL.** Limiting the scope of Article 438 to war crimes: (1) aligns with the nature of IHL provisions as only the most serious violations of IHL attracts criminal responsibility, namely war crimes. On the contrary, most other IHL provisions are technical in nature and their violation does not attract criminal responsibility; and (2) ensures accessibility and foreseeability of the law consistently with Article 7 of the ECHR and the relevant practice of the ECtHR, both directly applicable in the Ukrainian domestic legal system (paras [154-165](#)).
 - **Content – Article 438 criminalise existing war crimes as already identified and defined by the frameworks of ICTY and ICC in particular by articles 2 and 3 of the ICTY Statute and Article 8 of the ICC Statute** (paras [139-151](#), [167](#)). The relevant IHL instruments mentioned in article 438 do not identify the elements (actus reus and mens rea) of war crimes. The classification of war crimes and the identification of their legal elements has been elaborated by the framework and practice of international criminal tribunals, including the ICC and ICTY. The ICTY played a major role in identifying and defining existing war crimes and is considered reflective of customary international law. While not entirely reflective of customary law, article 8 of the ICC Statute is the first international instrument to provide an exhaustive and consolidated list of war crimes. It is complemented by the ICC Elements of Crimes that outlines the definition of each war crimes. The ICTY and ICC legal framework and practice can assist judges in identifying conduct that amounts to war crimes and their legal elements.

- Taking into account that Ukraine follows a monist approach by which international treaties accepted or ratified by Ukraine are incorporated into domestic legal system, without having to be transposed by specific national laws, four main arguments can support the conclusion that the statutes and case law of the ICTY and ICC can be considered as a source for the interpretation of Article 438, namely:
 - b) The ICTY and ICC frameworks may be considered as sources of interpretation of Article 438 as far as they simply developed and clarified existing war crimes that are already incorporated within the general references to IHL provisions and treaties in article 438. (paras [173-194](#))
 - c) The application of Article 438 consistent with the practice of ICTY/ICC is instrumental to ensure that the criminal proceedings on war crimes comply with the ECHR which is directly applicable in the Ukrainian domestic legal system. (paras [175-177](#))
 - d) The international instruments referred to by Article 438 of the CCU may also include the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity and the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes. These conventions, both ratified by Ukraine, contain a classification of war crimes that mirrors the ICTY Statute. (para. [178](#))
 - e) The ICC Statute and Elements of Crimes may be considered directly relevant to the application of Article 438 of the CCU by virtue of Ukraine's acceptance of the ICC's jurisdiction under Article 12(3) of the ICC Statute. (paras [179-182](#))
- **Personal scope of article 438 – under Article 438 of the CCU, any person, regardless of their function (civilian or member of the armed forces) or nationality, may be liable.** However, for members of the Ukrainian Armed Forces, some specific offenses are also listed in Chapter XIX of the CCU and supplemented by the Order of the Ministry of Defence № 164 of 23 March 2017. With respect to offenses committed by the Ukrainian Armed Forces, judges may have to assess the potential interplay between Article 438 and Chapter XIX of the CCU supplemented by the Order of the Ministry of Defence № 164 of 23 March 2017 and IHL. The Benchbook present some elements of analysis to assist judges in adjudicating this interplay (paras [124-126](#)).

A. Relevant domestic legislation under Ukrainian law: Article 438

121. Article 438 of Chapter XX of the Criminal Code of Ukraine (CCU) criminalises violations of the rules of warfare. Article 438 is the only article of general application in the CCU governing crimes arising from violations of international humanitarian law (IHL).

ARTICLE 438 OF THE CCU “VIOLATION OF THE RULES AND CUSTOMS OF WAR”

1. Cruel treatment of prisoners of war or civilians, deportation of civilian population for forced labor, pillage of national treasures on occupied territories, use of methods of the warfare prohibited by international instruments, or any other violations of rules of the warfare recognized by international instruments consented to by binding by the Verkhovna Rada (Parliament) of Ukraine, and also giving an order to commit any such actions,
 - shall be punishable by imprisonment for a term of eight to twelve years.
2. The same acts accompanied with a murder,
 - shall be punishable by imprisonment for a term of ten to fifteen years, or life imprisonment.

122. Article 438 criminalises violations of IHL under Ukrainian Law. While not explicitly referring to “war crimes”, the title (“violation of rules of the warfare”) and the language of article 438, which refers to concepts deriving from IHL,²⁵⁴ is indicative of the intention to criminalise war crimes as serious violations of IHL. This consideration is further supported by the fact that the disposition is part of Chapter XX of the CCU entitled “Criminal Offenses against Peace, Security of Mankind and International Legal Order”.
123. In terms of the offenses covered, Article 438 seems to be a catchall clause covering the various war crimes identified in international criminal law and in particular by the framework and practice of international criminal courts and tribunals, including the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Statute of the International Criminal Court (ICC).
124. On its face it appears that any person, regardless of their function (civilian or member of the armed forces) or nationality, may be liable for the offences listed therein. This is fully compatible with the framework of war crimes under international practice, which reiterated that members of the armed forces and civilians alike can commit war crimes in the context of international and non-international armed conflicts.²⁵⁵
125. In parallel, some offences listed in Chapter XIX of the CCU, dealing with military offences applicable, *inter alia*, to members of the Ukrainian Armed Forces (Article 401),²⁵⁶ seem to partly overlap with the scope of Article 438, as they share similar legal elements with war crimes under international criminal law, namely: (1) Vio-

²⁵⁴ For instance, Article 438 criminalises offenses against “prisoners of war” or committed “on occupied territories”, or violations of “methods of the warfare” or “rules of the warfare” in general.

²⁵⁵ See [ICRC Geneva Convention I Commentary](#), para. 2929 (in relation to international armed conflicts). See ICTR, *Akayesu Appeal Judgement*, para. 444 (in relation to non-international armed conflicts).

²⁵⁶ Article 401(1) (“Military offenses are the offenses created by this Chapter and committed by military servants, and also registrants during their training (or checkup) or special sessions, in violation of the established procedure of military service”), (2) (“Appropriate articles of this Chapter establish the liability of members of the Armed Forces of Ukraine, the Security Service of Ukraine, the Border Troops of Ukraine, Internal Troops of the Ministry of Internal Affairs of Ukraine, and other military formations established in compliance with the laws of Ukraine, and also other persons specified in the law.”).

lence against population in an operational zone (Article 433);²⁵⁷ (2) Ill-treatment of prisoners of war (Article 434);²⁵⁸ (3) Unlawful use or misuse of the Red Cross and Red Crescent symbols (Article 435);²⁵⁹ and (4) Marauding (Article 432).²⁶⁰ To the extent that such offences overlap with similar acts and conduct criminalised under Article 438 it appears that the Chapter XIX provisions prevail when committed by personnel of Ukrainian Armed Forces (*lex specialis*).

126. In addition, Chapter XIX of the CCU has been supplemented by the Order of the Ministry of Defence № 164 of 23 March 2017,²⁶¹ which specified that under Chapter XIX of the CCU “servicemen (citizens)” of the Ukrainian armed forces shall incur criminal liability for serious IHL violations against people,²⁶² against property,²⁶³ or committed through treacherous use of internationally recognised identification emblems (signs) and signals.²⁶⁴ It is not immediately clear whether the Order of Ministry of Defence

²⁵⁷ Article 433 punishes, *inter alia*, the violence, unlawful destruction or taking of property under the pretext of military necessity committed in respect of population in an operational zone. This offence seems to share, at least in part, similar elements with the following war crimes: (1) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (2) Plunder or pillaging of private property; (3) Wanton destruction of cities, towns or villages, or devastation not justified by military necessity. See below, paras [581-640](#).

²⁵⁸ Article 434 criminalises the repeated ill-treatment of prisoners of war, or any such treatment combined with exceptional cruelty or committed in respect of sick or wounded persons, and also negligent performance of duty in respect of sick or wounded persons by persons required to provide medical treatment and care to them. This offence seems to share, at least in part, similar elements with the war crimes of Torture or Inhumane Treatment. See below, paras [227-310](#).

²⁵⁹ Article 435 criminalises the carrying the Red Cross and Red Crescent symbols in an operational zone by persons not entitled to do so, and also the misuse of flags or signs of the Red Cross and Red Crescent or the colors attributed to medical vehicles in state of martial law. In part this offence overlaps with the following war crimes: Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury. However, the corresponding war crime requires the death of the victim or serious personal injury. See below, paras [770-791](#).

²⁶⁰ Article 432 punishes stealing things of the killed or wounded persons at a battlefield which share similar elements with pillage as a war crime. See below, paras [601-619](#).

²⁶¹ Ministry of Defence Ukraine, Order № 164 On approval of the Instruction on the procedure for implementing the norms of international humanitarian law in the Armed Forces of Ukraine, 23 March 2017 (“Order of the Ministry of Defence № 164 of 23 March 2017”), Chapter 8.

²⁶² According to the Order of Ministry of Defence № 164 of 23 March 2017, serious violations of IHL against people include: (1) premeditated murder, torture and inhuman treatment; (2) intentionally causing serious suffering or serious injury or harm to human health; (3) attack on persons under the protection of IHL; (4) carrying out an indiscriminate attack when it is known that it will cause casualties among the civilian population and cause damage to civilian objects; (5) attack on dangerous installations and structures, if it is known that this will cause excessive losses among the civilian population or significant damage to civilian objects; (6) attack on unprotected areas and demilitarised zones; (7) unlawful attack on cultural values that are clearly recognisable; (8) conducting medical, biological or scientific experiments on humans; (9) inhuman treatment accompanied by humiliation of human dignity, including the use of apartheid, genocide and other acts based on racial discrimination; (10) taking hostages; (11) committing acts of terror; (12) illegal imprisonment (arrest); (13) an order not to leave anyone alive; (14) deportation or illegal movement of the population of the occupied territory (both within this territory and outside it); (15) relocation by the occupying state of part of its own civilian population to the occupied territory; (16) deprivation of the right to an impartial and proper trial; (17) unjustified delay in the repatriation of prisoners of war or civilians; (18) coercion to serve in the enemy's armed forces; (19) restricting the population's access to food and water; (20) use of prohibited weapons; (21) use of living shields; and (22) recruitment into the armed forces or the use of children under the age of fifteen in hostilities, etc. See *ibidem*, Chapter 8, para. 6, pp 43-44. para. 5, pp 42-43.

²⁶³ According to the Order of Ministry of Defence № 164 of 23 March 2017, serious violations of IHL against property include: (1) large-scale destruction of property; (2) appropriation of property in large amounts; (3) destruction or looting of enemy property; (4) return on looting of the settlement or district; and (5) seizure of vessels intended for coastal fishing or the needs of local navigation, hospital vessels and vessels performing scientific and religious functions. See *ibidem*, Chapter 8, para. 6, pp 43-44.

²⁶⁴ Order of Ministry of Defence № 164 of 23 March 2017, Chapter 8, paras 4, 7, pp 42, 44.

№ 164 of 23 March 2017 clarifies or expands the offences articulated under Chapter XIX of the CCU with respect to the Ukrainian Armed Forces.²⁶⁵

127. In assessing the potential interplay between Article 438 and Chapter XIX as supplemented by the Order of the Ministry of Defence № 164 of 23 March 2017, it is important to note that under Article 85 of Geneva Convention III, prisoners of war who committed crimes before their capture are to be prosecuted according “to the laws, regulations and orders in force in the armed forces of the Detaining Power”. IHL, thus, introduces an equality paradigm for criminal proceedings between prisoners of wars and members of the Ukrainian armed forces.
128. Bearing in mind these considerations, the analysis in the following sections will focus on Article 438 and its interpretation under relevant international law applicable to war crimes. While addressing the possible relationship and coordination, between Article 438 and other war or military-related offences under Ukrainian Law goes beyond the scope of the analysis, the general principles in the following analysis are applicable, *mutatis mutandis*, for the interpretation of other domestic offences concerning war crimes.

B. Relevance of international law principles to adjudicate war crimes in Ukraine under Article 438 of the CCU

129. This section addresses the scope of Article 438 of the CCU, including the applicability and relevance of international instruments codifying war crimes. These instruments include the Statute of the ICTY and the Statute of the ICC.
130. The reference to the “use of methods of the warfare prohibited by international instruments” and “any other violations of rules of the warfare recognized by international instruments consented to by binding by the Verkhovna Rada (Parliament) of Ukraine” in article 438(1) of the CCU does not explicitly state the specific conduct prohibited under this provision. International instruments and authorities that classify war crimes, such as the ICTY/ICC legal framework, can assist judges to assess the scope of Article 438 and to select the specific acts that can attract criminal responsibility.
131. The following section will: (1) provide an overview of the status of war crimes under international law and the nature of the relevant international instruments; and (2) assess their relevance in interpreting Article 438.

1. Notion and structure of war crimes under international law

132. “War crimes” refer to the criminalisation of specific prohibited conduct under IHL, such as murder, torture, inhumane treatment (underlying acts), when that conduct occurs in the context of an armed conflict, international or non-international in char-

²⁶⁵ For instance, the Order of Ministry of Defence № 164 of 23 March 2017 does not specify a sentencing range for the mentioned listed IHL violations. In addition, under Article 92 (22) of the Constitution of Ukraine “acts that are crimes” can be established exclusively by the laws of Ukraine, adopted by the Verkhovna Rada. Further, under Article 3 (3) of the CCU criminal acts are exclusively regulated by the Code (“[t]he criminality of any act and also its punishability and other criminal consequences shall be determined exclusively by this Code”).

acter (contextual element). The existence of an armed conflict and the link between the conflict and the conduct are referred to as the contextual elements of a war crime. The contextual elements are what differentiates war crimes from corresponding ordinary or domestic crimes.²⁶⁶

133. Not all IHL violations amount to a war crime. Rather, to amount to war crimes the specific violation: (1) needs to be serious; and (2) should be criminalised by an international treaty or under customary international law.²⁶⁷

a) Relationship between international humanitarian law and war crimes

134. As noted above, war crimes cover **only** the most serious violations of IHL which attract criminal responsibility.²⁶⁸ Many of these violations are identified in several international instruments commonly organised under two bodies of law, namely the Law of Geneva and the Law of The Hague.²⁶⁹

- **The Law of Geneva.** This body of law includes the four Geneva Conventions of 1949 which regulate the protection of: (1) wounded and sick in armed forces during wartime ([Geneva Convention I](#)); (2) wounded, sick and shipwrecked members of the armed forces at sea ([Geneva Convention II](#)); (3) prisoners of war ([Geneva Convention III](#)); civilian persons in time of war ([Geneva Convention IV](#)). The Geneva Conventions are applicable to international armed conflicts and to a limited extent also to non-international armed conflicts (Common Article 3 to the four Geneva Conventions). The Geneva Conventions are complemented by the Additional Protocols I-II of 1977 which cover the protection of victims of international armed conflicts ([Additional Protocol I](#)) and non-international armed conflicts ([Additional Protocol II](#)). Ukraine has ratified all of these instruments.²⁷⁰
- **The Law of The Hague.** This body of law is principally aimed at regulating the conduct of hostilities by imposing limitations on the means and methods of warfare available to the parties to the conflict and include:
 - The [Hague Regulations of 1899 and 1907](#);
 - The [Convention for the Protection of Cultural Property in the Event of an Armed Conflict](#) (1954);
 - The [Convention on the Prohibition of Biological Weapons](#) (1972);
 - The [Convention prohibiting Certain Conventional Weapons](#) (1980);
 - The [Convention prohibiting Chemical Weapons](#) (1993);

²⁶⁶ ICTY, *Kunarac et al. Appeal Judgement*, para. 58; ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, para. 383.

²⁶⁷ Werle and Jessberger, *Principles of International Criminal Law*, Oxford University Press Fourth, 2020, p. 441. See also ICTY, *Tadic Decision on Interlocutory Appeal on Jurisdiction*, para. 94.

²⁶⁸ ICTY, *Tadic Decision on Interlocutory Appeal on Jurisdiction*, para. 94.

²⁶⁹ While the terminology remains, the dichotomy between the Law of Geneva and the Law of The Hague has largely become irrelevant with the adoption of the Additional Protocols I-II of 1977 to the 1949 Geneva Conventions. Amanda Alexander, *A Short History of International Humanitarian Law*, European Journal of International Humanitarian Law, 2015, pp 117-118; ICRC, [How Does Law Protect in War, Law of the Hague](#).

²⁷⁰ Ukraine ratified the Geneva Convention on 3 August 1954 and Additional Protocol I and II on 25 January 1990. See ICRC, *Treaties, States Parties and Commentaries*, [Ukraine](#).

- The [Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction](#) (1997).

135. Ukraine has ratified these instruments.²⁷¹

136. Many provisions of the Law of Geneva and the Law of The Hague are technical in nature and their violation does not amount to a war crime.²⁷² Rather, war crimes arise from violations of IHL that are sufficiently serious to warrant criminalisation.

EXAMPLE

Under Article 62 of Geneva Convention III, prisoners of war should be paid a fair rate in relation to their work provided to the Detained Power. The failure to correspond a “fair” working rate does not amount to war crimes as it does not meet the required element of gravity and/or is not criminalised.²⁷³ Similarly, the failure to mark cultural property with blue shield signs to ensure its protection as required by Articles 10 and 16 of the 1954 Convention for the Protection of Cultural Property in the Event of an Armed Conflict cannot qualify as war crime.

137. Moreover, the Laws of Geneva and the Hague do not identify the elements (*actus reus* and *mens rea*) of a crime stemming from such violations of IHL instruments. IHL primarily concerns the international liability of states, rather than individual criminal responsibility. Indeed, IHL provisions are framed in the context of state responsibility.²⁷⁴ The transposition of such norms into the structure of an (international) crime is not always straightforward.

²⁷¹ Ukraine ratified all the the Hague Regulations of 1899 and 1907 on 29 May 2015; the Convention for the Protection of Cultural Property in the Event of an Armed Conflict on 6 February 1957; The Convention on the Prohibition of Biological Weapons on 26 March 1975; the Convention prohibiting Certain Conventional Weapons on 23 June 1982; the Convention prohibiting Chemical Weapons on 16 October 1998; and the The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction on 27 December 2005.

²⁷² Robert Cryer, Darryl Robinson, Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 2nd Edition, Cambridge University Press, 2010, p. 272.

²⁷³ ICTY, *Tadic Decision on Interlocutory Appeal on Jurisdiction*, para. 94. See also Robert Cryer, Darryl Robinson, Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 2nd Edition, Cambridge University Press, 2010, p. 272.

²⁷⁴ Robert Cryer, Darryl Robinson, Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 2nd Edition, Cambridge University Press, 2010, p. 273.

EXAMPLE

The war crime of wilful killing (of a civilian) is predicated on [Article 32 of the Geneva Convention IV](#) which establishes that “the High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents.” This provision differs from a criminal norm. It does not provide any description of the conduct of the crime of unlawful killing, nor its legal elements. No additional specification is provided by [Articles 146 and 147](#) of the Geneva Convention IV that merely states that willful killing should be criminalised by the High Contracting Parties. Thus, the elements of the war crime of wilful killing have been developed through the jurisprudence of international criminal tribunals.

138. The statutes and practice of international criminal tribunals, and other specific international instruments, have identified which violations of IHL amount to war crimes and the legal elements of those crimes

b) Identification and classification of war crimes in international law

139. The classification of war crimes and their legal elements has been elaborated over time through a number of international instruments and institutions. In particular, international criminal tribunals played a major role in the development of the law of war crimes through their statutes and their jurisprudence. Their practice gradually developed a legal framework aimed at identifying those specific IHL violations that qualify as war crimes and elaborates their elements.

140. 1945: Charter of the Nuremberg international Military Tribunal. The Charter of the Nuremberg Tribunal is one of the initial attempts at the classification of war crimes. Incorporating customary law,²⁷⁵ Article 6(b) of the Charter defines war crimes as “violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity”. The list provided in Article 6(b) is not exhaustive and leaves the specific identification of war crimes to the judge based on customary law.

²⁷⁵ See for instance IMT Nuremberg, *Göring et al.*, [Judgement delivered on 30 September and 1 October 1946](#), pp 53-54, 79-80.

EXAMPLE

The Nuremberg Tribunal concluded that while not explicitly criminalised in a treaty, certain violations of the 1907 Hague Convention attracted criminal liability under international customary law.²⁷⁶

141. 1950: Nuremberg Principles. Following the experience of the Nuremberg Tribunal, the definition of war crimes pursuant to Article 6(b) of the Charter was included in the so-called Nuremberg Principles (Principle VI(b)) drafted by the International Law Commission at the request of the UN General Assembly.²⁷⁷ The Nuremberg Principles are considered reflective of customary international law.²⁷⁸
142. 1968: UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. Article I(a) of the Convention incorporates the definition of war crimes set forth in the Nuremberg Charter as well as the “grave breaches” listed in the Geneva Conventions.²⁷⁹ The reference to the “grave breaches” of the Geneva Conventions of 1949 reflects the progress in the codification of humanitarian law which for the first time expressly provided for the criminalisation of certain IHL violations. The Convention on the Non-Applicability of Statutory Limitations is one of the first treaties incorporating a definition of war crimes. Ukraine has ratified this convention.²⁸⁰
143. 1974: (CoE) European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes.²⁸¹ This instrument provides a more sophisticated definition of war crimes with respect to the 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. While Article 1(2)(a) recalls the “grave breaches” listed in the Geneva Conventions of 1949, Article 1(2)(b) includes also “any comparable violations of the laws of war having effect at the time when this Convention enters into force and of customs of war existing at that time, which are not already provided for in the above-mentioned provisions of the Geneva Conventions.”²⁸² To a certain extent such definition of war crimes mirrors the definition incorporated in the ICTY Statute under Articles 2 and

²⁷⁶ IMT Nuremberg, *Göring et al.*, [Judgement delivered on 30 September and 1 October 1946](#), pp 53-54, 67-68, 79-80.

²⁷⁷ [Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal](#), 1950, Principle VI (b), p. 2.

²⁷⁸ Antonio Cassese, [Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal](#), United Nations Audiovisual Library of International Law, 2009.

²⁷⁹ [Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity](#), Adopted by General Assembly resolution 2391 (XXIII) of 26 November 1968, Article I(a).

²⁸⁰ See United Nations Treaty Collection, [Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity](#).

²⁸¹ [European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes Strasbourg](#), 25.I.1974, European Treaty Series – No. 82 ([link](#)).

²⁸² [European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes Strasbourg](#), 25.I.1974, European Treaty Series – No. 82, Article 1(2)(a)-(b).

3 (see below). The convention entered into force on 27 March 2003.²⁸³ Ukraine has ratified this convention.²⁸⁴

144. 1993: The statute and practice of ICTY. The [ICTY Statute](#) is an annex of a Security Council Resolution pursuant to Chapter VII of the UN Charter and it is considered one of the most notable developments concerning the codification and classification of war crimes in modern international criminal law. The ICTY Statute frames war crimes in two sets of prohibited acts, namely: (2) grave breaches of the four Geneva Conventions of 1949 (Article 2);²⁸⁵ and (3) violations of law and customs of war (Article 3).²⁸⁶ The two provisions differ in terms of applicability, scope and structure.
145. Article 2 provides an exhaustive list of prohibited conduct explicitly criminalised by the Geneva Conventions (the so-called “grave breaches”). The reference to “grave breaches” limits the scope of the provision to international armed conflicts.
146. Article 3 refers to prohibited IHL conduct under customary international law and applies to international and non-international armed conflicts.²⁸⁷ In addition, Article 3 only provides an illustrative list of crimes, entrusting judges to identify other conduct of a similar criminal nature. For this purpose, in the *Tadic* case, the ICTY Appeals Chamber identified a four-prong test to identify additional war crimes not expressly mentioned in the list of Article 3 (“Tadic test”). According to this test, conduct not expressly prohibited under Article 3 would nonetheless amount to a war crime under the provision when: (1) it infringes a rule of IHL; (2) the infringed rule has a customary character; (3) the violation must be “serious”; and (4) the violation of the rule entails individual criminal responsibility, under customary or conventional

²⁸³ Council of Europe, [Details of Treaty No.082](#).

²⁸⁴ See Council of Europe, [Chart of signatures and ratifications of Treaty 082](#). However, on 19 April 2022, Ukraine presented a Declaration with respect to the Convention declaring that “The Permanent Representation of Ukraine to the Council of Europe presents its compliments to the Secretary General of the Council of Europe and has the honour to convey hereby, on behalf of the Government of Ukraine, the list of international treaties concerning international cooperation within the Council of Europe, signed/ratified by Ukraine, as well as to inform about the impossibility to guarantee the implementation by the Ukrainian Side in full of its obligations under the above mentioned international treaties of Ukraine for the period of the armed aggression of the Russian Federation against Ukraine and introduction of martial law on the territory of Ukraine, until full termination of the infringement of the sovereignty, territorial integrity and inviolability of borders of Ukraine”. See Council of Europe, [Reservations and Declarations for Treaty No.082](#).

²⁸⁵ [ICTY Statute](#), Article 2 (“The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (a) wilful killing; (b) torture or inhuman treatment, including biological experiments; (c) wilfully causing great suffering or serious injury to body or health; (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power; (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial; (g) unlawful deportation or transfer or unlawful confinement of a civilian; (h) taking civilians as hostages.”).

²⁸⁶ [ICTY Statute](#), Article 3 (“The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to: (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; (e) plunder of public or private property.”).

²⁸⁷ ICTY, *Tadic* [Decision on Interlocutory Appeal on Jurisdiction](#).

law.²⁸⁸ Through this test, judges of the ICTY identified a list of prohibited conduct which amount to war crimes including:

- hostage-taking;²⁸⁹
- unlawful labour;²⁹⁰
- outrages upon personal dignity;²⁹¹
- rape;²⁹²
- humiliating and degrading treatment;²⁹³
- unlawful attacks on civilian persons and objects;²⁹⁴
- murder, torture, and cruel treatment of prisoners of war;²⁹⁵
- terror.²⁹⁶

147. The ICTY practice also played a major role in clarifying the structure of war crimes. For each war crime considered, the ICTY Appeals Chamber or Trial Chamber elaborated and explained their objective and subjective elements. The authority of these decisions is also demonstrated by the fact that they have been relied upon by other international courts and tribunals including by the European Court of Human Rights²⁹⁷ and the International Court of Justice.²⁹⁸

148. **1998: ICC Statute.** While not entirely reflective of customary law, the ICC Statute is the first international instrument that provided an exhaustive and consolidated list of war crimes based on international treaties, the statutes and practice of international criminal tribunals and customary international law.²⁹⁹

149. Article 8 of the ICC Statute covers around 50 different war crimes divided in four different lists, namely: (1) grave breaches of the Geneva Conventions applicable to international armed conflicts (Article 8(2)(a)); (2) other serious violations of the laws and customs applicable to international armed conflicts (Article 8(2)(b)); (3) serious violations of Common Article 3 of the 1949 Geneva Conventions applicable to non-international armed conflicts (Article 8(2)(c)); and (4) other serious violations of the laws and customs applicable in non-international armed conflicts ((Article 8(2)(e)).

²⁸⁸ ICTY, *Tadic Decision on Interlocutory Appeal on Jurisdiction*, para. 94.

²⁸⁹ ICTY, *Blaskic Trial Judgement*, para. 187.

²⁹⁰ ICTY, *Naletilic and Martinovic Trial Judgement*, paras 250-261.

²⁹¹ ICTY, *Aleksovski Trial Judgement*, paras 55-56; ICTY, *Aleksovski Appeal Judgement*, paras 17-28.

²⁹² ICTY, *Kunarac et al. Kunarac et al. Trial Judgement*, paras 436-464..

²⁹³ ICTY, *Cesic Trial Sentencing Judgement*, para. 52.

²⁹⁴ ICTY, *Jokic Trial Judgement*, paras 44-45.

²⁹⁵ ICTY, *Mrksic et al. Appeal Judgement*, paras 70-73..

²⁹⁶ ICTY, *Galic Appeal Judgement*, paras 90, 98.

²⁹⁷ See for instance, ECtHR, *Kononov v. Latvia*, *Grand Chamber Judgement*, para. 211; ECtHR, *Milankovic v. Croatia*, *Judgement*, pp 52-62; ECtHR, *Simsic v. Bosnia and Herzegovina*, *Judgement*, paras 8-13, 23; ECtHR, *Vasiliauskas v. Lithuania*, *Grand Chamber Judgement*, paras 85-87.

²⁹⁸ See for instance, ICJ, *Bosnia v. Serbia*, Case concerning application of the Convention on the prevention and the punishment of the crime of genocide, *Judgement of 26 February 2007*, paras 188, 190, 195, 198-200, 344; ICJ *Croatia v. Serbia*, Application of the Convention on the prevention and punishment of the crime of Genocide, *Judgement of 3 February 2015*, paras 142, 146-147, 157-158.

²⁹⁹ Robert Cryer, Darryl Robinson, Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 2nd Edition, Cambridge University Press, 2010, p. 275.

150. There are a number of notable differences between Article 8 of the ICC Statute and Articles 2 and 3 of the ICTY Statute:
- First, Article 8 of the ICC Statute includes a clear separation between war crimes applicable to international armed conflicts and those applicable to non-international armed conflict. Article 3 of the ICTY Statute, instead, covered crimes that could apply to both categories of conflicts.
 - Second, the list of prohibited conduct pursuant to Article 8 of the ICC Statute is exhaustive as to the war crimes over which the ICC has jurisdiction. Whereas the open-ended list of Article 3 of the ICTY Statute allowed more flexibility in identifying conducts not explicitly listed that could qualify as war crimes, either based on treaty law or on customary law.
151. The ICC legal framework also outlines a detailed list of the specific conduct of war crimes through the “[ICC Elements of Crimes](#)”. The Elements of Crimes is an instrument adopted alongside the ICC Statute aimed at assisting the Court in the interpretation and application of the four international crimes (genocide, crimes against humanity, war crimes, and crime of aggression). For each crime, the Elements of Crimes outlines and details the specific objective and subjective elements (*actus reus* and *mens rea*) of the prohibited conduct.

2. Relationship between Article 438 of the CCU and international instruments on war crimes

ARTICLE 438 OF THE CCU “VIOLATION OF RULES OF THE WARFARE”

1. Cruel treatment of prisoners of war or civilians, deportation of civilian population for forced labor, pillage of national treasures on occupied territories, use of methods of the warfare prohibited by international instruments, or any other violations of rules of the warfare recognized by international instruments consented to by binding by the Verkhovna Rada (Parliament) of Ukraine, and also giving an order to commit any such actions,
 - shall be punishable by imprisonment for a term of eight to twelve years.
2. The same acts accompanied with a murder,
 - shall be punishable by imprisonment for a term of ten to fifteen years, or life imprisonment.

152. Article 438 of the CCU covers a broad range of conduct. Article 438 criminalises specific acts (Article 438(1): cruel treatment of prisoners of war or civilians, deportation of civilian population for forced labor, pillage of national treasures on occupied territories; Article 438(2): murder), but also an entire range of other conduct broadly classified as:
- use of methods of the warfare prohibited by international law;
 - any other violations of the rules of the warfare recognised by international instruments consented to be binding by the Verkhovna Rada (Parliament) of Ukraine.

153. In considering the scope of Article 438 of the CCU for the purposes of the Benchbook, two general questions were considered:
- Scope of Article 438. Whether the reference to the “rules of the warfare recognised by international instruments consented to be binding by the Verkhovna Rada” means that Article 438 criminalises all violations of IHL applicable to Ukraine or is confined only to war crimes.
 - Relevance of international criminal law instruments. Whether international legal principles regarding war crimes, including the legal frameworks and practices of international criminal tribunals defining and adjudicating war crimes, most particularly but not limited to the ICTY and ICC, are relevant for interpreting Article 438.
- a) Article 438 may be interpreted as criminalising only conduct that amounts to war crimes under international law
154. A contextual and teleological interpretation of Article 438 suggests that despite its breadth, it is safer to interpret it as criminalising only serious violations of IHL recognised internationally as war crimes, and not all violations of IHL applicable in Ukraine.
155. Although the plain language of Article 438 may, in theory, sustain a broad reading whereby any violation of IHL applicable in Ukraine is criminalised, this does not appear to be the most sound reading of the provision for a number of reasons. Such an interpretation would be at odds with international law regarding war crimes, which do not arise from all violations of IHL. Rather, many IHL rules reflect mere technical requirements addressed to States which, in terms of nature and gravity, do not seem suitable to trigger individual criminal responsibility, as war crimes do.³⁰⁰
156. For example, Geneva Convention III requires that prisoners of war should be provided with tobacco³⁰¹ or should enjoy the exercise of their religious duties.³⁰² Likewise, the 1907 Hague Convention provides that “capitulations agreed on between the Contracting Parties must be in accordance with the rules of military honour.”³⁰³ Clearly, by nature and seriousness, the violation of these provisions is not comparable to those violations of IHL rules giving rise to war crimes (e.g. torture/ill-treatment of prisoners of war and civilians, deportation of civilian population or plunder of public and private property).
157. Interpreting Article 438 to criminalise all violations of IHL, would put the specific crimes listed in Article 438(1), namely torture/ill-treatment, deportation, and pillage

³⁰⁰ However Article 50, [Geneva Convention I](#), Article 51, [Geneva Convention II](#), Article 130, [Geneva Convention III](#), Article 147, [Geneva Convention IV](#) also requires states to take measures necessary for the suppression of all acts contrary to the other provisions of the conventions other than the “grave breaches”.

³⁰¹ [Geneva Convention III](#), Article 28 (“Canteens shall be installed in all camps, where prisoners of war may procure foodstuffs, soap and tobacco and ordinary articles in daily use.”).

³⁰² [Geneva Convention III](#), Article 34 (“Prisoners of war shall enjoy complete latitude in the exercise of their religious duties”).

³⁰³ [The 1907 Hague Convention with Respect to the Laws and Customs of War on Land](#) and its annex: Regulations concerning the Laws and Customs of War on Land.

of national treasures and other serious violations on the same level, and under the same penalty (8-12 years of imprisonment), as negligible violations that are less grave in nature, such as denying an officer their tobacco.

158. Such reading is also consistent with the Order of Ministry of Defence № 164 of 23 March 2017, which governs the responsibility of, *inter alia*, members of the Ukrainian Armed Forces for violations of “IHL norms”.³⁰⁴ The order specifies that criminal liability is confined to a list of “serious violations of IHL” which, in broad terms, corresponds to war crimes under international law.³⁰⁵ Other IHL violations amount instead to disciplinary violations.³⁰⁶
159. Moreover, in addition to its interpretative value, the Order of Minister of Defence № 164 of 23 March 2017 triggers direct obligations stemming from Articles 82 and 85 of Geneva Convention III concerning the prosecution of prisoners of war. According to these provisions prisoners of war can be prosecuted for crimes committed before their capture (Article 85), but in accordance “to the laws, regulations and orders in force in the armed forces of the Detaining Power” (Article 82). Geneva Convention III, thus, introduces an equality paradigm with respect to criminal proceedings between prisoners of wars and members of the Ukrainian armed forces. It follows that if, for members of Ukrainian armed forces, the scope of Article 438 is limited to serious violations of IHL, the same must apply to prisoners of war.
160. Lastly, confining the applicability of Article 438 to war crimes appears also in line with Article 7 of the European Convention on Human Rights (ECHR) and the relevant practice of the European Court of Human Rights (ECtHR), both directly applicable in the Ukrainian domestic legal system by virtue of Article 9 of the Constitution and Article 17 of the Law on the execution of judgements and the application of the case-law of the European Court of Human Rights.

³⁰⁴ The Order of Ministry of Defence № 164 of 23 March 2017, Chapter 8.

³⁰⁵ See The Order of Ministry of Defence № 164 of 23 March 2017, Chapter 8, Section 5 (referring to (1) premeditated murder; (2) torture and inhuman treatment; (3) intentionally causing serious suffering or serious injury or harm to human health; (4) attack on persons under the protection of IHL; (5) carrying out an indiscriminate attack when it is known that it will cause casualties among the civilian population and cause damage to civilian objects; (6) attack on dangerous installations and structures, if it is known that this will cause excessive losses among the civilian population or significant damage to civilian objects; (7) attack on unprotected areas and demilitarized zones; (8) unlawful attack on cultural values that are clearly recognisable; (9) conducting medical, biological or scientific experiments on humans; (10) inhuman treatment accompanied by humiliation of human dignity, including the use of apartheid, genocide and other acts based on racial discrimination; (11) taking hostages; committing acts of terror; (12) illegal imprisonment (arrest); (13) an order not to leave anyone alive; (14) deportation or illegal movement of the population of the occupied territory (both within this territory and outside it); (15) relocation by the occupying state of part of its own civilian population to the occupied territory; (16) deprivation of the right to an impartial and proper trial; (17) unjustified delay in the repatriation of prisoners of war or civilians; (18) coercion to serve in the enemy's armed forces; (19) restricting the population's access to food and water; (20) use of prohibited weapons; (21) use of human shields; (22) recruitment into the armed forces or the use of children under the age of fifteen in hostilities), Section 6 (referring to: (1) large-scale destruction of property; (2) appropriation of property in large amounts; (3) destruction or looting of enemy property; (4) return on looting of the settlement or district; (5) seizure of vessels intended for coastal fishing or the needs of local navigation, hospital vessels and vessels performing scientific and religious functions); Section 7 (referring to treacherous use of identification emblems (signs, signals), which denote persons and objects that enjoy the protection of IHL, is considered a serious violation.)

³⁰⁶ The Order of Ministry of Defence № 164 of 23 March 2017, Chapter 8, Section 8.

161. Consistent with the principle of legality, Article 7 of the ECHR (*nullum crimen sine lege*) requires that a criminal law is accessible and foreseeable to an individual.³⁰⁷ Such requirements are satisfied where an individual is able to know “from the wording of the relevant provision – and, if need be, with the assistance of the courts’ interpretation of it and with informed legal advice – what acts and omissions will make him criminally liable.”³⁰⁸
162. According to the ECtHR, when the criminal provision refers to other legal sources (so called “blanket legislation” or “legislation by reference”), as in the case of Article 438, the requirements of accessibility and foreseeability of the provision are met when “both norms (the referencing and the referenced provision) taken together [...] enable the persons concerned to foresee, if need be with the help of appropriate legal advice, what conduct may make them criminally liable.”³⁰⁹ Indeed, the ECtHR found that domestic criminal provisions which include broad references to “international law” could be used as a basis to enter convictions for international crimes, including war crimes.³¹⁰ This was permissible in light of the “flagrantly unlawful nature” of international crimes under the relevant international law incorporated by the domestic provisions.³¹¹ Importantly, to assess the degree of accessibility and foreseeability of international crimes, the ECtHR relied on the statutes and the practice of the ICTY and the ICC,³¹² which was considered to reflect general principles of international law.
163. In light of this jurisprudence, interpreting Article 438 as limited to violations of IHL already identified as war crimes or as serious violations appears to be most consistent with the need for accessibility and foreseeability of the provision. This is because it is foreseeable that Ukraine’s criminalisation of violations of IHL would include those serious violations that have already been recognised as war crimes or that are sufficiently serious to be recognised as war crimes. Conversely, it may not be foreseeable that Article 438 was intended to criminalise even those technical violations that have not been deemed sufficiently serious to attract international criminal responsibility. A too-broad reading thereby risks a legality issue.
164. Two main points emerge from the ECtHR jurisprudence analysed above. First, domestic criminal provisions that broadly refer to international law or international instruments comply with Article 7 of the ECHR to the extent they are used as a basis to enter convictions for international crimes due to their “flagrantly unlawful nature”. Second, in most of these cases, the assessment of the foreseeability and accessibility

³⁰⁷ ECtHR, *Kononov v. Latvia*, [Grand Chamber Judgement](#), para. 185.

³⁰⁸ ECtHR, *Kononov v. Latvia*, [Grand Chamber Judgement](#), para. 185.

³⁰⁹ ECtHR, [Advisory Opinion](#), concerning the use of the “blanket reference” or “legislation by reference” technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law, para. 72. With respect to the Applicability of Article 7 of the ECHR concerning domestic convictions for the crime of genocide see also ECtHR, *Jorgic v. Germany*, [Judgement](#), paras 100-101.

³¹⁰ ECtHR, *Milankovic v. Croatia*, [Judgement](#), para. 64; ECtHR, *Kononov v. Latvia*, [Grand Chamber Judgement](#), para. 185.

³¹¹ ECtHR, *Milankovic v. Croatia*, [Judgement](#), para. 64; ECtHR, *Kononov v. Latvia*, [Grand Chamber Judgement](#), para. 185. Cf. ECtHR, *Jorgic v. Germany*, [Judgement](#), para. 113; ECtHR, *Ould Dah v. France*, [Decision](#).

³¹² ECtHR, *Milankovic v. Croatia*, [Judgement](#), para. 63; ECtHR, *Kononov v. Latvia*, [Grand Chamber Judgement](#), paras 211, 216. But see ECtHR, *Jorgic v. Germany*, [Judgement](#), paras 107-113 (in this case the ECtHR relied on international sources of interpretation and not ICTY jurisprudence for the definition of the crime of genocide, including the Genocide Convention and Resolutions of the United Nations General Assembly).

of the domestic law incorporating international sources has been conducted through an analysis of the statutes of international criminal tribunals and their practice as illustrative of the legal elements of international crimes under the international law applicable.

165. Considering Article 438 of the CCU, according to these principles suggests that:
- Limiting the scope of Article 438 to serious violations of IHL that may be recognised as war crimes, and not all violations of IHL, is most consistent and perhaps even necessary to comply with Article 7 and the relevant ECtHR practice;
 - Consistent with ECtHR jurisprudence, guidance for the proper identification of the elements of war crimes can be sought in the relevant statutes and practice of international criminal tribunals as reflective of principles of international law stemming from the international sources incorporated in Article 438.
- b) **Applicability of international criminal law instruments: whether Article 438 of the CCU can be read in conjunction with the ICTY and ICC Statutes and practice**
166. Even narrowing the scope of Article 438 to war crimes may not assist the judges in their interpretation of the provision. As noted above, IHL instruments incorporated in Article 438 do not provide a clear classification of war crimes and of their constitutive elements.
167. The interpretation of IHL instruments by international criminal tribunals (and particularly the Nuremberg Tribunal and the ICTY) served to identify war crimes as such, as well as their objective and subjective elements. To a certain extent, the jurisprudence of the ICTY concerning the identification of war crimes and their elements is reflected in Article 8 of the ICC Statute and the Elements of Crimes, which is the most comprehensive list of war crimes applicable to international armed conflicts.
168. Accordingly, relying on the ICTY and ICC legal framework and practice may assist the judges in identifying the conduct that amounts to war crimes under Article 438 and their legal elements.
169. The question is whether the domestic legal system of Ukraine allows for such possibility. At first sight, the ICTY and ICC statutes do not seem to amount to sources of law under the Ukrainian legal system. The ICTY Statute is not a treaty, but an annex to a UN Security Council Resolution. As for the ICC Statute, it has not been ratified by Ukraine.
170. Nonetheless, the legal framework of Ukraine is highly receptive *vis-à-vis* its international commitments. Following a monist approach, international treaties accepted or ratified by Ukraine are incorporated into the domestic legal system, without having to be transposed by specific national laws. This is confirmed by Article 9 of the Constitution of Ukraine, which establishes that “International treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine”.

171. The spirit of Article 9 of the Constitution permeates domestic legislation and is reflected in Article 19 of the Law on international agreements of Ukraine which provides that international treaties are part of national legislation and have higher hierarchical status than national law.³¹³ More specifically, Article 17 of the Law on the implementation of decisions and application of the practice of the ECtHR mandates domestic courts to apply the ECHR and the ECtHR case law.³¹⁴ Of note, Article 3 of the CCU makes clear that the application of international law permeates also the criminal domestic framework as it establishes that “[t]he Criminal Code of Ukraine, based on the Constitution of Ukraine and generally recognized principles and rules of international law, shall be the Ukrainian legislation on criminal liability.” The monist approach has been confirmed also by the practice of the Constitutional Court of Ukraine establishing the principle of a friendly attitude to international law (Constitutional Court of Ukraine, case no.1-1 /2016).
172. Consistent with these principles, there are at least four arguments that may be considered to rely on the ICTY and ICC legal framework and practice to interpret Article 438.
173. **As the most persuasive authorities regarding the identification and consideration of internationally recognised war crimes in actual criminal proceedings, including the identification, interpretation and application of their objective and subjective elements, the ICTY/ICC Statutes and caselaw, amongst other international criminal law authorities, may be considered and even relied on when interpreting and applying Article 438.** The ICTY and ICC frameworks may be considered as source of interpretation of Article 438 as far as it developed and clarified those aspects of IHL that indisputably attract criminal liability (war crimes). As noted above, with respect to war crimes,³¹⁵ the ICTY and ICC elaborated principles that were already articulated in IHL instruments incorporated in Article 438. Thus, the ICTY and ICC statutes and practice could be considered nothing more than a clarification of existing war crimes under the general principles of IHL. In its Study on Customary International Humanitarian Law, the International Committee of the Red Cross (ICRC) refers extensively to the ICTY Statute and practice as well as to the ICC Statute in relation to the international recognition of war crimes.³¹⁶ This confirms the authority of such sources to interpret IHL instruments recalled in Article 438. Under this perspective, relying on the ICTY/ICC to interpret Article 438 would not result in the application of sources of law alien to the Ukrainian domestic system. Ukrainian courts may consider

³¹³ Law about international agreements of Ukraine (Vidomosti Verkhovnoi Rady Ukrainy (VVR), 2004, № 50, p. 540), Article 19 (“The current international treaties of Ukraine (...) are part of the national legislation and are applied in the order provided for the norms of the national legislation. 2. If an international treaty of Ukraine, which has entered into force in the prescribed manner, establishes rules other than those provided for in the relevant act of the legislation of Ukraine, the rules of the international treaty shall apply.”).

³¹⁴ Law on the implementation of decisions and application of the case law of the European Court of Human Rights (Vidomosti Verkhovnoi Rady Ukrainy (VVR), 2006, N 30, p. 260), Article 17 (“The courts shall apply the Convention and the case-law of the Court as a source of law in their proceedings.”).

³¹⁵ See above, paras 166-182.

³¹⁶ ICRC, IHL Database, Customary IHL, [Rule 156. Definition of War Crimes](#). See also ICRC, IHL Database, Customary IHL, [Rule 2. Violence Aimed at Spreading Terror among the Civilian Population](#); [Rule 11. Indiscriminate Attacks](#); [Rule 87. Humane Treatment](#); [Rule 89. Violence to Life](#); [Rule 90. Torture and Cruel, Inhuman or Degrading Treatment](#); [Rule 92. Mutilation and Medical, Scientific or Biological Experiments](#); [Rule 93. Rape and Other forms of Sexual Violence](#); [Rule 96. Hostage-Taking](#); [Rule 97. Human Shields](#); [Rule 99. Deprivation of Liberty](#); [Rule 100. Fair Trial Guarantees](#).

these international criminal law sources for their authoritative interpretation of IHL instruments already applicable in Ukraine.

174. In addition, insofar as the ICRC, namely the international body mandated “to work for the understanding and dissemination of knowledge of IHL applicable in armed conflicts”,³¹⁷ adopted the ICTY/ICC practice to interpret those international instruments, the suggested solution appears in line with the principle of a friendly attitude to international law established by Constitutional Court of Ukraine in case no.1-1 /2016 (“the Constitutional Court of Ukraine takes into account the provisions of existing international treaties approved by the Verkhovna Rada of Ukraine and the practice of interpretation and application of these agreements by international bodies whose jurisdiction is recognized by Ukraine”).
175. **Relying on the ICTY/ICC Statutes and practice via the application of Article 7 of the ECHR.** In case a conviction for international crimes is based on blanket legislation broadly incorporating international norms (as in the case of Article 438), the ECtHR generally relies on the ICTY/ICC statutes and practice to ensure that the principle of legality (foreseeability/accessibility) is respected,³¹⁸ as it considered to be illustrative of the legal elements of international crimes under the international law applicable.
176. Since the Ukrainian courts are obliged to apply the ECHR and the ECtHR case law,³¹⁹ the same logic should apply at the domestic level. In cases concerning war crimes, an ECHR oriented interpretation of Article 438 of the CCU would require considering the ICTY/ICC framework to assess whether the criminal provision complies with Article 7 of the ECHR.
177. In other words, applying Article 438 consistent with the practice of international criminal tribunals would be instrumental to ensure that the relevant proceedings comply with the ECHR. In addition, in light of the ECtHR jurisprudence, guidance for the proper identification of the elements of war crimes can be sought in the relevant statutes and practice of international criminal tribunals as reflective of principles of international law stemming from the international sources incorporated in Article 438.
178. **Relying on the Conventions on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity to interpret Article 438.** Besides international instruments constituting the Geneva Law and The Hague Law, Ukraine ratified at least two additional treaties that identify war crimes and can be relevant for the interpretation of Article 438, namely: (1) the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity; and (2) the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes.³²⁰ As these conventions address the classification of war crimes, they can be considered among the international instruments men-

³¹⁷ [Statutes of the International Red Cross and Red Crescent Movement](#), Article 5.

³¹⁸ ECtHR, *Milankovic v. Croatia*, [Judgement](#), para. 63; ECtHR, ECtHR, *Kononov v. Latvia*, [Grand Chamber Judgement](#), 211, 216. See above, [Introduction – Sources of Law: IHL, IHRL and ICL, II. International Human Rights Law](#).

³¹⁹ Law on the implementation of decisions and application of the case law of the European Court of Human Rights (Vidomosti Verkhovnoi Rady Ukrainy (VVR), 2006, N 30, p. 260), Article 17 (“The courts shall apply the Convention and the case-law of the Court as a source of law in their proceedings.”).

³²⁰ See above, [Introduction – Sources of Law: IHL, IHRL and ICL, II. International Human Rights Law](#).

tioned by Article 438. Relying on these treaties as a source would assist the judges in identifying the specific conduct amounting to a war crime. In this context, the ICTY practice may be taken into consideration as a persuasive authority to interpret such conventions. Article 1(2)(a)(b) of the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes mirrors to a large extent Articles 2 and 3 of the ICTY Statute.

179. **Relying on the ICC Statute and Elements of Crimes as “international instruments consented to be binding by the Verkhovna Rada (Parliament) of Ukraine” by virtue of the acceptance of the ICC’s jurisdiction under Article 12(3) of the ICC Statute.** Notably, the main preclusion for the introduction of the ICC Statute and practice within the domestic framework is the fact that Ukraine did not ratify the ICC Statute. The question is whether the Verkhovna Rada (Parliament)’s Declaration on the acceptance of the Court’s jurisdiction under Article 12(3) of the ICC Statute of 4 February 2015 (“4 February 2015 Declaration”) could be equated to an instrument of accession.
180. Indeed, similar to treaty ratification, the acceptance of the ICC jurisdiction under Article 12(3) creates specific international commitments on behalf of the accepting State. The accepting State becomes bound to the cooperation obligations provided by part 9 of the ICC Statute. As such, the position of the accepting States could be considered as “equivalent to that of a State party to the Statute.”³²¹ Authoritative doctrine has confirmed that, under treaty law, the mechanism under Article 12(3) reflects a treaty stipulation in favour of third States governed by Articles 34-36 of the Vienna Convention on the Law of Treaties, which require the consent of the third-State in order for a treaty to create either obligations or rights on its behalf.³²²
181. As a consequence, from the perspective of public international law, the acceptance of the jurisdiction under Article 12(3) could be considered an agreement between the accepting State and the ICC States Parties (“when the third State lodges its declaration with the Registrar, a new agreement between the States Parties to the Statute, on the one hand, and the third State, on the other, relating to the exercise of the ICC’s jurisdiction over the crime in question, would be concluded”).³²³
182. If construed as an independent, although partial, instrument of accession, the 4 February 2015 Declaration could lead to the possibility of introducing the ICC Statute and the Elements of Crimes at domestic level by virtue of Article 438, falling within

³²¹ Palmisano, *The ICC and Third States*, in *Essays on the Rome Statute of the International Criminal Court*, Lattanzi/Schabas ed., Sereni, 1999, p. 393.

³²² Palmisano, *The ICC and Third States*, in *Essays on the Rome Statute of the International Criminal Court* Lattanzi/Schabas ed., Sereni, 1999, p. 393. The prevailing view is that the acceptance of the obligation (or a right) contained in the original treaty should amount to a separate agreement between the third State and the original Parties to the treaty itself. Proelss, *Article 35 Treaties providing for obligations for third States*, in *Vienna Convention on the Law of Treaties: A Commentary*, Oliver/Schmalenbach ed., Springer Second, 2018, pp 702-703.

³²³ Palmisano, *The ICC and Third States*, in *Essays on the Rome Statute of the International Criminal Court*, Lattanzi/Schabas ed., Sereni, 1999, pp 393-394 (“when the third State lodges its declaration with the Registrar, a new agreement between the States parties to the Statute, on the one hand, and the third State, on the other, relating to the exercise of the ICC’s jurisdiction over the crime in question, would be concluded”). Alternatively, the acceptance mechanism under Article 12(3) may be also considered a separate agreement with the ICC, according to Articles 34-36 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. However, the same principles would apply.

the categories of the international legal instruments incorporated in the provision (adopted by the Verkhovna Rada (Parliament) and reflecting “rules of the warfare”).

C. Definition of War Crimes under international law and applicability under article 438 of the CCU

1. Introduction

183. This section analyses the elements of war crimes under international criminal law specifying how the relevant underlying acts of war crimes can be considered subsumed under Article 438 of the CCU.
184. War crimes are: (1) a specific set of prohibited acts under IHL (**underlying acts**); (2) that occur in the context of an armed conflict, international or non-international in character (**contextual element**). The existence of an armed conflict and the link between the conflict and the underlying acts are common elements for each war crime and are what differentiates war crimes from corresponding ordinary or domestic offences. War crimes are traditionally divided between underlying acts committed in the context of international and non-international armed conflicts. The Benchbook focuses on war crimes committed in the context of international armed conflict.
185. Section 2 addresses the main features of the contextual elements of war crimes focusing on international armed conflict, while Section 3 (1) assesses the applicability of internationally recognised war crimes under Article 438 and (2) details the relevant objective and subjective elements of each crime. While the analysis will focus on Article 438, it may also apply, *mutatis mutandis*, to other current or future legal provisions on war crimes under Ukrainian law.

2. Contextual Elements of War crimes

SUMMARY CONTEXTUAL ELEMENTS

- The contextual elements of war crimes must always be established and are what distinguish war crimes from ordinary crimes.
- The contextual elements of war crimes in international armed conflict are:
 - The conduct of the perpetrator took place in the context and was associated with an international armed conflict (paras 188-198).
 - The perpetrator was aware of the factual circumstances that established the existence of an armed conflict (para. 199).
- An armed conflict may be qualified as international in case of:
 - (1) resort to armed forces between states (para. 190).
 - (2) partial or total occupation of a state's territory (para. 190).
 - (3) non-state armed groups operating in a state act under the “overall control” of a foreign state (para.190).
- The “war crimes nexus”: there must be a link between the conduct and the conflict (“the conduct [...] took place in the context and was associated with an international armed conflict”). Such link may be established when the conflict played a substantial part in the perpetrator's ability or intention to commit the crime (paras 194-198).
- All war crimes require the establishment of the contextual elements.

a) Introduction

186. As noted above, Article 438 covers offences that amount to war crimes.³²⁴ IHL violations occur in the context of armed conflict. War crimes are serious violations of IHL and therefore must also occur in the same context. According to international criminal law, any war crime requires that the perpetrator's acts took place in the context of and were associated with the armed conflict. This is an essential element of the definition of a war crime. It is what differentiates – under similar conduct – a war crime from an ordinary crime.

187. Although not expressly spelled out in Article 438, it can be considered that the contextual elements is to be proven for any of the war crimes listed in this provision.

ICTY, *CELEBICI TRIAL JUDGEMENT*, PARA. 182.

In order to apply the body of law termed “international humanitarian law” to a particular situation it must first be determined that there was, in fact, an “armed conflict”, whether of an internal or international nature. Without a finding that there was such an armed conflict it is not possible for the Trial Chamber to progress further to its discussion of the nature of this conflict and how this impacts upon the applicability of Articles 2 and 3 (*articles of the ICTY Statute related to war crimes*).

³²⁴ See above, paras 121-128.

b) Definition of the contextual elements of war crimes

188. The contextual elements of war crimes applicable to an international armed conflict are:

- The conduct of the perpetrator took place in the context and was associated with an international armed conflict;
- The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.

i. The conduct of the perpetrator took place in the context and was associated with an armed conflict

a. Existence of an armed conflict

189. War crimes can be committed both in the context of an international armed conflict or of a non-international armed conflict.³²⁵ In light of the current situation in Ukraine, this bench book focuses on war crimes in international armed conflicts.

190. An armed conflict is qualified international when:

- There is a resort to armed forces between states.³²⁶ In this regard, there is no requirement that the hostilities reach a certain level of intensity or a certain duration.³²⁷
- There is a partial or total occupation of a state's territory. Even if the occupation is not met with armed resistance. A military occupation exists “where a State's military forces intervene in and exercise control over a territory beyond that State's internationally recognised frontiers, whether that territory belongs to a hostile State, a neutral State or a co-belligerent provided that the deployment of forces has not been authorized by an agreement with the occupied power.”³²⁸
- Non-state armed groups operating in a state act under the “overall control” of a foreign state. The “overall control” test is met when a foreign state has a role in organising, coordinating, or planning the military actions of the military group in addition to financing, training and equipping, and providing operational support to that group.³²⁹

³²⁵ Contrary to an international armed conflict, a non-international armed conflict opposes governmental authorities and organised groups or between such groups within a state and thus requires the existence of a “protracted” conflict, namely of a certain intensity of the conflict. Moreover, the armed group(s) involved must reach a certain level of organisation. See ICC, *Katanga Trial Judgement*, paras 1183-1187; ICC, *Lubanga Trial Judgement*, paras 534-536. .
³²⁶ ICTY, *Tadic Decision on Interlocutory Appeal on Jurisdiction*, para. 70 (“an armed conflict exists whenever there is a resort to armed force between States”); ICC *Katanga Trial Judgement*, para. 1177 (“an international armed conflict exists in case of armed hostilities between States through their respective armed forces or other actors acting on their behalf”).

³²⁷ ICTY, *Celebici Trial Judgement*, paras 184, (“the existence of armed force between States is sufficient of itself to trigger the application of international humanitarian law”), 208 (“the Trial Chamber is guided by the Commentary to the Fourth Geneva Convention, which considers that ‘[a]ny difference arising between two States and leading to the intervention of members of the armed forces’ is an international armed conflict and ‘[i]t makes no difference how long the conflict lasts, or how much slaughter takes place”).

³²⁸ ICTY, *Prlic et al. Appeal Judgement*, paras 318, 339.

³²⁹ ICC, *Lubanga Trial Judgement*, para. 541 (“PreTrial Chamber II, when considering this issue, concluded that ‘an international armed conflict exists in case of armed hostilities between States through their respective armed forces or other actors acting on behalf of the State.’ As regards the necessary degree of control of another State over an armed

ICC, KATANGA TRIAL JUDGEMENT, PARAS 1177-1179 (FOOTNOTES OMITTED)

1177. The ICC Statute framework does not define “international armed conflicts”. In the light of the relevant jurisprudence, and in agreement with the parties and participants in the instant case, the Chamber considers that an armed conflict is international:

[...] if it takes place between two or more States; this extends to the partial or total occupation of the territory of another State, whether or not the said occupation meets with armed resistance. In addition, an internal armed conflict that breaks out on the territory of a State may become international – or, depending on the circumstances, be international in character alongside with an internal armed conflict – if (i) another State intervenes in that conflict through its troops (direct intervention), or if (ii) some of the participants in the internal armed conflict act on behalf of that other State (indirect intervention).

An international armed conflict exists in case of armed hostilities between States through their respective armed forces or other actors acting on their behalf.

1178. To assess if an international armed conflict exists by reason of the indirect participation of a State, the Chamber must analyse and appraise the degree of control exerted by that State over one of the armed groups participating in the hostilities. In appraising the degree of such control, Trial Chamber I held the “overall control” test to be the correct approach, allowing a determination as to whether an armed conflict not of an international character has become internationalised due to the involvement of armed forces acting on behalf of another State. That test is met when the State “has a role in organising, co-ordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group”. It is not required that the State give specific orders or direct each military operation.

1179. Further, the Elements of Crimes specify that the Court’s jurisdiction as regards the law of international armed conflict also extends to military occupation. In the Chamber’s estimation, and in view of the pertinent jurisprudence and treaty law, “territory is considered to be occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised”. Hence, military occupation exists where a State’s military forces intervene in and exercise control over a territory beyond that State’s internationally recognised frontiers, whether that territory belongs to a hostile State, a neutral State or a co-belligerent, provided that the deployment of forces has not been authorised by an agreement with the occupied power

191. Determining the existence of an international armed conflict is an issue of fact.³³⁰ It does not require a declaration of war to be issued. A situation where none of the warring parties recognise the state of war does not affect the status of the conflict.³³¹

group acting on its behalf, the Trial Chamber has concluded that the ‘overall control’ test is the correct approach. This will determine whether an armed conflict not of an international character may have become internationalised due to the involvement of armed forces acting on behalf of another State. A State may exercise the required degree of control when it ‘has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group.’ Pre-Trial Chamber I adopted this approach.”). See also ICTY, *Tadic Appeal Judgement*, para. 137.

³³⁰ ICTY, *Prlic et al. Trial Judgement*, vol. III. of VI., para. 525 (“the Chamber would recall that in international humanitarian law, determination of the international character of an armed conflict is purely an issue of fact.”).

³³¹ ICTY, *Kordic and Cerkez Appeal Judgement*, para. 373 (“Last, the Appeals Chamber turns to the argument that there was no international armed conflict between Croatia and Bosnia and Herzegovina because they denied the existence of a state of war between them. Without prejudice to the factual veracity of this claim, the Appeals Chamber finds any such argument irrelevant. Article 2 of Geneva Convention IV speaks of ‘armed conflict [...] between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them.’ However, this article

The factual determination of the existence of an armed conflict is to be made by judges in a particular case and does not depend of the imposition of martial law in the manner prescribed by the Constitution of Ukraine and the Law of Ukraine “On Legal Regime of Martial Law”.³³²

192. Likewise, possible underlying motives of the participants in the conflict or the lawfulness of their participation have no relevance to the qualification of the conflict.³³³ Provided that the definition of the armed conflict is met, it is immaterial how the operations are labelled by the authorities. Thus, even if the operations are labeled as “anti-terrorists” or the violent acts as “terrorists acts”, it does not affect the qualification of armed conflict and the applicability of IHL.³³⁴
193. *Temporal and geographical scope.* Once an armed conflict arises IHL applies beyond the cessation of hostilities and until a general conclusion of peace is reached. Until that moment, IHL continues to apply in the whole territory of the warring States whether or not actual combat takes place there.³³⁵

cannot be interpreted to rule out the characterisation of the conflict as being international in a case when none of the parties to the armed conflict recognises the state of war. The purpose of Geneva Convention IV, i.e. safeguarding the protected persons, would be endangered if States were permitted to escape from their obligations by denying a state of armed conflict. The Appeals Chamber recalls that “[i]t must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests.”)

³³² USAID Ukraine, Respect for Human Rights during the armed conflict in Ukraine, judicial application of international humanitarian law and human rights law, 30 June 2017, p. 7.

³³³ ICTY, *Prlic et al Trial Judgement*, vol. III. of VI., para. 525 (“possible underlying motives of the participants in the conflict or the lawfulness of their participation have no relevance.”).

³³⁴ ICTY, *Boskoski and Tarculovski Trial Judgement*, para. 185 (“The Trial Chamber in Tadić relied on the ICRC Commentary to the Geneva Conventions of 1949 to explain that the elements of intensity and organisation of the parties may be used solely for the purpose, as a minimum, to distinguish an armed conflict from lesser forms of violence such as ‘terrorist activities’. The part of the Commentary relied upon noted that the Conventions’ drafters did not intend the term ‘armed conflict’ to apply ‘to any and every isolated event involving the use of force and obliging the officers of the peace to have resort to their weapons’. Rather, Common Article 3 was to apply to ‘conflicts which are in many respects similar to an international war, but take place within the confines of a single country’, that is, where ‘armed forces’ on either side are engaged in ‘hostilities’. The essential point made by the Trial Chamber in Tadić is that isolated acts of violence, such as certain terrorist activities committed in peace time, would not be covered by Common Article 3. This conclusion reflected the Appeals Chamber’s determination in Tadić that armed conflict of a non-international character exists when there is ‘protracted violence between governmental authorities and organized groups or between such groups within a State’. In applying this test, what matters is whether the acts are perpetrated in isolation or as part of a protracted campaign that entails the engagement of both parties in hostilities. It is immaterial whether the acts of violence perpetrated may or may not be characterised as terrorist in nature. This interpretation is consistent with the Appeals Chamber’s observation in Kordić, that ‘[t]he requirement of protracted fighting is significant in excluding mere cases of civil unrest or single acts of terrorism.”). See also ICTY, *Boskoski and Tarculovski Appeal Judgement*, para. 33.

³³⁵ See ICTY, *Oric Trial Judgement*, para. 255 (“The temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached or, in the case of internal conflicts, a peaceful settlement is achieved. Thus, the norms of international humanitarian law apply regardless of whether actual combat activities are taking place in a particular location”).

ICTY, TADIĆ DECISION ON INTERLOCUTORY APPEAL ON JURISDICTION, PARA. 70

70. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.

b. Nexus between the conduct and the armed conflict (war crime nexus)

194. Not all criminal activities taking place at the time of an armed conflict qualify as war crimes. A war crime is committed if there is a nexus between a criminal act and the armed conflict. The conduct must take place in the context of and be associated with an armed conflict. In the absence of a link between the offence and the armed conflict, the offence constitutes an ordinary crime under the law applicable in the territory.³³⁶
195. In order for the nexus requirement to be satisfied the perpetrator's conduct need not take place as part of the hostilities, and the required nexus can be met even for crimes temporally or geographically remote from the actual fighting.³³⁷
196. The armed conflict also need not have been causal to the commission of the crime. Instead, a sufficiently close link to the hostilities is required, namely that the conflict played a substantial part in the perpetrator's ability to commit the crime, decision to commit it, or with regard to the purpose of its commission.³³⁸

³³⁶ ICC, *Ntaganda Trial Judgement*, para. 731 (“For conduct to qualify as a war crime, a nexus must be established with the armed conflict in question. The nexus requirement serves to distinguish war crimes from crimes that ought to be treated as purely domestic, and it prevents random or isolated criminal occurrences from being characterised as war crime”); ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, paras 379, fn. 495 (referring to Cassese, *International Criminal Law*, 2nd ed., Oxford, Oxford University Press, 2008, p. 83: “special attention should be paid to crimes committed by civilians against other civilians. They may constitute war crimes, provided there is a link or connection between the offence and the armed conflict. In the absence of such a link, the breach simply constitutes an ‘ordinary’ criminal offence under the law applicable in the relevant territory”), 383 (“Therefore, criminal acts or offences unrelated to the armed conflict are not considered to be war crimes.”).

³³⁷ ICC, *Ntaganda Trial Judgement*, para. 731 (“the perpetrator's conduct need not have taken place as part of hostilities, or at a time or place where fighting was actually taking place.”)

³³⁸ ICC, *Katanga Trial Judgement*, para. 1176 (“The perpetrator's conduct must have been closely linked to the hostilities taking place in any part of the territories controlled by the parties to the conflict. The armed conflict alone need not be considered to be the root of the conduct of the perpetrator and the conduct need not have taken place in the midst of battle. Nonetheless, the armed conflict must play a major part in the perpetrator's decision, in his or her ability to commit the crime or the manner in which the crime was ultimately committed”); ICC, *Ntaganda Trial Judgement*, para. 731 (the perpetrator's conduct ‘must have been closely linked to the hostilities or be related to the control carried out over a certain part of the territory by the relevant party to the conflict. The existence of an armed conflict must have, at a minimum, played a substantial part in the perpetrator's ability to commit the crime, the decision to commit it, the purpose of the commission, or the manner in which the crime was committed, as [w]hat ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment — the armed conflict — in which it is committed”).

197. In this respect, factors indicating a link between the crime and the relevant armed conflict may include that: (1) the perpetrator is a combatant; (2) the victim is a non-combatant or is a member of the opposing party; and (3) the crime may be said to serve the ultimate goal of a military campaign; (4) the fact that the crime is committed as part of or in the context of the perpetrator's official duties.³³⁹ This list of factors should not be considered exhaustive.

ICTY, *KUNARAC ET AL.* APPEAL JUDGEMENT, PARAS 57-59 (FOOTNOTES OMITTED)

57. A violation of the laws or customs of war may therefore occur at a time when and in a place where no fighting is actually taking place. As indicated by the Trial Chamber, the requirement that the acts of the accused must be closely related to the armed conflict would not be negated if the crimes were temporally and geographically remote from the actual fighting. It would be sufficient, for instance, for the purpose of this requirement, that the alleged crimes were closely related to hostilities occurring in other parts of the territories controlled by the parties to the conflict.

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

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

198. Significantly, to establish the war crime nexus, the crimes “need not have been planned or supported by some form of policy.”³⁴⁰ Even a single, isolated act may amount to a war crime if linked to the armed conflict.

³³⁹ ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, para. 382 (“In relation to the nexus between a conduct and the armed conflict, the Chamber endorses the ICTY finding that: ‘In determining whether or not the act in question is sufficiently related to the armed conflict, the Trial Chamber may take into account, inter alia, the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties’”).

³⁴⁰ ICTY, *Halilovic Trial Judgement*, para. 724 (“The Trial Chamber recalls that for the existence of the required nexus, the crimes need not have been planned or supported by some form of policy. The Trial Chamber further notes that there is no reason why a single, isolated act, could not constitute a violation of the law and customs of war, when the required nexus has been established.”).

- ii. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.

199. As spelled out by the Elements of the Crimes of the ICC³⁴¹ and by ICTY and ICC jurisprudence: the perpetrator need not have made a legal evaluation whether an international armed conflict existed, or have realised that the situation qualified as such, but he/she must have been aware of the factual circumstances that established the existence of the armed conflict.³⁴² In other words, the perpetrator must be aware of the factual elements showing that there is armed hostilities.

3. Underlying Acts of War Crimes applicable under Article 438 of the CCU

a) Introduction

200. The present section analyses the underlying acts of war crimes under international criminal law that can be considered applicable under Article 438 of the CCU by relying on the legal framework of international criminal courts and tribunals as a source of interpretation. While it cannot be excluded that other violations of IHL could be identified as war crimes, the war crimes in international armed conflicts presented in this Benchbook represent the most up to date list of the generally accepted war crimes under international criminal law.

201. For each underlying act, the section will provide: (1) a snapshot of the applicability and the main elements of each war crime; (2) the applicability of the relevant international criminal law sources in the context of the specific offence included in Article 438; (3) the objective elements and the (4) the subjective elements of the corresponding offence under international criminal law, as well as (5) the contextual elements.

202. The offenses are articulated according to the following classification: (1) war crimes against persons; (2) war crimes against property; (3) war crimes on prohibited targets; (4) war crimes by employing prohibited means and methods of warfare; and (5) war crimes against humanitarian personnel and operations.

203. All the underlying acts listed under these five categories can be subsumed, and integrated, under the acts and conduct listed in Article 438. The structure of Article 438 can be articulated under two main prongs.

204. The first prong covers a list of specific offences expressly listed, namely:

- Cruel treatment of prisoners of war or civilians – Article 438(1);
- Deportation of civilian population for forced labor – Article 438(1);

³⁴¹ [ICC Elements of the Crimes](#), Article 8, Introduction, p. 9 (“(a) There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international; (b) In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international; (c) There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms ‘took place in the context of and was associated with’”). See also ICC, *Bemba Trial Judgement*, para. 135.

³⁴² ICTY, *Prlic et al Appeal Judgement*, para. 2392; ICTY, *Naletilic and Martinovic Appeal Judgement*, paras 116-121; ICC, *Ntaganda Trial Judgement*, para. 733.

- Pillage of national treasures on occupied territories – Article 438(1);
 - Murder – Article 438(2).
205. The second prong covers a wide range of acts subsumed under the general categories of:
- use of methods of the warfare prohibited by international instruments – Article 438(1);
 - any other violations of rules of the warfare recognised by international instruments consented to by binding by the Verkhovna Rada (Parliament) of Ukraine – Article 438(1).
206. The offences listed under Article 438 are not always identical to the underlying acts of war crimes codified under international criminal law. In some cases, Article 438 offences may cover one or more underlying acts of war crimes, in others the underlying acts of war crimes may be subsumed under the different prongs of Article 438 at the same time. The synoptic table below summarises this relationship.

Synoptic Table	
Offences under Article 438	• War crimes under international criminal law
Cruel treatment of prisoners of war or civilians – Article 438(1)	<ul style="list-style-type: none"> • [IN PART] Torture (ICTY Statute, Article 2(b); ICC Statute, Article 8(2)(a)(ii)) • [IN PART] Inhuman Treatment, including Biological Experiments (ICTY Statute, Article 2(b); ICC Statute, Article 8(2)(a)(ii)) • [IN PART] Wilfully Causing Great Suffering or Serious Injury to Body or Health (ICTY Statute, Article 2(c); ICC Statute, Article 8(2)(a)(iii))
Deportation of civilian population for forced labor – Article 438(1)	<ul style="list-style-type: none"> • [IN PART] Unlawful deportation or transfer (ICC Statute, Article 8(2)(a)(vii); ICTY Statute Article 2(g)) • [IN PART] The transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory (ICC Statute, Article 8(2)(b)(viii))
Pillage of national treasures on occupied territories – Article 438(1);	• [IN PART] Pillaging a town or place, even when taken by assault (ICTY Statute, Article 3(d), ICC Statute, Article 8(2)(b)(xvi))
Murder – Article 438(2)	• Wilful killing (ICTY Statute, Article 2(a); ICC Statute, Article 8(2)(a)(i))
Use of methods of the warfare prohibited by international instruments – Article 438(1)	<ul style="list-style-type: none"> • Killing or wounding a hors de combat (ICTY Statute, Article 3; ICC Statute, Article 8(2)(b)(vi)) • Making improper use of distinctive signs (ICC Statute, Article 8(2)(b)(vii)) • Killing or wounding treacherously individuals belonging to the hostile nation or army (ICC Statute, Article 8(2)(b)(xi)) • Declaring that no quarter will be given (ICC Statute, Article 8(2)(b)(xii)) • Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations (ICTY Statute, Article 3; ICC Statute, Article 8(2)(b)(xxiii)) • Intentionally using starvation of civilians as a method of warfare (ICC Statute, Article (8)(2)(b)(xxv)) • Unlawful Infliction of Terror on Civilians (ICTY Statute, Article 3)

	<ul style="list-style-type: none"> • Intentionally using starvation of civilians as a method of warfare (ICC Statute, Article 8)(2)(b)(xxv)) • Unlawful Infliction of Terror on Civilians (ICTY Statute, Article 3)
<p>Any other violations of rules of the warfare recognised by international instruments – Article 438(1)</p>	<ul style="list-style-type: none"> • Wilful killing (ICTY Statute, Article 2(a); ICC Statute, Article 8(2)(a)(i)) • Offences of Mistreatment: Torture or Inhuman Treatment, including Experiments and Mutilation, as well as Wilfully Causing Great Suffering or Serious Injury (ICTY Statute, Article 2(b)-(c); ICC Statute, Articles 8(2)(a)(ii)-(iii), 8(2)(b)(x)) • Committing outrages upon personal dignity, in particular humiliating and degrading treatment (ICTY Statute, Article 3; ICC Statute, Article 8(2)(b)(xxi)) • Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity (ICC Statute, Article 8(2)(xxii)). • Compelling service in hostile forces/Compelling participation in military operations (ICTY Statute, Article 2(e); ICC Statute, Articles 8(2)(a)(v), 8(2)(b)(xv)) • Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities (ICC Statute, Article (8)(2)(b)(xxvi)) • Wilfully Depriving a Prisoner of War or Other Protected Person of the Rights of Fair and Regular Trial (ICTY Statute, Article 2(f); ICC Statute, Article 8(2)(a)(vi)) • Declaring abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party (ICC Statute, Article 8(2)(b)(xiv)) • Unlawful deportation or transfer (ICC Statute, Article 8(2)(a)(vii); ICTY Statute Article 2(g)) • Taking of hostages (ICTY Statute, Articles 2(h) and 3; ICC Statute, Article 8(2)(a)(viii)) • The transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory (ICC Statute, Article 8(2)(b)(viii)) • Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly (ICTY Statute, Article 2(d); ICC Statute, Article 8(2)(a)(iv)) • Pillaging a town or place, even when taken by assault (ICTY Statute, Article 3(d), ICC Statute, Article 8(2)(b)(xvi)) • Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war (Article 8(2)(b)(xiii) of the ICC Statute) • Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities (ICC Statute, Article 8(2)(b)(i); ICTY Statute, Article 3). • Intentionally directing attacks against civilian objects, that is, objects which are not military objectives (ICC Statute, Article 8(2)(b)(ii); ICTY Statute, Article 3).

	<ul style="list-style-type: none"> • <u>Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated (ICC Statute, Article 8(2)(b)(iv); ICTY Statute, Article 3)</u> • <u>Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives (ICTY Statute, Article 3; ICC Statute, Article 8(2)(b)(v))</u> • <u>Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives (ICC Statute, Article 8(2)(b)(ix))</u> • <u>Killing or wounding a hors de combat (ICTY Statute, Article 3; ICC Statute, Article 8(2)(b)(vi))</u> • <u>Making improper use of distinctive signs (ICC Statute, Article 8(2)(b)(vii))</u> • <u>Killing or wounding treacherously individuals belonging to the hostile nation or army (ICC Statute, Article 8(2)(b)(xi))</u> • <u>Declaring that no quarter will be given (ICC Statute, Article 8(2)(b)(xii))</u> • <u>Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations (ICTY Statute, Article 3; ICC Statute, Article 8(2)(b)(xxiii))</u> • <u>Employment of poison or poisoned weapons, prohibited gases, liquids, materials or devices (ICTY Statute, Article 3(a); ICC Statute, Articles 8(2)(b)(xvii)-(xviii))</u> • <u>Employment of prohibited bullets (ICTY Statute, Article 3(a), ICC Statute, Articles 8(2)(b)(xix))</u> • <u>Intentionally using starvation of civilians as a method of warfare (ICC Statute, Article (8)(2)(b)(xxv))</u> • <u>Unlawful Infliction of Terror on Civilians (ICTY Statute, Article 3)</u> • <u>Intentionally directing attacks against personnel or objects involved in a humanitarian assistance or peacekeeping mission entitled to the protection under IHL (ICC Statute, Article 8(2)(b)(iii))</u> • <u>Intentionally directing attacks against objects and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law (ICC Statute, Article 8(2)(b)(xxiv))</u>
--	--

b) War crimes against Persons

i. Wilful killing (ICTY Statute, Article 2(a); ICC Statute, Article 8(2)(a)(i))

APPLICABILITY: ARTICLE 438(2) OF THE CCU REFERS TO “MURDER” IN THE CONTEXT OF WAR CRIMES PUNISHABLE UNDER UKRAINIAN CRIMINAL LAW. IT MAY BE UNDERSTOOD THAT MURDER AS A “VIOLATION OF RULES OF WARFARE” IS THEREFORE CRIMINALISED UNDER ARTICLE 438, REFLECTING THE INTERNATIONAL WAR CRIME OF WILFUL KILLING. IF THE REFERENCE TO MURDER IN ARTICLE 438(2) WOULD BE INTERPRETED AS AN AGGRAVATING FACTOR, THEN THE CONDUCT, MAY STILL BE SUBSUMED UNDER “OTHER VIOLATIONS OF RULES OF THE WARFARE RECOGNIZED BY INTERNATIONAL TREATIES THE BINDING BY THE VERKHOVNA RADA (PARLIAMENT) OF UKRAINE TO WHICH ARTICLE 438(1) OF THE CCU REFERS.

Elements of the crime: To convict a perpetrator of the war crime of wilful killing, the following elements must be established:

(1) Objective elements

- The perpetrator’s actions or omissions resulted in the death of one or more persons (paras [212-215](#)).
- The person(s) killed was/were protected under the Geneva Conventions, namely: (1) Members of the armed forces who are wounded or sick; (2) Prisoners of war; (3) Civilians; and (4) Medical and religious personnel (paras [216-221](#)).

(2) Subjective elements

- The perpetrator intended to cause the death of the person or to cause serious injury which the perpetrator should reasonably have known might lead to death (paras [223-224](#)).
- The perpetrator was aware that the person was a protected person under the Geneva Conventions (para. [225](#)).

(3) Contextual elements

- (4) There is an international armed conflict (para. [226](#)).
- (5) The conduct of the perpetrator took place in the context and was associated with the conflict (para. [226](#)).
- (6) The perpetrator was aware of the factual circumstances that established the existence of an armed conflict (para. [226](#)).

a. Applicability under Article 438

207. Article 438(2) of the CCU refers to “murder” in the context of war crimes punishable under Ukrainian criminal law. It may be understood that murder as a “violation of rules of warfare” is therefore criminalised under Article 438, reflecting the interna-

tional war crime of wilful killing. If the reference to murder in Article 438(2) would be interpreted as an aggravating factor, then the conduct, may still be subsumed under “other violations of rules of the warfare recognized by international treaties the binding by the Verkhovna Rada (Parliament) of Ukraine to which Article 438(1) of the CCU refers.

208. **Wilful killing is a serious violation of International Humanitarian Law reflected in international treaties ratified by Ukraine.** Wilful killing is prohibited under international treaties ratified by Ukraine, namely as a grave breach of the Geneva Conventions ([Geneva Convention I](#), article 50; [Geneva Convention II](#), article 51; [Geneva Convention III](#), article 130; [Geneva Convention IV](#), article 147).³⁴³
209. **Recognition as war crime.** Wilful killing is recognised as a war crime in international armed conflicts.³⁴⁴ Wilful killing has been codified as a war crime applicable to international armed conflicts in the statutes of several international criminal tribunals, including in Article 6(b) the Charter of the International Military Tribunal of Nuremberg, Article 2(a) of the ICTY Statute, and Article 8(2)(a)(i) of the ICC Statute. As a war crime applicable to international armed conflicts, wilful killing shares the same elements of murder as a war crime applicable to non-international armed conflicts reflected in Article 3 of the ICTY Statute and Article 8(2)(c)(i) of the ICC Statute.³⁴⁵
210. All of these elements support a finding that the crime of wilful killing is criminalised under article 438(1) or (2) of the CCU and that the crime of murder covered under article 438(2) corresponds to the crime of wilful killing defined as a war crime under international criminal law.

³⁴³ Ukraine ratified the Geneva Conventions, 1949 on 3 August 1954. See ICRC, Treaties and States Parties, [Ukraine](#).

³⁴⁴ The criminalisation finds its rationale in the prohibitions provided in article 12 of the Geneva Convention I, article 12 of the Geneva Convention II, article 13 of Geneva Convention II, and article 32 of Geneva Convention IV. See also ICRC, IHL Database, Customary IHL, [Rule 156. Definition of War Crimes](#).

³⁴⁵ International jurisprudence confirms that there is no difference between wilful killing as a war crime applicable to international armed conflicts and murder as a war crime applicable to non-international armed conflicts. ICC, [Katanga Trial Judgement](#), para. 789 (“the preparatory work shows that the drafters of the Statute intended that there should be no difference between wilful killing under article 8(2)(a) and murder under article 8(2)(c)(i). The Chamber notes, moreover, that the ad hoc tribunals give those two terms a similar meaning”). See also ICTY, [Brdanin Trial Judgement](#), paras 422-423.

MURDER OR WILFUL KILLING AS A WAR CRIME (ARTICLE 438 OF THE CCU) VERSUS MURDER AS AN ORDINARY CRIME (ARTICLES 115 AND 119 OF THE CCU)

Murder or wilful killing as a war crime under Article 438 of the CCU must be distinguished from murder and negligent homicide under Articles 115 and 119 of the CCU.

Murder or wilful killing as a war crime under Article 438 of the CCU shall apply only when:

- There is an international armed conflict and the killing took place in the context and was associated with that conflict;
- The person killed is a protected person under the Geneva Conventions.

Contrary to the ordinary crime of murder in peace-time if a person is not protected under the Geneva Conventions (e.g. a member of the armed forces, who is not wounded, sick or has not fallen into the power of the enemy) then causing his/her death shall not be considered as the war crime of wilful killing.

b. Definition of wilful killing (Objective Elements)

211. The objective element of wilful killing requires that: (1) a perpetrator's act or omission caused the death of one or more persons, who (2) are protected under the Geneva Conventions.
212. **The act or omission of the perpetrator caused the death of a person.** Wilful killing may be committed by action or omission. Evidence must show that one or more persons died "as a result of" the perpetrator's acts or omissions. Put otherwise, there must be a causal link between the perpetrator's act or omission and the person's death.³⁴⁶
213. However, the perpetrator's conduct does not need to be the sole cause of the victim(s) death. It is sufficient that the perpetrator's acts substantially contributed to the death of the person(s).³⁴⁷

³⁴⁶ ICTY, *Kordic and Cerkez Appeal Judgement*, para. 36 ("The Appeals Chamber recalls that the elements of wilful killing under Article 2 of the Statute are the death of the victim as the result of the action(s) of the accused"); ICTY, *Celebici Trial Judgement*, para. 424 ("The first of these may be termed the actus reus – the physical act necessary for the offence. In relation to homicide of all natures, this actus reus is clearly the death of the victim as a result of the actions of the accused. The Trial Chamber finds it unnecessary to dwell on this issue, although it notes that omissions as well as concrete actions can satisfy the actus reus element"); ICTY, *Brdanin Trial Judgement*, paras 381, ("The death was caused by an act or omission of the accused, or of a person or persons for whose acts or omissions the accused bears criminal responsibility."), 382 ("The actus reus consists in the action or omission of the accused resulting in the death of the victim").

³⁴⁷ ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, para. 296 ("The Chamber also adopts the ICTY conclusion that 'the conduct of the accused must be a substantial cause of the death of the victim.'"); ICTY, *Brdanin Trial Judgement*, para. 382 ("The Prosecution need only prove beyond reasonable doubt that the accused's conduct contributed substantially to the death of the victim"); ICTY, *Karadzic Trial Judgement*, para. 446 ("With regard to the requisite causal nexus, the requirement that death must have occurred 'as a result of' the perpetrator's act or omission does not require this to be the sole cause for the victim's death; it is sufficient that the 'perpetrator's conduct contributed substantially to the death of the person'").

214. It needs to be established that the person(s) is/are dead. In terms of evidence, ICTY and ICC jurisprudence indicates that the death of the person can be established through:
- Direct evidence (e.g. the production of a dead body); or
 - Circumstantial evidence, so long as the only reasonable inference from the evidence is that the victim is dead.³⁴⁸
215. The killing of one person is sufficient to amount to wilful killing as a war crime. In the case of mass atrocities, however, it may be impractical to insist on a high degree of specificity and thus neither the exact number nor the precise identity of the victims are required by international jurisprudence.³⁴⁹

CIRCUMSTANTIAL EVIDENCE IN PRACTICE – NON-EXHAUSTIVE LIST OF FACTORS TO ESTABLISH THE DEATH OF A PERSON

- Evidence of mistreatment directed against the person before his/her disappearance;
- Patterns of mistreatment and disappearances of other victims;
- The coincident or near-coincident time of death of other victims;
- The fact that the person was present in an area where an armed attack was carried out;
- The time, location, and circumstances in which the person was last seen;
- Behavior of soldiers in the vicinity where the person was last seen, as well as towards other civilians, at the relevant time; or
- Lack of contact by the person with others whom he/she would have been expected to contact, such as his/her family.

— KARADZIC TRIAL JUDGEMENT, PARA. 446, FN. 1476

216. **The person killed must be a protected person under the Geneva Conventions.**

217. The person killed must be a protected person under the four Geneva Conventions.³⁵⁰ This element is fundamental as it distinguishes wilful killing as a war crime from the ordinary crime of murder.

³⁴⁸ ICTY, *Kvočka et al.* [Appeal Judgement](#), para. 260 (“The Trial Chamber rightly stated that proof beyond reasonable doubt that a person was murdered does not necessarily require proof that the dead body of that person has been recovered. The fact of a victim’s death can be inferred circumstantially from all of the evidence presented to the Trial Chamber. All that is required to be established from that evidence is that the only reasonable inference from the evidence is that the victim is dead as a result of acts or omissions of the accused or of one or more persons for whom the accused is criminally responsible”); ICC, *Katanga Trial Judgement*, para. 768 (“To prove the victim’s death, the Prosecution need not show that the corpse of the deceased was found. It may tender circumstantial evidence of the death provided that the victim’s death is the only reasonable conclusion that can be drawn”). See also ICTY, *Karadzic Trial Judgement*, para. 446; ICTY, *Brdanin Trial Judgement*, paras 384-385

³⁴⁹ ICC, *Ngwen Trial Judgement*, para. 2698 (“while the Prosecutor must demonstrate, to the extent possible, the location, date and means of killing, she is not required to demonstrate for each killing the identity of the victim or that the corpse of the deceased has been found.”).

³⁵⁰ ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, para.. 287 (“The war crime of wilful killing occurs when it is committed by someone who, by action or omission, causes the death of one or more persons referred to in articles 13, 24, 25 and 26 Geneva Convention I, articles 13, 36 and 37 Geneva Convention II, article 4 Geneva Convention III and articles 4,13 and 20 Geneva Convention IV.”)

218. The persons protected under the four Geneva Conventions are:
- Members of the armed forces who are wounded, sick and/or shipwrecked at sea; [[Geneva Convention I](#), Article 13; [Geneva Convention II](#), Article 13];
 - Prisoners of war; [[Geneva Convention III](#), article 4];
 - Civilians who at a given moment and in any manner whatsoever find themselves in the hands of a party to the conflict or Occupying Power of which they are not nationals; [[Geneva Convention IV](#), Article 4].
 - Medical and religious personnel. [[Geneva Convention I](#), Articles 24, 25, 26; [Geneva Convention II](#), Articles 36 and 37; [Geneva Convention IV](#), Article 20].
219. If a person does not fall under any of these categories (e.g. a member of the armed forces, who is not wounded, sick or has not fallen into the power of the enemy) then causing his/her death shall not be considered as wilful killing.

CASE STUDY ON PROTECTED PERSONS

In *Kordic and Cerkez*, the ICTY Appeals Chamber considered the protected persons' status in the following cases:

- The Appeals Chamber reversed a conviction for the killing of a man and a woman in their apartment in April 1993. In reaching this conclusion, the Appeals Chamber considered that the evidence suggested that they were not civilian but members of the Territorial Defense and thus were not protected persons under any of the Geneva Conventions. (ICTY, *Kordic and Cerkez* [Appeal Judgement](#), para. 458).
- A man named Salih Omerdic had been stabbed and shot by Bosnian Croats soldier in April 1993 and died as a result of his injuries. Nothing in the evidence showed whether Salih Omerdic was a civilian or a member of the Territorial Defense. Therefore, the Appeals Chamber could not conclude that Salih Omerdic was a protected person under the Geneva Conventions. (ICTY, *Kordic and Cerkez* [Appeal Judgement](#), para. 460).
- The Appeals Chamber confirmed a conviction for the killing of a father and his son on April 1993. The evidence showed that they had their hands above their heads and had surrendered to the soldiers. Whether they were to be considered as civilians or combatants, the Appeals Chamber noted that they had fallen in the hands of the enemy, namely the Bosnian Croats soldiers. Thus, they were protected persons under the Geneva Conventions. (ICTY, *Kordic and Cerkez* [Appeal Judgement](#), paras 478-480).

220. Civilians as protected persons. For civilians who find themselves in the midst of an international conflict, the protection afforded under Article 4 of Geneva Convention IV is to be interpreted as to have the maximum extent of protection possible. Accordingly, the “nationality” requirement provided under Article 4 of Geneva Convention IV to define civilians should be ascertained upon a review of “the substance of relations” and not based on the legal characterisation of their nationality under domestic legislation (“allegiance criterion”). Thus, allegiance to a party to the conflict and control by this party over persons in a given territory, may be regarded as the crucial test.³⁵¹

³⁵¹ ICTY, *Celebici* [Appeal Judgement](#), paras 83-84 (“Article 4 of Geneva Convention IV is to be interpreted as intending to protect civilians who find themselves in the midst of an international, or internationalised, conflict to the maximum extent possible. The nationality requirement of Article 4 should therefore be ascertained upon a review of

221. As a result, as the forces of a party to the armed conflict gradually gain control of a territory, individual civilians in these successive areas automatically become protected persons within the meaning of Geneva Convention IV, provided they do not claim allegiance to the party in question.³⁵²

ICC, KATANGA AND NGUDJOLO CHUI DECISION ON THE CONFIRMATION OF CHARGES, PARAS 289-293 (FOOTNOTES OMITTED).

289. For this reason, and also further to article 4 GC IV, protected persons are those individual civilians who “at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the Conflict or Occupying Power of which they are not nationals”.

290. The ICTY Appeals Chamber in the Tadic case found that “nationality”, as provided for in article 4 GC IV, is not the crucial test for determining whether an individual civilian has protected status under GC IV. According to the ICTY Appeals Chamber:

[...] not only the text and the drafting history of the Convention but also, and more importantly, the Convention’s object and purpose suggests that allegiance to a Party to the conflict and correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.

291. This Chamber also adopts the approach that the term “nationals” in article 4 GC IV, which was drafted in 1949, reflected, at that time, the perceived importance of nationality in determining the allegiances of individual civilians. Although the nexus between nationality and allegiance remains an important factor in determining protected status for persons involved in international armed conflicts, as the ICTY jurisprudence demonstrates, it is no longer the definitive test.

292. Consequently, article 8(2)(a)(i) of the Statute applies to those cases in which protected civilians are killed “in the hands of” a party to the conflict. Under the case law of the international tribunals, an individual civilian falls “into the hands of” a party to the conflict when that individual is in the territory under the control of such a party.

293. Therefore, in the view of the Chamber, as the attacking forces of a party to the conflict gradually gain control of a targeted village, individual civilians in these successive areas automatically become protected persons within the meaning of article 4 GC IV, provided they do not claim allegiance to the party in question. Article 8(2)(a)(i) of the Statute thus prohibits the wilful killing of those civilians in such a circumstance.

“the substance of relations” and not based on the legal characterisation under domestic legislation. In today’s ethnic conflicts, the victims may be “assimilated” to the external State involved in the conflict, even if they formally have the same nationality as their captors, for the purposes of the application of humanitarian law, and of Article 4 of Geneva Convention IV specifically. The Appeals Chamber thus agrees with the Tadic Appeal Judgement that “even if in the circumstances of the case the perpetrators and the victims were to be regarded as possessing the same nationality, Article 4 would still be applicable [...]. The nationality of the victims for the purpose of the application of Geneva Convention IV should not be determined on the basis of formal national characterisations, but rather upon an analysis of the substantial relations, taking into consideration the different ethnicity of the victims and the perpetrators, and their bonds with the foreign intervening State.”). See also ICTY, *Prlic et al.* [Appeal Judgement](#), paras 354-355; ICTY, *Tadic* [Appeal Judgement](#) paras 165-166.

³⁵² ICC, *Katanga and Ngudjolo Chui* [Decision on the Confirmation of Charges](#), para. 293 (“in the view of the Chamber, as the attacking forces of a party to the conflict gradually gain control of a targeted village, individual civilians in these successive areas automatically become protected persons within the meaning of article 4 GC IV, provided they do not claim allegiance to the party in question.”)

c. Definition of wilful killing (Subjective Elements)³⁵³

222. Under the subjective element, wilful killing requires: (1) the intent to kill; and (2) the awareness of the protected status of the victim.
223. **The perpetrator’s intentionally and knowingly killed one or more persons.**³⁵⁴ Commentators suggest that because of the use of the notion “wilfully” in the ICC Statute, a lower *mens rea* standard could apply to this offense as “wilfully” has been interpreted by the jurisprudence of the ICTY as including direct intent and recklessness (*dolus eventualis*).³⁵⁵ It would also match the requirements for murder under Ukrainian criminal law,³⁵⁶ covering both direct intent, namely the intention to cause the death of the individual, as well as *dolus eventualis*, amounting to wilfully causing serious bodily harm with the knowledge on the part of the perpetrator that the death of the victim was a probable consequence of his/her act or omission.³⁵⁷

ICTY, PRLIC ET AL. APPEAL JUDGEMENT, VOL II OF III, PARA. 2793.

“the *mens rea* of murder requires that there was an act or omission, with the intention to kill or to inflict grievous bodily harm, in the reasonable knowledge that it might lead to death.”

224. If the death is accidental (not the foreseeable consequence of the actions or omissions of the perpetrator) then the conduct of the perpetrator does not constitute wilful killing.³⁵⁸ In addition, premeditation is not required for the war crime of wilful killing to be established.³⁵⁹

³⁵³ This section details the subjective elements for this war crime as detailed under international law. However, the general part of the CCU identifies subjective elements that apply to crimes. See Articles 23, 24 and 25 of the CCU. It will be necessary to consider the relevance of the subjective elements in the general part of the CCU when considering the elements of this crime as applied under Article 438 CCU.

³⁵⁴ [ICC Elements of Crimes](#), Article 8(2)(a)(i); [ICC Statute](#), Article 30.

³⁵⁵ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 346, para. 144; Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, p. 504, para. 1327, fn. 447; ICTY, *Blaskic Trial Judgement*, para. 152 (“[A]ccording to the Trial Chamber, the mens rea constituting all the violations of Article 2 of the Statute [containing the grave breaches] includes both guilty intent and recklessness which may be likened to serious criminal negligence”).

³⁵⁶ See articles 23-25, 115-118, 119 of the CCU.

³⁵⁷ ICTY, *Kordic and Cerkez Appeal Judgement*, para. 36 (“the accused, (...) intended to cause death or serious bodily injury which, as it is reasonable to assume, he had to understand was likely to lead to death”); ICTY, *Celebici Appeal Judgement*, para. 422 (“intended to cause death or serious bodily injury which, as it is reasonable to assume, he had to understand was likely to lead to death”). See also ICTY, *Brdanin Trial Judgement*, para. 381 (“an intention: – to kill, or – to inflict grievous bodily harm or serious injury, in the reasonable knowledge that such act or omission was likely to cause death”).

³⁵⁸ ICTY, *Celebici Trial Judgement*, para 433 (“The Trial Chamber is further instructed by the plain, ordinary meaning of the word ‘wilful’, as found in the Concise Oxford English Dictionary, which is ‘intentional, deliberate’. There is, on this basis, no divergence of substance between the use of the term ‘wilful killing’ and the French version, ‘l’homicide intentionnel’. (...) The essence to be derived from the usage of this terminology in both languages is simply that death should not be an accidental consequence of the acts of the accused.”).

³⁵⁹ ICTY, *Brdanin Trial Judgement*, para. 386 (“The Trial Chamber finds that the mens rea for murder and wilful killing does not require premeditation”).

225. **Awareness of the protected status of the victim.** The perpetrator must also be aware of the protected status of the victim. Awareness of the protected status does not mean that the perpetrator must have evaluated and concluded that the victim was a protected person under any of the four Geneva Conventions. What matters is the factual circumstances that establishes that status.³⁶⁰

d. Contextual Elements

226. In addition, as with all war crimes, it is necessary to demonstrate the following contextual elements:

- i. There was an international armed conflict;³⁶¹
- ii. The conduct took place in the context of and was associated with an international armed conflict;³⁶² and
- iii. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.³⁶³

- ii. **Offences of Mistreatment: Torture or Inhuman Treatment, including Experiments and Mutilation, as well as Wilfully Causing Great Suffering or Serious Injury (ICTY Statute, Article 2(b)-(c); ICC Statute, Articles 8(2)(a)(ii)-(iii), 8(2)(b)(x))**

227. This Section addresses a cluster of war crimes, which may be conceptualised as “offences of mistreatment”.³⁶⁴ The crimes have the same or similar genesis and sources. Some of their elements are identical whereas others differ, sometimes significantly. For ease of reference, they are set out in the ensuing four separate Sections.

³⁶⁰ ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, paras 297 (“article 8(2)(a)(i) of the Statute also requires that the perpetrator is ‘aware of the factual circumstances that established that protected status’ of the victim. Thus, it is not necessary for the perpetrator to have evaluated and concluded that the victim was in fact a protected person under any of the Geneva Conventions”), 305 (“the war crime of wilful killing provided for in article 8(2)(a)(i) of the Statute also requires that the perpetrator is ‘aware of the factual circumstances that established that protected status’ of the victim. Thus, it is not necessary for the perpetrator to have made the necessary value judgement to conclude that the victim did in fact have protected status under any of the 1949 Geneva Conventions”).

³⁶¹ See above, paras 188-189.

³⁶² See above, paras 190-198. See also [ICC Elements of Crimes](#), Article 8(2)(a)(i).

³⁶³ See above, para. 199. See also [ICC Elements of Crimes](#), Article 8(2)(a)(i).

³⁶⁴ See ICTY, *Celebici Trial Judgement*, paras 440-445. See also Werle and Jessberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, pp 486, 490, paras 1265-1266, 1281; ICTY, *Prlic et al. Trial Judgement*, Vol. I of VI, para. 114.

a. Torture (ICTY Statute, Article 2(b); ICC Statute, Article 8(2)(a)(ii))

APPLICABILITY: THE WAR CRIME OF TORTURE MAY BE CONSIDERED CRIMINALISED UNDER ARTICLE 438 OF THE CCU AS IT MAY BE SUBSUMED WITHIN "VIOLATIONS OF RULES OF WARFARE RECOGNISED BY INTERNATIONAL INSTRUMENTS CONSENTED TO BE BY BINDING BY THE VERKHOVNA RADA OF UKRAINE" TO WHICH ARTICLE 438(1) REFERS (PARAS 108-111).

Elements of the crimes: To convict a perpetrator for torture as a war crime the following elements need to be established:

(1) Objective elements

- The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons (paras 233-238).
- The person or persons were protected under one or more of the Geneva Conventions of 1949 (paras 239-241).

(2) Subjective elements

- The perpetrator intentionally and knowingly inflicted the severe physical or mental pain or suffering (para. 243).
- The perpetrator inflicted the pain or suffering for such purposes as obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind (paras 244-245).
- The perpetrator was aware of the factual circumstances that established the protected status of the persons under one or more of the Geneva Conventions of 1949 (para. 126).

(3) Contextual elements

- There is an international armed conflict (para. 247).
- The conduct of the perpetrator took place in the context and was associated with the conflict (para. 247).
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict (para. 247).

i. Applicability under Article 438

228. Article 438 of the CCU does not explicitly mention the war crime of torture. However this offence may be subsumed within “violations of rules of warfare recognised by international instruments consented to be binding by the Verkhovna Rada of Ukraine” to which Article 438(1) refers. As explained below, this violation of IHL is prohibited under international instruments ratified by Ukraine and has been recognised as a war crime, particularly by those same international instruments. Thus it may be concluded that the violation is criminalised under Article 438.

229. **Torture is a violation of rules of warfare recognised by international treaties ratified by Ukraine.** Torture is a violation of IHL contained in from the four [Geneva Conventions of 1949](#) and [Additional Protocol I](#).³⁶⁵ Ukraine is a State party to the Geneva Conventions and Additional Protocol I.³⁶⁶
230. **Recognition as a war crime.** Torture as a violation of IHL is recognised as a war crime in international armed conflict, because it is a grave breach of the Geneva Conventions, as well as of Additional Protocol I.³⁶⁷ Such criminalisation has the status of customary international law.³⁶⁸ Finally, torture is expressly codified as a war crime in international armed conflict in the [ICTY Statute](#) (Article 2(b)) and the [ICC Statute](#) (Article 8(2)(a)(ii)).³⁶⁹
231. The foregoing analysis supports a conclusion that torture can be considered criminalised under Article 438 of the CCU.

ii. Definition of Torture (Objective Elements)

232. The objective elements of torture are: (1) the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons; and (2) the person or persons were protected under one or more of the Geneva Conventions of 1949.³⁷⁰ These elements have the status of customary international law.³⁷¹
233. **The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.**
234. Torture may be committed by action or culpable omission.³⁷²

³⁶⁵ [Geneva Convention I](#), Article 12; [Geneva Convention II](#), Article 12; [Geneva Convention III](#), Articles 17, 87; [Geneva Convention IV](#), Article 32; [Additional Protocol I](#), Article 75(1)-(2)(a).

³⁶⁶ Ukraine ratified the Geneva Conventions on 3 August 1954, and Additional Protocol I on 25 January 1990. ICRC, IHL Database, Treaties, States Parties and Commentaries, [Ukraine](#). The prohibition of torture also has the status of customary international law. ICRC, IHL Database, Customary IHL, [Rule 90. Torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment, are prohibited](#). Further, the prohibition of torture comprises *ius cogens*, that is a peremptory norm of international law from which there can be no derogation. ICTY, [Celebici Trial Judgement](#), para. 454.

³⁶⁷ [Geneva Convention I](#), Articles 49-50 ; [Geneva Convention II](#), Articles 50-51; [Geneva Convention III](#), Articles 129-130; [Geneva Convention IV](#), Articles 146-147; [Additional Protocol I](#), Article 85(1)-(2), (5); ICRC, Advisory Service on International Humanitarian Law, [Prohibition and punishment of torture and other forms of ill-treatment](#), 2014, p. 2.

³⁶⁸ ICRC, IHL Database, Customary IHL, [Rule 156. Serious violations of international humanitarian law constitute war crimes](#).

³⁶⁹ [ICTY Statute](#), Article 2(b); [ICC Statute](#), Article 8(2)(a)(ii). See also [ICC Statute](#), Article 8(2)(c)(i) applicable in the context of non-international armed conflict. See also above, paras [162-182](#).

³⁷⁰ [ICC Elements of Crimes](#), Article 8(2)(a)(ii)-1.

³⁷¹ ICTY, [Kunarac et al. Trial Judgement](#), paras 483-485. The *Kunarac et al.* Trial Judgement sets out those of the elements that are uncontroversial and customary, which are largely reflected in the ICC Elements of Crimes. The *Kunarac et al.* Trial Judgement also notes, and sets aside, the elements in relation to which it is contentious whether they are customary. They are largely not reflected in the ICC Elements of Crimes.

³⁷² ICC, [Ongwen Trial Judgement](#), para. 2700 (“The crime of torture, whether as a crime against humanity or war crime, is committed either by act or omission and has a common material element that “[t]he perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.”) in relation to the offence of torture in non-international armed conflict under Article 8(2)(c)(i) but the consideration also applies *mutatis mutandis* to the present crime; ICTY, [Kunarac et al. Trial Judgement](#), para. 483 (“Torture consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental.”).

235. *Physical or mental pain or suffering*. The inflicted physical or mental pain or suffering does not necessarily have to involve physical injury, impairment of a bodily function or death. Any injury that is caused does not have to be permanent, and the consequences of torture do not have to be visible.³⁷³
236. *Severity*. The severity implies an important degree of pain or suffering.³⁷⁴ It is well established in the case law of the *ad hoc* international criminal tribunals that this heightened, acute degree of pain or suffering distinguishes the crime of torture from the crime of inhuman treatment, as well as from the crime of wilfully causing great suffering or serious injury to body or health, both of which require comparatively lower pain or suffering.³⁷⁵
237. This distinction was not replicated in the language chosen in the ICC Elements of Crimes for torture and inhuman treatment, which both use the same language “severe”.³⁷⁶ Nonetheless at this point recent ICC pre-trial jurisprudence seems to acknowledge a difference of degree in the severity required between the crimes of torture and inhuman treatment.³⁷⁷
238. There is no specifically identified threshold level of severe suffering or pain to be inflicted for mistreatment to amount to torture. This can be assessed only on a case-by-case basis in the light of all the circumstances of the case. The severity requirement may be met by a single act or a combination of acts viewed as a whole.³⁷⁸ In addition,

³⁷³ ICC, *Ongwen Trial Judgement*, para. 2701 (“It is not necessary to prove that the pain or suffering involved specific physical injury (such as organ failure), impairment of a bodily function or death. The pain and suffering may be either physical or mental. The consequences of torture do not have to be visible, nor must the injury be permanent.”); ICC, *Al Hassan Decision on Confirmation of charges*, para. 231, both in relation to the offence of torture in non-international armed conflict under Article 8(2)(c)(i) but the consideration may also apply *mutatis mutandis* to the present crime.

³⁷⁴ ICC, *Ongwen Trial Judgement*, para. 2701 (“The severity implies an important degree of pain and suffering”); ICC, *Al Hassan ICC, Al Hassan Decision on Confirmation of charges*, para. 230 (“Un degré important de douleur et de souffrance doit être atteint pour qu’un crime puisse être qualifié de torture au regard du Statut”) both in relation to the offence of torture in non-international armed conflict under Article 8(2)(c)(i) but the consideration may also apply *mutatis mutandis* to the present crime.

³⁷⁵ ICTY, *Prlic et al. Trial Judgement*, Vol. I of VI, para. 119, fn. 236 (“The Chamber notes that the extent of mental or physical suffering required for inhuman treatment is less than that required for torture”); ICTY, *Naletilic and Martinovic Trial Judgement*, para. 246 (“The degree of physical or mental suffering required to prove either one of th[e] offences [of inhuman treatment or cruel treatment] is lower than the one required for torture, though at the same level as the one required to prove a charge of ‘wilfully causing great suffering or serious injury to body or health.’”); ICTY, *Brdanin Trial Judgement*, para. 483 (“The seriousness of the pain or suffering sets torture apart from other forms of mistreatment”). See paras 248-269, 291-310.

³⁷⁶ The ICC Elements of Crimes for torture and for inhuman treatment both use the same language “severe” physical or mental pain or suffering, Article 8(2)(a)(ii)-1, -2, Element 1; Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 334, para. 92.

³⁷⁷ See ICC, *Al Hassan Decision on Confirmation of charges*, paras 230 (“c’est le caractère « aigu » de la douleur ou de la souffrance qui différencie le crime de torture d’autres actes de mauvais traitements.”), 232 (“La qualification de torture doit être réservée au degré le plus fort de traitement inhumain, en raison du caractère spécialement infamant de celle-ci. Les mauvais traitements qui n’atteignent pas le seuil de gravité de la torture peuvent, le cas échéant, constituer [...] des traitements cruels constitutifs de crime de guerre.”), 257, 259 in relation to the offence of torture in non-international armed conflict under Article 8(2)(c)(i) but the consideration may also apply *mutatis mutandis* to the present crime.

³⁷⁸ ICC, *Ongwen Trial Judgement*, para. 2701 (“The severity implies an important degree of pain and suffering and may be met by a single act or by a combination of acts when viewed as a whole. This can be assessed only on a case-by-case basis in the light of all the circumstances of the case.”); ICC, *Al Hassan Decision on Confirmation of charges*, para. 230 both in relation to the offence of torture in non-international armed conflict under Article 8(2)(c)(i) but

objective and subjective criteria as well as the social, cultural and religious context can be taken into consideration in assessing the seriousness of the mistreatment.³⁷⁹

ICTY, *BRDANIN TRIAL JUDGEMENT*, PARA. 484 (FOOTNOTES OMITTED), ON RELEVANT CRITERIA TO ASSESS THE SEVERITY:

In assessing the seriousness of any mistreatment, the objective severity of the harm inflicted must be considered, including the nature, purpose and consistency of the acts committed. Subjective criteria, such as the physical or mental condition of the victim, the effect of the treatment and, in some cases, factors such as the victim's age, sex, state of health and position of inferiority will also be relevant in assessing the gravity of the harm.

CASE STUDY: EXAMPLES OF SEVERE PHYSICAL OR MENTAL PAIN OR SUFFERING AMOUNTING TO TORTURE

International jurisprudence has considered that the following examples of severe physical or mental pain or suffering can amount to torture:

- Lashing as a torture method following arrest.³⁸⁰
- Inflicting the corporal punishment of “15 lashes” on a prisoner who is bound naked to a metal structure and hooded.³⁸¹
- Inflicting corporal punishments by means of electric cables or administering electric shocks.³⁸²
- Causing burn injuries.³⁸³
- Inducing the sensation of suffocation using water, including by way of immersion in dirty water or the simulation of drowning.³⁸⁴
- Simulating executions or amputations.³⁸⁵
- Forcing someone to witness the execution or rape of another person.³⁸⁶
- Forcing someone to witness severe mistreatment inflicted on their relative.³⁸⁷
- Forcing victims to bury the bodies of their neighbours and friends.³⁸⁸

the consideration may also apply *mutatis mutandis* to the present crime.

³⁷⁹ ICTY, *Brdanin Trial Judgement*, para. 484; ICTY, *Brdanin Appeal Judgement*, paras 246-252; ICC, *Al Hassan Decision on Confirmation of charges*, para. 230 (“Le contexte social, culturel et religieux relatif aux victimes peut également être pris en considération, en tant qu’élément pouvant aggraver les souffrances.”).

³⁸⁰ ICC, *Al Hassan Decision on Confirmation of charges*, para. 231.

³⁸¹ ICC, *Al Hassan Decision on Confirmation of charges*, para. 231.

³⁸² ICC, *Al Hassan Decision on Confirmation of charges*, para. 231; ICTY, *Martic Trial Judgement*, para. 76.

³⁸³ ICTY, *Martic Trial Judgement*, para. 76.

³⁸⁴ ICC, *Al Hassan Decision on Confirmation of charges*, para. 231.

³⁸⁵ ICC, *Al Hassan Decision on Confirmation of charges*, para. 231.

³⁸⁶ ICC, *Al Hassan Decision on Confirmation of charges*, para. 231; ICTY, *Martic Trial Judgement*, para. 76; ICTY, *Furundzija Trial Judgement*, paras 267-269.

³⁸⁷ ICTY, *Kvočka et al. Trial Judgement*, para. 149.

³⁸⁸ *Martic Trial Judgement*, para. 76.

- Reverse hanging (also known as “Palestinian hanging”, “lestrapade” or “strappado”, in which the victim’s hands are tied behind their back and the victim is suspended by a rope attached to the wrists, typically resulting in dislocated shoulders).³⁸⁹
- Pulling out nails.³⁹⁰
- Inflicting prolonged isolation including sensory isolation.³⁹¹
- Rape.³⁹²

239. **The person or persons were protected under one or more of the Geneva Conventions of 1949.** The persons upon whom severe physical or mental pain or suffering was inflicted must be protected under one of the four Geneva Conventions namely:
- Members of armed forces and combatants who are wounded, sick and/or shipwrecked ([Geneva Convention I](#), Article 13; [Geneva Convention II](#), Article 13);
 - Medical and religious personnel ([Geneva Convention I](#), Articles 24, 25, 26; [Geneva Convention II](#), Articles 36, 37; [Geneva Convention IV](#), Article 20);
 - Prisoners of war ([Geneva Convention III](#), Article 4); or
 - Civilians who at a given moment and in any manner whatsoever find themselves in the hands of a party to the armed conflict or occupying power of which they are not nationals ([Geneva Convention IV](#), Articles 4, 13).³⁹³
240. *Allegiance to a party and that party’s control over persons and territory.* Concerning the last category of civilians under Article 4 of Geneva Convention IV, strict, formal/legal nationality is not as important as the substance of relations of victims vis-à-vis perpetrators.³⁹⁴ Allegiance to a party to the armed conflict, and control by this party over persons in a given territory, may be regarded as the crucial test.³⁹⁵ As attacking

³⁸⁹ ICC, *Al Hassan Decision on Confirmation of charges*, para. 231; ECtHR, *Kurt et al. v. Turkey Court (Second Section) Judgement*, paras 29-30.

³⁹⁰ ICC, *Al Hassan Decision on Confirmation of charges*, para. 231.

³⁹¹ ICC, *Al Hassan Decision on Confirmation of charges*, para. 231.

³⁹² ICTY, *Martic Trial Judgement*, para. 76; ICTY, *Kunarac et al. Appeal Judgement*, paras 150-151.

³⁹³ ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, paras 357-358 in relation to the offence of inhuman treatment under Article 8(2)(a)(ii)-2 but the consideration may also apply *mutatis mutandis* to the present crime since this element is identical for both offences. See also ICTY, *Prlic et al. Trial Judgement*, Vol. I of VI, para. 98.

³⁹⁴ ICTY, *Celebici Appeal Judgement*, paras 83-84 (“Article 4 of Geneva Convention IV is to be interpreted as intending to protect civilians who find themselves in the midst of an international, or internationalised, conflict to the maximum extent possible. The nationality requirement of Article 4 should therefore be ascertained upon a review of ‘the substance of relations’ and not based on the legal characterisation under domestic legislation. In today’s ethnic conflicts, the victims may be ‘assimilated’ to the external State involved in the conflict, even if they formally have the same nationality as their captors, for the purposes of the application of humanitarian law, and of Article 4 of Geneva Convention IV specifically. The Appeals Chamber thus agrees with the Tadic Appeal Judgement that ‘even if in the circumstances of the case the perpetrators and the victims were to be regarded as possessing the same nationality, Article 4 would still be applicable.’”).

³⁹⁵ ICTY, *Tadic Appeal Judgement*, paras 165-166 (“This legal approach, hinging on substantial relations more than on formal bonds, becomes all the more important in present-day international armed conflicts. While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance. Or, put another way, ethnicity may become determinative of national allegiance. Under these conditions, the requirement of nationality is even less adequate to define protected persons. In such conflicts, not only the text and the drafting history of the Convention but also, and more importantly, the Convention’s object and

forces of a party to the armed conflict gradually gain control of territory, individual civilians in these successive areas automatically become protected persons, provided they do not claim allegiance to the party in question.³⁹⁶

241. **No requirement of official involvement or that the person(s) be “in the custody or under the control of the accused”** – It is now well established that torture as a war crime does not require the presence of a state official or of any other authority-wielding person in the torture process, contrary to the definition of torture under Article 1 of the [Convention against Torture](#).³⁹⁷ In addition and conversely to the ICC definition of torture as a crime against humanity, there is no requirement for torture as a war crime that the person(s) be “in the custody or under the control of the perpetrator”.³⁹⁸

iii. Definition of Torture (Subjective Elements)³⁹⁹

242. The subjective elements of torture under the ICC framework are: (1) the perpetrator intentionally and knowingly inflicted the severe physical or mental pain or suffering; (2) the perpetrator inflicted the pain or suffering for such purposes as

purpose suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.”).

³⁹⁶ ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, paras 292 (“Under the case law of the international tribunals, an individual civilian falls ‘into the hands of’ a party to the conflict when that individual is in the territory under the control of such a party.”), 293 (“Therefore, in the view of the Chamber, as the attacking forces of a party to the conflict gradually gain control of a targeted village, individual civilians in these successive areas automatically become protected persons within the meaning of article 4 GC IV, provided they do not claim allegiance to the party in question. Article 8(2)(a)(i) of the Statute thus prohibits the wilful killing of those civilians in such a circumstance [Element 2 of which applies equally to Article 8(2)(a)(ii) torture or inhuman treatment, including biological experiments]”), 358 (“Article 8(2)(a)(ii) of the Statute therefore applies to those situations in which protected civilians are inhumanely treated ‘in the hands of’ a party to the conflict, and thus also applies to the inhuman treatment of the protected persons by an attacking force, when such conduct occurs after the overall attack has ended, and defeat or full control of the targeted village has been secured. In addition, this provision prohibits perpetrators from inflicting inhuman treatment on protected persons as these forces move toward areas of enemy resistance in a targeted village”) in relation to the offence of inhumane treatment under Article 8(2)(a)(ii)-2 but the consideration may also apply *mutatis mutandis* to the present crime since this element is identical for both offenses.

³⁹⁷ ICTY, *Kunarac et al. Trial Judgement*, para. 496 (“The Trial Chamber concludes that the definition of torture under international humanitarian law does not comprise the same elements as the definition of torture generally applied under human rights law. In particular, the Trial Chamber is of the view that the presence of a state official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law.”); ICTY, *Kunarac et al. Appeal Judgement*, para. 148 (“The Trial Chamber in the present case was therefore right in taking the position that the public official requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside of the framework of the Torture Convention.”).

³⁹⁸ Compare [ICC Elements of Crimes](#), Article 8(2)(a)(ii)-1 and Article 7(1)(f). See Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, p. 46 (“A few delegations pointed out that the definition of torture as a crime against humanity contains the requirement that the victim must be ‘in the custody or under the control of the accused’, which should be included as an element also for the war crime of torture. This proposal did not gain much support. On the basis of the inclusion of the footnote ‘As element 3 requires that all victims must be protected persons under one or more of the Geneva Conventions of 1949, these elements do not include the custody or control requirement found in the elements of article 7(1)(e)’, the delegations which were in favour of the insertion of custody or control as an element withdrew the proposal.”).

³⁹⁹ This section details the subjective elements for this war crime as detailed under international law. However, the general part of the CCU identifies subjective elements that apply to crimes. See Articles 23, 24 and 25 of the CCU. It will be necessary to consider the relevance of the subjective elements in the general part of the CCU when considering the elements of this crime as applied under Article 438 CCU.

obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind; and (3) the perpetrator was aware of the factual circumstances that established protected status under one or more of the Geneva Conventions of 1949.⁴⁰⁰

243. **The perpetrator intentionally and knowingly inflicted the severe physical or mental pain or suffering.**⁴⁰¹ The perpetrator does not need to have completed a value judgment as to the severity of the pain or suffering.⁴⁰²
244. **The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.** This subjective element of special intent as to the purpose of the pain or suffering is additional to the required intent and knowledge as to the infliction of the pain or suffering.⁴⁰³ This special intent distinguishes the crime of torture from the crime of inhuman treatment, as well as from the crime of wilfully causing great suffering or serious injury to body or health, both of which only require intent and knowledge as to the infliction of the pain or suffering.⁴⁰⁴
245. The list of specific purposes expressly mentioned (obtaining information or a confession, punishment, intimidation or coercion or any reason based on discrimination of any kind) is non-exhaustive.⁴⁰⁵ The specific purpose in question must be part of the motivation behind the conduct, but it does not need to be the sole or even the pre-

⁴⁰⁰ [ICC Elements of Crimes](#), Article 8(2)(a)(ii)-1; [ICC Statute](#), Article 30.

⁴⁰¹ This subjective element flows from ordinary intent and knowledge under Article 30 of the [ICC Statute](#).

⁴⁰² [ICC Elements of Crimes](#), General introduction, para. 4 (“With respect to mental elements associated with elements involving value judgement, such as those using the terms ‘inhumane’ or ‘severe’, it is not necessary that the perpetrator personally completed a particular value judgement, unless otherwise indicated.”); ICC, [Ongwen Trial Judgement](#), para. 2707 (“As concerns the severe pain or suffering required, the perpetrator need not have completed a value judgment as to the severity of the pain inflicted.”) in relation to torture in non-international armed conflict under Article 8(2)(c)(i) but the consideration can apply *mutatis mutandis* to the present crime of torture in international armed conflict.

⁴⁰³ ICC, [Ongwen Trial Judgement](#), para. 2705 (“In addition to the mental elements specified in Article 30, the war crime of torture further requires that: The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.”) in relation to the offence of torture under Article 8(2)(c)(i) but the consideration may also apply *mutatis mutandis* to the present crime.

⁴⁰⁴ ICTY, [Celebici Trial Judgement](#), para. 552 (“Treatment that does not meet the purposive requirement for the offence of torture in common article 3, constitutes cruel treatment”); ICTY, [Naletilic and Martinovic Trial Judgement](#), para. 340 (“The Commentary to Article 147 of Geneva Convention IV describes the offence of wilfully causing great suffering as referring to suffering which is inflicted without ends in view for which torture [...] [is] carried out. It could be inflicted for other motives such as [...] revenge or out of sadism”); ICC, [Al Hassan Decision on Confirmation of charges](#), para. 235 (“La présence de cet élément [que l’acte de torture en tant que crime de guerre soit exécuté dans un but en particulier] permettra en outre de distinguer la torture d’autres infractions similaires.”), the specific passages from [Celebici](#) and [Al Hassan](#) concern the offences of torture and cruel treatment in non-international armed conflict but the consideration also applies *mutatis mutandis* to the crimes of torture and inhuman treatment in international armed conflict. See below See paras [248-269](#), [291-310](#).

⁴⁰⁵ ICTY, [Celebici Trial Judgement](#), para. 470 (“The use of the words ‘for such purposes’ in the customary definition of torture, indicate that the various listed purposes do not constitute an exhaustive list, and should be regarded as merely representative.”); ICTY, [Mrksic et al. Trial Judgement](#), para. 515 (“Further, the act or omission must have been carried out with a specific purpose. This includes, albeit not exhaustively, the purpose to obtain information or a confession, to punish, intimidate or coerce the victim or a third person, or to discriminate, on any ground, against the victim or a third person.”) in relation to the offence of torture in non-international armed conflict but the consideration may also apply *mutatis mutandis* to the present crime.

dominant motivation behind the conduct.⁴⁰⁶ In the case of rape and sexual violence, a sexual motivation can coexist with, and does not negate, an intent of torturous purpose.⁴⁰⁷

246. **The perpetrator was aware of the factual circumstances that established protected status under one or more of the Geneva Conventions of 1949.** With respect to civilians and nationality, the perpetrator needs only to know that the victim belonged to an adverse party to the armed conflict.⁴⁰⁸

iv. Contextual Elements

247. In addition, as with all war crimes, it is necessary to demonstrate the following contextual elements:
- i. There was an international armed conflict;⁴⁰⁹
 - ii. The conduct took place in the context of and was associated with an international armed conflict;⁴¹⁰ and
 - iii. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.⁴¹¹

⁴⁰⁶ ICC, *Ongwen Trial Judgement*, para. 2706 (“This specific purpose must be part of the motivation behind the conduct but it need not be the ‘predominant or sole purpose’”); ICC, *Al Hassan Decision on Confirmation of charges*, para. 235, both in relation to the offence of torture in non-international armed conflict under Article 8(2)(c)(i) but the consideration may also apply *mutatis mutandis* to the present crime. See also ICTY, *Mrksic et al. Trial Judgement*, para. 515 (“The prohibited purpose need not be the sole or the main purpose of the act or omission in question”) in relation to the offence of torture in non-international armed conflict but the consideration may also apply *mutatis mutandis* to the present crime.

⁴⁰⁷ ICTY, *Kunarac et al. Appeal Judgement*, paras (“The Appellants argue that the intention of the perpetrator was of a sexual nature, which, in their view, is inconsistent with an intent to commit the crime of torture. In this respect, the Appeals Chamber wishes to assert the important distinction between “intent” and “motivation”. The Appeals Chamber holds that, even if the perpetrator’s motivation is entirely sexual, it does not follow that the perpetrator does not have the intent to commit an act of torture or that his conduct does not cause severe pain or suffering, whether physical or mental, since such pain or suffering is a likely and logical consequence of his conduct. In view of the definition, it is important to establish whether a perpetrator intended to act in a way which, in the normal course of events, would cause severe pain or suffering, whether physical or mental, to his victims. The Appeals Chamber concurs with the findings of the Trial Chamber that the Appellants did intend to act in such a way as to cause severe pain or suffering, whether physical or mental, to their victims, in pursuance of one of the purposes prohibited by the definition of the crime of torture, in particular the purpose of discrimination.”), 155 (“Furthermore, in response to the argument that the Appellant’s avowed purpose of sexual gratification is not listed in the definition of torture, the Appeals Chamber restates the conclusions of the Trial Chamber that acts need not have been perpetrated solely for one of the purposes prohibited by international law. If one prohibited purpose is fulfilled by the conduct, the fact that such conduct was also intended to achieve a non-listed purpose (even one of a sexual nature) is immaterial.”); ICTY, *Celebici Trial Judgement*, para. 471 (“[Rape and other sexual assaults can] meet the purposive requirements of torture as, during armed conflicts, the purposive elements of intimidation, coercion, punishment or discrimination can often be integral components of behaviour, thus bringing the relevant conduct within the definition.”).

⁴⁰⁸ *ICC Elements of Crimes*, Article 8(2)(a)(i), Element 3, fn. 33, applicable to the corresponding element in each crime under Article 8(2)(a). See also ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, para. 360 applying fn. 33 by extension to all protected persons under the four Geneva Conventions (“In accordance with footnote 33 of the Elements of Crimes, it is not necessary for the perpetrator to have evaluated and concluded that the victim was a legally a protected person under any of the four Geneva Conventions, but rather that the perpetrator knows that ‘the victim belonged to an adverse party to the conflict.’”) in relation to the offence of inhuman treatment under Article 8(2)(a)(ii)-2 but the consideration may also apply *mutatis mutandis* to the present crime since this element is identical for both offences.

⁴⁰⁹ See above, paras 188-189.

⁴¹⁰ See above, paras 190-198. See also *ICC Elements of Crimes*, Article 8(2)(a)(ii)-1.

⁴¹¹ See above, para. 199. See also *ICC Elements of Crimes*, Article 8(2)(a)(ii)-1.

- b. Inhuman Treatment, including Biological Experiments (ICTY Statute, Article 2(b); ICC Statute, Article 8(2)(a)(ii))⁴¹²

APPLICABILITY: THE WAR CRIME OF INHUMAN TREATMENT, INCLUDING BIOLOGICAL EXPERIMENTS, MAY BE CONSIDERED CRIMINALISED UNDER ARTICLE 438 OF THE CCU. INHUMAN TREATMENT MAY BE COVERED, IN PART, BY THE OFFENCE OF "CRUEL TREATMENT OF PRISONERS OF WAR OR CIVILIANS" OR MAY BE SUBSUMED WITHIN "VIOLATIONS OF RULES OF WAR FARERECOGNISED BY INTERNATIONAL INSTRUMENTS CONSENTED TO BE BINDING BY THE VERKHOVNA RADA OF UKRAINE" TO WHICH ARTICLE 438(1) REFERS (PARAS 248-253).

Elements of the crimes: To convict a perpetrator for inhuman treatment including biological experiments as war crimes the following elements need to be established:

(1) Objective elements

- The perpetrator (a) inflicted severe physical or mental pain or suffering upon one or more persons (paras 253-259); or (b) subjected one or more persons to a particular biological experiment (para. 260) where
- In relation to biological experiments only:
- 3. the experiment was non-therapeutic and was neither justified by medical reasons nor carried out in the person's or persons' interest (para. 261); and
- the experiment seriously endangered the physical or mental health or integrity of the person or persons (para. 262).
- The person or persons were protected under one or more of the Geneva Conventions of 1949 (paras 263-264).

(2) Subjective elements

- The perpetrator (a) intentionally and knowingly inflicted the severe physical or mental pain or suffering (para. 266); or (b) intentionally and knowingly subjected the person or persons to the particular biological experiment (para. 267).
- The perpetrator was aware of the factual circumstances that established the protected status of the persons under one or more of the Geneva Conventions of 1949 (para. 268).

(3) Contextual elements

- There is an international armed conflict (para. 269).
- The conduct of the perpetrator took place in the context and was associated with the conflict (para. 269).
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict (para. 269).

⁴¹² The war crime of biological experiments may be conceptualised as a subset of the crime of inhuman treatment. Werle and Jessberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, p. 489, para. 1280.

i. Applicability under Article 438

248. The war crime of inhuman treatment could be considered explicitly covered, in part, by the offence of “cruel treatment of prisoners of war or civilians” enumerated by Article 438 of the CCU. Moreover inhuman treatment including biological experiments may be subsumed within “violations of rules of warfare recognised by international instruments consented to be binding by the Verkhovna Rada of Ukraine” to which Article 438(1) refers. As explained below, these violations of IHL are prohibited under international instruments ratified by Ukraine and have been recognised as war crimes, particularly by those same international instruments. Thus it may be concluded that the violations are criminalised under Article 438.
249. **Inhuman treatment including biological experiments are violations of rules of warfare recognised by international treaties ratified by Ukraine.** Inhuman treatment including biological experiments are violations of IHL is contained in the four [Geneva Conventions of 1949](#) and [Additional Protocol I](#).⁴¹³ Ukraine is a State party to the Geneva Conventions and Additional Protocol I.⁴¹⁴
250. **Recognition as war crimes.** Inhuman treatment including biological experiments as IHL violations are recognised as war crimes, because they are grave breaches of the Geneva Conventions, as well as of Additional Protocol I.⁴¹⁵ Such criminalisation has the status of customary international law.⁴¹⁶ Finally, inhuman treatment including biological experiments are expressly codified as war crimes by Article 2(b) of the [ICTY Statute](#) and Article 8(2)(a)(ii) of the [ICC Statute](#).⁴¹⁷
251. **Inhuman treatment as explicitly covered in part by “cruel treatment of prisoners of war or civilians”.** Under the ICC and ICTY Statutes and case law, inhuman treatment and cruel treatment are analogous offences. Strictly speaking the wording “inhuman treatment” is used in international armed conflict and the wording “cruel treatment” is used in non-international armed conflict, but the two crimes have similar require-

⁴¹³ [Geneva Convention I](#), Article 12; [Geneva Convention II](#), Article 12; [Geneva Convention III](#), Article 13; [Geneva Convention IV](#), Article 27; [Additional Protocol I](#), Article 75(1).

⁴¹⁴ Ukraine ratified the Geneva Conventions on 3 August 1954, and Additional Protocol I on 25 January 1990. ICRC, IHL Database, Treaties, States Parties and Commentaries, [Ukraine](#). The prohibitions of inhuman treatment including biological experiments also have the status of customary international law. ICRC, IHL Database, Customary IHL, [Rule 90. Torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment, are prohibited](#); [Rule 92. Mutilation and Medical, Scientific or Biological Experiments](#).

⁴¹⁵ [Geneva Convention I](#), Articles 49-50; [Geneva Convention II](#), Articles 50-51; [Geneva Convention III](#), Articles 129-130; [Geneva Convention IV](#), Articles 146-147; [Additional Protocol I](#), Article 85(1)-(2), (5). ICRC, Advisory Service on International Humanitarian Law, [Prohibition and punishment of torture and other forms of ill-treatment](#), 2014, p. 2.

⁴¹⁶ ICRC, IHL Database, Customary IHL, [Rule 156. Serious violations of international humanitarian law constitute war crimes](#).

⁴¹⁷ [ICTY Statute](#), Article 2(b); [ICC Statute](#), Article 8(2)(a)(ii), see also Article 8(2)(c)(i) in the context of non-international armed conflict. See also above, paras [166-182](#).

ments.⁴¹⁸ In addition, the notion of prisoners of war in Article 438 applies only in international armed conflict,⁴¹⁹ implying inhuman treatment.

252. The foregoing analysis supports a conclusion that inhuman treatment including biological experiments are considered criminalised under Article 438 of the CCU.

ii. Definition of Inhuman Treatment, including Biological Experiments (Objective Elements)

253. The objective elements of inhuman treatment including biological experiments are: (1) the perpetrator (a) inflicted severe physical or mental pain or suffering upon one or more persons; or (b) subjected one or more persons to a particular biological experiment where (i) the experiment was non-therapeutic and was neither justified by medical reasons nor carried out in the person's or persons' interest; and (ii) the experiment seriously endangered the physical or mental health or integrity of the person or persons. Additionally, (2) the person or persons were protected under one or more of the Geneva Conventions of 1949.⁴²⁰

254. **For the crime of inhuman treatment,⁴²¹ the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.**

255. Inhuman treatment may be committed by an act or an omission.⁴²²

256. *Physical or mental pain or suffering.* The physical or mental pain or suffering inflicted upon the victim does not need to be lasting or irremediable, so long as its effect on the victim is more than temporary and/or is real and serious.⁴²³

257. Any sexual violence inflicted on the physical and moral integrity of a person by means of threat, intimidation or force; all forms of sexual violence not including penetration; as well as rape, may constitute inhuman treatment.⁴²⁴

⁴¹⁸ ICC, *Al Hassan Decision on Confirmation of charges*, para. 257; ICTY, *Celebici, Appeal Judgement*, para. 426; ICTY, *Celebici Trial Judgement*, para. 551 (“the Trial Chamber is of the view that cruel treatment is treatment which causes serious mental or physical suffering or constitutes a serious attack upon human dignity, which is equivalent to the offence of inhuman treatment in the framework of the grave breaches provisions of the Geneva Conventions.”); Werle and Jessberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, p. 491, para. 1285.

⁴¹⁹ *Geneva Convention III*, Articles 2, 4; *Additional Protocol I*, Articles 1, 44.

⁴²⁰ *ICC Elements of Crimes*, Article 8(2)(a)(ii)-2, -3.

⁴²¹ *ICC Elements of Crimes*, Article 8(2)(a)(ii)-2.

⁴²² ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, para. 357 (“Article 8(2)(a)(ii)-2 of the Elements of Crimes establishes as a war crime a conduct which is committed by one who causes — by action or omission — severe physical or mental pain or suffering of one or more persons who are accorded protected status under articles 13, 24, 25 and 26 GC I, articles 13, 36 and 37 GC II, article 4 GC III and articles 4, 13 and 20 GC IV”).

⁴²³ ICC, *Al Hassan Decision on Confirmation of charges*, para. 255 (“Il n'est pas nécessaire de prouver que le dommage causé est permanent ou irrémédiable, mais il doit avoir, sur la victime, plus que des effets temporaires ou passagers”) in relation to the offence of cruel treatment in non-international armed conflict under Article 8(2)(c)(i) but the consideration may also apply *mutatis mutandis* to the present crime; ICTY, Krnojelac *Trial Judgement*, paras 131, 144.

⁴²⁴ ICTY, *Prlic et al. Trial Judgement*, Vol. I of VI, para. 116 (“In keeping with the case-law of the Tribunal, any sexual violence inflicted on the physical and moral integrity of a person by means of threat, intimidation or force, in such as a way as to degrade or humiliate the victim, may constitute inhuman treatment under Article 2(b) of the Statute. Rape is thereby prohibited, as well as all forms of sexual violence not including penetration.”).

258. *Severity*. There is no specifically identified threshold level of severe suffering or pain to be inflicted for mistreatment to amount to inhuman treatment. The assessment is to be conducted on a case by case basis.⁴²⁵

ICTY, *KRNOJELAC TRIAL JUDGEMENT*, PARA. 131 (FOOTNOTES OMITTED); ON ASSESSING SERIOUSNESS OF INHUMAN TREATMENT:

All the factual circumstances must be taken into account, including the nature of the act or omission, the context in which it occurs, its duration and/or repetition, the physical, mental and moral effects of the act on the victim and the personal circumstances of the victim, including age, sex and health.

CASE STUDY: EXAMPLES OF SEVERE PHYSICAL OR MENTAL PAIN OR SUFFERING AMOUNTING TO INHUMAN TREATMENT

International jurisprudence has considered the following examples of severe physical or mental pain or suffering can amount to inhuman treatment:

- Threats of physical violence to the victim or to members of the victim's family.⁴²⁶
- Beatings, a "thrashing" or series of physical strikes.⁴²⁷
- Being forced to dig trenches, or being compelled to perform forced labour along the front lines under dangerous conditions.⁴²⁸
- The use of detainees as human shields.⁴²⁹
- Intentionally depriving persons of water and food.⁴³⁰
- Lack of medical treatment.⁴³¹

⁴²⁵ ICC, *Al Hassan Decision on Confirmation of charges*, para. 255 ("L'examen des allégations de traitements cruels doit prendre en compte les particularités de chaque cas d'espèce, et doit tenir compte de la nature des actes ou de l'omission, du contexte dans lequel ils ont eu lieu, leur durée ou leur répétition, leurs conséquences sur l'état physique et mental de la victime ainsi que les caractéristiques propres à la victime telles que son âge, son sexe et son état de santé") in relation to the offence of cruel treatment in non-international armed conflict under Article 8(2)(c)(i) but the consideration may also apply *mutatis mutandis* to the present crime.

⁴²⁶ ICC, *Al Hassan Decision on Confirmation of charges*, para. 260.

⁴²⁷ ICTY, *Prlic et al. Trial Judgement*, Vol. I of VI, para. 115; ICTY, *Kordic Trial Judgement*, paras 774, 790, 800; ICTY, *Blaskic Trial Judgement*, paras 690, 700; ICTY, *Jelusic Trial Judgement*, paras 41-42; ICC, *Al Hassan Decision on Confirmation of charges*, para. 260 (referring to "les roustes ou passages à tabac" in French original).

⁴²⁸ ICC, *Al Hassan Decision on Confirmation of charges*, para. 260; ICTY, *Prlic et al. Trial Judgement*, Vol. I of VI, para. 115; ICTY, *Blaskic Trial Judgement*, paras 689, 699, 713.

⁴²⁹ ICTY, *Prlic et al. Trial Judgement*, Vol. I of VI, para. 115; ICTY, *Kordic Trial Judgement*, paras 783 and 800; ICTY, *Blaskic Trial Judgement*, paras 714-716.

⁴³⁰ ICC, *Al Hassan Decision on Confirmation of charges*, para. 260; ICTY, *Prlic et al. Trial Judgement*, Vol. I of VI, paras 117-118.

⁴³¹ ICC, *Al Hassan Decision on Confirmation of charges*, para. 260; ICTY, *Prlic et al. Trial Judgement*, Vol. I of VI, paras 117-118.

- Certain conditions of detention or confinement.⁴³²
- Imprisoning persons with hands tied for many hours in a room filled with corpses of men women, and children.⁴³³
- Sexual assault.⁴³⁴

259. The objective element of inflicting severe physical or mental pain or suffering is particular to the ICC system.⁴³⁵ The equivalent element under the ICTY's case law is "serious physical or mental harm or suffering or [...] a serious attack on human dignity".⁴³⁶ Offences against human dignity, which are included as part of inhuman treatment in the ICTY system, are instead covered by the separate crime of outrages upon personal dignity in the ICC system.⁴³⁷

260. **For the subset crime of biological experiments,⁴³⁸ the perpetrator subjected one or more persons to a particular biological experiment.** Commentary notes that biological experiments, and medical or scientific experiments, considerably overlap.⁴³⁹

261. **The biological experiment was non-therapeutic and it was neither justified by medical reasons nor carried out in the person's or persons' interest.** While there is no contemporary jurisprudence on this crime, commentary suggests the term "biological experiments" in its ordinary meaning covers conduct the primary purpose of which is to study the unknown effects of a product or situation on the human body.⁴⁴⁰ The commentary suggests that protected persons cannot validly give consent to a particular biological experiment which endangers their physical or mental health or integrity.⁴⁴¹

⁴³² ICTY, *Prlic et al.* [Trial Judgement](#), Vol. I of VI, paras 115, 117-118; ICTY, *Kordic* [Trial Judgement](#), paras 774, 783, 790, 794, 795, 800; ICTY, *Blaskic* [Trial Judgement](#), paras 688, 690, 692, 694, 695, 697, 698, 700; ICTY, *Krnojelac* [Trial Judgement](#), para. 144.

⁴³³ ICC, *Katanga and Ngudjolo Chui* [Decision on the Confirmation of Charges](#), paras 361-364.

⁴³⁴ ICTY, *Prlic et al.* [Trial Judgement](#), Vol. I of VI, para. 115; ICTY, *Blaskic* [Trial Judgement](#), paras 692, 695, 700.

⁴³⁵ [ICC Elements of Crimes](#), Article 8(2)(a)(ii)-2, Element 1.

⁴³⁶ ICTY, *Prlic et al.* [Trial Judgement](#), Vol. I of VI, para. 113 ("The offence of inhuman treatment is punishable under Article 2(b) of the Statute and is one of the grave breaches under the Geneva Conventions. Inhuman treatment comprises (1) intentional acts or omissions which, when judged objectively, are deliberate, not accidental, and which cause serious physical or mental harm or suffering or constitute a serious attack on human dignity, and (2) are committed against a protected person within the meaning of Article 2 of the Statute").

⁴³⁷ See below paras [311-324](#).

⁴³⁸ [ICC Elements of Crimes](#), Article 8(2)(a)(ii)-3.

⁴³⁹ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 337, para. 100. See below paras [270-280](#), [285](#), [287](#), [290](#), including para. 161 for WWII era case study of Allied Military Tribunal, with examples of medical experiments and illustrating similar elements. US Military Tribunal No. 1 at Nuremberg, *Brandt et al.* Judgement; in *Vol. 2 Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 p. 171*.

⁴⁴⁰ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, pp 336-337, paras 100, 102; see also [ICRC Commentary on Geneva Convention III \(1960\)](#), p. 141.

⁴⁴¹ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 337, para. 102 ("the prohibition of biological experiments contained in the Geneva Conventions is absolute, as wounded or sick persons or detained persons cannot validly give consent to a particular biological experiment which endangers their physical or mental health or integrity. Consent can only justify treatment of an eminently therapeutic nature").

262. **The biological experiment seriously endangered the physical or mental health or integrity of the person or persons.** A biological experiment that actually causes harm to the victim is criminalised. Nevertheless, based on the wording “seriously endangered”, commentary further notes that manifestation of harm is not needed, and the concrete danger of the harm is sufficient for the crime to be completed.⁴⁴²
263. **The person or persons were protected under one or more of the Geneva Conventions of 1949.** The persons upon whom severe physical or mental pain or suffering was inflicted must be protected under one of the four Geneva Conventions namely:
- Members of armed forces and combatants who are wounded, sick and/or shipwrecked ([Geneva Convention I](#), Article 13; [Geneva Convention II](#), Article 13);
 - Medical and religious personnel ([Geneva Convention I](#), Articles 24, 25, 26; [Geneva Convention II](#), Articles 36, 37; [Geneva Convention IV](#), Article 20);
 - Prisoners of war ([Geneva Convention III](#), Article 4); or
 - Civilians who at a given moment and in any manner whatsoever find themselves in the hands of a party to the armed conflict or occupying power of which they are not nationals ([Geneva Convention IV](#), Articles 4, 13).⁴⁴³
264. *Allegiance to a party and that party’s control over persons and territory.* Concerning the last category of civilians under Article 4 of Geneva Convention IV, strict, formal/legal nationality is not as important as the substance of relations of victims vis-à-vis perpetrators.⁴⁴⁴ Allegiance to a party to the armed conflict, and control by this party over persons in a given territory, may be regarded as the crucial test.⁴⁴⁵ As attacking forces of a party to the armed conflict gradually gain control of territory, individual

⁴⁴² Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 337, para. 101 (“Contrary to some initial proposals during the negotiations of the elements of crimes, the crime does not require that death or serious bodily or mental harm be caused. [...] Thus, the concrete danger of the mentioned harm is sufficient for the crime to be completed, not only when the harm actually occurs. To know whether a person’s health has been seriously endangered is a matter of judgement and a court should determine this not only on the basis of the conduct of the perpetrator, but also on the foreseeable consequences having regard to the state of health of the person subjected to them.”).

⁴⁴³ ICC, *Katanga and Ngudjolo CChui Decision on the Confirmation of Charges*, paras 357-358. See also ICTY, *Prlic et al. Trial Judgement*, Vol. I of VI, para. 98.

⁴⁴⁴ ICTY, *Celebici Appeal Judgement*, paras 83-84 (“Article 4 of Geneva Convention IV is to be interpreted as intending to protect civilians who find themselves in the midst of an international, or internationalised, conflict to the maximum extent possible. The nationality requirement of Article 4 should therefore be ascertained upon a review of ‘the substance of relations’ and not based on the legal characterisation under domestic legislation. In today’s ethnic conflicts, the victims may be ‘assimilated’ to the external State involved in the conflict, even if they formally have the same nationality as their captors, for the purposes of the application of humanitarian law, and of Article 4 of Geneva Convention IV specifically. The Appeals Chamber thus agrees with the Tadic Appeal Judgement that ‘even if in the circumstances of the case the perpetrators and the victims were to be regarded as possessing the same nationality, Article 4 would still be applicable.’”).

⁴⁴⁵ ICTY, *Tadic Appeal Judgement*, paras 165-166 (“This legal approach, hinging on substantial relations more than on formal bonds, becomes all the more important in present-day international armed conflicts. While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance. Or, put another way, ethnicity may become determinative of national allegiance. Under these conditions, the requirement of nationality is even less adequate to define protected persons. In such conflicts, not only the text and the drafting history of the Convention but also, and more importantly, the Convention’s object and purpose suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.”).

civilians in these successive areas automatically become protected persons, provided they do not claim allegiance to the party in question.⁴⁴⁶

iii. Definition of Inhuman Treatment, including Biological Experiments (Subjective Elements)⁴⁴⁷

265. The subjective elements of inhuman treatment including biological experiments under the ICC framework are: (1) the perpetrator (a) intentionally and knowingly inflicted the severe physical or mental pain or suffering; or (b) intentionally and knowingly subjected the person or persons to the particular biological experiment. Additionally, (2) the perpetrator was aware of the factual circumstances that established protected status under one or more of the Geneva Conventions of 1949.⁴⁴⁸
266. **For the crime of inhuman treatment,⁴⁴⁹ the perpetrator intentionally and knowingly inflicted the severe physical or mental pain or suffering.**⁴⁵⁰ The perpetrator does not need to have completed a value judgment as to the severity of the pain or suffering.⁴⁵¹
267. **For the subset crime of biological experiments,⁴⁵² the perpetrator intentionally and knowingly subjected the person or persons to the particular biological experiment.**⁴⁵³

⁴⁴⁶ ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, paras 292 (“Under the case law of the international tribunals, an individual civilian falls ‘into the hands of’ a party to the conflict when that individual is in the territory under the control of such a party”), 293 (“Therefore, in the view of the Chamber, as the attacking forces of a party to the conflict gradually gain control of a targeted village, individual civilians in these successive areas automatically become protected persons within the meaning of article 4 GC IV, provided they do not claim allegiance to the party in question. Article 8(2)(a)(i) of the Statute thus prohibits the wilful killing of those civilians in such a circumstance [Element 2 of which applies equally to Article 8(2)(a)(ii) torture or inhuman treatment, including biological experiments]”), 358 (“Article 8(2)(a)(ii) of the Statute therefore applies to those situations in which protected civilians are inhumanely treated ‘in the hands of’ a party to the conflict, and thus also applies to the inhuman treatment of the protected persons by an attacking force, when such conduct occurs after the overall attack has ended, and defeat or full control of the targeted village has been secured. In addition, this provision prohibits perpetrators from inflicting inhuman treatment on protected persons as these forces move toward areas of enemy resistance in a targeted village”).

⁴⁴⁷ This section details the subjective elements for this war crime as detailed under international law. However, the general part of the CCU identifies subjective elements that apply to crimes. See Articles 23, 24 and 25 of the CCU. It will be necessary to consider the relevance of the subjective elements in the general part of the CCU when considering the elements of this crime as applied under Article 438 CCU.

⁴⁴⁸ [ICC Elements of Crimes](#), Article 8(2)(a)(ii)-2, -3.

⁴⁴⁹ [ICC Elements of Crimes](#), Article 8(2)(a)(ii)-2.

⁴⁵⁰ [ICC Statute](#), Article 30; ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, para. 359 (“Article 30 of the Statute sets out the subjective element for crimes within the jurisdiction of the Court, including the war crimes provided for in article 8(2)(a)(ii) of the Statute. Thus, this offence includes, first and foremost, cases of *dolus directus* of the first degree. In the view of the Chamber, this offence also encompasses *dolus directus* of the second degree.”). See also ICTY, *Prlic et al. Trial Judgement*, Vol. I of VI, para. 113 (“Inhuman treatment comprises (1) intentional acts or omissions which, when judged objectively, are deliberate, not accidental, and which cause serious physical or mental harm or suffering [...]”).

⁴⁵¹ [ICC Elements of Crimes](#), General introduction, para. 4 (“With respect to mental elements associated with elements involving value judgement, such as those using the terms ‘inhumane’ or ‘severe’, it is not necessary that the perpetrator personally completed a particular value judgement, unless otherwise indicated.”); ICC, *Ongwen Trial Judgement*, para. 2707 (“As concerns the severe pain or suffering required, the perpetrator need not have completed a value judgment as to the severity of the pain inflicted”) in relation to the offence of torture in non-international armed conflict under Article 8(2)(c)(i) but the consideration may also apply *mutatis mutandis* to the present crime.

⁴⁵² [ICC Elements of Crimes](#), Article 8(2)(a)(ii)-3.

⁴⁵³ [ICC Statute](#), Article 30.

268. **The perpetrator was aware of the factual circumstances that established protected status under one or more of the Geneva Conventions of 1949.**⁴⁵⁴ With respect to civilians and nationality, the perpetrator needs only to know that the victim belonged to an adverse party to the armed conflict.⁴⁵⁵

iv. Contextual Elements

269. In addition, as with all war crimes, it is necessary to demonstrate the following contextual elements:

- i. There was an international armed conflict;⁴⁵⁶
- ii. The conduct took place in the context of and was associated with an international armed conflict;⁴⁵⁷ and
- iii. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.⁴⁵⁸

⁴⁵⁴ ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, para. 356.

⁴⁵⁵ [ICC Elements of Crimes](#), Article 8(2)(a)(i), Element 3 fn. 33, applicable to the corresponding element in each crime under Article 8(2)(a); see ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, para. 360 applying fn.33 by extension to all protected persons under the four Geneva Conventions (“In accordance with footnote 33 of the Elements of Crimes, it is not necessary for the perpetrator to have evaluated and concluded that the victim was a legally a protected person under any of the four Geneva Conventions, but rather that the perpetrator knows that ‘the victim belonged to an adverse party to the conflict’”).

⁴⁵⁶ See above, paras [188-189](#).

⁴⁵⁷ See above, paras [190-198](#). See also [ICC Elements of Crimes](#), Article 8(2)(a)(ii)-2, -3.

⁴⁵⁸ See above, para. [199](#). See also [ICC Elements of Crimes](#), Article 8(2)(a)(ii)-2, -3.

- c. Physical Mutilation or Medical or Scientific Experiments (ICC Statute, Article 8(2)(b)(x))

APPLICABILITY: THE WAR CRIMES OF PHYSICAL MUTILATION OR MEDICAL OR SCIENTIFIC EXPERIMENTS MAY BE CONSIDERED CRIMINALISED UNDER ARTICLE 438 OF THE CCU AS THEY MAY BE SUBSUMED WITHIN "VIOLATIONS OF RULES OF WARFARE RECOGNISED BY INTERNATIONAL INSTRUMENTS CONSENTED TO BE BINDING BY THE VERKHOVNA RADA OF UKRAINE" TO WHICH ARTICLE 438(1) REFERS (PARAS 270-273).

Elements of the crimes: To convict a perpetrator for physical mutilation or medical or scientific experiments as war crimes the following elements need to be established:

(1) Objective elements

- The perpetrator subjected one or more persons (a) to physical mutilation (paras 275, 277); or (b) to a medical or scientific experiment (para. 275) where
- The mutilation or the experiment was neither justified by the medical, dental or hospital treatment of the person or persons concerned nor carried out in such person's consent or persons' interest (paras 278-279, paras 281-283 respectively); and
- The mutilation or the experiment caused death or seriously endangered the physical or mental health and/or integrity of the person or persons (paras 280, 284 respectively).
- The person or persons were in the power of an adverse party (para. 285).

(2) Subjective elements

- The perpetrator intentionally and knowingly inflicted the mutilation or the experiment (paras 287, 288 respectively).
- The perpetrator was aware that the person or persons were in the power of an adverse party (para. 289).

(3) Contextual elements

- There is an international armed conflict (para. 290).
- The conduct of the perpetrator took place in the context and was associated with the conflict (para. 290).
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict (para. 290).

i. Applicability under Article 438

270. Article 438 of the CCU does not explicitly mention the war crimes of physical mutilation or medical or scientific experiments. However these offences may be subsumed within "violations of rules of warfare recognised by international instruments consented to be binding by the Verkhovna Rada of Ukraine" to which Article 438(1) refers. As explained below, these violations of IHL are prohibited under international

instruments ratified by Ukraine and have been recognised as war crimes. Thus it may be concluded that the violations are criminalised under Article 438.

271. **Physical mutilation or medical or scientific experiments are violations of rules of warfare recognised by international treaties ratified by Ukraine.** Physical mutilation or medical or scientific experiments are violations of IHL contained in [Geneva Convention III](#), [Geneva Convention IV](#) and [Additional Protocol I](#).⁴⁵⁹ Ukraine is a State party to the Geneva Conventions and Additional Protocol I.⁴⁶⁰
272. **Recognition as war crimes.** Mutilation or medical or scientific experiments as IHL violations are recognised as war crimes, because they are grave breaches of Additional Protocol I.⁴⁶¹ Such criminalisation has the status of customary international law.⁴⁶² Finally, they are expressly codified as a war crime in international armed conflict by Article 8(2)(b)(x) of the [ICC Statute](#).⁴⁶³
273. The foregoing analysis supports a conclusion that mutilation or medical or scientific experiments are considered criminalised under Article 438 of the CCU.

ii. Definition of Physical Mutilation or Medical or Scientific Experiments (Objective Elements)

274. The objective elements of physical mutilation or medical or scientific experiments are: (1) the perpetrator subjected one or more persons (a) to physical mutilation; or (b) to a medical or scientific experiment; (2) where the mutilation or the experiment was neither justified by the medical, dental or hospital treatment of the person or persons concerned nor carried out in such person's or persons' interest; and (3) the mutilation or the experiment caused death or seriously endangered the physical or mental health and/or integrity of the person or persons. Additionally, (4) the person or persons were in the power of an adverse party.⁴⁶⁴
275. **For the crime of physical mutilation,⁴⁶⁵ the perpetrator subjected one or more persons to mutilation**
276. *Mutilation.* Mutilation is to be understood as “physical suffering”⁴⁶⁶ that “injure[s], damage[s] or disfigure[s] somebody by breaking, tearing or cutting off a necessary part”.⁴⁶⁷ The ICC Elements of Crimes list in particular permanently disfiguring the

⁴⁵⁹ [Geneva Convention III](#), Article 13; [Geneva Convention IV](#), Article 32; [Additional Protocol I](#), Articles 11, 75(2)(a)(iv).
⁴⁶⁰ Ukraine ratified the Geneva Conventions on 3 August 1954, and Additional Protocol I on 25 January 1990. ICRC, IHL Database, Treaties, States Parties and Commentaries, [Ukraine](#). The prohibitions of mutilation or medical or scientific experiments also have the status of customary international law. ICRC, IHL Database, Customary IHL, [Rule 92. Mutilation and Medical, Scientific or Biological Experiments](#).

⁴⁶¹ [Additional Protocol I](#), Articles 11(4), 85(5).

⁴⁶² ICRC, IHL Database, Customary IHL, [Rule 156. Serious violations of international humanitarian law constitute war crimes](#).

⁴⁶³ [ICC Statute](#), Article 8(2)(b)(x), see also Article 8(2)(e)(xi) applicable in the context of non-international armed conflict. See also above, paras [166-182](#).

⁴⁶⁴ [ICC Elements of Crimes](#), Article 8(2)(b)(x)-1, -2. See also SCSL, *Sesay et al. Trial Judgement*, paras 180-181 in the context of non-international armed conflict.

⁴⁶⁵ [ICC Elements of Crimes](#), Article 8(2)(b)(x)-1.

⁴⁶⁶ [ICRC Commentary on Geneva Convention IV](#), pp 223-224.

⁴⁶⁷ Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Comm-*

person or persons, or permanently disabling or removing an organ or appendage as examples of mutilation.⁴⁶⁸ Amputations and injury to limbs, carving someone's body, taking out a person's eye, injuring internal organs or scarring a face with acid are other examples of mutilation.⁴⁶⁹ The offence includes sexual mutilation, for example cutting off sexual organs.⁴⁷⁰ International jurisprudence generally considers mutilation to be a particularly serious form of physical harm, including because of its irreparability.⁴⁷¹

277. *Subjected one or more persons, not corpses.* The crime of mutilation presupposes an act committed against a person and not a dead body. The mutilation needs to be inflicted before, as opposed to after, the person's death.⁴⁷²

tary, Cambridge University Press, 2003, p. 230 (“The verb ‘to mutilate’ is defined in the Cambridge International Dictionary of English (1995) as to ‘damage severely, esp. by violently removing a part’ (p. 933) and in the Oxford Advanced Learner’s Dictionary (1992) as to ‘injure, damage or disfigure somebody by breaking, tearing or cutting off a necessary part’ (p. 819). These definitions refer to an act of physical violence”).

⁴⁶⁸ [ICC Elements of Crimes](#), Article 8(2)(b)(x)-1, Element 1..

⁴⁶⁹ [ICRC Commentary on Additional Protocol I](#), p. 156, para. 478; [ICRC Commentary on Geneva Convention I \(2016\)](#), para. 606.

⁴⁷⁰ ICC, *Mbarushimana Confirmation of Charges*, paras 159 (“In relation to the status of the victims. Witness 672, a former FDLR member who was not present during the attack, says that he heard that Mandarine had cut off the sexual organs of soldiers during the attack in Busurungi. It is unclear whether or not such soldiers were *hors de combat*, but it appears more likely that they were. Witness 562, who also participated in the attack, explains that he could not be sure whether Mandarine was mutilating civilians or soldiers, but assumed it was civilians because there were no FARDC soldiers anymore in the village when he saw Mandarine holding a penis. Furthermore, Witness 694 [REDACTED] was indeed a civilian inhabitant of the village. The Chamber is further satisfied that the FDLR soldiers who committed those acts of mutilation did so intentionally and were aware of the civilian status of the victims.”), 160 (“In light of the above, the Chamber finds substantial grounds to believe that the war crime of mutilation under article 8(2)(c)(i)-2 of the Statute was committed by the FDLR troops in Busurungi and surrounding villages on or about 9-10 May 2009. The Prosecution charges the war crime of mutilation in the alternative under article 8(2)(c)(i)-2 or article 8(2)(e)(xi)-1. Since the Chamber has already found substantial grounds to believe that the elements of the crime under article 8(2)(c)(i)-2 of the Statute are fulfilled, it will not analyse the same offence under article 8(2)(e)(xi)-1 of the Statute.”) in relation to the offence of mutilation in non-international armed conflict under Articles 8(2)(c)(i)-2 or 8(2)(e)(xi)-1 of the [ICC Statute](#), but the consideration also applies *mutatis mutandis* to the present crime of mutilation in international armed conflict under Article 8(2)(b)(x); ICTY, *Tadic Trial Judgement*, para. 45 where it was charged as torture or inhuman treatment/cruel treatment (“Paragraph 6 relates to the beating of numerous prisoners and an incident of sexual mutilation at the Omarska camp, which took place in the large hangar building. A number of prisoners were severely beaten, including Emir Karaba{i}, Jasmin Hrni}, Enver Ali}, Fikret Haramba{i} and Emir Beganovi}. Fikret Haramba{i} was sexually mutilated. It is charged that all but Emir Beganovi} died as a result of these assaults. The accused is alleged to have been an active participant and is charged with [...] torture or inhuman treatment, a grave breach under Article 2(b) of the Statute; [...] [and] cruel treatment, a violation of the laws or customs of war under Article 3 of the Statute”).

⁴⁷¹ ICTR, *Kayishema and Ruzindana Appeal Judgement*, para. 361 in the context of appeal against sentence (“[P]erpetrating a crime in a manner which brings about irreparable harm to the victims and their families may also be considered an aggravation [...] Some types of harm are more severe than others. Certain forms of physical harm, for instance, are irreparable, particularly in the case of mutilation. The Trial Chamber found that Kayishema’s acts inflicted irreparable harm not only to the victims, but also to their families. This constituted an aggravating circumstance to be taken into account in sentencing”); SCSL, *Sesay et al. Trial Judgement*, para. 179 (“Further, the ICTR has recognised that mutilation, which can be irreparable, is a particularly serious form of physical harm. Given that mutilation is a particularly egregious form of prohibited violence, this Chamber is satisfied that the prohibition against mutilation exists at customary international law and entails individual criminal responsibility.”) in relation to the offence of “violence to life, health and physical or mental well-being of persons, in particular mutilation” in non-international armed conflict under Article 3(a) of the [SCSL Statute](#), but the consideration also applies *mutatis mutandis* to the present crime of mutilation in international armed conflict under Article 8(2)(b)(x) of the [ICC Statute](#).

⁴⁷² ICC, *Mbarushimana Confirmation of Charges*, paras 134 (“The Prosecution does not specifically allege that the acts relied on to support the charge of mutilation were carried out [REDACTED] was still alive and no evidence is provided to support the view that he was mutilated before, as opposed to after, he was killed. Accordingly, the Chamber is not satisfied that there is sufficient evidence establishing substantial grounds to believe that the crime of mutilation under

278. **The conduct of mutilation was neither justified by the medical, dental or hospital treatment of the person or persons concerned nor carried out in such person's or persons' interest.**
279. Consent is not a defence to this crime. The crime prohibits any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the party conducting the procedure and who are in no way deprived of liberty.⁴⁷³
280. **The conduct of mutilation caused death or seriously endangered the physical or mental health of the person or persons.** Mutilation that actually causes death or harm to the victim is criminalised. Nevertheless, based on the wording “seriously endangered”, commentary notes that manifestation of harm to health is not needed, and the concrete danger of the harm is sufficient for the crime to be completed.⁴⁷⁴
281. **For the crime of medical or scientific experiments,⁴⁷⁵ the perpetrator subjected one or more persons to a medical or scientific experiment.** Commentary notes that biological experiments, and medical or scientific experiments, considerably overlap.⁴⁷⁶

either article 8(2)(c)(i)-2 or 8(2)(e)(xi)-1 of the Statute was committed by FDLR soldiers in Busurungi and surrounding villages in March 2009”, 154 (“[...] the Chamber stresses, at the outset, that the acts allegedly inflicted on the body of Witness [REDACTED] after she was killed cannot amount to the war crime of mutilation which presupposes an act committed against a person and not a dead body. This conduct will, therefore, not be analysed under the charge of mutilation”), 158 (“The Chamber however finds that the evidence provides substantial grounds to believe that at least some of the acts of mutilation were perpetrated when the victims were still alive. For example, Witness describes how the acts of mutilation that eventually caused the death of [REDACTED] started while [REDACTED] was crying and therefore still alive”) in relation to the offence of mutilation in non-international armed conflict under Articles 8(2)(c)(i)-2 or 8(2)(e)(xi)-1 of the [ICC Statute](#), but the consideration also applies *mutatis mutandis* to the present crime of mutilation in international armed conflict under Article 8(2)(b)(x).

⁴⁷³ [ICC Elements of Crimes](#), Article 8(2)(b)(x)-1, Element 3 fn. 46, applicable to the same element for Article 8(2)(b)(x)-2.

⁴⁷⁴ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 425, para. 443 (“It is also important to note that article 8 para. 2 (b) (x) does not contain the requirement that the act under consideration has indeed affected the health of the person concerned. Instead, it is sufficient that the health is endangered by the respective act. Such endangering requires that the act or omission causes an objective danger in the concrete case which is attributable to the alleged offender and which could have easily turned into a violation of the health of the victim. It follows, that any action that has then actually resulted in such an injury would accordingly *a fortiori* fulfill the requirements of article 8 para. 2 (b) (x)”).

⁴⁷⁵ [ICC Elements of Crimes](#), Article 8(2)(b)(x)-2.

⁴⁷⁶ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 337, para. 100. See above paras [270-290](#).

**CASE STUDY, US MILITARY TRIBUNAL NO. 1 AT NUREMBERG, *BRANDT ET AL. JUDGEMENT*⁴⁷⁷
(UNDER A DIFFERENT CRIMINAL PROVISION BUT RELEVANT BY ANALOGY AS EXAMPLES THAT COULD BE CONSIDERED MEDICAL OR SCIENTIFIC EXPERIMENTS UNDER ARTICLE 8(2)(B)(X) OF THE ICC STATUTE)**

The Military Tribunal entered convictions for medical experiments on prisoners of war and civilians, involving “ill treatment” as a war crime under Article 2(1)(b) of Law No. 10 of the Control Council for Germany.⁴⁷⁸

The indictment had charged the Accused for war crimes of “medical experiments [...] in the course of which [they] committed murders, brutalities, cruelties, tortures, atrocities, and other inhuman acts.”⁴⁷⁹ Including the following:

- **(A) High-Altitude Experiments.**⁴⁸⁰ To investigate the limits of human endurance and existence at extremely high altitudes. The experimental subjects were placed in a low-pressure chamber and thereafter the simulated altitude therein was raised.
- **(B) Freezing Experiments.**⁴⁸¹ To investigate the most effective means of treating persons severely chilled or frozen. Subjects were forced to remain in a tank of ice water for up to 3 hours. Numerous victims died. After the survivors were severely chilled, rewarming was attempted by various means. Subjects were also kept naked outdoors for hours at temperatures below freezing.
- **(C) Malaria Experiments.**⁴⁸² To investigate immunisation and treatment of malaria. Healthy concentration camp inmates were infected by mosquitoes or by injections of extracts of the mucous glands of mosquitoes. After having contracted malaria the subjects were treated with various drugs to test their relative efficacy. Over 1,000 involuntary subjects were used.

⁴⁷⁷ US Military Tribunal No. 1 at Nuremberg, *Brandt et al. Judgement*; in [Vol. 2 Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 p. 171](#).

⁴⁷⁸ US Military Tribunal No. 1 at Nuremberg, *Brandt et al. Judgement*; in [Vol. 2 Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 p. 171](#), pp 172 (the provision reads “1. Each of the following acts is recognized as a crime: (b) War Crimes. Atrocities or offenses against persons or property constituting violations of the laws or customs of war, including but not limited to, [...] ill-treatment [...] of civilian population from occupied territory, [...] ill treatment of prisoners of war [...]”), 189-298.

⁴⁷⁹ US Military Tribunal No. 1 at Nuremberg, *Brandt et al. Judgement*; in [Vol. 2 Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 p. 171](#), pp 174-175.

⁴⁸⁰ US Military Tribunal No. 1 at Nuremberg, *Brandt et al. Judgement*; in [Vol. 2 Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 p. 171](#), p. 175.

⁴⁸¹ US Military Tribunal No. 1 at Nuremberg, *Brandt et al. Judgement*; in [Vol. 2 Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 p. 171](#), p. 175.

⁴⁸² US Military Tribunal No. 1 at Nuremberg, *Brandt et al. Judgement*; in [Vol. 2 Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 p. 171](#), p. 175.

- **(D) Mustard Gas Experiments.**⁴⁸³ To investigate the most effective treatment of wounds caused by mustard gas. Wounds deliberately inflicted on the subjects were infected with mustard gas.
- **(E) Sulfanilamide Experiments.**⁴⁸⁴ Wounds deliberately inflicted on subjects were infected with bacteria such as streptococcus, gas gangrene, and tetanus. Circulation of blood was interrupted by tying off blood vessels at both ends of the wound to simulate battlefield wounds. Infection was aggravated by forcing wood shavings and ground glass into the wounds. The infection was treated with sulfanilamide and other drugs to determine their effectiveness.
- **(F) Bone, Muscle, and Nerve Regeneration and Transplantation Experiments.**⁴⁸⁵ Sections of bones, muscles, and nerves were removed from the subjects.
- **(G) Sea-Water Experiments.**⁴⁸⁶ To study various methods of making sea water drinkable. Subjects were deprived of all food and given only chemically processed sea water.
- **(H) Epidemic Jaundice Experiments.**⁴⁸⁷ To investigate the causes of, and inoculations against, epidemic jaundice. Subjects were deliberately infected with epidemic jaundice.
- **(I) Sterilisation Experiments.**⁴⁸⁸ To develop a method of sterilization which would be suitable for sterilizing millions of people with a minimum of time and effort. These experiments were conducted by means of X-ray, surgery, and various drugs. Thousands of victims were sterilized.
- **(J) Experiments with Typhus (Fleckfieber) and Other Pathogens.**⁴⁸⁹ Healthy inmates were infected with typhus virus in order to keep the virus alive; over 90 percent of the victims died as a result. Other healthy inmates were used to determine the effectiveness of vaccines and chemical substances. Some were vaccinated with one of the vaccines or nourished with one of the chemical substances and then infected with the virus. Others were infected without any previous protection as a control. Hundreds of the subjects died. Experiments with yellow fever, smallpox, paratyphus A and B, cholera, and diphtheria were also conducted.
- **(K) Experiments with Poison.**⁴⁹⁰ Poisons were secretly administered to subjects in their food. The victims died as a result of the poison or were killed immediately in order to permit autopsies. Some experimental subjects were shot with poison bullets.
- **(L) Incendiary Bomb Experiments.**⁴⁹¹ To test the effect of various pharmaceutical preparations on phosphorus burns. These burns were inflicted on subjects with phosphorus matter taken from incendiary bombs.

⁴⁸³ US Military Tribunal No. 1 at Nuremberg, *Brandt et al.* Judgement; in [Vol. 2 Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 p. 171](#), p. 176.

⁴⁸⁴ US Military Tribunal No. 1 at Nuremberg, *Brandt et al.* Judgement; in [Vol. 2 Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 p. 171](#), p. 176.

⁴⁸⁵ US Military Tribunal No. 1 at Nuremberg, *Brandt et al.* Judgement; in [Vol. 2 Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 p. 171](#), pp 176-177.

⁴⁸⁶ US Military Tribunal No. 1 at Nuremberg, *Brandt et al.* Judgement; in [Vol. 2 Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 p. 171](#), p. 177.

⁴⁸⁷ US Military Tribunal No. 1 at Nuremberg, *Brandt et al.* Judgement; in [Vol. 2 Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 p. 171](#), p. 177.

⁴⁸⁸ US Military Tribunal No. 1 at Nuremberg, *Brandt et al.* Judgement; in [Vol. 2 Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 p. 171](#), p. 177.

⁴⁸⁹ US Military Tribunal No. 1 at Nuremberg, *Brandt et al.* Judgement; in [Vol. 2 Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 p. 171](#), pp 177-178.

⁴⁹⁰ US Military Tribunal No. 1 at Nuremberg, *Brandt et al.* Judgement; in [Vol. 2 Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 p. 171](#), p. 178.

⁴⁹¹ US Military Tribunal No. 1 at Nuremberg, *Brandt et al.* Judgement; in [Vol. 2 Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 p. 171](#), p. 178.

In each case the foregoing experiments were conducted for the benefit of the German Air Force, Armed Forces, and Navy, they had nothing to do with the treatment of the persons concerned and they were not in those persons' interest.⁴⁹²

Many victims died as a result of these experiments and the survivors suffered intense, severe and grave agony, pain, suffering and anguish and injury, mutilation and/or permanent disability.⁴⁹³

282. **The experiment was neither justified by the medical, dental or hospital treatment of the person or persons concerned nor carried out in such person's or persons' interest.** This element is illustrated by the *Brandt et al.* case study above. Commentary suggests the crime of medical or scientific experiments aims at prohibiting experiments that do not serve a therapeutic purpose but which are rather undertaken in order to gain medical or scientific knowledge.⁴⁹⁴
283. Consent is not a defence to this crime. The crime prohibits any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the party conducting the procedure and who are in no way deprived of liberty.⁴⁹⁵
284. **The experiment caused death or seriously endangered the physical or mental health or integrity of the person or persons.** This element is illustrated by the *Brandt et al.* case study above. Experiments that actually cause death or harm to the victim are criminalised. In addition, based on the wording “seriously endangered” commentary notes that manifestation of harm to health is not needed and the concrete danger of the harm is sufficient for the crime to be completed.⁴⁹⁶ With respect to the reference to “integrity” in relation to medical or scientific experiments, commentators note that it was considered by the drafters of the Elements of Crimes as only relevant for medical or scientific experiments and not mutilation.⁴⁹⁷

⁴⁹² US Military Tribunal No. 1 at Nuremberg, *Brandt et al.* Judgement; in [VVol. 2 Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10 p. 171](#), pp 175-178.

⁴⁹³ US Military Tribunal No. 1 at Nuremberg, *Brandt et al.* Judgement; in [VVol. 2 Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10 p. 171](#), pp 175-178.

⁴⁹⁴ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, pp 423-424, paras 438 (“The use of the term ‘medical or scientific experiments’ prohibits using any of the persons protected under this article as so-called ‘Guinea-pigs’. Only such acts are prohibited which do not serve a therapeutic purpose, but which are rather undertaken in order to gain medical or scientific knowledge”), 439 (“medical and scientific experiments solely undertaken for scientific purposes cannot be considered to be either justified by the medical, dental or hospital treatment of the person concerned nor can they be considered to be carried out in his or her interest.”).

⁴⁹⁵ [ICC Elements of Crimes](#), Article 8(2)(b)(x)-1, Element 3 fn. 46, applicable to the same element for Article 8(2)(b)(x)-2.

⁴⁹⁶ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 425, para. 443; Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, p. 233.

⁴⁹⁷ Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, p. 230.

285. **The person or persons victims of the mutilation or the experiment were in the power of an adverse party.** The personal field of application of this offence draws its wording from Article 11(1) of [Additional Protocol I](#): “persons who are in the power of the adverse party or who are interned, detained or otherwise deprived of liberty as a result of [the armed conflict]”. Commentary suggests “persons in the power of an adverse party” encompasses mainly prisoners of war, civilian internees, and all persons belonging to a party to the armed conflict finding themselves in the territory of an adverse party to the conflict, including territory occupied by the adverse party, over which the adverse party exercises public authority, or simply which is under the adverse party’s control.⁴⁹⁸

iii. Definition of Physical Mutilation or Medical or Scientific Experiments (Subjective Elements)⁴⁹⁹

286. The subjective elements of physical mutilation or medical or scientific experiments under the ICC framework are: (1) the perpetrator intentionally and knowingly inflicted the mutilation or the experiment. Additionally, (2) the perpetrator was aware that the person or persons were in the power of an adverse party.⁵⁰⁰

287. **For the crime of physical mutilation,⁵⁰¹ the perpetrator intentionally and knowingly inflicted the mutilation.**⁵⁰²

288. **For the crime of medical or scientific experiments,⁵⁰³ the perpetrator intentionally and knowingly inflicted the medical or scientific experiment.**⁵⁰⁴

289. **The perpetrator was aware that the person or persons were in the power of an adverse party.**⁵⁰⁵

⁴⁹⁸ [ICRC Commentary on Additional Protocol I](#), p. 153, para. 468 (“[T]his first sentence defines the persons covered by the application of the principle in the context of the Protocol. These are primarily all persons in the power of the adverse Party, i.e., prisoners of war, civilian internees, persons who have been refused authorization to leave the territory of this adverse Party, and even all persons belonging to a Party to the conflict who simply find themselves in the territory of the adverse Party. The term ‘territory of the adverse Party’ is used here to mean the territory in which this Party exercises public authority de facto. However, enemy aliens need not necessarily have anything to do directly with the authorities: the simple fact of being in the territory of the adverse Party, as defined above, implies that one is ‘in the power’ of the latter. In other words, as specified in the commentary on the fourth Convention, the expression ‘in the power’ should not necessarily be taken in the literal sense; it simply signifies that the person is in the territory under control of the Power in question [...] Finally, the inhabitants of territory occupied by the adverse Party are also in the power of this adverse Party.”), see also 469-472; Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, p. 231.

⁴⁹⁹ This section details the subjective elements for this war crime as detailed under international law. However, the general part of the CCU identifies subjective elements that apply to crimes. See Articles 23, 24 and 25 of the CCU. It will be necessary to consider the relevance of the subjective elements in the general part of the CCU when considering the elements of this crime as applied under Article 438 CCU.

⁵⁰⁰ [ICC Elements of Crimes](#), Article 8(2)(b)(x)-1, -2. See also SCSL, *Sesay et al. Trial Judgement*, paras 180-181 in the context of non-international armed conflict.

⁵⁰¹ [ICC Elements of Crimes](#), Article 8(2)(b)(x)-1.

⁵⁰² [ICC Statute](#), Article 30.

⁵⁰³ [ICC Elements of Crimes](#), Article 8(2)(b)(x)-2.

⁵⁰⁴ [ICC Statute](#), Article 30.

⁵⁰⁵ This subjective element flows from ordinary knowledge under Article 30(1), (3) of the [ICC Statute](#).

iv. Contextual Elements

290. In addition, as with all war crimes, it is necessary to demonstrate the following contextual elements:

- i. There was an international armed conflict;⁵⁰⁶
- ii. The conduct took place in the context of and was associated with an international armed conflict;⁵⁰⁷ and
- iii. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.⁵⁰⁸

d. Wilfully Causing Great Suffering or Serious Injury to Body or Health (ICTY Statute, Article 2(c); ICC Statute, Article 8(2)(a)(iii))

291. The war crime of wilfully causing great suffering or serious injury to body or health is the secondary, residual branch of ‘offences of mistreatment’, interrelated and somewhat overlapping with torture or inhuman treatment, including experiments and mutilation.⁵⁰⁹

⁵⁰⁶ See above, paras [188-189](#).

⁵⁰⁷ See above, paras [190-198](#). See also [ICC Elements of Crimes](#), Article 8(2)(b)(x).

⁵⁰⁸ See above, para. [199](#). See also [ICC Elements of Crimes](#), Article 8(2)(b)(x).

⁵⁰⁹ [ICRC Commentary on Geneva Convention I \(1952\)](#), p. 372. See also ICTY, *Kordic and Cerkez Trial Judgement*, para. 243.

APPLICABILITY: THE WAR CRIME OF WILFULLY CAUSING GREAT SUFFERING OR SERIOUS INJURY TO BODY OR HEALTH MAY BE CONSIDERED CRIMINALISED UNDER ARTICLE 438 OF THE CCU AS IT MAY BE COVERED, IN PART, BY THE OFFENCE OF "CRUEL TREATMENT OF PRISONERS OF WAR OR CIVILIANS" OR MAY BE SUBSUMED WITHIN "VIOLATIONS OF RULES OF WARFARE RECOGNISED BY INTERNATIONAL INSTRUMENTS CONSENTED TO BE BINDING BY THE VERKHOVNA RADA OF UKRAINE" TO WHICH ARTICLE 438(1) REFERS (PARAS [292-296](#)).

Elements of the crimes: To convict a perpetrator for wilfully causing great suffering or serious injury to body or health as a war crime the following elements need to be established:

(1) Objective elements

- The perpetrator caused great physical or mental pain or suffering to, or serious injury to body or health of, one or more persons (paras [298-303](#)).
- The person or persons were protected under one or more of the Geneva Conventions of 1949 (paras [304-305](#)).

(2) Subjective elements

- The perpetrator intentionally and knowingly caused the great physical or mental pain or suffering, or the serious injury to body or health (paras [307-308](#)).
- The perpetrator was aware of the factual circumstances that established protected status of the persons under one or more of the Geneva Conventions of 1949 (para. [309](#)).

(3) Contextual elements

- There is an international armed conflict (para. [310](#)).
- The conduct of the perpetrator took place in the context of and was associated with the conflict (para. [310](#)).
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict ((para. [310](#)).

i. Applicability under Article 438

292. The war crime of wilfully causing great suffering or serious injury to body or health could be considered explicitly covered, in part, under the offence of “cruel treatment of prisoners of war or civilians”. This offence may also be subsumed within “violations of rules of warfare recognised by international instruments consented to be binding by the Verkhovna Rada of Ukraine” to which Article 438(1) refers. As explained below, this violation of IHL is prohibited under international instruments ratified by Ukraine and has been recognised as a war crime, particularly by the same provisions of those same international instruments. Thus, it may be concluded that the violation is criminalised under Article 438.

293. **Wilfully causing great suffering or serious injury is a violation of rules of warfare recognised by international treaties ratified by Ukraine.** Wilfully causing great suffering or serious injury is a violation of IHL in international armed conflict in the sense of a grave breach of the four [Geneva Conventions of 1949](#).⁵¹⁰ Ukraine is a State party to the Geneva Conventions.⁵¹¹
294. **Recognition as a war crime.** Wilfully causing great suffering or serious injury is recognised as a war crime in international armed conflict, because it is a grave breach of the Geneva Conventions.⁵¹² Such criminalisation also has the status of customary international law.⁵¹³ The offence is expressly codified as a war crime in Article 2(c) of the [ICTY Statute](#) and Article 8(2)(a)(iii) of the [ICC Statute](#).⁵¹⁴
295. **Wilfully causing great suffering or serious injury as explicitly covered, in part, by “cruel treatment of prisoners of war or civilians”.** The war crime of wilfully causing great suffering or serious injury overlaps with inhuman treatment.⁵¹⁵ As explained above, the war crime of inhuman treatment could be considered explicitly covered by the offence of “cruel treatment of prisoners of war or civilians” enumerated by Article 438 of the CCU.
296. The foregoing supports a conclusion that wilfully causing great suffering or serious injury can be considered criminalised under Article 438 of the CCU.

ii. Definition of Wilfully Causing Great Suffering or Serious Injury to Body or Health (Objective Elements)

297. The objective elements of wilfully causing great suffering or serious injury are: (1) the perpetrator caused (a) great physical or mental pain or suffering to, or (b) serious injury to body or health of, one or more persons; (2) such person or persons were protected under one or more of the Geneva Conventions of 1949.⁵¹⁶
298. **The perpetrator caused great physical or mental pain or suffering to, or serious injury to body or health of, one or more persons.**
299. This offence may be committed by an act or an omission.⁵¹⁷

⁵¹⁰ [Geneva Convention I](#), Articles 49-50, see also 12; [Geneva Convention II](#), Articles 50-51, see also 12; [Geneva Convention III](#), Articles 129-130, see also 13; [Geneva Convention IV](#), Articles 146-147, see also 27, 32. [ICRC Commentary on Geneva Convention I \(2016\)](#), para. 2998 (“[apart from the grave breaches provisions,] [t]he prohibition on causing great suffering or serious injury to body or health is not found per se in any particular article of the Geneva Conventions, but it expresses the obligation to treat protected persons humanely and to respect their physical and mental integrity at all times.”).

⁵¹¹ Ukraine ratified the Geneva Conventions on 3 August 1954. ICRC, IHL Database, Treaties, States Parties and Commentaries, [Ukraine](#).

⁵¹² [Geneva Convention I](#), Articles 49-50; [Geneva Convention II](#), Articles 50-51; [Geneva Convention III](#), Articles 129-130; [Geneva Convention IV](#), Articles 146-147.

⁵¹³ ICRC, IHL Database, Customary IHL, [Rule 156. Serious violations of international humanitarian law constitute war crimes](#), see also more generally [Rule 87. Civilians and persons hors de combat must be treated humanely](#).

⁵¹⁴ [ICTY Statute](#), Article 2(c); [ICC Statute](#), Article 8(2)(a)(iii). See also above, paras [166-182](#).

⁵¹⁵ [ICRC Commentary on Geneva Convention I \(1952\)](#), p. 372. See also ICTY, *Kordic and Cerkez Trial Judgement*, para. 243.

⁵¹⁶ [ICC Elements of Crimes](#), Article 8(2)(a)(iii).

⁵¹⁷ ICTY, *Celebici Trial Judgement*, para. 511 (“The Trial Chamber thus finds that the offence of wilfully causing great

300. *Physical or mental pain or suffering, or injury to body or health.* This is one offence, the first element of which is framed as an alternative, *i.e.* physical or mental pain or suffering; and/or, injury to body or health.⁵¹⁸
301. This alternative reference to “injury” distinguishes the crime of wilfully causing great suffering or serious injury⁵¹⁹ from the other mistreatment crimes.⁵²⁰ Namely, torture and inhuman treatment require physical or mental pain or suffering, regardless of whether there is injury or otherwise.⁵²¹ Mutilation and biological, medical or scientific experiments centre on endangerment of physical or mental health and/or integrity, again regardless of whether injury is actually occasioned or otherwise.⁵²²
302. The jurisprudence of the *ad hoc* international criminal tribunals has developed such that the great suffering or serious injury to body or health could include mental health.⁵²³ With respect to the ICC, commentary notes that States Parties in negotiating the ICC Elements of Crimes purposefully applied the word “mental” to “physical or mental pain or suffering”, but not to “injury to body or health”.⁵²⁴ ICC jurisprudence has not to date addressed this issue.

suffering or serious injury to body or health constitutes an act or omission[...].”

⁵¹⁸ ICTY, *Celebici Trial Judgement*, para. 506 (“The construction of the phrase “wilfully causing great suffering or serious injury to body or health” indicates that this is one offence, the elements of which are framed in the alternative and apparent on its face.”).

⁵¹⁹ Under *ICC Statute*, Article 8(2)(a)(iii).

⁵²⁰ Under *ICC Statute*, Articles 8(2)(a)(ii), 8(2)(b)(x).

⁵²¹ *ICC Elements of Crimes*, Article 8(2)(a)(ii)-1, -2, Element 1; see above paras 228-247, 270-290. *I.e.* for example occasioning a serious injury but without pain or suffering could amount to this crime of wilfully causing great suffering or serious injury under Article 8(2)(a)(iii) of the *ICC Statute*; but not to inhuman treatment under Article 8(2)(a)(ii) of the *ICC Statute*. Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 338, para. 107 (“there is hardly any difference between the two crimes [of wilfully causing great suffering or serious injury and inhuman treatment] in the Elements of Crimes, unless injury is caused, which does not at the same time lead to great physical or mental pain”); see ICTY, *Naletilic and Martinovic Trial Judgement*, para. 341 (“This crime is distinguished from that of inhuman treatment in that it requires a showing of serious mental or physical injury.”); ICTY, *Kordic and Cerkez Trial Judgement*, para. 245.

⁵²² *ICC Elements of Crimes*, Article 8(2)(a)(ii)-3, Elements 1-2, Article 8(2)(b)(x)-1, -2, Elements 1-2; see above paras 270-280, 285, 286-287, 290.

⁵²³ ICTY, *Naletilic and Martinovic Trial Judgement*, para. 339 (“The offence of wilfully causing great suffering or serious injury to body or health under Article 2(c) of the Statute is defined as: a. an intentional act or omission consisting of causing great suffering or serious injury to body or health, including mental health, b. committed against a protected person.”); ICTY, *Celebici Appeal Judgement*, para. 424 (“[Wilfully causing great suffering or serious injury to body or health under Article 2] is defined as: a. an intentional act or omission consisting of causing great suffering or serious injury to body or health, including mental health.”); ICTY, *Kordic and Cerkez, Trial Judgement*, paras 244 (“In interpreting this Commentary, the Chamber agrees with the findings of the Trial Chamber in *Celebici*, which held, inter alia, that the scope of this crime encompasses mental, in addition to physical suffering.”), 245 (“[...] the crime of wilfully causing great suffering or serious injury to body or health constitutes an intentional act or omission which causes serious mental or physical suffering or injury”); ICTY, *Celebici Trial Judgement*, para. 509 (“Secondly, the Commentary suggests that ‘causing great suffering’ encompasses more than mere physical suffering, and includes moral suffering. This view is supported by the plain, ordinary meaning of the words ‘wilfully causing great suffering’, which are not qualified by the words ‘to body or health’, as is the case with ‘causing injury’. Thus, the suffering incurred can be mental or physical.”); referencing *ICRC Commentary on Geneva Convention IV (1958)*, p 599.

⁵²⁴ *ICC Elements of Crimes*, Article 8(2)(a)(iii); *ICRC Commentary on Geneva Convention I (2016)*, para. 3000 (“States negotiating the ICC Elements of Crimes took the view, however, that it would be difficult to conceive of mental injury. Under the ICC Elements of Crimes, the elements adopted for this grave breach therefore include the phrase ‘mental or physical’ only in relation to the suffering caused.”); Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 338, para. 108.

303. *“Great” and “serious” requisite level of severity.* Assessing the level of severity is done on a case by case basis. The *ad hoc* international criminal tribunals interpreted the term “serious” along the lines that there does not need to be “permanent and irreparable harm”, only “harm [going] beyond temporary unhappiness, embarrassment, or humiliation”, *i.e.* “[resulting] in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life”.⁵²⁵ Another criterion which may be used for assessing the seriousness of the injury to body or health is the length of time the victim is incapacitated for work.⁵²⁶

CASE STUDY: EXAMPLES AMOUNTING TO THE CRIME OF WILFULLY CAUSING GREAT SUFFERING OR SERIOUS INJURY TO BODY OR HEALTH

International jurisprudence has considered that the following examples can amount to the crime of wilfully causing great suffering or serious injury:

- Beating, hitting and kicking.⁵²⁷
- Stabbing to limbs.⁵²⁸
- Tying a detainee to a roof beam, beating him including striking him with a baseball bat.⁵²⁹
- Pouring gasoline on a detainee’s trousers, setting them on fire and burning his legs.⁵³⁰
- Placing a burning fuse cord around a detainee’s genital area.⁵³¹
- Forcing victims to sing nationalistic songs of an adverse party.⁵³²
- Forcing a victim to chew and eat a bullet.⁵³³
- Forcing a victim to strip, to do push-ups and to clean the boots of adverse party officers.⁵³⁴
- Forcing victims to crawl on the ground and in mud.⁵³⁵

⁵²⁵ ICTY, *Naletilic and Martinovic Trial Judgement*, para. 342; referencing ICTY, *Krstic Trial Judgement*, para. 513 (“The gravity of the suffering must be assessed on a case by case basis and with due regard for the particular circumstances. In line with the *Akayesu* Judgement, the Trial Chamber states that serious harm need not cause permanent and irreparable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life.”); and ICTR, *Akayesu Trial Judgement*, para. 502 (“causing serious bodily or mental harm to members of the group does not necessarily mean that the harm is permanent and irreparable.”). The Trial Chambers in the latter two judgements were assessing serious bodily or mental harm to members of a group as an act of genocide, under *ICTY Statute*, Article 4(2)(b); *ICTR Statute*, Article 2(2)(b).

⁵²⁶ ICTY, *Naletilic and Martinovic Trial Judgement*, para. 340 (“In describing serious injury to body or health, [the Commentary to Article 147 of Geneva Convention IV] states that the concept usually uses as a criterion of seriousness the length of time the victim is incapacitated for work.”); referencing *ICRC Commentary on Geneva Convention IV (1958)*, p 599; see also *Kordic and Cerkez, Trial Judgement*, para. 243; ICTY, *Celebici Trial Judgement*, paras 507, 510.

⁵²⁷ ICTY, *Naletilic and Martinovic Trial Judgement*, paras 349-351, 353-357; ICTY, *Celebici Trial Judgement*, paras 1019, 1029-1034, 1046-1048..

⁵²⁸ ICTY, *Naletilic and Martinovic Trial Judgement*, paras 349-350.

⁵²⁹ ICTY, *Celebici Trial Judgement*, paras 1012, 1016, 1018, 1046-1048.

⁵³⁰ ICTY, *Celebici Trial Judgement*, paras 1012, 1016-1018, 1046-1048.

⁵³¹ ICTY, *Celebici Trial Judgement*, paras 1019, 1038-1040, 1046-1048.

⁵³² ICTY, *Naletilic and Martinovic Trial Judgement*, paras 349-350, 357.

⁵³³ ICTY, *Naletilic and Martinovic Trial Judgement*, paras 349, 351.

⁵³⁴ ICTY, *Naletilic and Martinovic Trial Judgement*, paras 349, 351.

⁵³⁵ ICTY, *Naletilic and Martinovic Trial Judgement*, paras 353-354.

- Forcing detainees to drink urine.⁵³⁶
- Creating and maintaining an atmosphere of terror in a prison-camp and constant fear to detainees by killing and abuse.⁵³⁷
- Inhumane detention conditions and chronically depriving detainees of adequate water, food, sleeping and toilet facilities and medical care.⁵³⁸

304. **The person or persons were protected under one or more of the Geneva Conventions of 1949.** The persons upon whom great suffering or serious injury was inflicted must be protected under one of the four Geneva Conventions namely:

- Members of armed forces and combatants who are wounded, sick and/or shipwrecked ([Geneva Convention I](#), Article 13; [Geneva Convention II](#), Article 13);
- Medical and religious personnel ([Geneva Convention I](#), Articles 24, 25, 26; [Geneva Convention II](#), Articles 36, 37; [Geneva Convention IV](#), Article 20);
- Prisoners of war ([Geneva Convention III](#), Article 4); or
- Civilians who at a given moment and in any manner whatsoever find themselves in the hands of a party to the armed conflict or occupying power of which they are not nationals ([Geneva Convention IV](#), Articles 4, 13).⁵³⁹

305. *Allegiance to a party and that party's control over persons and territory.* Concerning the last category of civilians under Article 4 of Geneva Convention IV, strict, formal/legal nationality is not as important as the substance of relations of victims vis-à-vis perpetrators.⁵⁴⁰ Allegiance to a party to the armed conflict, and control by this party over persons in a given territory, may be regarded as the crucial test.⁵⁴¹ As attacking forces of a party to the armed conflict gradually gain control of territory, individual

⁵³⁶ ICTY, *Celebici Trial Judgement*, paras 1016, 1018.

⁵³⁷ ICTY, *Celebici Trial Judgement*, paras 1073, 1112, 1116, 1118-1119; ICTY, *Celebici Appeal Judgement*, para. 525.

⁵³⁸ ICTY, *Celebici Trial Judgement*, paras 1073, 1112-1115, 1117-1119; ICTY, *Celebici Appeal Judgement*, para. 525.

⁵³⁹ ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, paras 357-358 in relation to the crime of inhuman treatment under Article 8(2)(a)(ii) of the [ICC Statute](#), but this consideration may also apply *mutatis mutandis* to the present crime. See also ICTY, *Prlic et al. Trial Judgement*, Vol. I of VI, para. 98.

⁵⁴⁰ ICTY, *Celebici Appeal Judgement*, paras 83-84 ("Article 4 of Geneva Convention IV is to be interpreted as intending to protect civilians who find themselves in the midst of an international, or internationalised, conflict to the maximum extent possible. The nationality requirement of Article 4 should therefore be ascertained upon a review of 'the substance of relations' and not based on the legal characterisation under domestic legislation. In today's ethnic conflicts, the victims may be 'assimilated' to the external State involved in the conflict, even if they formally have the same nationality as their captors, for the purposes of the application of humanitarian law, and of Article 4 of Geneva Convention IV specifically. The Appeals Chamber thus agrees with the Tadic Appeal Judgement that 'even if in the circumstances of the case the perpetrators and the victims were to be regarded as possessing the same nationality, Article 4 would still be applicable.'").

⁵⁴¹ ICTY, *Tadic Appeal Judgement*, paras 165-166 ("This legal approach, hinging on substantial relations more than on formal bonds, becomes all the more important in present-day international armed conflicts. While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance. Or, put another way, ethnicity may become determinative of national allegiance. Under these conditions, the requirement of nationality is even less adequate to define protected persons. In such conflicts, not only the text and the drafting history of the Convention but also, and more importantly, the Convention's object and purpose suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.").

civilians in these successive areas automatically become protected persons, provided they do not claim allegiance to the party in question.⁵⁴²

iii. Definition of Wilfully Causing Great Suffering or Serious Injury to Body or Health (Subjective Elements)⁵⁴³

306. The subjective elements of wilfully causing great suffering or serious injury are: (1) the perpetrator intentionally and knowingly caused the great physical or mental pain or suffering, or the serious injury to body or health; (2) The perpetrator was aware of the factual circumstances that established protected status under one or more of the Geneva Conventions of 1949.⁵⁴⁴
307. **The perpetrator intentionally and knowingly caused the great physical or mental pain or suffering, or the serious injury to body or health.**⁵⁴⁵ Commentators suggest that because of the use of the notion “wilfully” in the ICC Statute, a lower *mens rea* standard could apply to this offense as “wilfully” has been generally interpreted by the ICTY jurisprudence as including direct intent and recklessness (*dolus eventualis*).⁵⁴⁶

⁵⁴² ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, paras 292 ("Under the case law of the international tribunals, an individual civilian falls 'into the hands of' a party to the conflict when that individual is in the territory under the control of such a party."), 293 ("Therefore, in the view of the Chamber, as the attacking forces of a party to the conflict gradually gain control of a targeted village, individual civilians in these successive areas automatically become protected persons within the meaning of article 4 GC IV, provided they do not claim allegiance to the party in question. Article 8(2)(a)(i) of the Statute thus prohibits the wilful killing of those civilians in such a circumstance" Element 2 of which applies equally to wilfully causing great suffering or serious injury to body or health under Article 8(2)(a)(iii).), 358 ("Article 8(2)(a)(ii) of the Statute therefore applies to those situations in which protected civilians are inhumanely treated 'in the hands of' a party to the conflict, and thus also applies to the inhuman treatment of the protected persons by an attacking force, when such conduct occurs after the overall attack has ended, and defeat or full control of the targeted village has been secured. In addition, this provision prohibits perpetrators from inflicting inhuman treatment on protected persons as these forces move toward areas of enemy resistance in a targeted village" again Element 2 of which applies equally to wilfully causing great suffering or serious injury to body or health under Article 8(2)(a)(iii).).

⁵⁴³ This section details the subjective elements for this war crime as detailed under international law. However, the general part of the CCU identifies subjective elements that apply to crimes. See Articles 23, 24 and 25 of the CCU. It will be necessary to consider the relevance of the subjective elements in the general part of the CCU when considering the elements of this crime as applied under Article 438 of the CCU.

⁵⁴⁴ [ICC Elements of Crimes](#), Article 8(2)(a)(iii).

⁵⁴⁵ This subjective element flows from ordinary intent and knowledge under Article 30 of the [ICC Statute](#).

⁵⁴⁶ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 339, para. 110; Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, p. 488, para. 1273; ICTY, *Blaskic Trial Judgement*, para. 152 ("[A]ccording to the Trial Chamber, the mens rea constituting all the violations of Article 2 of the Statute [containing the grave breaches] includes both guilty intent and recklessness which may be likened to serious criminal negligence."). See also ICTY, *Celebici Trial Judgement*, para. 511 ("The Trial Chamber thus finds that the offence of wilfully causing great suffering or serious injury to body or health constitutes an act or omission that is intentional, being an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury.").

308. The crime can be inflicted for any or no motives such as revenge or out of sadism.⁵⁴⁷ The perpetrator does not need to have completed a value judgment as to the aspects of “greatness” or “seriousness” of the consequences.⁵⁴⁸
309. **The perpetrator was aware of the factual circumstances that established protected status under one or more of the Geneva Conventions of 1949.** With respect to civilians and nationality, the perpetrator needs only to know that the victim belonged to an adverse party to the armed conflict.⁵⁴⁹

iv. Contextual Elements

310. In addition, as with all war crimes, it is necessary to demonstrate the following contextual elements:
- i. There was an international armed conflict;⁵⁵⁰
 - ii. The conduct took place in the context of and was associated with an international armed conflict;⁵⁵¹ and
 - iii. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.⁵⁵²

⁵⁴⁷ ICTY, *Naletilic and Martinovic Trial Judgement*, para. 340 (“The Commentary to Article 147 of Geneva Convention IV describes the offence of wilfully causing great suffering as referring to suffering which is inflicted without ends in view for which torture or biological experiments are carried out. It could be inflicted for other motives such as [...] revenge or out of sadism.”); referencing *ICRC Commentary on Geneva Convention IV (1958)*, p. 599. See also ICTY, *Kordic and Cerkez Trial Judgement*, para. 243; ICTY, *Celebici Trial Judgement*, paras 507-508, 511.

⁵⁴⁸ *ICC Elements of Crimes*, General introduction, para. 4 (“With respect to mental elements associated with elements involving value judgement, such as those using the terms ‘inhumane’ or ‘severe’, it is not necessary that the perpetrator personally completed a particular value judgement, unless otherwise indicated.”); Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 339, para. 111.

⁵⁴⁹ *ICC Elements of Crimes*, Article 8(2)(a)(i), Element 3 fn. 33, applicable to the corresponding element in each crime under Article 8(2)(a). See also ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, para. 360 applying fn. 33 by extension to all protected persons under the four Geneva Conventions (“In accordance with footnote 33 of the Elements of Crimes, it is not necessary for the perpetrator to have evaluated and concluded that the victim was a legally a protected person under any of the four Geneva Conventions, but rather that the perpetrator knows that ‘the victim belonged to an adverse party to the conflict.’”) in relation to the crime of inhuman treatment under Article 8(2)(a)(ii) but this consideration may also apply *mutatis mutandis* to the present crime since this element is identical for both offences.

⁵⁵⁰ See above, paras 188-189.

⁵⁵¹ See above, paras 190-198. See also *ICC Elements of Crimes*, Article 8(2)(a)(iii).

⁵⁵² See above, para. 199. See also *ICC Elements of Crimes*, Article 8(2)(a)(iii).

- iii. Committing outrages upon personal dignity, in particular humiliating and degrading treatment (ICTY Statute, Article 3; ICC Statute, Article 8(2)(b)(xxi))

APPLICABILITY: OUTRAGES UPON PERSONAL DIGNITY CAN BE CONSIDERED CRIMINALISED UNDER ARTICLE 438(1) OF THE CCU AS IT IS SUBSUMED UNDER THE NOTION OF “OTHER VIOLATIONS OF RULES OF THE WARFARE RECOGNIZED BY INTERNATIONAL INSTRUMENTS CONSENTED TO BY BINDING BY THE VERKHOVNA RADA (PARLIAMENT) OF UKRAINE” (PARAS 311-314).

Elements of the crime: To convict a perpetrator of the war crime of outrages upon personal dignity, the following elements must be established:

(1) Objective elements

- The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons (paras 315-319).
- The severity of the humiliation, degradation or other violation was of such degree as to be generally recognised as an outrage upon personal dignity (para. 320).

(2) Subjective elements

- The perpetrator intended to commit an act or omission which would generally be considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity (paras 321-322).
- The perpetrator knew that the act or omission could cause serious humiliation, degradation or otherwise be a serious attack on human dignity (para. 323).

(3) Contextual elements

- There is an international armed conflict (para. 324).
- The conduct of the perpetrator took place in the context and was associated with the conflict (para. 324).
- The perpetrator was aware of the factual circumstances that established the existence of an armed conflict (para. 324).

a. Applicability under Article 438

311. Article 438 of the CCU does not explicitly criminalise outrages upon personal dignity as a war crime. However, as outlined below, this offence may be subsumed under “other violations of rules of the warfare recognised by international instruments consented to by binding nature of which has been approved by the Verkhovna Rada (Parliament) of Ukraine” to which Article 438(1) refers.
312. **Outrages upon personal dignity is a violation of the laws of warfare recognised in international treaties ratified by Ukraine.** Outrages upon personal dignity is qualified as a serious violation of IHL in an international armed conflict. It is reflected in Article 75(2)(b) of [Additional Protocol I](#) and is also encompassed by the notion

of inhumane treatment included in Articles 14 and 52 of the Geneva Convention III and Article 27 of Geneva Convention IV.⁵⁵³ Ukraine has ratified these instruments.⁵⁵⁴

313. **Recognition as war crimes.** In addition, outrages upon personal dignity is recognised as a war crime in international armed conflict, with the status of customary international law. It is recognised as a war crime because it is a grave breach of Additional Protocol I under Article 85.⁵⁵⁵ The ICRC’s Customary Law Study considers its criminalisation as customary.⁵⁵⁶ The crime is codified as a war crime in Article 8(2)(b) (xxi) of the ICC Statute applicable to international armed conflict. The ICTY found that the offence could be subsumed under Article 3 of the ICTY Statute (violations of the laws and customs of war) applicable to both international and non-international armed conflicts ICTY.⁵⁵⁷
314. All of these elements support a finding, that committing outrages upon personal dignity is to be considered criminalised under Article 438(1) of the CCU.

b. Definition of outrages upon personal dignity (Objective Elements)

315. As to the objective element, the war crime of outrages upon personal dignity requires that: (1) the perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons; and (2) the severity of the humiliation, degradation or other violation is of such a degree as to be generally recognised as an outrage upon personal dignity.⁵⁵⁸
316. **The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons.** Outrages upon personal dignity is defined as “any act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity”.⁵⁵⁹

⁵⁵³ See [ICRC Commentary on Additional Protocol I](#), para. 3048 referring to Articles 14 and 52 of Geneva Convention III and article 27 of Geneva Convention IV. The expression outrage upon personal dignity derives from Common article 3 to the Geneva Conventions applicable in non-international armed conflict. The Commentary to common article 3 notes that “humane treatment” must be understood within the meaning of article 27 of Geneva Convention IV. Thus, while the expression outrage upon personal dignity was not mentioned expressly in the Geneva Conventions outside Common Article 3, the notion of inhumane treatment contained therein in both international and non-international armed conflict are intrinsically related. Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 470, paras 616, 618 (“The ICRC Commentary to the Add. Prot. I acknowledges article 75 para. 2 (b)’s tie to both common article 3 and article 27 of Geneva Convention IV”).

⁵⁵⁴ Ukraine ratified the Geneva Conventions, 1949 on 3 August 1954 and Additional Protocol 1 on 25 January 1990. See ICRC, *Treaties and States Parties*, [Ukraine](#).

⁵⁵⁵ [Additional Protocol I](#), Article 85(1)-(3)(e), (5).

⁵⁵⁶ ICRC, IHL Database, Customary IHL, [Rule 156. Serious violations of international humanitarian law constitute war crimes](#). See also Robert Cryer, Darryl Robinson, Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2nd Edition, 2010, p. 291.

⁵⁵⁷ ICTY, *Aleksovski Trial Judgement*, paras 55-56; ICTY, *Aleksovski Appeals Judgement*, paras 17-28. In the context of non-international armed conflict see ICTY, *Kunarac et al. Trial Judgement*, para. 408; ICTY *Kunarac et al. Appeal Judgement*, paras 67-68 (recognising outrages upon personal dignity as a war crime in non-international armed conflict under Article 3 of the Statute). The ICTY also concluded that the offence be subsumed under the notion of inhuman treatment under Article 2(b) of the ICTY Statute applicable to international armed conflicts. See ICTY, *Prlic et al. Trial Judgement*, vol. III. of VI, para. 115.

⁵⁵⁸ ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, para. 367.

⁵⁵⁹ ICTY, *Kunarac et al. Appeal Judgement*, para. 163 (“In explaining that outrages upon personal dignity are constituted by “any act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity”, the Trial Chamber correctly defined the objective threshold for an act

317. The offence is not predicated on a specific “list of acts”. The core element to qualify as outrages upon personal dignity is that the conduct results in the humiliation, degradation or violation of the person’s dignity.⁵⁶⁰
318. Likewise, there is no requirement that the conduct causes or involves physical or mental harm however serious, as the offence captures all acts or omissions aimed at humiliating and ridiculing an individual, including forcing to perform degrading acts.⁵⁶¹

ICC, KATANGA AND NGUDJOLU CHUI DECISION ON THE CONFIRMATION OF CHARGES, PARA. 369

The types of actions or omissions which could constitute a crime under article 8(2)(b)(xxi) were left undefined. As a result, the core element of this war crime is the humiliation, degradation, or violation of the person’s dignity”. (...) The jurisprudence of the ICTY provides that “so long as the serious humiliation or degradation is real and serious,” there is no requirement that such suffering be lasting, or that it is “necessary for the act to directly harm the physical or mental well-being of the victim.

319. Notably, the ICTY jurisprudence has determined that, in and of itself, murder cannot be characterised as outrages upon personal dignity, as causing death is different from serious humiliation, degradation or attacks on human dignity.⁵⁶² At the same time, victims of the crime can include deceased persons.⁵⁶³ In these terms, disrespectful acts against corpses (e.g. performing sexual acts on corpses or burying them in latrine pits) may also amount to outrages upon personal dignity.⁵⁶⁴

to constitute an outrage upon personal dignity. It was not obliged to list the acts which constitute outrages upon personal dignity”).

⁵⁶⁰ ICTY, *Kunarac et al.* [Appeal Judgement](#), para. 162 (“Contrary to the claims of the Appellant, the Appeals Chamber considers that the Trial Chamber was not obliged to define the specific acts which may constitute outrages upon personal dignity. Instead it properly presented the criteria which it used as a basis for measuring the humiliating or degrading character of an act or omission”); ICTY, *Furundzija* [Trial Judgement](#), para. 183 (“The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d’être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well being of a person.”).

⁵⁶¹ [ICRC Commentary to Additional Protocol I](#), Article 75(2) (b); ICTY, *Kvočka* [Trial Judgement](#), para.172 (“The focus of violations of dignity is primarily on acts, omission, or words that do not necessarily involve long-term physical harm, but which nevertheless are serious offences deserving of punishment”); ICTY, *Kunarac et al.* [Trial Judgement](#), paras 501 (“Insofar as this definition provides that an outrage upon personal dignity is an act which ‘cause[s] serious humiliation or degradation to the victim’, the Trial Chamber agrees with it. However, the Trial Chamber would not agree with any indication from the passage above that this humiliation or degradation must cause ‘lasting suffering’ to the victim. So long as the humiliation or degradation is real and serious, the Trial Chamber can see no reason why it would also have to be ‘lasting’”), 502-503.

⁵⁶² ICTY, *Kvočka* [Trial Judgement](#), para. 172 (“In the view of the Trial Chamber, murder in and of itself cannot be characterized as an outrage upon personal dignity. Murder causes death, which is different from concepts of serious humiliation, degradation or attacks on human dignity”).

⁵⁶³ [ICC Elements of Crimes](#), Article 8(2)(b)(xxi), fn. 49 (“For this crime, ‘persons’ can include dead persons.”).

⁵⁶⁴ ICTR, *Bagosora* [Decision on Motions for Judgement of Acquittal](#), para. 40 (“In its Response, the Prosecution has identified the alleged acts. which it considers relevant to this charge: forced incest, burying corpses in latrine pits;

320. **The severity of the humiliation, degradation or other violation was of such degree as to be generally recognised as an outrage upon personal dignity.** The determination of whether the humiliation, degradation, or violation to the person's dignity is of sufficient severity to be "generally recognized" as an outrage upon personal dignity is to be carried out objectively and on case-by-case basis.⁵⁶⁵ To avoid a subjective assessment of the conduct that would depend on the sensitivity of each victim, in the *Aleksovski* case, the ICTY Trial Chamber has clarified that the humiliation of the victim must be so intense that a reasonable person would be outraged.⁵⁶⁶ While the assessment must be objective, it should take into account relevant factors such as the culture or religion of the victim.⁵⁶⁷

ICC, ONGWEN TRIAL JUDGEMENT, PARA. 2756 (FOOTNOTES OMITTED)

Whether the 'severity' of the humiliation, degradation or violation is 'generally recognised' as an outrage upon personal dignity entails an objective assessment of a reasonable person and must be assessed on a case-by-case basis. There is no requirement that the suffering or injury must have long term effects.

CASE STUDY: EXAMPLES OF OUTRAGE UPON PERSONAL DIGNITY

While there is no exhaustive list of acts that can constitute outrage upon personal dignity, the practice of the ICC, the ICTY and the International Criminal Tribunal for Rwanda (ICTR) considered that the following acts could amount to outrages upon personal dignity:

- Rape and other forms of sexual violence such as forced penetration of the mouth by the male sexual organ; sexual slavery or forced incest;⁵⁶⁸
- Forcing a woman to walk in public wearing only her blouse and underwear, and then cutting off her underwear with a knife;⁵⁶⁹

leaving infants without care after killing their guardians; and removing fetuses from the womb. (...) the Chamber finds that a reasonable trier of fact could, if the evidence were to be believed, find the Accused guilty beyond a reasonable doubt of outrages upon personal dignity for one or more of the criminal acts described").

⁵⁶⁵ ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, para. 369 ("The acts of humiliation, degradation or violation to the person's dignity must be committed with objectively sufficient gravity so as to be 'generally recognized as an outrage upon personal dignity.'"); ICC, *Al Hassan Decision on the Confirmation of the Charges*, para. 262 ("La réponse à la question de savoir si l'humiliation, la dégradation ou la violation était d'une 'gravité' suffisante pour être 'généralement considérée' comme une atteinte à la dignité de la personne, doit résulter d'une évaluation objective, opérée au cas par cas.") (available only in French). See also ICC, *Ongwen Trial Judgement*, para. 2756.

⁵⁶⁶ ICTY, *Aleksovski Trial Judgement*, para. 56 ("an objective component to the *actus reus* is apposite: the humiliation to the victim must be so intense that the reasonable person would be outraged.").

⁵⁶⁷ ICC *Elements of Crimes*, Article 8(2)(b)(xxi), fn. 49 ("This element takes into account relevant aspects of the cultural background of the victim.").

⁵⁶⁸ ICTR, *Bagosora Trial Judgement*, para. 2254; ICTR, *Akayesu Trial Judgement*, para. 688; ICTY, *Kunarac et al. Appeal Judgement*, para. 162; ICTY, *Furundzija Trial Judgement*, para. 183. ICTR, *Bagosora Decision on Motions for Judgement of Acquittal*, para. 40; SCSL, *Taylor Trial Judgement*, para. 432.

⁵⁶⁹ ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, paras 375, 377.

- Forcing a young woman to undress and do gymnastics naked in the public courtyard of the bureau communal, in front of a crowd;⁵⁷⁰
- Forcing someone to kill another person with a club and to inspect corpses and forcing someone to beat a person to death;⁵⁷¹
- Forcing a person to watch someone being killed;⁵⁷²
- Forcing mothers to abandon their children on the side of the road;⁵⁷³
- Leaving infants without care after killing their guardians;⁵⁷⁴
- Removing a fetus from the womb;⁵⁷⁵
- Suspend handcuffed and naked female detainees or to forcing them to stay a long time in certain positions;⁵⁷⁶
- Using detainees as human shields or trench diggers;⁵⁷⁷
- Imposing conditions of constant fear of being subjected to physical, mental, or sexual violence on detainees⁵⁷⁸
- Forcing detainees to relieve bodily functions in their clothing;⁵⁷⁹
- Burying corpses in latrine pits⁵⁸⁰.

c. Definition of outrages upon personal dignity (Subjective Elements)⁵⁸¹

321. As to the subjective element within the ICC framework, outrages upon personal dignity requires that the perpetrator: (1) intended to commit an act or omission which would generally be considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity (**intent**); and (2) knew or is aware that it will occur in the ordinary course of event that the act or omission could cause serious humiliation, degradation or otherwise be a serious attack on human dignity (**knowledge**).⁵⁸²

⁵⁷⁰ ICTR, *Akayesu Trial Judgement*, para. 688.

⁵⁷¹ ICC, *Ongwen Trial Judgement*, paras 2903, 3065.

⁵⁷² ICC, *Ongwen Trial Judgement*, para. 2903.

⁵⁷³ ICC, *Ongwen Trial Judgement*, para. 2903.

⁵⁷⁴ ICTR, *Bagosora Decision on Motions for Judgement of Acquittal*, para. 40.

⁵⁷⁵ ICTR, *BBagosora Decision on Motions for Judgement of Acquittal*, para. 40.

⁵⁷⁶ ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, para. 370.

⁵⁷⁷ ICTY, *Aleksovski Trial Judgement*, para. 229.

⁵⁷⁸ ICTY, *Kvocka et al. Trial Judgement*, para. 173.

⁵⁷⁹ ICTY, *Kvocka et al. Trial Judgement*, para. 173.

⁵⁸⁰ ICTR, *Bagosora Decision on Motions for Judgement of Acquittal*, para. 40.

⁵⁸¹ This section details the subjective elements for this war crime as detailed under international law. However, the general part of the CCU identifies subjective elements that apply to crimes. See Articles 23, 24 and 25 of the CCU. It will be necessary to consider the relevance of the subjective elements in the general part of the CCU when considering the elements of this crime as applied under Article 438 CCU.

⁵⁸² *ICC Statute*, Article 30; ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, para. 372.

322. With respect to the intent, outrages upon personal dignity does not require that the perpetrator has the specific intent to humiliate, ridicule or degrade the victim,⁵⁸³ or any form of discriminatory intent or motives.⁵⁸⁴
323. As to the knowledge requirement at the ICTY and SCSL, it is sufficient that the perpetrator knew that his/her acts and omissions “could” generally cause serious humiliation, degradation or a an attack on human dignity. There is no requirement that the perpetrator “should” or “must” know of the actual consequences of his/her acts and omissions.⁵⁸⁵

SCSL, RUF TRIAL JUDGEMENT, PARA. 177 (FOOTNOTES OMITTED)

The Chamber also recognises that the *mens rea* of the offence does not require that the Accused had a specific intent to humiliate or degrade the victims, that is, that he perpetrated the act for that very reason. The act or omission must, however, have been done intentionally and the Accused must have known “that his act or omission could cause serious humiliation, degradation or otherwise be a serious attack on human dignity.” The Chamber considers that there is no requirement to establish that the Accused knew of the “actual consequences of the act”, but only of its possible consequences. There is no additional requirement to establish that the Accused had a discriminatory intent or motive.

d. Contextual Elements

324. In addition, as with all war crimes, it is necessary to demonstrate the following contextual elements:
- i. There was an international armed conflict;⁵⁸⁶
 - ii. The conduct took place in the context of and was associated with an international armed conflict;⁵⁸⁷ and

⁵⁸³ ICTY, *Aleksovski Appeals Judgement*, para. 27 (“the Appeals Chamber does not interpret the observation in the ICRC Commentary on the Additional Protocols, that the term ‘outrages upon personal dignity’ refers to acts ‘aimed at humiliating and ridiculing’ the victim, as necessarily supporting a requirement of a specific intent on the part of a perpetrator to humiliate, ridicule or degrade the victims. The statement seems simply to describe the conduct which the provision seeks to prevent”).

⁵⁸⁴ ICTY, *Aleksovski Appeals Judgement*, para. 28 (“it is not an element of offences under Article 3 of the Statute, nor of the offence of outrages upon personal dignity, that the perpetrator had a discriminatory intent or motive”). See also ICC, *Ongwen Trial Judgement*, para. 2756.

⁵⁸⁵ ICTY, *Kunarac et al. Appeal Judgement*, paras 165-166 (“The Trial Chamber carried out a detailed review of the case-law relating to the *mens rea* of the crime of outrages upon personal dignity. The Trial Chamber was never directly confronted with the specific question of whether the crime of outrages upon personal dignity requires a specific intent to humiliate or degrade or otherwise seriously attack human dignity. However, after reviewing the case-law, the Trial Chamber properly demonstrated that the crime of outrages upon personal dignity requires only a knowledge of the ‘possible’ consequences of the charged act or omission. The relevant paragraph of the Trial Judgement reads as follows: As the relevant act or omission for an outrage upon personal dignity is an act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity, an accused must know that his act or omission is of that character — i.e., that it could cause serious humiliation, degradation or affront to human dignity. This is not the same as requiring that the accused knew of the actual consequences of the act.”). See also ICTY, *Kunarac et al. Trial Judgement*, paras 512-513.

⁵⁸⁶ See above, paras 188-189.

⁵⁸⁷ See above, paras 190-198 See also *ICC Elements of Crimes*, Article 8(2)(b)(xxi).

iii. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.⁵⁸⁸

iv. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity (ICC Statute, Article 8(2)(xxii)).

325. This section addresses a cluster of offenses related to sexual violence. It includes the war crimes of: rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and any other form of sexual violence of comparable gravity.

a. Rape

APPLICABILITY: THE WAR CRIME OF RAPE CAN BE CONSIDERED CRIMINALISED UNDER ARTICLE 438 OF THE CCU AS IT IS SUBSUMED UNDER THE NOTION OF “OTHER VIOLATIONS OF THE LAWS OR CUSTOMS OF WAR RECOGNISED BY INTERNATIONAL TREATIES THE BINDING NATURE OF WHICH HAS BEEN APPROVED BY THE VERKHOVNA RADA (PARLIAMENT) OF UKRAINE” (PARAS 316-321).

Elements of the crime: To convict a perpetrator for the war crime of rape the following elements need to be established:

(1) Objective elements

- The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body (paras 333-334).
- The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent (paras 335-338).

(2) Subjective elements

- The perpetrator intentionally invaded the body of a person (para. 339).
- The perpetrator was aware that the act was committed by force, by the threat of force or coercion, by taking advantage of a coercive environment, or against a person incapable of giving genuine consent (para. 340).

(3) Contextual elements

- There is an international armed conflict (para. 341).
- The conduct of the perpetrator took place in the context and was associated with the conflict (para. 341).
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict (para. 341).

⁵⁸⁸ See above, para. 199. See also [ICC Elements of Crimes](#), Article 8(2)(b)(xxi)..

i. Applicability under Article 438

326. Although not explicitly mentioned in Article 438 of the CCU, rape may be subsumed under “any other violations of rules of warfare recognized by international instruments consented to be binding by the Verkhovna Rada of Ukraine” to which Article 438(1) refers. As explained below, rape is prohibited under international instruments ratified by Ukraine and a violation of this prohibition has been recognised as a war crime. These factors support interpreting Article 438 of the CCU as criminalising violations of this prohibition.
327. **Rape constitutes a violation of International Humanitarian Law reflected in international treaties ratified by Ukraine.** Article 27 of [Geneva Convention IV ratified by Ukraine](#) explicitly prohibits rape by stipulating that “women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.”⁵⁸⁹ Rape is listed as an example of inhumane treatment in the aforementioned article.⁵⁹⁰ [Geneva Convention III](#) does not explicitly prohibit rape. Nonetheless, considering that the Convention requires the humane treatment of prisoners of war at all times and prohibits acts of violence or intimidation against them, the ICRC Commentary submits that it implicitly prohibits rape.⁵⁹¹
328. Moreover, Article 76 of [Additional Protocol I, ratified by Ukraine](#), reiterates the prohibition of rape included in Article 27 of [Geneva Convention IV](#).⁵⁹² In addition to the above, Article 75 of [Additional Protocol I](#) requires the humane treatment of all persons that find themselves in the power of a Party to the armed conflict and prohibits, amongst other, “outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault”.⁵⁹³ While Article 75(2)(b) of [Additional Protocol I](#) does not mention rape, the jurisprudence of international criminal tribunals has considered rape to fall within the scope of “out-

⁵⁸⁹ Notwithstanding the focus of this provision on “women”, the ICRC Commentary notes that “the prohibition of sexual violence is recognised to encompass violence not only against women and girls, but any person, including men and boys.” See [ICRC Commentary on Geneva Convention III](#) (2020), para. 736. Ukraine ratified the 1949 Geneva Conventions on 3 August 1954. See ICRC, *Treaties, States Parties and Commentaries*, [Ukraine](#).

⁵⁹⁰ [ICRC Commentary on Geneva Convention III](#) (2020), para. 737; ICRC, IHL Database, Customary Law, [Rule 156. Definition of War Crimes](#) (“Although rape was prohibited by the Geneva Conventions, it was not explicitly listed as a grave breach either in the Conventions or in Additional Protocol I but would have to be considered a grave breach on the basis that it amounts to inhuman treatment or wilfully causing great suffering or serious injury to body or health.”); See also ICTY, *Prlic Trial Judgement*, Vol. I of VI, para.116 (“[...] any sexual violence inflicted on the physical and moral integrity of a person by means of threat, intimidation or force, in such a way as to degrade or humiliate the victim, may constitute inhuman treatment under Article 2(b) of the Statute.”) (footnotes omitted); [ICTY Statute, Article 2](#) (“Grave breaches of the Geneva Conventions of 1949”).

⁵⁹¹ [Geneva Convention III](#), Article 13; [ICRC Commentary on Geneva Convention III](#) (2020), para. 1578. With regard to non-international armed conflicts, [Common Article 3 to the 1949 Geneva Conventions](#) prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment”. Pursuant to the ICRC Commentary, “[w]hile common Article 3 does not explicitly prohibit sexual violence, it does so implicitly because it establishes an obligation of humane treatment and prohibits violence to life and person, including mutilation, cruel treatment, torture and outrages upon personal dignity.” [ICRC Commentary on Geneva Convention III](#), para. 732.

⁵⁹² Ukraine ratified Additional Protocol I on 25 January 1990. See ICRC, *Treaties, States Parties and Commentaries*, [Ukraine](#). With regard to [Additional Protocol II to the 1949 Geneva Conventions applicable during non-international armed conflicts](#), Article 4 of the instrument explicitly states that rape remains prohibited at any time and any place whatsoever.

⁵⁹³ [Additional Protocol I](#), Article 75(1) and (2)(b).

rages upon personal dignity”.⁵⁹⁴ Therefore, for the purposes of Article 438 of the CCU, rape could constitute a violation of the laws of warfare recognised in international instruments accepted as binding by the Ukrainian parliament.

329. **Recognition as a war crime.** Violations of the rules of IHL requiring the humane treatment of protected persons constitute grave breaches of the 1949 Geneva Conventions and their Additional Protocol I.⁵⁹⁵ Rape can constitute inhumane treatment and therefore amount to a grave breach of the Geneva Conventions and Additional Protocol I.⁵⁹⁶ Grave breaches of the Geneva Conventions and Additional Protocol I are war crimes.⁵⁹⁷ Rape may also qualify as a war crime without necessarily constituting a grave breach.⁵⁹⁸
330. The [ICC Statute](#) recognises violations of the prohibition of rape as a war crime applicable to an international armed conflict.⁵⁹⁹ The war crime of rape is included in the list of “other serious violations of the laws and customs applicable in international armed conflict” under the [ICC Statute](#). With regard to the ICTY, while not explicitly listed as a war crime in the [ICTY Statute](#), the Tribunal’s jurisprudence confirms that rape may constitute a grave breach or a serious violation of the laws or customs of war under Article 3 of the [ICTY Statute](#).⁶⁰⁰

⁵⁹⁴ ICTY, *Kunarac et al.* Trial Judgement, para. 436 (“The jurisdiction to prosecute rape as an outrage against personal dignity, in violation of the laws or customs of war pursuant to Article 3 of the Statute, including upon the basis of common Article 3 to the 1949 Geneva Conventions, is also clearly established.”) (footnotes omitted); ICTR, *Akayesu Trial Judgement*, para. 688 (“Sexual violence falls within the scope of “outrages upon personal dignity”, set forth in [...] Article 4(e) of the Tribunal’s Statute [...]”); ICTY, *Furundzija Trial Judgement*, para. 274 (“[the accused] is individually responsible for outrages upon personal dignity including rape, a violation of the law and customs of war under Article 3 of the Statute.”); ICTR, *Bogosora et al. Trial Judgement*, para. 2254 (“The Chamber finds Bogosora guilty of outrages against personal dignity as violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 12) for the rapes committed between 6 and 9 April 1994 [...]”); [ICRC Commentary on Geneva Convention III](#) (2020), paras 708, 742; See also [ICRC Commentary on Additional Protocol I](#), p. 873, para. 3047, according to which acts that constitute humiliating and degrading treatment are included in Article 27 of [Geneva Convention IV](#). The latter states that “[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.” Given the above, rape can be considered “degrading treatment” and therefore an outrage upon personal dignity.

⁵⁹⁵ [Geneva Convention I](#), Article 50; [Geneva Convention II](#), Article 51; [Geneva Convention III](#), Article 130; [Geneva Convention IV](#), Article 147; [Additional Protocol I](#), Article 85.

⁵⁹⁶ [ICRC Commentary on Geneva Convention III](#) (2020), para. 737; ICRC, IHL Database, Customary Law, [Rule 156. Definition of War Crimes](#) (“Although rape was prohibited by the Geneva Conventions, it was not explicitly listed as a grave breach either in the Conventions or in Additional Protocol I but would have to be considered a grave breach on the basis that it amounts to inhuman treatment or wilfully causing great suffering or serious injury to body or health”); ICTY, *Prlic Trial Judgement*, Vol. I of VI, para.116 (“[...] any sexual violence inflicted on the physical and moral integrity of a person by means of threat, intimidation or force, in such a way as to degrade or humiliate the victim, may constitute inhuman treatment under Article 2(b) of the Statute.”) (footnotes omitted).

⁵⁹⁷ ICRC, IHL Database, Customary IHL, [Rule 156. Definition of War Crimes](#); ICRC, Advisory Service on International Humanitarian Law, [Obligations in terms of penal repression](#), p. 1.

⁵⁹⁸ Gloria Gaggioli, “[Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law](#)”, 96 *International Review of the Red Cross*, p. 527 (“[...] Rape and other forms of sexual violence can also be qualified as war crimes in the context of international armed conflicts, without necessarily being grave breaches. This is important to note in particular for sexual abuses that do not enter into the specific categories of grave breaches or that are committed against individuals who do not fall within the category of protected persons.”).

⁵⁹⁹ [ICC Statute](#), Article 8(2)(b)(xxii). The ICC Statute also identifies this offence as a war crime in non-international armed conflicts, [ICC Statute](#), Article 8(2)(e)(vi). [The ICTR Statute and the SCSL Statute include rape in the list of crimes falling under “violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II” in the context of non-international armed conflicts.](#) See [ICTR Statute](#), Article 4; [SCSL Statute](#), Article 3.

⁶⁰⁰ See Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 481, para. 661; ICTY, *Kunarac et al. Trial Judgement*, para. 436 (“The Statute refers explicitly

331. These factors support recognition of the criminalisation of rape under Article 438(1) of the CCU.

ii. Definition of Rape (Objective Elements)

332. The objective elements of this war crime require that: (1) the perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body; and (2) the invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.⁶⁰¹

333. **The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.** To establish the first element of the war crime of rape, it must be demonstrated that there was an “invasion” of the body of a person through penetration.

**ICC, NTAGANDA TRIAL JUDGEMENT, PARA. 933
(FOOTNOTES OMITTED)⁶⁰²**

The concept of ‘invasion’ is intended to be broad enough to be gender-neutral. Accordingly, ‘invasion’, in the Court’s legal framework, includes same-sex penetration, and encompasses both male and/or female perpetrators and victims.

to rape as a crime against humanity within the Tribunal’s jurisdiction in Article 5(g). The jurisdiction to prosecute rape as an outrage against personal dignity, in violation of the laws or customs of war pursuant to Article 3 of the Statute, including upon the basis of common Article 3 to the 1949 Geneva Conventions, is also clearly established.” (footnotes omitted). The ICTY has also considered that rape and other forms of sexual violence may amount to torture which constitutes a grave breach under Article 2 of the [ICTY Statute](#). See ICTY, *Kunarac et al.* [Appeal Judgement](#), para. 150.

⁶⁰¹ [ICC Elements of Crimes](#), Article 8(2)(b)(xxii)-1; ICC, *Katanga and Ngudjolo Chui Decision on Confirmation of Charges*, para. 342.

⁶⁰² In relation to the offence of rape in non-international armed conflict under Article 8(2)(e)(vi) of the ICC Statute but the consideration may also apply *mutatis mutandis* to the present crime.

334. There are two forms of penetration covered by this element:

- *Penetration of any part of the body with a sexual organ.*⁶⁰³ This not only covers the penetration of the vagina or anus, but also covers oral penetration (i.e., penetration of the mouth).⁶⁰⁴ In addition, the penetration may be of any part of the body of the victim or the perpetrator.⁶⁰⁵

ICC, KATANGA TRIAL JUDGEMENT, PARA. 963 (FOOTNOTES OMITTED)⁶⁰⁶

The Chamber considers that the first constituent element is established where the perpetrator invaded the body of a person by conduct resulting in penetration, even where the perpetrator does not engage in the act of penetration. In fact, the element is framed so as to also foresee the eventuality that the perpetrator is penetrated in addition to that of the perpetrator causing or prompting penetration.

- *Penetration of the anal or genital opening of the victim with any object or any other part of the body.*⁶⁰⁷ This covers penetration of the body of the victim only (and not the perpetrator) with something other than a sexual organ which could include penetration with either a) other body parts, for example a hand, or b) an object.⁶⁰⁸

335. **The invasion was committed by (1) force, or (2) by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or (3) by taking advantage of a coercive environment.** This element provides for the circumstances and conditions

⁶⁰³ [ICC Elements of Crimes](#), Article 8(2)(b)(xxii)-1.

⁶⁰⁴ ICC, *Bemba Trial Judgement*, para. 101 (“The Chamber notes that the definition of rape encompasses acts of ‘invasion’ of any part of a victim’s body, including the victim’s mouth, by a sexual organ.”); SCSL, *Sesay et al. Trial Judgement*, para. 146 (“The first element of the actus reus defines the type of invasion that is required to constitute the offence of rape and covers two types of penetration, however slight. The first part of the provision refers to the penetration of any part of the body of either the victim or the Accused with a sexual organ. The ‘any part of the body’ in this part includes genital, anal or oral penetration.”) (footnotes omitted) (in relation to the offence of rape in non-international armed conflict under Article 8(2)(e)(vi) of the ICC Statute but the consideration may also apply *mutatis mutandis* to the present crime.); ICTY, *Furundzija Trial Judgement*, para. 185 (“[...]The Trial Chamber finds that the following may be accepted as the objective elements of rape: (i) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person.”).

⁶⁰⁵ [ICC Elements of Crimes](#), Article 8(2)(b)(xxii)-1; ICC, *Katanga Trial Judgement*, para. 963 (in relation to the offence of rape in non-international armed conflict under Article 8(2)(e)(vi) of the ICC Statute but the consideration may also apply *mutatis mutandis* to the present crime.); Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 486, para. 677.

⁶⁰⁶ In relation to the offence of rape in non-international armed conflict under Article 8(2)(e)(vi) of the ICC Statute but the consideration may also apply *mutatis mutandis* to the present crime.

⁶⁰⁷ [ICC Elements of Crimes](#), Article 8(2)(b)(xxii)-1.

⁶⁰⁸ ICTR, *Akayesu Trial Judgement*, para. 596 (“[...] variations on the act of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual.”); SCSL, *Sesay et al. Trial Judgement*, para. 146 (“The second part of the provision refers to the penetration of the genital or anal opening of the victim with any object or any other part of the body. This part is meant to cover penetration with something other than a sexual organ which could include either other body parts or any other object.”) (footnotes omitted); See also ICTR, *Gacumbitsi Trial Judgement*, para. 321 (in relation to the offence of rape in non-international armed conflict but the consideration may also apply *mutatis mutandis* to the present crime.).

which give the penetration a criminal character.⁶⁰⁹ In *Kunarac et al.*, the ICTY Appeals Chamber agreed with the Trial Chamber’s finding that “force is not an element *per se* of rape” and that “there are factors ‘other than force’ which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim.”⁶¹⁰

ICC, ONGWEN TRIAL JUDGEMENT, PARA. 2710 (FOOTNOTES OMITTED)⁶¹¹

Coercive circumstances need not be evidenced by a show of physical force — threats, intimidation, extortion, and other forms of duress which prey on fear or desperation may constitute coercion. Coercion may be inherent in certain circumstances, such as armed conflict or the military presence of hostile forces amongst the civilian population. Several factors may contribute to creating a coercive environment, such as the number of people involved in the commission of the crime, or whether the rape is committed during or immediately following a combat situation, or is committed together with other crimes.

336. Establishing one of the above coercive circumstances (force, threat of force or coercion, and taking advantage of a coercive environment) is sufficient for penetration to amount to the war crime of rape.⁶¹² In addition, there is no requirement that the victim resisted.⁶¹³
337. Moreover, as recognised in the extracts from the judgement in the text box below, it is not necessary to prove the victim’s lack of consent.⁶¹⁴

⁶⁰⁹ ICC, *Bemba Trial Judgement*, para. 102; ICC, *Katanga Trial Judgement*, para. 964 (in relation to the offence of rape in non-international armed conflict under Article 8(2)(e)(vi) of the ICC Statute but the consideration may also apply *mutatis mutandis* to the present crime.).

⁶¹⁰ ICTY, *Kunarac et al. Appeal Judgement*, para. 129; ICTY *Kunarac et al Trial Judgement*, paras 438, 458.

⁶¹¹ In relation to the offence of rape in non-international armed conflict under Article 8(2)(e)(vi) of the ICC Statute but the consideration may also apply *mutatis mutandis* to the present crime.

⁶¹² ICC, *Ntaganda Trial Judgement* para. 934 (“The establishment of at least one of the coercive circumstances or conditions set out in the second element is therefore sufficient alone for penetration to amount to rape [...]”) (footnotes omitted); ICC, *Katanga Trial Judgement*, para. 965 (in relation to the offence of rape in non-international armed conflict under Article 8(2)(e)(vi) of the ICC Statute but the consideration may also apply *mutatis mutandis* to the present crime.).

⁶¹³ ICC, *Ongwen Trial Judgement*, para. 2709 (“there is no requirement of resistance on the part of the victim”).

⁶¹⁴ ICC, *Ongwen Trial Judgement*, para. 2709; ICC, *Ntaganda Trial Judgement*, para. 934; ICC, *Katanga Trial Judgement*, para. 965 (in relation to the offence of rape in non-international armed conflict under Article 8(2)(e)(vi) of the ICC Statute but the consideration may also apply *mutatis mutandis* to the present crime.).

ICC, BEMBA TRIAL JUDGEMENT, PARAS 105-106 (FOOTNOTES OMITTED)⁶¹⁵

105. The Chamber notes that the victim's lack of consent is not a legal element of the crime of rape under the Statute. The preparatory works of the Statute demonstrate that the drafters chose not to require that the Prosecution prove the non-consent of the victim beyond reasonable doubt, on the basis that such a requirement would, in most cases, undermine efforts to bring perpetrators to justice.

106. Therefore, where “force”, “threat of force or coercion”, or “taking advantage of coercive environment” is proven, the Chamber considers that the Prosecution does not need to prove the victim's lack of consent.

338. **The invasion was committed (4) against a person incapable of giving genuine consent.** The second element of the war crime of rape also cover cases where the “invasion” was committed against a person not able to give consent due to “natural, induced or age-related incapacity”.⁶¹⁶ Upon such cases, the ICC Trial Chamber in *Bemba* determined that only proof of the impact of the “natural, induced or age-related incapacity” on the victim's ability to give consent is required.⁶¹⁷

iii. Definition of Rape (Subjective Elements)⁶¹⁸

339. The subjective elements of the war crime of rape require that the perpetrator (1) intentionally invaded the body of a person; and (2) the perpetrator was aware that the act was committed by force, or by threat of force or coercion, by taking advantage of a coercive environment, or against a person incapable of giving genuine consent.⁶¹⁹

340. With regard to “intent”, in the Katanga case, the Trial Chamber determined that this standard is satisfied “where it is proven that the perpetrator acted deliberately or failed to act (1) such that penetration took place or (2) whereas he or she was aware that such a consequence would arise in the ordinary course of events.”⁶²⁰

⁶¹⁵ In relation to the offence of rape in non-international armed conflict under Article 8(2)(e)(vi) of the ICC Statute but the consideration may also apply *mutatis mutandis* to the present crime.

⁶¹⁶ [ICC Elements of Crimes](#), Article 8(2)(b)(xxii)-1, fn 51; ICC, *Bemba Trial Judgement*, para. 107 (in relation to the offence of rape in non-international armed conflict under Article 8(2)(e)(vi) of the ICC Statute but the consideration may also apply *mutatis mutandis* to the present crime.).

⁶¹⁷ ICC, *Bemba Trial Judgement*, para. 107 (in relation to the offence of rape in non-international armed conflict under Article 8(2)(e)(vi) of the ICC Statute but the consideration may also apply *mutatis mutandis* to the present crime.).

⁶¹⁸ This section details the subjective elements for this war crime as detailed under international law. However, the general part of the CCU identifies subjective elements that apply to crimes. See Articles 23, 24 and 25 of the CCU. It will be necessary to consider the relevance of the subjective elements in the general part of the CCU when considering the elements of this crime as applied under Article 438 CCU.

⁶¹⁹ [ICC Elements of Crimes](#), Article 8(2)(b)(xxii)-1; [ICC Statute](#), Article 30; ICC, *Katanga Trial Judgement*, paras 969-970 (in relation to the offence of rape in non-international armed conflict under Article 8(2)(e)(vi) of the ICC Statute but the consideration may also apply *mutatis mutandis* to the present crime.). See also ICTY *Kunarac et al Trial Judgement*, para. 460 (“The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.”).

⁶²⁰ ICC, *Katanga Trial Judgement*, para. 970 (in relation to the offence of rape in non-international armed conflict under Article 8(2)(e)(vi) of the ICC Statute but the consideration may also apply *mutatis mutandis* to the present crime.).

iv. Contextual Elements

341. In addition, as with all war crimes, it is necessary to demonstrate the following contextual elements:
- i. There was an international armed conflict;⁶²¹
 - ii. The conduct took place in the context of and was associated with an international armed conflict;⁶²² and
 - iii. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.⁶²³

a. Sexual Slavery

APPLICABILITY: THE WAR CRIME OF SEXUAL SLAVERY CAN BE CONSIDERED CRIMINALISED UNDER ARTICLE 438 OF THE CCU AS IT IS SUBSUMED UNDER THE NOTION OF “OTHER VIOLATIONS OF THE LAWS OR CUSTOMS OF WAR RECOGNISED BY INTERNATIONAL TREATIES THE BINDING NATURE OF WHICH HAS BEEN APPROVED BY THE VERKHOVNA RADA (PARLIAMENT) OF UKRAINE” (PARAS 342-346).

Elements of the crime: To convict a perpetrator for the war crime of sexual slavery the following elements need to be established:

(1) Objective elements

- The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty (paras 348-353).
- The perpetrator caused such person or persons to engage in one or more acts of a sexual nature (paras 354-356).

(2) Subjective elements

- The perpetrator intentionally and knowingly exercised any or all of the powers attaching to the right of ownership over one or more persons (para. 357).
- The perpetrator intentionally and knowingly caused such person or persons to engage in one or more acts of a sexual nature (para. 357).

(3) Contextual elements

- There is an international armed conflict (para. 358).
- The conduct of the perpetrator took place in the context and was associated with the conflict (para. 358).
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict (para. 358).

⁶²¹ See above, paras 188-189.

⁶²² See above, paras 190-198. See also [ICC Elements of Crimes](#), Article 8(2)(b)(xxii)-1.

⁶²³ See above, para. 199. See also [ICC Elements of Crimes](#), Article 8(2)(b)(xxii)-1.

i. Applicability under Article 438

342. Although not explicitly mentioned in Article 438 of the CCU, sexual slavery may be subsumed within “any other violations of rules of warfare recognized by international instruments consented to be binding by the Verkhovna Rada of Ukraine” to which Article 438(1) refers. As explained below, sexual slavery is prohibited under international instruments ratified by Ukraine and a violation of this prohibition has been recognised as a war crime. These factors support interpreting Article 438 of the CCU as criminalising violations of this prohibition.

343. **Sexual slavery constitutes a violation of International Humanitarian Law reflected in international treaties ratified by Ukraine.** While the 1949 Geneva Conventions and their Additional Protocols do not explicitly prohibit sexual slavery, this conduct is implicitly prohibited by IHL rules requiring the humane treatment of protected persons.⁶²⁴ For instance, Article 27 of [Geneva Convention IV](#) – ratified by Ukraine – requires that “[protected persons] shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof [...]” Article 75 of [Additional Protocol I](#), also ratified by Ukraine, further states that persons that find themselves in the power of a Party to the armed conflict shall be treated humanely in all circumstances. Specifically, Article 75(2)(b) of [Additional Protocol I](#) prohibits, amongst other acts, “outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault.”⁶²⁵ Therefore, for the purposes of Article 438 of the CCU, sexual slavery constitutes a violation of the laws of warfare recognised in international instruments accepted as binding by the Ukrainian parliament.

344. **Recognition as a war crime.** Violations of the rules of IHL requiring the humane treatment of protected persons constitute grave breaches of the 1949 Geneva Conventions and their Additional Protocol I.⁶²⁶ Sexual slavery can constitute inhumane treatment and therefore amount to a grave breach of the Geneva Conventions and Additional Protocol I.⁶²⁷ Grave breaches of the Geneva Conventions and Additional

⁶²⁴ [Geneva Convention I](#), Article 12(2); [Geneva Convention II](#), Article 12; [Geneva Convention III](#), Article 13(1); [Geneva Convention IV](#), Articles 5(3), 27(1), 127(1); [Additional Protocol I](#), Articles 10(2), 75; [Geneva Conventions I-IV](#), Common Article 3; [Additional Protocol II](#), Article 4(1); [ICRC Commentary on Geneva Convention III](#), para. 1578 (“While Article 13 does not explicitly prohibit sexual violence, it does so implicitly because it establishes an obligation of humane treatment and requires protection against violence or intimidation.”); See also ICTY, *Prlic Trial Judgement*, Vol. I of VI, para.116 (“any sexual violence inflicted on the physical and moral integrity of a person by means of threat, intimidation or force, in such a way as to degrade or humiliate the victim, may constitute inhuman treatment.”) (footnotes omitted).

⁶²⁵ There is a clear practice from international criminal tribunals to interpret sexual slavery as constituting outrage upon personal dignity. See ICTR, *Akayesu Trial Judgement*, para. 688 (“Sexual violence falls within the scope of “outrages upon personal dignity”, set forth in [...] Article 4(e) of the Tribunal’s Statute [...]”). SCSL, *Brima et al. Trial Judgement*, paras 713 (“[...] The Trial Chamber finds, by a majority, that the evidence adduced by the Prosecution is completely subsumed by the crime of sexual slavery and that there is no lacuna in the law which would necessitate a separate crime of “forced marriage” as an ‘other inhumane act’. In view of the Trial Chamber’s findings that Count 7 is bad for duplicity, the Trial will in the interests of justice consider the evidence of Sexual Slavery under Count 9.”) (footnotes omitted). Count 9 concerns “Outrages Upon Personal Dignity (Article 3(e) of the Statute)”.

⁶²⁶ [Geneva Convention I](#), Article 50; [Geneva Convention II](#), Article 51; [Geneva Convention III](#), Article 130; [Geneva Convention IV](#), Article 147; [Additional Protocol I](#), Article 85.

⁶²⁷ ICTY, *Prlic Trial Judgement*, Vol. I of VI, para.116 (“[...] any sexual violence inflicted on the physical and moral integrity of a person by means of threat, intimidation or force, in such a way as to degrade or humiliate the victim,

Protocol I are war crimes.⁶²⁸ Sexual slavery may also qualify as a war crime without necessarily constituting a grave breach.⁶²⁹

345. Sexual slavery is expressly codified as a war crime in Article 8(2)(b)(xxii) of the [ICC Statute](#) applicable to international armed conflict.⁶³⁰ The war crime of sexual slavery is included in the list of “other serious violations of the laws and customs applicable in international armed conflict” under the ICC Statute.
346. These factors support recognition of the criminalisation of sexual slavery under Article 438(1) of the CCU.

ii. Definition of sexual slavery (Objective Elements)

347. The objective elements of the war crime require that: (1) the perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty; and (2) the perpetrator caused such person or persons to engage in one or more acts of a sexual nature.⁶³¹
348. The perpetrators and victims of the war crime of sexual slavery can be of any sex and gender.⁶³²
349. **The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons or by imposing on them a similar deprivation of**

may constitute inhuman treatment under Article 2(b) of the Statute.”) (footnotes omitted).

⁶²⁸ ICRC, IHL Database, Customary IHL, [Rule 156. Definition of War Crimes](#); ICRC, Advisory Service on International Humanitarian Law, [Obligations in terms of penal repression](#), p. 1.

⁶²⁹ Gloria Gaggioli, “[Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law](#)”, 96 *International Review of the Red Cross*, p. 527 (“[...] Rape and other forms of sexual violence can also be qualified as war crimes in the context of international armed conflicts, without necessarily being grave breaches. This is important to note in particular for sexual abuses that do not enter into the specific categories of grave breaches or that are committed against individuals who do not fall within the category of protected persons.”).

⁶³⁰ The ICC Statute also identifies this offence as a war crime in non-international armed conflicts, see [ICC Statute](#), Article 8(2)(e)(vi). While not explicitly mentioned as a war crime in the [SCSL Statute](#), sexual slavery has been charged before the court as the war crime of outrages upon personal dignity in a non-international armed conflict. See [SCSL Statute](#), Article 3; SCSL, *Sesay et al. Trial Judgement*, para. 173 (“The Indictment charges the Accused in Count 9 with outrages upon personal dignity as a violation of Common Article 3 and of Additional Protocol II punishable under Article 3 of the Statute. The Count relates to the Accused’s alleged responsibility for the acts outlined above in Counts 6 through 8 of the Indictment.”) (Count 6-8 of the Indictment relate to rape, sexual slavery and other inhumane acts); SCSL, *Brima et al. Trial Judgement*, para. 713 (“[...] The Trial Chamber finds, by a majority, that the evidence adduced by the Prosecution is completely subsumed by the crime of sexual slavery and that there is no lacuna in the law which would necessitate a separate crime of “forced marriage” as an ‘other inhumane act’. In view of the Trial Chamber’s findings that Count 7 is bad for duplicity, the Trial will in the interests of justice consider the evidence of Sexual Slavery under Count 9.”) (footnotes omitted). Count 9 concerns “Outrages Upon Personal Dignity (Article 3(e) of the Statute)”.

⁶³¹ [ICC Elements of Crimes](#), Article 8(2)(b)(xxii)-2.

⁶³² Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 483, para. 668 (“With the exception of the war crime of forced pregnancy, which by its nature can only be committed against women, the drafters of the Rome Statute intended all of the war crimes of sexual violence under article 8 para. 2 (b) (xxii) to be defined, in principle, in a gender-neutral way. Thus, both victims as well as perpetrators may be of any sex and gender. This also results from the almost entirely gender-neutrally wording of the elements of crimes for article 8 para. 2 (b) (xxii), and with regard to the war crime of rape is underscored in footnote 50 of the elements.”) (footnotes omitted).

liberty.⁶³³ Sexual slavery is a specific form of enslavement.⁶³⁴ Element 1 of the war crime of sexual slavery encompasses contemporary forms of slavery.⁶³⁵ In accordance with the extract from the ICC *Katanga* Trial Judgement, exercising powers attaching to the right of ownership has been interpreted to mean:

**ICC, KATANGA TRIAL JUDGEMENT, PARA. 975
(FOOTNOTES OMITTED)⁶³⁶**

Powers attaching to right of ownership must be construed as the use, enjoyment and disposal of a person who is regarded as property, by placing him or her in a situation of dependence which entails his or her deprivation of any form of autonomy.

350. The [ICC Elements of Crimes](#) list examples of the exercise of powers attaching to the right of ownership. They include “purchasing, selling, lending or bartering” a person or persons,⁶³⁷ or “imposing on them a similar deprivation of liberty”.⁶³⁸ The latter may include, amongst other, exacting forced labour, reducing a person to servile status, or trafficking in persons,⁶³⁹ and may cover “situations where the victims have not been

⁶³³ It should be noted that Element 1 is identical in the context of the war crime of “sexual slavery” and the crime against humanity of “enslavement”. See [ICC Elements of Crimes](#), Article 7(1) (c) and 8(2)(b)(xxii)-2; Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary*, Cambridge: Cambridge University Press, 2003, p. 328. For this reason, this section of the draft refers to relevant jurisprudence on the crime against humanity of enslavement.

⁶³⁴ ICC, *Ongwen Trial Judgement*, para. 2715 (“The crime of sexual slavery is a specific form of the crime of ‘enslavement’, penalising the perpetrator’s restriction or control of the victim’s sexual autonomy while held in the state of enslavement. The crime of sexual slavery, whether as a crime against humanity or war crime, is committed when the material element of enslavement is fulfilled.”) (footnotes omitted) (in relation to the offence of sexual slavery in non-international armed conflict under Article 8(2)(e)(vi) of the ICC Statute but the consideration may also apply *mutatis mutandis* to the present crime.).

⁶³⁵ ICTY, *Kunarac et al. Appeal Judgement*, para. 117 (“The Appeals Chamber accepts the chief thesis of the Trial Chamber that the traditional concept of slavery, as defined in the 1926 Slavery Convention and often referred to as “chattel slavery”, has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership. In the case of these various contemporary forms of slavery, the victim is not subject to the exercise of the more extreme rights of ownership associated with “chattel slavery”, but in all cases, as a result of the exercise of any or all of the powers attaching to the right of ownership, there is some destruction of the juridical personality; the destruction is greater in the case of “chattel slavery” but the difference is one of degree. The Appeals Chamber considers that, at the time relevant to the alleged crimes, these contemporary forms of slavery formed part of enslavement as a crime against humanity under customary international law.”) (footnotes omitted) (in the context of enslavement as a crime against humanity but given that enslavement is one of the element of the war crime of sexual slavery this jurisprudence may apply *mutatis mutandis* to this element).

⁶³⁶ In relation to the offence of sexual slavery in non-international armed conflict under Article 8(2)(e)(vi) of the ICC Statute but the consideration may also apply *mutatis mutandis* to the present crime.

⁶³⁷ [ICC Elements of Crimes](#), Article 8(2)(b)(xxii)-2.

⁶³⁸ [ICC Elements of Crimes](#), Article 8(2)(b)(xxii)-2.

⁶³⁹ [ICC Elements of Crimes](#), Article 8(2)(b)(xxii)-2, fn 53 (“It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.”). The examples provided in fn 53 are not exhaustive. See Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 496, para. 715. “‘Servile status’ is defined as a person in the condition or status resulting from any of the institutions or practices of slavery mentioned in Article 1 of the Convention.” See [1956 Supplementary Convention on the Abo-](#)

physically confined, but were otherwise unable to leave as they would have nowhere else to go and fear for their lives”.⁶⁴⁰

351. The exercise of powers attaching to the right of ownership does not need to involve a commercial transaction.⁶⁴¹ Instead, as held by the Trial Chamber in the *Katanga* case “the notion of servitude relates first and foremost to the impossibility of the victim’s changing his or her condition.”⁶⁴²
352. Furthermore, the Appeals Chamber in *Kunarac* held that it is not necessary that the enslavement or the duration of the detention last for an extended period.⁶⁴³

ICTY, KUNARAC ET AL. APPEAL JUDGEMENT, PARA. 121 (FOOTNOTES OMITTED)

The Trial Chamber found that the duration of the detention is another factor that can be considered but that its importance will depend on the existence of other indications of enslavement. The Appeals Chamber upholds this finding and observes that the duration of the enslavement is not an element of the crime. The question turns on the quality of the relationship between the accused and the victim. A number of factors determine that quality. One of them is the duration of the relationship. The Appeals Chamber considers that the period of time, which is appropriate, will depend on the particular circumstances of each case.

353. The examples related to the exercise of powers attaching to the right of ownership included in Element 1 of the war crime are not exhaustive.⁶⁴⁴ Indeed, the exertion of such powers may take various forms.⁶⁴⁵ There is no exhaustive list of actions or circumstances that demonstrate the exercise of powers of ownership over one or more persons.⁶⁴⁶ A case-by-case analysis must be conducted and the following factors can be considered to determine whether the perpetrator exercised a power of ownership:

[lition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery](#), Article 7(b).

⁶⁴⁰ ICC, *Ongwen Trial Judgement*, para. 2713; ICC, *Ntaganda Trial Judgement*, para. 952; ICC, *Katanga Trial Judgement*, para. 977; SCSL, *Brima et al. Trial Judgement*, para. 709; SCSL, *Taylor Trial Judgement*, para. 420 (in relation to the offence of sexual slavery in non-international armed conflict under Article 8(2)(e)(vi) of the ICC Statute and as crime against humanity but the consideration may also apply *mutatis mutandis* to the present crime.).

⁶⁴¹ ICC, *Ongwen Trial Judgement*, para. 2713; ICC, *Katanga Trial Judgement*, para. 976; ICC, *Ntaganda Trial Judgement*, para. 952; SCSL, *Taylor Trial Judgement*, para. 420; SCSL, *Brima et al. Trial Judgement*, para. 709 (in relation to the offence of sexual slavery in non-international armed conflict under Article 8(2)(e)(vi) of the ICC Statute and as crime against humanity but the consideration may also apply *mutatis mutandis* to the present crime.).

⁶⁴² ICC, *Katanga Trial Judgement*, para. 976 (in relation to the offence of sexual slavery in non-international armed conflict under Article 8(2)(e)(vi) of the ICC Statute but the consideration may also apply *mutatis mutandis* to the present crime.).

⁶⁴³ ICTY, *Kunarac et al. Appeal Judgement*, para. 121; See also ICC, *Ongwen Trial Judgement*, para. 2714 (“The law also does not establish a minimum period of enslavement.”) (in relation to the offence of sexual slavery in non-international armed conflict under Article 8(2)(e)(vi) of the ICC Statute, enslavement as crime against humanity but the consideration may also apply *mutatis mutandis* to the present crime.).

⁶⁴⁴ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 496, para. 715.

⁶⁴⁵ ICC, *Katanga Trial Judgement*, para. 975 (in relation to the offence of sexual slavery in non-international armed conflict under Article 8(2)(e)(vi) of the ICC Statute but the consideration may also apply *mutatis mutandis* to the present crime.).

⁶⁴⁶ ICC, *Ntaganda Trial Judgement*, para. 952; ICC, *Katanga Trial Judgement*, para. 975; ICTY, *Kunarac et al. Appeal*

CASE-STUDY: ONGWEN TRIAL JUDGEMENT (PARA. 2712)⁶⁴⁷

- control or restrictions of someone’s movement and, more generally, measures taken to prevent or deter escape;
- control of physical environment;
- psychological control or pressure;
- force, threat of force or coercion;
- duration of the exercise of powers attaching to the right of ownership;
- assertion of exclusivity;
- subjection to cruel treatment and abuse;
- control of sexuality;
- forced labour or subjecting the person to servile status; and
- the person’s vulnerability and the socio-economic conditions in which the power is exerted.

354. **The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.** In addition to demonstrating that the perpetrator exercised the power attaching to the right of ownership over a person, it must be established that the perpetrator caused the enslaved person to engage in one or more acts of a sexual nature.⁶⁴⁸

SCSL, SESAY ET AL. TRIAL JUDGEMENT, PARA. 162 (FOOTNOTES OMITTED)⁶⁴⁹

To convict an Accused for this offence, the Prosecution must also prove that the Accused caused the enslaved person to engage in acts of a sexual nature. The acts of sexual violence are the additional element that, when combined with evidence of slavery, constitutes sexual slavery.

355. As recognised in the extracts from the judgements in the text box below, sexual slavery may include rape but is not limited to physical acts of a sexual nature.⁶⁵⁰

[Judgement](#), para. 119; SCSL, *Sesay et al. Trial Judgement*, para. 160 (in relation to the offence of sexual slavery in non-international armed conflict under Article 8(2)(e)(vi) of the ICC Statute, enslavement and sexual slavery as crimes against humanity but the consideration may also apply *mutatis mutandis* to the present crime).

⁶⁴⁷ In relation to the offence of sexual slavery in non-international armed conflict under Article 8(2)(e)(vi) of the ICC Statute but the consideration may also apply *mutatis mutandis* to the present crime.

⁶⁴⁸ ICC, *Ongwen Trial Judgement*, para 2715 (“The crime of sexual slavery, whether as a crime against humanity or war crime, is committed when the material element of enslavement is fulfilled and the perpetrator also caused such person or persons to engage in one or more acts of a sexual nature.”) (footnotes omitted) (in relation to the offence of sexual slavery in non-international armed conflict under Article 8(2)(e)(vi) but the consideration may also apply *mutatis mutandis* to the present crime).

⁶⁴⁹ In relation to the offence of sexual slavery as crime against humanity but the consideration may also apply *mutatis mutandis* to the present crime.

⁶⁵⁰ ICC, *Ongwen Trial Judgement*, paras 2716, 3037 (in relation to the offence of sexual slavery in non-international armed conflict under Article 8(2)(e)(vi) of the ICC Statute but the consideration may also apply *mutatis mutandis* to the present crime); ICTR, *Akeyesu Trial Judgement*, para. 688 (in relation to the offence of “outrages upon personal dignity” in non-international armed conflict but the consideration may also apply *mutatis mutandis* to the present

ICTR, AKAYESU TRIAL JUDGEMENT, PARA. 688 (FOOTNOTES OMITTED)⁶⁵¹

The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.

ICC, ONGWEN TRIAL JUDGEMENT, PARA. 2716 (FOOTNOTES OMITTED)⁶⁵²

Acts of a sexual nature in this context include acts of rape, but are not limited to them. Accordingly, they [do not need to] involve penetration or even physical contact. The term ‘sexual’ may refer to acts carried out through sexual means or by targeting sexuality. Whether an act is sexual in nature must be determined on a case-by-case basis, depending on the specific facts and circumstances of a given case.

356. The war crime of sexual slavery may involve more than one perpetrator.⁶⁵³ The acts of a sexual nature are not required to be perpetrated by the individual who exercises the rights attaching to ownership.⁶⁵⁴

i. Definition of sexual slavery (Subjective Elements)⁶⁵⁵

357. The subjective elements of the war crime require that (1) the perpetrator intentionally and knowingly exercised any or all of the powers attaching to the right of ownership over one or more persons; and (2) the perpetrator intentionally and knowingly caused such person or persons to engage in one or more acts of a sexual nature.⁶⁵⁶

crime). See also ICTY, *Furundzija Trial Judgement*, para. 186 (“[I]nternational criminal rules punish not only rape but also any serious sexual assault falling short of actual penetration. It would seem that the prohibition embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim’s dignity.”).

⁶⁵¹ In relation to the offence of sexual slavery in non-international armed conflict under Article 8(2)(e)(vi) of the ICC Statute but the consideration may also apply *mutatis mutandis* to the present crime.

⁶⁵² In relation to the offence of sexual slavery in non-international armed conflict under Article 8(2)(e)(vi) of the ICC Statute but the consideration may also apply *mutatis mutandis* to the present crime.

⁶⁵³ *ICC Elements of Crimes*, Article 8(2)(b)(xxii)-2, fn 52 (“Given the complex nature of this crime, it is recognized that its commission could involve more than one perpetrator as a part of a common criminal purpose.”).

⁶⁵⁴ ICC, *Ntaganda Trial Judgement*, para. 980 (in relation to the offence of sexual slavery in non-international armed conflict under Article 8(2)(e)(vi) of the ICC Statute but the consideration may also apply *mutatis mutandis* to the present crime).

⁶⁵⁵ This section details the subjective elements for this war crime as detailed under international law. However, the general part of the CCU identifies subjective elements that apply to crimes. See Articles 23, 24 and 25 of the CCU. It will be necessary to consider the relevance of the subjective elements in the general part of the CCU when considering the elements of this crime as applied under Article 438 of the CCU.

⁶⁵⁶ *ICC Elements of Crimes*, Article 8(2)(b)(xxii)-2; *ICC Statute*, Article 30.

**ICC, KATANGA TRIAL JUDGEMENT, PARA. 981
(FOOTNOTES OMITTED)⁶⁵⁷**

The Chamber considers that the perpetrator must have been aware of individually or collectively exercising one of the attributes of the rights of ownership over a person and forced such person to engage in one or more acts of a sexual nature. Therefore the perpetrator must have been aware that he or she was exerting such powers and have meant to engage in the conduct in order to force the person concerned to engage in acts of a sexual nature or have been aware that such a consequence would occur in the ordinary course of events.

iii. Contextual Elements

358. In addition, as with all war crimes, it is necessary to demonstrate the following contextual elements:
- i. There was an international armed conflict;⁶⁵⁸
 - ii. The conduct took place in the context of and was associated with an international armed conflict;⁶⁵⁹ and
 - iii. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.⁶⁶⁰

⁶⁵⁷ In relation to the offence of sexual slavery in non-international armed conflict under Article 8(2)(e)(vi) of the ICC Statute but the consideration may also apply *mutatis mutandis* to the present crime.

⁶⁵⁸ See above, paras 188-189.

⁶⁵⁹ See above, paras 190-198. See also [ICC Elements of Crimes](#), Article 8(2)(b)(xxii)-2.

⁶⁶⁰ See above, para. 199. See also [ICC Elements of Crimes](#), Article 8(2)(b)(xxii)-2.

b. Enforced Prostitution

APPLICABILITY: THE WAR CRIME OF ENFORCED PROSTITUTION CAN BE CONSIDERED CRIMINALISED UNDER ARTICLE 438 OF THE CCU AS IT IS SUBSUMED UNDER THE NOTION OF “OTHER VIOLATIONS OF THE LAWS OR CUSTOMS OF WAR RECOGNISED BY INTERNATIONAL TREATIES THE BINDING NATURE OF WHICH HAS BEEN APPROVED BY THE VERKHOVNA RADA (PARLIAMENT) OF UKRAINE” (PARAS [359-364](#)).

Elements of the crime: To convict a perpetrator for the war crime of enforced prostitution the following elements need to be established:

(1) Objective elements

- The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent (para. [366-368](#)).
- The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature (para. [369](#)).

(2) Subjective elements

- The perpetrator intentionally and knowingly caused one or more persons to engage in one or more acts of a sexual nature by force, by the threat of force or coercion, by taking advantage of a coercive environment, or against a person incapable of giving genuine consent (para. [370](#)).
- The perpetrator intended that they or another person would obtain a pecuniary or other advantage in exchange for or in connection with the acts of sexual nature (para. [370](#)).

(3) Contextual elements

- There is an international armed conflict (para. [371](#)).
- The conduct of the perpetrator took place in the context and was associated with the conflict (para. [371](#)).
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict (para. [371](#)).

i. Applicability under Article 438

359. Although not explicitly mentioned in Article 438 of the CCU, enforced prostitution may be subsumed within “any other violations of rules of warfare recognized by international instruments consented to be binding by the Verkhovna Rada of Ukraine” to which Article 438(1) refers. As explained below, enforced prostitution is prohibited under international instruments ratified by Ukraine and a violation of this prohibition has been recognised as a war crime. These factors support interpreting Article 438 CCU as criminalising violation of this prohibition.

360. **Enforced prostitution constitutes a violation of International Humanitarian Law reflected in international treaties ratified by Ukraine.** Article 27 of [Geneva Convention IV](#) ratified by Ukraine requires that “women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.”⁶⁶¹ Enforced prostitution is listed as an example of inhumane treatment in the aforementioned article.⁶⁶² Regarding [Geneva Convention III](#), it does not explicitly prohibit enforced prostitution. Nonetheless, considering that the Convention requires the humane treatment of prisoners of war at all times and prohibits acts of violence or intimidation against them, the ICRC Commentary submits that it implicitly prohibits sexual violence.⁶⁶³
361. Moreover, Article 76 of [Additional Protocol I](#) ratified by Ukraine reiterates the prohibition of enforced prostitution included in [Geneva Convention IV](#).⁶⁶⁴ In addition, Article 75 of [Additional Protocol I](#) requires the humane treatment of all persons that find themselves in the power of a Party to the armed conflict and prohibits, amongst other, “outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault”.⁶⁶⁵ Therefore, for the purposes of Article 438 of the CCU, enforced prostitution constitutes a violation of the laws of warfare recognised in international instruments accepted as binding by the Ukrainian parliament.
362. **Recognition as a war crime.** Violations of the rules of IHL requiring the humane treatment of protected persons constitute grave breaches of the 1949 Geneva Conventions and their Additional Protocol I.⁶⁶⁶ Enforced prostitution can constitute inhumane treatment and therefore amount to a grave breach of the Geneva Conventions and Additional Protocol I.⁶⁶⁷ Graves breaches of the Geneva Conventions and Additional

⁶⁶¹ Notwithstanding the focus of this provision on “women”, the ICRC Commentary notes that “the prohibition of sexual violence is recognised to encompass violence not only against women and girls, but any person, including men and boys.” See [ICRC Commentary on Geneva Convention III](#) (2020), para. 736. Ukraine ratified the 1949 Geneva Conventions on 3 August 1954. See ICRC, *Treaties, States Parties and Commentaries*, [Ukraine](#).

⁶⁶² [ICRC Commentary on Geneva Convention III](#) (2020), para. 737. See also ICTY, *Prlic Trial Judgement*, Vol. I of VI, para.116 (“[...] any sexual violence inflicted on the physical and moral integrity of a person by means of threat, intimidation or force, in such a way as to degrade or humiliate the victim, may constitute inhuman treatment under Article 2(b) of the Statute.”) (footnotes omitted); [ICTY Statute](#), Article 2 (“Grave breaches of the Geneva Conventions of 1949”).

⁶⁶³ [Geneva Convention III](#), Article 13(2); [ICRC Commentary on Geneva Convention III](#) (2020), para. 1578. With regard to instruments applicable to non-international armed conflicts, [Common Article 3 to the 1949 Geneva Conventions](#) prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment”.

⁶⁶⁴ [Additional Protocol I](#), Article 76(1); Ukraine ratified Additional Protocol I on 25 January 1990. See ICRC, *Treaties, States Parties and Commentaries*, [Ukraine](#). With regard to [Additional Protocol II to the 1949 Geneva Conventions](#) applicable to non-international armed conflict, Article 4 of the instrument explicitly states that enforced prostitution remains prohibited at any time and any place whatsoever.

⁶⁶⁵ [Additional Protocol I](#), Article 75(1) and (2)(b).

⁶⁶⁶ [Geneva Convention I](#), Article 50; [Geneva Convention II](#), Article 51; [Geneva Convention III](#), Article 130; [Geneva Convention IV](#), Article 147; [Additional Protocol I](#), Article 85.

⁶⁶⁷ [ICRC Commentary on Geneva Convention III](#) (2020), para. 737; ICTY, *Prlic Trial Judgement*, Vol I of VI, para.116 (“[...] any sexual violence inflicted on the physical and moral integrity of a person by means of threat, intimidation or force, in such a way as to degrade or humiliate the victim, may constitute inhuman treatment under Article 2(b) of the Statute.”) (footnotes omitted).

Protocol I are war crimes.⁶⁶⁸ Enforced prostitution may also qualify as a war crime without necessarily constituting a grave breach.⁶⁶⁹

363. Enforced prostitution is expressly codified as a war crime in Article 8(2)(b)(xxii) of the [ICC Statute](#) applicable to international armed conflict.⁶⁷⁰ The war crime of enforced prostitution is included in the list of “other serious violations of the laws and customs applicable in international armed conflict” under the ICC Statute.
364. These factors support recognition of the criminalisation of enforced prostitution under Article 438(1) of the CCU.

ii. Definition of Enforced Prostitution (Objective Elements)

365. The objective elements of this war crime require that: (1) the perpetrator (i) caused one or more persons to engage in one or more acts of a sexual nature (ii) by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent; and (2) the perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.⁶⁷¹
366. **The perpetrator caused one or more persons to engage in one or more acts of a sexual nature.** In considering the elements of sexual assault, the Appeals Chamber in the *Dordevic* case determined that conduct may qualify as an act of a sexual nature in the following cases:

ICTY, *DORDEVIC* APPEAL JUDGEMENT, PARA. 852 (FOOTNOTES OMITTED)

It is evident that sexual assault requires that an act of a sexual nature take place. The Appeals Chamber notes that the act must also constitute an infringement of the victim’s physical or moral integrity. Often the parts of the body commonly associated with sexuality are targeted or involved. Physical contact is, however, not required for an act to be qualified as sexual in nature. Forcing a person to perform or witness certain acts may be sufficient, so long as the acts humiliate and/or degrade the victim in a sexual manner.

⁶⁶⁸ ICRC, IHL Database, Customary IHL, [Rule 156. Definition of War Crimes](#); ICRC, Advisory Service on International Humanitarian Law, [Obligations in terms of penal repression](#), p. 1.

⁶⁶⁹ Gloria Gaggioli, “[Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law](#)”, 96 *International Review of the Red Cross*, p. 527 (“[...] Rape and other forms of sexual violence can also be qualified as war crimes in the context of international armed conflicts, without necessarily being grave breaches. This is important to note in particular for sexual abuses that do not enter into the specific categories of grave breaches or that are committed against individuals who do not fall within the category of protected persons.”).

⁶⁷⁰ The ICC Statute also identifies this offence as a war crime in non-international armed conflicts, see [ICC Statute](#), Article 8(2)(e)(vi). The [ICTR Statute](#) and the [SCSL Statute](#) also include enforced prostitution in the list of crimes falling under “violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II” in the context of non-international armed conflicts. See [ICTR Statute](#), Article 4; [SCSL Statute](#), Article 3.

⁶⁷¹ [ICC Elements of Crimes](#), Article 8(2)(b)(xxii)-3.

367. The person subjected to prostitution can be a woman/girl or a man/boy.⁶⁷² In addition, it should be noted that in contrast to rape, the perpetrator is not necessarily the person that engaged in the act of sexual nature but the person that “caused” the victim to do so.⁶⁷³ Commentators have suggested that the war crime of enforced prostitution “may cover a single act as well as a continuing situation”⁶⁷⁴ and may constitute a continuing crime.⁶⁷⁵
368. **The perpetrator committed the aforementioned act(s) by force, or by threat of force or coercion, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent.** For more information about this element, see the war crime of rape (paras 206-221).
369. **The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.** As suggested by one commentator, this element of the war crime distinguishes it from the war crime of sexual slavery with which it otherwise largely overlaps as it captures the motives of the perpetrator (greed rather than just power) and the “element of profiting.”⁶⁷⁶

iii. Definition of Enforced Prostitution (Subjective Elements)⁶⁷⁷

370. In relation to the subjective elements, the war crime of enforced prostitution requires that: (1) the perpetrator intentionally and knowingly caused one or more persons to engage in one or more acts of a sexual nature by force, by the threat of force or coercion, by taking advantage of a coercive environment, or against a person incapable of giving genuine consent; and (2) the perpetrator intended that they or another person

⁶⁷² Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 483, para. 668 (“With the exception of the war crime of forced pregnancy, which by its nature can only be committed against women, the drafters of the Rome Statute intended all of the war crimes of sexual violence under article 8 para. 2 (b) (xxii) to be defined, in principle, in a gender-neutral way. Thus, both victims as well as perpetrators may be of any sex and gender. This also results from the almost entirely gender-neutrally wording of the elements of crimes for article 8 para. 2 (b) (xxii), and with regard to the war crime of rape is underscored in footnote 50 of the elements.”) (footnotes omitted).

⁶⁷³ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 497, para. 718.

⁶⁷⁴ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 497, para. 718.

⁶⁷⁵ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 497, para. 718. See also *idem.* p. 215, para. 65. The latter refers to the commentary on the crime against humanity of enforced prostitution. Nonetheless, given that the war crime of enforced prostitution and the crime against humanity of enforced prostitution only differ in terms of their contextual elements, the above commentary is relevant for the discussion and analysis of the war crime of enforced prostitution. See also [ICC Elements of Crimes](#), Article 7(1)(g)-3 and Article 8(2)(b)(xxii)-3.

⁶⁷⁶ Melanie O’Brien, “‘Don’t kill them, let’s choose them as wives’: the development of the crimes of forced marriage, sexual slavery and enforced prostitution in international criminal law”, 20 *International Journal of Human Rights*, p. 397.

⁶⁷⁷ This section details the subjective elements for this war crime as detailed under international law. However, the general part of the CCU identifies subjective elements that apply to crimes. See Articles 23, 24 and 25 of the CCU. It will be necessary to consider the relevance of the subjective elements in the general part of the CCU when considering the elements of this crime as applied under Article 438 of the CCU.

would obtain a pecuniary or other advantage in exchange for or in connection with the acts of sexual nature.⁶⁷⁸

iv. Contextual Elements

371. In addition, as with all war crimes, it is necessary to demonstrate the following contextual elements:
- i. There was an international armed conflict;⁶⁷⁹
 - ii. The conduct took place in the context of and was associated with an international armed conflict;⁶⁸⁰ and
 - iii. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.⁶⁸¹

⁶⁷⁸ [ICC Elements of Crimes](#), Article 8(2)(b)(xxii)-3; [ICC Statute](#), Article 30. The Elements of Crimes do not provide a particular mental standard for the war crime of enforced prostitution and therefore the requirement under Article 30 of the ICC Statute applies. See for a similar reasoning in relation to rape, ICC, [Katanga Trial Judgement](#), para. 969 (“The Chamber recalls that where the Elements of Crimes leave the mental element unspecified, regard must be had to article 30 of the Statute to determine whether the crime was committed with intent and knowledge.”) (footnotes omitted).

⁶⁷⁹ See above, paras [188-189](#).

⁶⁸⁰ See above, paras [190-198](#). See also [ICC Elements of Crimes](#), Article 8(2)(b)(xxii)-3.

⁶⁸¹ See above, para. [199](#). See also [ICC Elements of Crimes](#), Article 8(2)(b)(xxii)-3.

c. Forced Pregnancy

APPLICABILITY: THE WAR CRIME OF FORCED PREGNANCY CAN BE CONSIDERED CRIMINALISED UNDER ARTICLE 438 OF THE CCU AS IT IS SUBSUMED UNDER THE NOTION OF “OTHER VIOLATIONS OF THE LAWS OR CUSTOMS OF WAR RECOGNISED BY INTERNATIONAL TREATIES THE BINDING NATURE OF WHICH HAS BEEN APPROVED BY THE VERKHOVNA RADA (PARLIAMENT) OF UKRAINE” (PARAS 372-376).

Elements of the crime: To convict a perpetrator for the war crime of forced pregnancy the following elements need to be established:

(1) Objective element

- The perpetrator confined one or more women and forcibly made pregnant (paras 377-382).

(2) Subjective elements

- The perpetrator intentionally and knowingly confined one or more women forcibly made pregnant (para. 384).
- The perpetrator intended to affect the ethnic composition of any population or to carry out other grave violations of international law (para. 385).

(3) Contextual elements

- There is an international armed conflict (para. 386).
- The conduct of the perpetrator took place in the context and was associated with the conflict (para. 386).
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict (para. 386).

i. Applicability under Article 438

372. Although not explicitly mentioned in Article 438 of the CCU, forced pregnancy may be subsumed within “any other violations of rules of warfare recognized by international instruments consented to be binding by the Verkhovna Rada of Ukraine” to which Article 438(1) refers. As explained below, forced pregnancy is prohibited under international instruments ratified by Ukraine and a violation of this prohibition has been recognised as a war crime. These factors support interpreting Article 438 of the CCU as criminalising violations of this prohibition.

373. **Forced pregnancy constitutes a violation of International Humanitarian Law reflected in international treaties ratified by Ukraine.** While the 1949 Geneva Conventions and their Additional Protocols do not explicitly prohibit forced pregnancy, this conduct is implicitly prohibited by the rules of IHL requiring the humane treatment of protected persons.⁶⁸² For instance, Article 27 of [Geneva Convention IV](#) ratified by

⁶⁸² [Geneva Convention I](#), Article 12(2); [Geneva Convention II](#), Article 12; [Geneva Convention III](#), Article 13(1); [Geneva Convention IV](#), Articles 5(3), 27(1), 127(1); [Additional Protocol I](#), Articles 10(2), 75; [Geneva Conventions I-IV](#), Article

Ukraine requires that “[protected persons] shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.” In addition, Article 75 of [Additional Protocol I](#), also ratified by Ukraine, requires the humane treatment of all persons that find themselves in the power of a Party to the armed conflict and prohibits, amongst other, “outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault”.⁶⁸³ Therefore, for the purposes of Article 438 of the CCU, forced pregnancy constitutes a violation of the laws of warfare recognised in international instruments accepted as binding by the Ukrainian parliament.

374. **Recognition as a war crime.** Violations of the rules of IHL requiring the humane treatment of protected persons constitute grave breaches of the 1949 Geneva Conventions and their Additional Protocol I.⁶⁸⁴ Forced pregnancy may constitute inhumane treatment and therefore amount to a grave breach of the Geneva Conventions and Additional Protocol I.⁶⁸⁵ Graves breaches of the Geneva Conventions and Additional Protocol I are war crimes.⁶⁸⁶ Forced pregnancy may also qualify as a war crime without necessarily constituting a grave breach.⁶⁸⁷
375. Forced pregnancy is expressly codified as a war crime in Article 8(2)(b)(xxii) of the [ICC Statute](#) applicable to international armed conflict making the [ICC Statute](#) the first instrument that explicitly recognises forced pregnancy as a war crime.⁶⁸⁸ The war crime of forced pregnancy is included in the list of “other serious violations of the laws and customs applicable in international armed conflict” under the ICC Statute.
376. These factors support recognition of the criminalisation of forced pregnancy under Article 438(1) of the CCU.

3; [Additional Protocol II](#), Article 4(1). See also [ICRC Commentary on Geneva Convention III](#), para. 1578 (“While Article 13 does not explicitly prohibit sexual violence, it does so implicitly because it establishes an obligation of humane treatment and requires protection against violence or intimidation.”); ICTY, *Prlic Trial Judgement*, Vol. I of VI, para.116 (“any sexual violence inflicted on the physical and moral integrity of a person by means of threat, intimidation or force, in such a way as to degrade or humiliate the victim, may constitute inhuman treatment.”) (footnotes omitted).

⁶⁸³ [Additional Protocol I](#), Article 75(1) and (2)(b).

⁶⁸⁴ [Geneva Convention I](#), Article 50; [Geneva Convention II](#), Article 51; [Geneva Convention III](#), Article 130; [Geneva Convention IV](#), Article 147; [Additional Protocol I](#), Article 85.

⁶⁸⁵ ICTY, *Prlic Trial Judgement*, Vol. I of VI, para.116 (“[...] any sexual violence inflicted on the physical and moral integrity of a person by means of threat, intimidation or force, in such a way as to degrade or humiliate the victim, may constitute inhuman treatment under Article 2(b) of the Statute.”) (footnotes omitted).

⁶⁸⁶ ICRC, IHL Database, Customary IHL, [Rule 156. Definition of War Crimes](#); ICRC, Advisory Service on International Humanitarian Law, [Obligations in terms of penal repression](#), p. 1.

⁶⁸⁷ Gloria Gaggioli, “[Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law](#)”, 96 *International Review of the Red Cross*, p. 527 (“[...] Rape and other forms of sexual violence can also be qualified as war crimes in the context of international armed conflicts, without necessarily being grave breaches. This is important to note in particular for sexual abuses that do not enter into the specific categories of grave breaches or that are committed against individuals who do not fall within the category of protected persons.”).

⁶⁸⁸ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 497, para. 720. The ICC Statute also identifies this offence as a war crime in non-international armed conflicts, see [ICC Statute](#), Article 8(2)(e)(vi).

ii. Definition of Forced Pregnancy (Objective Elements)

377. The ICC Trial and Appeals Chambers in the Ongwen case determined that “the crime of forced pregnancy seeks to protect, among others, the woman’s reproductive health and autonomy and the right to family planning.”⁶⁸⁹
378. The objective elements of the war crime require that (1) the perpetrator confined one or more women and (2) the woman or women confined had been forcibly made pregnant.⁶⁹⁰
379. **The perpetrator unlawfully confined one or more women.** In accordance with this first component of the objective element, it must be demonstrated that the perpetrator “unlawfully” confined one or more women, meaning that the physical liberty of one or more women was restricted contrary to standards of international law.⁶⁹¹ The confinement does not need to be of specific duration or reach a certain level of severity.⁶⁹²
380. **The woman or women confined had been forcibly made pregnant.** The second component of the objective element of the war crime requires that the confined woman or women were made forcibly pregnant.

⁶⁸⁹ ICC, *Ongwen Appeal Judgement*, para. 1063; ICC, *Ongwen Trial Judgement*, para. 2717 (in relation to the offence of forced pregnancy in non-international armed conflict under Article 8(2)(e)(vi) of the ICC Statute but the consideration may also apply *mutatis mutandis* to the present crime).

⁶⁹⁰ *ICC Elements of Crimes*, Article 8(2)(b)(xxii)-4. The sentence contained in the ICC Statute’s definition of forced pregnancy, namely that the crime “shall not in any way be interpreted as affecting national laws related to pregnancy” does not add a new element to the crime but merely addresses concerns that forced pregnancy may be interpreted as legalising abortion. See *ICC Statute*, Article 8(2)(b)(xxii); ICC, *Ongwen Trial Judgement*, para. 2721; ICC, *Ongwen Appeal Judgement*, para.1065 (in relation to the offence of forced pregnancy in non-international armed conflict under Article 8(2)(e)(vi) of the ICC Statute but the consideration may also apply *mutatis mutandis* to the present crime); Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, paras 723-724, p. 499..

⁶⁹¹ ICC, *Ongwen Trial Judgement*, para. 2724 (in relation to the offence of forced pregnancy in non-international armed conflict under Article 8(2)(e)(vi) of the ICC Statute but the consideration may also apply *mutatis mutandis* to the present crime). See also Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, para. 726, p. 499 (“[...] The Preparatory Commission did not stipulate in element 1 for article 8 para. 2 (b) (xxii)-4 [...] that the confining must be ‘unlawful’. However, in view of the aim of the prohibition, confining a woman made forcibly pregnant in accordance with international humanitarian law (for instance as a prisoner of war) is insufficient to incur criminal responsibility under article 8 para. 2 (b) (xxii)-4, unless, it is submitted, the woman is prevented from accessing medical services and from a feasible abortion in time with the necessary special intent.”).

⁶⁹² ICC, *Ongwen Trial Judgement*, para. 2724 (in relation to the offence of forced pregnancy in non-international armed conflict under Article 8(2)(e)(vi) of the ICC Statute but the consideration may also apply *mutatis mutandis* to the present crime).

ICC, *ONGWEN TRIAL JUDGEMENT*, PARA. 2725 (FOOTNOTES OMITTED)⁶⁹³

The second component of the material element is that the woman has been ‘forcibly made pregnant’. This is understood as encompassing the same coercive circumstances described for other sexual violence crimes in the Statute. This means that the woman need not have been made pregnant through physical violence alone. ‘Forcibly’ in this context means force, or threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against her or another person, or by taking advantage of a coercive environment, or that the woman made pregnant was a person incapable of giving genuine consent. The existence of such coercive circumstances undermines the woman’s ability to give voluntary and genuine consent.

381. It is not required that the perpetrator personally made the woman or women forcibly pregnant, as “confining a woman made forcibly pregnant by another is necessary and sufficient for the crime of forced pregnancy.”⁶⁹⁴
382. Moreover, the ICC Trial Chamber in the *Ongwen* case determined that the forcible conception could have taken place prior to or during the unlawful confinement.⁶⁹⁵

iii. Definition of Forced Pregnancy (Subjective Elements)⁶⁹⁶

383. In relation to the subjective elements, the crime of forced pregnancy requires that (1) the perpetrator intentionally and knowingly confined one or more women forcibly made pregnant,⁶⁹⁷ and (2) the perpetrator intended to affect the ethnic composition of any population or to carry out other grave violations of international law.⁶⁹⁸
384. **The perpetrator intentionally and knowingly confined one or more women forcibly made pregnant.**⁶⁹⁹
385. **Specific intent to affect the ethnic composition of any population or to carry out other grave violations of international law.** The war crime of forced pregnancy requires the specific intent to either: (1) affect the ethnic composition of any pop-

⁶⁹³ In relation to the offence of forced pregnancy in non-international armed conflict under Article 8(2)(e)(vi) of the ICC Statute but the consideration may also apply *mutatis mutandis* to the present crime.

⁶⁹⁴ ICC, *Ongwen Trial Judgement*, paras 2723 (in relation to the offence of forced pregnancy in non-international armed conflict under Article 8(2)(e)(vi) of the ICC Statute but the consideration may also apply *mutatis mutandis* to the present crime).

⁶⁹⁵ ICC, *Ongwen Trial Judgement*, para. 2723 (in relation to the offence of forced pregnancy in non-international armed conflict under Article 8(2)(e)(vi) of the ICC Statute but the consideration may also apply *mutatis mutandis* to the present crime).

⁶⁹⁶ This section details the subjective elements for this war crime as detailed under international law. However, the general part of the CCU identifies subjective elements that apply to crimes. See Articles 23, 24 and 25 of the CCU. It will be necessary to consider the relevance of the subjective elements in the general part of the CCU when considering the elements of this crime as applied under Article 438 of the CCU.

⁶⁹⁷ [ICC Elements of Crimes](#), Article 8(2)(b)(xxii)-4; [ICC Statute](#), Article 30.

⁶⁹⁸ [ICC Elements of Crimes](#), Article 8(2)(b)(xxii)-4

⁶⁹⁹ This subjective element is covered by the “intent and knowledge” standard of Article 30 of the [ICC Statute](#).

ulation, or (2) carry out other grave violations of international law.⁷⁰⁰ The notion of “other grave violations of international law” encompass rape, sexual slavery, slavery and/or torture,⁷⁰¹ but could also cover other violations such as medical experiments contrary to international law.⁷⁰²

ICC, ONGWEN TRIAL JUDGEMENT, PARAS 2727-2729 (FOOTNOTES OMITTED)⁷⁰³

2727. This requirement of special intent is phrased alternatively, meaning that the crime of forced pregnancy under the Statute is committed with the intent either to affect the ethnic composition of the population or to carry out other grave violations of international law, e.g., confining a woman with the intent to rape, sexually enslave, enslave and/or torture her.

2728. It is not required that the accused intended to keep the woman pregnant beyond these alternative intentions. [...]

2729. [...] The crime of forced pregnancy consists in the confinement of a forcibly pregnant woman in order to carry out other grave violations of international law, regardless of whether the accused specifically intended to keep the woman pregnant.

iv. Contextual Elements

386. In addition, as with all war crimes, it is necessary to demonstrate the following contextual elements:
- i. There was an international armed conflict;⁷⁰⁴
 - ii. The conduct took place in the context of and was associated with an international armed conflict;⁷⁰⁵ and
 - iii. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.⁷⁰⁶

⁷⁰⁰ [ICC Elements of Crimes](#), Article 8(2)(b)(xxii)-4.

⁷⁰¹ ICC, *Ongwen Trial Judgement*, paras 2726-2727. In the *Ongwen* case, the Trial Chamber determined that the special intent requirement of the crime of forced pregnancy was met as Dominic Ongwen acted “with the intent of sustaining the continued commission of other crimes found, in particular of forced marriage, torture, rape and sexual slavery.” See *ibidem*, para. 3061 (in relation to the offence of forced pregnancy in non-international armed conflict under Article 8(2)(e)(vi) of the ICC Statute but the consideration may also apply *mutatis mutandis* to the present crime).

⁷⁰² Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, para. 727, p. 499 (“This second alternative may for instance cover medical experiments contrary to international law, while not covering pure sadism or, apparently, the mere intention that the child always reminds the woman and her family or community of what happened”) (footnotes omitted).

⁷⁰³ In relation to the offence of forced pregnancy in non-international armed conflict under Article 8(2)(e)(vi) of the ICC Statute but the consideration may also apply *mutatis mutandis* to the present crime.

⁷⁰⁴ See above, paras 188-189.

⁷⁰⁵ See above, paras 190-198. See also [ICC Elements of Crimes](#), Article 8(2)(b)(xxii)-4.

⁷⁰⁶ See above, para. 199. See also [ICC Elements of Crimes](#), Article 8(2)(b)(xxii)-4.

d. Enforced Sterilisation

APPLICABILITY: THE WAR CRIME OF ENFORCED STERILISATION CAN BE CONSIDERED CRIMINALISED UNDER ARTICLE 438 OF THE CCU AS IT IS SUBSUMED UNDER THE NOTION OF “OTHER VIOLATIONS OF THE LAWS OR CUSTOMS OF WAR RECOGNISED BY INTERNATIONAL TREATIES THE BINDING NATURE OF WHICH HAS BEEN APPROVED BY THE VERKHOVNA RADA (PARLIAMENT) OF UKRAINE” (PARAS 387-391).

Elements of the crime: To convict a perpetrator for the war crime of enforced sterilization the following elements need to be established:

(1) Objective elements

- The perpetrator deprived one or more persons of biological reproductive capacity (para. 394).
- The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent (para. 395).

(2) Subjective elements

- The perpetrator intentionally and knowingly deprived one or more persons of biological reproductive capacity (para. 396).
- The perpetrator was aware that their conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent (para. 396).

(3) Contextual elements

- There is an international armed conflict (para. 397).
- The conduct of the perpetrator took place in the context and was associated with the conflict (para. 397).
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict (para. 397).

i. Applicability under Article 438

387. Although not explicitly mentioned in Article 438 of the CCU, enforced sterilisation may be subsumed within “any other violations of rules of warfare recognized by international instruments consented to be binding by the Verkhovna Rada of Ukraine” to which Article 438(1) refers. As explained below, enforced sterilisation is prohibited under international instruments ratified by Ukraine and a violation of this prohibition has been recognised as a war crime. These factors support interpreting Article 438 of the CCU as criminalising violations of this prohibition.

388. **Enforced sterilisation constitutes a violation of International Humanitarian Law reflected in international treaties ratified by Ukraine.** While the 1949 Geneva Conventions and their Additional Protocols do not explicitly prohibit enforced sterili-

sation, this conduct is implicitly prohibited by the IHL rules requiring the humane treatment of persons.⁷⁰⁷ For instance, Article 27 of [Geneva Convention IV](#), ratified by Ukraine, requires that “[protected persons] shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.” In addition, Article 75 of [Additional Protocol I](#), also ratified by Ukraine, requires the humane treatment of all persons that find themselves in the power of a Party to the armed conflict and prohibits, amongst other, “outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault”.⁷⁰⁸ Therefore, for the purposes of Article 438 of the CCU, enforced sterilisation constitutes a violation of the laws of warfare recognised in international instruments accepted as binding by the Ukrainian parliament.

389. **Recognition as a war crime.** Violations of the rules of IHL requiring the humane treatment of protected persons constitute grave breaches of the 1949 Geneva Conventions and their Additional Protocol I.⁷⁰⁹ Enforced sterilisation may constitute inhumane treatment and therefore amount to a grave breach of the Geneva Conventions and Additional Protocol I.⁷¹⁰ Grave breaches of the Geneva Conventions and Additional Protocol I are war crimes.⁷¹¹ Enforced sterilisation may also qualify as a war crime without necessarily constituting a grave breach.⁷¹²
390. Enforced sterilisation is expressly codified as a war crime in Article 8(2)(b)(xxii) of the [ICC Statute](#) applicable to international armed conflict, thus making the [ICC Statute](#) the first instrument to explicitly recognise this prohibited conduct as a war crime.⁷¹³ The war crime of enforced sterilisation is included in the list of “other serious violations of the laws and customs applicable in international armed conflict” under the ICC Statute.
391. These factors support recognition of the criminalisation of enforced sterilisation under Article 438(1) of the CCU.

⁷⁰⁷ [Geneva Convention I](#), Article 12(2); [Geneva Convention II](#), Article 12; [Geneva Convention III](#), Article 13(1); [Geneva Convention IV](#), Articles 5(3), 27(1), 127(1); [Additional Protocol I](#), Articles 10(2), 75; [Geneva Conventions I-IV](#), Common Article 3; [Additional Protocol II](#), Article 4(1). See also ICTY, *Prlic Trial Judgement*, Vol. I of VI, para.116 (“[...] any sexual violence inflicted on the physical and moral integrity of a person by means of threat, intimidation or force, in such a way as to degrade or humiliate the victim, may constitute inhuman treatment under Article 2(b) of the Statute.”) (footnotes omitted); [ICTY Statute](#), Article 2 (“Grave breaches of the Geneva Conventions of 1949”).

⁷⁰⁸ [Additional Protocol I](#), Article 75(1) and (2)(b).

⁷⁰⁹ [Geneva Convention I](#), Article 50; [Geneva Convention II](#), Article 51; [Geneva Convention III](#), Article 130; [Geneva Convention IV](#), Article 147; [Additional Protocol I](#), Article 85.

⁷¹⁰ ICTY, *Prlic Trial Judgement*, Vol. I of VI, para.116 (“[...] any sexual violence inflicted on the physical and moral integrity of a person by means of threat, intimidation or force, in such a way as to degrade or humiliate the victim, may constitute inhuman treatment under Article 2(b) of the Statute.”) (footnotes omitted).

⁷¹¹ ICRC, IHL Database, Customary IHL, [Rule 156. Definition of War Crimes](#); ICRC, Advisory Service on International Humanitarian Law, [Obligations in terms of penal repression](#), p. 1.

⁷¹² Gloria Gaggioli, “[Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law](#)”, 96 *International Review of the Red Cross*, p. 527 (“[...] Rape and other forms of sexual violence can also be qualified as war crimes in the context of international armed conflicts, without necessarily being grave breaches. This is important to note in particular for sexual abuses that do not enter into the specific categories of grave breaches or that are committed against individuals who do not fall within the category of protected persons.”).

⁷¹³ Eve La Haye, Article 8(2)(b)(xxii)-5-Enforced Sterilization, in Lee (ed), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, 2001, p. 195. The ICC Statute also identifies this offence as a war crime in non-international armed conflicts, [ICC Statute](#), Article 8(2)(e)(vi).

ii. Definition of Enforced Sterilisation (Objective Elements)

392. The objective elements of this war crime require that: (1) the perpetrator deprived one or more persons of biological reproductive capacity; and (2) the conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.⁷¹⁴
393. The perpetrators and victims of the war crime of enforced sterilisation can be of any sex and gender.⁷¹⁵
394. **The perpetrator deprived one or more persons of biological reproductive capacity.** As suggested by commentators, “sterilisation is not limited to the removal of, or operation on, organs which cause deprivation of the power of reproduction”;⁷¹⁶ but also “forcible castration or other forms of severe genital mutilation carried out against men” and the inability of women “to conceive or bear a child as a result of genital mutilation or injuries from rape or other forms of sexual violence” could satisfy the elements of enforced sterilisation.⁷¹⁷ However, this deprivation does not include birth-control measures which have non-permanent effect in practice.⁷¹⁸
395. **The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.** This element of the war crime suggests that sterilisation may be lawful when justified by the medical or hospital treatment of the person or carried out with their genuine consent.⁷¹⁹ Consent that was given through deception, for instance “through misinformation regarding the permanence or reversibility of the sterilisation” would not qualify as genuine.⁷²⁰

⁷¹⁴ [ICC Elements of Crimes](#), Article 8(2)(b)(xxii)-5.

⁷¹⁵ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 483, para. 668 (“With the exception of the war crime of forced pregnancy, which by its nature can only be committed against women, the drafters of the Rome Statute intended all of the war crimes of sexual violence under article 8 para. 2 (b) (xxii) to be defined, in principle, in a gender-neutral way. Thus, both victims as well as perpetrators may be of any sex and gender. This also results from the almost entirely gender-neutrally wording of the elements of crimes for article 8 para. 2 (b) (xxii), and with regard to the war crime of rape is underscored in footnote 50 of the elements.”) (footnotes omitted).

⁷¹⁶ Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary*, Cambridge: Cambridge University Press, 2003, p. 331.

⁷¹⁷ Ambos (ed), *The Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4th Edition, Beck Hart, 2022, p. 213, para. 113.

⁷¹⁸ [ICC Elements of Crimes](#), Article 8(2)(b)(xxii)-5 fn. 54. Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 500, para. 729. (“The war crime of enforced sterilization [...] requires intent to permanently deprive of reproductive capacity.”). However, as noted by one commentator, the addition of footnote 54 to the elements of the war crime “does not exclude the possibility of considering enforced sterilisation, for example, the repeated and forcible administration of contraceptive pills during the fertile years of a woman, without the genuine consent of the person.” See Eve La Haye, Article 8(2)(b) (xxii)-5-Enforced Sterilization, in Lee (ed), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, 2001, p. 196.

⁷¹⁹ Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary*, Cambridge: Cambridge University Press, 2003, p. 331.

⁷²⁰ [ICC Elements of Crimes](#), Article 8(2)(b)(xxii)-5 fn 55; Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 500, para. 730.

iii. Definition of Enforced Sterilisation (Subjective Elements)⁷²¹

396. In relation to the subjective elements, the war crime of enforced sterilisation requires that: (1) the perpetrator intentionally and knowingly deprived one or more persons of biological reproductive capacity; and (2) the perpetrator was aware that their conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.⁷²²

iv. Contextual Elements

397. In addition, as with all war crimes, it is necessary to demonstrate the following contextual elements:

- i. There was an international armed conflict;⁷²³
- ii. The conduct took place in the context of and was associated with an international armed conflict;⁷²⁴ and
- iii. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.⁷²⁵

⁷²¹ This section details the subjective elements for this war crime as detailed under international law. However, the general part of the CCU identifies subjective elements that apply to crimes. See Articles 23, 24 and 25 of the CCU. It will be necessary to consider the relevance of the subjective elements in the general part of the CCU when considering the elements of this crime as applied under Article 438 of the CCU.

⁷²² [ICC Elements of Crimes](#), Article 8(2)(b)(xxii)-5; [ICC Statute](#), Article 30.

⁷²³ See above, paras 188-189.

⁷²⁴ See above, paras 190-198. See also [ICC Elements of Crimes](#), Article 8(2)(b)(xxii)-5.

⁷²⁵ See above, para. 199. See also [ICC Elements of Crimes](#), Article 8(2)(b)(xxii)-5.

e. Sexual Violence

APPLICABILITY: THE WAR CRIME OF SEXUAL VIOLENCE CAN BE CONSIDERED CRIMINALISED UNDER ARTICLE 438 OF THE CCU AS IT IS SUBSUMED UNDER THE NOTION OF “OTHER VIOLATIONS OF THE LAWS OR CUSTOMS OF WAR RECOGNISED BY INTERNATIONAL TREATIES THE BINDING NATURE OF WHICH HAS BEEN APPROVED BY THE VERKHOVNA RADA (PARLIAMENT) OF UKRAINE” (PARAS 398-403).

Elements of the crime: To convict a perpetrator for the war crime of sexual violence the following elements need to be established:

(1) Objective elements

- The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent (paras 405-408).
- The conduct was of gravity comparable to that of a grave breach of the Geneva Conventions (para. 409).

(2) Subjective elements

- The perpetrator intended to commit an act of a sexual nature against one or more persons or to cause such person or persons to engage in an act of a sexual nature (para. 410).
- The perpetrator was aware that they would commit an act of a sexual nature or would cause a person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent (para. 410).
- The perpetrator was aware of the factual circumstances that established the gravity of the conduct (para. 410).

(3) Contextual elements

- There is an international armed conflict (para. 411).
- The conduct of the perpetrator took place in the context and was associated with the conflict (para. 411).
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict (para. 411).

i. Applicability under Article 438

398. Although not explicitly mentioned in Article 438 of the CCU, sexual violence of any other form may be subsumed within “any other violations of rules of warfare recognized by international instruments consented to be binding by the Verkhovna Rada of Ukraine” to which Article 438(1) refers. As explained below, sexual violence of any other form is prohibited under international instruments ratified by Ukraine and a

violation of this prohibition has been recognised as a war crime. These factors support interpreting Article 438 of the CCU as criminalising violations of this prohibition.

399. **Sexual violence constitutes a violation of International Humanitarian Law reflected in international treaties ratified by Ukraine.** Article 27 of [Geneva Convention IV](#), requires that “women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.”⁷²⁶ The aforementioned article lists “indecent assault” as an example of inhumane treatment.⁷²⁷ Regarding [Geneva Convention III](#), it does not explicitly prohibit sexual violence. Nonetheless, considering that the Convention requires the humane treatment of prisoners of war at all times and prohibits acts of violence or intimidation against them, the ICRC Commentary submits that it implicitly prohibits sexual violence.⁷²⁸
400. Moreover, Article 76 of [Additional Protocol I](#) reiterates the prohibition of “indecent assault” included in Article 27 of [Geneva Convention IV](#).⁷²⁹ In addition to the above, Article 75 of [Additional Protocol I](#) requires the humane treatment of all persons that find themselves in the power of a Party to the conflict and prohibits, amongst other, “outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault”.⁷³⁰ Therefore, for the purposes of Article 438 of the CCU, sexual violence constitutes a violation of the laws of warfare recognised in international instruments accepted as binding by the Ukrainian parliament.
401. **Recognition as a war crime.** Violations of the IHL rules requiring the humane treatment of protected persons constitute grave breaches of the 1949 Geneva Conventions and their Additional Protocol I.⁷³¹ Sexual violence may constitute inhumane treatment and therefore amount to a grave breach of the Geneva Conventions.⁷³² Graves breaches

⁷²⁶ Notwithstanding the focus of this provision on “women”, the ICRC Commentary notes that “the prohibition of sexual violence is recognised to encompass violence not only against women and girls, but any person, including men and boys.” See [ICRC Commentary on Geneva Convention III](#) (2020), para. 736. Ukraine ratified the 1949 Geneva Conventions on 3 August 1954. See ICRC, *Treaties, States Parties and Commentaries*, [Ukraine](#).

⁷²⁷ [ICRC Commentary on Geneva Convention III](#) (2020), para. 737; See also ICTY, *Prlic Trial Judgement*, Vol. I of VI, para.116 (“[...] any sexual violence inflicted on the physical and moral integrity of a person by means of threat, intimidation or force, in such a way as to degrade or humiliate the victim, may constitute inhuman treatment under Article 2(b) of the Statute.”) (footnotes omitted); [ICTY Statute](#), Article 2 (“Grave breaches of the Geneva Conventions of 1949”).

⁷²⁸ [Geneva Convention III](#), Article 13; [ICRC Commentary on Geneva Convention III](#) (2020), para. 1578. With regard to non-international armed conflicts, [Common Article 3 to the 1949 Geneva Conventions](#) prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment”. Pursuant to the ICRC Commentary, “[w]hile common Article 3 does not explicitly prohibit sexual violence, it does so implicitly because it establishes an obligation of humane treatment and prohibits violence to life and person, including mutilation, cruel treatment, torture and outrages upon personal dignity.” [ICRC Commentary on Geneva Convention III](#), para. 732.

⁷²⁹ Ukraine ratified [Additional Protocol I](#) on 25 January 1990. See ICRC, *Treaties, States Parties and Commentaries*, [Ukraine](#). Regarding [Additional Protocol II to the 1949 Geneva Conventions](#) applicable during non-international armed conflicts, Article 4 of the instrument explicitly states that “indecent assault” remains prohibited at any time and any place whatsoever.

⁷³⁰ [Additional Protocol I](#), Article 75(1) and (2)(b).

⁷³¹ [Geneva Convention I](#), Article 50; [Geneva Convention II](#), Article 51; [Geneva Convention III](#), Article 130; [Geneva Convention IV](#), Article 147; [Additional Protocol I](#), Article 85.

⁷³² [ICRC Commentary on Geneva Convention III](#) (2020), para. 737; ICTY, *Prlic Trial Judgement*, Vol. I of VI, para.116 (“[...] any sexual violence inflicted on the physical and moral integrity of a person by means of threat, intimidation or force, in such a way as to degrade or humiliate the victim, may constitute inhuman treatment under Article 2(b) of the Statute.”) (footnotes omitted).

of the Geneva Conventions and Additional Protocol I are war crimes.⁷³³ Sexual violence may also qualify as a war crime without necessarily constituting a grave breach.⁷³⁴

402. Sexual violence is expressly codified as a war crime in Article 8(2)(b)(xxii) of the [ICC Statute](#) applicable to international armed conflict.⁷³⁵ The war crime is included in the list of “other serious violations of the laws and customs applicable in international armed conflict” under the ICC Statute. With regard to the ICTY, while not explicitly listed as a war crime in the [ICTY Statute](#), the Tribunal’s jurisprudence confirms that sexual violence may constitute a violation of the laws and customs of war under article 3 of its Statute.⁷³⁶
403. These factors support recognition of the criminalisation of sexual violence under Article 438(1) of the CCU.

ii. Definition of any other form of sexual violence (Objective Elements)

404. Forms of sexual violence that do not fall within the other offences analysed in this section may qualify as “any other form of sexual violence of comparable gravity”.⁷³⁷
405. The objective element of the war crime of sexual violence requires that the perpetrator (1) committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature (2) by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent.⁷³⁸ Moreover, (3) the conduct must be of a gravity comparable to that of a grave breach of the Geneva Conventions.⁷³⁹

⁷³³ ICRC, IHL Database, Customary IHL, [Rule 156. Definition of War Crimes](#); ICRC, Advisory Service on International Humanitarian Law, [Obligations in terms of penal repression](#), p. 1.

⁷³⁴ Gloria Gaggioli, “[Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law](#)”, 96 *International Review of the Red Cross*, p. 527 (“[...] Rape and other forms of sexual violence can also be qualified as war crimes in the context of international armed conflicts, without necessarily being grave breaches. This is important to note in particular for sexual abuses that do not enter into the specific categories of grave breaches or that are committed against individuals who do not fall within the category of protected persons.”).

⁷³⁵ The ICC Statute also identifies this offence as a war crime in non-international armed conflicts, see [ICC Statute](#), Article 8(2)(e)(vi). The [ICTR Statute](#) and the [SCSL Statute](#) also include sexual assault in the list of crimes falling under “violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II” in the context of non-international armed conflicts. See [ICTR Statute](#), Article 4; [SCSL Statute](#), Article 3.

⁷³⁶ See Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 481, para. 661 (“In a number of cases, [...], the ICTY Office of the Prosecutor has charged rape and other forms of sexual violence as war crimes under the ICTY Statute. More particularly, ICTY Chambers have consistently affirmed that such conduct may amount to a grave breach or a serious violation of the laws and customs of war.”)(footnotes omitted); ICTY, *Furundzija Trial Judgement*, para. 186 (“[...] International criminal rules punish not only rape but also any serious sexual assault falling short of actual penetration. It would seem that the prohibition embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim’s dignity.”); ICTY, *Celebici Trial Judgement*, para. 476 (“There can be no doubt that rape and other forms of sexual assault are expressly prohibited under international humanitarian law.”).

⁷³⁷ [ICC Statute](#), Article 8(2)(b)(xxii); Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 500, para. 731.

⁷³⁸ [ICC Elements of Crimes](#), Article 8(2)(b)(xxii)-6.

⁷³⁹ [ICC Elements of Crimes](#), Article 8(2)(b)(xxii)-6.

406. The victims and perpetrators of the war crime of sexual violence can be of any sex and gender.⁷⁴⁰
407. **The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature.** There is no exhaustive list of what constitutes an “act of a sexual nature”. In accordance with the ICTR and ICTY jurisprudence, an act of a sexual nature is not limited to physical invasion of the human body.⁷⁴¹

ICTR, AKAYESU TRIAL JUDGEMENT, PARA. 688 (FOOTNOTES OMITTED)

The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.

ICTY, DORDEVIC APPEAL JUDGEMENT, PARA. 852 (FOOTNOTES OMITTED)

It is evident that sexual assault requires that an act of a sexual nature take place. The Appeals Chamber notes that the act must also constitute an infringement of the victim’s physical or moral integrity. Often the parts of the body commonly associated with sexuality are targeted or involved. Physical contact is, however, not required for an act to be qualified as sexual in nature. Forcing a person to perform or witness certain acts may be sufficient, so long as the acts humiliate and/or degrade the victim in a sexual manner.

⁷⁴⁰ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 483, para. 668 (“With the exception of the war crime of forced pregnancy, which by its nature can only be committed against women, the drafters of the Rome Statute intended all of the war crimes of sexual violence under article 8 para. 2 (b) (xxii) to be defined, in principle, in a gender-neutral way. Thus, both victims as well as perpetrators may be of any sex and gender. This also results from the almost entirely gender-neutrally wording of the elements of crimes for article 8 para. 2 (b) (xxii), and with regard to the war crime of rape is underscored in footnote 50 of the elements.”) (footnotes omitted).

⁷⁴¹ ICTR, *Akayesu Trial Judgement*, para. 688 (in relation to the offence of “outrages upon personal dignity” in non-international armed conflict but the consideration may also apply *mutatis mutandis* to the present crime); ICTY, *Furundzija Trial Judgement*, para. 186 (“[...] International criminal rules punish not only rape but also any serious sexual assault falling short of actual penetration. It would seem that the prohibition embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim’s dignity.”) (in relation to outrages upon personal dignity including rape); ICTY, *Milutinovic et al. Trial Judgement*, para. 199 (“The Statute and jurisprudence of the Tribunal only contain rape and sexual assault, rather than other categories of offences of a sexual nature. [...] The Chamber considers that ‘sexual assault’ may be committed in situations where there is no physical contact between the perpetrator and the victim, if the actions of the perpetrator nonetheless serve to humiliate and degrade the victim in a sexual manner.”) (in relation to the crime against humanity of persecution but the consideration may also apply *mutatis mutandis* to the present crime); ICTY, *Prlic Trial Judgement*, Vol. I of VI, para.116 (“In keeping with the case-law of the Tribunal, any sexual violence inflicted on the physical and moral integrity of a person by means of threat, intimidation or force, in such a way as to degrade or humiliate the victim, may constitute inhuman treatment under Article 2(b) of the Statute. Rape is thereby prohibited, all forms of sexual violence not including penetration.”) (footnotes omitted).

408. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature **by force, or by threat of force or coercion, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent**. For more information about this element, see the war crime of rape (paras [326-341](#)).

CASE STUDY: EXAMPLES OF ACTS OF A SEXUAL NATURE

In addition to rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilisation, the following acts may constitute sexual violence:

- forced (public) nudity;⁷⁴²
- enforced masturbation;⁷⁴³
- violent acts to the genitalia such as beating, burning, or electrical shocks;⁷⁴⁴
- injuring a sexual body part;⁷⁴⁵
- sexual mutilation;⁷⁴⁶
- forced abortion;⁷⁴⁷
- forced marriage;⁷⁴⁸
- sexual intimidation or causing someone to form reasonable apprehension, or fear, of acts of sexual violence;⁷⁴⁹
- inspecting someone's sexual body parts.⁷⁵⁰

⁷⁴² ICTY, *Brdanin Trial Judgement*, para. 1013 (in relation to the crime against humanity of persecution); ICTY, *Kunarac et al. Trial Judgement*, paras 746, 766, 769 (in relation to war crime of outrages on personal dignity); ICTR, *Akayesu Trial Judgement*, para. 688 (in relation to the crime against humanity of other inhumane acts, the war crime of outrages upon personal dignity and genocide by serious bodily or mental harm); SCSL, *Brima et al. Appeal Judgement*, para. 184 (in relation to the crime against humanity of other inhumane acts); ICC OTP, *Report on Preliminary Examination Activities 2016*, para. 94.

⁷⁴³ ICC OTP, *Report on Preliminary Examination Activities 2016*, para. 94.

⁷⁴⁴ ICTY, *Celebici Trial Judgement*, paras 1019, 1035, 1038-1041 (in relation to the war crime of causing great suffering or serious injury and the war crime of cruel treatment); ICTY, *Todorovic Sentencing Judgement*, para. 38 (in relation to the crime against humanity of persecution); ICTY, *Simic Trial Judgement*, paras 695, 698 (in relation to the crime against humanity of persecution); ICTY, *Naletilic and Martinovic Trial Judgement*, para. 450 (in relation to the war crimes of cruel treatment and willfully causing great suffering); ICTY, *Brdanin Trial Judgement*, para. 498 (in relation to the crime against humanity and war crime of torture); ICTY, *Tadic Trial Judgement*, paras 195, 198 (in relation to the war crime of torture and inhumane treatment, the war crime of willfully causing great suffering or serious injury to body and health, the war crime of cruel treatment, and the crime against humanity of other inhumane acts).

⁷⁴⁵ Women's Initiative for Gender Justice, '*The Hague Principles on Sexual Violence*', 2019, p. 41; SCSL, *Sesay et al. Trial Judgement*, para. 1307 (in relation to the war crime of outrages on personal dignity).

⁷⁴⁶ ICTY, *Kvocka et al. Trial Judgement*, para. 180, fn. 343 (in relation to the war crime of outrages on personal dignity).

⁷⁴⁷ ICTY, *Kvocka et al. Trial Judgement*, para. 180, fn. 343 (in relation to the war crime of outrages on personal dignity).

⁷⁴⁸ ICTY, *Kvocka et al. Trial Judgement*, para. 180, fn. 343 (in relation to the war crime of outrages on personal dignity).

⁷⁴⁹ ICTY, *Kvocka et al. Trial Judgement*, para. 98 (in relation to the war crimes of torture and outrages upon personal dignity and the crimes against humanity of torture, other inhumane acts and persecution); ICTY, *Brdanin Trial Judgement*, para. 1013 (in relation to the crime against humanity of persecution); Women's Initiative for Gender Justice, '*The Hague Principles on Sexual Violence*', 2019, p. 41.

⁷⁵⁰ Women's Initiative for Gender Justice, '*The Hague Principles on Sexual Violence*', 2019, p. 41; ICTY, *Milutinovic et al. Trial Judgement*, Vol. 2, para. 631 (in relation to crime against humanity of persecution).

409. **The conduct was of a gravity comparable to that of a grave breach of the Geneva Conventions.** As commentators suggest, the ICC may have jurisdiction over “any other form of sexual violence” provided that the latter “reach the minimum threshold of gravity comparable to a grave breach of the Geneva Conventions, such as torture, inhuman treatment, biological experiments, wilfully causing great suffering or serious injury to body or health, or, arguably, one of the five specific forms of sexual violence listed under article 8 para. 2 (b) (xxii), insofar these are deemed to *per se* constitute grave breaches.”⁷⁵¹

iii. Definition of Sexual Violence (Subjective Elements)⁷⁵²

410. With regard to the subjective elements, the war crime of sexual violence requires that the perpetrator (i) intended to commit an act of a sexual nature against one or more persons or to cause such person or persons to engage in an act of a sexual nature; (ii) the perpetrator was aware that they would commit an act of a sexual nature or would cause a person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent; and (iii) the perpetrator was aware of the factual circumstances that established the gravity of the conduct.⁷⁵³

iv. Contextual Elements

411. In addition, as with all war crimes, it is necessary to demonstrate the following contextual elements:

- i. There was an international armed conflict;⁷⁵⁴
- ii. The conduct took place in the context of and was associated with an international armed conflict;⁷⁵⁵ and
- iii. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.⁷⁵⁶

⁷⁵¹ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 503, para. 741.

⁷⁵² This section details the subjective elements for this war crime as detailed under international law. However, the general part of the CCU identifies subjective elements that apply to crimes. See Articles 23, 24 and 25 of the CCU. It will be necessary to consider the relevance of the subjective elements in the general part of the CCU when considering the elements of this crime as applied under Article 438 of the CCU.

⁷⁵³ [ICC Elements of Crimes](#), Article 8(2)(b)(xxii)-6; [ICC Statute](#), Article 30.

⁷⁵⁴ See above, paras 188-189.

⁷⁵⁵ See above, paras 190-198. See also [ICC Elements of Crimes](#), Article 8(2)(b)(xxii)-6.

⁷⁵⁶ See above, para. 199. See also [ICC Elements of Crimes](#), Article 8(2)(b)(xxii)-6.

- v. Compelling service in hostile forces/Compelling participation in military operations (ICTY Statute, Article 2(e); ICC Statute, Articles 8(2)(a)(v), 8(2)(b)(xv))

APPLICABILITY: THE WAR CRIMES OF COMPELLING SERVICE IN HOSTILE FORCES BY PROTECTED PERSONS AND PARTICIPATION IN MILITARY OPERATIONS BY NATIONALS OF THE HOSTILE PARTY CAN BE CONSIDERED CRIMINALISED UNDER ARTICLE 438 OF THE CCU AS THEY ARE SUBSUMED UNDER THE NOTION OF “OTHER VIOLATIONS OF THE LAWS OR CUSTOMS OF WAR” RECOGNISED BY INTERNATIONAL TREATIES THE BINDING NATURE OF WHICH HAS BEEN APPROVED BY THE VERKHOVNA RADA (PARLIAMENT) OF UKRAINE (PARAS [412-417](#)).

Elements of the crimes: to convict a perpetrator for the war crimes of compelling service in hostile forces and participation in military operations, the following elements need to be established:

(1) Objective element

- The perpetrator coerced one or more persons, by act or threat, to take part in military operations against that person’s own country or forces, or otherwise serve in the forces of a hostile power (paras [420-422](#)).
- Such person or persons were protected under one or more of the Geneva Conventions of 1949 (para. [423](#)).

OR

- The perpetrator coerced one or more persons by act or threat to take part in military operations against that person’s own country or forces (para. [424](#)).
- Such person or persons were nationals of a hostile party (para. [425](#)).

(2) Subjective element

- The perpetrator committed the objective element of the crime with intent and knowledge (paras [433-435](#)).
- The perpetrator was aware of the factual circumstances that established that protected status (paras [433-435](#)).

OR

- The perpetrator committed the objective element of the crime with intent and knowledge (paras [433-435](#)).

(3) Contextual elements applicable to both war crimes

- There is an international armed conflict (para. [436](#)).
- The conduct of the perpetrator took place in the context and was associated with the conflict (para. [436](#)).
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict (para. [436](#)).

a. Applicability under Article 438

412. Although not explicitly mentioned in Article 438 of the CCU, compelling service in enemy forces by prisoners of war and protected persons and forcing participation in military operations by nationals of the adverse party are prohibited under international instruments ratified by Ukraine. Moreover, violations of these prohibitions have been recognised as war crimes. These factors support interpreting Article 438 of the CCU as criminalising violations of these IHL prohibitions.
413. **Compelling service in enemy forces by protected persons and participation in military operations by nationals of the hostile party constitute violations of International Humanitarian Law reflected in international treaties ratified by Ukraine.** Compelling service in enemy forces by prisoners of war and protected persons constitutes a grave breach of the [Geneva Convention III](#) and the [Geneva Convention IV](#) respectively.⁷⁵⁷ In addition, coercing nationals of the hostile party to participate in military operations against their own country is a serious violation of IHL, as the conduct is explicitly prohibited by Article 23 of the [1907 Hague Regulations](#).⁷⁵⁸ Given the above, compelling prisoners of war and other protected persons to serve in enemy forces, and compelling nationals of the adverse party to participate in military operations against their own country constitute grave breaches and a serious violation respectively of international treaties ratified by Ukraine.
414. **Recognition as a war crime.** Compelling prisoners of war and other protected persons to serve in enemy forces constitutes a grave breach of the [Geneva Convention III](#) and the [Geneva Convention IV](#) respectively and therefore a war crime.⁷⁵⁹ States Parties are therefore required to “enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches [of the Geneva Conventions].”⁷⁶⁰ Subsuming this conduct under Article 438 of the CCU is therefore consistent with Ukraine’s international obligations to penalise this grave breach.
415. The grave breach of compelling prisoners of war and other protected persons to serve in hostile forces is expressly codified as a war crime in Article 8(2)(a)(v) of the [ICC Statute](#) applicable to international armed conflict.⁷⁶¹ Moreover, compelling nationals of the hostile party to take part in military operations against their own country is also codified as a war crime in Article 8(2)(b)(xv) of the [ICC Statute](#) applicable to international armed conflict.⁷⁶²

⁷⁵⁷ [Geneva Convention III](#), Article 130; [Geneva Convention IV](#), Article 147. Ukraine ratified the Geneva Conventions on 3 August 1954. See ICRC, *Treaties, States Parties and Commentaries*, [Ukraine](#).

⁷⁵⁸ Ukraine ratified the 1907 Hague Convention (IV) on War on Land and its Annexed Regulations on 29 May 2015. See ICRC, *Treaties, States Parties and Commentaries*, [Ukraine](#); See also ICRC, IHL Database, Customary IHL, [Rule 156. Definition of War Crimes](#). Uncompensated or abusive forced labour is also prohibited under customary law. See ICRC IHL Database, Customary IHL, [Rule 95. Forced Labour](#).

⁷⁵⁹ [Geneva Convention III](#), Article 130; [Geneva Convention IV](#), Article 147; ICRC, IHL Database, Customary IHL, [Rule 156. Definition of War Crimes](#); ICRC, *Advisory Service on International Humanitarian Law*, [Obligations in terms of penal repression](#), p. 1.

⁷⁶⁰ [Geneva Convention I](#), Article 49; [Geneva Convention II](#), Article 50; [Geneva Convention III](#), Article 129; [Geneva Convention IV](#), Article 146.

⁷⁶¹ This offence is listed under “grave breaches” in Article 8(2) of the [ICC Statute](#).

⁷⁶² This offence is included in the list of “other serious violations of the laws and customs applicable in international

416. The grave breach of compelling prisoners of war and civilians to serve in the forces of a hostile power has also been codified as a war crime in Article 2(e) of the [ICTY Statute](#). The ICTY also considered that the forced labour of protected persons in relation to activities having a military character or purpose constitutes unlawful labour,⁷⁶³ cruel treatment,⁷⁶⁴ and an outrage upon personal dignity.⁷⁶⁵ Though not explicitly listed, these are recognised as crimes under Article 3 of the [ICTY Statute](#).⁷⁶⁶
417. In sum, compelling service in enemy forces by prisoners of war and protected persons and forcing participation in military operations by nationals of the adverse party constitute grave breaches and a serious violation respectively of international instruments ratified by Ukraine and have been recognised as war crimes. These factors support a finding that the above conduct is criminalised under Article 438(1) of the CCU.

a. **Definition of Compelling Service in Enemy Forces and Participation in Military Operations (Objective Elements)**

418. Compelling service in enemy forces and participation in military operations are listed as separate offences under the ICC Statute, namely Article 8(2)(a)(v) and Article 8(2)(b)(xv). While the respective criminal elements are generally discussed in separate sections for each offence, some elements common to both offences are treated together for brevity and consistency.

i. **Compelling service in hostile forces**

419. The objective element of the war crime requires that the perpetrator (1) coerced one or more persons, by act or threat, to take part in military operations against that person's own country or forces or otherwise serve in the forces of a hostile power; and (2) such person or persons were protected under one or more of the Geneva Conventions of 1949.⁷⁶⁷
420. This formulation of element (1) of the war crime is based on the grave breaches provisions of the [Geneva Convention III](#) and the [Geneva Convention IV](#) ("compelling a prisoner of war to serve in the forces of the hostile Power") and Article 23 of the [1907 Hague Regulations](#) ("a belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war").⁷⁶⁸

armed conflict" under Article 8(2) of the [ICC Statute](#).

⁷⁶³ ICTY, *Naletilic and Martinovic Trial Judgement*, paras 333-334; ICTY, *Prlic et al. Trial Judgement*, Vol. III of VI, paras 1500-1522.

⁷⁶⁴ See ICTY, *Blaskic Appeal Judgement*, para. 597; ICTY, *Blaskic Trial Judgement*, para. 713.

⁷⁶⁵ ICTY, *Aleksovski Trial Judgement*, paras 129, 229.

⁷⁶⁶ Article 3 of the [ICTY Statute](#) covers violations of the laws or customs of war not falling under Article 2 of the ICTY Statute (grave breaches).

⁷⁶⁷ [ICC Elements of Crimes](#), Article 8(2)(a)(v).

⁷⁶⁸ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 343, para. 128.

421. **Coercing one or more persons to take part in military operations against that person's own country or forces or otherwise serve in the forces of a hostile power.** The use of the word “otherwise” has led commentators to argue that the participation in military operations by a prisoner of war or a protected person is one example of the prohibition to compel service in hostile forces.⁷⁶⁹
422. Commentators have suggested that, with the exception of limited permissible labour provided for in the Geneva Conventions III and IV, “compelling a protected person to work, which serves military purposes, without being integrated/enlisted in the armed forces, may be covered by this crime” given the war crime’s basis on both the grave breaches provisions of the [Geneva Convention III](#) and the [Geneva Convention IV](#) as well as the [1907 Hague Regulations](#).⁷⁷⁰ In addition, pursuant to the ICRC Commentary, the term “forces of a hostile Power” encompasses not only the armed forces but also police forces or intelligence services.⁷⁷¹ Moreover, as one commentator suggests, the term “hostile forces” could encompass compelled service in armed forces allied to the hostile power.⁷⁷²
423. **Protected Persons.** While the ICC Elements of crimes mentions that the persons deprived of fair and regular trial must be protected under one of the four Geneva Conventions, in practice the offense concerns the following protected person or persons:
- Prisoners of war [[Geneva Convention III](#), Article 4];
 - Civilians who at a given moment and in any manner whatsoever find themselves in the hands of a Party to the armed conflict or Occupying Power of which they are not nationals [[Geneva Convention IV](#), Article 4].

ii. Compelling participation in military operations

424. The objective element of the war crime requires that the perpetrator (1) coerced one or more persons by act or threat to take part in military operations against that person’s own country or forces; and (2) such person or persons were nationals of a hostile party.⁷⁷³
425. This war crime is based on Article 23 of the [1907 Hague Regulations](#),⁷⁷⁴ according to which “a belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent’s service before the commencement of the war.”

⁷⁶⁹ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 343, para. 128.

⁷⁷⁰ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 343, para. 131; Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary*, Cambridge: Cambridge University Press, 2003, p. 97.

⁷⁷¹ [ICRC Commentary on Geneva Convention III](#) (2020), para. 5277.

⁷⁷² Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 344, para.133.

⁷⁷³ [ICC Elements of Crimes](#), Article 8(2)(b)(xv).

⁷⁷⁴ Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary*, Cambridge: Cambridge University Press, 2003, p. 269.

iii. Elements relevant for both war crimes

426. **Permissible labour.** Commentators have suggested that the interpretation of the terms “participation in military operations” and “serving in hostile forces” in Articles 8(2)(a)(v) and 8(2)(b)(xv) of the [ICC Statute](#) should exclude permissible types of labour under the Geneva Conventions III and IV.⁷⁷⁵
427. Pursuant to [Geneva Convention III](#), prisoners of war may be compelled to carry out work in specific employment categories without any restrictions,⁷⁷⁶ and work permissible under certain circumstances, e.g. labour that has no military character and purpose.⁷⁷⁷ The term “military character” encompasses “activities which are commanded and regulated by military authorities, as opposed to by civilian authorities”, while the wording “military purpose” relates to the intended use of labour by prisoners of war which it cannot be assigned “for the sole or principal benefit of the military.”⁷⁷⁸
428. With regard to protected persons under [Geneva Convention IV](#), they may only be forced to carry out work that is necessary “to ensure the feeding, sheltering, clothing, transport and health of human beings and which is not directly related to the conduct of military operations.”⁷⁷⁹ In occupied territories, protected persons may only be assigned labour required “either for the needs of the army of occupation, or for the public utility services, or for the feeding, sheltering, clothing, transportation or health of the population of the occupied country.”⁷⁸⁰ The above provision has been understood to allow for work linked to the maintenance needs of the Occupying Power; however, “inhabitants of the occupied territory cannot be requisitioned for such work as the construction of fortifications, trenches or aerial bases.”⁷⁸¹
429. **Forced labour.** Compelling protected persons to serve in hostile forces is a specific type of forced labour prohibited in international armed conflicts.⁷⁸²

⁷⁷⁵ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, pp 343, para. 131 and pp 449-450, paras 545-548; Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary*, Cambridge: Cambridge University Press, 2003, p. 98; see also [ICRC Commentary on Geneva Convention III](#) (2020), para. 5275 (“Serving in ‘the forces of the hostile Power’ encompasses a wide range of roles, from taking part in military operations to carrying out a broader range of activities. The list of permissible work contained in Article 50 is excluded from these activities.”) (footnotes omitted).

⁷⁷⁶ The following categories and classes constitute permissible work for prisoners of war: “camp administration or maintenance; agriculture; commercial business, and arts and crafts; domestic service.” See [Geneva Convention III](#), Article 50; [ICRC Commentary on Geneva Convention III](#) (2020), paras 2699-2703.

⁷⁷⁷ Prisoners of war may also be compelled to work in “industries connected with the production or the extraction of raw materials, and manufacturing industries, with the exception of metallurgical, machinery and chemical industries.” [ICRC Commentary on Geneva Convention III](#) (2020), paras 2705, 2708. Prisoners of war may volunteer to carry out prohibited work. See [ICRC Commentary on Geneva Convention III](#) (2020), para. 2714 (“Article 50 enumerates the categories of labour which the Detaining Power is permitted to compel prisoners of war to do, implicitly prohibiting the use of the prisoners in any other type of work not specifically listed. However, Article 50 does not deprive prisoners of war of the freedom to opt to do these other types of work. They may therefore volunteer for such work, in the same way as under Article 52 they can volunteer for work which is of an unhealthy or dangerous nature.”) (footnotes omitted).

⁷⁷⁸ [ICRC Commentary on Geneva Convention III](#) (2020), para. 2709.

⁷⁷⁹ [Geneva Convention IV](#), Article 40(2).

⁷⁸⁰ [Geneva Convention IV](#), Article 51(2).

⁷⁸¹ [ICRC Commentary on Geneva Convention IV](#), p. 294.

⁷⁸² ICRC, IHL Database, Customary IHL, [Rule 95. Forced Labour](#).

CASE STUDY: EXAMPLES OF FORCED LABOUR BY PROTECTED PERSONS

The ICTY considered the following conduct to constitute forced labour:

- “The detainees were forced, at great risk to their lives, to perform various dangerous military support tasks benefiting [hostile forces] including: digging trenches, building defences with sandbags, carrying wounded or killed [...] soldiers, carrying ammunition and explosives across the confrontation line, and placing them in front of [military] positions. These tasks were often performed by the detainees, under conditions which exposed them directly to hostile fire, and thereby served the purpose of protecting [hostile] soldiers.”⁷⁸³
- Forcing prisoners “to perform military support tasks in extremely dangerous conditions, such as digging trenches near the confrontation line, sealing exposed windows or areas with sandbags, or other forms of fortification labour.”⁷⁸⁴
- Compelling detainees “to carry explosives across the confrontation line, or to retrieve bodies of wounded or killed [hostile] soldiers.”⁷⁸⁵
- Forcing detainees to perform labour linked to the military operations of the adverse party including, amongst other, digging trenches, building military fortifications, fortifying lines, carrying heavy cases of ammunition to a military site, repairing fortifications and shelters, and preparing front line installations for winter.⁷⁸⁶

430. **Coercion by act or threat.** Civilian internees may consent to voluntary work under the same conditions applicable to the inhabitants of the detaining power and provided that “there is no direct connection between the work and the conduct of military operations.”⁷⁸⁷

431. With regard to prisoners of war, they may volunteer to carry out work otherwise prohibited by the Geneva Convention III.⁷⁸⁸ Pursuant to the ICRC Commentary, “it is not illegal for the hostile power to recruit prisoners who volunteer to join its forces, but it is prohibited to use force or the threat of force for this purpose.”⁷⁸⁹ Nonetheless, assessing the voluntary nature of such acts may prove difficult in practice.⁷⁹⁰

⁷⁸³ ICTY, *Naletilic and Martinovic* [Second Amended Indictment](#), para. 37..

⁷⁸⁴ ICTY, *Naletilic and Martinovic* [Trial Judgement](#), paras 268-269. See also ICTY, *Blaskic* [Trial Judgement](#), paras 693, 738 (“[...] use of detainees to dig trenches, including under dangerous conditions at the front.”); ICTY, *Aleksovski* [Trial Judgement](#), para.123.

⁷⁸⁵ ICTY, *Naletilic and Martinovic* [Trial Judgement](#), paras 268-269.

⁷⁸⁶ ICTY, *Prlic et al.* [Trial Judgement](#), Vol. III of VI, paras 1503, 1505-1506, 1510, 1514, 1518, 1521.

⁷⁸⁷ [Geneva Convention IV](#), Article 95(1); [ICRC Commentary on Geneva Convention IV](#), p. 415.

⁷⁸⁸ [Geneva Convention III](#), Article 52(1); [ICRC Commentary on Geneva Convention III](#) (2020), para. 2714 (“Article 50 enumerates the categories of labour which the Detaining Power is permitted to compel prisoners of war to do, implicitly prohibiting the use of the prisoners in any other type of work not specifically listed. However, Article 50 does not deprive prisoners of war of the freedom to opt to do these other types of work. They may therefore volunteer for such work, in the same way as under Article 52 they can volunteer for work which is of an unhealthy or dangerous nature.”) (footnotes omitted); See also ICTY, *Naletilic and Martinovic*, [Trial Judgement](#), para. 269 (“[...] compelling prisoners of war to perform these forms of labour is patently prohibited under Geneva Convention III, and in particular under Articles 50 and 52 of the said Convention, which respectively prohibit work of ‘military character or purpose’, and ‘unhealthy or dangerous labour’. The labour may therefore only have been lawful if the prisoners consented to perform it.”) (footnotes omitted).

⁷⁸⁹ [ICRC Commentary on Geneva Convention III](#) (2020), para. 5273.

⁷⁹⁰ [ICRC Commentary on Geneva Convention III](#) (2020), para. 5273.

The ICTY considered the following criteria to determine whether protected persons were forced to perform assigned labour:

ICTY, *NALETILIC AND MARTINOVIC TRIAL JUDGEMENT*, PARA. 259 (FOOTNOTES OMITTED)

To determine whether a person was not in a position to make a “real choice” to undertake labour in contravention of the law, the following criteria may be considered, in accordance with previous jurisprudence: a) the substantially uncompensated aspect of the labour performed; b) the vulnerable position in which the detainees found themselves; c) the allegations that detainees who were unable or unwilling to work were either forced to do so or put in solitary confinement; d) claims of longer term consequences of the labour; e) the fact and the conditions of detention; and f) the physical consequences of the work on the health of the internees.

432. The ICRC Commentary has specified that “certain forms of pressure or propaganda could amount to force or threat of force, which could coerce prisoners to join the forces of the hostile Power.”⁷⁹¹

b. Definition of Compelling Service in Hostile Forces and Participation in Military Operations (Subjective Elements)⁷⁹²

433. **Compelling Service in Hostile Forces.** The subjective element of the war crime in the ICC framework requires that the perpetrator (1) intentionally and knowingly coerced protected persons to take part in military operations against their own country or forces, or otherwise serve in the forces of a hostile power; and (2) was aware of the factual circumstances that established their protected status.⁷⁹³

434. **Compelling Participation in Military Operations.** The subjective element of the war crime requires that the perpetrator intentionally and knowingly coerced nationals of a hostile party to take part in military operations against their own country or forces.⁷⁹⁴

435. **Subjective elements applicable to crimes under the ICTY Statute covering similar conduct (forced labour of protected persons).** The ICTY has determined that the subjective element of the crime of unlawful labour (Article 3 of the ICTY Statute) requires that the perpetrator had the intent that the victim carry out prohibited work.⁷⁹⁵

⁷⁹¹ [ICRC Commentary on Geneva Convention III](#) (2020), para. 5273.

⁷⁹² This section details the subjective elements for this war crime as detailed under international law. However, the general part of the CCU identifies subjective elements that apply to crimes. See Articles 23, 24 and 25 of the CCU. It will be necessary to consider the relevance of the subjective elements in the general part of the CCU when considering the elements of this crime as applied under Article 438 of the CCU.

⁷⁹³ [ICC Elements of Crimes](#), Article 8(2)(a)(v); [ICC Statute](#), Article 30.

⁷⁹⁴ [ICC Elements of Crimes](#), Article 8(2)(b)(xv); [ICC Statute](#), Article 30.

⁷⁹⁵ In determining that the forced labour of protected persons constitutes “cruel treatment”, the Trial Chamber in *Blaskic* held that “cruel treatment constitutes an intentional act or omission ‘which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity. [...]’” See ICTY, *Blaskic Trial Judgement*, para. 186.

ICTY, *NALETILIC AND MARTINOVIĆ TRIAL JUDGEMENT*, PARAS 260-261 (FOOTNOTES OMITTED)

260. In order to establish the *mens rea* requirement for the crime of unlawful labour, the Prosecution must prove that the perpetrator had the intent that the victim would be performing prohibited work. The intent can be demonstrated by direct explicit evidence, or, in the absence of such evidence, can be inferred from the circumstances in which the labour was performed.

261. [...] The Chamber finds that the offence of unlawful labour against prisoners of war may be defined as an intentional act or omission by which a prisoner of war is forced to perform labour prohibited under Articles 49, 50, 51 or 52 of Geneva Convention III.

ICTY, *PRLIĆ ET AL TRIAL JUDGEMENT*, VOL. I OF VI, PARA. 162 (FOOTNOTES OMITTED)

The perpetrator of the crime [of unlawful labour] must have acted with the intent that the victim perform prohibited labour. This *mens rea* can be inferred from the circumstances in which the labour is carried out.

c. Contextual Elements

436. In addition, as with all war crimes, it is necessary to demonstrate the following contextual elements:
- i. There was an international armed conflict;⁷⁹⁶
 - ii. The conduct took place in the context of and was associated with an international armed conflict;⁷⁹⁷ and
 - iii. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.⁷⁹⁸

⁷⁹⁶ See above, paras 188-189.

⁷⁹⁷ See above, paras 190-198. See also [ICC Elements of Crimes](#), Article 8(2)(a)(v), Article 8(2)(b)(xv).

⁷⁹⁸ See above, para 199. See also [ICC Elements of Crimes](#), Article 8(2)(a)(v), Article 8(2)(b)(xv).

- vi. Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities (ICC Statute, Article (8)(2)(b)(xxvi))

APPLICABILITY: CONSCRIPTING OR ENLISTING CHILDREN UNDER THE AGE OF FIFTEEN YEARS INTO THE NATIONAL ARMED FORCES OR USING THEM TO PARTICIPATE ACTIVELY IN HOSTILITIES CAN BE CONSIDERED CRIMINALISED UNDER ARTICLE 438(1) OF THE CCU, AS IT IS SUBSUMED UNDER THE NOTION OF “OTHER VIOLATIONS OF RULES OF THE WARFARE RECOGNIZED BY INTERNATIONAL INSTRUMENTS CONSENTED TO BY BINDING BY THE VERKHOVNA RADA (PARLIAMENT) OF UKRAINE” (PARAS [437-440](#)).

Elements of the crime: To convict a perpetrator for this war crime the following elements must be established:

(1) Objective elements

- The perpetrator (a) conscripted or (b) enlisted a person or persons into the national armed forces, or (c) used a person or persons to participate actively in hostilities (paras [441-443](#)).
- The person or persons were under fifteen years of age (paras [454-455](#)).

(2) Subjective elements

- The perpetrator intended to (a) conscript or (b) enlist a person or persons into the national armed forces or (c) use a person or persons to participate actively in hostilities; (para. [456](#)) OR
- (d) the perpetrator was aware that, in the ordinary course of events, the result of their conduct would be that a person or persons would be conscripted, or enlisted, or used to participate actively in hostilities; (para. [456](#)).
- The perpetrator knew or should have known that such person or persons were under the age of fifteen years (paras [457-460](#)).

(3) Contextual elements

- There is an international armed conflict (para. [461](#)).
- The conduct of the perpetrator took place in the context and was associated with the conflict (para. [461](#)).
- The perpetrator was aware of the factual circumstances that established the existence of an armed conflict (para. [461](#)).

a. Applicability under Article 438

437. Although not explicitly mentioned in Article 438 of the CCU, conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities is subsumed under the notion of “other violations of rules of the warfare recognized by international instruments consented to by binding by the Verkhovna Rada (Parliament) of Ukraine”. It is prohibited un-

der international instruments ratified by Ukraine and has been recognised as a war crime. These factors support interpreting Article 438 CCU as criminalising violations of this IHL prohibition.

438. **Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities is a violation of the laws of warfare recognised in international treaties ratified by Ukraine.** Article 77(2) of Additional Protocol I requires, in international armed conflicts, “[t]he Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces”.⁷⁹⁹ The ICRC identifies this prohibition as part of customary international law.⁸⁰⁰ Ukraine has ratified Additional Protocol I.⁸⁰¹ Therefore, for the purposes of Article 438 CCU, the prohibition against conscripting or enlisting children under the age of 15 into the national armed forces or using them to participate actively in hostilities is a violation of the laws of warfare recognised in an international instrument accepted as binding by the Ukrainian parliament.
439. **Recognition as a war crime.** The ICC Statute and the Statute of the Special Court for Sierra Leone (SCSL) recognise violation of the prohibition against conscripting or enlisting children under the age of fifteen into armed groups or using them to participate actively in hostilities as a war crime.⁸⁰² According to the ICRC, the recognition of this war crime “reflect[s] the development of customary international law since the adoption of Additional Protocol I in 1977”.⁸⁰³
440. These factors support recognition of the criminalisation of conscripting or enlisting children under the age of fifteen into the national armed forces or using them to participate actively in hostilities under Article 438 of the CCU.

⁷⁹⁹ [Additional Protocol I](#), Article 77(2). Article 4 of Additional Protocol II contains a similar prohibition for non-international armed conflicts. [Additional Protocol II](#), Article 4(3)(c).

⁸⁰⁰ ICRC, IHL Database, Customary Law, [Rule 136. Recruitment of Child Soldiers](#); [Rule 137. Participation of Child Soldiers in Hostilities](#).

⁸⁰¹ Ukraine ratified Additional Protocol I on 25 January 1990. ICRC, IHL Database, IHL Treaties, [Treaties and State Parties, Additional Protocol I](#).

⁸⁰² [ICC Statute](#), Article 8(2)(b)(xxvi) (recognizing as a war crime and criminalising “Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities”); Article 8(2)(e)(vii) (criminalising the recruitment of children under fifteen into an armed group or using them to participate actively in hostilities during a non-international armed conflict; [SCSL Statute](#), Article 4(c) (recognizing as a war crime and criminalizing “Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities”). On the relevance of looking to the ICC Statute and other international criminal law authorities to interpret Article 438, See also above, paras [166-182](#).

⁸⁰³ ICRC, IHL Database, Customary Law, [Rule 156. Definition of War Crimes](#) (“*Conscripting or enlisting children under the age of 15 into armed forces, or using them to participate actively in hostilities*. The prohibition of enlisting children under 15 years of age into the armed forces, or using them to participate actively in hostilities, was introduced in Additional Protocol I. Although this is a relatively recent prohibition, the inclusion of such acts as war crimes in the Statute of the ICC was uncontroversial. The recruitment of children is prohibited under the legislation of many States. Using children to participate actively in hostilities is also prohibited under the legislation of many States. References to more practice can be found in the commentary to Rules 136–137.”) (footnotes omitted).

b. Definition of conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities (Objective Elements)

441. The objective elements of this crime are: (1) the perpetrator (a) conscripted or (b) enlisted a person or persons into the national armed forces or (c) used a person or persons to participate actively in hostilities; and (2) the person or persons were under the age of fifteen years.⁸⁰⁴ Conscripting, enlistment and use to participate actively in hostilities are separate criminal offences.⁸⁰⁵

442. **Enlisting a person or persons into the national armed forces.** Enlistment has been defined as “enrolment on the list of a military body”⁸⁰⁶ or “the voluntary integration of children under the age of 15 years into the armed force or group”.⁸⁰⁷ Particularly where an armed group is not a conventional military organisation, enlistment should not be narrowly defined as a formal process; rather, it should include any conduct accepting a person under the age of fifteen into the armed force or group.⁸⁰⁸ To show enlistment “there must be a nexus between the act of the accused and the child join-

⁸⁰⁴ [ICC Elements of Crimes](#), Article 8(2)(b)(xxvi). See also [ICC Elements of Crimes](#), Article 8(2)(e)(vii). As noted in the case law and commentaries, the relevant elements of recruiting and using child soldiers in international armed conflicts and in non-international armed conflicts are substantially similar and cases concerning the use or recruitment of child soldiers will be relevant for the interpretation of the elements in either context. See e.g. ICC, [Lubanga Trial Judgement](#), para. 568; Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 520, para. 797. Given this, this section will also refer to relevant case law arising in the context of non-international armed conflicts. See e.g. ICC, [Ongwen Trial Judgement](#), para. 2768 (referring to Article 8(2)(e)(vii), which is the analogous crime arising from Non international armed conflict and noting the following material elements, (i) “The perpetrator conscripted or enlisted one or more persons into an armed force or group or used one or more persons to participate actively in hostilities” and (ii) “Such person or persons were under the age of 15 years.”); ICC, [Ntaganda Trial Judgement](#), para. 1103 (quoting the ICC Elements of Crimes for the analogous Non international armed conflict crime under Article 8(2)(e)(vii)); ICC, [Katanga Trial Judgement](#), para. 1039 (quoting the ICC Elements of Crimes for the analogous NIAC crime under Article 8(2)(e)(vii)); ICC, [Lubanga Trial Judgement](#), para. 569 (quoting the ICC Elements of Crimes for Article 8(2)(e)(vii)). SCSL, [Fofana and Kondewa Appeal Judgement](#), para. 139 (“The actus reus requires that the accused recruited children by way of conscripting or enlisting them or that the accused used children to participate actively in hostilities.”); SCSL, [Taylor Trial Judgement](#), paras 439-440 (“The perpetrator conscripted or enlisted one or more persons into an armed force or group or used one or more persons to actively participate in hostilities” and “Such person or persons were under the age of 15 years”); SCSL, [Sesay et al. Trial Judgement](#), paras 190-193 (“One or more persons were enlisted or conscripted by the Accused into an armed force or group;” and “Such person or persons were under the age of 15 years;”); SCSL, [Fofana and Kondewa Trial Judgement](#), paras 195-196 (“One or more persons were enlisted, either voluntarily or compulsorily, into an armed force or group by the Accused;” and “Such person or persons were under the age of 15 years; and One or more persons were used by the Accused to participate actively in hostilities;” and “Such person or persons were under the age of 15 years;”); SCSL, [Brima et al. Trial Judgement](#), paras 729, 733 (“The perpetrator conscripted or enlisted one or more persons into an armed force or group or used one or more persons to participate actively in hostilities” and “Such person or persons were under the age of 15 years”).

⁸⁰⁵ See e.g. ICC, [Lubanga Trial Judgement](#), para. 609 (referring to the analogous crime in NIAC, and ruling “Bearing in mind the use of the word “or “in Article 8(2)(e)(vii), in the Chamber’s view the three alternatives (viz. conscription, enlistment and use) are separate offences.”); SCSL, [Fofana and Kondewa Appeal Judgement](#), para. 139 (“These modes of recruiting children are distinct from each other and liability for one does not necessarily preclude liability for the other.”).

⁸⁰⁶ See e.g. ICC, [Ntaganda Trial Judgement](#), para. 1107..

⁸⁰⁷ See e.g. ICC, [Ongwen Trial Judgement](#), para. 2769. See also SCSL, [Fofana and Kondewa Appeal Judgement](#), para. 140; SCSL, [Sesay et al. Trial Judgement](#), para. 185; SCSL, [Brima et al. Trial Judgement](#), para. 735.

⁸⁰⁸ See e.g. SCSL, [Fofana and Kondewa Appeal Judgement](#), para. 144 (“In the context of this case, in which the armed group is not a conventional military organisation, ‘enlistment’ cannot narrowly be defined as a formal process. The Appeals Chamber regards ‘enlistment’ in the broad sense as including any conduct accepting the child as a part of the militia. Such conduct would include making him participate in military operations.”).

ing the armed force or group”.⁸⁰⁹ A child’s consent does not constitute a legitimate defence to a charge of enlistment.⁸¹⁰

443. Given that children under the age of fifteen may not be able to give genuine, informed consent when enrolling in an armed force or group, it may be difficult to distinguish between voluntary and forced recruitment of such persons.⁸¹¹

444. **Conscripting a person or persons into the national armed forces.** Conscription entails the compulsory enlistment of persons into military service.⁸¹² Determining whether a person has been conscripted is to be done on a case-by-case basis.⁸¹³ The element of compulsion necessary for conscription may be demonstrated by showing that a person joined the armed forces due to a legal obligation, the use of force or the threat of force, or psychological pressure amounting to coercion.⁸¹⁴ However, it is not necessary to demonstrate that the person joined against their will.⁸¹⁵ The ICC Appeals Chamber has ruled that the general living conditions of a population cannot on their own establish the element of compulsion necessary to find that the crime of conscription was committed.⁸¹⁶

⁸⁰⁹ SCSL, *Fofana and Kondewa Appeal Judgement*, para. 141.

⁸¹⁰ See e.g. ICC, *Ntaganda Trial Judgement*, para. 1107 (“Furthermore, a child’s consent does not constitute a legitimate defence to a charge of enlistment.”). See also SCSL, *Fofana and Kondewa Appeal Judgement*, para. 140 (“However, where a child under the age of 15 years is allowed to voluntarily join an armed force or group, his or her consent is not a valid defence.”); SCSL, *Brima et al. Trial Judgement*, para. 735 (“Enlistment is a voluntary act, and the child’s consent is therefore not a valid defence.”).

⁸¹¹ See e.g. ICC, *Ntaganda Trial Judgement*, para. 1107..

⁸¹² See e.g. ICC, *Lubanga Appeal Judgement*, para. 277 (“The ordinary meaning of conscription is the ‘compulsory enlistment of persons into military service.’”); ICC, *Ongwen Trial Judgement*, para. 2769 (“Conscription has been defined as the coercive [...] integration of children under the age of 15 years into an armed force or group.”). See also SCSL, *Taylor Trial Judgement*, para. 441 (“Conscription encompasses any acts of coercion, such as abductions, and forced recruitment of children by an armed group [...]”); SCSL, *Brima et al. Trial Judgement*, para. 734 (“Rather, the Trial Chamber adopts an interpretation of ‘conscription’ which encompasses acts of coercion, such as abductions and forced recruitment, by an armed group”).

⁸¹³ See e.g. ICC, *Lubanga Appeal Judgement*, paras 282, 286..

⁸¹⁴ See e.g. ICC, *Lubanga Appeal Judgement*, para. 278 (“The Appeals Chamber considers that the element of compulsion necessary for the crime of conscription can be established by demonstrating that an individual under the age of fifteen years joined the armed force or group due to, *inter alia*, a legal obligation, brute force, threat of force, or psychological pressure amounting to coercion. As explained below, the Appeals Chamber is of the view that this interpretation is consistent with other comparable provisions of the Statute involving an element of compulsion, as well as the jurisprudence of the SCSL.”); ICC, *Ongwen Trial Judgement*, para. 2769 (“The element of compulsion distinguishes both forms of integration and is established by taking into account ‘whether the force, threat of force or psychological pressure applied was of such a degree and so pervasive, that individuals can be said to have been forced to join the armed force or group.’”); ICC, *Ntaganda Trial Judgement*, para. 1106 (“The existence of such coercion or compulsion can be established by demonstrating that an individual joined the armed force or group due to, *inter alia*, a legal obligation, brute force, threat of force, or psychological pressure amounting to coercion.”). See also SCSL, *Taylor Trial Judgement*, para. 441; SCSL, *Brima et al. Trial Judgement*, para. 734. See e.g. ICC, *Lubanga Appeal Judgement*, para. 278; ICC, *Ongwen Trial Judgement*, para. 2769; ICC, *Ntaganda Trial Judgement*, para. 1106. See also SCSL, *Taylor Trial Judgement*, para. 441; SCSL, *Brima et al. Trial Judgement*, para. 734.

⁸¹⁵ See e.g. ICC, *Lubanga Appeal Judgement*, para. 301 (“The Appeals Chamber considers that it follows from the above that lack of consent, or the requirement that the act is against the conscripted individual’s will generally does not form an element of the crime of conscription, including in circumstances such as the present case.”); ICC, *Ntaganda Trial Judgement*, para. 1106 (“Conscription, however, does not generally require demonstrating that the individual joined the armed force or group against his or her will.”).

⁸¹⁶ ICC, *Lubanga Appeal Judgement*, para. 295 (“Thus, the Appeals Chamber finds that the general living conditions of a population cannot on its own establish the element of compulsion necessary to find that the crime of conscription was committed.”).

445. **Conscription and Enlistment are continuing crimes.** Enlisting or conscripting children under the age of fifteen are continuous offences. They continue until the child leaves the armed forces or reaches the age of fifteen years.⁸¹⁷
446. **National armed forces not limited to armed forces of a State.** The term “national armed forces” has been interpreted as not being limited to the armed forces of a state.⁸¹⁸ This interpretation is consistent with Article 43 of Additional Protocol I, which contemplates that parties to an international conflict need not be represented by a recognised government or state.⁸¹⁹
447. **Using children under the age of fifteen to participate actively in hostilities.** The term “participate actively in hostilities” is not limited to ‘direct participation in hostilities’ as that phrase is used in the context of the IHL principle of distinction between combatants and non-combatants.⁸²⁰ Rather, this phrase is to be given a “wide interpretation”.⁸²¹ All that is required is “the existence of a link between the activity and the hostilities”.⁸²² More specifically, “it is necessary to analyse the link between the activity for which the child is used and the combat in which the armed force or group of the perpetrator is engaged”.⁸²³
448. In doing so, the ICC Appeals Chamber is guided by activities set out in commentary to Additional Protocols as well as in the Preparatory Committee’s Draft Statute.⁸²⁴ The commentary to the Additional Protocols refers to following activities: “gathering

⁸¹⁷ See e.g. ICC, *Ongwen Trial Judgement*, para. 2771 (“Conscripting and using children under the age of 15 years is a crime of continuing nature for as long as the children remain in the armed force or group; consequently, it ceases to be committed when the children leave the force or group or reach the age of 15 years, whichever comes first.”); ICC, *Ntaganda Trial Judgement*, para. 1104 (“Conscription and enlistment is a continuing crime, for which the commission occurs for as long as the child remains part of or is associated with the armed force or group and until the child reaches 15 years of age.”); ICC, *Lubanga Trial Judgement*, para. 618 (“In the circumstances of this case, conscription and enlistment are dealt with together, notwithstanding the Chamber’s earlier conclusion that they constitute separate offences. These offences are continuous in nature. They end only when the child reaches 15 years of age or leaves the force or group.”); SCSL, *Taylor Trial Judgement*, para. 443 (“The crime of enlisting or conscripting “is an offence of a continuing character – referred to by some courts as a continuous crime and by others as a permanent crime”. The crime of conscripting or enlisting children under the age of 15 continues to be committed as long as a child remains in the armed force or group and consequently ceases to be committed when the child leaves the armed group or reaches the age of 15 years.”).

⁸¹⁸ ICC, *Lubanga Decision on Confirmation of Charges*, para. 285 (“Thus the Chamber considers that, under Article 8(2) (b)(xxvi) of the Statute, the term “the national armed forces” is not limited to the armed forces of a State”).

⁸¹⁹ *Additional Protocol I*, Article 43(1). See also Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 525, para. 813.

⁸²⁰ ICC, *Lubanga Appeal Judgement*, paras 324-328 (“324. Nevertheless, and contrary to Mr Lubanga’s submissions, the Appeals Chamber finds that the term ‘participate actively in hostilities’ in article 8 (2) (e) (vii) of the Statute does not have to be given the same interpretation as the terms active or direct participation in the context of the principle of distinction between combatants and civilians, as set out, in particular, in Common Article 3 of the Geneva Conventions. [...] 328. In sum, the Appeals Chamber finds that the provisions of international humanitarian law do not establish that the phrase “participate actively in armed hostilities” should be interpreted so as to only refer to forms of direct participation in armed hostilities, as understood in the context of the principle of distinction and Common Article 3 of the Geneva Conventions.”).

⁸²¹ ICC, *Lubanga Appeal Judgement*, para. 340; ICC, *Ntaganda Trial Judgement*, para. 1108.

⁸²² ICC, *Lubanga Appeal Judgement*, para. 333.

⁸²³ ICC *Lubanga Appeal Judgement*, para. 335; ICC, *Ongwen Trial Judgement*, para. 2770; ICC, *Ntaganda Trial Judgement*, para. 1108.

⁸²⁴ ICC, *Lubanga Appeal Judgement*, para. 335 (“In determining the existence of such a link, the Appeals Chamber will be guided by the lists of activities set out in the ICRC commentary on the Additional Protocols and in the Preparatory Committee’s Draft Statute.”).

information, transmitting orders, transporting ammunition and foodstuffs, or acts of sabotage”.⁸²⁵ And the Preparatory Committee’s Draft Statute contained the following explanatory footnote:

ICC, LUBANGA APPEAL JUDGEMENT, PARA. 334

ICC Preparatory Committee’s Draft Statute explanatory footnote:

The words ‘using’ and ‘participate’ have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer’s married accommodation. However, use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included within the terminology.

449. The ICC Appeals Chamber and Trial Chambers have found a number of instances where there was a sufficient link between the activity for which a child or children under fifteen were used and the hostilities to show that the children were used to “participate actively in hostilities”. It is “beyond dispute” that the use of children under fifteen to participate in “actual combat” demonstrates this link.⁸²⁶ Using children under fifteen to act as bodyguards for military officials in conflict-zones constitutes using them to participate actively in hostilities.⁸²⁷ Using children under fifteen for “reconnaissance missions” or “to gather intelligence information” also constitutes using them to participate actively in hostilities.⁸²⁸
450. The ICC has also found instances where the activities for which children under fifteen were used were not sufficiently linked to hostilities to show that they were used to participate actively in hostilities, including using children under fifteen: (1) as part of a unit in an armed group, in and of itself;⁸²⁹ (2) to guard detained persons, without further details such as “who were guarded and where the guarded persons were detained”;⁸³⁰ (3) to carry out patrols, where “the Chamber could not establish a military purpose” and it appeared that the patrols “were aimed at the prevention of ordinary crimes, such as theft”.⁸³¹
451. Trial Chambers of the SCSL have also adopted a broad approach to interpreting this crime:

⁸²⁵ ICC, *Lubanga Appeal Judgement*, para. 334.

⁸²⁶ ICC, *Lubanga Appeal Judgement*, paras 336, 340; ICC, *Ntaganda Trial Judgement*, paras 1109, 1125, 1128.

⁸²⁷ ICC, *Lubanga Appeal Judgement*, paras 337, 340. ICC, *Ntaganda Trial Judgement*, paras 1109, 1126, 1129.

⁸²⁸ ICC, *Ntaganda Trial Judgement*, paras 1127, 1130.

⁸²⁹ ICC, *Lubanga Appeal Judgement*, para. 338.

⁸³⁰ ICC, *Ntaganda Trial Judgement*, para. 1131.

⁸³¹ ICC, *Ntaganda Trial Judgement*, para. 1132.

SCSL, *TAYLOR TRIAL JUDGEMENT*, PARA. 444

‘Using’ children to participate actively in the hostilities encompasses putting their lives directly at risk in combat, but may also include participation in activities linked to combat such carrying loads for the fighting faction, finding and/or acquiring food, ammunition or equipment, acting as decoys, carrying messages, making trails or finding routes, manning checkpoints or acting as human shields. Whether a child is actively participating in hostilities in such situations will be assessed on a case-by-case basis.

452. Trial Chambers before the SCSL have found a wide range of activities of children under fifteen were sufficiently linked to hostilities to show these children were used to “participate actively in hostilities”. These activities include using children under fifteen: (1) in active hostilities;⁸³² (2) in attacks against civilians and civilian objects;⁸³³ (3) in armed patrols, even when away from the “front”;⁸³⁴ (4) to guard military objectives, including diamond mines;⁸³⁵ (5) as spies;⁸³⁶ (6) as bodyguards to commanders;⁸³⁷ (7) on food finding missions, at least where there was an additional link to hostilities;⁸³⁸ and (8) to carry ammunition and looted items.⁸³⁹
453. Trial Chambers of the SCSL have also ruled that certain activities for which children under fifteen were used were not sufficiently linked to show they were used to participate actively in hostilities. There is broad agreement that using children under fifteen in domestic labour did not constitute using them to actively participate in hostilities.⁸⁴⁰ Moreover, unlike in the *Charles Taylor* trial, the Trial Chamber in the *Sesay et al.* proceedings ruled, in the circumstances in that case, using children to find food did not constitute using them to actively participate in hostilities.⁸⁴¹
454. **Under the age of fifteen years.** Determining the age of persons who were conscripted, enlisted, or used to participate actively in hostilities has sometimes proved difficult before international criminal tribunals. On this issue, the ICC has ruled: (1) this determination, and what evidence is appropriate is to be determined on a case-by-case basis;⁸⁴² (2) it is not necessarily impermissible to make a finding on the age of a

⁸³² SCSL, *Taylor Trial Judgement*, paras 1476, 1516, 1523, 1540-1541, 1553.

⁸³³ SCSL, *Taylor Trial Judgement*, paras 1462, 1489-1490; 1502-1505; 1516, 1526, 1528, 1565, 1575, 1591-1594; SCSL, *Sesay et al. Trial Judgement*, paras 1719-1724.

⁸³⁴ SCSL, *Taylor Trial Judgement*, para. 1523; SCSL, *Sesay et al. Trial Judgement*, paras 1717-1718. But see ICC, *Ntaganda Trial Judgement*, para. 1132.

⁸³⁵ SCSL, *Taylor Trial Judgement*, paras 1458-1459, 1467-1468, 1495; SCSL, *Sesay et al. Trial Judgement*, paras 1725-1728.

⁸³⁶ SCSL, *Sesay et al. Trial Judgement*, para. 1729.

⁸³⁷ SCSL, *Taylor Trial Judgement*, paras 1460, 1486, 1526, 1540-1541, 1581-1582; SCSL, *Sesay et al. Trial Judgement*, paras 1731, 1735-1738.

⁸³⁸ SCSL, *Taylor Trial Judgement*, paras 1461, 1479-1482, 1509, 1519, 1523, 1528, 1546.

⁸³⁹ SCSL, *Taylor Trial Judgement*, paras 1463, 1524, 1565, 1591-1594.

⁸⁴⁰ SCSL, *Taylor Trial Judgement*, paras 1477, 1522; SCSL, *Sesay et al. Trial Judgement*, paras 1730, 1739.

⁸⁴¹ SCSL, *Sesay et al. Trial Judgement*, para. 1743.

⁸⁴² See e.g. ICC, *Ongwen Appeal Judgement*, para. 885 (“In addition, the Appeals Chamber has held that whether a chamber can establish beyond reasonable doubt that a person was below the age of 15 years “in circumstances where the identity and exact date of birth of the victim are unknown is a question of fact and must be decided on a case-by-case basis taking into account the specific facts and circumstances of the case and individual at issue”).

person whose identity is unknown;⁸⁴³ (3) the law does not require that a victim's exact age is established, the age element of the crime is established if it is shown that the victim was under fifteen years of age;⁸⁴⁴ (4) the size of an individual considered along with their general appearance, for example, when compared to other individuals in a video excerpt, may be a determining factor for finding that a person is under the age of fifteen years;⁸⁴⁵ and (5) it is permissible for a non-expert witness to estimate a person's age, particularly where the witness provides reasons that enable judges to assess their conclusions.⁸⁴⁶

455. The judges of the SCSL have adopted their own practices for determining the age of child soldiers. For example, at least one SCSL Trial Chamber ruled that evidence showing children were screened or registered based on their age and then assigned to Small Boys Units and Small Girls Units demonstrated beyond reasonable doubt that some of these children were under fifteen years of age.⁸⁴⁷ The SCSL also made findings that children were under fifteen years of age based on appearance alone.⁸⁴⁸

c. Definition of conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities (Subjective Elements)⁸⁴⁹

456. The subjective elements of this crime are: (1) the perpetrator intended to (a) conscript or (b) enlist a person or persons into the national armed forces or (c) use a person or persons to participate actively in hostilities; OR (d) the perpetrator was aware that, in the ordinary course of events, the result of their conduct would be that a person or persons would be conscripted, or enlisted, or used to participate actively in hostilities; and (2) the perpetrator knew or should have known that such person or persons were under the age of fifteen years.⁸⁵⁰

⁸⁴³ ICC, *Ongwen Appeal Judgement*, para. 882 (“The Appeals Chamber recalls that “it is not *per se* impermissible to make a finding on the age element of the crimes in circumstances where the identity of the victim is unknown”); ICC, *Lubanga Appeal Judgement*, para. 197 (“Nevertheless, the Appeals Chamber finds that it is not *per se* impermissible to make a finding on the age element of the crimes in circumstances where the identity of the victim is unknown.”).

⁸⁴⁴ ICC, *Ongwen Appeal Judgement*, para. 882 (“The Appeals Chamber has also determined that the relevant legal framework applicable to the crime of conscripting children under the age of 15 years into armed forces or groups and using them to participate actively in hostilities does “not require that the exact age of a victim of the crime be established”. Rather, what needs to be established is “that the victim is under the age of fifteen years”); ICC, *Lubanga Appeal Judgement*, para. 198 (“Article 8 (2) (e) (vii) of the Statute and the required elements of the crimes listed in that article, as provided in the Elements of Crimes, do not require that the exact age of a victim of the crime be established. Rather, the text only requires that the victim is under the age of fifteen years. Thus, it suffices that it is established that the victim is within a certain *age range*, namely *under* the age of fifteen years.”).

⁸⁴⁵ ICC, *Lubanga Appeal Judgement*, para. 229 (“The Appeals Chamber considers that the size of an individual, when compared to the other individuals present in the video excerpt, can be a determining factor for finding that the person is under the age of fifteen years, if considered in connection with their general appearance.”). See also ICC, *Ntaganda Appeal Judgement*, paras 768-769.

⁸⁴⁶ ICC, *Ongwen Appeal Judgement*, paras 883-884.

⁸⁴⁷ See e.g. SCSL, *Taylor Trial Judgement*, para. 1378.

⁸⁴⁸ See e.g. SCSL, *Taylor Trial Judgement*, paras 1425, 1431. See also SCSL, *Sesay et al. Trial Judgement*, para. 1702.

⁸⁴⁹ This section details the subjective elements for this war crime as detailed under international law. However, the general part of the CCU identifies subjective elements that apply to crimes. See Articles 23, 24 and 25 of the CCU. It will be necessary to consider the relevance of the subjective elements in the general part of the CCU when considering the elements of this crime as applied under Article 438 CCU.

⁸⁵⁰ See *ICC Elements of Crimes*, Article 8(2)(b)(xxvi); *ICC Statute*, Article 30; See also ICC, *Ongwen Trial Judgement*, para. 2772 (“In addition to the mental elements specified in Article 30, the perpetrator must know or should have known that such person or persons were under the age of 15 years.”); ICC, *Ntaganda Appeal Judgement*, paras

457. **Knew or should have known that victims were under the age of fifteen years.** A pre-trial chamber of the ICC stated that the “should have known” standard is met when the perpetrator:

ICC, LUBANGA DECISION ON CONFIRMATION OF CHARGES, PARA. 358

- i. did not know that the victims were under the age of fifteen years at the time they were conscripted, enlisted or used to participate actively in hostilities; and
- ii. lacked such knowledge because he or she did not act with due diligence in the relevant circumstances (one can only say that the suspect “should have known” if his or her lack of knowledge results from his or her failure to comply with his or her duty to act with due diligence).

458. As the following case study shows, ICC trial chambers have inferred perpetrator’s knowledge of the age of persons conscripted, enlisted, or used to participate actively in hostilities:

CASE STUDY: DETERMINING KNOWLEDGE OF THE AGE OF CHILD SOLDIERS NTAGANDA TRIAL JUDGEMENT (8 JULY 2019):

In the Ntaganda Trial before the ICC, the trial chamber found, on the basis of video images, that three children in Mr Ntaganda’s personal escort were “manifestly’ under 15 years of age”. It also found that he interacted with his escorts “on a daily basis”. His escorts (i) “guarded his residence and compound”; (ii) “accompanied him on his travels and during his visits to training camps”; (iii) participated in combat operations with him”. The trial chamber also noted that under 15 year olds were trained as radio operators at Mr Ntaganda’s residence.

1103, 1176, 1190-1195; ICC, *Katanga Trial Judgement*, para. 1048 (“Accordingly, the Chamber finds that in the case at bar the perpetrator must have intentionally used children under the age of 15 years to participate actively in the hostilities. Such intent will be proven where the perpetrator acted deliberately or failed to act (1) in order to use children under the age of 15 years to participate actively in hostilities or (2) whereas he or she was aware that such participation would occur in the ordinary course of events.”); ICC, *Lubanga Trial Judgement*, paras 1013(i), 1018(iii) (1013. (i) “The Chamber is of the view that the prosecution must establish, as regards the mental element, that: (i) the accused and at least one other perpetrator meant to conscript, enlist or use children under the age of 15 to participate actively in hostilities or they were aware that in implementing their common plan this consequence “will occur in the ordinary course of events”); SCSL, *Taylor Trial Judgement*, para. 439 (“The perpetrator knew or should have known that such person or persons were under the age of 15 years.”); SCSL, *Sesay et al. Trial Judgement*, paras 190-193 (“The Accused knew or had reason to know that such person or persons were under the age of 15 years and that they may be trained for or used in combat and [] the Accused intended to conscript or enlist the said persons into the armed force or group” [...] “The Accused knew or had reason to know that such persons were under the age of 15 years; and [...] The Accused intended to use the said persons to actively participate in hostilities.”); SCSL, *Fofana and Kondewa Trial Judgement*, paras 195-196 (“The Accused knew or had reason to know that such person or persons were under the age of 15 years and that they may be trained for or used in combat and [...] the Accused intended to conscript or enlist the said persons into the armed force or group” [...] “The Accused knew or had reason to know that such persons were under the age of 15 years; and [...] The Accused intended to use the said persons to actively participate in hostilities.”); SCSL, *Brima et al. Trial Judgement*, para. 729 (“The perpetrator knew or should have known that such person or persons were under the age of 15 years.”).

Given the frequency of Mr Ntaganda's contact with his escorts, some of whom were manifestly under the age of 15 years, the only reasonable conclusion was that Mr Ntaganda knew that some of his escorts were under 15 years of age, and "they were active members of the UPC/FPLC, ensuring his protection and participating in various military activities".

The trial chamber also found that, "on at least three occasions", Mr Ntaganda called for young people to join the UPC/FPLC, including by calling for "parents and families to give their children to the group".

The trial chamber concluded, "In light of the above, the Chamber considers that Mr Ntaganda necessarily knew that the UPC/FPLC would recruit, train, and deploy children under 15 years of age in the context of its military campaign against the RCD-K/ML and the Lendu community."⁸⁵¹

459. Before the SCSL, trial chambers found that perpetrators must have known that children under fifteen were conscripted, enlisted, or used to participate actively in hostilities on the basis of their sheer prevalence in the relevant armed forces or groups,⁸⁵² as well as where there were screening or registration processes expressly aimed at creating "Small Boy Units" and Small Girl Units".⁸⁵³
460. **Neither subsequent demobilisation of children nor lack of knowledge that it was unlawful to conscript or enlist child soldiers will exclude the requisite subjective elements.** The ICC has ruled that a perpetrators demobilisation efforts did not exclude the mental element for conscripting child soldiers.⁸⁵⁴ Before the SCSL, a perpetrators mistake of law belief that it was legally permissible to recruit children under the age of fifteen into armed forces did not remove the requisite subjective elements for crimes relating to child soldiers.⁸⁵⁵

d. Contextual Elements

461. In addition, as with all war crimes, it is necessary to demonstrate the following contextual elements:
- i. There was an international armed conflict;⁸⁵⁶
 - ii. The conduct took place in the context of and was associated with an international armed conflict;⁸⁵⁷ and
 - iii. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.⁸⁵⁸

⁸⁵¹ ICC, *Ntaganda Appeal Judgement*, paras 1190-1194.

⁸⁵² See e.g. SCSL, *Taylor Trial Judgement*, paras 1367, 1393, 1410, 1416, 1418, 1422, 1431, 1438, 1446, 1450, 1455, *passim*.

⁸⁵³ See e.g. SCSL, *Taylor Trial Judgement*, paras 1378, 1419, 1424, *passim*; SCSL, *Sesay et al. Trial Judgement*, paras 1745-1746.

⁸⁵⁴ See ICC, *Lubanga Appeal Judgement*, para. 525.

⁸⁵⁵ See SCSL, *Brima et al. Appeal Judgement*, para. 296..

⁸⁵⁶ See above, paras 188-189.

⁸⁵⁷ See above, paras 190-198. See also *ICC Elements of Crimes*, Article 8(2)(b)(xxvi).

⁸⁵⁸ See above, para. 199. See also *ICC Elements of Crimes*, Article 8(2)(b)(xxvi).

- vii. Wilfully Depriving a Prisoner of War or Other Protected Person of the Rights of Fair and Regular Trial (ICTY Statute, Article 2(f); ICC Statute, Article 8(2)(a)(vi))

APPLICABILITY: THE WAR CRIME OF WILFULLY DEPRIVING A PRISONER OF WAR OR OTHER PROTECTED PERSON OF THE RIGHTS OF FAIR AND REGULAR TRIAL MAY BE CONSIDERED CRIMINALISED UNDER ARTICLE 438 OF THE CCU AS IT MAY BE SUBSUMED WITHIN "VIOLATIONS OF RULES OF WARFARE RECOGNISED BY INTERNATIONAL INSTRUMENTS CONSENTED TO BE BINDING BY THE VERKHOVNA RADA OF UKRAINE" TO WHICH ARTICLE 438(1) REFERS (PARAS [462-465](#)).

Elements of the crimes: To convict a perpetrator for wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial as a war crime the following elements need to be established:

(1) Objective elements

- The perpetrator deprived one or more persons of a fair and regular trial by denying judicial guarantees as defined, in particular, in the third and the fourth Geneva Conventions of 1949 (para. [466-473](#)).
- Such person or persons were protected under one or more of the Geneva Conventions of 1949 (paras [474-475](#)).

(2) Subjective elements

- The perpetrator intentionally and knowingly deprived the person or persons of a fair and regular trial by denying the judicial guarantees (para. [477](#)).
- The perpetrator was aware of the factual circumstances that established protected status of the persons under one or more of the Geneva Conventions of 1949 (para. [478](#)).

(3) Contextual elements

- There is an international armed conflict (para. [479](#)).
- The conduct of the perpetrator took place in the context of and was associated with the conflict (para. [479](#)).
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict (para. [479](#)).

a. Applicability under Article 438

462. Article 438 of the CCU does not explicitly mention the war crime of wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial. However, this offence may be subsumed within “violations of rules of warfare recognised by international instruments consented to be binding by the Verkhovna Rada of Ukraine” to which Article 438(1) refers. As explained below, this violation of IHL is prohibited under international instruments ratified by Ukraine and has been

recognised as a war crime by those same international instruments. Thus, it may be concluded that the violation is criminalised under Article 438.

463. **Denial of a fair trial is a violation of rules of warfare recognised by international treaties ratified by Ukraine.** Depriving a prisoner of war or other protected person of the rights of a fair and regular trial is a violation of IHL enumerated in [Geneva Convention III](#), [Geneva Convention IV](#) and [Additional Protocol I](#).⁸⁵⁹ Ukraine is a State party to the Geneva Conventions and their Additional Protocols.⁸⁶⁰
464. **Recognition as a war crime.** Wilfully depriving a prisoner of war or other protected person of the rights of a fair and regular trial is a grave breach of [Geneva Convention III](#), [Geneva Convention IV](#) and [Additional Protocol I](#) and therefore a war crime in international armed conflict.⁸⁶¹ Such criminalisation has the status of customary international law.⁸⁶² The offence is expressly codified as a war crime in international armed conflict in Article 2(f) of the [ICTY Statute](#) and Article 8(2)(a)(vi) of the [ICC Statute](#).⁸⁶³
465. Accordingly, this offence can be considered criminalised under Article 438 of the CCU.

b. Definition of Wilfully Depriving a Prisoner of War or Other Protected Person of the Rights of Fair and Regular Trial (Objective Elements)

466. The objective elements of wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial are: (1) the perpetrator deprived one or more persons of a fair and regular trial by denying judicial guarantees as defined, in particular, in the third and the fourth Geneva Conventions of 1949; and (2) such person or persons were protected under one or more of the Geneva Conventions of 1949.⁸⁶⁴

⁸⁵⁹ See in particular [Geneva Convention III](#), Articles 84, 86-87, 99-108; [Geneva Convention IV](#), Articles 5, 33; [Additional Protocol I](#), Article 75.

⁸⁶⁰ Ukraine ratified the Geneva Conventions on 3 August 1954, and the Additional Protocols on 25 January 1990. ICRC, IHL Database, Treaties, States Parties and Commentaries, [Ukraine](#). The prohibition of wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial also has the status of customary international law. ICRC, IHL Database, Customary IHL, [Rule 100. Fair Trial Guarantees](#).

⁸⁶¹ [Geneva Convention III](#), Articles 129-130; [Geneva Convention IV](#), Articles 146-147; [Additional Protocol I](#), Article 85(1)-(2), (4)(e), (5).

⁸⁶² ICRC, IHL Database, Customary IHL, [Rule 156. Serious violations of international humanitarian law constitute war crimes](#).

⁸⁶³ [ICTY Statute](#), Article 2(f); [ICC Statute](#), Article 8(2)(a)(vi). See also [ICC Statute](#), Article 8(2)(c)(iv) which codifies a similar but more narrow offense applicable in the context of non-international armed conflict ("The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognised as indispensable."). See also above, See also above, paras [166-182](#).

⁸⁶⁴ [ICC Elements of Crimes](#), Article 8(2)(a)(vi); ECCC, *Kaing Guek Eav (alias Duch) Trial Judgement*, para. 459. See also and compare [ICC Elements of Crimes](#), Article 8(2)(c)(iv) crime in non-international armed conflict of sentencing or execution without due process, with different elements ("1. The perpetrator passed sentence or executed one or more persons. 2. Such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities [...] 4. There was no previous judgement pronounced by a court, or the court that rendered judgement was not 'regularly constituted', that is, it did not afford the essential guarantees of independence and impartiality, or the court that rendered judgement did not afford all other judicial guarantees generally recognised as indispensable under international law [...]"). These elements are largely influenced by [Additional Protocol II](#), Article 6, Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, pp 408-409. Recent ICC pre-trial jurisprudence provides an extensive interpretation of sentencing or execution without due process. See ICC, *Al Hassan Decision*

467. **The perpetrator deprived one or more persons of a fair and regular trial by denying judicial guarantees as defined, in particular, in the third and the fourth Geneva Conventions of 1949.**

468. *Judicial guarantees as defined, in particular, in the third and the fourth Geneva Conventions of 1949.* As shown below, [Geneva Convention III](#) and [Geneva Convention IV](#) set out numerous, detailed judicial guarantees specially tailored for and applicable to international armed conflict including occupation. In drafting the [ICC Statute](#) and the [ICC Elements of Crimes](#), States Parties did not intend to limit the judicial guarantees to only those in the Geneva Conventions as reflected by the use of the term “in particular”.⁸⁶⁵

EXAMPLES OF JUDICIAL GUARANTEES

- The right of Accused to be judged by an independent and impartial court.⁸⁶⁶
- Timely notification and information by the detaining power to a protecting power about any planned judicial proceedings against a prisoner of war.⁸⁶⁷
- The right of the Accused to be promptly informed of the offences with which they are charged.⁸⁶⁸
- The rights and means of defence, such as the right to be assisted by a qualified lawyer chosen freely.⁸⁶⁹
- The right to be assisted by a competent interpreter.⁸⁷⁰
- The principle of legality, *nullum crimen sine lege*.⁸⁷¹

[on Confirmation of charges](#), paras 358-389.

⁸⁶⁵ Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, p. 100; Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 345, para. 139.

⁸⁶⁶ [Geneva Convention III](#), Article 84; [Additional Protocol I](#), Article 75(4); ECCC, *Kaing Guek Eav (alias Duch) Trial Judgement*, paras 459, 462 (“the punishment meted out to [captured prisoners of war or civilians] was clearly arbitrary. There were no trials [...]”). See also similar wording in [Additional Protocol II](#), Article 6(1)-(2), applicable to non-international armed conflict. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, p. 101.

⁸⁶⁷ [Geneva Convention III](#), Article 104; Mark Klamburg in CILRAP CMN Case Matrix Network, [Knowledge Hub: CLICC Commentary on the Law of the International Criminal Court](#), Updated: 30 June 2016, Article 8(2)(a)(vi).

⁸⁶⁸ [Geneva Convention III](#), Article 105; [Geneva Convention IV](#), Article 71; [Additional Protocol I](#), Article 75(4)(a); ECCC, *Kaing Guek Eav (alias Duch) Trial Judgement*, paras 459, 462 (“The Chamber observes that no arrangements were made to screen captured prisoners of war or civilians, nor were there any mechanisms to inform them of the reasons for their arrest.”). See also similar wording in [Additional Protocol II](#), Article 6(2)(a) applicable to non-international armed conflict. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, p. 101.

⁸⁶⁹ [Geneva Convention III](#), Article 99, 105; [Geneva Convention IV](#), Article 72; [Additional Protocol I](#), Article 75(4)(a); ECCC, *Kaing Guek Eav (alias Duch) Trial Judgement*, para. 462 (“[...] nor were there any mechanisms to [...] enable [captured prisoners of war or civilians] to challenge [the] basis [for their arrest].”). See also similar wording in [Additional Protocol II](#), Article 6(2)(a) applicable to non-international armed conflict. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, p. 101.

⁸⁷⁰ [Geneva Convention III](#), Article 105; [Geneva Convention IV](#), Article 72; Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, p. 101.

⁸⁷¹ [Geneva Convention III](#), Article 86; [Additional Protocol I](#), Article 75(4)(h); ECCC, *Kaing Guek Eav (alias Duch) Trial Judgement*, para. 459; Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, p. 101.

- The principle against double jeopardy, *ne bis in idem* (i.e. no trial, conviction and punishment more than once for the same conduct).
- ⁸⁷²The presumption of innocence.⁸⁷³
- The right of the Accused not to confess guilt nor to testify against themselves.⁸⁷⁴
- The right of the Accused to present evidence and especially to call and question witnesses.⁸⁷⁵
- The principle of individual criminal responsibility and the prohibition of collective punishment.⁸⁷⁶
- The right of the Accused to be present at their trial.⁸⁷⁷
- The right of the Accused to have judgment pronounced publicly.⁸⁷⁸
- The rights of appeal or petition, and the right to be informed of such rights of appeal or petition.⁸⁷⁹
- Specific requirements relating to the death penalty.⁸⁸⁰

⁸⁷² [Geneva Convention III](#), Article 86; [Additional Protocol I](#), Article 75(4)(h); ECCC, *Kaing Guek Eav (alias Duch) Trial Judgement*, para. 459; Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, p. 101.

⁸⁷³ [Additional Protocol I](#), Article 75(4)(d). See also similar wording in [Additional Protocol II](#), Article 6(2)(d) applicable to non-international armed conflict. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, p. 101.

⁸⁷⁴ [Geneva Convention III](#), Article 99; [Additional Protocol I](#), Article 75(4)(f). See also similar wording in [Additional Protocol II](#), Article 6(2)(f) applicable to non-international armed conflict. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, p. 101.

⁸⁷⁵ [Geneva Convention III](#), Article 105; [Geneva Convention IV](#), Article 72; [Additional Protocol I](#), Article 75(4)(g). Mark Klamburg in CILRAP CMN Case Matrix Network, [Knowledge Hub: CLICC Commentary on the Law of the International Criminal Court](#), Updated: 30 June 2016, Article 8(2)(a)(vi).

⁸⁷⁶ [Geneva Convention III](#), Article 87; [Geneva Convention IV](#), Article 33; [Additional Protocol I](#), Article 75(2)(d), 75(4)(b); ECCC, *Kaing Guek Eav (alias Duch) Trial Judgement*, para. 459. See also similar wording in [Additional Protocol II](#), Article 6(2)(b) applicable to non-international armed conflict. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, p. 101.

⁸⁷⁷ [Additional Protocol I](#), Article 75(4)(e). See also similar wording in [Additional Protocol II](#), Article 6(2)(e) applicable to non-international armed conflict. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, p. 101.

⁸⁷⁸ [Additional Protocol I](#), Article 75(4)(i). Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, p. 101.

⁸⁷⁹ [Geneva Convention III](#), Article 106; [Geneva Convention IV](#), Article 73; [Additional Protocol I](#), Article 75(4)(j); ECCC, *Kaing Guek Eav (alias Duch) Trial Judgement*, paras 459, 462 ("[...] nor were there any mechanisms to [...] enable [captured prisoners of war or civilians] to appeal."). See also similar wording in [Additional Protocol II](#), Article 6(3) applicable to non-international armed conflict. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, p. 101.

⁸⁸⁰ [Geneva Convention III](#), Articles 100 ("Prisoners of war and the Protecting Powers shall be informed as soon as possible of the offences which are punishable by the death sentence under the laws of the Detaining Power. Other offences shall not thereafter be made punishable by the death penalty without the concurrence of the Power upon which the prisoners of war depend [...]"), 101 ("If the death penalty is pronounced on a prisoner of war, the sentence shall not be executed before the expiration of a period of at least six months from the date when the Protecting Power receives, at an indicated address, the detailed communication provided for in Article 107."); [Geneva Convention IV](#), Articles 68 ("Protected persons who commit an offence which is solely intended to harm the Occupying Power, but which does not constitute an attempt on the life or limb of members of the occupying forces or administration, nor a grave collective danger, nor seriously damage the property of the occupying forces or administration or the installations used by them, shall be liable to internment or simple imprisonment, provided the duration of such internment or imprisonment is proportionate to the offence committed. Furthermore, internment or imprisonment shall, for such offences, be the only measure adopted for depriving protected persons of liberty. The courts provided for under Article 66 of the present Convention may at their discretion convert a sentence of imprisonment to one of internment for the same period. The penal provisions promulgated by the Occupying Power in accordance with

- Some specific institutional, procedural and legal requirements in relation to judicial proceedings against prisoners of war and civilians in occupied territory.⁸⁸¹

469. Commentary suggests, and recent ICC pre-trial jurisprudence supports, that interpretation and elaboration of the definition of judicial guarantees may be made by recourse to human rights instruments and decisions.⁸⁸²

Articles 64 and 65 may impose the death penalty on a protected person only in cases where the person is guilty of espionage, of serious acts of sabotage against the military installations of the Occupying Power or of intentional offences which have caused the death of one or more persons, provided that such offences were punishable by death under the law of the occupied territory in force before the occupation began. [...] In any case, the death penalty may not be pronounced against a protected person who was under eighteen years of age at the time of the offence.", 75 ("In no case shall persons condemned to death be deprived of the right of petition for pardon or reprieve. No death sentence shall be carried out before the expiration of a period of at least six months from the date of receipt by the Protecting Power of the notification of the final Judgement confirming such death sentence, or of an order denying pardon or reprieve. The six months period of suspension of the death sentence herein prescribed may be reduced in individual cases in circumstances of grave emergency involving an organized threat to the security of the Occupying Power or its forces, provided always that the Protecting Power is notified of such reduction and is given reasonable time and opportunity to make representations to the competent occupying authorities in respect of such death sentences."); ECCC, *Kaing Guek Eav (alias Duch) Trial Judgement*, para. 462 ("extra-judicial executions were carried out on detainees as a matter of policy."); Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, p. 102.

⁸⁸¹ [Geneva Convention III](#), Articles 84 ("A prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war [...]"), 102 ("A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed."); [Geneva Convention IV](#), Articles 64 ("The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws. The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them."), 66 ("In case of a breach of the penal provisions promulgated by it by virtue of the second paragraph of Article 64, the Occupying Power may hand over the accused to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country. Courts of appeal shall preferably sit in the occupied country"). See Mark Klamberg in CILRAP CMN Case Matrix Network, [Knowledge Hub: CLICC Commentary on the Law of the International Criminal Court](#), Updated: 30 June 2016, re Article 8(2)(a)(vi). See also above, "Introduction – Specific provisions dealing with the prosecution of prisoners of war".

⁸⁸² Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, pp 101-102 ("It has to be noted that a number of human rights treaty provisions which contain similar principles may be of relevance for the interpretation of this war crime, in particular since there is a very extensive and detailed case law interpreting these provisions."), 409-410; Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 345, para. 14; ICC, *Al Hassan Decision on Confirmation of charges*, paras 374, 378-380, 383-384, concerning the crime of sentencing or execution without due process in non-international armed conflict, under Article 8(2)(c)(iv) of the [ICC Statute](#), but this consideration may also apply *mutatis mutandis* to or may otherwise have general relevance for the present crime.

CASE STUDY: DEFINITION OF THE RIGHT OF ACCUSED TO BE JUDGED BY AN INDEPENDENT AND IMPARTIAL COURT.

ICC, *Al Hassan Decision on Confirmation of charges*, paras 378-380⁸⁸³

Since neither the ICC Statute nor the ICC Elements of Crimes define the notions of independence and impartiality, the Pre-Trial Chamber clarified the terms relying on the interpretation of various human rights organisations in accordance with Article 21(3) of the ICC Statute.

The Pre-Trial Chamber stated the Court must be “independent” vis-à-vis other powers; i.e. the executive and the legislative branches of the government. It noted that the UN Human Rights Committee considered that a situation in which the functions and powers of the judiciary and the executive cannot be clearly distinguished or in which the second is able to control or to direct the former is inconsistent with the principle of an independent court within the meaning of Article 14(1) of the [International Covenant on Civil and Political Rights](#). The ICC Pre-Trial Chamber further stated that in order to determine whether an organ complies with the criteria of independence, the Human Rights Committee, the ECtHR, the Inter-American Commission on Human Rights and the African Commission on Human and Peoples’ Rights take into account the following factors: (1) the mode of designation, (2) the length of the mandate, (3) the existence of protection against external pressures and (4) whether or not there is an appearance of independence.

Regarding “impartiality”, the ICC Pre-Trial Chamber clarified that judges must decide cases objectively on the basis of their knowledge and conscience, without any bias, prejudice or personal influence. Quoting several human rights organisations, it added that this requirement also implies in particular that the judge does not presume the guilt of the accused nor acts in such a way that would favour the interests of one of the parties. In order to determine whether the conduct of a judge raises doubts as to his or her impartiality, consideration should be given to the beliefs or personal interests of a judge in a given case and on whether the judge offers sufficient objectively verifiable guarantees to exclude any legitimate doubt regarding her or his impartiality.

470. In a situation where no judicial system exists, an institution *de facto* functioning as a State institution with power to detain, interrogate and execute persons is bound to apply fair trial rights and judicial guarantees as set out above.⁸⁸⁴
471. The crime of wilfully depriving a prisoner of war or other protected person of the rights of a fair and regular trial may be committed by action or omission.⁸⁸⁵ There is no requirement that the perpetrator actually caused a punishment to be imposed on the victim, the unfair and irregular trial itself completes the crime.⁸⁸⁶

⁸⁸³ Concerning the crime of sentencing or execution without due process in non-international armed conflict, under Article 8(2)(c)(iv) of the [ICC Statute](#), but the consideration may also apply *mutatis mutandis* to the present crime or may otherwise have general relevance for the present crime.

⁸⁸⁴ ECCC, *Kaing Guek Eav (alias Duch) Trial Judgement*, para. 462; ICC, *Al Hassan Decision on Confirmation of charges*, para. 363, concerning the crime of sentencing or execution without due process in non-international armed conflict, under Article 8(2)(c)(iv) of the [ICC Statute](#), but the consideration may also apply *mutatis mutandis* to the present crime.

⁸⁸⁵ ICRC, IHL Database, Customary IHL, [Rule 156. Serious violations of international humanitarian law constitute war crimes](#) ("Practice provides further specifications with respect to the nature of the conduct constituting a war crime [...] War crimes can consist of acts or omissions. Examples of the latter include failure to provide a fair trial."); Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 346, para. 143.

⁸⁸⁶ Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, p. 100. See also and compare ICC, *Al Hassan Decision on Confirmation of charges*,

472. A single infringement of one judicial guarantee does not necessarily amount to the crime of wilfully depriving a prisoner of war or other protected person of the rights of a fair and regular trial. But it may do so. The Court should consider whether, in light of all relevant circumstances, the cumulative effect of factors with respect to guarantees deprived the person or persons of a fair trial.⁸⁸⁷
473. The crime of wilfully depriving a prisoner of war or other protected person of the rights of a fair and regular trial overlaps with the crime of declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party.⁸⁸⁸
474. **The person or persons were protected under one or more of the Geneva Conventions of 1949.** While the ICC Elements of Crimes state that the persons deprived of fair and regular trial must be “protected under one or more” of the four Geneva Conventions, in practice the offence concerns the following protected persons:
- Prisoners of war ([Geneva Convention III](#), Article 4);⁸⁸⁹ or
 - Civilians who at a given moment and in any manner whatsoever find themselves in the hands of a party to the conflict or occupying power of which they are not nationals ([Geneva Convention IV](#), Articles 4, 13).⁸⁹⁰
475. *Allegiance to a party and that party’s control over persons and territory.* Concerning the last category of civilians under Article 4 of Geneva Convention IV, strict, formal/legal nationality is not as important as the substance of relations of victims vis-à-vis perpetrators.⁸⁹¹ Allegiance to a party to the conflict, and control by this party over

para. 365.

⁸⁸⁷ See [ICC Elements of Crimes](#), Article 8(2)(c)(iv), Elements 4-5 fn. 59; ICC, *Al Hassan Decision on Confirmation of charges*, paras 381-382, 385-386 (“Concernant la question du seuil de violation des garanties judiciaires exigé pour qualifier un comportement de crime en application de l’article 8-2-c-iv du Statut, la Chambre note que les Éléments des crimes l’invitent à prendre en compte la procédure dans son ensemble et l’effet cumulatif que peut avoir la violation de plusieurs garanties procédurales ou statutaires. Néanmoins, la Chambre est d’avis que cette approche ne la prive pas en soi de considérer, qu’à la lumière des circonstances, la violation d’une seule garantie judiciaire soit de nature à établir le crime visé à l’article 8-2-c-iv du Statut. En effet, une garantie judiciaire peut être considérée comme cruciale et dès lors porter, à elle seule, atteinte à la conformité de la procédure et caractériser le crime sous l’article 8- 2-c-iv du Statut.”); Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, p. 409. All three cited sources address the crime of sentencing or execution without due process in non-international armed conflict, under Article 8(2)(c)(iv) of the [ICC Statute](#), but the consideration may also apply *mutatis mutandis* to the present crime.

⁸⁸⁸ Under [ICC Statute](#), Article 8(2)(b)(xiv). See below paras 480-492. It may be that some conduct could amount to both crimes. Commentary suggests the former crime of denying fair trial focusses on criminal cases whereas the latter crime of depriving rights or, in particular, ‘actions’ covers civil claims. This in addition to the former crime’s application to protected persons, as set out below, compared with the latter crime’s application to nationals of a hostile party. See Mark Klamberg in CILRAP CMN Case Matrix Network, [Knowledge Hub: CLICC Commentary on the Law of the International Criminal Court](#), Updated: 30 June 2016, re Article 8(2)(b)(xiv).

⁸⁸⁹ See ECCC, *Kaing Guek Eav (alias Duch) Trial Judgement*, para. 425 (“No fewer than 345 Vietnamese prisoners of war and civilians were detained at S-21 and constituted protected persons under the Geneva Conventions of 1949 [...] Vietnamese prisoners of war, many of whom were captured on the battlefield, entered the S-21 complex in their military uniforms.”).

⁸⁹⁰ See ECCC, *Kaing Guek Eav (alias Duch) Trial Judgement*, para. 425.

⁸⁹¹ ICTY, *Celebici Appeal Judgement*, paras 83-84 (“Article 4 of Geneva Convention IV is to be interpreted as intending to protect civilians who find themselves in the midst of an international, or internationalised, conflict to the maximum extent possible. The nationality requirement of Article 4 should therefore be ascertained upon a review of ‘the substance of relations’ and not based on the legal characterisation under domestic legislation. In today’s ethnic conflicts, the victims may be ‘assimilated’ to the external State involved in the conflict, even if they formally have

persons in a given territory, may be regarded as the crucial test.⁸⁹² As attacking forces of a party to the conflict gradually gain control of territory, individual civilians in these successive areas automatically become protected persons, provided they do not claim allegiance to the party in question.⁸⁹³

c. **Definition of Wilfully Depriving a Prisoner of War or Other Protected Person of the Rights of Fair and Regular Trial (Subjective Elements)**⁸⁹⁴

476. The subjective elements of wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial are: (1) the perpetrator intentionally and knowingly deprived the person or persons of a fair and regular trial by denying the judicial guarantees; and (2) the perpetrator was aware of the factual circumstances that established protected status under one or more of the Geneva Conventions of 1949.⁸⁹⁵

477. **The perpetrator intentionally and knowingly deprived the person or persons of a fair and regular trial by denying the judicial guarantees.**⁸⁹⁶ Commentators suggest

the same nationality as their captors, for the purposes of the application of humanitarian law, and of Article 4 of Geneva Convention IV specifically. The Appeals Chamber thus agrees with the Tadic Appeal Judgement that 'even if in the circumstances of the case the perpetrators and the victims were to be regarded as possessing the same nationality, Article 4 would still be applicable.'")

⁸⁹² ICTY, *Tadic Appeal Judgement*, paras 165-166 ("This legal approach, hinging on substantial relations more than on formal bonds, becomes all the more important in present-day international armed conflicts. While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance. Or, put another way, ethnicity may become determinative of national allegiance. Under these conditions, the requirement of nationality is even less adequate to define protected persons. In such conflicts, not only the text and the drafting history of the Convention but also, and more importantly, the Convention's object and purpose suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test."). See ECCC, *Kaing Guek Eav (alias Duch) Trial Judgement*, para. 426 ("Further, due to their real or perceived allegiance with Vietnam, some Cambodians, originating primarily from the East Zone, were detained and executed as Vietnamese sympathisers. Although Cambodian nationals, they were viewed by the CPK as having allegiances to Vietnam and as a threat to DK. Accordingly, the Chamber considers that these Cambodian detainees were also protected persons within the meaning of Article 4 of Geneva Convention IV.").

⁸⁹³ ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, paras 292 ("Under the case law of the international tribunals, an individual civilian falls 'into the hands of' a party to the conflict when that individual is in the territory under the control of such a party."), 293 ("Therefore, in the view of the Chamber, as the attacking forces of a party to the conflict gradually gain control of a targeted village, individual civilians in these successive areas automatically become protected persons within the meaning of article 4 GC IV, provided they do not claim allegiance to the party in question.") concerning the crime of wilful killing under Article 8(2)(a)(i) of the *ICC Statute*, Element 2 of which equally applies to wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial under Article 8(2)(a)(vi), 358 ("[This] applies to those situations in which protected civilians are inhumanely treated 'in the hands of' a party to the conflict, and thus also applies to the inhuman treatment of the protected persons by an attacking force, when such conduct occurs after the overall attack has ended, and defeat or full control of the targeted village has been secured. In addition, this provision prohibits perpetrators from inflicting inhuman treatment on protected persons as these forces move toward areas of enemy resistance in a targeted village.") concerning the crime of inhuman treatment under Article 8(2)(a)(ii) of the Statute, again Element 2 of which equally applies to wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial under Article 8(2)(a)(vi).

⁸⁹⁴ This section details the subjective elements for this war crime as detailed under international law. However, the general part of the CCU identifies subjective elements that apply to crimes. See Articles 23, 24 and 25 of the CCU. It will be necessary to consider the relevance of the subjective elements in the general part of the CCU when considering the elements of this crime as applied under Article 438 of the CCU.

⁸⁹⁵ *ICC Elements of Crimes*, Article 8(2)(a)(vi); *ICC Statute*, Article 30.

⁸⁹⁶ This subjective element flows from ordinary intent and knowledge under Article 30 of the *ICC Statute*.

that because of the use of the notion “wilfully” in the ICC Statute, a lower *mens rea* standard could apply to this offense as “wilfully” has been interpreted by the jurisprudence of the ICTY as including direct intent and recklessness (*dolus eventualis*).⁸⁹⁷

478. **The perpetrator was aware of the factual circumstances that established protected status under one or more of the Geneva Conventions of 1949.** With respect to civilians and nationality, the perpetrator needs only to know that the victim belonged to an adverse party to the conflict.⁸⁹⁸

d. Contextual Elements

479. In addition, as with all war crimes, it is necessary to demonstrate the following contextual elements:
- i. There was an international armed conflict;⁸⁹⁹
 - ii. The conduct took place in the context of and was associated with an international armed conflict;⁹⁰⁰ and
 - iii. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.⁹⁰¹

⁸⁹⁷ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 346, para. 144; Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, p. 504, para. 1327, fn. 447; ICTY, *Blaskic Trial Judgement*, para. 152 (“[A]ccording to the Trial Chamber, the mens rea constituting all the violations of Article 2 of the Statute [containing the grave breaches] includes both guilty intent and recklessness which may be likened to serious criminal negligence.”) See also ECCC, *Kaing Guek Eav (alias Duch) Trial Judgement*, para. 460 (“The jurisprudence of the ICTY has established that the requisite mental element for this offence includes both culpable intent and recklessness.”); ICRC, IHL Database, Customary IHL, [Rule 156. Serious violations of international humanitarian law constitute war crimes](#) (“Mental element. International case-law has indicated that war crimes are violations that are committed wilfully, i.e., either intentionally (*dolus directus*) or recklessly (*dolus eventualis*).”); [ICRC Commentary on Additional Protocol I](#), p. 994, para. 3474 (“wilfully: the accused must have acted consciously and with intent, i.e., with his mind on the act and its consequences, and willing the ('criminal intent' or 'malice aforethought'); this encompasses the concepts of 'wrongful intent' or 'recklessness', viz., the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening; on the other hand, ordinary negligence or lack of foresight is not covered, i.e., when a man acts without having his mind on the act or its consequences (although failing to take the necessary precautions, particularly failing to seek precise information, constitutes culpable negligence punishable at least by disciplinary sanctions.”).

⁸⁹⁸ [ICC Elements of Crimes](#), Article 8(2)(a)(i), Element 3 fn. 33, applicable to the corresponding element in each crime under Article 8(2)(a). See also ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, para. 360 applying fn. 33 by extension to all protected persons under the four Geneva Conventions (“In accordance with footnote 33 of the Elements of Crimes, it is not necessary for the perpetrator to have evaluated and concluded that the victim was a legally a protected person under any of the four Geneva Conventions, but rather that the perpetrator knows that 'the victim belonged to an adverse party to the conflict.'”) concerning the crime of inhuman treatment under Article 8(2)(a)(ii) of the [ICC Statute](#), Element 3 of which equally applies to wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial under Article 8(2)(a)(vi).

⁸⁹⁹ See above, paras [188-189](#).

⁹⁰⁰ See above, paras [190-198](#). See also [ICC Elements of Crimes](#), Article 8(2)(a)(vi).

⁹⁰¹ See above, para. [199](#). See also [ICC Elements of Crimes](#), Article 8(2)(a)(vi).

- viii. Declaring abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party (ICC Statute, Article 8(2)(b)(xiv))

APPLICABILITY: DECLARING ABOLISHED, SUSPENDED, OR INADMISSIBLE IN A COURT OF LAW THE RIGHTS AND ACTIONS OF THE NATIONALS OF THE HOSTILE PARTY CAN BE CONSIDERED CRIMINALISED UNDER ARTICLE 438(1) OF THE CCU, AS IT IS SUBSUMED UNDER THE NOTION OF “OTHER VIOLATIONS OF RULES OF THE WARFARE RECOGNIZED BY INTERNATIONAL INSTRUMENTS CONSENTED TO BY BINDING BY THE VERKHOVNA RADA (PARLIAMENT) OF UKRAINE” (PARAS 480-484).

Elements of the crimes: To convict a perpetrator of declaring abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party as a war crime the following elements need to be established:

(1) Objective elements

- The perpetrator effected the abolition, suspension or termination of admissibility in a court of law of certain rights or actions (paras 485-487).
- The abolition, suspension or termination was directed at the nationals of a hostile party (paras 488-490).

(2) Subjective element

- The perpetrator intended the abolition, suspension or termination to be directed at the nationals of a hostile party (para.491).

(3) Contextual elements

- There is an international armed conflict (para. 492).
- The conduct of the perpetrator took place in the context and was associated with the conflict (para. 492).
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict (para. 492).

a. Applicability under Article 438

480. Although not explicitly mentioned in Article 438 of the CCU, “declaring abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party” may be subsumed within “any other violations of rules of warfare recognized by international instruments consented to be binding by the Verkhovna Rada of Ukraine” to which Article 438(1) refers. As explained below, the conduct is prohibited under international instruments ratified by Ukraine and this prohibition has been recognised as a war crime. These factors support interpreting Article 438 of the CCU as criminalising violations of this IHL prohibition.

481. **Declaring abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party is a violation of the laws of warfare recognised in international treaties ratified by Ukraine.** Declaring abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party is prohibited under Article 23(h) of the [Hague Regulations of 1907](#).⁹⁰² Ukraine ratified the Hague Regulation of 1907.⁹⁰³ Moreover, this prohibition is one of the rules of customary international law as recognised by the ICRC.⁹⁰⁴
482. Therefore, for the purposes of Article 438 of the CCU, the prohibition against declaring abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party is a violation of the laws of warfare recognised in an international instrument accepted as binding by the Ukrainian parliament.
483. **Recognition as a war crime.** Article 8(2)(b)(xiv) of the [ICC Statute](#) lists “declaring abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party” as a war crime when committed in international armed conflicts. Likewise, the ICRC recognises the offence as a war crime under customary international law.⁹⁰⁵
484. These factors support recognition of the criminalisation of declaring abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party under Article 438 of the CCU.

b. **Definition of Declaring Abolished, Suspended, or Inadmissible in a Court of Law the Rights and Actions of the Nationals of the Hostile Party (Objective Elements)**

485. According to the ICC Elements of Crimes, the objective elements of the offence are: (1) the perpetrator effected the abolition, suspension or termination of admissibility in a court of law of certain rights or actions; and (2) the abolition, suspension or termination was directed at the nationals of a hostile party.⁹⁰⁶ The war crime declaring abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party has not been adjudicated by an international tribunal and thus, the ICC still did not clarify the relevant elements.⁹⁰⁷

⁹⁰² The [Hague Regulations of 1907](#), Article 23(h) (“To declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party. A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent’s service before the commencement of the war.”).

⁹⁰³ Ukraine ratified the 1907 Hague Regulations on 29 May 2015. See ICRC, *Treaties, States Parties and Commentaries, Ukraine*.

⁹⁰⁴ ICRC, IHL Database, Customary IHL, [Rule 156 Definition of War Crimes](#) (“It was included without controversy in the Statute of the International Criminal Court, as it was considered part of customary international law.”); Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 444, paras 514-515.

⁹⁰⁵ ICRC, IHL Database, Customary IHL, [Rule 156 Definition of War Crimes](#) (“It was included without controversy in the Statute of the International Criminal Court, as it was considered part of customary international law.”); Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 444, para. 514.

⁹⁰⁶ [ICC Elements of Crimes](#), Article 8(2)(b)(xiv).

⁹⁰⁷ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, pp 445-448, para. 516.

486. **The perpetrator effected the abolition, suspension or termination of admissibility in a court of law of certain rights or actions.** The strict wording of Article 8(2)(b)(xiv) suggests that simply “declaring” rights and actions abolished, suspended, or inadmissible in a court of law fulfils the objective element. However, as the ICC Elements of Crimes indicate, the relevant objective element has been understood as requiring that the perpetrator “‘effected’ the abolition [...] of certain rights and actions”.⁹⁰⁸ Thus, the means of abolition, suspension, or inadmissibility is not determinative, but rather depends on the resulting denial of judicial access to a right or action.⁹⁰⁹ At the same time, commentators have suggested that the term “declaring” should cover also legislative and administrative acts abolishing the rights or actions of individuals.⁹¹⁰
487. As to the notion of “rights or actions”,⁹¹¹ beyond the fact that such category covers “important, substantial rights and actions, and not only trivial, isolated rights”,⁹¹² its exact scope remains an open question.⁹¹³ Whereas “actions” refer to “legal claims and rights of actions” within the meaning of the right to access to a judge,⁹¹⁴ it is not clear whether the offence is confined to rights/actions of civil and commercial nature or encompasses also fundamental rights and guarantees of individuals.⁹¹⁵ However, according to commentators “the general wording of Article 8(2)(b)(xiv) and the precedents permit to understand Article 8(2)(b)(xiv) as prohibiting not only the abolition *etc.* of property and commercial rights, but also other discriminatory measures and restrictions of the rights of the nationals of the adversary party to the conflict.”⁹¹⁶ Nothing in the provision restricts this protection to civil claims/rights and actions. Therefore, this provision appears to protect both civil and criminal [procedure] “rights and actions”⁹¹⁷ including those of fair trial.⁹¹⁸

⁹⁰⁸ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 448, para. 531.

⁹⁰⁹ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 448, para. 531.

⁹¹⁰ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 448, para. 531.

⁹¹¹ The provision in Article 8(2)(b)(xiv) of the [ICC Statute](#) is identical to that in Article 23(h) of [Hague Regulation of 1907](#), the basic elements of which are: (1) declaring abolished, suspended, or inadmissible in a court of law; (2) substantial “rights and actions”; and (3) the rights and actions abolished, suspended, or declared inadmissible are those of the nationals of the hostile party.

⁹¹² Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 448, para. 529.

⁹¹³ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 446, paras 523-524.

⁹¹⁴ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 446, paras 523-524.

⁹¹⁵ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 447, para. 52.

⁹¹⁶ This line of reasoning is in line with the German draft of the ICC Statute that clarified that this provision applied to economic warfare as well as discriminatory measures and restrictions of rights. See Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 447, para. 528, fn. 832

⁹¹⁷ But see Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 446, para. 523, fns. 824-825 (“The Netherlands Special Court of Cessation also limited the scope of the provision to civil claims in 1949.”).

⁹¹⁸ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 447, paras 525-526. The prohibition also relates to Article 8(2)(a)(vi) of the [ICC Statute](#) that protects individual rights and due process. See Triffterer and Ambos (eds.), *Rome*

488. **The abolition, suspension or termination was directed at the nationals of a hostile party.** As to the territorial scope of application, the offence aims at the protection of *any* nationals of the hostile party to the armed conflict.⁹¹⁹ However, the United States and the United Kingdom appear to limit this prohibition to nationals of the hostile party, in an occupied territory.⁹²⁰
489. Regardless, this prohibition protects the rights and actions of all or at least a substantial part of the nationals of the hostile party,⁹²¹ and does not apply to “individual cases of withdrawing rights”.⁹²² This prohibition “rather aims at legislative or general administrative acts or possibly also to court decisions with wide implications but not isolated individual cases.”⁹²³
490. There is no causal element to this crime meaning that a legal abolition of rights is sufficient – the courts need not actually have refused access to the rights and actions to fulfill the objective elements.⁹²⁴

c. Definition of Declaring Abolished, Suspended, or Inadmissible in a Court of Law the Rights and Actions of the Nationals of the Hostile Party (Subjective Elements)⁹²⁵

491. According to the ICC Elements of Crimes, the subjective element of the offence requires that the perpetrator intended the abolition, suspension or termination to be directed at the nationals of a hostile party.⁹²⁶ While there is no judicial application in this regard,⁹²⁷ commentators have suggested that its *mens rea* requires “the intentional conduct directed at the nationals of a hostile party”.⁹²⁸

Statute of the International Criminal Court: A Commentary, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 445, para. 517 (Related to this prohibition is “the war crime of denying rights of fair and regular trial under article 8 para. 2 (a) (vi), which protects rights of due process [...]. While article 8 para. 2 (b) (xiv) rather aims at legislative or general administrative acts or possibly also to court decisions with wide implications but not isolated individual cases.”).

⁹¹⁹ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 445, para. 519.

⁹²⁰ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, pp 445-446, paras 519-521, fn. 820.

⁹²¹ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 448, para. 530.

⁹²² Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 448, fn. 833. The prohibition also does not apply to Security Council sanctions, even though those are usually against all or a substantial part of the nationals of a hostile party. (“The Commentary also affirms that embargo measures decided by the UN Security Council on the basis of Chapter VII of the UN Charter would not be covered.”).

⁹²³ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 445, para. 517.

⁹²⁴ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 448, para. 531, fn. 836.

⁹²⁵ This section details the subjective elements for this war crime as detailed under international law. However, the general part of the CCU identifies subjective elements that apply to crimes. See Articles 23, 24 and 25 of the CCU. It will be necessary to consider the relevance of the subjective elements in the general part of the CCU when considering the elements of this crime as applied under Article 438 of the CCU.

⁹²⁶ [ICC Elements of Crimes](#), Article 8(2)(b)(xiv).

⁹²⁷ Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, p. 268.

⁹²⁸ Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, p. 528, para. 1398. See also Article 30 of the [ICC Statute](#) (“1. Unless otherwise provided, a person shall be criminally responsible

d. Contextual Elements

492. In addition, as with all war crimes, it is necessary to demonstrate the following contextual elements:
- i. There was an international armed conflict;⁹²⁹
 - ii. The conduct took place in the context of and was associated with an international armed conflict;⁹³⁰ and
 - iii. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.⁹³¹

and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. 2. For the purposes of this article, a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. 3. For the purposes of this article, ‘knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. ‘Know’ and ‘knowingly’ shall be construed accordingly.”).

⁹²⁹ See above, paras [188-189](#).

⁹³⁰ See above, paras [190-198](#). See also [ICC Elements of Crimes](#), Article 8(2)(b)(xiv).

⁹³¹ See above, para. [199](#). See also [ICC Elements of Crimes](#), Article 8(2)(b)(xiv).

- ix. Unlawful deportation or transfer (ICC Statute, Article 8(2)(a)(vii); ICTY Statute Article 2(g))

APPLICABILITY: UNLAWFUL DEPORTATION OR TRANSFER CAN BE CONSIDERED CRIMINALISED UNDER ARTICLE 438(1) OF THE CCU, AS IT IS SUBSUMED UNDER THE NOTIONS OF “OTHER VIOLATIONS OF RULES OF THE WARFARE RECOGNIZED BY INTERNATIONAL INSTRUMENTS CONSENTED TO BY BINDING BY THE VERKHOVNA RADA (PARLIAMENT) OF UKRAINE” AND IN PART, BY “DEPORTATION OF CIVILIAN POPULATION FOR FORCED LABOR”. (PARAS 493-497).

Elements of the crimes: To convict a perpetrator for unlawful deportation or transfer as a war crime the following elements need to be established:

(1) Objective element

- The perpetrator deported or transferred one or more persons to another State or to another location (paras 499-504).
- Such person or persons were protected under one or more of the Geneva Conventions of 1949 (paras 505-509).

(2) Subjective element

- The perpetrator was aware of the factual circumstances that established the protected status of the person or persons under one or more of the Geneva Conventions of 1949 (para. 510).
- The perpetrator intended to deport or transfer one or more persons to another State or location or was aware that deportation or transfer would occur in the ordinary course of events based on their actions (para. 510).
- The perpetrator was aware of the circumstances that made that deportation unlawful under Geneva Convention IV (para. 510).

(3) Contextual element

- There is an international armed conflict (para. 512).
- The conduct of the perpetrator took place in the context and was associated the conflict (para. 512).
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict (para. 512).

a. Applicability under Article 438

493. Although not explicitly mentioned in Article 438 of the CCU, unlawful deportation or transfer may be subsumed within “any other violations of rules of warfare recognized by international instruments consented to be binding by the Verkhovna Rada of Ukraine” and in part, by “deportation of civilian population for forced labor” to which Article 438(1) refers. As explained below, unlawful deportation or transfer is prohibited under international instruments ratified by Ukraine. Violation of this

prohibition is recognised as a war crime. These factors support interpreting Article 438 of the CCU as criminalising violations of this IHL prohibition.

494. **Unlawful deportation or transfer is a violation of the laws of warfare recognised in international treaties ratified by Ukraine.** Article 147 of [Geneva Convention IV](#) recognises the unlawful deportation or transfer of a protected person in international armed conflict as a grave breach of that convention.⁹³² The ICRC identifies this prohibition as customary international law.⁹³³ Ukraine has ratified Geneva Convention IV.⁹³⁴ For the purposes of Article 438 CCU, the prohibition against unlawful deportation or transfer of a protected person is a violation of the laws of warfare recognised in an international instrument accepted as binding by the Ukrainian parliament.
495. **Unlawful deportation or transfer as covered, in part, by “deportation of civilian population for forced labor” under article 438 of the CCU.** As noted below, the war crime of unlawful deportation or transfer includes acts of displacement outside or within a State’s territory.⁹³⁵ Thus, at least in part, the offence can also be subsumed under “deportation of civilian population for forced labor” identified as a specific offence under Article 438 of the CCU. However, differently from the specific domestic offence under Article 438, unlawful deportation or transfer does not require any link or connection with forced labour.
496. **Recognition as a war crime.** As a grave breach of Geneva Convention IV, the unlawful deportation or transfer of protected persons during international armed conflict is a war crime.⁹³⁶ Violation of this prohibition in these precise terms has been recognised as a war crime under Article 2(g) of [ICTY Statute](#) and Article 8(2)(a)(vii) of the ICC Statute.⁹³⁷ According to the ICRC, the recognition of this war crime has attained customary international law status.⁹³⁸
497. These factors support the recognition of the criminalisation of unlawful deportation and transfer of protected persons under Article 438 of the CCU.

b. Definition of unlawful deportation or transfer (Objective Elements)

498. The objective elements of this crime before the ICC are (1) The perpetrator deported or transferred one or more persons to another State or to another location; and (2) Such person or persons were protected under one or more of the Geneva Conventions of 1949.⁹³⁹

⁹³² [Geneva Convention IV](#), Article 147.

⁹³³ ICRC, IHL Database, Customary Law, [Rule 129. The Act of Displacement](#).

⁹³⁴ Ukraine ratified Geneva Convention IV on 3 August 1954. ICRC, IHL Database, IHL Treaties, Treaties and State Parties, [Geneva Convention IV](#).

⁹³⁵ See below paras [499-509](#).

⁹³⁶ [Geneva Convention IV](#), Articles 146, 147.

⁹³⁷ [ICTY Statute](#), Article 2(g); [ICC Statute](#), Article 8(2)(a)(vii). See also 1945 [IMT Charter](#) (Nuremberg), Article 6; [ICC Statute](#), Articles 8(2)(b)(viii), 8(2)(e)(viii).

⁹³⁸ ICRC, IHL Database, Customary Law, [Rule 156. Definition of War Crimes](#) (identifying serious violations of international humanitarian law, including all grave breaches of the Geneva Conventions, as war crimes, and listing unlawful deportation or transfer as one of the grave breaches of the Geneva Conventions).

⁹³⁹ [ICC Elements of Crimes](#), Article 8(2)(a)(vii)-1.

499. **The perpetrator deported or transferred one or more persons to another State or to another location.** This element requires: (1) an act of deportation or transfer, which is (2) coercive, and (3) unlawful in character.
500. *Deportation or transfer.* The [ICC Elements of Crimes](#) distinguish two types of culpable conduct: “deportation” and “transfer”. ICTY jurisprudence has clarified that “deportation” indicates the displacement of individuals outside the *de jure* or *de facto* state borders, whereas with respect to forcible transfer, the displacement may be carried out entirely within the borders of a single state.⁹⁴⁰ Notably, to demonstrate unlawful deportation or transfer, it is not necessary to show that the displaced person or persons were removed “to a ‘location sufficiently remote from its original location’”.⁹⁴¹ Moreover, the ICTY and ICC jurisprudence reflect that this crime applies in the context of hostilities⁹⁴² and during occupation.⁹⁴³ Despite the considerable overlaps, the specific war crime of “deportation or transfer of all or parts of the population of the occupied territory within or outside this territory” is addressed in another section of the Benchbook.⁹⁴⁴
501. *Coercive character of the deportation or transfer.* Both acts of deportation and transfer need to be forced, coerced, or at least involuntary (forced removal).⁹⁴⁵ It is not necessary to show that actual force was used in the deportation or transfer; rather it is sufficient that deportation/transfer was based on a choice that, in light of the circumstances, was not genuine.⁹⁴⁶ The ICTY Appeals Chamber identified “[f]actors other than force itself [that] may render displacement involuntary”, including threats of force, “coercion such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power”, “taking advantage of a coercive environment”, or “creating ‘severe living conditions’ for a certain population – which in turn makes it impossible for that population to remain in their homes”.⁹⁴⁷

⁹⁴⁰ ICTY, *Prlic et al. Trial Judgement*, Vol. I of VI, paras 47 (concerning deportation and forcible transfer as a crimes against humanity), 132 (holding that “[t]he constituent elements for deportation and forcible transfer are identical whether it involves a war crime or a crime against humanity, with one exception: to be characterized as a grave breach of the Geneva Conventions, the offences of forcible transfer and deportation must be committed against a person protected under the Geneva Conventions.”); ICTY, *Prlic et al. Appeal Judgement*, Vol. I of III, para. 300. Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, p. 510, para. 1351.

⁹⁴¹ ICTY, *Prlic et al. Appeal Judgement*, Vol. I of III, para. 492.

⁹⁴² See e.g., ICC, *Guchmazov Arrest Warrant*, paras 1, 6 (holding that unlawful deportation and transfer under Article 8(2)(a)(vii) of the ICC Statute does not require the existence of an occupation).

⁹⁴³ ICTY, *Prlic et al. Appeal Judgement*, Vol. I of III, paras 300, 301 (applying the offence of unlawful deportation and transfer under Article 2(g) of the ICC Statute in the context of an occupation).

⁹⁴⁴ See below, paras 562-565.

⁹⁴⁵ ICC, *Guchmazov Arrest Warrant*, para. 35; ICC *Sanakoev Arrest Warrant*, para. 23. See also Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 414, para. 398; Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, p. 510, para. 1351.

⁹⁴⁶ ICC, *Guchmazov Arrest Warrant*, para. 33; ICC *Sanakoev Arrest Warrant*, para. 23; ICTY, *Krstic Trial Judgement*, paras 528-530; ICTY, *Prlic et al. Appeal Judgement*, Vol. I of III, para. 495. See also ICTY, *Prlic et al. Trial Judgement*, Vol. I of VI, paras 50 (concerning deportation and forcible transfer as a crimes against humanity), 132 (holding that “[t]he constituent elements for deportation and forcible transfer are identical whether it involves a war crime or a crime against humanity, with one exception: to be characterized as a grave breach of the Geneva Conventions, the offences of forcible transfer and deportation must be committed against a person protected under the Geneva Conventions.”) (footnotes omitted).

⁹⁴⁷ ICTY, *Prlic et al. Appeal Judgement*, Vol. I of III, para. 495. See also ICTY, *Prlic et al. Trial Judgement*, Vol. I of VI, paras 50 (concerning deportation and forcible transfer as a crimes against humanity), 132 (holding that “[t]he constit-

502. As noted above, consent by the victim does not necessarily make displacement lawful, “as the circumstances surrounding that consent may deprive it of any potential value”.⁹⁴⁸ “Generally speaking, detaining a person in a climate of terror and violence obviates any and all value arising from the consent.”⁹⁴⁹ “[W]hether a transferred person had a genuine choice is a determination to be made within the context of a particular case.”⁹⁵⁰

CASE STUDY: FACTORS DEMONSTRATING THE ABSENCE OF GENUINE CHOICE, ICTY, *THE PROSECUTOR V. KRSTIC* TRIAL JUDGEMENT PARAS 147, 524-525, 527 (FOOTNOTES OMITTED)⁹⁵¹

The trial chamber in the ICTY case of *The Prosecutor v. Krstic* summed up its overall consideration of evidence showing the absence of genuine choice in connection with the movement of the Bosnian Muslim population from Srebrenica.

“147. Overwhelming evidence presented during the course of the Trial, however, demonstrates that, in July 1995, the Bosnian Muslim population of Srebrenica was not faced with a genuine choice as to whether to leave or remain in the area. The shelling of Srebrenica, particularly on 10 and 11 July 1995, and the burning of Bosnian Muslim homes was calculated to terrify the population and make them flee the area with no hope of return. Further, it was General Mladic who initiated the meetings at the hotel Fontana when he made it abundantly clear that he wanted the Bosnian Muslims out of the area. On 12 July 1995, as the bus convoys were being organised, General Mladic was heard to say during an intercepted conversation:

‘They’ve all capitulated and surrendered and we’ll evacuate them all – those who want to and those who don’t want to.’

uent elements for deportation and forcible transfer are identical whether it involves a war crime or a crime against humanity, with one exception: to be characterized as a grave breach of the Geneva Conventions, the offences of forcible transfer and deportation must be committed against a person protected under the Geneva Conventions.”).

⁹⁴⁸ ICTY, *Prlic et al. Trial Judgement*, Vol. I of VI, paras 51 (concerning deportation and forcible transfer as a crimes against humanity), 132 (holding that “[t]he constituent elements for deportation and forcible transfer are identical whether it involves a war crime or a crime against humanity, with one exception: to be characterized as a grave breach of the Geneva Conventions, the offences of forcible transfer and deportation must be committed against a person protected under the Geneva Conventions.”).

⁹⁴⁹ ICTY, *Prlic et al. Trial Judgement*, Vol. I of VI, paras 51 (concerning deportation and forcible transfer as a crimes against humanity), 132 (holding that “[t]he constituent elements for deportation and forcible transfer are identical whether it involves a war crime or a crime against humanity, with one exception: to be characterized as a grave breach of the Geneva Conventions, the offences of forcible transfer and deportation must be committed against a person protected under the Geneva Conventions.”).

⁹⁵⁰ ICTY, *Prlic et al. Appeal Judgement*, Vol. I of III, para. 495.

⁹⁵¹ ICTY, *Krstic Trial Judgement*, paras 147, 524-525, 527.

Certainly the Bosnian Muslim refugees were not consulted or given a choice about their final destination. An UNMO in the Srebrenica area testified to an incident he witnessed in which Serb soldiers threatened to shoot an elderly woman if she did not leave Srebrenica, despite her pleas to remain. As a result of this threat and to ensure her safety, the UNMO physically removed the woman from the Srebrenica hospital where she had been and took her to Poto-ari. All of these factors, against the backdrop of the terror campaign waged by the VRS against the refugees in Poto-ari, make it clear that the Bosnian Serbs wanted the area cleansed of Bosnian Muslims.”

In paragraphs 524-525 of its judgement, the trial chamber went on to note that, where active hostilities had ceased in the area before the population was transferred, the security of the population did not justify that displacement. It then concluded this assessment:

“527. In this case no military threat was present following the taking of Srebrenica. The atmosphere of terror in which the evacuation was conducted proves, conversely, that the transfer was carried out in furtherance of a well organised policy whose purpose was to expel the Bosnian Muslim population from the enclave. The evacuation was itself the goal and neither the protection of the civilians nor imperative military necessity justified the action.”

503. *Unlawful character of the deportation or transfer*.⁹⁵² While not explicitly mentioned in the ICC Elements of Crimes, the transfer or deportation must be unlawful.⁹⁵³ Unlawfulness is of crucial importance to understanding the objective elements of this crime.⁹⁵⁴ Unlawful character of the deportation or transfer can be assessed against specific IHL rules, including Article 49 of Geneva Convention IV, applicable to occupations, that, in exceptional cases, allow for the deportation/transfer of protected persons.⁹⁵⁵ Article 49 of Geneva Convention IV, an “Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand”.⁹⁵⁶ Such evacuations are to be within the “bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement”.⁹⁵⁷ Evacuated persons must, to the extent practicable, receive proper accommodation, with satisfactory conditions of hygiene, health, safety and nutrition and without separating family members.⁹⁵⁸ Finally, evacuated persons must be returned to their homes as soon as hostilities in their home area have ceased.⁹⁵⁹

⁹⁵² With respect to these exceptions in the context of the war crime of deportation and transfer of protected persons within or outside an occupied territory, see below, paras 552-565.

⁹⁵³ ICC, *Guchmazov Arrest Warrant*, para. 33; ICC *Sanakoev Arrest Warrant*, para. 22. In accordance with paragraph 6 of the General Introduction to the Elements of Crimes, the adopted elements do not repeat the requirement of unlawfulness. *ICC Elements of Crimes*, General Introduction, para. 6.

⁹⁵⁴ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 346, para. 146. See also ICC, *Guchmazov Arrest Warrant*, para. 33.

⁹⁵⁵ ICC, *Guchmazov Arrest Warrant*, para. 33; ICC *Sanakoev Arrest Warrant*, para. 22.

⁹⁵⁶ *Geneva Convention IV*, Article 49. See also ICTY, *Prlic et al. Trial Judgement*, Vol. I of VI, para. 52.

⁹⁵⁷ *Geneva Convention IV*, Article 49. See also ICTY, *Prlic et al. Trial Judgement*, Vol. I of VI, para. 52. Outside the context of occupation under *Geneva Convention IV*, Article 45 (A transferring state must not transfer a protected person to a receiving state that is not a signatory to Geneva Convention IV or to any country where that person has reason to fear persecution for political or religious beliefs. Moreover, the transferring state must satisfy itself that the receiving state is willing and able to apply the Convention, and the transferring state retains residual responsibility for any failure by the receiving state to do so).

⁹⁵⁸ *Geneva Convention IV*, Article 49. See also ICTY, *Prlic et al. Trial Judgement*, Vol. I of VI, para. 52.

⁹⁵⁹ *Geneva Convention IV*, Article 49. See also ICTY, *Prlic et al. Trial Judgement*, Vol. I of VI, para. 52.

504. It is also significant to note that displacement is not made lawful simply because it is carried out pursuant to an agreement reached between political or military leaders or brokered by the ICRC or any other organisation. Nor does the participation of an international organisation, such as the UN or the ICRC, in organising the displacement render the displacement of a person or persons lawful.⁹⁶⁰
505. **Such person or persons were protected under one or more of the Geneva Conventions of 1949.** While the ICC Element of Crimes refer broadly to any protected persons under the Geneva Conventions, the fact that the offence covers acts of transfer and deportation in violation of Article 147 of Geneva Convention IV indicates that, in essence, the notion of the protected person under this element is confined to civilians as protected by Article 4 of Geneva Convention IV. Under Article 4 of Geneva Convention IV, protected persons are defined as “those, who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”⁹⁶¹ “The mere fact of being in the territory of a Party to the conflict or in occupied territory implies that one is in the power or ‘hands’ of the Occupying Power”.⁹⁶² Persons who are in the territory prior to the outbreak of armed conflict or occupation and those who arrive later are equally protected by the Geneva Convention IV.⁹⁶³ Protected persons under Geneva Convention IV are not necessarily limited to civilians: “[...]while Geneva Convention IV primarily concerns the protection of civilians, the plain language of Article 4 defines protected persons more broadly, encompassing all persons – not just civilians – who fall into the hands of a party to the conflict, or occupying power of which they are not nationals, and who are not protected under the other Geneva Conventions.”⁹⁶⁴
506. Article 4 of Geneva Convention IV clarifies that the protected persons “are not nationals” of a Party to the armed conflict or Occupying Power. The ICTY adopted a teleological approach to considering nationality under Article 4 of Geneva Convention IV. Specifically, “[t]he nationality of the victims [...] should not be determined on the basis of formal national characterisations, but rather upon an analysis of the substantial relations, taking into consideration the different ethnicity of the victims and the perpetrator, and their bonds with the foreign intervening State.”⁹⁶⁵ Animating this approach was the ICTY Appeals Chamber’s concern that:
- “[...] depriving victims, who arguably are of the same nationality under domestic law as their captors, of the protection of the Geneva Conventions solely based on that national law would not be consistent with the object and purpose of the Conventions. Their very object could indeed be defeated if undue emphasis were placed on formal legal bonds [...]. It finds that Article 4 of Geneva Convention IV cannot be interpreted in a way that would exclude victims from the protected persons status merely on the

⁹⁶⁰ ICTY, *Prlić et al. Trial Judgement*, Vol. I of VI, para. 54. See also ICTY, *Stakić Appeal Judgement*, para. 286

⁹⁶¹ *Geneva Convention IV*, Article 4. See also ICTY, *Prlić et al. Appeal Judgement*, Vol. I of III, para. 346; ICTY, *Prlić et al. Trial Judgement*, Vol. I of VI, para. 102.

⁹⁶² ICTY, *Prlić et al. Trial Judgement*, Vol. I of VI, para. 101. With respect to acts of deportations and transfers protected persons within or outside occupied territory, see below, paras 562-565.

⁹⁶³ ICTY, *Prlić et al. Trial Judgement*, Vol. I of IV, para. 101.

⁹⁶⁴ ICTY, *Prlić et al. Appeal Judgement*, Vol. I of III, para. 353.

⁹⁶⁵ ICTY, *Prlić et al. Trial Judgement*, Vol. I of VI, para. 100.

basis of their common citizenship with a perpetrator. They are protected as long as they owe no allegiance to the Party to the conflict in whose hands they find themselves and of which they are nationals.”⁹⁶⁶

507. The ICTY Appeals Chamber also noted “that the allegiance analysis ‘hinging on substantial relations more than on formal bonds, becomes all the more important in present-day international armed conflicts [...] [where] ethnicity rather than nationality may become the grounds for allegiance’.”⁹⁶⁷ The ICC adopted the same approach.⁹⁶⁸
508. Nationals of a co-belligerent State are not protected under Geneva Convention IV “while the State of which they are nationals has normal diplomatic representation in the State whose hands they are in”.⁹⁶⁹ This provision only applies where the States are allies and they enjoy effective diplomatic relations. Determining whether this is the case requires consideration of not only formal diplomatic relations between the two States but also “the true situation”.⁹⁷⁰
509. The following excerpts from the *Prlic et al.* trial and appeal judgements offer a useful case study concerning the determination of protected status under Geneva Convention IV.

CASE STUDY: DETERMINING WHETHER PERSONS ARE PROTECTED BY THE FOURTH GENEVA CONVENTION (ICTY, *PRLIC ET AL.*, [TRIAL JUDGEMENT](#), VOL. I OF VI, PARAS 606-611 AND ICTY *PRLIC ET AL.*, [APPEAL JUDGEMENT](#) PARAS 355, 359, FOOTNOTES OMITTED).

The trial chamber examined whether the HVO Muslims were protected by the Fourth Geneva Convention (*Prlic et al.* Trial Judgement, Vol. I of VI, para. 606). It first determined that they were not protected persons under the other Geneva Conventions (*Prlic et al.* Trial Judgement, Vol. I of VI, para. 607).

It then turned to the express criteria under Geneva Convention IV:

“608. To ascertain whether the Fourth Convention applies, it is necessary to establish whether the HVO Muslims had fallen into the hands of a party to the conflict of which they were not nationals. The Appeals Chamber clearly established that the criterion applicable to determine the status of protected persons is not nationality but allegiance. In the context of the conflicts in the former Yugoslavia, such allegiance may result from ethnic loyalties. Thus, it is proper, in light of the evidence available to the Chamber, to determine the Party to which the HVO Muslims detained by the HVO owed their allegiance.

⁹⁶⁶ ICTY, *Prlic et al.* [Appeal Judgement](#), Vol. I of III, para. 354 (quoting *Kordic and Cerkez* [Appeal Judgement](#), para. 329).

⁹⁶⁷ ICTY, *Prlic et al.* [Appeal Judgement](#), Vol. I of III, para. 355.

⁹⁶⁸ See e.g., ICC *Sanakoev* [Arrest Warrant](#), fn. 31.

⁹⁶⁹ [Geneva Convention IV](#), Article 4; see also ICTY, *Prlic et al.* [Appeal Judgement](#), Vol. I of III, para. 346; ICTY, *Prlic et al.* [Trial Judgement](#), Vol. I of VI, para. 102.

⁹⁷⁰ ICTY, *Prlic et al.* [Trial Judgement](#), Vol. I of VI, para. 102.

609. As the Ćorić Defence itself points out, the HVO Muslims were perceived, starting in 1993, to constitute a threat to the security of the HVO. From the time of the ABiH attack on “North Camp” on 30 June 1993, in which HVO Muslims participated, the HVO authorities considered that, generally, the Muslim HVO members constituted a threat to the security of the HVO and ordered that they be disarmed and detained en masse. The Ćorić Defence nevertheless considers that these acts do not fall within the jurisdiction of the Tribunal because the HVO Muslims had sworn allegiance to the HVO. Milivoj Petković stated that, pursuant to orders received from Mate Boban, the President of the HZ H-B and Supreme Commander of the HVO, during their meeting on 30 June 1993, he issued an order that same day to the commanding officer of the South-East OZ on disarming and “isolating” the Muslim HVO soldiers, as well on “isolating” Muslims fit for combat in light of the threat they posed to the security of the HVO units. Milan Gorjanc stated that, from a military perspective, it was reasonable for the HVO armed forces to view the Muslim soldiers within their units as a threat.⁹⁷¹

610. The Chamber therefore considers that from at least 30 June 1993, the HVO Muslims were perceived by the HVO as loyal to the ABiH.

611. The Chamber consequently finds that the HVO Muslims, detained by the HVO from 30 June 1993 onwards, had indeed fallen into the hands of the enemy power and were thus persons protected within the meaning of Article 4 of the Fourth Geneva Convention.”

The ICTY Appeals Chamber upheld this analysis, noting:

“355. [...] In this case, the Trial Chamber correctly took into account the allegiance of the Muslim HVO members rather than merely considering their nationality. Moreover, to reach the conclusion that Muslim HVO members were protected by Geneva Convention IV from 30 June 1993 onwards, the Trial Chamber relied on the perceived allegiance of the Muslim HVO members by the HVO. Recalling that the detaining authority’s view of the victims’ allegiance has been considered a relevant factor by the Appeals Chamber, the Appeals Chamber considers that Stojic, Praljak, Petkovic, and Coric have failed to show an error on the part of the Trial Chamber.”

“359. The Appeals Chamber finds that the Trial Chamber reasonably concluded that the Muslim HVO members could not be deemed POWs within the strict meaning of Geneva Convention III as they did not formally belong to the ABiH, the “armed forces of a Party other than the detaining Party”. They could nevertheless be protected under Geneva Convention IV because they were in fact in enemy hands, and “[e]very person in enemy hands must have some status under international law [...]. There is no intermediate status; nobody in enemy hands can be outside the law”.”

a. Definition of unlawful deportation or transfer (Subjective Elements)⁹⁷²

510. Pursuant to the ICC elements of crimes, the perpetrator must be “aware of the factual circumstances that established” the protected status of the person or persons under one or more of the Geneva Conventions of 1949.⁹⁷³ Moreover, under Article 30 of the [ICC Statute](#), the perpetrator must have intended to deport or transfer one or more persons to another State or location or been aware that deportation or transfer would occur in the ordinary course of events based on their actions.

⁹⁷¹ ICTY, *Prlic et al. Trial Judgement*, Vol. I of VI, para. 102.

⁹⁷² This section details the subjective elements for this war crime as detailed under international law. However, the general part of the CCU identifies subjective elements that apply to crimes. See Articles 23, 24 and 25 of the CCU. It will be necessary to consider the relevance of the subjective elements in the general part of the CCU when considering the elements of this crime as applied under Article 438 of the CCU.

⁹⁷³ [ICC Elements of Crimes](#), Article 8(2)(a)(vii)-1.

511. Before the ICTY, “[t]he *mens rea* for these crimes is present when the perpetrator of the forcible removal intended to remove the victims by force. In the case of deportation, the perpetrator must, in addition, have had the intent to carry out the removal by crossing a *de jure* or *de facto* border.”⁹⁷⁴ “Neither deportation nor forcible transfer requires that the perpetrator have the intent to remove the victim permanently.”⁹⁷⁵

b. Contextual Elements

512. In addition, as with all war crimes, it is necessary to demonstrate the following contextual elements:

- i. There was an international armed conflict;⁹⁷⁶
- ii. The conduct took place in the context of and was associated with an international armed conflict;⁹⁷⁷ and
- iii. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.⁹⁷⁸

⁹⁷⁴ ICTY, *Prlic et al.* [Trial Judgement](#), Vol. I of VI, para. 58. See also ICTY, *Naletilic and Martinovic* [Trial Judgement](#), para. 521 (ruling that Article 2(g) of the ICTY Statute required proof of “the intent of the perpetrator to transfer a person.”).

⁹⁷⁵ ICTY, *Prlic et al.* [Trial Judgement](#), Vol. I of VI, para. 57. See also ICTY, *Stakic* [Appeal Judgement](#), para. 307.

⁹⁷⁶ See above, paras 188-189.

⁹⁷⁷ See above, paras 190-198. See also [ICC Elements of Crimes](#), Article 8(2)(a)(vii)-1.

⁹⁷⁸ See above, para. 199. See also [ICC Elements of Crimes](#), Article 8(2)(a)(vii)-1.

- x. Unlawful confinement (ICC Statute, Article 8(2)(a)(vii); ICTY Statute Article 2(g))

APPLICABILITY: UNLAWFUL CONFINEMENT CAN BE CONSIDERED CRIMINALISED UNDER ARTICLE 438(1) OF THE CCU, AS IT IS SUBSUMED UNDER THE NOTIONS OF “OTHER VIOLATIONS OF RULES OF THE WARFARE RECOGNIZED BY INTERNATIONAL INSTRUMENTS CONSENTED TO BY BINDING BY THE VERKHOVNA RADA (PARLIAMENT) OF UKRAINE” (PARAS 512-516).

Elements of the crimes: To convict a perpetrator unlawful confinement as a war crime the following elements need to be established:

(1) Objective element

- The perpetrator confined or continued to confine one or more persons to a certain location (paras 518-526).
- Such person or persons were protected under one or more of the Geneva Conventions of 1949 (para. 527).

(2) Subjective element

- The perpetrator was aware of the factual circumstances that established the protected status of the person or persons under one or more of the Geneva Conventions of 1949 (para. 528).
- The perpetrator intended to confine or continue to confine one or more persons to a certain location para. 528).
- The perpetrator was aware of the circumstances that made that the confinement unlawful under Geneva Convention IV para. 528).

(3) Contextual element

- There is an international armed conflict (para. 530).
- The conduct of the perpetrator took place in the context and was associated the conflict (para. 530).
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict (para. 530).

a. Applicability under Article 438

513. Although not explicitly mentioned in Article 438 of the CCU, confinement may be subsumed within “any other violations of rules of warfare recognized by international instruments consented to be binding by the Verkhovna Rada of Ukraine” and in part, by “deportation of civilian population for forced labor” to which Article 438(1) refers. As explained below, unlawful confinement is prohibited under international instruments ratified by Ukraine. Violation of this prohibition is recognised as a war crime. These factors support interpreting Article 438 of the CCU as criminalising violations of this IHL prohibition.

514. **Unlawful confinement is a violation of the laws of warfare recognised in international treaties ratified by Ukraine.** Article 147 of [Geneva Convention IV](#) recognises the unlawful confinement of a protected person in international armed conflict as a grave breach of that convention.⁹⁷⁹ The ICRC identifies various laws concerning confinement during the conflict as customary international law.⁹⁸⁰ Ukraine has ratified Geneva Convention IV.⁹⁸¹ For the purposes of Article 438 CCU, the prohibition against unlawful confinement of a protected person is, therefore a violation of the laws of warfare recognised in an international instrument accepted as binding by the Ukrainian parliament.
515. **Recognition as a war crime.** As a grave breach of Geneva Convention IV, the unlawful confinement of protected persons during international armed conflict is a war crime.⁹⁸² Violation of this prohibition has been recognised as a war crime under Article 2(g) of the ICTY Statute and Article 8(2)(a)(vii) of the ICC Statute.⁹⁸³ According to the ICRC, the recognition of this war crime has attained customary international law status.⁹⁸⁴
516. These factors support recognition of the criminalisation of unlawful confinement of protected persons under Article 438 of the CCU.

b. Definition of unlawful confinement (Objective Elements)

517. The objective elements of this crime are the following: (1) the perpetrator confined or continued to confine one or more persons to a certain location; and (2) such person or persons were protected under one or more of the Geneva Conventions of 1949.⁹⁸⁵
518. **The perpetrator confined or continued to confine one or more persons to a certain location.** This element requires: (1) an act of confinement which is (2) unlawful in character.
519. *Notion of confinement.* In terms of culpable conduct, the notion of confinement involves any measures of deprivation of liberty, including arrest, assigned residence or internment.⁹⁸⁶ In the *Prlic et al* case, the ICTY Appeals Chamber concluded that “determining whether a person has been deprived of his or her liberty will depend on the circumstances of each particular case and must take into account a range of factors, including the type, duration, effects, and the manner of implementation of the measures allegedly amounting to a deprivation of liberty.”⁹⁸⁷ In this regard, the ICTY concluded that the notion of confinement could cover situations where confined

⁹⁷⁹ [Geneva Convention IV](#), Article 147.

⁹⁸⁰ ICRC, IHL Database, [Customary Law](#), Chapter 37. Persons Deprived of Their Liberty.

⁹⁸¹ Ukraine ratified Geneva Convention IV on 3 August 1954. See ICRC, [Treaties, States Parties and Commentaries, Ukraine](#).

⁹⁸² [Geneva Convention IV](#), Articles 146, 147.

⁹⁸³ [ICTY Statute](#), Article 2(g); [ICC Statute](#), Article 8(2)(a)(vii).

⁹⁸⁴ ICRC, IHL Database, Customary Law, [Rule 156](#) (identifying serious violations of international humanitarian law, including all grave breaches of the Geneva Conventions, as war crimes, and listing unlawful confinement as one of the grave breaches of the Geneva Conventions).

⁹⁸⁵ [ICC Elements of Crimes](#), Article 8(2)(a)(vii)-2.

⁹⁸⁶ ICTY, *Prlic et al* [Appeal Judgement](#), Vol. I of III, paras 471-473.

⁹⁸⁷ ICTY, *Prlic et al* [Appeal Judgement](#), Vol. I of III, para. 473.

persons maintain some freedom of movement. In circumstances where freedom of movement was limited to particular locations and consisted of some individuals occasionally leaving the house to get food or avoid abuse and sexual assaults at night, this did not make the confinement lawful.⁹⁸⁸ Moreover, the ICTY and ICC jurisprudence reflect that this crime applies in the context of hostilities⁹⁸⁹ and during occupation.⁹⁹⁰

520. *Unlawful character of the confinement.* While not explicitly mentioned in the ICC Elements of the Crimes the confinement must be unlawful in character.⁹⁹¹ Unlawfulness is, however, of crucial importance to understanding the objective elements of this crime.⁹⁹² Unlawful character of confinement can be assessed against specific IHL rules (namely Articles 42, 43, and 78 of [Geneva Convention IV](#)) that in exceptional cases allow for the deportation/transfer of protected persons.⁹⁹³
521. Article 42 of [Geneva Convention IV](#) permits internment or placing in assigned residence of protected persons “only if the security of the detaining power makes it absolutely necessary”.⁹⁹⁴ It also permits voluntary internment where the situation makes it necessary.⁹⁹⁵ According to Article 43 of [Geneva Convention IV](#), the detaining power must designate an appropriate court or administrative board to reconsider such internment or assigned residence “as soon as possible”. If the state of internment or assigned residence is maintained, then there must be periodic review, at least twice per year, of this internment or assigned residence.⁹⁹⁶
522. Likewise, Article 78 of [Geneva Convention IV](#), applicable in cases of occupation, also permits internment or placement in assigned residence of protected persons where an occupying power “considers it necessary, for imperative reasons of security”.⁹⁹⁷ It requires that decisions to intern protected persons or place them in assigned residences be made according to a regular procedure, that there be a right to appeal such decisions to be decided “with the least possible delay”, and that such decisions be subject to a periodical review, “if possible every six months”, by a competent body established by the occupying power.⁹⁹⁸
523. Against this background, any deprivation of liberty carried out outside the legitimate grounds and procedural parameters set forth by Articles 42, 43 of 78 of [Geneva Con-](#)

⁹⁸⁸ ICTY, *Celebici Appeal Judgement*, paras 473, 513-515.

⁹⁸⁹ See e.g., ICC, *Guchmazov Arrest Warrant*, paras 1, 6 (holding that unlawful deportation and transfer under Article 8(2)(a)(vii) of the ICC Statute does not require the existence of an occupation); ICTY, *Prlic et al. Appeal Judgement*, Vol. I of III, para. 472 (referring to Article 42 Geneva Convention IV applicable in the context of hostilities).

⁹⁹⁰ ICC, *Guchmazov Arrest Warrant*, para. 14; ICTY, *Prlic et al. Trial Judgement*, Vol. I of VI, para.134, fn. 271 (referring to Articles 42 and 78 of Geneva Convention IV applicable in the context of hostilities and occupation).

⁹⁹¹ ICC, *Guchmazov Arrest Warrant*, para. 13. In accordance with paragraph 6 of the General Introduction to the Elements of Crimes, the adopted elements do not repeat the requirement of unlawfulness ([ICC Elements of Crimes](#), General Introduction, para. 6.).

⁹⁹² Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 349, para. 157.

⁹⁹³ ICC, *Guchmazov Arrest Warrant*, para. 13.

⁹⁹⁴ See also ICC, *Guchmazov Arrest Warrant*, para. 13.

⁹⁹⁵ [Geneva Convention IV](#), Article 42.

⁹⁹⁶ [Geneva Convention IV](#), Article 43. See also ICTY, *Prlic et al. Trial Judgement*, Vol. I of VI, paras 135-136.

⁹⁹⁷ See also ICC, *Guchmazov Arrest Warrant*, para. 14.

⁹⁹⁸ [Geneva Convention IV](#), Article 78. For a discussion of the law of occupation, see, see below, paras 562-565.

[vention IV](#) would amount to *unlawful* confinement.⁹⁹⁹ This consideration has been confirmed by the ICTY which has concluded that the detention or confinement of protected persons is unlawful in the following circumstances: (1) one or more protected persons have been detained in violation of Geneva Convention IV Articles 42 or 78; or (2), even if the detention was initially justified, where there has not been compliance with the procedural safeguards of Geneva Convention IV Articles 43 and 78.¹⁰⁰⁰

524. With respect to legitimate grounds justifying the confinement, the ICTY has recognised that the parties to an armed conflict “may resort to internment or placement in assigned residence if they have serious or legitimate reasons ‘to think that the person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security’. Subversive activity carried on inside the territory of a party to the conflict or acts that directly assist an enemy power may constitute threats to national security.”¹⁰⁰¹ Recent jurisprudence from the ICC has further supported this line of reasoning.¹⁰⁰² However, the mere fact that a person is a national of or otherwise aligned with the enemy party is not, of itself, a threat to the security of the country in which he or she resides that would warrant confinement.¹⁰⁰³ Furthermore, that a man is of military age does not necessarily justify confinement.¹⁰⁰⁴ “Internment and placement in assigned residence constitute measures taken on an exceptional basis, after detailed examination of each individual case and may not in any circumstance constitute a collective measure.”¹⁰⁰⁵

525. As for the procedural safeguards, confinement is unlawful in cases of:

- Absence of a judicial or administrative body reviewing as soon as possible a decision to confine a person or persons. The decision as to whether a confined person constitutes a threat to the security of the State needs to be carried out on an individual case-by-case basis and in a reasonable time.¹⁰⁰⁶ Reasonable time has been defined as “the minimum time necessary to make inquiries to determine whether a view that [confined persons] pose a security risk has any objective foundation such that it would found a ‘definite suspicion’ ”¹⁰⁰⁷
- Absence of a periodic review (at least twice a year) to assess whether the circumstances justifying the confinement no longer exist. According to the ICTY “fundamental consideration must be that no civilian should be kept in assigned residence or in an internment camp for a longer time than the security of the detaining party absolutely demands”.¹⁰⁰⁸

⁹⁹⁹ ICC, *Guchmazov Arrest Warrant*, paras 13-14. See also Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 349, para. 157.

¹⁰⁰⁰ ICTY, *Prlic et al. Trial Judgement*, Vol. I of VI, para. 139. See also ICTY, *Celebici Appeal Judgement*, para. 322.

¹⁰⁰¹ ICTY, *Prlic et al. Trial Judgement*, Vol. I of VI, para. 134.

¹⁰⁰² ICC, *Guchmazov Arrest Warrant*, para. 13.

¹⁰⁰³ ICC, *Guchmazov Arrest Warrant*, para. 13; ICTY, *Celebici Appeal Judgement*, para. 327. See also ICTY, *Prlic et al. Trial Judgement*, Vol. I of VI, para.134.

¹⁰⁰⁴ ICTY, *Prlic et al. Trial Judgement*, Vol. I of VI, para.134.

¹⁰⁰⁵ ICTY, *Prlic et al. Trial Judgement*, Vol. I of VI, para.135. See also ICTY, *Celebici Appeal Judgement*, para. 1134; ICC, *Guchmazov Arrest Warrant*, para. 13.

¹⁰⁰⁶ ICTY, *Prlic et al. Trial Judgement*, Vol. I of VI, para.135.

¹⁰⁰⁷ ICTY, *Celebici Appeal Judgement*, para. 328.

¹⁰⁰⁸ ICTY, *Celebici Trial Judgement*, para. 581.

526. Lastly, the ICTY has identified three cumulative conditions for voluntary internment: “(1) it must be requested by the protected person, (2) the request must be made through the representatives of the Protecting Powers, and (3) it must be warranted by the situation of the interested Party. When a request of this nature meets these three conditions, then the authorities of the State where he or she is living are obliged to give it favourable consideration.”¹⁰⁰⁹

CASE STUDY: A DETERMINATION OF UNLAWFUL CONFINEMENT, ICTY, CELEBICI, TRIAL JUDGEMENT, PARAS 1131-1141.

- In the so-called *Celebici* trial at the ICTY, the Trial Chamber determined that protected persons were unlawfully confined at the Celebici prison camp. For those civilians detained in the Celebici prison camp who were armed, the Trial Chamber refrained from determining whether the confinement of this category of civilians actually was necessary for the security of the detaining forces, and therefore justifiable under international humanitarian law.¹⁰¹⁰
- “However, it is clear that the confinement of a number of the civilians detained in the Čelebići prison-camp cannot be justified by any means. While it must be recognised that a detaining power is given a large degree of discretion to determine the behaviour which it deems detrimental to its security, it is clear to the Trial Chamber that several of the civilians detained in the Čelebići prison-camp cannot reasonably have been considered to pose any sufficiently serious danger to the detaining forces as to warrant their detention.”¹⁰¹¹
- “ [I]t appears that the confinement of civilians in the Čelebići prison-camp was a collective measure aimed at a specific group of persons, based mainly on their ethnic background, and not a legitimate security measure. As stated above, the mere fact that a person is a national of, or aligned with, an enemy party cannot be considered as threatening the security of the opposing Party where he is living, and is not, therefore, a valid reason for interning him.”¹⁰¹²
- “Even were the Trial Chamber to accept that the initial confinement of the individuals detained in the Čelebići prison-camp was lawful, the continuing confinement of these civilians was in violation of international humanitarian law, as the detainees were not granted the procedural rights required by article 43 of Geneva Convention IV. According to this provision, the decision to take measures of detention against civilians must be ‘reconsidered as soon as possible by an appropriate court or administrative board.’”¹⁰¹³
- The Trial Chamber also found that the Military Investigations Commission established to investigate the crimes allegedly committed by persons confined in the camp did not meet the requirements of Article 43 of Geneva Convention IV where that Commission: (1) lacked the “necessary power to finally decide on the release of prisoners whose detention could not be considered as being justified for any serious reason”; (2) “did not have any possibility to supervise the actual release of prisoners who were suggested for release by its members”; (3) had prepared a report noting the mistreatment of detainees and the incarceration of peaceful civilians; and (4) there was evidence that the Commission was a façade.¹⁰¹⁴ (paras 1136-1140).
- Finally, the Trial Chamber did not consider a second commission established later because it was established too late in the period of confinement, and there was no judicial body reviewing the detention of prisoners during most of the period during which the Celebici prison camp existed (para. 1141).

¹⁰⁰⁹ ICTY, *Prlic et al. Trial Judgement*, Vol. I of VI, para.138.

¹⁰¹⁰ ICTY, *Celebici Trial Judgement*, para.1131.

¹⁰¹¹ ICTY, *Celebici Trial Judgement*, para. 1132.

¹⁰¹² ICTY, *Celebici Trial Judgement*, para. 1134.

¹⁰¹³ ICTY, *Celebici Trial Judgement*, para. 1135.

¹⁰¹⁴ ICTY, *Celebici Trial Judgement*, paras 1136-1140.

527. **Such person or persons were protected under one or more of the Geneva Conventions of 1949.** While the ICC Element of Crimes refer broadly to any protected persons under the Geneva Conventions, the fact that the offence covers acts of transfer and deportation in violation of Article 147 of Geneva Convention IV indicates that, in essence, the notion of the protected person under this element is confined to civilians as protected by Article 4 of Geneva Convention IV. For the purposes of Geneva Convention IV, protected persons are defined as “those, who, at a given moment and in any manner whatsoever, find themselves, in case of an armed conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”¹⁰¹⁵ With regards to unlawful confinement, it is important to also note that “[i]f an individual is not entitled to the protections of the Third Convention as a prisoner of war (or of the First or Second Conventions) he or she necessarily falls within the ambit of Convention IV, provided that its Article 4 requirements are satisfied.”¹⁰¹⁶

c. Definition of unlawful confinement (Subjective Elements)¹⁰¹⁷

528. Pursuant to the ICC elements of crimes, the perpetrator must be “aware of the factual circumstances that established” the protected status of the person or persons under one or more of the Geneva Conventions of 1949.¹⁰¹⁸ Moreover, under Article 30 of the [ICC Statute](#), the perpetrator must have intended to confine one or more persons knowing that such confinement is unlawful under Geneva Convention IV under the circumstances or be aware that such unlawful confinement would occur in the ordinary course of events based on their actions.

529. The ICTY has not identified subjective elements for unlawful confinement, in general, but has ruled that where an accused has authority to release civilian detainees and fails to exercise that power, that accused commits unlawful confinement where they did not have reasonable grounds to believe that the detainees posed a real risk to the security of the state; or they know that the detainees have not been afforded the requisite procedural guarantees (or has reckless disregard as to whether those guarantees have been afforded or not).¹⁰¹⁹

d. Contextual Elements

530. In addition, as with all war crimes, it is necessary to demonstrate the following contextual elements:

i. There was an international armed conflict;¹⁰²⁰

¹⁰¹⁵ [Geneva Convention IV](#), Article 4; see also ICTY, *Prlic et al. Appeal Judgement*, Vol. I of III, para. 346; ICTY, *Prlic et al. Trial Judgement*, Vol. I of VI, para. 102. For a thorough discussion of protected persons under Geneva Convention IV, see , see below, parasparas 562-565.

¹⁰¹⁶ See also ICTY, *Celebici Trial Judgement*, para. 271.

¹⁰¹⁷ This section details the subjective elements for this war crime as detailed under international law. However, the general part of the CCU identifies subjective elements that apply to crimes. See Articles 23, 24 and 25 of the CCU. It will be necessary to consider the relevance of the subjective elements in the general part of the CCU when considering the elements of this crime as applied under Article 438 of the CCU.

¹⁰¹⁸ [ICC Elements of Crimes](#), Article 8(2)(a)(vii)-2.

¹⁰¹⁹ ICTY, *Celebici Appeal Judgement*, para. 378.

¹⁰²⁰ See above, paras 188-189.

- ii. The conduct took place in the context of and was associated with an international armed conflict;¹⁰²¹ and
 - iii. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.¹⁰²²
- xi. Taking of hostages (ICTY Statute, Articles 2(h) and 3; ICC Statute, Article 8(2)(a) (viii))

APPLICABILITY: TAKING OF HOSTAGES CAN BE CONSIDERED CRIMINALISED UNDER ARTICLE 438(1) OF THE CCU, AS IT IS SUBSUMED UNDER THE NOTION OF “OTHER VIOLATIONS OF RULES OF THE WARFARE RECOGNIZED BY INTERNATIONAL INSTRUMENTS CONSENTED TO BY BINDING BY THE VERKHOVNA RADA (PARLIAMENT) OF UKRAINE”. (PARAS 531-535).

Elements of the crimes: To convict a perpetrator for taking of hostages as a war crime the following elements need to be established:

(1) Objective elements

- The perpetrator seized, detained or otherwise held hostage one or more persons (paras 537-539).
- The perpetrator threatened to kill, injure or continue to detain such person or persons (paras 540-541).
- Such person or persons were protected under one or more of the Geneva Conventions of 1949 (paras 542-544).

(2) Subjective elements

- The perpetrator intended to compel a State, an international organisation, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of person or persons (para. 546-549).
- The perpetrator was aware of the factual circumstances that established the protected status of persons (para. 550).

(3) Contextual elements

- There is an international armed conflict (para. 551).
- The conduct of the perpetrator took place in the context and was associated with the conflict (para. 551).
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict (para. 551).

¹⁰²¹ See above, paras 190-198. See e.g. [ICC Elements of Crimes](#), Article 8(2)(a)(vii)-2.

¹⁰²² See above, para. 199. See e.g. [ICC Elements of Crimes](#), Article 8(2)(a)(vii)-2.

a. Applicability under Article 438

531. Although not explicitly mentioned in Article 438 of the CCU, “taking of hostages” may be subsumed within “any other violations of rules of warfare recognized by international instruments consented to be binding by the Verkhovna Rada of Ukraine” to which Article 438(1) refers. As explained below, the conduct is prohibited under international instruments ratified by Ukraine and this prohibition has been recognised as a war crime. These factors support interpreting Article 438 of the CCU as criminalising violations of this IHL prohibition.
532. **Taking of hostages is a violation of the laws of warfare recognised in international treaties ratified by Ukraine.** Article 34 of [Geneva Convention IV](#) and Article 75(2) (c) of [Additional Protocol I](#) prohibit the taking of hostages in international armed conflicts.¹⁰²³ In addition, it constitutes a grave breach of [Geneva Convention IV](#) under Article 147.¹⁰²⁴ Ukraine has ratified these instruments.¹⁰²⁵
533. **Recognition as a war crime.** Taking of hostages is recognised as a war crime in international armed conflict with the status of customary international law.¹⁰²⁶ It is a grave breach of [Geneva Convention IV](#) and it is therefore recognised as a war crime. As listed under grave breaches of the Geneva Conventions, taking of hostages has been codified as a war crime in Article 8(2)(a)(viii) of the [ICC Statute](#) and in Article 2(h) of the [ICTY Statute](#), both applicable to international armed conflicts. In parallel, the ICTY concluded that the conduct of taking of hostages could be qualified as a war crime as a serious violation of the laws or customs of war under Article 3 of the ICTY Statute applicable to international and non-international armed conflicts.¹⁰²⁷
534. Accordingly, the ICTY framework recognises, under customary international law, two separate war crimes of taking of hostages, namely: (1) taking *civilians* as hostages under Article 2(h) of the ICTY Statute as a grave breach of Geneva Conventions applicable only to civilians in international armed conflicts; and (2) taking of hostages under Article 3 of the ICTY Statute as a serious violation the laws or customs of war applicable to any person regardless of his or her status in international and non-international armed conflicts.¹⁰²⁸ Distinctly, in the context of an international armed

¹⁰²³ Common Article 3 of the Geneva Conventions and Article 4(2)(c) of [Additional Protocol II](#) prohibit taking of hostages in non-international armed conflicts. See also ICRC, IHL Database, Customary IHL, [Practice relating to Rule 96, Ukraine](#) (referring to Ukraine’s Manual on the Application of IHL Rules of 11 September 2004, which states that “Serious violations of international humanitarian law directed against people include: [...] taking hostages.”).

¹⁰²⁴ See also ICRC, IHL Database, Customary IHL, [Rule 156. Definition of War Crimes](#).

¹⁰²⁵ Ukraine ratified the Geneva Conventions, 1949 on 3 August 1954 and Additional Protocol I on 25 January 1990. See ICRC, Treaties and States Parties, [Ukraine](#).

¹⁰²⁶ ICRC, IHL Database, Customary IHL, [Rule 96. Hostage-taking](#). See also SCSL, *Sesay et al Trial Judgement*, para. 239.

¹⁰²⁷ ICTY, *Blaskic Appeal Judgement*, para. 639 (“Hostage-taking as a grave breach of the Geneva Conventions and as a violation of the laws or customs of war was considered by the Trial Chamber in this case, and in the *Kordic and Cerkez Trial Judgement*.”); ICTY, *Blaskic Trial Judgement*, para.187 (“The taking of hostages is prohibited by Article 3(b) common to the Geneva Conventions which is covered by Article 3 of the Statute”); ICTY, *Kordic and Cerkez Trial Judgement*, para. 825 (“Taking of civilians as hostages (Article 2)/taking of hostages (Article 3): As with wilful killing/murder, the elements of these two offences are similar except for the requirement that the victims be protected persons contained in Article 2; therefore where all the elements of the offences are proved, an accused should be convicted of taking civilians as hostages under Article 2 of the Statute”) (footnotes omitted).

¹⁰²⁸ ICTY, *Karadzic Appeal Decision on Hostage-Taking*, para. 21 (holding that the offence applies to “all detained individuals, irrespective of whether their detention is explicitly sought in order to use them as hostages and irrespective of

conflict, the ICC recognises the war crime of taking of hostages only as a grave breach of the Geneva Conventions under Article 8(2)(a)(viii) of the ICC Statute.¹⁰²⁹

535. These factors support recognition of the criminalisation of taking of hostages under Article 438 of the CCU.

b. Definition of taking of hostages (Objective Elements)

536. Under the ICC Elements of Crimes, the objective elements of this offence are: (1) the perpetrator seized, detained or otherwise held hostage one or more persons; (2) the perpetrator threatened to kill, injure or continue to detain such person or persons; and (3) such person or persons were protected under one or more of the Geneva Conventions of 1949.¹⁰³⁰ Likewise, the ICTY jurisprudence reflects similar elements for the war crimes of hostage taking under Articles 2(h) and 3 of the ICTY Statute.¹⁰³¹

537. **The perpetrator seized, detained or otherwise held hostage one or more persons.** This element requires (1) a certain degree of deprivation of freedom (“seized, detained or otherwise held hostage”), (2) of an unlawful character.¹⁰³²

538. Deprivation of freedom. The notion of “seized, detained or otherwise held hostage” requires the exercise of control over a person.¹⁰³³ The ICRC Commentary to Article 34 of the Geneva Convention IV sets out that the term, “hostages”, must be interpreted

their prior status as combatants”). Except the personal scope of application, the jurisprudence of the ICTY concluded that hostage taking under Articles 2(h) and 3 of the ICTY Statute share the same objective and subjective elements. The ICC Statute and the SCSL Statute also identify taking of hostages as a war crime in non-international armed conflicts, [ICC Statute](#), Article 8(2)(c)(iii); [SCSL Statute](#), Article 3(c).

¹⁰³⁰ [ICC Elements of Crimes](#), Article 8(2)(a)(viii). See also [ICC Elements of Crimes](#), Article 8(2)(c)(iii) in relation to the same offense in the context of non-international armed conflicts. The elements of this crime are taken from Article 1(1) of the [International Convention Against the Taking of Hostages](#), which states that “any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (the ‘hostage’) in order to compel a third party, namely a State, an international intergovernmental organisation, a natural or judicial person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages [...]”. Ukraine ratified this Convention on 19 June 1987. See United Nations Treaty Collection, [International Convention Against the Taking of Hostages](#). See Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 352, para. 173.

¹⁰³¹ See ICTY, *Blaskic Appeal Judgement*, para. 639 (“The Appeals Chamber agrees that the essential element in the crime of hostage-taking is the use of a threat concerning detainees so as to obtain a concession or gain an advantage; a situation of hostage-taking exists when a person seizes or detains and threatens to kill, injure or continue to detain another person in order to compel a third party to do or to abstain from doing something as a condition for the release of that person”); ICTY, *Blaskic Trial Judgement*, para. 158 (“Within the meaning of Article 2 of the Statute, civilian hostages are persons unlawfully deprived of their freedom, often arbitrarily and sometimes under threat of death. However, as asserted by the Defence, detention may be lawful in some circumstances, inter alia to protect civilians or when security reasons so impel. The Prosecution must establish that, at the time of the supposed detention, the allegedly censurable act was perpetrated in order to obtain a concession or gain an advantage. The elements of the offence are similar to those of Article 3(b) of the Geneva Conventions covered under Article 3 of the Statute.”) (footnotes omitted). Similarly for Article 8(2)(a)(viii) of the ICC Statute, the jurisprudence of the ICTY also relied on the [International Convention Against the Taking of Hostages](#) to elaborate the elements of hostage taking as a war crime. See ICTY, *Blaskic Appeal Judgement*, fn. 1332.

¹⁰³² See Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, pp 352-353, paras 175, 176.

¹⁰³³ See Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 352, para. 175.

“in the widest possible sense” and defines it as “nationals of a belligerent State who of their own free will or through compulsion are in the hands of the enemy and are answerable with their freedom or their life for the execution of his orders and the security of his armed forces”.¹⁰³⁴

539. Unlawful character of the deprivation of freedom. While not explicitly mentioned in the specific ICC Elements of the Crimes, the deprivation of freedom must be unlawful. This is in line with paragraph 6 of the General Introduction to the Elements of Crimes which indicates that the elements do not repeat the requirement of unlawfulness¹⁰³⁵ as well as with the practice of the ICTY and SCSL with respect to this specific war crime.¹⁰³⁶ Commentators raised that there are divergent views as to whether the detention must be unlawful at the outset, or whether an initially lawful detention that becomes unlawful at a later stage could also be sufficient to fulfil this element.¹⁰³⁷ The SCSL supports a broad understanding of deprivation of liberty which encompasses “an initially lawful detention” that later develops into an unlawful one in line with the formulation “or otherwise held” in the first element of this crime.¹⁰³⁸ The scope of this crime, which has a continuing character, includes cases where other elements are met, and the perpetrator possesses the *mens rea* at a period subsequent to the initially lawful detention.¹⁰³⁹

540. **The perpetrator threatened to kill, injure or continue to detain such person or persons.** In the *Blaskic* case, the ICTY Appeals Chamber stated that “the essential element in the crime of hostage-taking is the use of a threat concerning detainees so as to obtain a concession or gain an advantage”.¹⁰⁴⁰ This element includes a conditional

¹⁰³⁴ ICRC Commentary to the Geneva Convention IV, pp 229-230. See also ICTY, *Blaskic Trial Judgement*, para. 187; SCSL, *Sesay et al. Trial Judgement*, para. 241 (“the term ‘hostage’ must be interpreted in its broadest sense.”).

¹⁰³⁵ ICC Elements of Crimes, General Introduction, para. 6.

¹⁰³⁶ ICTY, *Blaskic Trial Judgement*, para. 158 (“Within the meaning of Article 2 of the Statute, civilian hostages are persons unlawfully deprived of their freedom, often arbitrarily and sometimes under threat of death. [...] The elements of the offence are similar to those of Article 3(b) of the Geneva Conventions covered under Article 3 of the Statute”) (emphasis added); SCSL, *Sesay et al. Appeal Judgement*, para. 598.

¹⁰³⁷ See Triffterer and Ambos (Eds.), Rome Statute of the International Criminal Court: A Commentary, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 353, paras 176 (referring to *inter alia* ICTY, *Blaskic Trial Judgement*, para. 158; ICTY, *Kordic and Cerkez Trial Judgement*, para. 312), 903.

¹⁰³⁸ SCSL, *Sesay et al. Appeal Judgement*, para. 598 (“[...] it could not be otherwise, for it would mean that the crime of hostage-taking could never arise out of an initially lawful detention; similarly, an unlawful abduction could never be transformed into a case of hostage taking. Yet the precise means by which the individual falls into the hands of the perpetrator is not the defining characteristic of the offence; it is, rather, a secondary feature. As the Trial Chamber found, the first element of the crime is that an individual was ‘seized, detained, or otherwise held hostage.’ For its part, the ICRC Commentary on Additional Protocol II defines a hostage as ‘persons who are in the power of a party to the conflict or its agent, willingly or unwillingly.’ [...]”) (footnotes omitted) (emphasis in original) (in relation to the offense of taking of hostages in the context of non-international armed conflict but the consideration may also apply *mutatis mutandis* to the present crime); Triffterer and Ambos (Eds.), Rome Statute of the International Criminal Court: A Commentary, 3rd Edition, C.H. Beck Hart Nomos, 2016, pp 353, 553, 554, paras 176, 903.

¹⁰³⁹ SCSL, *Sesay et al. Appeal Judgement*, para. 598 (“In the view of the Appeals Chamber, to exclude from the scope of the crime the individual who possesses the *mens rea* at a period subsequent to the initial confinement fails to recognize the continuing nature of the offence.”) (in relation to the offense of taking of hostages in the context of non-international armed conflict but the consideration may also apply *mutatis mutandis* to the present crime).

¹⁰⁴⁰ ICTY, *Blaskic Appeal Judgement*, para. 639; ICTY, *Blaskic Trial Judgement*, para. 158 (“The Prosecution must establish that, at the time of the supposed detention, the allegedly censurable act was perpetrated in order to obtain a concession or gain an advantage.”), 187 (“[T]o be characterised as hostages the detainees must have been used to obtain some advantage or to ensure that a belligerent, other person or other group of persons enter into some undertaking.”).

threat against the physical and mental well-being of such persons.¹⁰⁴¹ The threat can be issued either explicitly or implicitly.¹⁰⁴² The SCSL Appeals Chamber in the *Sesay et al.* proceedings clarified that “the communication of the threat to a third party is not an element of the offence”.¹⁰⁴³ Commentators suggest that such communication may, however, prove the intent to coerce.¹⁰⁴⁴

541. The threat must be unlawful. For example, if the release of a person is not required by law and the person is lawfully detained, the threat to continue to detain this person as part of negotiations, e.g., for a prisoners of war exchange during the hostilities, would not be unlawful and thus would not constitute the taking of hostages.¹⁰⁴⁵

542. **Such person or persons were protected under one or more of the Geneva Conventions of 1949.** As war crime underpinning a grave breach of the Geneva Convention IV, the prohibition of hostage-taking in international armed conflicts primarily applies to all persons protected within the meaning of Article 4 of the [Geneva Convention IV](#).¹⁰⁴⁶ This provision provides that the protected persons are civilians “who at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a party to the conflict or Occupying Power of which they are not nationals”.¹⁰⁴⁷

543. *Allegiance to a party and that party’s control over persons and territory.* Strict, formal/legal nationality is not as important as the substance of relations of victims vis-à-vis perpetrators.¹⁰⁴⁸ Allegiance to a party to the conflict and control by this party over persons in a given territory may be regarded as the crucial test.¹⁰⁴⁹ As attacking forc-

¹⁰⁴¹ ICTY, *Kordic and Cerkez Trial Judgement*, para. 313. See also SCSL, *Sesay et al. Trial Judgement*, para. 242 (“[T]he Prosecution must prove that there was a threat made against the hostage which would be realised if a particular condition is not fulfilled.”) (in relation to the offense of taking of hostages in the context of non-international armed conflict but the consideration may also apply *mutatis mutandis* to the present crime); [ICRC Commentary to Geneva Convention IV](#), p. 600 (specifying this element as a “threat either to prolong the hostage’s detention or to put him to death”).

¹⁰⁴² SCSL, *Sesay et al. Trial Judgement*, para. 242 (in relation to the offense of taking of hostages in the context of non-international armed conflict but the consideration may also apply *mutatis mutandis* to the present crime).

¹⁰⁴³ SCSL, *Sesay et al. Appeal Judgement*, para. 582 (“It does not follow from a requirement that the threat be made with an intention to coerce that the threat be communicated to the third party [...]”) (in relation to the offense of taking of hostages in the context of non-international armed conflict but the consideration may also apply *mutatis mutandis* to the present crime).

¹⁰⁴⁴ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 353, para. 178.

¹⁰⁴⁵ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 353, para. 177.

¹⁰⁴⁶ Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, para. 1347.

¹⁰⁴⁷ [Geneva Convention IV](#), Article 4.

¹⁰⁴⁸ ICTY, *Celebici Appeal Judgement*, paras 83-84 (“Article 4 of Geneva Convention IV is to be interpreted as intending to protect civilians who find themselves in the midst of an international, or internationalised, conflict to the maximum extent possible. The nationality requirement of Article 4 should therefore be ascertained upon a review of ‘the substance of relations’ and not based on the legal characterisation under domestic legislation. In today’s ethnic conflicts, the victims may be ‘assimilated’ to the external State involved in the conflict, even if they formally have the same nationality as their captors, for the purposes of the application of humanitarian law, and of Article 4 of Geneva Convention IV specifically. The Appeals Chamber thus agrees with the Tadic Appeal Judgement that ‘even if in the circumstances of the case the perpetrators and the victims were to be regarded as possessing the same nationality, Article 4 would still be applicable.’”).

¹⁰⁴⁹ ICTY, *Tadic Appeal Judgement*, paras 165-166 (“This legal approach, hinging on substantial relations more than on formal bonds, becomes all the more important in present-day international armed conflicts. While previously wars

es of a party to the conflict gradually gain control of territory, individual civilians in these successive areas automatically become protected persons, provided they do not claim allegiance to the party in question.¹⁰⁵⁰

CASE STUDY: ALLEGIANCE TO A PARTY TO A CONFLICT, E.G., ETHNICITY ICC, SITUATION IN GEORGIA, *SANAKOEV ARREST WARRANT* (FOOTNOTES OMITTED)

The ICC Pre-Trial Chamber has adopted the interpretation of Article 4 of the Geneva Convention IV contained in the jurisprudence of the ICTY, according to which “protected persons should not be defined by the strict requirement of nationality, as opposed to more realistic bonds demonstrating effective allegiance to a party to a conflict, such as ethnicity”.¹⁰⁵¹ It stated as follows: “12. Based on the evidence, the Chamber finds reasonable grounds to believe that, between 10 and 12 August 2008, several villagers perceived as ethnic Georgians (‘ethnic Georgians’) or from mixed marriages, and who had not yet fled, were arrested in the Tskhinvali area, randomly in the streets or at home, by persons described as ethnic Ossetians dressed as policemen, in military uniforms, or in plain clothes, sometimes together with Russians or members of the Russian armed forces. [...] The persons arrested were brought to the preliminary detention facility in Tskhinvali (the ‘KPZ’ or the ‘Isolator’).

were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance. Or, put another way, ethnicity may become determinative of national allegiance. Under these conditions, the requirement of nationality is even less adequate to define protected persons. In such conflicts, not only the text and the drafting history of the Convention but also, and more importantly, the Convention’s object and purpose suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.”).

¹⁰⁵⁰ ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, paras 292 (“Under the case law of the international tribunals, an individual civilian falls ‘into the hands of’ a party to the conflict when that individual is in the territory under the control of such a party.”), 293 (“Therefore, in the view of the Chamber, as the attacking forces of a party to the conflict gradually gain control of a targeted village, individual civilians in these successive areas automatically become protected persons within the meaning of article 4 GC IV, provided they do not claim allegiance to the party in question. Article 8(2)(a)(i) of the Statute thus prohibits the willful killing of those civilians in such a circumstance.” Element 2 of which applies equally to taking of hostages under Article 8(2)(a)(viii)), 358 (“Article 8(2)(a)(ii) of the Statute therefore applies to those situations in which protected civilians are inhumanely treated ‘in the hands of’ a party to the conflict, and thus also applies to the inhuman treatment of the protected persons by an attacking force, when such conduct occurs after the overall attack has ended, and defeat or full control of the targeted village has been secured. In addition, this provision prohibits perpetrators from inflicting inhuman treatment on protected persons as these forces move toward areas of enemy resistance in a targeted village.” Again Element 2 of which applies equally to taking of hostages under Article 8(2)(a)(viii)).

¹⁰⁵¹ ICC, *Sanakoev Arrest Warrant*, para. 13, fn. 22 (quoting, ICTY, *Brdanin Appeal Judgement*, para. 125).

13. The Chamber finds that there are reasonable grounds to believe that approximately 170 persons were arrested and subsequently detained at the Isolator, and that the majority of them were civilians, amongst which many women and elderly persons, who found themselves in the hands of a party to the armed conflict opposite to the party they were perceived to be aligned with (the Georgian Government), because of their perceived ethnic background. Therefore there are reasonable grounds to believe that the majority of the aforementioned persons were protected persons under the Fourth Geneva Convention of 1949 (the ‘Fourth Geneva Convention’).¹⁰⁵²

544. In the absence of jurisprudence, it remains to be clarified whether taking of hostages in the ICC framework would also be considered applicable to protected persons other than civilians within the meaning of the [Geneva Convention IV](#). In any event, under customary international law the war crime of hostage taking, whether in international or non-international armed conflict, is not confined to civilians and can be applicable to any person protected by the Geneva Conventions,¹⁰⁵² including prisoners of war.¹⁰⁵³ In the *Karadzic* case, the ICTY Appeals Chamber recalled “the absolute prohibition of taking hostage of any person taking no active part in hostilities as well as detained individuals irrespective of their status prior to detention”.¹⁰⁵⁴ Commentators also suggest that the prohibition of hostage-taking applies to “all persons in the power of an adverse party”.¹⁰⁵⁵

c. Definition of taking of hostages (Subjective Elements)¹⁰⁵⁶

545. The subjective elements of this offence are: (1) the perpetrator intended to compel a State, an international organisation, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the

¹⁰⁵² ICRC, IHL Database, Customary IHL, [Rule 96. Hostage-taking](#) (“Although the prohibition of hostage-taking is specified in the Fourth Geneva Convention and is typically associated with the holding of civilians as hostages, there is no indication that the offence is limited to taking civilians hostage. Common Article 3 of the Geneva Conventions, the Statute of the International Criminal Court and the International Convention against the Taking of Hostages do not limit the offence to the taking of civilians, but apply it to the taking of any person. Indeed, in the Elements of Crimes for the International Criminal Court, the definition applies to the taking of any person protected by the Geneva Conventions.”). See also ICTY, *Kordic and Cerkez Trial Judgement*, para. 825 (“Taking of civilians as hostages (Article 2)/taking of hostages (Article 3): As with wilful killing/murder, the elements of these two offences are similar except for the requirement that the victims be protected persons contained in Article 2; therefore where all the elements of the offences are proved, an accused should be convicted of taking civilians as hostages under Article 2 of the Statute”) (footnotes omitted).

¹⁰⁵³ ICTY, *Karadzic Appeal Decision on Hostage-Taking*, para. 21 (“[T]he Appeals Chamber considers that the prohibition of hostage-taking cannot be considered as extraneous to the Third Geneva Convention. [...] [T]he protection of POWs is covered by an extensive net of provisions within the Third Geneva Convention which, read together, lead to the conclusion that any conduct of hostage-taking involving POWs could not but be in violation of the Third Geneva Convention”).

¹⁰⁵⁴ ICTY, *Karadzic Appeal Judgement*, para. 659; [ICRC Commentary to the Geneva Convention IV](#), p. 231 (indicating that Article 34 of the Geneva Convention IV, “coming at the very end of the provisions common to the four Conventions, is absolute in character.”).

¹⁰⁵⁵ [Additional Protocol I](#), Article 75(1); Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 352, para. 171, including fn. 229.

¹⁰⁵⁶ This section details the subjective elements for this war crime as detailed under international law. However, the general part of the CCU identifies subjective elements that apply to crimes. See Articles 23, 24 and 25 of the CCU. It will be necessary to consider the relevance of the subjective elements in the general part of the CCU when considering the elements of this crime as applied under Article 438 of the CCU.

release of person or persons; and (2) the perpetrator was aware of the factual circumstances that established the protected status of persons.¹⁰⁵⁷

546. **Specific intent – the perpetrator intended to compel a State, an international organisation, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of a person or persons.** In addition to the *mens rea* standard provided in Article 30 of the ICC Statute, this offence requires the specific intent to compel a State, an international organisation, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of person or persons.¹⁰⁵⁸ The threat to kill, injure or continue to detain hostages must be “coupled with the compulsion”,¹⁰⁵⁹ and “such a threat must be intended as a coercive measure to achieve the fulfilment of a condition”.¹⁰⁶⁰ This specific intent distinguishes the taking of hostages from the deprivation of someone’s liberty as an administrative or judicial measure.¹⁰⁶¹

547. The perpetrator may develop this specific intent at a later stage.¹⁰⁶²

SCSL, *SESAY ET AL. APPEAL JUDGEMENT*, PARA. 597 (FOOTNOTES OMITTED)

As a matter of law, the requisite intent may be present at the moment the individual is first detained or may be formed at some time thereafter while the persons were held. In the former instance, the offence is complete at the time of the initial detention (assuming all the other elements of the crime are satisfied); in the latter, the situation is transformed into the offence of hostage-taking the moment the intent crystallises (again, assuming the other elements of the crime are satisfied).

¹⁰⁵⁷ [ICC Elements of Crimes](#), Article 8(2)(a)(viii); [ICC Statute](#), Article 30.

¹⁰⁵⁸ ICTY *Karadzic Trial Judgement*, para. 468; ICTY, *Kordic and Cerkez Trial Judgement*, para. 313; SCSL, *Sesay et al. Trial Judgement*, para. 243 (in relation to the offence of taking of hostages in the context of non-international armed conflict but the consideration may also apply *mutatis mutandis* to the present crime); Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, paras 596 (referring to a coercive intent), 1349.

¹⁰⁵⁹ SCSL, *Sesay et al. Appeal Judgement*, para. 598 (in relation to the offence of taking of hostages in the context of non-international armed conflict but the consideration may also apply *mutatis mutandis* to the present crime).

¹⁰⁶⁰ ICTY, *Kordic and Cerkez Trial Judgement*, para. 313; SCSL, *Sesay et al. Trial Judgement*, para. 243 (in relation to the offence of taking of hostages in the context of non-international armed conflict but the consideration may also apply *mutatis mutandis* to the present crime).

¹⁰⁶¹ ICRC, IHL Database, Customary IHL, [Rule 96. Hostage-taking](#).

¹⁰⁶² SCSL, *Sesay et al. Appeal Judgement*, para. 597 (in relation to the offence of taking of hostages in the context of non-international armed conflict but the consideration may also apply *mutatis mutandis* to the present crime); ICTY *Karadzic Trial Judgement*, para. 468 (“The *mens rea* required for hostage-taking is the intention to compel a third party to act or refrain from acting as a condition for the release of the detained persons. Because the essential feature of the offence of hostage taking is the use of a threat to detainees to obtain a concession or gain an advantage, which may happen at any time during the detention, the requisite intent may be formed at the time of the detention or it may be formed at some later time, after the person has been detained”) (footnotes omitted); Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 353, para. 179.

548. This subjective element may include the intention, such as to use the civilian detainees “as a bargaining tool in negotiations” and to hold them “in order to use them for exchanges”.¹⁰⁶³
549. As to the intention “to compel a State”, for example, the ICC Pre-Trial Chamber I in the Situation of Georgia has found that “there [were] reasonable grounds to believe that detaining and threatening to continue to detain the protected persons in order to compel the Georgian authorities to release Ossetian convicts amount[ed] to the crime of hostage-taking pursuant to Article 8(2)(a)(viii) of the Statute”.¹⁰⁶⁴
550. **The perpetrator was aware of the factual circumstances that established the protected status of persons.** The perpetrator must also be aware of the protected status of the victim. Awareness of the protected status does not mean that the perpetrator must have evaluated and concluded that the victim was a protected person under any of the four Geneva Conventions. What matters is the factual circumstances that establish that status.¹⁰⁶⁵

d. Contextual Elements

551. In addition, as with all war crimes, it is necessary to demonstrate the following contextual elements:
- i. There was an international armed conflict;¹⁰⁶⁶
 - ii. The conduct took place in the context of and was associated with an international armed conflict;¹⁰⁶⁷ and
 - iii. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.¹⁰⁶⁸

¹⁰⁶³ ICC, *Mindzaev Arrest Warrant*, para. 31 (“[T]he Chamber finds that there are reasonable grounds to believe that the detainees were used as a bargaining tool in the negotiations. In addition, the Chamber recalls that the intention to hold civilian prisoners in order to use them for exchanges already seems to have been present at the moment of the arrests.”); ICC, *Guchmazov Arrest warrant*, para. 30; ICC, *Sanakoev Arrest Warrant*, para. 19.

¹⁰⁶⁴ ICC, *Mindzaev Arrest Warrant*, para. 32; ICC, *Guchmazov Arrest warrant*, para. 31; ICC, *Sanakoev Arrest Warrant*, para. 20.

¹⁰⁶⁵ Cf. ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, paras 297 (“article 8(2)(a)(i) of the Statute also requires that the perpetrator is ‘aware of the factual circumstances that established that protected status’ of the victim. Thus, it is not necessary for the perpetrator to have evaluated and concluded that the victim was in fact a protected person under any of the Geneva Conventions.” Element 3 of which applies equally to taking of hostages under Article 8(2)(a)(viii).), 305 (“the war crime of wilful killing provided for in article 8(2)(a)(i) of the Statute also requires that the perpetrator is ‘aware of the factual circumstances that established that protected status’ of the victim. Thus, it is not necessary for the perpetrator to have made the necessary value judgement to conclude that the victim did in fact have protected status under any of the 1949 Geneva Conventions.” Element 3 of which applies equally to taking of hostages under Article 8(2)(a)(viii).). Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, para. 578.

¹⁰⁶⁶ See above, paras 188-189.

¹⁰⁶⁷ See above, paras 190-198. See also *ICC Elements of Crimes*, Article 8(2)(a)(viii).

¹⁰⁶⁸ See above, para. 199. See also *ICC Elements of Crimes*, Article 8(2)(a)(viii).

- xii. The transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory (ICC Statute, Article 8(2)(b)(viii))

552. The offense includes two separate culpable acts with distinctive objective and subjective elements, namely: (1) the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies; and (2) the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory. The present section will analyse the above acts separately.

- a. Transfer by the Occupying Power of parts of its own civilian population into the territory it occupies (ICC Statute, Article 8(2)(b)(viii), in part)

APPLICABILITY: THE TRANSFER BY THE OCCUPYING POWER OF PARTS OF ITS OWN CIVILIAN POPULATION INTO THE TERRITORY IT OCCUPIES CAN BE CONSIDERED CRIMINALISED UNDER ARTICLE 438(1) OF THE CCU, AS IT IS SUBSUMED UNDER THE NOTION OF “OTHER VIOLATIONS OF RULES OF THE WARFARE RECOGNISED BY INTERNATIONAL INSTRUMENTS CONSENTED TO BY BINDING BY THE VERKHOVNA RADA (PARLIAMENT) OF UKRAINE” (PARAS 553-556).

Elements of the crimes: To convict a perpetrator for this offence the following elements need to be established:

(1) Objective elements

- The perpetrator transferred, directly or indirectly, parts of its own population into the territory it occupies (paras 557-563).

(2) Subjective elements

- The perpetrator willfully transferred, directly or indirectly, part of its own civilian population into the territory it occupies (para. 564).

(3) Contextual elements

- There is an international armed conflict (para. 565).
- The conduct of the perpetrator took place in the context and was associated the conflict (para. 565).
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict (para. 565).

i. Applicability under Article 438

553. “The transfer by the Occupying Power of parts of its own civilian population into the territory it occupies” may be subsumed within “any other violations of rules of warfare recognised by international instruments consented to be binding by the

Verkhovna Rada of Ukraine” which Article 438(1) refers. As explained below, the offence is prohibited under international instruments ratified by Ukraine. Moreover, violation of this prohibition has been recognised as a war crime. These factors support interpreting Article 438 of the CCU as criminalising violations of this IHL prohibition.

554. **The transfer by the Occupying Power of parts of its own civilian population into the territory it occupies is a serious violation of the laws of warfare recognised in international treaties ratified by Ukraine.** The offence is prohibited under international treaties ratified by Ukraine, as a violation of Geneva Convention IV, Article 49(6), which has been recognised as a grave breach of [Additional Protocol I](#), under Article 85(4)(a).¹⁰⁶⁹ The ICRC identifies this prohibition as part of customary international law.¹⁰⁷⁰ Ukraine is a State Party to Additional Protocol I.¹⁰⁷¹ Therefore, for the purposes of Article 438 of the CCU, the prohibition against the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies is a violation of the laws of warfare recognised in an international instrument accepted as binding by the Ukrainian parliament.
555. **Recognition as a war crime.** As a grave breach of Additional Protocol I, the violation by an Occupying Power of the prohibition to transfer parts of its own civilian population into the territory it occupies qualifies as a war crime in international armed conflict.¹⁰⁷² Likewise, the ICRC recognises such a violation as a war crime.¹⁰⁷³ In addition, Article 8(2)(b)(viii) of the [ICC Statute](#) codifies the violation of the prohibition of transfer by the Occupying Power of parts of its own civilian population into the territory it occupies as a war crime in international armed conflict.
556. These factors support recognition of the criminalisation of transfer by the Occupying Power of parts of its own civilian population into the territory it occupies under Article 438 of the CCU.

ii. Transfer by the Occupying Power of parts of its own civilian population into the territory it occupies (Objective Elements)

557. The [ICC Elements of Crimes](#) articulate a single objective element vis-à-vis this crime, that is: the perpetrator transferred, directly or indirectly, parts of its own population into the territory it occupies.¹⁰⁷⁴ The analysis below will address this element into its main components, namely: (1) the existence of an occupation; (2) the perpetrator/the Occupying Power; (3) transfer into an occupied territory; (4) directly or indirectly; and (5) parts of Occupied Power’s own population.

¹⁰⁶⁹ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 406, paras 370-371; Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, p. 513, para. 1358; Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, p. 210.

¹⁰⁷⁰ ICRC, IHL Database, Customary Law, [Rule 130. Transfer of Own Civilian Population into Occupied Territory](#).

¹⁰⁷¹ Ukraine ratified/acceded to Geneva Convention IV on 3 August 1954 and Additional Protocol I on 25 January 1990. See ICRC, *Treaties and States Parties*, [Ukraine](#).

¹⁰⁷² [Additional Protocol I](#), Article 85(4)(a).

¹⁰⁷³ ICRC, IHL Database, Customary Law, [Rule 156. Definition of War Crimes](#).

¹⁰⁷⁴ [ICC Elements of Crimes](#), Article 8(2)(b)(xiii).

558. **Existence of an occupation.** As for the offence of transfer by the Occupying Power of parts of its own civilian population into the territory it occupies,¹⁰⁷⁵ the offence is predicated on the existence of an occupation, namely when a given “territory is placed under the effective control of a foreign State’s army and extends only to the territory where such control has been established and can be exercised.”¹⁰⁷⁶
559. **The perpetrator as the Occupying Power.** While Article 8(2)(b)(viii) appears to mention the “Occupying Power” as the main offender for this crime, the ICC Elements of Crimes do not include such reference referring to the “perpetrator”. However, the language of the ICC Elements of Crimes (“*its own population*” or “*territories it occupies*”)¹⁰⁷⁷ suggests that the “perpetrator” identifies with the notion of “Occupying Powers”. As noted below, the offence includes the criminalisation of the involvement of an Occupying Power and its agents to transfer or facilitate the transfer of its civilian population.¹⁰⁷⁸
560. **Transfer into occupied territory.** According to commentators, “transfer” within the meaning of Article 8(2)(b)(viii) refers to a physical displacement of a “certain duration”. Displacement that take place for a limited amount of time (“tourist visa” type) does not meet the objective elements of the crime.¹⁰⁷⁹ This is because the relevant rationale of the crime is to prohibit any attempts to change the demographic composition of an occupied territory to consolidate its territorial claims.¹⁰⁸⁰ In addition, it is irrelevant whether the transfer is forced or voluntary, as the provision aims at protecting the population of the occupied territory.¹⁰⁸¹ However, to fall within the scope of the crime when voluntary, the transfer(s) need to occur with at least some involvement of the Occupying Power.¹⁰⁸² Lastly, the transfer needs to occur within a territory under occupation.
561. **Directly or indirectly.** According to the formulation of the offence under Article 8(2)(b)(viii) and the ICC Elements of the Crimes, the form of involvement of the Occupying Power in the transfer may be *direct or indirect*. This reference includes in the scope of the offence also transfers that occur with the encouragement, or direct and indirect support of the State, or its agents, as “policies and measures to induce and facilitate

¹⁰⁷⁵ See above, para. 557.

¹⁰⁷⁶ [Hague Regulations 1907](#), Article 42; ICJ, [Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory](#), paras 78-79; [ICRC Commentary on Geneva Convention III \(2020\)](#), Common Article 2, para. 336. See above [Introduction – Sources of Law: IHL, IHRL and ICL, I.B.2.b](#)) and paras 188-199.

¹⁰⁷⁷ [ICC Elements of Crimes](#), Article 8(2)(b)(xiii) (The perpetrator transferred, directly or indirectly, parts of *its own population* into the territory *it occupies*) (emphasis added).

¹⁰⁷⁸ See Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 410, para. 382; Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, p. 211.

¹⁰⁷⁹ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, pp 409-410, para. 378.

¹⁰⁸⁰ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 407, para. 372; Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, p. 513, para. 1359.

¹⁰⁸¹ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 410, para. 381; Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, pp 513-514, para. 1359.

¹⁰⁸² Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, pp 410-411, para. 382.

migration into occupied territories such as economic and financial incentives, subsidies, and tax exonerations.”¹⁰⁸³ The addition of the reference “directly and indirectly” in Article 8(2)(2)(b)(viii) raised debate during the drafting phase of the ICC Statute as some States objected that it unduly expanded the offence beyond the parameters of the primary IHL rules, Article 49(6) of the [Geneva Convention IV](#).¹⁰⁸⁴ However, such objections have been, at least indirectly, rejected in the *Advisory Opinion on the Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory*, where the International Court of Justice concluded that Article 49 of [Geneva Convention IV](#) “prohibits not only deportations or forced transfers of the population such as those carried during the Second World War, but also measures taken by an occupying Power in order to organize or encourage the transfer of parts of its own population into the occupied territory.”¹⁰⁸⁵

562. A question remains on whether the state’s involvement can be qualified through omission, namely through failure to take steps to prevent the population from relocating to the occupied territory.¹⁰⁸⁶
563. **Parts of occupied Power’s own population.** In line with the rationale of the offence, this component specifically requires the persons transferred to belong to the same population of the Occupying Power.¹⁰⁸⁷ While this does not apply to the displacement of armed forces in the occupied territory to be in charge of “military tasks” does not fulfil this element, commentators have suggested that the permanent relocation of elements of armed forces with their families in an occupied territory would qualify under Article 8(2)(b)(viii).¹⁰⁸⁸ Importantly, an exception provided in Article 78 of [Additional Protocol I](#) allows for the transfer of children to occupied territories for health and medical reasons.¹⁰⁸⁹ Further, according to some commentators, the explicit reference to “parts of its own civilian population” in the ICC Statute and ICC Elements of the Crimes¹⁰⁹⁰ suggests a quantitative threshold excluding from the scope of the offence the transfer of a limited number of persons is excluded from the culpable conduct of the crime.¹⁰⁹¹

¹⁰⁸³ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 411, para. 383; Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, p. 514, para. 1360; Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, p. 211.

¹⁰⁸⁴ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, pp 407-408, paras 373.

¹⁰⁸⁵ ICJ, [Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory](#), para. 210.

¹⁰⁸⁶ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 411, para. 383.

¹⁰⁸⁷ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 410, para. 379.

¹⁰⁸⁸ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 410, para. 379.

¹⁰⁸⁹ [Additional Protocol I](#), Article 78; Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, p. 514, para. 1361.

¹⁰⁹⁰ [ICC Statute](#), Article 8(2)(b)(viii), [ICC Elements of the Crimes](#), Article 8(2)(b)(viii) (emphasis added).

¹⁰⁹¹ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 410, para. 380; Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, p. 212. But see *contra* Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, p. 513, para. 1359.

iii. Transfer by the Occupying Power of parts of its own civilian population into the territory it occupies (Subjective Elements)¹⁰⁹²

564. The *mens rea* element of the offence requires the perpetrator/Occupying Power to willfully transfer, directly or indirectly, part of its own civilian population into the territory it occupies. According to commentators, the reference to “wilful” in Article 85(4)(a) of [Additional Protocol I](#), appears to indicate that indirect intent or *dolus eventualis* might be sufficient.¹⁰⁹³ This lower *mens rea* standard is of specific relevance in the case of indirect transfer.¹⁰⁹⁴

iv. Contextual elements

565. In addition, as with all war crimes, it is necessary to demonstrate the following contextual elements:

- i. There was an international armed conflict;¹⁰⁹⁵
- ii. The conduct took place in the context of and was associated with an international armed conflict;¹⁰⁹⁶ and
- iii. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.¹⁰⁹⁷

¹⁰⁹² This section details the subjective elements for this war crime as detailed under international law. However, the general part of the CCU identifies subjective elements that apply to crimes. See Articles 23, 24 and 25 of the CCU. It will be necessary to consider the relevance of the subjective elements in the general part of the CCU when considering the elements of this crime as applied under Article 438 of the CCU.

¹⁰⁹³ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 410, para. 380; Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, p. 514, para. 1362.

¹⁰⁹⁴ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 410, para. 380; Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, p. 514, para. 1362.

¹⁰⁹⁵ See above, paras [188-189](#).

¹⁰⁹⁶ See above, paras [190-198](#). See also [ICC Elements of Crimes](#), Article 8(2)(b)(viii).

¹⁰⁹⁷ See above, para. [199](#). See also [ICC Elements of Crimes](#) Article 8(2)(b)(viii).

- b. Deportation or transfer of all or parts of the population of the occupied territory within or outside this territory (ICC Statute, Article 8(2)(b)(viii), in part)

APPLICABILITY: DEPORTATION OR TRANSFER OF ALL OR PARTS OF THE POPULATION OF THE OCCUPIED TERRITORY WITHIN OR OUTSIDE THIS TERRITORY CAN BE CONSIDERED CRIMINALISED UNDER ARTICLE 438(1) OF THE CCU, AS IT IS SUBSUMED UNDER THE NOTION OF “OTHER VIOLATIONS OF RULES OF THE WARFARE RECOGNISED BY INTERNATIONAL INSTRUMENTS CONSENTED TO BY BINDING BY THE VERKHOVNA RADA (PARLIAMENT) OF UKRAINE” OR IN PART UNDER “DEPORTATION OF CIVILIAN POPULATION FOR FORCED LABOR” (PARAS 566-570).

Elements of the crimes: To convict a perpetrator for this offence the following elements need to be established:

(1) Objective elements

- The perpetrator deported or transferred all or parts of the population of the occupied territory within or outside this territory (paras 571-578).

(2) Subjective elements

- The perpetrator intentionally deported/transferred all or parts of the population of the occupied territory within or outside the occupied territory (para. 579); or
- The perpetrator acted with the awareness that such deportation will result from their acts and conduct (para. 579).

(3) Contextual elements

- There is an international armed conflict (para. 560).
- The conduct of the perpetrator took place in the context and was associated the conflict (para. 560).
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict (para. 560).

i. Applicability under Article 438

566. “Deportation or transfer of all or parts of the population of the occupied territory within or outside this territory” may be subsumed within “any other violations of rules of warfare recognised by international instruments consented to be binding by the Verkhovna Rada of Ukraine” and in part, by “deportation of civilian population for forced labor” to which Article 438(1) refers.¹⁰⁹⁸ As explained below, the offence is

¹⁰⁹⁸ At least in part, the offence may be also subsumed also under “deportation of civilian population for forced labor” as a specific act criminalised in Article 438. However, it is important to note that the war crime of “Deportation or transfer of all or parts of the population of the occupied territory within or outside this territory” does not require any link or connection with forced labor.

prohibited under international instruments ratified by Ukraine. Moreover, violation of this prohibition has been recognised as a war crime. These factors support interpreting Article 438 of the CCU as criminalising violations of this IHL prohibition.

567. **Deportation or transfer of all or parts of the population of the occupied territory within or outside this territory is a serious violation of the laws of warfare recognised in international treaties ratified by Ukraine.** The offence is prohibited under international treaties ratified by Ukraine, as a violation of [Geneva Convention IV](#), Article 49(1)-(5), which has been recognised as a grave breach under Article 147, and [Additional Protocol I](#), under Article 85(4)(a).¹⁰⁹⁹ The ICRC identifies this prohibition as part of customary international law.¹¹⁰⁰ Ukraine is a State Party to Additional Protocol I.¹¹⁰¹ Therefore, for the purposes of Article 438 of the CCU, the prohibition against deportation or transfer of all or parts of the population of the occupied territory within or outside this territory is a violation of the laws of warfare recognised in an international instrument accepted as binding by the Ukrainian parliament.
568. **Deportation or transfer of all or parts of the population of the occupied territory within or outside this territory as covered, in part, by “deportation of civilian population for forced labor” under article 438 of the CCU.** As noted below, the war crime includes acts of displacement outside or within a State’s territory.¹¹⁰² Thus, at least in part, the offence can also be subsumed under “deportation of civilian population for forced labor” identified as a specific offence under Article 438 of the CCU. However, differently from the specific domestic offence under Article 438, the war crime does not require any link or connection with forced labour.
569. **Recognition as a war crime.** As a grave breach of Geneva Convention IV and Additional Protocol I, the violation of the prohibition of deportation or transfer of all or parts of the population of the occupied territory within or outside this territory qualifies as a war crime in international armed conflict.¹¹⁰³ Likewise, the ICRC recognises such a violation as a war crime.¹¹⁰⁴ In addition, Article 8(2)(b)(viii) of the [ICC Statute](#) codifies the violation of the prohibition of deportation or transfer of all or parts of the population of the occupied territory within or outside this territory as a war crime in international armed conflict.¹¹⁰⁵ To a certain extent, the offence was also codified under Article 6(b) of the [Nuremberg Charter](#), which included as a war crime “deportation to slave labour or for any other purpose of civilian population of or in occupied territory”.¹¹⁰⁶ The underlying crime is also a specification of the war crime of “unlawful deportation or transfer” listed as a war crime under Article 8(2)(a)

¹⁰⁹⁹ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 406, paras 370-371; Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, p. 513, para. 1358; Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, p. 210.

¹¹⁰⁰ ICRC, IHL Database, Customary Law, [Rule 129. The Act of Displacement](#).

¹¹⁰¹ Ukraine ratified/acceded to Geneva Convention IV on 3 August 1954 and Additional Protocol I on 25 January 1990. See ICRC, *Treaties and States Parties*, [Ukraine](#).

¹¹⁰² See below para. 573.

¹¹⁰³ [Geneva Convention IV](#), Article 147; [Additional Protocol I](#), Article 85(4)(a).

¹¹⁰⁴ ICRC, IHL Database, Customary Law, [Rule 156. Definition of War Crimes](#).

¹¹⁰⁵ [ICC Statute](#), Article 8(2)(b)(viii).

¹¹⁰⁶ [Charter of the International Military Tribunal of Nuremberg](#), Article 6(b).

(vii) of the [ICC Statute](#) and article 2(g) of the [ICTY Statute](#) applicable to international armed conflicts.¹¹⁰⁷

570. These factors support recognition of the criminalisation of the offence under Article 438 of the CCU.

ii. **Deportation or transfer of all or parts of the population of the occupied territory within or outside this territory (Objective Elements)**

571. The [ICC Elements of Crimes](#) articulate a single objective element vis-à-vis this crime, that is: the perpetrator deported or transferred all or parts of the population of the occupied territory within or outside this territory.¹¹⁰⁸ The analysis below will address this element with respect to its main components, namely: (1) the existence of an occupation; (2) deportation or transfer within or outside an occupied territory; and (3) parts of the population of the occupied territory.

572. **Existence of an occupation.** As for the offence of transfer by the Occupying Power of parts of its own civilian population into the territory it occupies,¹¹⁰⁹ the offence is predicated on the existence of an occupation, namely when a given “territory is placed under the ‘effective control of a foreign State’s army and extends only to the territory where such control has been established and can be exercised.’”¹¹¹⁰

573. **Deportation or transfer (within or outside the occupied territory).** The [ICC Elements of Crimes](#) distinguish two types of culpable conduct: “deportation” and “transfer”. ICTY jurisprudence has clarified that “deportation” indicates the displacement of individuals outside the state borders, while “transfer” is confined to relocations that occur within the state borders.¹¹¹¹ Additionally, in *Prlic et al.*, the Appeals Chamber concluded that within the context of an occupation, the displacement outside the occupied territory qualifies as “deportation” as the transfer occurred beyond the *de facto* borders of the Occupying Power.¹¹¹² In any event, besides the semantic difference the criminalisation of both transfer and deportation cover displacement within and outside the occupied territory. Importantly, the transfer or deportation must be

¹¹⁰⁷ [ICC Statute](#), Article 8(2)(a)(vii) (“unlawful deportation or transfer or unlawful confinement”); ICTY Statute, Article 2(e) (“unlawful deportation or transfer or unlawful confinement of a civilian”). See also Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, pp 411-412, para. 386; Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, p. 212.

¹¹⁰⁸ [ICC Elements of Crimes](#), Article 8(2)(b)(xiii).

¹¹⁰⁹ See above, para. 557.

¹¹¹⁰ [Hague Regulations 1907](#), Article 42; ICJ, [Construction of a Wall Advisory Opinion](#), paras 78-79; ICJ, [Armed Activities Judgement](#), para. 172; [ICRC Commentary on Geneva Convention III \(2020\)](#), Common Article 2, para. 336. See above, [Introduction – Sources of Law: IHL, IHRL and ICL, I.B.2.b](#) and paras 188-199.

¹¹¹¹ See above, para. 573. Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, p. 510, para. 1351.

¹¹¹² ICTY *Prlic et al Appeal Judgement*, Vol I of III, para. 300 (“At the outset, the Appeals Chamber recalls that Article 49 of Geneva Convention IV applies to instances of displacement across the *de facto* borders of an occupied territory.’ In the *Stakic* case, the Appeals Chamber held that ‘the *actus reus* of deportation is the forced displacement of persons by expulsion or other forms of coercion from the area in which they are lawfully present, across a *de jure* state border or, in certain circumstances, a *de facto* border, without grounds permitted under international law”) (footnotes omitted).

forced, coerced or at least involuntary.¹¹¹³ Distinct from the crime against humanity of deportation/forcible transfer under Article 7(1)(d) of the ICC Statute, the offence does not require the person/victim to be legally residing in the territory from where he or she is displaced.¹¹¹⁴

574. Under Geneva Convention IV, the deportation or transfer of civilians may be justified in exceptional circumstances which do not fall within the scope of the offence. This may occur in the following cases.

575. *Evacuation for imperative military reasons.* The transfer/deportation of persons of occupied territories may be permitted when *imperative military reasons* require the evacuation of certain areas to protect the security of the population (Article 49(2) of Geneva Convention IV).¹¹¹⁵ The evacuation may be allowed when “an area is in danger as a result of military operations or is liable to be subjected to intense bombing” or if “the presence of protected persons in an area hampers military operations”.¹¹¹⁶ According to commentators, the reference to “a given area” contained in Article 49(2) of [Geneva Convention IV](#) suggests that only a specific, geographically limited area may be evacuated.¹¹¹⁷ Furthermore, in light of the exceptional and provisional nature of that measure, as soon as the hostilities have ceased in that area, the evacuated population must be transferred back immediately.¹¹¹⁸

576. *Relocation within the occupied territory of individuals for the purpose of serving their sentences.* Within occupied territories, it is permissible to detain individuals (protected persons) in other areas other than their residences for the purpose of serving their sentences (Articles 70(2) and 76 of [Geneva Convention IV](#)).¹¹¹⁹ However, in detention-related cases it is not allowed to displace individuals outside the occupied territory. Article 76(1) of [Geneva Convention IV](#) specifically stipulates that “protected persons accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein”.¹¹²⁰

¹¹¹³ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 414, para. 398; Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, p. 510, para. 1351.

¹¹¹⁴ Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, pp 510-511, para. 1351.

¹¹¹⁵ See also Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 415, para. 404; Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, p. 512, para. 1352; Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, p. 212.

¹¹¹⁶ [ICRC Commentary on Geneva Convention IV \(1958\), p. 280](#); Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 415, para. 404.

¹¹¹⁷ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 415, para. 404.

¹¹¹⁸ [ICRC Commentary on Geneva Convention IV \(1958\)](#), pp 280-281; Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, p. 512, para. 1352; Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, p. 213.

¹¹¹⁹ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 416, para. 406.

¹¹²⁰ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 416, para. 405.

577. **Parts of the population of the occupied territory.** Article 8 para 2 (b)(viii) of the [ICC Statute](#) and the relevant [ICC Elements of Crimes](#) do not specify whether the victims of the offence need to be civilians. The reference to protected persons in Article 49(1) of the [Geneva Convention IV](#) seems to exclude that the displacement of individuals outside this category could fall within the scope of the offence. However, some commentators have considered that the term “population” within Article 8 para 2 (b)(viii) of the [ICC Statute](#) and the relevant [ICC Elements of Crimes](#) could be construed to cover also deportation/transfer of non-civilians.¹¹²¹

578. Moreover, some commentators argued that the reference to “parts of the civilian population” in the [ICC Statute](#) and [ICC Elements of the Crimes](#)¹¹²² excludes the criminalisation of individual transfers or deportations.¹¹²³ The same commentators, however, suggest that the deportation/displacement of a small number of persons might, in any case, be sufficient.¹¹²⁴

iii. Deportation or transfer of all or parts of the population of the occupied territory within or outside this territory (Subjective Elements) 1125

579. Following Article 30 of the [ICC Statute](#), the *mens rea* element of the offence requires the perpetrator either to: (1) intentionally deport/transfer all or parts of the population of the occupied territory within or outside the occupied territory; or (2) to act with the awareness that such deportation will result from their acts and conduct. The offence does not require specific intent.¹¹²⁶ According to commentators, the reference to “wilful” in Article 85(4)(a) of [Additional Protocol I](#), appears to indicate that indirect intent or *dolus eventualis* might be sufficient.¹¹²⁷

iv. Contextual elements

580. In addition, as with all war crimes, it is necessary to demonstrate the following contextual elements:

- i. There was an international armed conflict;¹¹²⁸

¹¹²¹ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, pp 414-415, para. 401.

¹¹²² ICC Statute, Article 8(2)(b)(viii), ICC Elements of the Crimes, Article 8(2)(b)(viii) (emphasis added).

¹¹²³ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 415, para. 402; Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, p. 212. But see *contra* Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, p. 510, para. 1351.

¹¹²⁴ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 415, para. 402.

¹¹²⁵ This section details the subjective elements for this war crime as detailed under international law. However, the general part of the CCU identifies subjective elements that apply to crimes. See Articles 23, 24 and 25 of the CCU. It will be necessary to consider the relevance of the subjective elements in the general part of the CCU when considering the elements of this crime as applied under Article 438 CCU.

¹¹²⁶ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 416, para. 408.

¹¹²⁷ Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, p. 511, para. 1353.

¹¹²⁸ See above, paras 188-189.

- ii. The conduct took place in the context of and was associated with an international armed conflict;¹¹²⁹ and
- iii. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.¹¹³⁰

¹¹²⁹ See above, paras 190-198. See also [ICC Elements of Crimes](#), Article 8(2)(b)(viii).

¹¹³⁰ See above, para. 199. See also [ICC Elements of Crimes](#) Article 8(2)(b)(viii).

a) War Crimes against Property

- i. Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly (ICTY Statute, Article 2(d); ICC Statute, Article 8(2)(a)(iv))

APPLICABILITY: EXTENSIVE DESTRUCTION AND APPROPRIATION OF PROPERTY, NOT JUSTIFIED BY MILITARY NECESSITY AND CARRIED OUT UNLAWFULLY AND WANTONLY CAN BE CONSIDERED CRIMINALISED UNDER ARTICLE 438(1) OF THE CCU, AS IT IS SUBSUMED UNDER THE NOTION OF “OTHER VIOLATIONS OF RULES OF THE WARFARE RECOGNIZED BY INTERNATIONAL INSTRUMENTS CONSENTED TO BY BINDING BY THE VERKHOVNA RADA (PARLIAMENT) OF UKRAINE”. (PARAS [581-584](#)).

Elements of the crimes: To convict a perpetrator for “Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” as a war crime the following elements need to be established:

(1) Objective elements

- The perpetrator destroyed or appropriated certain property (para. [586](#)).
- The destruction or appropriation was extensive and carried out wantonly (para. [587](#)).
- Such property was protected under the Geneva Conventions of 1949 (paras [588-590](#)).
- The destruction or appropriation was not justified by military necessity (para. [591-595](#)).

(2) Subjective elements

- With respect to the conduct of destruction of property, the perpetrator acted with the intent to destroy the protected property or in reckless disregard of the likelihood of its destruction (paras [596-598](#)).
- With respect to the conduct of appropriation of property, the perpetrator acted with the intent to appropriate the protected property (paras [596-598](#)).
- With respect to both conduct of destruction and appropriation the perpetrator was aware of the factual circumstances that established that protected status of the property (para. [599](#)).

(3) Contextual elements

- There is an international armed conflict (para. [600](#)).
- The conduct of the perpetrator took place in the context and was associated with the conflict (para. [600](#)).
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict (para. [600](#)).

a. Applicability under Article 438

581. Although not explicitly mentioned in Article 438 of the CCU, “extensive destruction and appropriation of property, not justified by military necessity and carried out

unlawfully and wantonly” may be subsumed within “any other violations of rules of warfare recognized by international instruments consented to be binding by the Verkhovna Rada of Ukraine” to which Article 438(1) refers. As explained below, the conduct is prohibited under international instruments ratified by Ukraine and the violation of this prohibition has been recognised as a war crime. These factors support interpreting Article 438 CCU as criminalising violations of this IHL prohibition.

582. **Extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly is a violation of the laws of warfare recognised in international treaties ratified by Ukraine.** Destruction and appropriation of property is prohibited under international treaties ratified by Ukraine, namely as a grave breach of the Geneva Conventions ([Geneva Convention I](#), Article 50; [Geneva Convention II](#), Article 51; [Geneva Convention IV](#), Article 147).¹¹³¹ The ICRC identifies this prohibition as part of customary international law.¹¹³² Therefore, for the purposes of Article 438 of the CCU, the prohibition against extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly is a violation of the laws of warfare recognised in an international instrument accepted as binding by the Ukrainian parliament.
583. **Recognition as a war crime.** As a grave breach of the Geneva Conventions, the violation of the prohibition of extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly qualifies as a war crime in international armed conflict.¹¹³³ Likewise, the ICRC recognises such a violation as a war crime.¹¹³⁴ In addition, article 6(b) the [Charter](#) of the International Military Tribunal of Nuremberg, Article 2(d) of the [ICTY Statute](#), and Article 8(2)(a) (iv) of the [ICC Statute](#) codified the violation of the prohibition of extensive destruction and appropriation of property as a war crime in international armed conflict.
584. These factors support recognition of the criminalisation of extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly under Article 438 of the CCU.

¹¹³¹ Ukraine ratified the Geneva Conventions, 1949 on 3 August 1954. See ICRC, *Treaties and States Parties*, [Ukraine](#). With respect to the protection of property, the grave breaches specified in the Geneva Conventions I, II, and IV have to be read in conjunction with the specific protected properties defined in each convention. See [Geneva Convention I](#), Articles 19, 33, 34, (fixed medical establishments and mobile medical units), 20 (hospital ships), 35 and 36 (means of medical transport, including medical aircraft); [Geneva Convention II](#), Articles 22, 24, 25, 33 (military hospital ships), 21 (neutral vessels assisting with the rescue effort), 23 (medical establishments ashore), 27 (coastal rescue craft and fixed coastal installations used exclusively by these craft for their humanitarian missions), 28 (sick-bays on warships), 38 and 39 (medical transports, including medical aircraft); [Geneva Convention IV](#), Articles 18 (civilian hospitals), 19, 21 and 22 (concerning the protection of medical transport for civilians), 33 (concerning protection against reprisals against protected persons and their property), 53 (concerning protection against the destruction by the Occupying Power of real/personal property of private persons or the occupied State), 57 (concerning protection against the permanent requisition by the Occupying Power of hospitals). See [ICRC Commentary on Geneva Convention I](#), paras 2928, 3035; [ICRC Commentary on Geneva Convention II](#), paras 3037, 3116; [ICRC Commentary on Geneva Convention IV](#), p. 597.

¹¹³² ICRC, IHL Database, Customary Law, [Rule 50. Destruction and Seizure of Property of an Adversary](#); [Rule 51. Public and Private Property in Occupied Territory](#).

¹¹³³ [Geneva Convention I](#), Articles 49, 50; [Geneva Convention II](#), Articles 50, 51; [Geneva Convention IV](#), Articles 146, 147.

¹¹³⁴ ICRC, IHL Database, Customary Law, [Rule 156. Definition of War Crimes](#).

b. Definition of extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly (Objective Elements)

585. According to the jurisprudence of the ICTY, the objective elements of this crime are: (1) the perpetrator destroyed or appropriated certain property; (2) the destruction or appropriation was extensive and carried out wantonly; (3) such property was protected under one or more of the Geneva Conventions of 1949; and (4) the destruction or appropriation was not justified by military necessity.¹¹³⁵ Albeit in a different order, the [ICC Elements of Crimes](#) list the same objective elements.¹¹³⁶

586. **The perpetrator destroyed or appropriated certain property.** The culpable conduct of destruction and appropriation can occur in different forms. Destruction may be fulfilled by “setting objects on fire, attacking or otherwise seriously damaging them”.¹¹³⁷ Depending on the facts of the case, partial destruction may be sufficient to qualify as an act of destruction.¹¹³⁸ Acts of appropriation has been defined as “the removal of something from the possession of an entitled person, for a not insignificant period of time, and against that person’s will or without his or her agreement.”¹¹³⁹ “Appropriation” does not require a formal, or definite, transfer of property.¹¹⁴⁰ The offense also covers appropriations motivated by self-interest and personal use.¹¹⁴¹

¹¹³⁵ ICTY, *Naletilic and Martinovic Trial Judgement*, para. 577 (“The Chamber considers that a crime under Article 2(d) of the Statute has been committed when: i) the general requirements of Article 2 of the Statute are fulfilled; ii) property was destroyed extensively; iii) the extensive destruction regards property carrying general protection under the Geneva Conventions of 1949, or; the extensive destruction not absolutely necessary by military operations regards property situated in occupied territory”).

¹¹³⁶ [ICC Elements of Crimes](#), Article 8(2)(a)(iv) (“1. The perpetrator destroyed or appropriated certain property. 2. The destruction or appropriation was not justified by military necessity. 3. The destruction or appropriation was extensive and carried out wantonly. 4. Such property was protected under one or more of the Geneva Conventions of 1949.”).

¹¹³⁷ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 340, para. 118; Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, p. 83. See also ICC, *Katanga Trial Judgement*, para. 894 (“Destruction entails acts such as setting ablaze, demolishing, or otherwise damaging property”) (in relation to the offence of “Destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of the conflict” in non-international armed conflict under Article 8(2)(e)(xii), the consideration may also apply *mutatis mutandis* to the present crime).

¹¹³⁸ ICC, *Katanga Trial Judgement*, para. 894 (“the Chamber considers that badly damaged property may be akin to partial destruction and thus fall under the definition of destruction”) (in relation to the offence of “Destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of the conflict” in non-international armed conflict under Article 8(2)(e)(xii), the consideration may also apply *mutatis mutandis* to the present crime). See also Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, pp 526, 1393.

¹¹³⁹ Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, p. 520, paras 1379-1380. See also Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, pp 340-341, para. 118 (defining appropriation as any conduct that involves the dispossession of an object or property as “taking, obtaining or withholding property, theft, requisition, plunder, spoliation or pillage”); Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, p. 83.

¹¹⁴⁰ Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, p. 83.

¹¹⁴¹ ICTY, *Prlic et al. Trial Judgement*, Vol. I of VI, para. 129 (“The prohibition on the unlawful and wanton seizure of property [...] covers both organised and systematic confiscations and acts of appropriation committed by soldiers acting in self-interest.”) (footnotes omitted).

587. **The destruction or appropriation was extensive and carried out wantonly.** This offence requires a specific threshold for the criminalisation of the destruction or appropriation as a crime, namely that it is carried out in an extensive and wanton manner.¹¹⁴² According to the jurisprudence of the ICTY, the “extensiveness” requirement needs to be assessed in concrete terms on a case-by-case basis.¹¹⁴³ In some cases a single incident of destruction/appropriation may qualify as extensive (e.g. the destruction of a hospital).¹¹⁴⁴

CASE STUDY: EXAMPLES OF DESTRUCTION/APPROPRIATION OF PROPERTY FOUND TO BE EXTENSIVE IN CHARACTER (PRLIC ET AL. TRIAL JUDGEMENT, VOL. III OF VI)

- “As the Chamber established, between 24 and at least 30 October 1992, when there were no combat activities, HVO soldiers and members of the HVO Military Police destroyed about 75 Muslim houses in the town of Prozor that they burned down using jerry cans filled with gasoline and destroyed other property such as vehicles belonging to Muslims, whereas not one of the houses belonging to Croats was burned down or damaged. [...] In view of the number of properties burned down or destroyed within a few days, the Chamber finds that the destruction was extensive.”¹¹⁴⁵
- “The Chamber also established that on 17 April 1993, after occupying the village of Parcani – where there were no ABiH military units –, the Military Police and members of HVO special units, in cooperation with the Rama Brigade, set fire to nine Muslim houses out of a total of about 26 houses on the ground that the people hiding in the woods did not respond to the HVO order to surrender their weapons. [...] Since the Chamber found that on 17 April 1993, nine out of the 26 houses in the village of Parcani were destroyed, it considers that the destruction was extensive.”¹¹⁴⁶
- “As the Chamber established, during their operations to expel the Muslims from the village of Borojevići at the end of July 1993, HVO soldiers, after taking over the village, burned and destroyed many houses of Muslims living in the village of Borojevići. The Chamber finds that HVO soldiers destroyed real property belonging to Muslim villagers, who were private persons. [...] The Chamber is also satisfied that the destruction of such property on the scale of an entire village such as Borojevići was extensive.”¹¹⁴⁷

588. **Such property was protected under one or more of the Geneva Conventions of 1949.** The definition of “Extensive destruction and appropriation of property, not justified

¹¹⁴² ICTY, *Prlic et al. Trial Judgement*, Vol. I of VI, paras 126 (“To violate the prohibition set out in Article 2(d) of the Statute, the destruction of property must be extensive in scope”), 130 (“To constitute a violation of the prohibition in Article 2(d) of the Statute, to the extent that the appropriation of property is a grave breach of the Geneva Conventions under Article 147 of the Fourth Geneva Convention, such appropriation must also be committed extensively and carried out unlawfully and wantonly.”).

¹¹⁴³ ICTY, *Prlic et al. Trial Judgement*, Vol. I of VI, paras 126 (“The Chamber considers, however, that the criterion that the destruction be extensive in scope must be evaluated in light of the facts of the case”), 129 (“The criterion of extensive scale must be evaluated according to the facts of the case.”).

¹¹⁴⁴ ICTY, *Prlic et al. Trial Judgement*, Vol. I of VI, paras 126 (“a single incident, such as the destruction of a hospital, may suffice to constitute an offence under this count”). See also *Brdanin Trial Judgement*, para. 587; *Blaskic Trial Judgement*, para. 157; *Naletilic and Martinovic Trial Judgement*, para. 576.

¹¹⁴⁵ ICTY, *Prlic et al. Trial Judgement*, Vol. III of VI, para. 1523 (footnotes omitted).

¹¹⁴⁶ ICTY, *Prlic et al. Trial Judgement*, Vol. III of VI, para. 1526 (footnotes omitted).

¹¹⁴⁷ ICTY, *Prlic et al. Trial Judgement*, Vol. III of VI, para. 1546 (footnotes omitted).

by military necessity and carried out unlawfully and wantonly” under Article 8(2)(a) (iv) of the ICC Statute and Article 2(d) of the ICTY Statute does not explicitly specify the categories of the property covered by the offence. Not all properties are protected. The scope of the crime is confined to the specific property protected by the grave breaches of the Geneva Conventions, namely [Geneva Convention I](#), Article 50; [Geneva Convention II](#), Article 51; [Geneva Convention IV](#), Article 147.¹¹⁴⁸ This includes the two specific categories of properties detailed below.

589. The first category concerns specific property under the general protection of the Geneva Conventions, in particular Geneva Conventions I, II, IV, regardless of its location.¹¹⁴⁹ This category includes: (1) fixed medical establishments and mobile medical units;¹¹⁵⁰ (2) hospital ships;¹¹⁵¹ (3) medical transports, including medical aircraft;¹¹⁵² (4) neutral vessels assisting with the rescue effort;¹¹⁵³ (5) medical establishments ashore;¹¹⁵⁴ (5) coastal rescue craft and fixed coastal installations used exclusively by these craft for their humanitarian missions;¹¹⁵⁵ (5) sick-bays on warships;¹¹⁵⁶ (5) ships

¹¹⁴⁸ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, pp 339-340, para. 112.

¹¹⁴⁹ ICTY, *Brdanin Trial Judgement*, para. 586 (“Two types of property are protected under Article 2 (d) [...] 2. property that carries general protection under the Geneva Conventions of 1949 regardless of its location”); ICTY, *Naletilic and Martinovic Trial Judgement*, para. 575 (“The Chamber considers that two types of property are protected under the grave breach regime: i) property, regardless of whether or not it is in occupied territory, that carries general protection under the Geneva Conventions of 1949, such as civilian hospitals, medical aircraft and ambulances”) (footnotes omitted).

¹¹⁵⁰ [Geneva Convention I](#), Articles 19, 33, 34. See also [ICRC Commentary on Geneva Convention I](#), para. 2928. ICTY, *Brdanin Trial Judgement*, fn. 1490 (“Several provisions of the Geneva Conventions identify particular types of property accorded general protection. For example [...] Articles 19-23 (protection of medical units and establishments), Articles 33-34 (protection of buildings and materials of medical units or of aid societies), Articles 35- 37 (protection of medical transports), of Geneva Convention I.”).

¹¹⁵¹ [Geneva Convention I](#), Article 20; [Geneva Convention II](#), Articles 22, 24-25, 33. See also [ICRC Commentary on Geneva Convention I](#), paras 2928, 3035; [ICRC Commentary on Geneva Convention II](#), paras 3038, 3116. *Naletilic and Martinovic Trial Judgement*, fn. 1436 (“Several kinds of property are generally protected by the Conventions, irrespective of any military need to destroy them. See [...] Articles 22-35 (protecting hospital ships) [...] of Geneva Convention II.”).

¹¹⁵² [Geneva Convention I](#), Articles 35-36. See also [ICRC Commentary on Geneva Convention I](#), para. 2928. ICTY, *Brdanin Trial Judgement*, fn. 1490 (“Several provisions of the Geneva Conventions identify particular types of property accorded general protection. For example [...] Articles 35- 37 (protection of medical transports), of Geneva Convention I.”).

¹¹⁵³ [Geneva Convention II](#), Article 21; [ICRC Commentary on Geneva Convention II](#), paras 3038, 3116.

¹¹⁵⁴ [Geneva Convention II](#), Article 23; [ICRC Commentary on Geneva Convention II](#), paras 3038, 3116. *Naletilic and Martinovic Trial Judgement*, fn. 1436 (“Several kinds of property are generally protected by the Conventions, irrespective of any military need to destroy them. See [...] Articles 22-35 (protecting hospital ships) [...] of Geneva Convention II.”).

¹¹⁵⁵ [Geneva Convention II](#), Article 27; [ICRC Commentary on Geneva Convention II](#), paras 3038, 3116. *Naletilic and Martinovic Trial Judgement*, fn. 1436 (“Several kinds of property are generally protected by the Conventions, irrespective of any military need to destroy them. See [...] Articles 22-35 (protecting hospital ships) [...] of Geneva Convention II.”).

¹¹⁵⁶ [Geneva Convention II](#), Article 28; [ICRC Commentary on Geneva Convention II](#), paras 3038, 3116. See also ICTY, *Naletilic and Martinovic Trial Judgement*, fn. 1436 (“Several kinds of property are generally protected by the Conventions, irrespective of any military need to destroy them. See [...] Articles 22-35 (protecting hospital ships) [...] of Geneva Convention II.”)

and aircraft employed for medical transport;¹¹⁵⁷ (6) civilian hospitals;¹¹⁵⁸ (7) medical transport for civilians;¹¹⁵⁹ and (8) property of protected persons against reprisals.¹¹⁶⁰

590. The second category concerns property in *occupied territory*. It includes: (1) real or personal property “belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organisations”, as set forth by Article 53 of [Geneva Convention IV](#);¹¹⁶¹ and (2) civilian hospitals for which specific protection from requisition is accorded under Article 57 of [Geneva Convention IV](#).¹¹⁶² It is important to note that, in light of the specific nature of the property under this second category, the assessment of this crime requires a determination that the territory where the act of destruction/appropriation occurred was under military occupation.¹¹⁶³

591. **The destruction or appropriation was not justified by military necessity.** “Military necessity” is a key element in assessing the lawfulness of the conduct and needs to be carried out in light of relevant IHL provisions.¹¹⁶⁴ ICC jurisprudence clarifies that military necessity is identified with “those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usage of war”.¹¹⁶⁵ It follows that an the assessment of military necessity will be

¹¹⁵⁷ [Geneva Convention II](#), Articles 38-39; [ICRC Commentary on Geneva Convention II](#), paras 3038, 3116. See also ICTY, *Brdanin Trial Judgement*, , fn. 1490 (“Several provisions of the Geneva Conventions identify particular types of property accorded general protection. For example, [...] Articles 38-39 (protecting ships and aircraft employed for medical transport) of Geneva Convention II”).

¹¹⁵⁸ [Geneva Convention IV](#), Article 18; [ICRC Commentary on Geneva Convention IV](#), p. 597. See also ICTY, *Brdanin Trial Judgement*, , fn. 1490 (“Several provisions of the Geneva Conventions identify particular types of property accorded general protection. For example, Article 18 (protection of civilian hospitals), Articles 21 and 22 (protection of land, sea and air medical transports), of Geneva Convention IV”).

¹¹⁵⁹ [Geneva Convention IV](#), Articles 19, 21-22; [ICRC Commentary on Geneva Convention IV](#), p. 597. See also ICTY, *Brdanin Trial Judgement*, , fn. 1490 (“Several provisions of the Geneva Conventions identify particular types of property accorded general protection. For example, Article 18 (protection of civilian hospitals), Articles 21 and 22 (protection of land, sea and air medical transports), of Geneva Convention IV”).

¹¹⁶⁰ [Geneva Convention IV](#), Article 33; [ICRC Commentary on Geneva Convention IV](#), p. 597.

¹¹⁶¹ ICTY, *Brdanin Trial Judgement*, , para. 586 (“Two types of property are protected under Article 2 (d) [...] 1. real or personal property in occupied territory, belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organisations”); ICTY, *Naletilic and Martinovic Trial Judgement*, para. 575 (“property protected under Article 53 of the Geneva Convention IV, which is real or personal property situated in occupied territory when the destruction was not absolutely necessary by military operation”). See also [Geneva Convention IV](#), Article 53; [ICRC Commentary on Geneva Convention IV](#), p. 597.

¹¹⁶² [Geneva Convention IV](#), Article 57; [ICRC Commentary on Geneva Convention IV](#), p. 597.

¹¹⁶³ See, e.g., *Prlic et al. Appeal Judgement*, Vol. I of VI, para. 303 (“With respect to the grave breaches of extensive destruction and appropriation of property, the Appeals Chamber recalls that the Trial Chamber held that Article 2(d) of the Statute offers protection to certain property, e.g., civilian hospitals and medical convoys, from acts of destruction wherever such property is located. The Trial Chamber further held that protection is also afforded to real or 'personal, public or private property, if situated on occupied territory. *Because there were allegations of grave breaches of extensive destruction and appropriation of real or personal, public or private property in the Indictment, the Appeals Chamber finds that it was necessary for the Trial Chamber to inquire into whether there was a state of occupation in the municipalities at times when such alleged grave breaches of extensive destruction and appropriation occurred.*”) (footnotes omitted) (emphasis added).

¹¹⁶⁴ Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, p. 524, para. 1388.

¹¹⁶⁵ ICC, *Katanga Trial Judgement*, para. 894 (in relation to the offence of “Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of the conflict” in non-international armed conflict under Article 8(2)(e)(xii), the consideration may also apply *mutatis mutandis* to the present crime).; Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, p. 81.

specific for each of the rules of IHL that protect the destruction or the appropriation of a property.

592. It is important to note that military necessity cannot be invoked to derogate an IHL rule unless it is explicitly provided for in the rule itself and to the extent provided for.¹¹⁶⁶ In these terms, the assessment of “military necessity” is articulated in a two-step process:
- First, it is necessary to identify if the IHL rules protecting the specific property allow for the destruction/appropriation of the property (first step);
 - Second, if such IHL rules exist, it is necessary to assess whether the relevant conduct is carried out consistently with the specific requirements of such provision, namely is justified by military necessity (second step).¹¹⁶⁷
593. For example, according to Article 19 of [Geneva Convention I](#), medical units cannot be the object of an attack under any circumstances.¹¹⁶⁸ In this case, the destruction or appropriation of such property is not foreseen by IHL rules and thus military necessity can never be used to justify its destruction or appropriation.
594. Conversely, in some cases, the Geneva Conventions permit the destruction or appropriation of certain property when military necessity requires.¹¹⁶⁹ For instance, Article 57 of [Geneva Convention IV](#) permits the Occupying Power to, *inter alia*, carry out seizures of civilian hospitals “only temporarily and only in cases of urgent necessity for the care of military wounded and sick”.¹¹⁷⁰ Likewise, Article 53 of [Geneva Convention IV](#) permits the Occupying Power to destroy personal or state property “where such destruction is rendered absolutely necessary by military operations.”¹¹⁷¹
595. In a general sense, consistent with the jurisprudence of the ICTY and ICC, the assessment of “military necessity” should be carried out on a case-by-case basis and should include the following considerations:

¹¹⁶⁶ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 341, para. 119; Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, p. 81. See also *Katanga Trial Judgement*, para. 894 (in relation to the offence of “Destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of the conflict” in non-international armed conflict under Article 8(2)(e)(xii), the consideration may also apply *mutatis mutandis* to the present crime).

¹¹⁶⁷ Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, p. 524, paras 1389-1890. See also *ibidem*, p. 526, para. 1394. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, p. 83.

¹¹⁶⁸ [Geneva Convention I](#), Article 19. See also Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, p. 526, para.1394.

¹¹⁶⁹ With respect to the appropriation of property see *Prlic et al. Trial Judgement*, Vol. I of VI, para. 130 (“To constitute a violation of the prohibition in Article 2(d) of the Statute, to the extent that the appropriation of property is a grave breach of the Geneva Conventions under Article 147 of the Fourth Geneva Convention, such appropriation must also be committed extensively and carried out unlawfully and wantonly. The Fourth Geneva Convention authorises the occupying powers, in certain cases, to requisition private property, such as food and medical supplies or articles, in occupied territory to meet the needs of their occupying forces and administration. The requisition of excess food and supplies for the benefit of occupied regions is authorised provided that it is proportionate to the resources of the country.”) (footnotes omitted).

¹¹⁷⁰ [Geneva Convention IV](#), Article 57.

¹¹⁷¹ [Geneva Convention IV](#), Article 53.

- whether the perpetrator was left with no other option but to carry out the act of destruction or seizure;¹¹⁷²
- whether “property destroyed or seized constituted a military objective before having fallen into the hands of the attacking party”;¹¹⁷³
- whether the property destroyed amounts to an “incidental damage” in the context of an attack directed to military objectives and was not excessive “in relation to the concrete and direct military advantage anticipated”.¹¹⁷⁴ In these cases, “the attack on the military objective [is] justified by military necessity and that proportionate damage caused to civilian property as an unintended by-product will not amount to destruction as a war crime.”¹¹⁷⁵
- whether, “having fallen into the hands of the attacking party, its destruction or seizure was still necessary for military reasons”.¹¹⁷⁶

¹¹⁷² ICC, *Katanga Trial Judgement*, para. 894 (in relation to the offence of “Destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of the conflict” in non-international armed conflict under Article 8(2)I(xii), the consideration may also apply *mutatis mutandis* to the present crime).

¹¹⁷³ ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, para. 318 (in relation to the offence of “Destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of war” in non-international armed conflict under Article 8(2)(b)(xiii), the consideration may also apply *mutatis mutandis* to the present crime).

¹¹⁷⁴ ICC, *Ntaganda Trial Judgement*, para. 1166 (“the Chamber observes that there may be cases where an attack directed at a military object caused ‘incidental damage’ to a civilian object and where damages were not expected to be ‘excessive in relation to the concrete and direct military advantage anticipated.’”) (in relation to the offence of “Destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of the conflict” under Article 8(2)(e)(xii) applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime). See also ICTY, *Prlic et al. Trial Judgement*, Vol. I of VI, para. 169 (“The Appeals Chamber likewise recalled that although attacks may be conducted only against military objectives, “collateral civilian damage” was not unlawful per se, provided that the customary rules of proportionality in the conduct of hostilities were complied with. This proportionality principle is defined in Article 51.5(b) of Additional Protocol I, which prohibits: an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”); ICTY, *Martić Trial Judgement*, para. 93.

¹¹⁷⁵ ICC, *Ntaganda Trial Judgement*, para. 1165 (“In such cases, it is understood that the attack on the military objective was justified by military necessity and that proportionate damage caused to civilian property as an unintended by-product will not amount to destruction as a war crime.”) (in relation to the offence of “Destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of the conflict” under Article 8(2)(e)(xii) applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime). See also ICTY, *Prlic et al. Trial Judgement*, Vol. I of VI, para. 169.

¹¹⁷⁶ ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, para. 318 (in relation to the offence of “Destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of war” in non-international armed conflict under Article 8(2)(b)(xiii), the consideration may also apply *mutatis mutandis* to the present crime).

CASE STUDY: EXAMPLES OF MILITARY NECESSITY ASSESSMENT (*PRLIC ET AL. TRIAL JUDGEMENT, VOL. III OF VI*)

- “The Chamber also established that in the village of Paljike, consisting of 25 houses, HVO soldiers set fire to at least one Muslim house on 24 October 1992. The Chamber notes that shots were fired when the HVO soldiers broke down the door of the house. However, the evidence did not establish the origin of the shots. The Chamber can therefore not exclude the possibility that Muslims inside the house took part in the combat activities, thus making the house a legitimate military target for the HVO soldiers. The Chamber can therefore not find that the house was property protected by the Fourth Geneva Convention. The Chamber can therefore not find that the destruction of the house in Paljike on 24 October 1992 constituted extensive destruction of property, not justified by military necessity and carried out unlawfully and wantonly, a crime recognised by Article 2 of the Statute.”¹¹⁷⁷
- “The Chamber finds that HVO soldiers destroyed the Sultan Selim Mosque, real property belonging collectively to private persons or to the State or to other public authorities or to social and cooperative organisations, and nothing indicates that it was a military target – in particular since it was destroyed on a day when there was no fighting between the opposing armed forces in the town of Stolac.”¹¹⁷⁸

c. Definition of extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly (Subjective Elements) ¹¹⁷⁹

596. The jurisprudence of the ICTY clarified that different *mens rea* standards apply in relation to the acts of destruction and appropriation.
597. With respect to the conduct of destruction, the perpetrator “must have acted with the intent to destroy the protected property or in reckless disregard of the likelihood of its destruction.”¹¹⁸⁰ As to the appropriation of property, the crime requires the perpetrator to act “intentionally, with knowledge and will of the proscribed result”.¹¹⁸¹
598. However, relying on the term “wantonly”, commentators have suggested that, under the ICC framework, both acts of destruction and appropriation of indirect intent, namely *dolus eventualis*, may apply.¹¹⁸²
599. In any case, it is noteworthy that in both cases, destruction and appropriation, the perpetrator must have been “aware of the factual circumstances that established that

¹¹⁷⁷ ICTY, *Prlic et al. Trial Judgement*, Vol. III of VI, para. 1525 (footnotes omitted).

¹¹⁷⁸ ICTY, *Prlic et al. Trial Judgement*, Vol. III of VI, para. 1584 (footnotes omitted).

¹¹⁷⁹ This section details the subjective elements for this war crime as detailed under international law. However, the general part of the CCU identifies subjective elements that apply to crimes. See Articles 23, 24 and 25 of the CCU. It will be necessary to consider the relevance of the subjective elements in the general part of the CCU when considering the elements of this crime as applied under Article 438 CCU.

¹¹⁸⁰ *Brdanin Trial Judgement*, para. 589.

¹¹⁸¹ *Brdanin Trial Judgement*, para. 590.

¹¹⁸² Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, p. 523, para. 1387. See also *ibidem*, p. 527, para. 1395, fn. 623. See also Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 342, para. 173.

protected status [of the property]”.¹¹⁸³ Further, from the perspective of the subjective element, the assessment of military necessity “must be decided from the perspective of the person contemplating the attack, taking into account the information available to the latter at the moment of the attack.”¹¹⁸⁴

d. Contextual elements

600. In addition, as with all war crimes, it is necessary to demonstrate the following contextual elements:
- i. There was an international armed conflict;¹¹⁸⁵
 - ii. The conduct took place in the context of and was associated with an international armed conflict;¹¹⁸⁶ and
 - iii. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.¹¹⁸⁷

¹¹⁸³ [ICC Elements of Crimes](#), Article 8(2)(a)(iv).

¹¹⁸⁴ *Prlic et al. Trial Judgement*, Vol. I of VI, para. 123 (“Knowing whether a definite military advantage may be achieved must be decided from the perspective of the person contemplating the attack, taking into account the information available to the latter at the moment of the attack.”). See also Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 342, para. 124.

¹¹⁸⁵ See above, paras [188-189](#).

¹¹⁸⁶ See above, paras [190-198](#). See also [ICC Elements of Crimes](#), Article 8(2)(a)(iv).

¹¹⁸⁷ See above, para. [199](#). See also [ICC Elements of Crimes](#) Article 8(2)(a)(iv).

- ii. Pillaging a town or place, even when taken by assault (ICTY Statute, Article 3(d), ICC Statute, Article 8(2)(b)(xvi))

APPLICABILITY: PILLAGING A TOWN OR A PLACE, EVEN WHEN TAKEN BY ASSAULT CAN BE CONSIDERED CRIMINALISED UNDER ARTICLE 438(1) OF THE CCU, AS IT IS SUBSUMED UNDER THE NOTIONS OF: (1) “OTHER VIOLATIONS OF RULES OF THE WARFARE RECOGNIZED BY INTERNATIONAL INSTRUMENTS CONSENTED TO BY BINDING BY THE VERKHOVNA RADA (PARLIAMENT) OF UKRAINE”; OR COVERED IN PART BY (2) PILLAGE OF NATIONAL TREASURES ON OCCUPIED TERRITORIES (PARAS 601-605).

Elements of the crimes: To convict a perpetrator for “Pillaging a town or a place, even when taken by assault” as a war crime the following elements need to be established:

(1) Objective elements

- The perpetrator appropriated certain property (paras 606-611).
- The appropriation was without the consent of the owner (paras 612-613).

(2) Subjective elements

1. Under customary international law, the offence requires the following elements
 - The perpetrator had knowledge to acquire property unlawfully (paras 614-615).
 - The perpetrator intended to acquire property unlawfully, or foresaw the appropriation as a consequence of his action (paras 614-615).
2. Under the ICC Statute, the offence requires a higher *mens rea* standard articulated through the following elements
 - The perpetrator acted deliberately to appropriate certain property or he was aware that such deprivation would occur in the ordinary course of the events (paras 616-618).
 - The perpetrator intended to appropriate such property for private or personal use (paras 616-618).
 - The perpetrator knew that the appropriation was without the consent of the owner paras 616-618).

(3) Contextual elements

- There is an international armed conflict (para. 619).
- The conduct of the perpetrator took place in the context and was associated the conflict (para. 619).
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict (para. 600).

a. Applicability under Article 438

601. “Pillaging a town or place, even when taken by assault” (hereinafter “pillaging”) may be subsumed within “any other violations of rules of warfare recognized by interna-

tional instruments consented to be binding by the Verkhovna Rada of Ukraine” and/or, at least in part, under “pillaging of national treasures on occupied territories” which Article 438(1) refers. As explained below, pillaging is prohibited under international instruments ratified by Ukraine. Moreover, violation of this prohibition has been recognised as a war crime. These factors support interpreting Article 438 of the CCU as criminalising violations of this IHL prohibition.

602. **Pillaging is a serious violation of the laws of warfare recognised in international treaties ratified by Ukraine.** The offence is prohibited under international treaties ratified by Ukraine, primarily as a violation of the: (1) [1907 Hague Convention \(IV\) with its Annexed Regulations](#) under Articles 28 and 47; (2) [Geneva Convention IV](#) under Article 33; and (3) [1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict](#), Article 4(2)(g).¹¹⁸⁸ The ICRC identifies this prohibition as part of customary international law.¹¹⁸⁹ Ukraine is a State Party to the 1907 Hague Convention (IV) with its Annexed Regulations, to Additional Protocol I, and the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.¹¹⁹⁰ Therefore, for the purposes of Article 438 of the CCU, the prohibition against pillage is a violation of the laws of warfare recognised in an international instrument accepted as binding by the Ukrainian parliament.
603. **Pillaging may be also subsumed, in part, under “pillage of national treasures on occupied territories” listed as a specific offence in Article 438 of the CCU.** As noted below, the war crime of pillage includes acts of appropriation of public property falling under the control of the perpetrator.¹¹⁹¹ Thus, at least in part, pillaging can also be subsumed under “pillage of national treasures on occupied territories” identified as a specific offence under Article 438 of the CCU.
604. **Recognition as a war crime.** Article 8(2)(b)(xvi) of the [ICC Statute](#) recognises the violation of the prohibition of pillaging as a war crime (defined as “Pillaging a town or place, even when taken by assault”).¹¹⁹² Pillage has been defined as a war crime also under Article 3(e) of the [ICTY Statute](#) (defined as plunder of public or private property and applicable to international and non-international armed conflicts)¹¹⁹³ as well as to Article 6(b) of the [Charter](#) of the International Military Tribunal of Nuremberg

¹¹⁸⁸ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 452, para. 551. See also ICTY, *Hadzihasanovic and Kubura Kubura Decision on Motions for Acquittal*, para. 37.

¹¹⁸⁹ ICRC, IHL Database, Customary Law, [Rule 52. Pillage](#).

¹¹⁹⁰ Ukraine acceded to the 1907 Hague Convention (IV) on 29 May 2015, ratified Additional Protocol I on 25 January 1990, and acceded to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict on 6 February 1957. See ICRC, *Treaties and States Parties*, [Ukraine](#).

¹¹⁹¹ See below para. 608.

¹¹⁹² The corresponding war crime applicable to non-international armed conflicts is listed under Article 8(2)(e)(v) of the [ICC Statute](#). [ICC Statute](#), Article 8(2)(e)(v) (Pillaging a town or place, even when taken by assault).

¹¹⁹³ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 437, para. 486.

(defined as plunder of public and private property).¹¹⁹⁴ Likewise, the ICRC recognises pillaging as a war crime.¹¹⁹⁵

605. These factors support recognition of the criminalisation of pillaging under Article 438 of the CCU.

a. Definition of pillaging a town or place, even when taken by assault (Objective Elements)

606. According to the [ICC Elements of Crimes](#) the objective elements of this crime are: (1) the perpetrator appropriated certain property; (2) the appropriation was without the consent of the owner.¹¹⁹⁶ Likewise, in relation to the corresponding war crime of plunder of public or private property under Article 3(e) of the [ICTY Statute](#), the ICTY jurisprudence set forth similar elements.¹¹⁹⁷

607. **The perpetrator appropriated certain property.** As a preliminary matter, it is important to highlight that there is not a specific definition of “pillage”, nonetheless commentators suggest that this term covers acts of “plundering, looting and sacking”.¹¹⁹⁸

608. *Appropriation as a material element of the culpable conduct.* As to the element of the culpable conduct, the term “appropriation” identifies with “the removal of something from the possession of an entitled person, for a not insignificant period of time, and against that person’s will or without his or her agreement.”¹¹⁹⁹ Pillage includes all forms of appropriation, including “not only organised and systematic appropriation, but also acts of appropriation committed by fighters in their own interest”.¹²⁰⁰

¹¹⁹⁴ ICTY, *Kordic and Cerkez Appeal Judgement*, para. 76 (“The wanton destruction of cities, towns or villages, or devastation not justified by military necessity, a violation of the laws and customs of war recognised by Article 3(b) of the Statute, is covered by Article 6(b) of the Nuremberg Charter.”).

¹¹⁹⁵ ICRC, IHL Database, Customary Law, [Rule 156. Definition of War Crimes](#).

¹¹⁹⁶ [ICC Elements of Crimes](#), Article 8(2)(b)(xvi). The same offence applicable to non-international armed conflicts is listed under Article 8(2)(e)(v) of the [ICC Statute](#) and is articulated on the same objective elements.

¹¹⁹⁷ ICTY, *Kordic and Cerkez Appeal Judgement*, para. 79 (“The Trial Chamber held that the essence of the offence was defined as: all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international criminal law, including those acts traditionally described as “pillage” The Appeals Chamber concurs with this assessment.”), 84 (“plunder is committed when private or public property is appropriated intentionally and unlawfully.”). See also *Prlic et al. Trial Judgement*, Vol. I of VI, para. 180.

¹¹⁹⁸ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 452, para. 553.

¹¹⁹⁹ Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, p. 520, paras 1379-1380. The “appropriation” element is common to the war crimes of: (1) “Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” under Article 8(2)(a)(iv) of the ICC Statute and Article 2(d) of the ICTY Statute; (2) “Destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of war” under Article 8(2)(b)(xiii) of the ICC Statute. See above, paras [581-600](#), [620-640](#).

¹²⁰⁰ ICC, *Ntaganda Trial Judgement*, para. 1028 (“The pillaging of a town or place comprises all forms of appropriation, public or private, including not only organised and systematic appropriation, but also acts of appropriation committed by fighters in their own interest”) (in relation to the offence of under Article 8(2)(e)(v) applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime). See also ICC, *Ongwen Trial Judgement*, para. 2763 (“The pillaging of a town or place comprises all forms of appropriation of property, including appropriation committed by individuals in their own interest and acts of organised or systematic appropriation”) (in relation to the offence of under Article 8(2)(e)(v) applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime).

609. *Geographical scope.* The ICC jurisprudence also concluded that the war crime of pillage can only occur when the property has come “under the control of the perpetrator.”¹²⁰¹ According to this jurisprudence, this element distinguishes pillage from the crime of “Destroying or seizing the enemy’s property” under Article 8(2)(b)(xiii) of the ICC Statute that can take place in any moment of the conflict, namely before, during and after the attack.¹²⁰² However, in its caselaw, the ICTY suggested a broader geographical scope for the offence concluding that “[t]he prohibition of pillage is not limited to acts committed in occupied territories.”¹²⁰³
610. *Property.* “Property” includes any property “whether moveable or immovable, private or public”.¹²⁰⁴ Specifically, the ICC jurisprudence has specified that while not explicitly reflected from the definition of the offence or the relevant elements of crimes, only property that belongs to “individuals or entities who are aligned with or whose allegiance is to a party to the conflict who is adverse or hostile to the perpetrator” can fall within the perimeter of the crime.¹²⁰⁵ Accordingly, appropriation of property belonging to individuals or entities aligned with or with allegiance to the perpetrator or individuals/entities of third states is not covered under the war crime of pillage.¹²⁰⁶
611. *Large scale requirement?* The ICC in its jurisprudence has adopted diverging approaches as to whether the war crime of pillaging needs to occur on a large-scale basis.¹²⁰⁷ In the *Ongwen* case and *Ntaganda* case trial chambers considered that “that there is no requirement that appropriations must occur on a large scale basis before constituting the crime of pillaging”.¹²⁰⁸ However, previous ICC jurisprudence from the

¹²⁰¹ ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, para. 330 (“the war crime of pillaging occurs when the enemy’s property has come under the control of the perpetrator. Only then is the perpetrator in a position to ‘appropriate’ such property.”). But *contra*, Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 454, para. 562 (“The prohibition of pillage seems to apply not only to occupied territory *stricto sensu* but also to the period which precedes the actual occupation of territory. Accordingly, it also applies during the time of ongoing military operations. This is confirmed by the fact that article 33 of the Fourth Geneva Convention, which had already enshrined the customary law prohibition of pillage, forms part of the general provisions of the Fourth Geneva Convention relating to the status of civilians. Besides, the very wording of article 8 para. 2 (b) (xvi) was, as mentioned, derived from article 28 of the 1907 Hague Convention Respecting the Laws and Customs of War on Land, which in turn figures in chapter I of that Convention dealing with means and methods of warfare. Finally, the elements of crimes, as adopted, neither contain any hint of such a limitation”) (footnotes omitted).

¹²⁰² ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, para. 330 (“Whereas the war crime of destruction of property under article 8(2)(b)(xiii) of the Statute can take place before the destroyed property has fallen into the hands of the party to the conflict to which the perpetrator belongs, the war crime of pillaging occurs when the enemy’s property has come under the control of the perpetrator. Only then is the perpetrator in a position to ‘appropriate’ such property.”). See above, paras 620-640.

¹²⁰³ ICTY, *Naletilic and Martinovic Trial Judgement*, para. 615.

¹²⁰⁴ ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, para. 329.

¹²⁰⁵ ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, para. 329 (“Therefore, the pillaged property – whether moveable or immovable, private or public – must belong to individuals or entities who are aligned with or whose allegiance is to a party to the conflict who is adverse or hostile to the perpetrator”). See also Doorman, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge, pp 279-280.

¹²⁰⁶ Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, p. 522, para. 1384.

¹²⁰⁷ ICC, *Ongwen Trial Judgement*, para. 2764 (in relation to the offence of under Article 8(2)(e)(v) applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime).

¹²⁰⁸ ICC, *Ongwen Trial Judgement*, para. 2764 (“there is no requirement that appropriations must occur on a large scale basis before constituting the crime of pillaging”) (in relation to the offence of under Article 8(2)(e)(v) applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime); ICC

Bemba case and *Katanga* case suggest that the war crime of pillaging “involves the appropriation of property on a ‘large scale’.”¹²⁰⁹ Such requirement would require to consider whether: (1) the acts of pillaging gave rise to grave consequences for the victims; (2) a large number of persons have been deprived of their property; and (3) the context in which the pillaging occurred.¹²¹⁰ This latter approach is also in line with the ICTY jurisprudence.¹²¹¹

612. **The appropriation was without the consent of the owner.** The notion of “owner” does not need to be assessed in the “legal sense”.¹²¹² In the *Ntaganda* case, the ICC Trial Chamber identified the “owner” with “the person who had the property under him or her”.¹²¹³ Moreover, in the *Ongwen* case, the ICC established that “concept of private property and the right to property must be understood as encompassing not only the property of individuals, but also the communal property of the communities. It must also take into consideration the customary law of the community (i.e. practices on possession, titles and registration).”¹²¹⁴

Ntaganda Trial Judgement, para. 1044 (“With regard to the Defence’s submission that pillage must take place on a ‘somewhat large-scale’, the Chamber considers that the war crime of pillage as included in the Statute does not contain such an element”) (footnote omitted) (in relation to the offence of under Article 8(2)(e)(v) applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime).

¹²⁰⁹ ICC, *Bemba Trial Judgement*, para. 117 (“In line with the Pre-Trial Chamber, the Chamber considers that pillaging, pursuant to Article 8(2)(e)(v), goes beyond ‘mere sporadic acts of violation of property rights’ and involves the appropriation of property on a ‘large scale’. Article 8(2)(e)(v) relates to ‘pillaging a town or place’, and therefore the pillaging of a single house would not suffice.”) (in relation to the offence of under Article 8(2)(e)(v) applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime); ICC *Katanga Trial Judgement*, para. 909 (in relation to the offence of under Article 8(2)(e)(v) applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime).

¹²¹⁰ ICC, *Bemba Trial Judgement*, para. 117 (“The Chamber adopts the Pre-Trial Chamber’s approach that determination of the seriousness of the violation is to be made in light of the particular circumstances of the case. For instance, a Chamber may consider whether the acts of pillaging involved grave consequences for the victims, even if these consequences are not of the same seriousness for all victims involved; if a large number of persons have been deprived of their property; and/or the context in which the pillaging occurred.”) (footnotes omitted) (in relation to the offence of under Article 8(2)(e)(v) applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime).

¹²¹¹ ICTY, *Kordić and Čerkez Appeal Judgement*, paras 82 (“The question remains at what point the breach actually involves grave consequences for the victim. The Trial Chamber in *Čelebići* referred to the *Tadić* Appeal Decision on Jurisdiction, when it held that there is a consequential link between the monetary value of the appropriated property and the gravity of the consequences for the victim. The Appeals Chamber agrees with this conclusion. However, it stresses that the assessment of when a piece of property reaches the threshold level of a certain value can only be made on a case-by-case basis and only in conjunction with the general circumstances of the crime.”) (footnotes omitted), 83 (“The Appeals Chamber is, moreover, of the view that a serious violation could be assumed in circumstances where appropriations take place vis-à-vis a large number of people, even though there are no grave consequences for each individual. In this case it would be the overall effect on the civilian population and the multitude of offences committed that would make the violation serious.”). See also ICTY, *Prlić et al. Trial Judgement*, Vol. I of VI paras 181, 182.

¹²¹² ICC, *Ntaganda Trial Judgement*, para. 1034 (“For the purpose of pillage, the Chamber will consider the person who had the property under him or her as the ‘owner’. Whether or not this person was the owner in the legal sense is not relevant for the Chamber’s assessment.”) (in relation to the offence of under Article 8(2)(e)(v) applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime).

¹²¹³ ICC, *Ntaganda Trial Judgement*, para. 1034 (“For the purpose of pillage, the Chamber will consider the person who had the property under him or her as the ‘owner’.”) (in relation to the offence of under Article 8(2)(e)(v) applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime).

¹²¹⁴ ICC, *Ongwen Trial Judgement*, para. 2766 (in relation to the offence of under Article 8(2)(e)(v) applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime).

613. The appropriation does not need to be carried out through violent means.¹²¹⁵ The lack of consent from the owner can be derived or assumed in specific situations, including from through coercion and threats.¹²¹⁶ If it is not clear who the owner of a property is “it suffices that the perpetrator was aware that the property belonged to someone else than him- or herself, and that as such any appropriation must be assumed to have without the owner’s consent”.¹²¹⁷ Similarly, “if the property owner has fled, such appropriations must be assumed to have been without the owner’s consent absent any contrary indication.”¹²¹⁸

b. Definition of pillaging a town or place, even when taken by assault (Subjective Elements)¹²¹⁹

614. In relation to the war crime of pillaging, two different *mens rea* standards have been adopted depending on the legal framework of the relevant international criminal jurisdiction, namely, customary international law (ICTY) or treaty law (ICC).

615. **International customary law.** Under the ICTY framework, based on international customary law, the war crime of pillage is satisfied by direct or indirect intent, namely “the perpetrator acts with the knowledge and intent to acquire property unlawfully, or when the consequences of his action are foreseeable”.¹²²⁰ In this regard, the ICTY jurisprudence specified that responsibility for pillaging has to be excluded when the appropriation is carried out for reasons of military necessity.¹²²¹

616. **ICC framework.** By contrast, the ICC Statute and the ICC elements of crimes set forth a higher *mens rea* standard.¹²²² The ICC framework articulates the subjective element

¹²¹⁵ ICC, *Bemba Trial Judgement*, para. 116 (“The Chamber notes that the Court’s legal framework does not include any requirement of violence as an element of the appropriation”) (in relation to the offence of under Article 8(2)(e)(v) applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime). *Contra* ICTY, *Celebici Trial Judgement*, para. 591.

¹²¹⁶ ICC, *Bemba Trial Judgement*, para. 116 (“Lack of consent may be further inferred by the existence of coercion.”) (in relation to the offence of under Article 8(2)(e)(v) applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime).

¹²¹⁷ ICC, *Ntaganda Trial Judgement*, para. 1034 (in relation to the offence of under Article 8(2)(e)(v) applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime).

¹²¹⁸ ICC, *Ongwen Trial Judgement*, para. 2766 (in relation to the offence of under Article 8(2)(e)(v) applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime).

¹²¹⁹ This section details the subjective elements for this war crime as detailed under international law. However, the general part of the CCU identifies subjective elements that apply to crimes. See Articles 23, 24 and 25 of the CCU. It will be necessary to consider the relevance of the subjective elements in the general part of the CCU when considering the elements of this crime as applied under Article 438 of the CCU.

¹²²⁰ ICTY, *Hadzihasanovic and Kubura Trial Judgement*, para. 50 (“The *mens rea* element of the offence of plunder of public or private property is established when the perpetrator of the offence acts with the knowledge and intent to acquire property unlawfully, or when the consequences of his actions are foreseeable”).

¹²²¹ ICTY, *Krajinski Trial Judgement*, para. 769 (“Some appropriation of property cannot be regarded as unlawful. For example, under international humanitarian law there is a general exception to the prohibition of appropriation of property as a grave breach under the Geneva Conventions when the appropriation is justified by military necessity”).

¹²²² ICC, *Bemba Trial Judgement*, para. 120 (“In relation to the concept of the appropriation of property for private or personal use, the Chamber notes that this requirement is not explicitly expressed in customary or conventional international humanitarian law and has not been established, as such, in the jurisprudence of other international criminal tribunals. However, given the explicit inclusion of this concept in the Elements of Crimes, the Chamber considers that this requirement must be met for the appropriation of property to amount to pillaging as a war crime under Article 8(2)(e)(v)”) (in relation to the offence of under Article 8(2)(e)(v) applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime).

of the war crime of pillaging according to three main prongs, requiring that the perpetrator: (1) acted deliberately to appropriate certain property or he was aware that such deprivation would occur in the ordinary course of the events;¹²²³ (2) intended to appropriate such property for private or personal use;¹²²⁴ and (3) knew that the appropriation was without the consent of the owner.¹²²⁵

617. The first and third prongs derive from the direct application of Article 30 of the ICC Statute concerning the general *mens rea* standard based on the “intent and knowledge” paradigm. The intention to appropriate such property for private or personal use is, instead, specifically incorporated in the ICC Elements of Crime reflecting a form of specific intent (*dolus specialis*).¹²²⁶ In addition, in the *Bemba* case the Trial Chamber specified that “the use of the conjunction “or” indicates that it is intended to include situations where the perpetrator did not intend to use the pillaged items himself or herself.”¹²²⁷
618. More importantly, this requirement should automatically exclude the possibility that the crime of pillage can be justified by military necessity (requiring the appropriated

¹²²³ ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, para. 331 (“The intent and knowledge requirement of article 30 of the Statute applies to the war crime of pillaging under article 8(2)(b)(xvi). This offence encompasses, first and foremost, cases of *dolus directus* of the first degree. It may also include *dolus directus* of the second degree”); ICC *Katanga Trial Judgement*, para. 912 (“In the instant case, it must be proven that the perpetrator acted deliberately or failed to act (1) in order to appropriate certain property or (2) whereas he or she was aware that the deprivation would occur in the ordinary course of events”) (in relation to the offence of under Article 8(2)(e)(v) applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime).

¹²²⁴ See ICC Elements of Crimes, Article 8(2)(b)(xiii). ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, para. 332 (“However, this offence additionally requires two elements, or *dolus specialis*. First, the act of physical appropriation must be carried out with the intent to deprive the owner of his property. Second, the act of physical appropriation must also be carried with the intent to utilise the appropriated property for private or personal use”); ICC *Katanga Trial Judgement*, para. 913 (“the perpetrator intended to “deprive the owner” of his or her property and to “appropriate [...] for private or personal use”).

¹²²⁵ *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, para. 333 (“Finally, the Elements of Crimes expressly provide for the exculpation of the perpetrator's unlawful conduct where the perpetrator appropriated property with the owner's consent.”); ICC, *Katanga Trial Judgement*, para. 914 (“Further, under article 30(3) of the Statute the perpetrator must also have known that the appropriation was without the consent of the owner”) (in relation to the offence of under Article 8(2)(e)(v) applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime).

¹²²⁶ See ICC Elements of Crimes, Article 8(2)(b)(xiii). ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, para. 332 (“However, this offence additionally requires two elements, or *dolus specialis*. First, the act of physical appropriation must be carried out with the intent to deprive the owner of his property. Second, the act of physical appropriation must also be carried with the intent to utilise the appropriated property for private or personal use”); ICC *Katanga Trial Judgement*, para. 913 (“the perpetrator intended to “deprive the owner” of his or her property and to “appropriate [...] for private or personal use”).

¹²²⁷ ICC, *Bemba Trial Judgement*, para. 120 (in relation to the offence of under Article 8(2)(e)(v) applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime).

property to be used for military purposes).¹²²⁸ Thus distinguishing pillage from lawful appropriation of property.¹²²⁹

c. Contextual elements

619. In addition, as with all war crimes, it is necessary to demonstrate the following contextual elements:

- i. There was an international armed conflict;¹²³⁰
- ii. The conduct took place in the context of and was associated with an international armed conflict;¹²³¹ and
- iii. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.¹²³²

¹²²⁸ ICC, *Ongwen Trial Judgement*, para. 2767 (“Appropriations justified by military necessity cannot constitute the crime of pillaging. Military necessity requires that the appropriation’s use be directed to further the war effort and thus be used for military purposes. This is in contrast to appropriations for private or personal use. The perpetrator must have specifically intended to deprive the owner of the property and to appropriate it for private or personal use. If combatants appropriate property essential to their survival, such as food, this alone does not make the appropriation one of military necessity.”) (in relation to the offence of under Article 8(2)(e)(v) applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime); ICC *Ntaganda Trial Judgement*, para. 1030 (“Contrary to the Defence’s submission, the Chamber considers that the reference to ‘military necessity’ in footnote 62 of the Elements of Crimes does not provide for an exception to the absolute prohibition on pillaging, but rather clarifies that the concept of military necessity is incompatible with a requirement that the perpetrator intended the appropriation for private or personal use, as any military necessity would require its use to be directed to further the war effort and thus use for military purposes. Accordingly, situations in which the perpetrator appropriated items for personal use (i.e. use by him- or herself), or for private use by another person or entity, assuming all other legal elements have been met, constitutes pillage under Article 8(2)(e)(v).”) (footnotes omitted) (in relation to the offence of under Article 8(2)(e)(v) applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime).

¹²²⁹ ICC, *Bemba Trial Judgement*, para. 120 (“The Chamber therefore finds that the “special intent” requirement, resulting from the “private or personal use” element, allows it to better distinguish pillage from seizure or booty, or any other type of appropriation of property which may in certain circumstances be carried out lawfully.”) (in relation to the offence of under Article 8(2)(e)(v) applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime).

¹²³⁰ See above, paras 188-189.

¹²³¹ See above, paras 190-198. See also *ICC Elements of Crimes*, Article 8(2)(b)(xvi).

¹²³² See above, para. 199. See also *ICC Elements of Crimes* Article 8(2)(b)(xvi).

- iii. Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war (Article 8(2)(b)(xiii) of the ICC Statute)

APPLICABILITY: DESTROYING OR SEIZING THE ENEMY'S PROPERTY UNLESS SUCH DESTRUCTION OR SEIZURE BE IMPERATIVELY DEMANDED BY THE NECESSITIES OF WAR CAN BE CONSIDERED CRIMINALISED UNDER ARTICLE 438(1) OF THE CCU, AS IT IS SUBSUMED UNDER THE NOTION OF "OTHER VIOLATIONS OF RULES OF THE WARFARE RECOGNIZED BY INTERNATIONAL INSTRUMENTS CONSENTED TO BY BINDING BY THE VERKHOVNA RADA (PARLIAMENT) OF UKRAINE" (PARAS 620-623).

Elements of the crimes: To convict a perpetrator for "destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war" as a war crime the following elements need to be established:

(1) Objective elements

- The perpetrator destroyed or seized certain property (para. 628).
- Such property was property of a hostile party (para. 629).
- Such property was protected from that destruction or seizure under the international law of armed conflict (para. 630).
- The destruction or seizure was not justified by military necessity (para. 514).

(2) Subjective elements

- The perpetrator intended to destroy/seize enemy property knowing that such destruction/seizure was not justified by military necessity (para. 637) or was aware that such destruction/seizure would occur in the ordinary course of the events as a result of his conduct (para. 638).
- The perpetrator was aware of the factual circumstances that established the protected status of the property (para. 639).

(3) Contextual elements

- There is an international armed conflict (para. 640).
- The conduct of the perpetrator took place in the context and was associated with the conflict (para. 640).
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict (para. 640).

a. Applicability under Article 438

620. Although not explicitly mentioned in Article 438 of the CCU, "destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war" may be subsumed within "any other violations of rules of warfare recognized by international instruments consented to be binding by the Verkhovna Rada of Ukraine" to which Article 438(1) refers. As explained below, the

conduct is prohibited under international instruments ratified by Ukraine and the violation of this prohibition has been recognised as a war crime. These factors support interpreting Article 438 of the CCU as criminalising violations of this IHL prohibition.

621. **Destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of war is a violation of the laws of warfare recognised in international treaties ratified by Ukraine.** The offence is prohibited under international treaties ratified by Ukraine, primarily as a violation of the [Hague Regulations](#) under Articles 23(g), 46, 50, 53 and 56.¹²³³ The ICRC identifies this prohibition as part of customary international law.¹²³⁴ Therefore, for the purposes of Article 438 of the CCU, the prohibition against “destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of war” is a violation of the laws of warfare recognised in an international instrument accepted as binding by the Ukrainian parliament.
622. **Recognition as a war crime.** Article 8(2)(b)(xiii) of the [ICC Statute](#) recognises the violation of the prohibition of destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of war as a war crime.¹²³⁵ To a certain extent, the offence covered by Article 8(2)(b)(xiii) corresponds to the war crime of wanton destruction of cities, towns or villages, or devastation not justified by military necessity under Article 3(b) of the [ICTY Statute](#) (applicable to international and non-international armed conflicts)¹²³⁶ as well as to Article 6(b) of the [Charter](#) of the International Military Tribunal of Nuremberg.¹²³⁷ Likewise, the ICRC recognises such a violation as a war crime.¹²³⁸
623. These factors support recognition of the criminalisation of destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of war as a war crime under Article 438 of the CCU.

¹²³³ Ukraine ratified the Hague Regulations, 1907 on 29 May 2015. See ICRC, *Treaties and States Parties*, [Ukraine](#); Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 437, para. 486. See also ICTY, *Kordic and Cerkez Appeal Judgement*, para. 76.

¹²³⁴ ICRC, IHL Database, Customary Law, [Rule 50. Destruction and Seizure of Property of an Adversary](#), [Rule 51. Public and Private Property in Occupied Territory](#).

¹²³⁵ The corresponding war crime applicable to non-international armed conflicts is listed under Article 8(2)(e)(xii) of the [ICC Statute](#), Article 8(2)(e)(xii) (Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict).

¹²³⁶ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 437, para. 486. Additionally, the offence also covers the more specific war crime of “seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science” under Article 3(d) of the [ICTY Statute](#) (applicable to international and non-international armed conflicts). The conduct underpinning Article 3 of the ICTY Statute can be considered a sub-category of the offence under Article 8(2)(b)(xiii) of the ICC Statute. Unless stated otherwise, the analysis concerning the elements of Article 8(2)(b)(xiii) apply *mutatis mutandis* to Article 3(d) of the ICTY Statute.

¹²³⁷ ICTY, *Kordic and Cerkez Appeal Judgement*, para. 76 (“The wanton destruction of cities, towns or villages, or devastation not justified by military necessity, a violation of the laws and customs of war recognised by Article 3(b) of the Statute, is covered by Article 6(b) of the Nuremberg Charter.”).

¹²³⁸ ICRC, IHL Database, Customary Law, [Rule 156. Definition of War Crimes](#).

b. Definition of destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war (Objective Elements)

624. According to the [ICC Elements of Crimes](#) the objective elements of this crime are: (1) the perpetrator destroyed or seized certain property; (2) such property was property of a hostile party; (3) such property was protected from that destruction or seizure under the international law of armed conflict; and (4) the destruction or seizure was not justified by military necessity.¹²³⁹ Likewise, with respect to the corresponding war crime of wanton destruction of cities, towns or villages, or devastation not justified by military necessity under Article 3(b) of the [ICTY Statute](#), the ICTY jurisprudence set forth similar elements.¹²⁴⁰

625. *The perpetrator destroyed or seized certain property.* Two main question need to be addressed in relation to this element: (1) the definition of destruction/seizure; and (2) the notion of property.

626. *Destruction/seizure.* As to the definition of the culpable conduct, the destruction and seizure can occur in different forms. Destruction occurs when the property is “set ablaze, demolished, pulled down or so badly damaged it is no longer fit for purpose”.¹²⁴¹ Depending on the facts of the case, partial destruction may be sufficient to qualify as an act of destruction.¹²⁴² “Seizure” does not seem to have a different meaning than “appropriation” under Article 8(2)(a)(iv) of the Statute.¹²⁴³ Therefore it may cover any conduct related to “the removal of something from the possession of an entitled per-

¹²³⁹ [ICC Elements of Crimes](#), Article 8(2)(b)(xiii). The crime of destruction of the property of an adversary under Article 8(2)(e)(xii) of the [ICC Statute](#) applicable to non-international armed conflicts is articulated under the same objective elements. ICC, [Katanga Trial Judgement](#), para. 899 (“By way of a preliminary comment, the Chamber notes that there is nothing to suggest that the constituent elements of the crime defined under article 8(2)(e)(xii) differ from those of the crime of destruction of enemy property committed in an international armed conflict, under article 8(2)(b)(xiii).”). Additionally, under the jurisprudence of the ICTY the more specific war crime of “seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science” under Article 3(d) of the [ICTY Statute](#) has similar objective elements. ICTY, [Prlic et al. Trial Judgement](#), Vol. I of VI, para. 178 (holding that the objective elements of Article 3(d) of the ICTY Statute require “(1) an intentional act or omission; (2) causing destruction or damage to a cultural or religious object of property; (3) the property did not constitute a military objective within the meaning of Article 52 of Additional Protocol I”) (footnotes omitted).

¹²⁴⁰ ICTY, [Prlic et al. Trial Judgement](#), Vol. I of VI, para. 166 (“i) the destruction of property occurs on a large scale; ii) the destruction is not justified by military necessity”).

¹²⁴¹ ICC, [Ongwen Trial Judgement](#), para. 2775 (“First, it is required that the perpetrator destroyed certain property. The property, including movable or immovable, private or public items, is ‘destroyed’, either by act or omission, if it is set ablaze, demolished, pulled down or so badly damaged it is no longer fit for purpose”) (footnotes omitted) (in relation to Article 8(2)(e)(xii) applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime). See also [Katanga Trial Judgement](#), para. 894 (“Destruction entails acts such as setting ablaze, demolishing, or otherwise damaging property”) (in relation to the offence of under Article 8(2)(e)(xii) applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime).

¹²⁴² ICC, [Katanga Trial Judgement](#), para. 891 (“the Chamber considers that badly damaged property may be akin to partial destruction and thus fall under the definition of destruction”) (in relation to Article 8(2)(e)(xii) applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime). See also Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, p. 526, 1393.

¹²⁴³ Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, p. 520, para. 1379. See above, paras [581-600](#).

son, for a not insignificant period of time, and against that person's will or without his or her agreement."¹²⁴⁴ It does not require a formal, or definite, transfer of property.¹²⁴⁵

627. A question that arose in the context of the interpretation of the crime is whether the offence requires the destruction/seizure to be extensive in character. Differently from the war crime of "Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" under Article 8(2) (a)(iv) of the ICC Statute and Article 2(d) of the ICTY Statute,¹²⁴⁶ there is no apparent requirement that the destruction or seizure be extensive. Nonetheless, commentators have suggested that "isolated violations of property rights" would not suffice to fulfil the elements of the crimes.¹²⁴⁷ While initially supporting this view,¹²⁴⁸ the ICC jurisprudence later rejected that the offence requires the destruction/seizure to be carried out extensively or on a large scale to qualify as a war crime.¹²⁴⁹
628. *Certain property*. The term "property" covers any property "whether moveable or immovable, private or public."¹²⁵⁰
629. **Such property was property of a hostile party**. According to the ICC jurisprudence, the reference to "hostile party" indicates that the destroyed/seized property "must belong to individuals or entities aligned with or with allegiance to a party to the conflict adverse or hostile to the perpetrator".¹²⁵¹ The alignment/allegiance to a party

¹²⁴⁴ Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, p. 520, paras 1379-1380. See also Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, pp 340-341, para. 118 (defining appropriation as any conduct that involves the dispossession of an object or property as "taking, obtaining or withholding property, theft, requisition, plunder, spoliation or pillage"); Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, p. 83.

¹²⁴⁵ Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, p. 83 (in relation to the offence under Article 8(2)(a)(iv) of the ICC Statute). See above, paras [581-600](#).

¹²⁴⁶ See above, paras [581-600](#).

¹²⁴⁷ Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, p. 522, para. 1385. See also *Ibidem*, p. 525, para.1394. Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 443, para. 508.

¹²⁴⁸ ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, para. 314 ("In the view of the Chamber, the destruction of the civilian properties constitutes a crime under the protection of international law of armed conflict. Article 147 GC IV provides that "extensive destruction and appropriation of property" constitutes a grave breach. Pursuant to the jurisprudence of the ICTY, in order to constitute a grave breach, destruction unjustified by military necessity must be extensive, unlawful, and wanton. The notion of "extensive" is evaluated according to the facts of the case") (footnote omitted).

¹²⁴⁹ ICC, *Katanga Trial Judgement*, para. 896 ("The Chamber further observes that neither the Statute nor the Elements of Crimes explicitly make provision for the "extensive" test in defining the crime of destruction of enemy property under article 8(2)(e)(xii). Indeed, they require, according to the exact terms of the element of the crimes of 8(2)(e)(xii)(1), only the destruction of 'certain' property. The Chamber considers, therefore, that it need not take this test into account in its analysis of the crime of destruction of property under article 8(2)(e)(xii)") (footnotes omitted) (in relation to the offence of "Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of the conflict" under Article 8(2)(e)(xii) applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime).

¹²⁵⁰ ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, para. 310. See also ICC, *Ongwen Trial Judgement*, para. 2775 ("the property, including movable or immovable, private or public items") (in relation to the offence of "Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of the conflict" under Article 8(2)(e)(xii) applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime).

¹²⁵¹ ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, para. 310.

to the conflict can be established in light of the nationality,¹²⁵² ethnicity, or place of residence of the individuals or entities.¹²⁵³ Seizure or appropriation of property that belongs to individuals or entities aligned with or with allegiance to the perpetrator or individuals/entities of third states falls outside the scope of the offence.¹²⁵⁴

630. **Such property was protected from that destruction or seizure under the international law of armed conflict.** The crime as reflected in Article 8(2)(b)(xiii) of the ICC Statute or Article 3(b) of the ICTY Statute does not explicitly identify the specific protected property. The same applies to the primary rule of IHL underpinning the crime, Article 23(g) of the Hague Regulations, which generically prohibits “[t]o destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war”.¹²⁵⁵

631. The ICC jurisprudence indicates that the offence covers destruction/seizure of property that *does not* constitute a military objective, namely “objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”.¹²⁵⁶ The ICTY took a similar approach in relation to the corresponding war crime of wanton destruction of cities, towns or villages, or devastation not justified by military necessity under Article 3(b) of the [ICTY Statute](#), clarifying that the offence covers the destruction of civilian objects.¹²⁵⁷

¹²⁵² Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, pp 441-442, para. 503.

¹²⁵³ ICC, *Katanga Trial Judgement*, para. 892 (“The property concerned must belong to an “adversary” in the conflict. In the view of the Chamber, this means that the property in question – whether moveable or immovable, private or public – must belong to individuals or entities aligned with or with allegiance to a party to the conflict adverse or hostile to the perpetrator, which can be established in the light of the ethnicity or place of residence of such individuals or entities.”) (footnote omitted) (in relation to the offence of “Destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of the conflict” under Article 8(2)(e)(xii) applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime).

¹²⁵⁴ Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, p. 522, para. 1383.

¹²⁵⁵ [Hague Regulations](#), Article 23(g).

¹²⁵⁶ ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, para. 312. See also *Ongwen Trial Judgement*, para. 2777 (“Third, such property must have been protected from that destruction under the international law of armed conflict. The property is protected under international law when it does not constitute ‘military objectives’, namely ‘objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage’”) (in relation to the offence of “Destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of the conflict” under Article 8(2)(e)(xii) applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime); ICC, *Katanga Trial Judgement*, para. 893 (“To fall within the ambit of article 8(2)(e)(xii) of the Statute, partially or totally destroyed property must be protected by the international law of armed conflict, that is, it must not constitute ‘military objectives’. Military objectives are those ‘objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.’”) (in relation to Article 8(2)(e)(xii) applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime).

¹²⁵⁷ ICTY, *Mladic Trial Judgement*, Vol. III of V, para. 3257 (“The prohibition on wanton destruction covers property located in any territory involved in the armed conflict. The requirement of destruction ‘on a large scale’ may be met either if many objects are damaged or destroyed, or if the value of one or a few destroyed objects is very high. Military necessity may never justify the targeting of civilian objects. *Civilian objects are defined by opposition to military objectives, which are limited to those objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time,*

632. In terms of geographical scope, relevant jurisprudence from the ICC suggests that the destruction/seizure is not necessary linked to a specific territory or location and it can occur (1) in the context of the conduct of hostilities against military objective or civilian objects;¹²⁵⁸ or (2) in a occupied territory.¹²⁵⁹ Likewise the ICTY jurisprudence similarly concluded that the offence under Article 3(b) of the ICTY Statute covers “property located in any territory involved in the armed conflict”.¹²⁶⁰

633. Besides its general scope covering all objects that do not qualify as military objectives, commentators have suggested that Articles 46, 53, 55 and 56 of the [Hague Regulations](#) provide additional guidance in identifying protected property under the scope of the offence, especially *vis-à-vis* private property and movable or immovable property located in occupied territory.¹²⁶¹ In particular:

- *Private property.* Private property is to considered protected under Article 46 of the [Hague Regulations](#),¹²⁶² unless it has been used for hostile purposes.¹²⁶³ Specifically, according to Article 53 of the [Hague Regulations](#), in times of occupation “appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of munitions of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made.”¹²⁶⁴
- *Movable public property.* Under Article 53 of the [Hague Regulations](#), the Occupying power may confiscate movable public property which can be used for military operation.¹²⁶⁵ Nonetheless, this does not apply to “[t]he property of municipali-

offers a definite military advantage. As a rule, destruction carried out before fighting begins or after fighting has ceased cannot be justified by military necessity.”) (emphasis added).

¹²⁵⁸ ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, para. 311 (“Article 8(2)(b)(xiii) of the Statute applies not only when the attack is specifically directed at a military objective but also when it targets and destroys civilian property. Thus, the provision includes scenarios in which the aim of the attack is to target only civilians or civilian objects and scenarios in which the attack is simultaneously aimed at both military objectives and civilians or civilian objects.”).

¹²⁵⁹ Cf. ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, para. 318.

¹²⁶⁰ ICTY, *Mladic Trial Judgement*, Vol. III of V, para. 3257; ICTY, *Kordic and Cerkez Appeal Judgement*, para. 74 (“while property situated on enemy territory is not protected under the Geneva Conventions, and is therefore not included in the crime of extensive destruction of property listed as a grave breach of the Geneva Conventions, the destruction of property is criminalised under Article 3 of the Statute”). See also *Prlic et al. Trial Judgement*, Vol. IV of VI, para. 1264 (“With respect to the constituent elements of the crimes of destruction of property not justified by military necessity punishable under Article 2 (d) of the Statute, and the wanton destruction of cities, towns or villages, or devastation not justified by military necessity punishable under Article 3 (b), the Chamber notes that the second does not contain a materially distinct element missing from the first. The destruction of property not justified by military necessity is characterised by the destruction of property which enjoys the general protection of the Geneva Conventions, or which is located in occupied territory, which is not a requirement for the wanton destruction of cities, towns or villages, or devastation not justified by military necessity. Conversely, the latter does not contain a materially distinct element missing from the destruction of property not justified by military necessity.”) (footnotes omitted). But see *contra* Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 439, para. 497.

¹²⁶¹ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 442, para. 497.

¹²⁶² [Hague Regulations](#), Article 46 (“Family honour and rights, the lives of persons, and *private property*, as well as religious convictions and practice, *must be respected. Private property cannot be confiscated.*”) (emphasis added).

¹²⁶³ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 442, para. 505.

¹²⁶⁴ [Hague Regulations](#), Article 53.

¹²⁶⁵ [Hague Regulations](#), Article 53 (“An army of occupation can only take possession of cash, funds, and realizable se-

ties, that of institutions dedicated to religion, charity and education, the arts and sciences.”¹²⁶⁶ Under Article 56 of the Hague Regulations such property cannot be seized or destroyed by the Occupying Power.¹²⁶⁷

- *Immovable public property.* Immovable public property located in occupied territory, as building, forests, parks and agricultural land cannot be seized or destroyed as Article 55 of the Hague Regulations states that “[t]he occupying State shall be regarded only as administrator and usufructuary of [property] belonging to the hostile State, and situated in the occupied country”.

634. **The destruction or seizure was not justified by military necessity.** The destruction/seizure of property fulfils the elements of this crime when it is not justified by military necessity. According to the ICC and ICTY jurisprudence “military necessity” is identified with “those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usage of war”.¹²⁶⁸

635. In this regard, consistent with the jurisprudence of the ICC and ICTY, the assessment of “military necessity” should be carried out on a case-by-case basis and should include the following considerations:

- whether the perpetrator was left with no other option but to carry out the act of destruction or seizure;¹²⁶⁹
- whether “property destroyed or seized constituted a military objective before having fallen into the hands of the attacking party”;¹²⁷⁰

curities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations.”).

¹²⁶⁶ [Hague Regulations](#), Article 56.

¹²⁶⁷ While under ICC Statute, Article 8(2)(b)(xiii) the destruction of these objects is covered by the general war crime of “Destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities”, under the ICTY framework this conduct is covered by the specific war crime of “Seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science” under Article 3(d) of the ICTY Statute. See e.g., ICTY, *Prlic et al.* Trial Judgement, Vol I of VI, paras 171-175, ICTY, *Kordic and Cerkez Appeal Judgement*, paras 86-92.

¹²⁶⁸ ICC, *Katanga Trial Judgement*, para. 894 (in relation to the offence of “Destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of the conflict” under Article 8(2)(e)(xii) applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime); ICTY, *Kordic and Cerkez Trial Judgement*, para. 686.

¹²⁶⁹ ICC, *Katanga Trial Judgement*, para. 894 (in relation to the offence of “Destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of the conflict” under Article 8(2)(e)(xii), the consideration may also apply *mutatis mutandis* to the present crime). See also ICC, *Ntaganda Trial Judgement*, para. 1164 (“With regard to the explicit reference in Article 8(2)(e)(xii) that the destruction be ‘imperatively demanded by the necessities of the conflict’, the Chamber agrees with Trial Chamber II that this phrase sets a certain threshold and denotes that only when the perpetrator had no other option, which would render the object intact, can the destruction be considered to have been justified by military necessity”) (in relation to the offence of “Destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of the conflict” under Article 8(2)(e)(xii) applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime).

¹²⁷⁰ ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, para. 318 ; See also ICC, *Ntaganda Trial Judgement*, para. 1165 (“Although attacks directed at or destruction of military objectives will generally be justified by military necessity and thereby fall outside the scope of Article 8(2)(e)(xii) applicable to non-international armed conflict, the Chamber considers that it will remain necessary to conduct a case-by-base assessment”) (in relation to the offence of “Destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of the conflict” under Article 8(2)(e)(xii) applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime). With respect to Article 3(d) of the ICTY Statute see ICTY, *Prlic et al. Trial Judgement*, Vol. I of VI, para. 178 (holding that the objective elements of Article

- whether the property destroyed amounts to an “incidental damage” in the context of an attack directed to military objectives and was not excessive “in relation to the concrete and direct military advantage anticipated”.¹²⁷¹ In these cases, “the attack on the military objective [is] justified by military necessity and that proportionate damage caused to civilian property as an unintended by-product will not amount to destruction as a war crime.”¹²⁷²
- whether, “having fallen into the hands of the attacking party, its destruction or seizure was still necessary for military reasons”.¹²⁷³

636. In this regard, the ICTY jurisprudence has further clarified that, in principle, destruction of property which occurred before or after armed confrontation cannot be justified by military necessity.¹²⁷⁴

3(d) of the ICTY Statute require “(1) an intentional act or omission; (2) causing destruction or damage to a cultural or religious object of property; (3) the property *did not constitute a military objective within the meaning of Article 52 of Additional Protocol I*” (footnotes omitted) (emphasis added).

¹²⁷¹ ICC, *Ntaganda Trial Judgement*, para. 1166 (“the Chamber observes that there may be cases where an attack directed at a military object caused ‘incidental damage’ to a civilian object and where damages were not expected to be ‘excessive in relation to the concrete and direct military advantage anticipated.’”) (in relation to the offence of “Destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of the conflict” under Article 8(2)(e)(xii) applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime). See also ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, para. 313; ICTY, *Prlic et al. Trial Judgement*, Vol. I of VI, para. 169 (“The Appeals Chamber likewise recalled that although attacks may be conducted only against military objectives, “collateral civilian damage” was not unlawful per se, provided that the customary rules of proportionality in the conduct of hostilities were complied with. This proportionality principle is defined in Article 51.5(b) of Additional Protocol I, which prohibits: an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”); ICTY, *Martić Trial Judgement*, para. 93.

¹²⁷² ICC, *Ntaganda Trial Judgement*, para. 1165 (“In such cases, it is understood that the attack on the military objective was justified by military necessity and that proportionate damage caused to civilian property as an unintended by-product will not amount to destruction as a war crime.”) (in relation to the offence of “Destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of the conflict” under Article 8(2)(e)(xii) applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime). See also ICTY, *Prlic et al. Trial Judgement*, Vol. I of VI, para. 169.

¹²⁷³ ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, para. 318.

¹²⁷⁴ ICTY, *Mladic Trial Judgement*, Vol. III of V, para. 3257 (“As a rule, destruction carried out before fighting begins or after fighting has ceased cannot be justified by military necessity”). ICTY, *Martić Trial Judgement*, para. 93 (“In principle, destruction carried out before fighting begins or after fighting has ceased cannot be justified by claiming military necessity”). However, see ICTY, *Martić Trial Judgement*, fn. 173 (“However, there may be rare occasions in which pre-emptive destruction could arguably fall within the scope of ‘military necessity’, when such destruction is reasonably connected with the overcoming of enemy forces”).

CASE STUDY: EXAMPLES OF ASSESSMENT OF MILITARY NECESSITY

Destruction of property not justified by military necessity

ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*: “The evidence tendered by the Prosecution also shows that the destruction was not justified by military necessity. The Chamber finds substantial grounds to believe that the objects destroyed by FNI/FRPI combatants were mainly civilian. In this respect, the Chamber recalls that article 47(2) of the ICRC Draft Protocol in 1970-1971 states that: “objects designed for civilian use, such as houses, dwellings, installations and means of transport, and all objects which are not military objectives, shall not be made the object of attack, except if they are used mainly in support of the military effort.” As mentioned previously, the property destroyed by the combatants was mainly houses, shops, schools and/or were the public or private property belonging to the civilian population, and thus did not constitute military objects by virtue of their location and purpose.”¹²⁷⁵

- **ICTY, *Prlic et al. Trial Judgement***: “As the Chamber established, from 24 to at least 30 October 1992, when there were no longer any combat activities, HVO soldiers and members of the HVO Military Police destroyed about 75 Muslim houses in the town of Prozor that they burned down using jerry cans filled with gasoline, and destroyed other property such as vehicles belonging to Muslims, whereas not one of the houses belonging to Croats was burned down or damaged. In view of the circumstances surrounding this destruction, the Chamber is satisfied that this was not justified by military necessity.”¹²⁷⁶

Destruction of property justified by military necessity

- **ICTY, *Prlic et al. Trial Judgement***: “The Chamber also established that in the village of Paljike consisting of 25 houses, HVO soldiers set fire to at least one Muslim house on 24 October 1992. The Chamber thus noted that on 24 October 1992, 18 HVO soldiers went in search of Muslim houses and took one inhabitant of the village hostage, and having broken into one of the houses occupied by a woman and an elderly man, the soldiers threw in grenades and set it on fire several minutes later. The Chamber notes that shots were fired when the HVO soldiers broke down the door of the house. However, the evidence did not establish the origin of the shots. The Chamber can therefore not exclude the possibility that the destruction of the house was justified by military necessity.”¹²⁷⁷

- a. Definition of destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of war (Subjective Elements)¹²⁷⁸

637. **The perpetrator intentionally and knowingly destroy/seize enemy property which was not justified by military necessity.** Under the ICC legal framework, the *mens rea* elements for the offence requires direct or indirect intent, namely that the perpetrator’s conduct was deliberate and that he: (1) intended to destroy/seize enemy property

¹²⁷⁵ ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, para. 324 (emphasis added).

¹²⁷⁶ ICTY, *Prlic et al. Trial Judgement*, Vol. III of VI, para. 1557 (footnotes omitted).

¹²⁷⁷ ICTY, *Prlic et al. Trial Judgement*, Vol. III of VI, para. 1558 (footnotes omitted).

¹²⁷⁸ This section details the subjective elements for this war crime as detailed under international law. However, the general part of the CCU identifies subjective elements that apply to crimes. See Articles 23, 24 and 25 of the CCU. It will be necessary to consider the relevance of the subjective elements in the general part of the CCU when considering the elements of this crime as applied under Article 438 of the CCU.

knowing that such destruction/seizure was not justified by military necessity;¹²⁷⁹ or (2) was aware that such destruction/seizure would occur in the ordinary course of the events as a result of his conduct.¹²⁸⁰

638. Importantly, it must be noted that the ICTY jurisprudence concerning the corresponding offences under Article 3(b) of the ICTY Statute (wanton destruction of cities, towns or villages, or devastation not justified by military necessity) appears to suggest a lower *mens rea* standard for the relevant war crime, namely that: (1) the perpetrator acted with the intent to destroy the property in question; or (2) in *reckless* disregard of the likelihood of its destruction.¹²⁸¹ The reference to recklessness as a subjective component of the offence seems to indicate that, under customary international law, *dolus eventualis* may apply vis-à-vis the crime.

639. **Awareness of the factual circumstances that established the status of the property.** Further, the [ICC Elements of Crimes](#) specify that the perpetrator must have been “aware of the factual circumstances that established the status of the property.”¹²⁸² According to the jurisprudence of the ICC, the specific reference to the *factual circumstances* reflects that “it is not required that the perpetrator make the necessary

¹²⁷⁹ ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, para. 325 (“The Chamber finds that there is sufficient evidence to establish substantial grounds to believe that when directing the attack against the civilian population, the FNI/FRPI combatants (i) intended to destroy civilian properties; (ii) knew that such destruction was not justified by military necessity.”) (in relation to the offence of “Destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of the conflict” under Article 8(2)(e)(xii) applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime). In relation to the knowledge requirement of “military necessity”, the relevant ICTY jurisprudence concerning Article 2(d) of the ICTY Statute seems to suggest that this element “must be decided from the perspective of the person contemplating the attack, taking into account the information available to the latter at the moment of the attack.” *Prlic et al. Trial Judgement*, Vol. I of VI, para. 123 (“Knowing whether a definite military advantage may be achieved must be decided from the perspective of the person contemplating the attack, taking into account the information available to the latter at the moment of the attack.”). See also Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 342, para. 124.

¹²⁸⁰ [ICC Statute](#), Article 30(2)(b). See also ICC, *Katanga Trial Judgement*, , paras 899 (“Under article 30 of the Statute, it is necessary to prove that the perpetrator acted deliberately or failed to act (1) in order to destroy intentionally the property or (2) whereas he or she was aware that its destruction would occur in the ordinary course of events”), 900 (“the perpetrator must have been aware of the fact that the destruction was not justified by military necessity”) (in relation to the offence of “Destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of the conflict” under Article 8(2)(e)(xii) applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime); ICC, *Ntaganda Trial Judgement*, para. 1150 (“The perpetrator’s conduct was deliberate and the perpetrator: (i) meant to cause the consequence; or (ii) was aware that it would occur in the ordinary course of events”) (in relation to the offence of “Destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of the conflict” under Article 8(2)(e)(xii) applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime).

¹²⁸¹ ICTY, *Kordic and Cerkez Appeal Judgement*, para. 74 (“the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction”); ICTY, *Prlic et al. Trial Judgement*, Vol. III of VI, para. 166(iii). A similar *mens rea* standards is applicable to Article 3(d) of the ICTY Statute, see ICTY, *Brdanin Trial Judgement*, (“With respect to the *mens rea* requisite of destruction or devastation of property under Article 3 (d), the jurisprudence of this Tribunal is consistent by stating that the *mens rea* requirement is intent (*dolus directus*). The Trial Chamber holds that as religious institutions enjoy the minimum protection afforded to civilian objects the *mens rea* requisite for this offence should be equivalent to that required for the destruction or devastation of property under Article 3 (b). The Trial Chamber, therefore, is of the opinion that the destruction or wilful damage done to institutions dedicated to religion must have been either perpetrated intentionally, with the knowledge and will of the proscribed result or in reckless disregard of the substantial likelihood of the destruction or damage.”) (footnotes omitted).

¹²⁸² [ICC Elements of Crimes](#), Article 8(2)(b)(xiii)-4.

value judgement in order to conclude that the property is in fact protected under the international law of armed conflict.”¹²⁸³

b. Contextual elements

640. In addition, as with all war crimes, it is necessary to demonstrate the following contextual elements:
- i. There was an international armed conflict;¹²⁸⁴
 - ii. The conduct took place in the context of and was associated with an international armed conflict;¹²⁸⁵ and
 - iii. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.¹²⁸⁶

¹²⁸³ ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, para. 316.

¹²⁸⁴ See above, paras 188-189.

¹²⁸⁵ See above, paras 190-198. See also [ICC Elements of Crimes](#), Article 8(2)(b)(xii).

¹²⁸⁶ See above, para. 199. See also [ICC Elements of Crimes](#) Article 8(2)(b)(xiii).

d) War Crimes of Attacks on Prohibited Targets

- i. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities (ICC Statute, Article 8(2)(b) (i); ICTY Statute, Article 3).

APPLICABILITY: THE WAR CRIME OF INTENTIONALLY DIRECTING ATTACKS AGAINST THE CIVILIAN POPULATION AS SUCH OR AGAINST INDIVIDUAL CIVILIANS NOT TAKING DIRECT PART IN HOSTILITIES CAN BE CONSIDERED CRIMINALISED UNDER ARTICLE 438 OF THE CCU AS IT IS SUBSUMED UNDER THE NOTIONS OF “OTHER VIOLATIONS OF RULES OF THE WARFARE RECOGNIZED BY INTERNATIONAL INSTRUMENTS CONSENTED TO BY BINDING BY THE VERKHOVNA RADA (PARLIAMENT) OF UKRAINE” (PARAS 641-645).

Elements of the crimes: To convict a perpetrator for the war crime of intentionally directing attacks against civilians or the civilian population, the following elements need to be established:

(1) Objective elements

- The perpetrator directed an attack (paras 647-651).
- The object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities (paras 652-663).

(2) Subjective elements

- The perpetrator intended to direct an attack (para. 665).
- The perpetrator intended to make the civilian population as such or individual civilians not taking direct part in hostilities the object of the attack (paras 666-667).
- The perpetrator was aware of the civilian character of the population or of civilians not taking part in hostilities (paras 668-669).

(3) Contextual elements

- There is an international armed conflict (para. 670).
- The conduct of the perpetrator took place in the context and was associated with the conflict (para. 670).
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict (para. 670).

a. Applicability under Article 438

641. Although not explicitly mentioned in Article 438 of the CCU, intentionally directing attacks against civilians or the civilian population (“attacking civilians”) may be subsumed under “any other violations of rules of warfare recognized by international instruments consented to be binding by the Verkhovna Rada of Ukraine” to which Article 438(1) refers. As explained below, attacking civilians is a method of warfare

prohibited under international instruments ratified by Ukraine. Moreover, violation of this prohibition has been recognised as a war crime. These factors support interpreting Article 438 of the CCU as criminalising violations of this IHL prohibition.

642. **Attacking civilians constitutes a prohibited method of warfare and a violation of International Humanitarian Law reflected in international treaties ratified by Ukraine.**

The prohibition of direct attacks against civilians stems from the IHL principle of distinction which is one of “the cardinal principles contained in the text constituting the fabric of humanitarian law.”¹²⁸⁷ Specifically, the principle of distinction between civilians and combatants is codified in Articles 48 and 51 of [Additional Protocol I](#) ratified by Ukraine.¹²⁸⁸ The former requires that “[i]n order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”¹²⁸⁹ Article 51(2) of [Additional Protocol I](#) specifies the aforementioned obligation to respect and protect the civilian population by stipulating that “the civilian population as such, as well as individual civilians, shall not be the object of attack”.¹²⁹⁰ Therefore, for the purposes of Article 438 of the CCU, the prohibition of attacking civilians is a method of warfare and a violation of the laws of warfare recognised in an international instrument accepted as binding by the Ukrainian parliament.¹²⁹¹

643. **Recognition as a war crime.** When committed wilfully and causing death or serious injury to body or health, attacking civilians constitutes a grave breach of [Additional Protocol I](#) and therefore a war crime.¹²⁹²

644. Moreover, “intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities” is expressly codified as a war crime in Article 8(2)(b)(i) of the [ICC Statute](#) applicable to international armed conflict.¹²⁹³ While not explicitly mentioned under the [ICTY Statute](#), the ICTY jurisprudence has determined that attacking civilians constitute violations of the laws and customs of war under Article 3 of the [ICTY Statute](#).¹²⁹⁴

¹²⁸⁷ ICJ, Legality of the Threat or Use of Nuclear Weapons, [Advisory Opinion](#), para. 78.

¹²⁸⁸ Ukraine ratified Additional Protocol I on 25 January 1990. See ICRC, Treaties and States Parties, [Ukraine](#). Concerning non-international armed conflicts, Article 13 of [Additional Protocol II](#) states that “the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations” and that “the civilian population as such, as well as individual civilians, shall not be the object of attack”.

¹²⁸⁹ [Additional Protocol I](#), Article 48.

¹²⁹⁰ See [ICRC Commentary on Additional Protocol I](#), para. 1947.

¹²⁹¹ The principle of distinction between civilians and combatants is also recognised as a norm of customary international law. See ICRC, IHL Database, Customary Law, [Rule 1. The Principle of Distinction between Civilians and Combatants](#).

¹²⁹² [Additional Protocol I](#), Article 85(3)(a); ICRC, Advisory Service on International Humanitarian Law, [Obligations in terms of penal repression](#), p. 1.

¹²⁹³ This offence is included in the list of “other serious violations of the laws and customs applicable in international armed conflict” under Article 8(2) of the [ICC Statute](#).

¹²⁹⁴ See e.g., ICTY, [Galic Trial Judgement](#) para. 596 (“The Trial Chamber is satisfied beyond reasonable doubt that the crime of attack on civilians within the meaning of Article 3 of the Statute was committed against the civilian population of Sarajevo during the Indictment Period. In relation to the *actus reus* of that crime, the Trial Chamber finds that attacks by sniping and shelling on the civilian population and individual civilians not taking part in hostilities constitute acts of violence. These acts of violence resulted in death or serious injury to civilians. The Trial Chamber

645. These factors support recognition of the criminalisation of attacking civilians under Article 438(1) of the CCU.

b. Definition of Attacking Civilians (Objective elements)

646. The objective elements of the war crime require that (1) the perpetrator directed an attack and (2) the object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities.¹²⁹⁵

647. **The perpetrator directed an attack.** Jurisprudence of the ICC and the ICTY relies on the definition of the “attack” provided in Article 49 of [Additional Protocol I](#).¹²⁹⁶ Pursuant to this article “attacks” are defined as “acts of violence against the adversary, whether in offence or in defence.”¹²⁹⁷ The war crime of attacking civilians must be committed during the conduct of hostilities before civilians or the civilian population fall into the hands of the adverse party.¹²⁹⁸

648. Moreover, to “direct” an attack has been interpreted to mean “that the perpetrator selected the intended target and decided on the attack.”¹²⁹⁹

further finds that these acts were wilfully directed against civilians, that is, either deliberately against civilians or through recklessness.”); ICTY, [Blaskic Trial Judgement](#), p. 267 (“[...] General Blaskic committed: — a violation of the laws or customs of war under Article 3 of the Statute and recognised by Article 51(2) of Additional Protocol I: unlawful attacks on civilians (count 3).”); ICTY, [Kordic and Cerkez Trial Judgement](#), para. 834 (“[...] The Trial Chamber finds the accused Dario Kordić liable under Article 7(1) on the following counts: (a) Count 3 (unlawful attacks on civilians) [...]”).

¹²⁹⁵ [ICC Elements of Crimes](#), Article 8(2)(b)(i).

¹²⁹⁶ ICC, [Ntaganda Trial Judgement](#), para. 916 (“The Chamber notes that neither the Statute nor the Elements of Crimes include a definition of the term ‘attack’. Having regard to the established framework of international law, the Chamber notes that the crime as described in Article 8(2)(e)(i) of the Statute is based on Article 13(2) of Additional Protocol II. This protocol does not define attacks, but Additional Protocol I does, and the term is considered to have the same meaning in Additional Protocol II. ‘Attack’ must therefore be understood within the meaning of Article 49 of Additional Protocol I as ‘acts of violence against the adversary, whether in offence or defence’”) (in relation to the offence of attacking civilians under Article 8(2)(e)(i) of the ICC Statute applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime); ICTY, [Kordic and Cerkez Appeal Judgement](#), para. 47 (“The term attack is defined in Article 49 of Additional Protocol I as “acts of violence against the adversary, whether in offence or in defence”).

¹²⁹⁷ [IICRC Commentary on Additional Protocol I](#), para. 1880 (“The definition given by the Protocol has a wider scope since it -- justifiably -- covers defensive acts (particularly “counter-attacks”) as well as offensive acts, as both can affect the civilian population. [...] In other words, the term “attack” means “combat action”).

¹²⁹⁸ ICC, [Ntaganda Trial Judgement](#), para. 904 (in relation to the offence of attacking civilians under Article 8(2)(e)(i) of the ICC Statute applicable to non-international armed conflict, but the consideration may also apply *mutatis mutandis* to the present crime); ICC, [Katanga and Ngudjolo Chui Decision on Confirmation of Charges](#), paras 267, 269 (“The war crime provided for in article 8(2)(b)(i) of the Statute is the first in the series of war crimes for which one essential element is that the crime must be committed during the conduct of hostilities [...] Accordingly, this crime is applicable only to attacks (acts of violence) directed against individual civilians not taking direct part in the hostilities, or a civilian population, that has not yet fallen into the hands of the adverse or hostile party to the conflict to which the perpetrator belongs. [...] In the view of the Chamber, after an individual civilian not taking an active part in the hostilities or the civilian population falls into the hands of such an adverse or hostile party to the conflict, an act of violence against them does not fall under article 8(2)(b)(i) of the Statute but under other provisions of the Statute [...]”) (footnotes omitted). ‘

¹²⁹⁹ ICC, [Ongwen Trial Judgement](#), para. 2758 (in relation to the offence of attacking civilians under Article 8(2)(e)(i) of the ICC Statute applicable to non-international armed conflict but the consideration may also apply *mutatis mutandis* to the present crime); ICC, [Ntaganda Trial Judgement](#), para. 744 (in relation to the offence of attacking civilians under Article 8(2)(e)(i) of the ICC Statute applicable to non-international armed conflict but the consideration may also apply *mutatis mutandis* to the present crime).

649. **Result requirement.** Regarding whether the war crime of attacking civilians requires a specific result to occur, different approaches have been adopted depending on the relevant legal framework of customary international law (ICTY) or treaty law (ICC).
650. The [ICC Statute](#) and the [ICC Elements of Crimes](#) do not require that the attacks against civilians or the civilian population cause a particular result such as death or serious injury to body or health.¹³⁰⁰

ICC, KATANGA TRIAL JUDGEMENT, PARA. 799 (FOOTNOTES OMITTED)¹³⁰¹

[The Chamber] further considers that the crime of attack against civilians proscribes a certain conduct and that the material element is established where the attack is launched and its object is a civilian population as such or individual civilians not taking direct part in hostilities; no result need ensue from the attack. Indeed, the Chamber considers that the absence of a result requirement in the Elements of Crimes is not accidental, insofar as, where such a requirement exists, the Elements of Crimes refer to it and specify the consequence thereof.

651. The ICTY jurisprudence has nonetheless determined that under customary law direct attacks against civilians need to reach the threshold of harm required in the grave breaches provision of Additional Protocol I, namely “death or serious injury to body or health” to fall under Article 3 (violations of the law and customs of war) of the [ICTY Statute](#).¹³⁰²

¹³⁰⁰ See ICC, *Katanga and Ngudjolo Chui Decision on Confirmation of Charges*, para. 270 (“The war crime provided for in article 8(2)(b)(i) of the Statute is committed when the attack (or the act of violence) is launched because, unlike article 85(3) AP I, it does not require any material result or a “harmful impact on the civilian population or on the individual civilians targeted by the attack, and is committed by the mere launching of the attack on a civilian population or individual civilians not taking direct part in hostilities, who have not yet fallen into the hands of the attacking party.” Such material results include, for instance, that the attack caused death or serious injury to the body or health of the targeted civilians.); ICC, *Ntaganda Trial Judgement*, para. 904 (“[...] Article 8(2)(e)(i) of the Statute does not require any actual harm to civilians to ensue from the attack and the crime may therefore be committed by the mere launching of an attack.”) (in relation to the offence of attacking civilians under Article 8(2)(e)(i) of the ICC Statute applicable to non-international armed conflict but the consideration may also apply *mutatis mutandis* to the present crime); ICC, *Ongwen Trial Judgement*, para. 2758 (“No particular harm to civilians need be caused; the crime is directing the attack as such.”) (in relation to the offence of attacking civilians under Article 8(2)(e)(i) of the ICC Statute applicable to non-international armed conflict but the consideration may also apply *mutatis mutandis* to the present crime).

¹³⁰¹ In relation to the offence of attacking civilians under Article 8(2)(e)(i) of the ICC Statute applicable to non-international armed conflict but the consideration may also apply *mutatis mutandis* to the present crime.

¹³⁰² Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 359, para. 194; ICTY, *Galic Trial Judgement* paras 56, 62 (“In sum, the Trial Chamber finds that the crime of attack on civilians is constituted of the elements common to offences falling under Article 3 of the Statute, as well as of the following specific elements: 1. Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population. 2. The offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence. [...] The Trial Chamber finds that an attack on civilian can be brought under Article 3 by virtue of customary international law and, in the instant case, also by virtue of conventional law and is constituted of acts of violence wilfully directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.”); ICTY, *Kordic and Cerkez Appeal Judgement*, paras 66-67 (“The Appeals Chamber finds that at the time the unlawful attack occurred in this case, there was no basis for finding that, as a matter of

652. **The object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities.**

653. **Civilians.** The ICC and ICTY jurisprudence relies on the definition of civilians under Additional Protocol I to the Geneva Conventions.¹³⁰³ Article 50(1) of [Additional Protocol I](#) defines civilians as “any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third [Geneva] Convention and in Article 43 of [the] Protocol.”

654. [Geneva Convention III](#) assigns combatant and prisoner of war status to the following categories of persons:¹³⁰⁴

- members of States’ armed forces, as well as members of militias and voluntary corps incorporated in such armed forces;¹³⁰⁵
- members of other militias, voluntary corps and organised resistance movements that belong to a Party to the conflict and fulfil specific requirements;¹³⁰⁶
- members of regular armed forces that “profess allegiance to a government, or an authority not recognised by the Detaining Power”;¹³⁰⁷ and
- inhabitants in a non-occupied territory who spontaneously take up arms to fight the invading forces without having the time to organise themselves.¹³⁰⁸

655. In addition to Geneva Convention III, Article 44 of [Additional Protocol I](#) grants combatant status to members of armed forces, including when they cannot distinguish themselves from the civilian population but, nonetheless, carry their arms openly during military engagement and during such time as they are visible to the adversary.¹³⁰⁹

656. Individuals that do not belong to the aforementioned categories of persons are civilians.

customary international law, State practice or *opinio iuris* translated the prohibitions under Articles 51 and 52 of Additional Protocol I into international crimes, such that unlawful attacks were largely penalized regardless of the showing of a serious result. State practice was not settled as some required the showing of serious injury, death or damage as a result under their national penal legislation, while others did not. For the above-mentioned reasons, the Appeals Chamber is not satisfied that at the relevant time, a violation of Articles 51 and 52 of Additional Protocol I incurred individual criminal responsibility under Article 3 of the [of the 1993 ICTY] Statute without causing death, serious injury to body or health, or results listed in Article 3 of the Statute, or being of the same gravity.”); ICTY, [Martić Trial Judgement](#), para. 70 (“It is an element of the crime that the attacks resulted in death or serious bodily injury within the civilian population at the time of such attacks.”); ICTY, [Prlić et al. Trial Judgement](#), Vol. I of VI, para. 191 (“Under the Tribunal’s case-law, for a violation of Article 51 of Additional Protocol I to entail individual criminal responsibility under Article 3 of the Statute, it must result in death or serious injury to the body or health of the civilian victim or any other criminal act listed in Article 3 of the Statute, or any other consequence of equal severity.”).

¹³⁰³ ICC, [Katanga and Ngudjolo Chui Decision on Confirmation of Charges](#), para. 266, fn. 366; ICTY, [Kordić and Cerkez Appeal Judgement](#), paras 48-50; ICTY, [Galić Trial Judgement](#), para. 47.

¹³⁰⁴ Article 4 of [Geneva Convention III](#) outlines the categories of persons entitled to prisoner of war (POW) status. Nonetheless, considering that “combatants are the largest subset of those who benefit from POW status, this provision is also relevant to the definition of combatants.” Sassoli, *International Humanitarian Law, Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar, 2019, p. 252; How Does Law Protect on War, [Prisoners of War. Geneva Convention III](#), Article 4(A)(1); [ICRC Commentary on Geneva Convention III](#) (2020), para. 979.

¹³⁰⁵ [Geneva Convention III](#), Article 4(A)(1); [ICRC Commentary on Geneva Convention III](#) (2020), para. 979.

¹³⁰⁶ [Geneva Convention III](#), Article 4(A)(2) stipulates that members of militias, voluntary corps and organised resistance movements qualify as combatants when the following conditions are fulfilled: they are subject to responsible command, they use a fixed distinctive emblem, they carry arms openly and conduct operations in accordance with the rules of IHL. See [ICRC Commentary on Geneva Convention III](#) (2020), paras 1001, 1005.

¹³⁰⁷ [Geneva Convention III](#), Article 4(A)(3); [ICRC Commentary on Geneva Convention III](#) (2020), para. 1042.

¹³⁰⁸ [Geneva Convention III](#), Article 4(A)(6). See [ICRC Commentary on Geneva Convention III](#) (2020), paras 1061, 1065.

¹³⁰⁹ [Additional Protocol I](#), Article 44 (1) and (3).

ICTY, GALIC TRIAL JUDGEMENT, PARA. 47 (FOOTNOTES OMITTED)

For the purpose of the protection of victims of armed conflict, the term “civilian” is defined negatively as anyone who is not a member of the armed forces or of an organized military group belonging to a party to the conflict. It is a matter of evidence in each particular case to determine whether an individual has the status of civilian.

657. **Civilian population.** Regarding the meaning of the term “civilian population”, it consists of all persons who are civilians.¹³¹⁰ The presence of combatants or civilians that are directly participating in hostilities within a civilian population does not change its civilian status.¹³¹¹ However, the ICTY Trial Chamber in *Prlic* considered that “it will be necessary to give heed to the number of combatants intermingled with the civilian population and to whether they are on furlough in order to determine whether the presence of combatants within a civilian population deprives that population of its civilian character.”¹³¹²
658. Individual civilians and the civilian population enjoy general protection against dangers arising from military operations.¹³¹³ In addition, they remain protected against direct attacks unless and for such time as they directly participate in hostilities.¹³¹⁴
659. **Direct participation in hostilities.** Regarding jurisprudence by international criminal tribunals, the ICTY Trial Chamber in the *Galic* case considered that “to take a ‘direct’ part in the hostilities means acts of war which by their nature or purpose are likely to cause actual harm to the personnel or matériel of the enemy armed forces.”¹³¹⁵

¹³¹⁰ [Additional Protocol I](#), Article 50(2). See also ICTY, [Galic Trial Judgement](#), para. 49 (“The civilian population comprises all persons who are civilians [...]. The use of the expression “civilian population as such” in Article 51(2) of Additional Protocol I indicates that “the population must never be used as a target or as a tactical objective.”) (footnotes omitted); ICC [Katanga Trial Judgement](#), para. 801 (“The term “civilian population” denotes “civilians as a group.”) (footnotes omitted) (in relation to the offence of attacking civilians under Article 8(2)(e)(i) of the ICC Statute applicable to non-international armed conflict, but the consideration may also apply *mutatis mutandis* to the present crime); ICC, [Ntaganda Trial Judgement](#), para. 921 (“The object of the attack may be either a ‘civilian population’, in other words, a group of civilians.”) (footnotes omitted) (in relation to the offence of attacking civilians under Article 8(2)(e)(i) of the ICC Statute applicable to non-international armed conflict but the consideration may also apply *mutatis mutandis* to the present crime).

¹³¹¹ ICTY, [Galic Trial Judgement](#), para. 50 (“The presence of individual combatants within the population does not change its civilian character.”) (footnotes omitted); ICTY, [Strugar Rule 98bis Decision](#), para. 50 (“The presence of certain non-civilians among the targeted population does not change the character of that population.”); ICC, [Ntaganda Trial Judgement](#), para. 921 (“The presence within a civilian population of some members of an armed force or civilians directly participating in hostilities does not deprive it of its civilian character.”) (footnotes omitted) (in relation to the offence of attacking civilians under Article 8(2)(e)(i) of the ICC Statute applicable to non-international armed conflict but the consideration may also apply *mutatis mutandis* to the present crime).

¹³¹² ICTY, *Prlic et al.* [Trial Judgement](#), Vol. I of VI, para. 187.

¹³¹³ [Additional Protocol I](#), Articles 51(1).

¹³¹⁴ [Additional Protocol I](#), Articles 51(2) and (3).

¹³¹⁵ ICTY, [Galic Trial Judgement](#), para. 48.

660. Considering that IHL instruments do not specify which acts may amount to direct participation,¹³¹⁶ the ICRC offers further guidance in this regard. Specifically, direct participation concerns “specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict.”¹³¹⁷ Moreover, a civilian is directly participating in hostilities when the following criteria are fulfilled cumulatively:
- a. “the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm);
 - b. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation); and
 - c. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).”¹³¹⁸
661. Civilians taking a direct part in hostilities lose protection against direct attack for such time they participate.¹³¹⁹ Only active participation in hostilities can (temporarily) suspend civilians’ protection against direct attacks.¹³²⁰ This is the only exception to the absolute prohibition of targeting civilians or the civilian population.¹³²¹

ICTY, *GALIC* APPEAL JUDGEMENT, PARA. 130 (FOOTNOTES OMITTED)

The Appeals Chamber has previously emphasized that “there is an absolute prohibition on the targeting of civilians in customary international law” and that “the prohibition against attacking civilians and civilian objects may not be derogated from because of military necessity”. The Trial Chamber was therefore correct to hold that the prohibition of attacks against the civilians and the civilian population “does not mention any exceptions [and] does not contemplate derogating from this rule by invoking military necessity.”

¹³¹⁶ ICRC, *How Does Law Protect in War*, [Direct Participation in Hostilities](#).

¹³¹⁷ ICRC, *I*, [Interpretative Guidance on the Notion of Direct Participation in Hostilities](#), Part 1: Recommendations of the ICRC concerning the interpretation of international humanitarian law relating to the notion of direct participation in hostilities.

¹³¹⁸ ICRC, [Interpretative Guidance on the Notion of Direct Participation in Hostilities](#), p. 46.

¹³¹⁹ [Additional Protocol I](#), Article 51(3); ICRC, [Interpretative Guidance on the Notion of Direct Participation in Hostilities](#), p. 26. See also ICTY, *Galic Trial Judgement*, para. 48 (“The protection from attack afforded to individual civilians by Article 51 of Additional Protocol I is suspended when and for such time as they directly participate in hostilities.”) (footnotes omitted).

¹³²⁰ [Additional Protocol I](#), Articles 51(3); ICC, *Ntaganda Trial Judgement*, para. 883 (“[...] Under IHL, civilians are protected and they lose that protection only through active participation in hostilities and for such time they participate.”) (in relation to the offence of attacking civilians under Article 8(2)(e)(i) of the ICC Statute applicable to non-international armed conflict, but the consideration may also apply *mutatis mutandis* to the present crime).

¹³²¹ ICTY, *Prlic et al. Trial Judgement*, Vol. I of VI, para. 189 (“[...] The Appeals Chamber noted that the prohibition against attacks on civilians is absolute.”); ICTY, *Blaskic Appeal Judgement*, para. 109 (“The Appeals Chamber underscores that there is an absolute prohibition on the targeting of civilians in customary international law.”); ICTY, *Dragomir Milosevic Appeal Judgement*, para. 53 (“There is an absolute prohibition against the targeting of civilians in customary international law, encompassing indiscriminate attacks.”) (footnotes omitted).

ICC KATANGA TRIAL JUDGEMENT, PARA. 800 (FOOTNOTES OMITTED)¹³²²

The Chamber recalls that [the prohibition on the direct targeting of civilians] can in no circumstances be counterbalanced by military necessity. The prohibition on directly attacking civilians is therefore absolute and applies both to international and non-international armed conflict.

662. **Indiscriminate attacks.** The latter are attacks that are not directed at a specific military objective, or employ means and methods of warfare that cannot be directed at a specific military objective, or use means and methods of warfare the effect of which cannot be limited.¹³²³ Attacks that treat several clearly separated and distinct military objectives as a single one or are expected to cause excessive damage to civilian life or infrastructure also constitute indiscriminate attacks.¹³²⁴ This type of attacks may amount to attacking civilians. However, this determination is not automatic but should be made on a case-by-case basis.¹³²⁵

ICTY, MARTIC TRIAL JUDGEMENT, PARA. 69 (FOOTNOTES OMITTED)

[...] Indiscriminate attacks, that is attacks which affect civilians or civilian objects and military objects without distinction, may also be qualified as direct attacks on civilians. In this regard, a direct attack against civilians can be inferred from the indiscriminate character of the weapon used.

¹³²² In relation to the offence of attacking civilians under Article 8(2)(e)(i) of the ICC Statute applicable to non-international armed conflict, but the consideration may also apply *mutatis mutandis* to the present crime.

¹³²³ [Additional Protocol I](#), Article 51(4).

¹³²⁴ [Additional Protocol I](#), Article 51(5)(a) and (b).

¹³²⁵ ICC *Katanga Trial Judgement*, para. 802 (“It must be noted that indiscriminate attacks—proscribed by a rule of custom—may qualify as intentional attacks against the civilian population or individual civilians, especially where the damage caused to civilians is so great that it appears to the Chamber that the perpetrator meant to target civilian objectives. Use of weaponry that has indiscriminate effects may, *inter alia*, show that the attack was directed at the civilian population or individual civilians. The Chamber notes in this regard that an indiscriminate attack does not, however, automatically constitute an attack against the civilian population under article 8(2)(e)(i), as the subjective element is decisive in respect of the second case.”) (footnotes omitted) (in relation to the offence of attacking civilians under Article 8(2)(e)(i) of the ICC Statute applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime). See also ICTY, *Prlic et al. Trial Judgement*, Vol. I of VI, para. 190 (“The Appeals Chamber has held that an attack employing weapons which by their very nature cannot discriminate between military objectives and civilian objects may amount to a direct attack on civilians. That determination will be made case by case, based on the available evidence.”) (footnotes omitted).

ICC, [NTAGANDA TRIAL JUDGEMENT](#), PARA. 921 (FOOTNOTES OMITTED)¹³²⁶

The [war crime] may encompass attacks that are carried out in an indiscriminate manner, that is by targeting an area, as opposed to specific objects, or not targeting specific military objects or persons taking a direct part in hostilities, so long as the perpetrator was aware of the presence of civilians in the relevant area. It may also include attacks that are launched without taking necessary precautions to spare the civilian population or individual civilians. Therefore, the use of weapons that have inherently indiscriminate effects in an area where civilians are present may constitute an attack directed at the civilian population or individual civilians.

663. **Incidental harm/Disproportionate attacks.** As recognised in the extract from the judgement below, the war crime under the ICC framework excludes incidental civilian harm or damage arising from attacks against military objectives.¹³²⁷

ICC, [ONGWEN TRIAL JUDGEMENT](#), PARA. 2760 (FOOTNOTES OMITTED)¹³²⁸

The civilian population or individual civilians must have been the *primary* object of the ‘attack’; directing the attack against military objects that affect civilians incidentally does not suffice. Efforts to comply with international humanitarian law are relevant in this context, including the principle of distinction between legitimate targets and protected persons or objects and the duty to take precautionary measures. Depending on the circumstances, the civilian population can still qualify as the primary object of an attack in a situation where everyone is targeted at a mixed military-civilian position.

c. Definition of Attacking Civilians (Subjective elements)¹³²⁹

664. The subjective elements of the war crime under the [ICC Statute](#) requires that the perpetrator (1) intentionally directed an attack; (2) the perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities

¹³²⁶ In relation to the offence of attacking civilians under Article 8(2)(e)(i) of the ICC Statute applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime.

¹³²⁷ ICC [Katanga Trial Judgement](#), para. 802 (“It is important [...] to establish that the primary object of the attack was the civilian population or individual civilians. Thus, situations in which the attack is directed against a military objective and civilians are incidentally affected fall out with article 8(2)(e)(i).”) (in relation to the offence of attacking civilians under Article 8(2)(e)(i) of the ICC Statute applicable to non-international armed conflict, but the consideration may also apply *mutatis mutandis* to the present crime).

¹³²⁸ In relation to the offence of attacking civilians under Article 8(2)(e)(i) of the ICC Statute applicable to non-international armed conflict but the consideration may also apply *mutatis mutandis* to the present crime.

¹³²⁹ This section details the subjective elements for this war crime as detailed under international law. However, the general part of the CCU identifies subjective elements that apply to crimes. See Articles 23, 24 and 25 of the CCU. It will be necessary to consider the relevance of the subjective elements in the general part of the CCU when considering the elements of this crime as applied under Article 438 of the CCU.

to be the object of the attack; and (3) the perpetrator was aware of the civilian status of the population or the individual civilians.¹³³⁰

ICC, KATANGA AND NGUDJOLO CHUI DECISION ON CONFIRMATION OF CHARGES, PARA. 271 (FOOTNOTES OMITTED)

As regards the subjective elements, in addition to the standard *mens rea* requirement provided in article 30 of the Statute, the perpetrator must intend to make individual civilians not taking direct part in the hostilities or the civilian population the object of the attack. This offence therefore, first and foremost, encompasses *dolus directus* of the first degree.

665. Specifically, concerning the intent to target civilians or the civilian population, the ICC Trial Chamber in the *Katanga* case held the following:

ICC, KATANGA TRIAL JUDGEMENT, PARA. 806 (FOOTNOTES OMITTED)¹³³¹

The Chamber observes, [...], that article 8(2)(e)(i)(3) of the Elements of Crimes prescribes a specific subjective element as follows: “The perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack”. In the Chamber’s view, that specific element is, in fact, a repetition of article 30(2)(a). Indeed, the Chamber considers that the second element of the Elements of Crimes, to which it applies, namely, “[t]he object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities”, must be regarded as conduct.

666. With regard to the ICTY, the Tribunal’s jurisprudence has accepted the *mens rea* recognised in the grave breaches provision of [Additional Protocol I](#), namely to wilfully make the civilian population or individual civilians the object of the attack.¹³³²

¹³³⁰ [ICC Elements of Crimes](#), Article 8(2)(b)(i); [ICC Statute](#), Article 30; ICC, *Katanga Trial Judgement*, para. 808 (“For the mental element of the crime to be established, the perpetrator must have (1) intentionally directed an attack; (2) intended the civilian population or individual civilians to be the object of the attack; (3) been aware of the civilian character of the population or of civilians not taking part in hostilities; and (4) been aware of the factual circumstances that established the existence of an armed conflict.”) (footnotes omitted) (in relation to the offence of attacking civilians under Article 8(2)(e)(i) of the ICC Statute applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime).

¹³³¹ In relation to the offence of attacking civilians under Article 8(2)(e)(i) of the ICC Statute applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime.

¹³³² [Additional Protocol I](#), Article 85(3)(a); [ICRC Commentary on Additional Protocol I](#), para. 3474 (“[...] -- wilfully: the accused must have acted consciously and with intent, i.e., with his mind on the act and its consequences, and willing the (“criminal intent” or “malice aforethought”); this encompasses the concepts of “wrongful intent” or “recklessness”, viz., the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening; on the other hand, ordinary negligence or lack of foresight is not covered, i.e., when a man acts without having his mind on the act or its consequences (although failing to take the necessary precautions, particularly failing to seek precise information, constitutes culpable negligence punishable at least by disciplinary sanctions.”) (footnotes omitted). See also ICTY *Galic Trial Judgement*, para. 62 (“The Trial Chamber finds that an attack on civilian

ICTY, *PRLIC ET AL.* TRIAL JUDGEMENT, VOLUME 1, PARA. 192 (FOOTNOTES OMITTED)

Regarding the mental element required for the crime of attacks on the civilian population, the Tribunal's case-law has settled that the perpetrator of the crime is required to have acted with intent, which encompasses *dolus eventualis* whilst excluding negligence. [...] Thus, for there to be intent, the perpetrator has to have acted knowingly and wilfully, that is to say, perceiving his acts and their consequences and purposing that they should come to pass. *Dolus eventualis* occurs when the perpetrator, without being certain that the result will take place, accepts it in the event it does come to pass. Conduct is negligent when the perpetrator acts without having his mind on the act or its consequences.

667. The intent to target individuals civilians or the civilian population as such may be deduced from various factors including “the means and methods used during the attack, the number and status of the victims, the discriminatory nature of the attack or, as the case may be, the nature of the act constituting the attack.”¹³³³

can be brought under Article 3 by virtue of customary international law and, in the instant case, also by virtue of conventional law and is constituted of acts of violence wilfully directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.”) (footnotes omitted); ICTY *Strugar Appeal Judgement*, para. 270 (“[...] [T]he *mens rea* requirement is met if it has been shown that the acts of violence which constitute this crime were wilfully directed against civilians, that is, either deliberately against them or through recklessness.”) (footnotes omitted).

¹³³³ ICC, *Katanga Trial Judgement*, para. 807 (in relation to the offence of attacking civilians under Article 8(2)(e)(i) of the ICC Statute applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime); ICC, *Ntaganda Trial Judgement*, para. 921 (“The [war crime] may encompass attacks that are carried out in an indiscriminate manner, that is by targeting an area, as opposed to specific objects, or not targeting specific military objects or persons taking a direct part in hostilities, so long as the perpetrator was aware of the presence of civilians in the relevant area. It may also include attacks that are launched without taking necessary precautions to spare the civilian population or individual civilians. Therefore, the use of weapons that have inherently indiscriminate effects in an area where civilians are present may constitute an attack directed at the civilian population or individual civilians.”) (footnotes omitted) (in relation to the offence of attacking civilians under Article 8(2)(e)(i) of the ICC Statute applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime); ICTY, *Galic Appeal Judgement*, para. 132 (“[...] [T]he Trial Chamber was entitled to determine on a case-by-case basis that the indiscriminate character of an attack can assist it in determining whether the attack was directed against the civilian population.”); ICTY, *Martić Trial Judgement*, para. 69 (“In particular, indiscriminate attacks, that is attacks which affect civilians or civilian objects and military objects without distinction, may also be qualified as direct attacks on civilians. In this regard, a direct attack against civilians can be inferred from the indiscriminate character of the weapon used.”) (footnotes omitted).

ICTY, *STRUGAR APPEAL JUDGEMENT*, PARA. 271 (FOOTNOTES OMITTED)

“The intent to target civilians can be proved through inferences from direct or circumstantial evidence. [...] The determination of whether civilians were targeted is a case-by-case analysis, based on a variety of factors, including the means and method used in the course of the attack, the distance between the victims and the source of fire, the ongoing combat activity at the time and location of the incident, the presence of military activities or facilities in the vicinity of the incident, the status of the victims as well as their appearance, and the nature of the crimes committed in the course of the attack.”

668. Regarding the civilian status of a person, the Prosecution must establish that “in the circumstances at the time, a reasonable person could not have believed that the individual or group her or she attacked was [...] directly participating in hostilities.”¹³³⁴
669. Moreover, the war crime of attacking civilians may be committed when the perpetrator intended to attack simultaneously military objectives and civilian targets.¹³³⁵

¹³³⁴ ICC, *Ntaganda Trial Judgement*, para. 921 (in relation to the offence of attacking civilians under Article 8(2)(e)(i) of the ICC Statute applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime). See also ICTY, *Kordic and Cerkez Appeal Judgement*, para. 48 (“The Appeals Chamber notes that the imperative “in case of doubt” is limited to the expected conduct of a member of the military. However, when the latter’s criminal responsibility is at issue, the burden of proof as to whether a person is a civilian rests on the Prosecution.”) (footnotes omitted); ICTY, *Galic Trial Judgement*, para. 50 (“The Trial Chamber understands that a person shall not be made the object of attack when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including the information available to the latter, that the potential target is a combatant.”).

¹³³⁵ ICC, *Katanga Trial Judgement*, para. 802 (“The Chamber considers that the crime may be established even if the military operation also targeted a legitimate military objective.”) (footnotes omitted) (in relation to the offence of attacking civilians under Article 8(2)(e)(i) of the ICC Statute applicable to non-international armed conflict, the consideration may also apply *mutatis mutandis* to the present crime); ICC, *Ntaganda Trial Judgement*, para. 923 (“Part of the attacks during these assaults may have been fired at opposing fighters and military objectives. However, the Chamber finds that, in the course of its operation, the UPC/FPLC indiscriminately attacked all Lendu, civilians and fighters alike. The UPC/FPLC made no difference between the two, because in addition to attacking the opposing forces, it in fact also wished to target the Lendu civilians. In the assessment of the Chamber, while the UPC/FPLC did intend to target the APC and other Lendu fighters in Mongbwalu, as is clear from the objectives of the organisation and the orders given, it equally intended to attack civilians. As such, the Lendu civilian population of Mongbwalu and Sayo formed one of the objects of the attack. [...]”) (in relation to the offence of attacking civilians under Article 8(2)(e)(i) under the ICC Statute applicable to non-international armed conflict but the consideration may also apply *mutatis mutandis* to the present crime).

CC, KATANGA AND NGUDJOLO CHUI DECISION ON CONFIRMATION OF CHARGES, PARAS 272-274 (FOOTNOTES OMITTED)

272. [...] Once the perpetrators launch the attack with the intent to target individual civilians not taking direct part in the hostilities or the civilian population, the offence is completed. This is the case when individual civilians not taking direct part in the hostilities or the civilian population are the sole target of the attack.

273. The crime is also committed when the perpetrator launches the attack with two distinct specific aims: (i) to target a military objective within the meaning of articles 51 and 52 of AP I; and simultaneously, (ii) to target the civilian population or individual civilians not taking direct part in the hostilities who reside in the vicinity. In such a case, the crime is committed when an attack is launched against a village which has significant military value because of its strategic location and when the village contains two distinct targets:

(i) the defending forces of the adverse or hostile party in control of the village (that is, when only the defeat of these forces would permit the attacking party to seize control of the village); and

(ii) the civilian population of the village, if its allegiance is with the adverse or hostile party in control of the village thus leading the attacking forces to consider the “destruction” of that civilian population as the best method for securing control of the village once it has been seized.

274. This second type of case must be distinguished from the other situations in which an attack is launched with the specific aim of targeting only a military objective, albeit with the awareness that incidental loss of life or injury to civilians will or may result from such an attack.

d. Contextual Elements

670. In addition, as with all war crimes, it is necessary to demonstrate the following contextual elements:

- i. There was an international armed conflict;¹³³⁶
- ii. The conduct took place in the context of and was associated with an international armed conflict;¹³³⁷ and
- iii. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.¹³³⁸

¹³³⁶ See above, paras 188-189.

¹³³⁷ See above, paras 190-198. See also [ICC Elements of Crimes](#), Article 8(2)(b)(i).

¹³³⁸ See above, para. 199. See also [ICC Elements of Crimes](#), Article 8(2)(b)(i).

- ii. Intentionally directing attacks against civilian objects, that is, objects which are not military objectives (ICC Statute, Article 8(2)(b)(ii); ICTY Statute, Article 3).

APPLICABILITY: THE WAR CRIME OF INTENTIONALLY DIRECTING ATTACKS AGAINST CIVILIAN OBJECTS (“ATTACKING CIVILIAN OBJECTS”) CAN BE CONSIDERED CRIMINALISED UNDER ARTICLE 438 OF THE CCU AS IT IS SUBSUMED UNDER THE NOTION OF “OTHER VIOLATIONS OF RULES OF THE WARFARE RECOGNIZED BY INTERNATIONAL INSTRUMENTS CONSENTED TO BE BINDING BY THE VERKHOVNA RADA (PARLIAMENT) OF UKRAINE” (PARAS 671-674).

Elements of the crime: To convict a perpetrator for the war crime of attacking civilian objects, the following elements need to be established:

(1) Objective element

- The perpetrator directed an attack (paras 676-679).
- The object of the attack was civilian objects, that is, objects which are not military objectives (paras 680-684).

(2) Subjective element

- The perpetrator intended to direct an attack.
- The perpetrator intended to make civilian objects the object of the attack (paras 685-687).
- The perpetrator was aware of the civilian status of the objects (paras 685-687).

(3) Contextual elements

- There is an international armed conflict (para. 668).
- The conduct of the perpetrator took place in the context and was associated with the conflict (para. 668).
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict (para. 668).

a. Applicability under Article 438

671. Although not explicitly mentioned in Article 438 of the CCU, intentionally directing attacks against civilian objects (“attacking civilian objects”) may be subsumed under “any other violations of rules of warfare recognized by international instruments consented to be binding by the Verkhovna Rada of Ukraine” to which Article 438(1) refers. As explained below, attacking civilian objects is prohibited under international instruments ratified by Ukraine. Moreover, violation of this prohibition has been recognised as a war crime. These factors support interpreting Article 438 of the CCU as criminalising violations of this IHL prohibition.

672. Attacking civilian objects constitutes a violation of International Humanitarian Law reflected in international treaties ratified by Ukraine. The prohibition of direct attacks against civilian objects stems from the IHL principle of distinction which

is one of “the cardinal principles contained in the text constituting the fabric of humanitarian law.”¹³³⁹ Specifically, the principle of distinction between civilian objects and military objectives is codified in Articles 48 and 52 of [Additional Protocol I](#) ratified by Ukraine.¹³⁴⁰ The former requires that “[i]n order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”¹³⁴¹ Article 52(1) of [Additional Protocol I](#) reiterates the immunity of civilian objects by stating that “civilian objects shall not be the object of attack or of reprisals”.¹³⁴² Therefore, for the purposes of Article 438 of the CCU, the prohibition of directing attacks against civilian objects is a violation of the laws of warfare recognised in an international instrument accepted as binding by the Ukrainian parliament.¹³⁴³

673. **Recognition as a war crime.** Attacking civilian objects is expressly codified as a war crime in Article 8(2)(b)(ii) of the [ICC Statute](#) applicable to international armed conflict.¹³⁴⁴ While not explicitly mentioned under the [ICTY Statute](#), the ICTY jurisprudence has determined that attacking civilian objects constitute a violation of the laws and customs of war under Article 3 of [ICTY Statute](#).¹³⁴⁵

674. These factors support recognition of the criminalisation of attacking civilian objects under Article 438(1) of the CCU.

b. Definition of Attacking Civilian Objects (Objective Elements)

675. The objective elements of the war crime are: (1) the perpetrator directed an attack; and (2) the object of the attack was civilian objects, that is, objects which are not military objectives.¹³⁴⁶

¹³³⁹ ICJ, *Legality of the Threat or Use of Nuclear Weapons*, [Advisory Opinion](#), para. 78

¹³⁴⁰ Ukraine ratified [Additional Protocol I](#) on 25 January 1990. See ICRC, *Treaties and States Parties*, [Ukraine](#). Concerning non-international armed conflicts, Article 13 of [Additional Protocol II](#) does not explicitly prohibit attacks against civilian objects. Nonetheless, it has been argued that the general protection afforded to the civilian population and individual civilians by Article 13(1) of [Additional Protocol II](#) is broad enough to include such a prohibition. See ICRC, *IHL Database, Customary Law*, [Rule 7. The Principle of Distinction between Civilian Objects and Military Objectives](#). See also ICTY, *Strugar Trial Judgement*, para. 224 (“The Chamber [...] concludes that despite the lack of a provision similar to Article 52 in [Additional Protocol II](#), the general rule prohibiting attacks on civilian objects also applies to internal conflicts.”).

¹³⁴¹ [Additional Protocol I](#), Article 48.

¹³⁴² See [ICRC Commentary on Additional Protocol I](#), para. 2011.

¹³⁴³ The principle of distinction between civilian objects and military objectives is also recognised as a norm of customary international law. See ICRC, *IHL Database, Customary Law*, [Rule 7. The Principle of Distinction between Civilian Objects and Military Objectives](#).

¹³⁴⁴ This offence is included in the list of “other serious violations of the laws and customs applicable in international armed conflict” under Article 8(2) of the [ICC Statute](#). There is no equivalent crime in the ICC Statute in the context of non-international armed conflict.

¹³⁴⁵ ICTY, *Blaskic Trial Judgement*, pp 267-268 (“[...] General Blaskic committed: – a violation of the laws or customs of war under Article 3 of the Statute and recognised by Article 52(1) of [Additional Protocol I](#): unlawful attacks on civilian objects (count 4).”); ICTY, *Kordic and Cerkez Trial Judgement*, para. 834 (“[...] The Trial Chamber finds the accused Dario Kordić liable under Article 7(1) on the following counts: (a) [...] Count 4 (unlawful attacks on civilian objects) [...]”); ICTY, *Strugar Trial Judgement*, para. 289 (“[...] The Chamber finds that the elements of the offence of attacks on a civilian population and civilian objects have been established.”).

¹³⁴⁶ [ICC Elements of Crimes](#), Article 8(2)(b)(ii).

676. **The perpetrator directed an attack.** Under Article 49 of [Additional Protocol I](#), “attack” means “any acts of violence against the adversary, whether in offence or defence”.¹³⁴⁷
677. **Result requirement.** Regarding whether attacking civilian objects requires a particular result to occur, different approaches have been adopted depending on the relevant legal framework of customary international law (ICTY) or treaty law (ICC).
678. The [ICC Statute](#) and the [ICC Elements of Crimes](#) do not require that attacks against civilian objects cause a particular result such as actual damage to civilian objects.¹³⁴⁸
679. The ICTY jurisprudence has nonetheless determined that under customary law direct attacks against civilian objects need to cause damage to fall under Article 3 (violations of the laws and customs of war) of the [ICTY Statute](#).¹³⁴⁹ Regarding the extent of the damage required, the ICTY Appeals Chamber in the *Kordic and Cerkez* case determined that “the crime of unlawful attack on civilian objects does not require proof of a specific amount of civilian destruction as long as there is evidence which proves beyond reasonable doubt that civilian objects were deliberately attacked.”¹³⁵⁰
680. **The object of the attack was civilian objects.** The jurisprudence of the ICC and ICTY has defined “civilian objects” by reference to Article 52(1) of [Additional Protocol I](#), which states that “civilian objects are all objects which are not military objectives.”¹³⁵¹

¹³⁴⁷ For more details, see the war crime of attacking civilians, paras 641-670.

¹³⁴⁸ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 365, para. 215 (“As in the case of the war crime of attacking civilians, the elements do not require that a particular result be caused – contrary to the jurisprudence of the ICTY.”); ICRC, IHL Database, Customary IHL, , [Rule 156. Definition of War Crimes](#) (“The majority of war crimes involve death, injury, destruction or unlawful taking of property. However, not all acts necessarily have to result in actual damage to persons or objects in order to amount to war crimes. This became evident when the Elements of Crimes for the International Criminal Court were being drafted. It was decided, for example, that it was enough to launch an attack on civilians or civilian objects, even if something unexpectedly prevented the attack from causing death or serious injury.”).

¹³⁴⁹ ICTY, *Blaskic Blaskic Trial Judgement*, para. 180 (“[...] [T]he Trial Chamber deems that the attack must have caused deaths and/or serious bodily injury within the civilian population or damage to civilian property.”); ICTY, *Kordic and Cerkez Appeal Judgement*, paras 66-67 (“The Appeals Chamber finds that at the time the unlawful attack occurred in this case, there was no basis for finding that, as a matter of customary international law, State practice or *opinio iuris* translated the prohibitions under Articles 51 and 52 of Additional Protocol I into international crimes, such that unlawful attacks were largely penalized regardless of the showing of a serious result. State practice was not settled as some required the showing of serious injury, death or damage as a result under their national penal legislation, while others did not. For the above-mentioned reasons, the Appeals Chamber is not satisfied that at the relevant time, a violation of Articles 51 and 52 of Additional Protocol I incurred individual criminal responsibility under Article 3 of the Statute without causing death, serious injury to body or health, or results listed in Article 3 of the Statute, or being of the same gravity. Therefore, the Appeals Chamber will consider in the Judgement that criminal responsibility for unlawful attack on civilians or civilian objects does require the proof of such a result emanating from an unlawful attack.”) (footnotes omitted); ICTY, *Strugar Trial Judgement*, para. 280 (“[...] [T]he Appeals Chamber confirmed that criminal responsibility for unlawful attacks requires the proof of a result, namely of the death of or injury to civilians, or damage to civilian objects.”) (footnotes omitted).

¹³⁵⁰ ICTY, *Kordic and Cerkez Appeal Judgement*, para. 453.

¹³⁵¹ ICTY, *Kordic and Cerkez Appeal Judgement*, para. 53 (“Article 52(1) of Additional Protocol I prohibits explicitly attacks or reprisals on civilian objects. It defines civilian objects as ‘all objects which are not military objectives’. Further, Article 52(1) defines military objectives as ‘limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.’); ICTY, *Strugar Rule 98bis Decision*, para. 62 (“Regarding *Count 5*, the Chamber observes that civilian objects enjoy a similar level of protection as a civilian population. Article 52 of the Additional Protocol I stipulates that ‘[c]ivilian objects shall not be the object of attack or of reprisals’ and ‘civilian objects are all objects which are not military objectives’. ‘Military objectives’ are limited

Article 52(2) of [Additional Protocol I](#) defines military objectives as “objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.”

681. Based on the jurisprudence’s reliance on Article 52(2) of [Additional Protocol I](#) to define military objectives, the IHL framework may provide further guidance to interpret this notion. In light of the above definition, two criteria need to be fulfilled cumulatively for an object to qualify as a military objective.¹³⁵²

682. First, an object must make an effective contribution to military action by its nature, location, purpose or use.¹³⁵³ The aforementioned qualifiers are analysed below:

- “Nature”: this category concerns objects that possess “some inherent attribute which *eo ipso* makes an effective contribution to military action.”¹³⁵⁴
- “Location”: objects that do not have a military function by their nature but nonetheless contribute to military action through their location fall within this category.¹³⁵⁵
- “Purpose”: this category refers to the “intended future use of an object” in support of military action.¹³⁵⁶
- “Use”: objects of a civilian nature that are put to “actual military use” belong to this category.”¹³⁵⁷ In this regard, the ICTY jurisprudence specifies that “[i]n case of doubt as to whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.”¹³⁵⁸

683. Second, the object’s destruction, capture or neutralisation must offer a definite military advantage in the circumstances ruling at the time.¹³⁵⁹ In addition to the fact that

to ‘those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.’”) (footnotes omitted). ICC, *Ongwen Trial Judgement*, para. 2777 (in relation to the offence of destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict under Article 8(2)(e)(xii) of the ICC Statute but this specific consideration may also apply *mutatis mutandis* to the present crime).

¹³⁵² Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 363, paras 210-211; [ICRC Commentary on Additional Protocol I](#), para. 2018.

¹³⁵³ [Additional Protocol I](#), Article 52(2).

¹³⁵⁴ Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 4th Edition, Cambridge: Cambridge University Press, 2022, p. 127, para. 361.

¹³⁵⁵ [ICRC Commentary on Additional Protocol I](#), para. 2021.

¹³⁵⁶ [ICRC Commentary on Additional Protocol I](#), para. 2022.

¹³⁵⁷ Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 4th Edition, Cambridge: Cambridge University Press, 2022, p. 129, para. 363. See also Melzer, *International Humanitarian Law: A Comprehensive Introduction*, ICRC, 2016, p. 93 (“The negative impact that an attack against a dual use object is expected to have on the civilian population is not relevant for its categorization as a military objective [...]”). For the application of the principle of proportionality to dual-use objects, see the war crime of excessive incidental death, injury or damage, paras [690-716](#).

¹³⁵⁸ ICTY, *Kordic and Cerkez Appeal Judgement*, para. 53; ICTY, *Strugar Rule 98bis Decision*, para. 62 (“In case of doubt as to whether an object is used for civilian or military purposes, this object shall be presumed not to be used for military purpose”).

¹³⁵⁹ [Additional Protocol I](#), Article 52(2)..

the advantage must be military in nature,¹³⁶⁰ the use of the wording “definite” and “in the circumstances ruling at the time” excludes military gains that are “potential or indeterminate”.¹³⁶¹ Moreover, the term “definite military advantage” has been interpreted to refer to the military advantage “anticipated from an attack as a whole and not only from isolated or particular parts of the attack.”¹³⁶² In addition, the Trial Chamber in the *Ongwen* case determined that “whether or not the action offered a ‘military advantage’ must be evaluated from the attacker’s perspective for each targeted object [...]”.¹³⁶³

684. Civilian objects may be targeted only if and for such time they become military objectives, that is, they make an effective contribution to military action through their location, purpose or use and their destruction offers a definite military advantage in the circumstances ruling at the time.¹³⁶⁴ Military necessity cannot be invoked as an exception to the prohibition of attacks against civilian objects.¹³⁶⁵

c. Definition of Attacking Civilian Objects (Subjective Elements)¹³⁶⁶

685. The subjective elements of the war crime under the ICC Statute are: (1) the perpetrator intentionally directed an attack; (2) the perpetrator intended civilian objects to be the object of the attack; and (3) the perpetrator was aware of the civilian status of the objects.¹³⁶⁷

¹³⁶⁰ See Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 4th Edition, Cambridge: Cambridge University Press, 2022, p. 122, paras 344-345.

¹³⁶¹ [ICRC Commentary on Additional Protocol I](#), para. 2024; See also ICC, *Ongwen Trial Judgement*, para. 2777 (“[...] such advantage must be definite and cannot in any way be indeterminate or potential.”) (footnotes omitted) (in relation to the offence of destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict under Article 8(2)(e)(xii) of the ICC Statute but this specific consideration may also apply *mutatis mutandis* to the present crime).

¹³⁶² Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, pp 362-363, para. 211.

¹³⁶³ ICC, *Ongwen Trial Judgement*, para. 2777 (in relation to the offence of destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict under Article 8(2)(e)(xii) of the ICC Statute but this specific consideration may also apply *mutatis mutandis* to the present crime).

¹³⁶⁴ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 364, para. 213.

¹³⁶⁵ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 364, para. 213 (“When a prohibition is absolute as for the prohibition of attacking civilian objects, there is no room for invoking military necessity.”) (footnotes omitted); ICTY, *Strugar Appeal Judgement*, para. 330 (“The Appeals Chamber agrees that, in line with previous jurisprudence, the element of the non-justification by military necessity present in the crime of devastation not justified by military necessity (Count 4) is indeed not present in the crime of attack against civilian objects (Count 5).”) (footnotes omitted).

¹³⁶⁶ This section details the subjective elements for this war crime as detailed under international law. However, the general part of the CCU identifies subjective elements that apply to crimes. See Articles 23, 24 and 25 of the CCU. It will be necessary to consider the relevance of the subjective elements in the general part of the CCU when considering the elements of this crime as applied under Article 438 of the CCU.

¹³⁶⁷ [ICC Elements of Crimes](#), Article 8(2)(b)(ii); [ICC Statute](#), Article 30; ICC, *Katanga Trial Judgement*, para. 808 (“For the mental element of the crime to be established, the perpetrator must have (1) intentionally directed an attack; (2) intended the civilian population or individual civilians to be the object of the attack; (3) been aware of the civilian character of the population or of civilians not taking part in hostilities; and (4) been aware of the factual circumstances that established the existence of an armed conflict.”) (footnotes omitted); Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 365, para. 216 (“With regard to the mental elements required, reference may be made to the explanations given for the war crime of attacking civilians [...]. The same approach was taken *mutatis mutandis*

686. For the interpretation of the subjective elements, see the war crime of attacking civilians (paras [641-670](#)).¹³⁶⁸
687. With regard to the ICTY, the Tribunal’s jurisprudence has determined that attacks against civilian objects must be carried out “intentionally in the knowledge, or when it was impossible not to know, that [...] civilian property [was] being targeted.”¹³⁶⁹

d. Contextual Elements

688. In addition, as with all war crimes, it is necessary to demonstrate the following contextual elements:
- i. There was an international armed conflict;¹³⁷⁰
 - ii. The conduct took place in the context of and was associated with an international armed conflict;¹³⁷¹ and
 - iii. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.¹³⁷²

for all crimes covering unlawful attacks.”) (footnotes omitted).

¹³⁶⁸ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 365, para. 216 (“With regard to the mental elements required, reference may be made to the explanations given for the war crime of attacking civilians [...]. The same approach was taken mutatis mutandis for all crimes covering unlawful attacks.”) (footnotes omitted).

¹³⁶⁹ ICTY, *Strugar Rule 98bis Decision*, para. 63; ICTY, *Strugar Trial Judgement*, para. 283 (“The Chamber therefore concludes that the crime of attacks on civilians or civilian objects, as a crime falling within the scope of Article 3 of the Statute, is, as to *actus reus*, an attack directed against a civilian population or individual civilians, or civilian objects, causing death and/or serious injury within the civilian population, or damage to the civilian objects. As regards *mens rea*, such an attack must have been conducted with the intent of making the civilian population or individual civilians, or civilian objects, the object of the attack.”); ICTY, *Blaskic Trial Judgement*, para. 180 (“Civilian property covers any property that could not be legitimately considered a military objective. Such an attack must have been conducted intentionally in the knowledge, or when it was impossible not to know, that civilians or civilian property were being targeted not through military necessity.”).

¹³⁷⁰ See above, paras [188-189](#).

¹³⁷¹ See above, paras [190-198](#). See also [ICC Elements of Crimes](#), Article 8(2)(b)(ii).

¹³⁷² See above, para. [199](#). See also [ICC Elements of Crimes](#), Article 8(2)(b)(ii).

- iii. Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated (ICC Statute, Article 8(2)(b)(iv); ICTY Statute, Article 3)

APPLICABILITY: THE WAR CRIME OF “INTENTIONALLY LAUNCHING AN ATTACK IN THE KNOWLEDGE THAT SUCH ATTACK WILL CAUSE INCIDENTAL LOSS OF LIFE OR INJURY TO CIVILIANS OR DAMAGE TO CIVILIAN OBJECTS OR WIDESPREAD, LONG-TERM AND SEVERE DAMAGE TO THE NATURAL ENVIRONMENT WHICH WOULD BE CLEARLY EXCESSIVE IN RELATION TO THE CONCRETE AND DIRECT OVERALL MILITARY ADVANTAGE ANTICIPATED” (“DISPROPORTIONATE ATTACK”) CAN BE CONSIDERED CRIMINALISED UNDER ARTICLE 438(1) OF THE CCU AS IT IS SUBSUMED UNDER THE NOTION OF “OTHER VIOLATIONS OF THE LAWS OR CUSTOMS OF WAR RECOGNISED BY INTERNATIONAL TREATIES THE BINDING NATURE OF WHICH HAS BEEN APPROVED BY THE VERKHOVNA RADA (PARLIAMENT) OF UKRAINE” (PARAS. 689-694).

Elements of the crime: To convict a perpetrator for the war crime of disproportionate attack, the following elements need to be established:

(1) Objective elements

- The perpetrator launched an attack (para. 698).
- The attack was such that it would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated (paras 699-711).

(2) Subjective elements

- The perpetrator intentionally launched an attack (para. 713).
- The perpetrator knew that the attack would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated (para. 714).

(3) Contextual elements

- There is an international armed conflict (para. 716).
- The conduct of the perpetrator took place in the context and was associated with the conflict (para. 716).
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict para. 716).

a. Applicability under Article 438

689. Although not explicitly mentioned in Article 438 of the CCU, the war crime of “intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated” (“disproportionate attack”) may be subsumed within “any other violations of rules of warfare recognised by international instruments consented to be binding by the Verkhovna Rada of Ukraine” to which Article 438(1) refers. As explained below, the conduct is prohibited under international instruments ratified by Ukraine and this prohibition has been recognised as a war crime. These factors support interpreting Article 438 of the CCU as criminalising violations of this IHL prohibition.
690. Launching an attack which is expected to cause excessive incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment is a violation of the laws of warfare recognised in international treaties ratified by Ukraine. The principle of proportionality, which is codified in Articles 51(5)(b) and 57(2)(a)(iii) of [Additional Protocol I](#) (ratified by Ukraine), prohibits attacks against military objectives “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”¹³⁷³ The principle of proportionality is applicable when an attack is directed against a military objective and deals with the incidental effects anticipated from such an attack.¹³⁷⁴ Considering that incidental harm to civilians and civilian infrastructure is often inevitable in the course of military operations, the principle of proportionality “places a limit on the extent of incidental civilian harm that is permissible by spelling out how military necessity and considerations of humanity must be balanced in such situations.”¹³⁷⁵
691. The principle of proportionality “forms part of a framework that aims to give effect to the general obligation in the conduct of military operations to take constant care to spare civilians and civilian objects.”¹³⁷⁶ In addition to the principles of distinction and precautions in attack, the rules on the protection of the natural environment form part of the aforementioned framework.¹³⁷⁷ Specifically, Article 35(3) of [Additional](#)

¹³⁷³ [ICRC Commentary on Additional Protocol I](#), para. 2205. Ukraine ratified Additional Protocol I on 25 January 1990. See ICRC, *Treaties, States Parties and Commentaries*, [Ukraine. Concerning non-international armed conflicts](#), “[w]hile Additional Protocol II does not contain an explicit reference to the principle of proportionality in attack, it has been argued that it is inherent in the principle of humanity which was explicitly made applicable to the Protocol in its preamble and that, as a result, the principle of proportionality cannot be ignored in the application of the Protocol.” See ICRC, *IHL Database, Customary Law*, [Rule 14. Proportionality in Attack](#).

¹³⁷⁴ [ICRC Commentary on Additional Protocol I](#), para. 2212; ICRC, [The Principle of Proportionality in the Rules Governing the Conduct of Hostilities under International Humanitarian Law](#), International Expert Meeting, 22-23 June 2016, p. 8.

¹³⁷⁵ ICRC, [The Principle of Proportionality in the Rules Governing the Conduct of Hostilities under International Humanitarian Law](#), International Expert Meeting, 22-23 June 2016, p. 8.

¹³⁷⁶ Emanuela-Chiara Gillard, [Proportionality in the Conduct of Hostilities: The Incidental Harm Side of the Assessment](#), Chatham House, December 2018, p. 8, para. 22.

¹³⁷⁷ Emanuela-Chiara Gillard, [Proportionality in the Conduct of Hostilities: The Incidental Harm Side of the Assessment](#), Chatham House, December 2018, p. 8, para. 22.

[Protocol I](#) prohibits the use of “methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.” Article 55(1) of [Additional Protocol I](#) reiterates the above prohibition and links the “widespread, long-term and severe damage” to the natural environment to the health or survival of the civilian population.¹³⁷⁸ Therefore, for the purposes of Article 438 of the CCU, launching an attack which is expected to cause excessive incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment constitutes a violation of the laws of warfare recognised in international instruments accepted as binding by the Ukrainian parliament.

692. **Recognition as a war crime.** When committed wilfully and causing death or serious injury to body or health, “launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects” constitutes a grave breach of [Additional Protocol I](#) and therefore a war crime.¹³⁷⁹
693. The [ICC Statute](#) recognises violation of the prohibition of attacks that are expected to cause excessive incidental death, injury, or damage as a war crime applicable to international armed conflict.¹³⁸⁰ While not explicitly mentioned under the [ICTY Statute](#), the jurisprudence of the ICTY has considered the application of the principle of proportionality when adjudicating on the war crime of attacks against civilians or civilian objects (under Article 3 of the [Statute](#)),¹³⁸¹ and the war crime of wanton destruction not justified by military necessity (under Article 3 of the [Statute](#)).¹³⁸²
694. These factors support recognition of the criminalisation of disproportionate attack under Article 438 of the CCU.

b. Definition of Disproportionate Attack (Objective Elements)

695. Causing incidental harm to civilians or civilian objects is often inevitable during military operations.¹³⁸³ However, as the ICTY Trial Chamber held in *Kupreskic* “any

¹³⁷⁸ [Additional Protocol I](#), Article 55(1) (“Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.”); See also [ICRC Commentary on Additional Protocol I](#), para. 2133 (“While Article 35 ‘Basic rules’ broaches the problem from the point of view of methods of warfare, Article 55 concentrates on the survival of the population, so that even though the two provisions overlap to some extent, and their tenor is similar, they do not duplicate each other.”) (footnotes omitted).

¹³⁷⁹ [Additional Protocol I](#), Article 85(3)(b); ICRC, Advisory Service on International Humanitarian Law, [Obligations in terms of penal repression](#), p. 1.

¹³⁸⁰ [ICC Statute](#), Article 8(2)(b)(iv). The offence is included in the list of “other serious violations of the laws and customs applicable in international armed conflict” under Article 8(2) of the [ICC Statute](#). There is no equivalent crime under the ICC Statute in relation to non-international armed conflict.

¹³⁸¹ ICTY, *Galic Trial Judgement*, paras 57-58; ICTY, *Galic Appeal Judgement*, para. 190; ICTY, *Prlic et al. Trial Judgement*, Vol. III of VI, paras 1686, 1686; ICTY, *Prlic et al. Appeal Judgement*, Vol. I of III, para. 561.

¹³⁸² ICTY, *Prlic et al. Trial Judgement*, vol. III of VI, paras 1582-1584 See ICTY, *Prlic et al. Appeal Judgement*, Vol. I of III, para. 411.

¹³⁸³ ICRC, [The Principle of Proportionality in the Rules Governing the Conduct of Hostilities under International Humanitarian Law](#), International Expert Meeting, 22-23 June 2016, p. 8.

incidental (and unintentional) damage to civilians must not be out of proportion to the direct military advantage gained by the military attack.”¹³⁸⁴

696. The objective elements of the war crime of disproportionate attack are: 1) the perpetrator launched an attack; and 2) the attack was such that it would cause (a) incidental death or injury to civilians or damage to civilian objects or (b) widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.¹³⁸⁵
697. This offense concerns attacks directed against a military objective and deals with the incidental effects anticipated from such an attack.¹³⁸⁶
698. **The perpetrator launched an attack.** Under Article 49 of [Additional Protocol I](#), “attack” means “acts of violence against the adversary, whether in offence or in defence.”¹³⁸⁷ The term “launch an attack” has been accepted to have a broader meaning than the phrase “direct an attack” used in the war crime of attacking civilians and civilian objects,¹³⁸⁸ as the former term also encompasses the planning phase.¹³⁸⁹
699. The attack was such that it would cause (a) incidental death or injury to civilians or damage to civilian objects or (b) widespread, long-term and severe damage to the natural environment.
700. Commentators have argued that the wording “the attack was such that it would cause” confirms that the war crime of disproportionate attack under the ICC Statute does not encompass a result requirement.¹³⁹⁰

¹³⁸⁴ ICTY, *Kupreskic Trial Judgement*, para. 524; ICTY, *Martić Trial Judgement*, para. 69 (“The prohibition against targeting the civilian population does not exclude the possibility of legitimate civilian casualties incidental to an attack aimed at military targets. However, such casualties must not be disproportionate to the concrete and direct military advantage anticipated before the attack.”) (footnotes omitted); ICTY *Galic Trial Judgement*, para. 58 (“[...] Once the military character of a target has been ascertained, commanders must consider whether striking this target is ‘expected to cause incidental loss of life, injury to civilians, damage to civilian objectives or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.’ If such casualties are expected to result, the attack should not be pursued.”) (footnotes omitted); ICTY, *Galic Appeal Judgement*, para. 190 (“[...] According to the principle of distinction, warring parties must at all times distinguish between the civilian population and combatants, between civilian and military objectives, and accordingly direct attacks only against military objectives. These principles establish an absolute prohibition on the targeting of civilians in customary international law but do not exclude the possibility of legitimate civilian casualties incidental to the conduct of military operations. However, those casualties must not be disproportionate to the concrete and direct military advantage anticipated before the attack (the principle of proportionality).”) (footnotes omitted).

¹³⁸⁵ [ICC Elements of Crimes](#), Article 8(2)(b)(iv).

¹³⁸⁶ ICTY *Galic Trial Judgement*, para. 58 (“[...] Once the military character of a target has been ascertained, commanders must consider whether striking this target is ‘expected to cause incidental loss of life, injury to civilians, damage to civilian objectives or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.’ If such casualties are expected to result, the attack should not be pursued.”); ICRC, [The Principle of Proportionality in the Rules Governing the Conduct of Hostilities under International Humanitarian Law](#), International Expert Meeting, 22-23 June 2016, p. 8.

¹³⁸⁷ For more information, see the war crime of attacking civilians see paras. [641-670](#).

¹³⁸⁸ See above, paras. [641-670](#), [671-688](#).

¹³⁸⁹ Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary*, Cambridge: Cambridge University Press, 2003, p. 162.

¹³⁹⁰ Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary*, Cambridge: Cambridge University Press, 2003, p. 162; Triffterer and Ambos (eds.), *Rome Statute of the International*

701. *Incidental harm.* The types of incidental harm listed in Article 51(5)(b) of [Additional Protocol I](#) and generally accepted by the ICTY include “loss of civilian life”, “injury to civilians”, and “damage to civilian objects”.¹³⁹¹ With regard to indirect or reverberating effects, namely “consequences which are not directly and immediately caused by an attack but which are nevertheless a result of the attack”, it is debated whether they should factor into the proportionality assessment as incidental harm.¹³⁹² The ICRC and other commentators have suggested that reverberating effects of an attack must be considered in the proportionality assessment when they are caused by the attack and are foreseeable at the time the attack was planned and launched.¹³⁹³
702. *Dual-use objects.* A dual-use object is a military objective which has a civilian part or component (such as apartments in a building whose basement is used as a munitions depot) or which have a simultaneous civilian use or function of the object (such as in the case of a bridge or electricity station used for both military and civilian purposes).¹³⁹⁴ Traditionally, the principle of proportionality concerns incidental harm to civilians or civilians objects other than the military objective itself. For dual-use objects, different views have been expressed concerning whether the anticipated damage to the civilian function of a dual-use object and the emanating harm to the civilian population should be factored into the proportionality assessment.
703. The ICTY Trial Chamber in the *Prlic et al.* case has considered the application of the principle of proportionality to a dual-use object (the Old Bridge of Mostar).¹³⁹⁵ Specifically, the Trial Chamber has determined that the destruction of the Old Bridge : (1) obstructed the civilian population from accessing objects essential for survival and “[resulted] in a serious deterioration of the humanitarian situation for the population”; and (2) “had a very significant psychological impact on the Muslim population

Criminal Court: A Commentary, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 378, para. 251.

¹³⁹¹ ICTY *Galic Trial Judgement*, para. 58 (“[...] incidental loss of life, injury to civilians, damage to civilian objectives or a combination thereof [...]”); Emanuela-Chiara Gillard, [Proportionality in the Conduct of Hostilities: The Incidental Harm Side of the Assessment](#), Chatham House, December 2018, p. 27, para. 90.

¹³⁹² ICRC, [The Principle of Proportionality in the Rules Governing the Conduct of Hostilities under International Humanitarian Law](#), International Expert Meeting, 22-23 June 2016, pp 43-44, 46-47.

¹³⁹³ ICRC, [The Principle of Proportionality in the Rules Governing the Conduct of Hostilities under International Humanitarian Law](#), International Expert Meeting, 22-23 June 2016, p. 45, Emanuela-Chiara Gillard, [Proportionality in the Conduct of Hostilities: The Incidental Harm Side of the Assessment](#), Chatham House, December 2018, p. 25, (“The incidental harm that needs to be factored into the proportionality assessment concerns harm “a. which would not occur but for the attack but excluding harm that is – not due to the physical effects of the attack; and – which results from the conduct of another actor, and b. which was reasonably foreseeable at the time the attack was launched on the basis of information that the attacker had or could reasonably be expected to have in the circumstances.”); International Law Association Study Group on the Conduct of Hostilities in the 21st Century, [The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare](#), 93 International Legal Studies, U.S. Naval War College, p. 353 (“Regarding the consideration of indirect effects of an attack for purposes of the principle of proportionality, the main question that may be asked is whether it is an issue of how far the indirect incidental damage is actually (geographically or temporally) removed from the original attack (site), or whether it is rather a question of foreseeability. The [Study Group] agreed that foreseeability is the relevant criterion and that accordingly there is an obligation to take into account all indirect harm that can reasonably be foreseen by a reasonably well informed person.”).

¹³⁹⁴ ICRC, [The Principle of Proportionality in the Rules Governing the Conduct of Hostilities under International Humanitarian Law](#), International Expert Meeting, 22-23 June 2016, pp 37-38.

¹³⁹⁵ ICRC, [The Principle of Proportionality in the Rules Governing the Conduct of Hostilities under International Humanitarian Law](#), International Expert Meeting, 22-23 June 2016, p. 38.

of Mostar.”¹³⁹⁶ Based on the above, the Trial Chamber determined “that the impact on the Muslim civilian population of Mostar was disproportionate to the concrete and direct military advantage expected by the destruction of the Old Bridge.”¹³⁹⁷ However, the ICTY Appeals Chamber in the same *Prlic et al.* case rejected the Trial Chamber’s approach and determined that given the Old Bridge was a military objective, the damage to the civilian functions of the Old Bridge should not be considered in the proportionality assessment.¹³⁹⁸

704. At the present time, some commentators still suggest that given that a dual-use object constitutes a military objective, the damage to the civilian functions of this object should not be considered in the proportionality assessment.¹³⁹⁹ However, the majority of commentators argue (including the ICRC) that “while the dual use object is a military objective, the impact of the attack on the civilian part or component of the object [...] or on the simultaneous civilian use or function of the object [...] must also be taken into consideration in the assessment of proportionality.”¹⁴⁰⁰
705. *Widespread, long-term and severe damage to the natural environment.* There is no relevant ICTY or ICC jurisprudence on this aspect. Nonetheless, the final report of the Committee established to review the NATO bombing campaign against the Federal Republic of Yugoslavia has held the following:

CASE-STUDY: ICTY, [FINAL REPORT TO THE PROSECUTOR BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA, PARAS 14-15, 18-19, 21-22 \(FOOTNOTES OMITTED\)](#)

14. The NATO bombing campaign did cause some damage to the environment. For instance, attacks on industrial facilities such as chemical plants and oil installations were reported to have caused the release of pollutants, although the exact extent of this is presently unknown. The basic legal provisions applicable to the protection of the environment in armed conflict are Article 35(3) of Additional Protocol I [...] and Article 55 [...].

¹³⁹⁶ ICTY, *Prlic et al.* [Trial Judgement](#), Vol. III of VI, para. 1583.

¹³⁹⁷ ICTY, *Prlic et al.* [Trial Judgement](#), Vol. III of VI, para. 1584 (“The Chamber therefore holds that although the destruction of the Old Bridge by the HVO may have been justified by military necessity, the damage to the civilian population was indisputable and substantial. It therefore holds by a majority, with judge Antonetti dissenting, that the impact on the Muslim civilian population of Mostar was disproportionate to the concrete and direct military advantage expected by the destruction of the Old Bridge.”).

¹³⁹⁸ ICTY, *Prlic et al.* [Appeal Judgement](#), Vol. I of III, para. 411 (“Moreover, the Appeals Chamber, judge Pocar dissenting, notes that when outlining the damage caused to the civilian population in its determination of whether the crime of wanton destruction had been committed, the Trial Chamber did not make any finding about other property being collaterally destroyed as a result of the attack on the Old Bridge. Rather, in reaching its conclusion that the attack on the Old Bridge was disproportionate, the Trial Chamber found that the attack isolated the Muslim population in Mostar and caused a very significant psychological impact. Thus, in the absence of any destruction of property not justified by military necessity in the Trial Chamber’s legal findings for Count 20, the Appeals Chamber, judge Pocar dissenting, concludes that a requisite element of the crime was not satisfied.”) (footnotes omitted).

¹³⁹⁹ ICRC, [The Principle of Proportionality in the Rules Governing the Conduct of Hostilities under International Humanitarian Law](#), International Expert Meeting, 22-23 June 2016, p. 37.

¹⁴⁰⁰ ICRC, [The Principle of Proportionality in the Rules Governing the Conduct of Hostilities under International Hu-](#)

15. [...] Articles 35(3) and 55 have a very high threshold of application. Their conditions for application are extremely stringent and their scope and contents imprecise. For instance, it is generally assumed that Articles 35(3) and 55 only cover very significant damage. The adjectives “widespread, long-term, and severe” used in Additional Protocol I are joined by the word “and”, meaning that it is a triple, cumulative standard that needs to be fulfilled. Consequently, it would appear extremely difficult to develop a *prima facie* case upon the basis of these provisions, even assuming they were applicable. For instance, it is thought that the notion of “long-term” damage in [the 1977 Additional Protocol I] would need to be measured in years rather than months, and that as such, ordinary battlefield damage of the kind caused to France in World War I would not be covered.

[...]

18. Even when targeting admittedly legitimate military objectives, there is a need to avoid excessive long-term damage to the economic infrastructure and natural environment with a consequential adverse effect on the civilian population. Indeed, military objectives should not be targeted if the attack is likely to cause collateral environmental damage which would be excessive in relation to the direct military advantage which the attack is expected to produce.

19. It is difficult to assess the relative values to be assigned to the military advantage gained and harm to the natural environment, and the application of the principle of proportionality is more easily stated than applied in practice. In applying this principle, it is necessary to assess the importance of the target in relation to the incidental damage expected: if the target is sufficiently important, a greater degree of risk to the environment may be justified.

[...]

21. The military worth of the target would need to be considered in relation to the circumstances prevailing at the time. If there is a choice of weapons or methods of attack available, a commander should select those which are most likely to avoid, or at least minimize, incidental damage.

[...] Operational reality is recognized in the Statute of the International Criminal Court, an authoritative indicator of evolving customary international law on this point, where Article 8(b)(iv) makes the infliction of incidental environmental damage an offence only if the attack is launched intentionally in the knowledge that it will cause widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated. The use of the word “clearly” ensures that criminal responsibility would be entailed only in cases where the excessiveness of the incidental damage was obvious.

22. [...] [I]n order to satisfy the requirement of proportionality, attacks against military targets which are known or can reasonably be assumed to cause grave environmental harm may need to confer a very substantial military advantage in order to be considered legitimate. At a minimum, actions resulting in massive environmental destruction, especially where they do not serve a clear and important military purpose, would be questionable. [...]

706. The IHL framework also provides relevant guidance. In accordance with the ICRC Commentary, “the concept of the natural environment should be understood in the widest sense to cover the biological environment in which a population is living.”¹⁴⁰¹ Moreover, Additional Protocol I prohibits “widespread, long-term and severe damage” to the environment; these criteria need to be satisfied cumulatively.¹⁴⁰² There-

[humanitarian Law](#), International Expert Meeting, 22-23 June 2016, p. 37-38.

¹⁴⁰¹ [ICRC Commentary on Additional Protocol I](#), para. 2126.

¹⁴⁰² [ICRC Commentary on Additional Protocol I](#), para. 1457; ICTY, [Final Report](#) to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, para. 15. See also Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C. H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 379, para. 253 (“Some authors like Lawrence and Schmitt, even argue that by relying on the interpretation of Add. Prot. I, the ICC provision will even become a ‘virtual nullity’, since the AP I standard, to use Schmitt’s words, is ‘nearly impossible to meet in all but the most egregious circum-

fore, as one commentator notes, “only those attacks which are being launched in the knowledge that this will cause widespread, severe and long term damage to the environment, and which would be clearly excessive with regard to the anticipated military advantage, shall be considered as a war crime.”¹⁴⁰³

707. Death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.
708. *Concrete and direct overall military advantage.* Pursuant to the ICRC Commentary, the terms “concrete” and “direct” denote “that the advantage concerned should be substantial and relatively close, and that advantages which are hardly perceptible and those which would only appear in the long term should be disregarded.”¹⁴⁰⁴ The [ICC Elements of Crimes](#) specify that the term “concrete and direct overall military advantage” concerns “a military advantage that is foreseeable by the perpetrator at the relevant time” and which “may or may not be temporally or geographically related to the object of the attack.”¹⁴⁰⁵ The word “overall” is not used in Article 51(5)(b) of [Additional Protocol I](#) which prohibits attacks “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” The ICRC has argued that the meaning assigned to the phrase “concrete and direct overall military advantage” in the [ICC Elements of Crimes](#) is already captured in Article 51(5)(b) of [Additional Protocol I](#).¹⁴⁰⁶ Thus, as one commentator notes, the use of the term “overall” should not be understood as modifying existing law.¹⁴⁰⁷

stances.”) (footnotes omitted).

¹⁴⁰³ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 379, para. 253.

¹⁴⁰⁴ [ICRC Commentary on Additional Protocol I](#), para. 2209.

¹⁴⁰⁵ [ICC Elements of Crimes](#), Article 8(2)(b)(iv) fn 36.

¹⁴⁰⁶ Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary*, Cambridge: Cambridge University Press, 2003, pp 169-170. The ICRC expressed the following views at the Rome Conference in relation to the use of the term “overall” (“The word ‘overall’ could give the impression that an extra unspecified element has been added to a formulation that was carefully negotiated during the 1974–1977 Diplomatic Conference that led to Additional Protocol I to the 1949 Geneva Conventions and this formulation is generally recognized as reflecting customary law. The intention of this additional word appears to be to indicate that a particular target can have an important military advantage that can be felt over a lengthy period of time and affect military action in areas other than the vicinity of the target itself. As this meaning is included in the existing wording of Additional Protocol I, the inclusion of the word ‘overall’ is redundant.”) (footnotes omitted).

¹⁴⁰⁷ Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary*, Cambridge: Cambridge University Press, 2003, p. 169. For an opposite view see Heller and Lawrence, “[The Limits of Article 8\(2\)\(b\)\(iv\) of the Rome Statute, the First Ecocentric Environmental War Crime](#)”, 20 *Georgetown Environmental Law Review*, pp 19-20 (“The International Committee for the Red Cross has insisted that including the term ‘overall’ does not affect the meaning of the requirement, but that view is likely incorrect. The drafting history indicates that ‘overall’ was included to ensure that the concept of military advantage would include advantages that were ‘planned to materialize at a later time and in a different place,’ as indicated by footnote 36 in the Elements, which explains that ‘concrete and direct overall military advantage’ refers to an advantage that ‘may or may not be temporally or geographically related to the object of the attack.’ That understanding of military advantage, however, expands the original intent behind the inclusion of ‘concrete and direct military advantage’ in Protocol I, which was ‘to show that the advantage concerned should be substantial and relatively close, and that advantages which would. only appear in the long term would be disregarded.’”) (footnotes omitted).

709. Moreover, it has been suggested that the term “concrete and direct military advantage” concerns the military advantage anticipated from an attack considered as a whole, and not only from isolated or particular parts of it.¹⁴⁰⁸
710. *Clearly excessive*. It has been argued that the use of the term “clearly” in the [ICC Statute](#) and the [ICC Elements of Crimes](#), which is not reflected in [Additional Protocol I](#), does not modify existing law.¹⁴⁰⁹
711. While acknowledging that the principle of proportionality “allows for a fairly broad margin of judgment”, the ICRC Commentary submits that “the interpretation must above all be a question of common sense and good faith for military commanders”.¹⁴¹⁰ In the *Galic* case, the ICTY Trial Chamber held that “in determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.”¹⁴¹¹

CASE STUDY: EXAMPLES OF THE APPLICATION OF THE PRINCIPLE OF PROPORTIONALITY (WHETHER THE INCIDENTAL DEATH, INJURY OR DAMAGE CAUSED FROM AN ATTACK WOULD BE OF SUCH AN EXTENT AS TO BE CLEARLY EXCESSIVE IN RELATION TO THE CONCRETE AND DIRECT OVERALL MILITARY ADVANTAGE ANTICIPATED)

In the *Galic* case, the ICTY Trial Chamber considered an attack on a parking lot where a football match was ongoing at the time and off-duty military personnel was present.¹⁴¹² The Trial Chamber determined that “[a]lthough the number of soldiers present at the game was significant, an attack on a crowd of approximately 200 people, including numerous children, would clearly be expected to cause incidental loss of life and injuries to civilians excessive in relation to the direct and concrete military advantage anticipated.”¹⁴¹³

¹⁴⁰⁸ Bothe, *New Rules for Victims of Armed Conflicts, Commentary on the two 1977 Protocols Additional to the Geneva Conventions of 1949*, 2nd Edition, Brill, 2013, p. 352.

¹⁴⁰⁹ Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary*, Cambridge: Cambridge University Press, 2003, p. 169.

¹⁴¹⁰ [ICRC Commentary on Additional Protocol I](#), paras 2208, 2210.

¹⁴¹¹ ICTY, *Galic Trial Judgement*, para. 58; ICTY, *Boskoski and Tarculovski Trial Judgement*, para. 357 (“In determining whether an attack on military objectives was proportionate, it is necessary to adopt the perspective of a person in the circumstances of the actual perpetrator contemplating the attack and making reasonable use of the information available to him.”) (footnotes omitted).

¹⁴¹² ICTY, *Galic Trial Judgement*, paras 386-387.

¹⁴¹³ ICTY, *Galic Trial Judgement*, para. 387.

In the *Gotovina* case,¹⁴¹⁴ the Trial Chamber considered that the shelling of Martić's apartment “could disrupt his ability to move, communicate, and command and so offered a definite military advantage”.¹⁴¹⁵ Nonetheless, the apartment's location in a civilian area “created a significant risk of a high number of civilian casualties and injuries, as well as of damage to civilian objects” which in the Trial Chamber's view “was excessive in relation to the anticipated military advantage of firing at the two locations where the HV believed Martić to have been present.”¹⁴¹⁶ The Trial Judgement was overturned on appeal. The Appeals Chamber held that “[t]he Trial Chamber's analysis of the attacks on Martić involved a lawful military target, was not based on a concrete assessment of comparative military advantage, and did not make any findings on resulting damages or casualties.”¹⁴¹⁷

In the *Prlic et al.* case, the ICTY Trial Chamber held that “the zone in which obviously military targets, such as the headquarters of the ABiH, were located was a small residential area with a high population density into which the HVO had forcibly transferred a large number of Muslims from West Mostar.”¹⁴¹⁸ Consequently, “repeated heavy artillery attacks would have to result in the loss of human life among the civilian population, in civilians being wounded and in damage to property” which, in the Trial Chamber's view, “was excessive in relation to the concrete and direct military advantage anticipated.”¹⁴¹⁹ In relation to the aforementioned finding, the Appeals Chamber determined that the Trial Chamber has erred in law as it did not determine the military advantage anticipated.¹⁴²⁰

c. Definition of Disproportionate Attack (Subjective Elements)¹⁴²¹

712. Within the ICC framework, the subjective elements of the war crime are: 1) the perpetrator intentionally and knowingly launched an attack; and 2) the perpetrator knew that the attack would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.¹⁴²²
713. The perpetrator intentionally and knowingly launched an attack.¹⁴²³
714. The perpetrator knew that the attack would cause excessive incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment in relation to the concrete and direct overall military advantage anticipated. Regarding the second subjective element, a footnote was added to the [ICC Elements of Crimes](#) according to which “the knowledge element

¹⁴¹⁴ In relation to unlawful attacks against civilians as an underlying act of the crime against humanity of persecution.

¹⁴¹⁵ ICTY, *Gotovina et al.* [Trial Judgement](#), Vol. II of II, para. 1910.

¹⁴¹⁶ ICTY, *Gotovina et al.* [Trial Judgement](#), Vol. II of II, para. 1910.

¹⁴¹⁷ ICTY, *Gotovina et al.* [Appeal Judgement](#), para. 82.

¹⁴¹⁸ ICTY, *Prlic et al.* [Trial Judgement](#), Vol. III of VI, para. 1686.

¹⁴¹⁹ ICTY, *Prlic et al.* [Trial Judgement](#), Vol. III of VI, para. 1686.

¹⁴²⁰ ICTY, *Prlic et al.* [Appeal Judgement](#), Vol. I of III, para. 561.

¹⁴²¹ This section details the subjective elements for this war crime as detailed under international law. However, the general part of the CCU identifies subjective elements that apply to crimes. See Articles 23, 24 and 25 of the CCU. It will be necessary to consider the relevance of the subjective elements in the general part of the CCU when considering the elements of this crime as applied under Article 438 of the CCU.

¹⁴²² [ICC Elements of Crimes](#), Article 8(2)(b)(iv); [ICC Statute](#), Article 30.

¹⁴²³ This subjective element flows from ordinary intent and knowledge under Article 30 of the [ICC Statute](#).

requires that the perpetrator make the value judgement as described therein.”¹⁴²⁴ In addition, “an evaluation of that value judgement must be based on the requisite information available to the perpetrator at the time.”¹⁴²⁵ As one commentator notes, “[...] there seemed to be agreement between States that this footnote should not lead to the result of exonerating a reckless perpetrator who knows perfectly well the anticipated military advantage and the expected incidental damage or injury, but gives no thought to evaluating the possible excessiveness of the incidental injury or damage.”¹⁴²⁶ Failure to do so has been argued to actually amount to making the value judgement, that is to say, the perpetrator could be found guilty if the Court considers the harm to be excessive.¹⁴²⁷

715. Within the ICTY framework, in the *Galic case*, the ICTY Trial Chamber held that “to establish the *mens rea* of a disproportionate attack the Prosecution must prove [...] that the attack was launched wilfully and in knowledge of circumstances giving rise to the expectation of excessive civilian casualties.”¹⁴²⁸

d. Contextual Elements

716. In addition, as with all war crimes, it is necessary to demonstrate the following contextual elements:
- i. There was an international armed conflict;¹⁴²⁹
 - ii. The conduct took place in the context of and was associated with an international armed conflict;¹⁴³⁰ and
 - iii. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.¹⁴³¹

¹⁴²⁴ [ICC Elements of Crimes](#), Article 8(2)(b)(iv) fn 37.

¹⁴²⁵ [ICC Elements of Crimes](#), Article 8(2)(b)(iv) fn 37.

¹⁴²⁶ Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary*, Cambridge: Cambridge University Press, 2003, p. 165.

¹⁴²⁷ Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary*, Cambridge: Cambridge University Press, 2003, p. 165.

¹⁴²⁸ ICTY, *Galic Trial Judgement*, para. 59.

¹⁴²⁹ See above, paras 188-189.

¹⁴³⁰ See above, paras 190-198. See also [ICC Elements of Crimes](#), Article 8(2)(b)(iv).

¹⁴³¹ See above, para. 199. See also [ICC Elements of Crimes](#), Article 8(2)(b)(iv).

- iv. Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives (ICTY Statute, Article 3; ICC Statute, Article 8(2)(b)(v))

APPLICABILITY: THE WAR CRIME OF ATTACKING UNDEFENDED PLACES CAN BE CONSIDERED CRIMINALISED UNDER ARTICLE 438(1) OF THE CCU, AS IT IS SUBSUMED UNDER THE NOTION OF “OTHER VIOLATIONS OF RULES OF THE WARFARE RECOGNIZED BY INTERNATIONAL INSTRUMENTS CONSENTED TO BY BINDING BY THE VERKHOVNA RADA (PARLIAMENT) OF UKRAINE” (PARAS. 717-720).

Elements of the crime: To convict a perpetrator for the war crime of attacking undefended places, the following elements need to be established:

(1) Objective elements

- The perpetrator attacked one or more towns, villages, dwellings or buildings (para. 722).
- Such towns, villages, dwellings or buildings were open for unresisted occupation (para. 723).
- Such towns, villages, dwellings or buildings did not constitute military objectives (para. 724).

(2) Subjective elements

- The perpetrator intentionally attacked one or more towns, villages, dwellings or buildings (para. 725).
- The perpetrator knew that such towns, villages, dwellings or buildings were open for unresisted occupation (para. 725).
- The perpetrator knew that such towns, villages, dwellings or buildings did not constitute military objectives (para. 725).

(3) Contextual elements

- There is an international armed conflict (para. 726).
- The conduct of the perpetrator took place in the context and was associated with the conflict (para. 726).
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict (para. 726).

a. Applicability under Article 438

717. Although not explicitly mentioned in Article 438 of the CCU, attacking undefended places may be subsumed within “any other violations of rules of the warfare recognized by international instruments consented to be binding by the Verkhovna Rada of Ukraine” to which Article 438(1) refers. As explained below, the conduct is prohibited under international instruments ratified by Ukraine and this prohibition has been recognised as a war crime. These factors support interpreting Article 438 of the CCU as criminalising violations of this IHL prohibition.

718. **Attacking undefended places is a violation of the laws of warfare recognised in international treaties ratified by Ukraine.** Article 25 of the [Hague Regulations](#) (ratified by Ukraine) explicitly prohibits “the attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended.”¹⁴³² The aforementioned prohibition is reiterated in Article 59 of [Additional Protocol I](#) which also specifies when an area qualifies as a non-defended locality and is ratified by Ukraine.¹⁴³³ These provisions aim to prevent attacks on places that the enemy could occupy without targeting them.¹⁴³⁴ Therefore, for the purposes of Article 438 of the CCU, the prohibition of attacking undefended places is a violation of the laws of warfare recognised in international instruments accepted as binding by the Ukrainian parliament.¹⁴³⁵
719. **Recognition as a war crime.** When committed wilfully and causing death or serious injury to body or health, making non-defended localities the object of attack constitutes a grave breach of Additional Protocol I and therefore a war crime.¹⁴³⁶ The [ICTY Statute](#) and the [ICC Statute](#) also recognise violation of the prohibition of attacks against undefended localities as a war crime in international armed conflicts.¹⁴³⁷
720. These factors support recognition of the criminalisation of attacking undefended places under Article 438 of the CCU.

b. Definition of attacking undefended places (Objective Elements)

721. The objective elements of the war crime are: (1) the perpetrator attacked one or more towns, villages, dwellings or buildings; (2) such towns, villages, dwellings or buildings were open for unresisted occupation; and (3) such towns, villages, dwellings or buildings did not constitute military objectives.¹⁴³⁸
722. **The perpetrator attacked one or more towns, villages, dwellings or buildings.** Under Article 49 of [Additional Protocol I](#), “attack” means “any acts of violence against the adversary, whether in offence or defence”.¹⁴³⁹ The [ICC Elements of Crimes](#) do not repeat the terms “bombardment” and “by whatever means” included in Article 25 of the [Hague Regulations](#) and Article 8(2)(b)(v) of the [ICC Statute](#).¹⁴⁴⁰ The clarification

¹⁴³² Ukraine ratified the 1907 Convention (IV) respecting the Laws and Customs of War on Land and the annexed Regulations on 29 May 2015. See ICRC, *Treaties and States Parties*, [Ukraine](#).

¹⁴³³ [ICRC Commentary on Additional Protocol I](#), para. 2263. Ukraine ratified Additional Protocol I on 25 January 1990. See ICRC, *Treaties and States Parties*, [Ukraine](#).

¹⁴³⁴ Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, para. 1456.

¹⁴³⁵ The principle of attacking non-defending localities is also recognised as a norm of customary international law. See ICRC, IHL Database, Customary Law, [Rule 37. Open Towns and Non-Defended Localities](#).

¹⁴³⁶ [Additional Protocol I](#), Article 85(3)(d); [ICRC Commentary on Additional Protocol I](#), para. 3490; ICRC, Advisory Service on International Humanitarian Law, [Obligations in terms of penal repression](#), p. 1.

¹⁴³⁷ [ICTY Statute](#), Article 3(c); [ICC Statute](#), Article 8(2)(b)(v). The ICC Statute only recognises violation of the prohibition of attacking undefended places in the context of international armed conflict. See also ICRC, IHL Database, Customary Law, [Rule 156. Definition of War Crimes](#) (“*Making non-defended localities and demilitarized zones the object of attack. This practice amounts to a war crime because such attacks are either attacks on the civilian population or on civilian objects, namely destruction of an adversary’s property not imperatively demanded by the necessities of the conflict.*”).

¹⁴³⁸ [ICC Elements of Crimes](#), Article 8(2)(b)(v).

¹⁴³⁹ For more information, see the war crime of attacking civilians, see paras. 641-670.

¹⁴⁴⁰ Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary*,

provided by these terms has been observed as redundant in light of the definition of the term “attack” in Article 49 of [Additional Protocol I](#).¹⁴⁴¹

723. Such towns, villages, dwellings or buildings were open for unresisted occupation.

The reference to “open for unresisted occupation” equates to the notion of “undefended” or “non-defended” within the meaning of Article 59(2) of [Additional Protocol I](#).¹⁴⁴² Pursuant to Article 59(2) of [Additional Protocol I](#), a locality is considered non-defended when it is located “near or in a zone where armed forces are in contact” and is open for occupation.¹⁴⁴³ To the contrary, “[p]laces not located in the direct zone of combat or nearby do not count as undefended localities, as they cannot easily be occupied by the enemy.”¹⁴⁴⁴ Moreover, the following criteria need to be satisfied: “(1) all combatants, as well as mobile weapons and mobile military equipment must have been evacuated; (2) no hostile use shall be made of fixed military installations or establishments; (3) no acts of hostility shall be committed by the authorities or by the population; and (4) no activities in support of military operations shall be undertaken.”¹⁴⁴⁵ Article 59 of [Additional Protocol I](#) stipulates that Parties to the conflict may use unilateral declarations to communicate the status of a locality as undefended.¹⁴⁴⁶ However, the prohibition of attacking undefended places is still applicable in the absence of a declaration.¹⁴⁴⁷

724. Such towns, villages, dwellings or buildings did not constitute military objectives.

Article 52(2) of [Additional Protocol I](#) defines military objectives as “objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.”¹⁴⁴⁸ The requirement that non-defended localities do not constitute military objectives is unique to the ICC Statute and, as commentators note, it may appear redundant or unnecessary.¹⁴⁴⁹

Cambridge: Cambridge University Press, 2003, p. 177.

¹⁴⁴¹ Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary*, Cambridge: Cambridge University Press, 2003, p. 177.

¹⁴⁴² Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary*, Cambridge: Cambridge University Press, 2003, p. 178; Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C. H. Beck Hart Nomos, 2016, p. 381, para. 261 (“The only element that matters is that the area be open for unresisted occupation. The latter criterion is the one which particularly defines the notion of ‘non defended localities.’”) (footnotes omitted).

¹⁴⁴³ [ICRC Commentary on Additional Protocol I](#), para. 2268; Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary*, Cambridge: Cambridge University Press, 2003, p. 181; Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, p. 549, para. 1458.

¹⁴⁴⁴ Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, p. 549, para. 1458.

¹⁴⁴⁵ [Additional Protocol I](#), Article 59(2); [ICRC Commentary on Additional Protocol I](#), paras 2270-2272 (“The four conditions laid down [...] do not require much comment. The fact that all combatants and military equipment must be evacuated is self-evident. Fixed military installations must not be used for any hostile purpose. Thus refugees may be sheltered in barracks, but military air traffic control stations may not continue to operate. It is clear that factories situated in the locality should abstain from manufacturing weapons, ammunition or other objects of military use. It is also clear that roads and railways passing through the non-defended locality must not be used for the movement of combatants or military equipment, not even for transit purposes.”).

¹⁴⁴⁶ [ICRC Commentary on Additional Protocol I](#), para. 2263.

¹⁴⁴⁷ [ICRC Commentary on Additional Protocol I](#), para. 2267.

¹⁴⁴⁸ For more information, see the war crime of attacking civilian objects see paras 671-688.

¹⁴⁴⁹ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C. H. Beck Hart Nomos, 2016, p. 381, para. 263; Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford

Commentators have, indeed, suggested that, by their very nature, an undefended locality cannot qualify as a military objective given that “the adversary has deliberately excluded such a place from his military activities”;¹⁴⁵⁰ thus, the non-defended area cannot contribute to military action.¹⁴⁵¹ Other commentators, instead, argued that in specific situations undefended localities could qualify as military objects. This would be possible, for instance, when fixed military installations are left in an undefended area, and “for strategic or tactical reasons [they] may need to be destroyed”.¹⁴⁵² Moreover, the [ICC Elements of Crimes](#) specify that “the presence in the locality of persons specially protected under the Geneva Conventions of 1949 or of police forces retained for the sole purpose of maintaining law and order does not by itself render the locality a military objective.”¹⁴⁵³

c. Definition of attacking undefended places (Subjective Elements)¹⁴⁵⁴

725. The subjective elements of the war crime are: (1) the perpetrator intentionally attacked one or more towns, villages, dwellings or buildings; (2) the perpetrator knew that such towns, villages, dwellings or buildings were open for unresisted occupation; and (3) the perpetrator knew that such towns, villages, dwellings or building did not constitute military objectives.¹⁴⁵⁵

d. Contextual Elements

726. In addition, as with all war crimes, it is necessary to demonstrate the following contextual elements:
- i. There was an international armed conflict;¹⁴⁵⁶
 - ii. The conduct took place in the context of and was associated with an international armed conflict;¹⁴⁵⁷ and

University Press, 2020, p. 549, para. 1458.

¹⁴⁵⁰ Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary*, Cambridge: Cambridge University Press, 2003, p. 183; Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, p. 549, para. 1458 (“Undefended places are not usually military objectives to begin with, as the enemy will have exempted them from its military efforts, any desired military success could be achieved through simple occupation.”) (footnotes omitted).

¹⁴⁵¹ Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary*, Cambridge: Cambridge University Press, 2003, p. 183.

¹⁴⁵² Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C. H. Beck Hart Nomos, 2016, p. 381, para. 263.

¹⁴⁵³ [ICC Elements of Crimes](#), Article 8(2)(b)(v), fn 38. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary*, Cambridge: Cambridge University Press, 2003, p. 178 (“It was emphasised that the insertion of this footnote would not allow for an *a contrario* conclusion that with regard to other crimes where the footnote is not included, the presence of persons specially protected under the Geneva Conventions of 1949 or of police forces retained for the sole purpose of maintaining law and order does by itself render a locality a military objective.”).

¹⁴⁵⁴ This section details the subjective elements for this war crime as detailed under international law. However, the general part of the CCU identifies subjective elements that apply to crimes. See Articles 23, 24 and 25 of the CCU. It will be necessary to consider the relevance of the subjective elements in the general part of the CCU when considering the elements of this crime as applied under Article 438 of the CCU.

¹⁴⁵⁵ [ICC Elements of Crimes](#), Article 8(2)(b)(v); [ICC Statute](#), Article 30.

¹⁴⁵⁶ See above, paras [188-189](#).

¹⁴⁵⁷ See above, paras [190-198](#). See also [ICC Elements of Crimes](#), Article 8(2)(b)(v).

- iii. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.¹⁴⁵⁸

¹⁴⁵⁸ See above, para. 199. See also [ICC Elements of Crimes](#), Article 8(2)(b)(v).

- v. Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives (ICC Statute, Article 8(2)(b)(ix))

APPLICABILITY: INTENTIONALLY DIRECTING ATTACKS AGAINST BUILDINGS DEDICATED TO RELIGION, EDUCATION, ART, SCIENCE OR CHARITABLE PURPOSES, HISTORIC MONUMENTS, HOSPITALS AND PLACES WHERE THE SICK AND WOUNDED ARE COLLECTED, PROVIDED THEY ARE NOT MILITARY OBJECTIVES (“ATTACKING PROTECTED BUILDINGS”) IS NOT SPECIFICALLY LISTED UNDER ARTICLE 438 OF THE CCU. HOWEVER, IT IS SUBSUMED UNDER THE NOTION OF “OTHER VIOLATIONS OF RULES OF THE WARFARE RECOGNIZED BY INTERNATIONAL INSTRUMENTS CONSENTED TO BY BINDING BY THE VERKHOVNA RADA (PARLIAMENT) OF UKRAINE” (PARAS. [727-732](#)).

Elements of the crimes: To convict a perpetrator for attacking protected buildings as a war crime, the following elements need to be established:

(1) Objective elements

- The perpetrator directed an attack (paras [734-735](#)).
- The object of the attack was one or more buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected (paras [736-740](#)).
- The objects of the attack are not military objectives (paras [741-742](#)).

(2) Subjective elements

- The perpetrator intended to direct an attack (para. [745](#)).
- The perpetrator intended the building(s) dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded which were not military objectives to be the object of the attack (para. [746](#)).
- The perpetrator was aware that the protected buildings are dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected and are not military objectives (para. [744](#)).

(3) Contextual elements

- There is an international armed conflict (para. [748](#)).
- The conduct of the perpetrator took place in the context and was associated the conflict (para. [748](#)).
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict (para. [748](#)).

a. Applicability under Article 438

727. Although not explicitly mentioned in Article 438 of the CCU, intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives (“attacking protected buildings”), may be subsumed within “any other violations of rules of warfare recognized by international instruments consented to be binding by the Verkhovna Rada of Ukraine” to which Article 438(1) refers. As explained below, the conduct is prohibited under international instruments ratified by Ukraine and this prohibition has been recognised as a war crime. These factors support interpreting Article 438 of the CCU as criminalising violations of this IHL prohibition.
728. **Attacking protected buildings is a violation of the laws of warfare recognised in international treaties ratified by Ukraine.** Article 27 of the [Hague Regulations](#), ratified by Ukraine, requires that “in sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.”¹⁴⁵⁹ The 1949 Geneva Conventions, Additional Protocol I to the Geneva Conventions, and the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (all ratified by Ukraine) also afford protections to the aforementioned buildings and places. For instance, Article 12 of [Additional Protocol I](#) requires that medical units “shall be respected and protected at all times and shall not be the object of attack.”¹⁴⁶⁰ Moreover, Article 14 of [Additional Protocol I](#) states that “the protection to which civilian medical units are entitled shall not cease unless they are used to commit, outside their humanitarian function, acts harmful to the enemy.” Upon such cases, “protection may, however, cease only after a warning has been given setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.”¹⁴⁶¹ With regard to cultural property, Article 1 of [the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict](#) defines cultural property “as movable or immovable property of great importance to the cultural heritage of every people” and requires the respect and protection of objects covered by the above definition.¹⁴⁶² Moreover Article 53(a) of [Additional Protocol I](#) prohibits, amongst other, “any acts of hostility directed against the historic

¹⁴⁵⁹ See also [Hague Regulations](#), Article 56 (“the property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.”). Ukraine acceded to the 1907 Hague Convention (IV) on 29 May 2015. See ICRC, [Treaties and States Parties, Ukraine](#).

¹⁴⁶⁰ See also [Geneva Convention I](#), Articles 19-23; [Geneva Convention II](#), Articles 22, 23, 34, 35; [Geneva Convention IV](#), Articles 18, 19. Ukraine ratified the Geneva Conventions 1949 and Additional Protocol I on 3 August 1954 and 25 January 1990 respectively. See ICRC, [Treaties and States Parties, Ukraine](#).

¹⁴⁶¹ [Additional Protocol I](#), Article 13.

¹⁴⁶² [Hague Convention for the Protection of Cultural Property in the Event of an Armed Conflict \(1954\)](#), Articles 1, 2 and 4. Ukraine ratified the [Hague Convention for the Protection of Cultural Property in Armed Conflict](#) on 6 February 1957. See ICRC, [Treaties and States Parties, Ukraine](#).

monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples”.¹⁴⁶³

729. The ICRC has also recognised that the prohibition of attacks on cultural property specifically protects “buildings dedicated to religion, art, science, education or charitable purposes and historic monuments unless they are military objectives” as well as “[p]roperty of great importance to the cultural heritage of every people” is a principle of international customary law.¹⁴⁶⁴
730. Accordingly, for the purposes of Article 438 of the CCU, attacking protected buildings is a violation of the laws of warfare recognised in an international instrument accepted as binding by the Ukrainian parliament.
731. **Recognition as a war crime.** Article 8(2)(b)(ix) of the [ICC Statute](#) includes “intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives” as a serious violation of laws or customs applicable in international armed conflicts.¹⁴⁶⁵ Likewise, the ICRC lists making buildings dedicated to religion, education, art, science or charitable purposes or historic monuments the object of attack as a war crime.¹⁴⁶⁶
732. These factors support recognition of the criminalisation of attacking protected buildings under Article 438 of the CCU.

b. Definition of Attacking Protected Buildings (Objective Elements)

733. The objective elements of the war crime of attacking protected buildings under the ICC framework are: (1) the perpetrator directed an attack; (2) the object of the attack was one or more buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded

¹⁴⁶³ [Additional Protocol I](#), Article 53. The prohibitions under Article 53 of Additional Protocol I apply “without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict”. Article 16 of [Additional Protocol II](#) (also ratified by Ukraine) prohibits “any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military effort” in non-international armed conflicts. .

¹⁴⁶⁴ ICRC, IHL Database, Customary Law, [Rule 38. Attacks Against Cultural Property](#) (“Each party to the conflict must respect cultural property: A. Special care must be taken in military operations to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments unless they are military objectives. B. Property of great importance to the cultural heritage of every people must not be the object of attack unless imperatively required by military necessity.”).

¹⁴⁶⁵ [ICC Statute](#), Article 8(2)(b)(ix); ICC [Elements of Crimes](#), p.15. See also [ICC Statute](#), Article 8(2)(e)(iv) applicable in the context of non-international armed conflict. Article 3(d) of the ICTY Statute identifies as a war crime the “seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science”. Despite the similar wording, Article 3(d) of the ICTY and Article 8(2)(b)(ix) of the ICC Statute only partially overlap. While Article 3(d) of the ICTY Statute covers similar objects *vis-à-vis* Article 8(2)(b)(ix) of the ICC Statute, it differs in terms of conduct insofar as it requires the “seizure of, destruction or wilful damage” of the protected buildings (see below, paras 620-640), rather than the mere *attack* (see below, para. 735). However, the jurisprudence of the ICTY concerning Article 3(d) of the ICTY Statute may assist in interpreting this offence with respect to the definition of the protected objects.

¹⁴⁶⁶ ICRC, IHL Database, Customary Law, [Rule 156. Definition of War Crimes](#).

are collected; and (3) the protected buildings objects of the attack are not military objectives.¹⁴⁶⁷

734. **The perpetrator directed an attack.** According to the ICC Trial Chamber in the *Ntaganda* case an attack is defined by referring to Article 49(1) of [Additional Protocol I](#) as “acts of violence against the adversary, whether in offence or in defense”.¹⁴⁶⁸ The Trial Chamber added that the “crime of attacking protected objects belongs to the category of offences committed during the actual conduct of hostilities.”¹⁴⁶⁹ As a result, the Trial Chamber found that acts of violence against protected objects, occurring after the end of the actual conduct of the hostilities, do not constitute an attack.¹⁴⁷⁰
735. This offence only requires “the perpetrator to have launched an attack against a protected object and it need not be established that the attack caused any damage or destruction to the object in question”.¹⁴⁷¹
736. The object of attack was one or more buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected.
737. *Buildings.* It is notable that the offense only mentions “one or more buildings” and thus may not protect individual items of *moveable* property. This appears, for instance, to exclude historical, religious, educational, artistic, scientific or charitable moveable properties that may otherwise be protected under [the Convention for the Protection of Cultural Property in the Event of an Armed Conflict](#).¹⁴⁷²

¹⁴⁶⁷ ICC [Elements of Crimes](#), p. 15.

¹⁴⁶⁸ ICC, *Ntaganda* [Trial Judgement](#), para. 1136. The Appeals Chamber upheld the Trial Chamber’s conclusion in this regard. See *Ntaganda* [Appeal Judgement](#), para. 1163 (“The Appeals Chamber finds, by majority, judge Ibáñez Carranza dissenting, that the Prosecutor’s appeal should be rejected.”), para. 1164 (“judge Morrison and judge Hofmański find that the term ‘attack’ used in article 8(2)(e)(iv) of the Statute means ‘combat action’ and that the Trial Chamber did not err by not applying a different definition of ‘attack’”) (footnotes omitted); Annex 1: [Separate opinion of judge Howard Morrison and judge Piotr Hofmański on the Prosecutor’s appeal](#); Annex 4: [Separate opinion of judge Solomy Balungi Bossa on the Prosecutor’s appeal](#) (in relation to the offence of attacking protected buildings in non-international armed conflict under Article 8(2)(e)(iv), the consideration may also apply *mutatis mutandis* to the present crime). See however, ICC, *Ntaganda* [Trial Judgement](#), para. 1136, fn. 3147 (“In respect of the war crime of attacking protected objects, the Chamber’s findings do not relate to the interpretation of an ‘attack’ under Article 8(2)(e)(iv) when cultural objects enjoying a special status are the object of the attack. It notes that the protection of such objects under IHL is based on different underlying rules.”). See also contradictory jurisprudence that pre-date the *Ntaganda* Appeals Judgement, ICC, *Al Mahdi* [Trial Judgement](#), paras 15-16; ICC, *Al Hassan* [Decision on Confirmation of charges](#), paras 521-522 (both in relation to the offence of attacking protected buildings in non-international armed conflict under Article 8(2)(e)(iv), the consideration may also apply *mutatis mutandis* to the present crime).

¹⁴⁶⁹ ICC, *Ntaganda* [Trial Judgement](#), para. 1136 (in relation to the offence of attacking protected buildings in non-international armed conflict under Article 8(2)(e)(iv), the consideration may also apply *mutatis mutandis* to the present crime).

¹⁴⁷⁰ ICC, *Ntaganda* [Trial Judgement](#), paras 761, 1141 (“the Chamber does not consider that pillaging of protected objects, in particular in this case of the Mongbwalu hospital, is an ‘act of violence against the adversary’ and, consequently, it does not constitute an attack within the meaning of Article 8(2)(e)(iv) of the Statute.”), 1142 (“In addition, given that the attack on the church in Sayo took place sometime after the assault, and therefore not during the actual conduct of hostilities, the Chamber finds that the first element of Article 8(2)(e)(iv) of the Statute is not met.”) ((in relation to the offence of attacking protected buildings in non-international armed conflict under Article 8(2)(e)(iv), the consideration may also apply *mutatis mutandis* to the present crime).

¹⁴⁷¹ ICC, *Ntaganda* [Trial Judgement](#), para. 1136.

¹⁴⁷² See Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 419, para. 420.

738. *Protected buildings*. The offense regroups various categories of buildings considered of particular significance.¹⁴⁷³ The offense protects: (1) cultural objects; (2) buildings dedicated to religion; (3) buildings dedicated to education; and (4) hospitals and places for the collection of those in need.¹⁴⁷⁴ To be protected, “the attacked objects must have performed the function of buildings dedicated to religion or education, hospitals, or places where the sick and wounded are brought at the time of the attack.”¹⁴⁷⁵
739. *Cultural Property*. Different terminology is used in the Hague Convention for the Protection of Cultural Property in Armed Conflict (“movable or immovable property of great importance to the cultural heritage of every people”) and Additional Protocol I (“historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples”) to define cultural property but “the basic idea [underlying the two provisions] is the same.”¹⁴⁷⁶ Examples of such buildings include the Old Town of Dubrovnik,¹⁴⁷⁷ mausoleums of Timbuktu,¹⁴⁷⁸ mosques,¹⁴⁷⁹ educational¹⁴⁸⁰ and religious¹⁴⁸¹ institutions. While not necessary, many Trial Chambers have highlighted the shared reasoning behind protecting cultural property when determining if buildings were protected.¹⁴⁸² Some ICTY Trial Chambers even declared such buildings to

¹⁴⁷³ Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, para. 1435.

¹⁴⁷⁴ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 419, para. 420.

¹⁴⁷⁵ ICC, *Ntaganda Trial Judgement*, para. 1146 (in relation to the offence of attacking protected buildings in non-international armed conflict under Article 8(2)(e)(iv), the consideration may also apply *mutatis mutandis* to the present crime).

¹⁴⁷⁶ ICTY, *Stugar Trial Judgement*, para. 307 (“The Hague Convention of 1954 protects property ‘of great importance to the cultural heritage of every people.’ The Additional Protocols refer to ‘historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples.’ The Kordic Appeals Judgement, referring to the ICRC Commentary to Article 53 of Additional Protocol I, stated that despite this difference in terminology, the basic idea [underlying the two provisions] is the same. Whether there may be precise differences is not an issue raised by the facts of this case. The Chamber will limit its discussion to property protected by the above instruments (hereinafter ‘cultural property’).”) (footnotes omitted) (in relation to Article 3(d) of the ICTY Statute, the consideration may also apply *mutatis mutandis* to the present crime).

¹⁴⁷⁷ ICTY, *Strugar Appeal Judgement*, para. 279 (in relation to Article 3(d) of the ICTY Statute, the consideration may also apply *mutatis mutandis* to the present crime); ICTY, *Jokic Trial Judgement*, para. 51 (in relation to Article 3(d) of the ICTY Statute, the consideration may also apply *mutatis mutandis* to the present crime); ICTY, *Strugar Trial Judgement*, para. 232 (in relation to Article 3(d) of the ICTY Statute, the consideration may also apply *mutatis mutandis* to the present crime).

¹⁴⁷⁸ ICC, *Al Mahdi Trial Judgement*, paras 34-39, 46-47 (in relation to the offence of attacking protected objects in non-international armed conflict under Article 8(2)(e)(iv), the consideration may also apply *mutatis mutandis* to the present crime).

¹⁴⁷⁹ ICC, *Al Mahdi Trial Judgement*, paras 34-39, 46-47 (in relation to the offence of attacking protected objects in non-international armed conflict under Article 8(2)(e)(iv), the consideration may also apply *mutatis mutandis* to the present crime).

¹⁴⁸⁰ ICTY, *Kordic and Cerkez Appeal Judgement*, para. 92 (in relation to Article 3(d) of the ICTY Statute, the consideration may also apply *mutatis mutandis* to the present crime).

¹⁴⁸¹ ICTY, *Blaskic Trial Judgement*, paras 185, 419-423 (in relation to Article 3(d) of the ICTY Statute, the consideration may also apply *mutatis mutandis* to the present crime); ICTY, *Brdanin Trial Judgement*, paras 640-658 (in relation to Article 3(d) of the ICTY Statute, the consideration may also apply *mutatis mutandis* to the present crime).

¹⁴⁸² ICC, *Al Mahdi Trial Judgement*, paras 39, 78-81 (in relation to the offence of attacking protected objects in non-international armed conflict under Article 8(2)(e)(iv), the consideration may also apply *mutatis mutandis* to the present crime); ICTY, *Kordic and Cerkez Appeal Judgement*, paras 85-92 (in relation to Article 3(d) of the ICTY Statute, the consideration may also apply *mutatis mutandis* to the present crime); ICTY, *Jokic Trial Judgement*, paras 23, 46-55 (in relation to Article 3(d) of the ICTY Statute, the consideration may also apply *mutatis mutandis* to the present crime); ICTY, *Kordic and Cerkez Trial Judgement*, paras 359-362 (in relation to Article 3(d) of the ICTY Statute, the consideration may also apply *mutatis mutandis* to the present crime); For a discussion of the definition of cultural

be cultural property or of “the cultural heritage of humankind”.¹⁴⁸³ Nonetheless, the buildings need not be classified as cultural property to be protected and fall within the scope of this war crime. Put simply, even if deemed cultural property, an attack on a protected building can be charged under this crime and the status of its cultural significance need not be discussed. However, the cultural significance of a building may be considered as a basis for why a certain monument is protected under this provision.¹⁴⁸⁴

740. Attacks on some these protected buildings are also protected under other war crimes. In addition to the more general offence of attacking civilian objects,¹⁴⁸⁵ “hospitals and places where the sick and wounded are collected” may also be protected under Article 8(2)(b)(xxiv) of the [ICC Statute](#) “intentionally directing attacks against objects or personnel using the emblems of the Geneva Conventions”.¹⁴⁸⁶

741. **The protected buildings that are objects of the attack are not military objectives.** Protected buildings/cultural property are civilian objects.¹⁴⁸⁷ The civilian protection afforded to a protected building/cultural property is lost when the building becomes a military objective.¹⁴⁸⁸ The ICC jurisprudence relied on Article 52(1) of Additional Protocol I that defines a military objective as “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage”.¹⁴⁸⁹

property see Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, pp 418-419, paras 415-417.

¹⁴⁸³ ICTY, *Jokic Trial Judgement*, para. 51; ICTY, *Kordic and Cerkez Trial Judgement*, para. 360.

¹⁴⁸⁴ For example, when considering the protected status of a building dedicated to education under this provision, the ICTY Appeals Chamber held “that the Trial Chamber erred when it considered that ‘educational institutions are undoubtedly immovable property of great importance to the cultural heritage of peoples’ as the special rules applicable to cultural property cannot be construed as applying to all institutions dedicated to education such as schools. See ICTY, *Kordic and Cerkez Appeal Judgement*, para. 92 (in relation to Article 3(d) of the ICTY Statute, the consideration may also apply *mutatis mutandis* to the present crime).

¹⁴⁸⁵ See above, paras 671-688. In *Brdanin*, the ICTY Trial Chamber recognised that “the offence of destruction or wilful damage to institutions dedicated to religion overlaps to a certain extent with the offence of unlawful attacks on civilian objects” except for the fact “that the object of the offence of destruction or wilful damage to institutions dedicated to religion is more specific.” See ICTY, *Brdanin Trial Judgement*, para. 596 (in relation to Article 3(d) of the ICTY Statute, the consideration may also apply *mutatis mutandis* to the present crime).

¹⁴⁸⁶ See paras 921-931.

¹⁴⁸⁷ For instance Article 53 of Additional Protocol I protecting cultural objects and places of workshop is placed under Chapter III of the Protocol titled “Civilian Objects”; ICRC blog, [What objects are especially protected under IHL?;](#) ICTY, *Brdanin Trial Judgement*, para. 596 (“Institutions dedicated to religion must be presumed to have a civilian character and to enjoy the general protection to which these objects are entitled to under Article 52 of Additional Protocol I. Pursuant to Article 52 of Additional Protocol I, institutions dedicated to religion as general civilian objects should not be attacked.”) (footnotes omitted) (in relation to Article 3(d) of the ICTY Statute, the consideration may also apply *mutatis mutandis* to the present crime).

¹⁴⁸⁸ ICTY, *Stugar Trial Judgement*, para. 310 (in relation to Article 3(d) of the ICTY Statute, the consideration may also apply *mutatis mutandis* to the present crime).

¹⁴⁸⁹ ICC, *Ntaganda Trial Judgement*, para. 1146 (“In principle, all objects are protected under IHL as being civilian, apart from those ‘objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage’) in relation to the offence of attacking protected objects in non-international armed conflict under Article 8(2)(e)(iv), the consideration may also apply *mutatis mutandis* to the present crime); ICRC, IHL Database, Customary IHL, [ICRC Rule 8. Definition of Military Objectives](#). See paras 671-688.

742. As provided in Article 52(3) of Additional Protocol I and recognised by the ICTY, civilian objects are presumed not to be military objectives: “Article 52(3) of Additional Protocol I provides that in case of doubt as to whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.”¹⁴⁹⁰
743. Moreover, protected buildings do not lose their protected status merely by being in the vicinity of military objectives.¹⁴⁹¹ However, as recognised by the ICTY, “[i]n such a case, the practical result may be that it cannot be established that the acts which caused destruction of or damage to cultural property were ‘directed against’ that cultural property, rather than the military installation or use in its immediate vicinity.”¹⁴⁹²

¹⁴⁹⁰ See e.g. ICTY, *Brdanin Trial Judgement*, para. 596, fn 1508 (in relation to Article 3(d) of the ICTY Statute, the consideration may also apply *mutatis mutandis* to the present crime). Article 52(3) of Additional Protocol I (“In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.”).

¹⁴⁹¹ ICTY, *Stugar Trial Judgement*, para. 310 (“Nevertheless, the established jurisprudence of the Tribunal confirming the ‘military purposes’ exception which is consistent with the exceptions recognised by the *Hague Regulations* of 1907 and the Additional Protocols, persuades the Chamber that the protection accorded to cultural property is lost where such property is used for military purposes. Further, with regard to the differences between the *Blaskic* and *Naletilic* Trial Judgements noted above (regarding the use of the immediate surroundings of cultural property for military purposes), and leaving aside any implication of the issue of imperative military necessity, the preferable view appears to be that it is the use of cultural property and not its location that determines whether and when the cultural property would lose its protection. Therefore, contrary to the Defence submission the Chamber considers that the special protection awarded to cultural property itself may not be lost simply because of military activities or military installations in the immediate vicinity of the cultural property.”) (footnotes omitted) (in relation to Article 3(d) of the ICTY Statute, the consideration may also apply *mutatis mutandis* to the present crime); ICTY, *Natic and Martinovic Trial Judgement*, para. 604 (“The Chamber respectfully rejects that protected institutions ‘must not have been in the vicinity of military objectives’. The Chamber does not concur with the view that the mere fact that an institution is in the ‘immediate vicinity of military objective’ justifies its destruction.”) (footnotes omitted) (in relation to Article 3(d) of the ICTY Statute, the consideration may also apply *mutatis mutandis* to the present crime).

¹⁴⁹² ICTY, *Stugar Trial Judgement*, para. 310 (in relation to Article 3(d) of the ICTY Statute, the consideration may also apply *mutatis mutandis* to the present crime).

CASE STUDIES
WHETHER A RELIGIOUS BUILDING WAS A MILITARY OBJECTIVE
ICTY, *BRDANIN APPEAL JUDGEMENT*, PARAS 340-341
(FOOTNOTES OMITTED)

“The evidence referred to in the Trial Judgment in relation to the religious sites destroyed in the territory of the ARK in 1992 does not suggest that any of these sites may have been used for military purpose, or that their total or partial destruction offered a definite military advantage to the Bosnian Serb forces. Brdanin refers to no such evidence on appeal. To the contrary, there is evidence that these sites were destroyed as a part of a campaign to ethnically cleanse the area of its Muslim and Croat citizens. This is consistent with the Trial Chamber’s findings regarding ‘the deliberate campaign of devastation of the Bosnian Muslim and Bosnian Croat religious and cultural institutions’, which ‘was just another element of the larger attack. The final objective, however, was the removal of the population and the destruction of their homes’.[...] The very manner in which many of the sites were damaged or destroyed, including the time required to mine churches, mosques, and minarets and to blow them up (or to set them on fire), suggests that these installations contained no military threat, but were instead systematically destroyed because of their religious significance to the ethnicities targeted. There is nothing to suggest that their destruction provided any kind of advantage in weakening the military forces opposing the Bosnian Serbs, favoured the Bosnian Serb position, or was otherwise justified by military necessity.”

WHETHER A HOSPITAL WAS A MILITARY OBJECTIVE
ICC, *NTAGANDA TRIAL JUDGEMENT*, PARA. 1147
(FOOTNOTES OMITTED)¹⁴⁹³

Because persons seeking treatment were present at the Sayo health centre, the Chamber finds that the health centre was in use as a medical facility at the time of the attack. The evidence before the Chamber provides no indication that the health centre in Sayo was used, at the time of the attack, in any manner which would invalidate its protected status so as to turn it into a military objective. The Chamber therefore concludes that the health centre in Sayo qualified as a protected object for the purpose of Article 8(2)(e)(iv) of the Statute.

c. Definition of Attacking Protected Buildings (Subjective elements)¹⁴⁹⁴

744. The subjective elements of the war crime of attacking protected buildings under the ICC framework are that the perpetrator: (1) intentionally directed an attack; (2) intended the protected buildings to be the object of the attack and (3) was aware that the buildings were dedicated to religion, education, art, science or charitable

¹⁴⁹³ In relation to the offence of attacking protected objects in non-international armed conflict under Article 8(2)(e)(iv), the consideration may also apply mutatis mutandis to the present crime.

¹⁴⁹⁴ This section details the subjective elements for this war crime as detailed under international law. However, the general part of the CCU identifies subjective elements that apply to crimes. See Articles 23, 24 and 25 of the CCU. It will be necessary to consider the relevance of the subjective elements in the general part of the CCU when considering the elements of this crime as applied under Article 438 of the CCU.

purposes, historic monuments, hospitals or places where the sick and wounded are collected and are not military objectives.¹⁴⁹⁵

745. The perpetrator intentionally directed an attack.¹⁴⁹⁶
746. The perpetrator intended the protected buildings to be the object of the attack and was aware that the buildings were dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected and are not military objectives. In the *Ntaganda* case, the ICC Trial Chamber specified that it “must be demonstrated that the perpetrator intended to attack a building or place dedicated to one of the specific functions listed in [the crime of attacking protected buildings], and not just any object not constituting a military objective”.¹⁴⁹⁷
747. In assessing the intent of the perpetrator, in the *Al Mahdi* case, the ICC Trial Chamber considered whether or not the protected buildings were listed as protected sites by UNESCO,¹⁴⁹⁸ the significance of the protected building to the local population,¹⁴⁹⁹ the nature of the attack (*i.e.* modus operandi,¹⁵⁰⁰ perpetrators, timing,¹⁵⁰¹ weapons used, level of destruction),¹⁵⁰² as well as the guilty pleas¹⁵⁰³.

d. Contextual Elements

748. In addition, as with all war crimes, it is necessary to demonstrate the following contextual elements:
- i. There was an international armed conflict;¹⁵⁰⁴

¹⁴⁹⁵ [ICC Elements of Crimes](#), Article 8(2)(b)(ix); [ICC Statute](#), Article 30. ICC, *Katanga Trial Judgement*, , para. 808 (“For the mental element of the crime to be established, the perpetrator must have (1) intentionally directed an attack; (2) intended the civilian population or individual civilians to be the object of the attack; (3) been aware of the civilian character of the population or of civilians not taking part in hostilities; and (4) been aware of the factual circumstances that established the existence of an armed conflict.”) (footnotes omitted); Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 365, para. 216 (“With regard to the mental elements required, reference may be made to the explanations given for the war crime of attacking civilians [...]. The same approach was taken *mutatis mutandis* for all crimes covering unlawful attacks.”) (footnotes omitted).

¹⁴⁹⁶ This subjective element flows from ordinary intent and knowledge under Article 30 of the [ICC Statute](#).

¹⁴⁹⁷ ICC, *Ntaganda Trial Judgement*, para. 1147 (in relation to the offence of attacking protected objects in non-international armed conflict under Article 8(2)(e)(iv), the consideration may also apply *mutatis mutandis* to the present crime).

¹⁴⁹⁸ ICC, *Al Mahdi Trial Judgement*, paras 39 (in relation to the offence of attacking protected objects in non-international armed conflict under Article 8(2)(e)(iv), the consideration may also apply *mutatis mutandis* to the present crime), 46.

¹⁴⁹⁹ ICC, *Al Mahdi Trial Judgement*, para. 46 (in relation to the offence of attacking protected objects in non-international armed conflict under Article 8(2)(e)(iv), the consideration may also apply *mutatis mutandis* to the present crime).

¹⁵⁰⁰ ICC, *Al Mahdi Trial Judgement*, para. 48 (in relation to the offence of attacking protected objects in non-international armed conflict under Article 8(2)(e)(iv), the consideration may also apply *mutatis mutandis* to the present crime).

¹⁵⁰¹ ICC, *Al Mahdi Trial Judgement*, para. 47 (in relation to the offence of attacking protected objects in non-international armed conflict under Article 8(2)(e)(iv), the consideration may also apply *mutatis mutandis* to the present crime).

¹⁵⁰² ICC, *Al Mahdi Trial Judgement*, paras 47-48 (in relation to the offence of attacking protected objects in non-international armed conflict under Article 8(2)(e)(iv), the consideration may also apply *mutatis mutandis* to the present crime).

¹⁵⁰³ ICC, *Al Mahdi Trial Judgement*.

¹⁵⁰⁴ See above, paras [188-189](#).

- ii. The conduct took place in the context of and was associated with an international armed conflict;¹⁵⁰⁵ and
- iii. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.¹⁵⁰⁶

e) War Crimes by Employment of Prohibited Means and Methods of Warfare

- i. Killing or wounding a hors de combat (ICTY Statute, Article 3; ICC Statute, Article 8(2)(b)(vi))

APPLICABILITY: THE WAR CRIME OF KILLING OR WOUNDING PERSONS *HORS DE COMBAT* CAN BE CONSIDERED TO BE CRIMINALISED UNDER ARTICLE 438(1) OF THE CCU, AS IT IS SUBSUMED UNDER THE NOTIONS OF “USE OF METHODS OF THE WARFARE PROHIBITED BY INTERNATIONAL INSTRUMENTS” AND “OTHER VIOLATIONS OF RULES OF THE WARFARE RECOGNIZED BY INTERNATIONAL INSTRUMENTS CONSENTED TO BY BINDING BY THE VERKHOVNA RADA (PARLIAMENT) OF UKRAINE” (PARAS [749-753](#)).

Elements of the crime: To convict a perpetrator for killing or wounding persons *hors de combat* as a war crime the following elements must be established:

(1) Objective elements

- The perpetrator by act or omission killed, caused the death of or injured one or more persons (paras [756-758](#)).
- Such person or persons were *hors de combat* (paras. [759-762](#)).

(2) Subjective elements

- The perpetrator intended to kill, cause death or injure, or was aware that death or injury would occur in the ordinary course of events from his act or culpable omission (paras [765-766](#)).
- The perpetrator was aware of the factual circumstances that established the *hors de combat* status (paras [767-768](#)).

(3) Contextual elements

- There is an international armed conflict (para. [769](#)).
- The conduct of the perpetrator took place in the context of and was associated with the conflict (para. [769](#)).
- The perpetrator was aware of the factual circumstances that established the existence of an armed conflict (para. [769](#)).

¹⁵⁰⁵ See above, paras [190-198](#). See also [ICC Elements of Crimes](#), Article 8(2)(b)(ix).

¹⁵⁰⁶ See above, para. [199](#). See also [ICC Elements of Crimes](#), Article 8(2)(b)(ix).

a. Applicability under Article 438

749. Article 438 of the CCU does not explicitly mention the war crime of killing or wounding persons *hors de combat*. However this offence may be subsumed within “use of methods of warfare prohibited by international instruments” to which Article 438(1) refers. Ukraine has ratified the instruments that prohibit killing or wounding persons *hors de combat*. Given this, it may also be subsumed within “any other violations of rules of warfare recognized by international instruments consented to be binding by the Verkhovna Rada of Ukraine” to which Article 438(1) refers. This violation has been recognised as a war crime. It may be concluded that the violation may be considered criminalised under Article 438.
750. **Killing or wounding persons hors de combat is a method of warfare prohibited by international treaties and a violation of rules of warfare recognised by international treaties ratified by Ukraine.** Attacks on persons *hors de combat* are a prohibited “method of warfare”.¹⁵⁰⁷ This serious violation of IHL applicable in international armed conflict is set out in Article 23(c) of the [Hague Regulations](#).¹⁵⁰⁸ The violation is also sourced from Article 35(2) generally, and Article 41 specifically, of [Additional Protocol I](#).¹⁵⁰⁹ Ukraine is a State party to the 1907 Hague Convention (IV) with its Annexed Regulations and to Additional Protocol I.¹⁵¹⁰ Given this, violation of this prohibition may also be subsumed as “other violations of rules of warfare recognized by international instruments consented to be binding by the Verkhovna Rada of Ukraine” prong of Article 438(1).
751. **Recognition as a war crime.** Further, this violation is recognised as a war crime, with the status of customary international law. It is recognised as a war crime because it is a grave breach of Additional Protocol I under Article 85.¹⁵¹¹ The ICRC’s Customary Law Study considers its criminalisation as customary.¹⁵¹² The IMT at Nuremberg considered that violations of the 1907 Hague Convention (IV)’s Annexed Regulations were war crimes because these treaty rules had crystallised into customary law by the time of the Second World War.¹⁵¹³
752. Finally, killing or wounding persons *hors de combat* is expressly codified as a war crime in Article 8(2)(b)(vi) of the [ICC Statute](#).¹⁵¹⁴

¹⁵⁰⁷ ICRC, [Casebook: How Does Law Protect in War?](#), A to Z Glossary “Methods of Warfare”; Kalshoven and Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, 4th Edition, ICRC and Cambridge University Press, 2011, pp 33, 37-38, 92, 96-97..

¹⁵⁰⁸ [Hague Regulations](#), Article 23(c).

¹⁵⁰⁹ [Additional Protocol I](#), Articles 35(2), 41.

¹⁵¹⁰ Ukraine acceded to the 1907 Hague Convention (IV) on 29 May 2015, and ratified Additional Protocol I on 25 January 1990. ICRC, IHL Database, Treaties, States Parties and Commentaries, [1907 Hague Convention \(IV\)](#); [Additional Protocol I](#). Note that the violation also has the status of customary international law. ICRC, IHL Database, Customary IHL, [Rule 47. Attacks against Persons Hors de Combat](#).

¹⁵¹¹ [Additional Protocol I](#), Article 85(1)-(3)(e), (5).

¹⁵¹² ICRC, IHL Database, Customary IHL, [Rule 156. Serious violations of international humanitarian law constitute war crimes](#).

¹⁵¹³ IMT Nuremberg, *Göring et al.*, [Judgement delivered on 30 September and 1 October 1946](#), in 22 *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, pp 445, 467.

¹⁵¹⁴ [ICC Statute](#), Article 8(2)(b)(vi).

753. These factors support a finding that killing or wounding persons *hors de combat* is criminalised under Article 438 of the CCU.

b. Definition of killing or wounding persons *hors de combat* (Objective Elements)

754. The objective elements of killing or wounding persons *hors de combat* are : (1) the perpetrator killed, caused the death of or injured one or more persons; and (2) such person or persons were *hors de combat*.¹⁵¹⁵

755. The crime of killing or wounding persons *hors de combat*¹⁵¹⁶ shares the element of killing one or more persons with the war crime of wilful killing / murder.¹⁵¹⁷ As such, jurisprudence elaborating on wilful killing may assist in interpreting this common element in relation to killing or wounding persons *hors de combat*. However, there are important differences, including (1) killing is not a necessary element of this war crime, wounding persons *hors de combat* is sufficient; and (2) this crime is limited to a particular type of victim in a particular situation, namely persons, principally combatants, who are *hors de combat*.

756. **The perpetrator killed, caused the death of or injured one or more persons.** Unlike the crime of wilful killing, causing injury is sufficient to commit the crime of killing or wounding persons *hors de combat*. Killing would attract a higher penalty under Article 438(2) of the CCU, but it is not a necessary element of this crime.

757. As with the crime of wilful killing, killing or wounding persons *hors de combat* may be committed by action, and – at least in theory – possibly also by omission. To demonstrate this crime, evidence must show that one or more persons died or were physically injured “as a result of” the perpetrator’s acts or omissions. Put otherwise, there must be a causal link between the perpetrator’s act or omission and the person’s death or injury.¹⁵¹⁸

¹⁵¹⁵ [ICC Elements of Crimes](#), Article 8(2)(b)(vi).

¹⁵¹⁶ Per [ICC Statute](#), Article 8(2)(b)(vi).

¹⁵¹⁷ Cf. [ICC Statute](#), Article 8(2)(a)(i), 8(2)(c)(i).

¹⁵¹⁸ Under [ICTY Statute](#), Articles 2(a) and 3 wilful killing/murder but relevant by analogy to [ICC Statute](#), Article 8(2)(b)(vi) killing or wounding persons *hors de combat*: ICTY, *Kordic and Cerkez Appeal Judgement*, para. 36 (“The Appeals Chamber recalls that the elements of wilful killing under Article 2 of the Statute are the death of the victim as the result of the action(s) of the accused”); ICTY, *Celebici Trial Judgement*, para. 424 (“The first of these may be termed the actus reus – the physical act necessary for the offence. In relation to homicide of all natures, this actus reus is clearly the death of the victim as a result of the actions of the accused. The Trial Chamber finds it unnecessary to dwell on this issue, although it notes that omissions as well as concrete actions can satisfy the actus reus element”); ICTY, *Brdanin Trial Judgement*, paras 381 (“The death was caused by an act or omission of the accused, or of a person or persons for whose acts or omissions the accused bears criminal responsibility”), 382 (“The actus reus consists in the action or omission of the accused resulting in the death of the victim”); see further Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, pp 390-391, paras 305 (“The wording ‘killing or wounding’ implies that there must be a result of death or physical injury.”), 306 (“While it is submitted that omission may give rise to criminal responsibility under the Rome Statute, it is not entirely clear under what circumstances this would apply with regard to article 8 para. 2 (b) (vi). It appears appropriate that killing or wounding a *person hors de combat* by omission may amount to the war crime defined under article 8 para. 2 (b) (vi) under certain circumstances. This would appear to at least be the case insofar the perpetrator has, first, the requisite mental elements, in particular being aware of the *hors de combat status* of the combatant and intending his or her death or injury, and when, second, the omission violates a duty under humanitarian law, except, for instance, where the circumstances did not permit to comply with the duty or would have subjected the perpetrator to undue disadvantage or hazard. Consequently, withholding medical care for a wounded prisoner of war, starving

758. However, the perpetrator's conduct does not need to be the sole cause of the victim's death or injury. It is sufficient that the perpetrator's acts or omissions substantially contributed to the death or injury of the person(s).¹⁵¹⁹
759. **Such person or persons were *hors de combat*.** The status of being *hors de combat* is defined in Article 41(2) of Additional Protocol I.

ADDITIONAL PROTOCOL I, ARTICLE 41: SAFEGUARD OF AN ENEMY *HORS DE COMBAT*

1. A person who is recognized or who, in the circumstances, should be recognized to be '*hors de combat*' shall not be made the object of attack.
2. A person is '*hors de combat*' if:
 - (a) he is in the power of an adverse Party;
 - (b) he clearly expresses an intention to surrender; or
 - (c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself;
 provided that in any of these cases he abstains from any hostile act and does not attempt to escape.

760. The significance of this protection and this crime is that their application focusses on the interval from the moment persons become *hors de combat* in fact on the battlefield up to and overlapping with the moment they attain a more secure status, e.g. — determinative — prisoner of war status.¹⁵²⁰ This restricts methods of warfare interrelated with protection as/when persons become defenseless, including by reason of wounds or sickness and as/when persons are in the power of an adverse party, including eventually as POWs.¹⁵²¹

761. Commentary suggests the crime's victims can be combatants, but also civilians who directly participated in hostilities then became *hors de combat*.¹⁵²²

such prisoner to death, or not helping to rescue shipwrecked violates a duty under humanitarian law and might thus amount to the war crime defined under article 8 para. 2 (b) (vi) Rome Statute."

¹⁵¹⁹ Under [ICC Statute](#), Article 8(2)(a)(i) wilful killing but relevant by analogy to [ICC Statute](#), Article 8(2)(b)(vi) killing or wounding persons *hors de combat*: ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, para. 296 ("The Chamber also adopts the ICTY conclusion that 'the conduct of the accused must be a substantial cause of the death of the victim'"). Under [ICTY Statute](#), Articles 2(a) and/or 3 wilful killing / murder but relevant by analogy to [ICC Statute](#), Article 8(2)(b)(vi) killing or wounding persons *hors de combat*: ICTY, *Brdanin Trial Judgement*, para. 382 ("The Prosecution need only prove beyond reasonable doubt that the accused's conduct contributed substantially to the death of the victim"); ICTY, *Karadzic Trial Judgement*, para. 446 ("With regard to the requisite causal nexus, the requirement that death must have occurred 'as a result of' the perpetrator's act or omission does not require this to be the sole cause for the victim's death; it is sufficient that the 'perpetrator's conduct contributed substantially to the death of the person'").

¹⁵²⁰ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, pp 383-388, paras 269, 275, 283, 291, 293; see [ICRC Commentary on Additional Protocol I](#), pp 484-485 para. 1612.

¹⁵²¹ [ICRC Commentary on Additional Protocol I](#), p. 482 para. 1603; see also Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 384, para. 275.

¹⁵²² Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, pp 383-385, 387-388, paras 270, 279-280, 282, 292, 294; see also ECtHR, *Kononov v. Latvia*, [Grand Chamber Judgement](#). For definition of combatants, civilians and the latter's direct participation in hostilities see

ICRC COMMENTARY ON ADDITIONAL PROTOCOL I, PP 486-487 PARAS 1618-1619:

[A] soldier who wishes to indicate that he is no longer capable of engaging in combat, or that he intends to cease combat, lays down his arms and raises his hands. Another way is to cease fire, wave a white flag and emerge from a shelter with hands raised, whether the soldiers concerned are the crew of a tank, the garrison of a fort, or camouflaged combatants in the field. If he is surprised, a combatant can raise his arms to indicate that he is surrendering, even though he may still be carrying weapons [...]

In the air, it is generally accepted that a crew wishing to indicate their intention to cease combat, should do so by wagging the wings while opening the cockpit (if this is possible). At sea, fire should cease and the flag should be lowered. These measures can be supplemented by radio signals transmitted on international frequencies for call signs.

762. To further elaborate on Article 41 of Additional Protocol I and the criteria of persons *hors de combat* who surrender:

- a person is not required to have a particular legal status, and nor is there required particular formalities in surrender; but, on the other hand
- any intention to surrender does need to be signaled in a clear and unequivocal way, as illustrated in the following two cases:

CASE STUDY 1: ECTHR, KONONOV V. LATVIA, GRAND CHAMBER JUDGEMENT

The Applicant was convicted by the Latvian courts in 2000–2004 of war crimes from the Second World War, when he was a member of a Soviet ‘Red Partisans’ commando unit.¹⁵²³

¹⁵²³ [Geneva Convention III](#), Article 4; [Additional Protocol I](#), Articles 43-44, 50-51(3); [ICRC Commentary on Additional Protocol I](#), p. 619, para. 1944; Melzer and ICRC, [Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law](#), 2009.

¹⁵²³ ECtHR, [Kononov v. Latvia, Grand Chamber Judgement](#), paras 3, 14, 30, 38, 39.

The ECtHR relied on the Latvian courts' factual findings.¹⁵²⁴ Namely that in 1944 the Applicant and his unit had undertaken a punitive expedition to the village of Mazie Bati, which was then under German administration, on suspicion that certain inhabitants had betrayed another group of Partisans to the Germans.¹⁵²⁵ The unit had entered Mazie Bati and, after finding weapons including rifles and grenades supplied by the Germans, had set fire to buildings; attacked, beaten and shot villagers; killing several of them, including women, one of whom was pregnant.¹⁵²⁶ None of them had been armed or offered resistance.¹⁵²⁷ Since the facts were disputed, the ECtHR proceeded on the factual hypothesis most favorable to the Applicant.¹⁵²⁸ Namely that the villagers were “collaborators”, “civilians who had participated in hostilities”, or even “combatants”.¹⁵²⁹

The Applicant had been convicted under Article 68-3 of the Latvian Criminal Code.¹⁵³⁰ Article 68-3 gave examples of war crimes, but it referred to “relevant legal conventions” for precise definitions.¹⁵³¹ Accordingly the Applicant's conviction had been based on international law, as it stood in 1944.¹⁵³² The ECtHR considered that Article 23(c) of the 1907 Hague Regulations comprised a sufficiently clear legal basis for the killing, injuring and ill-treatment of the villagers to have violated the rule protecting enemy *hors de combat* — in this case not engaging in hostilities and not carrying arms.¹⁵³³ Such persons were not required to have a particular legal status or to have formally surrendered.¹⁵³⁴ As combatants, the villagers would also have been entitled to protection as prisoners of war under the control of the Applicant and his unit.¹⁵³⁵ Accordingly, the ECtHR was satisfied that, at the time they were committed, the Applicant's acts had constituted war crimes, which were defined with sufficient accessibility and foreseeability by the laws and customs of war.¹⁵³⁶

CASE STUDY 2: ECTHR, *KORBELY V. HUNGARY*, GRAND CHAMBER JUDGEMENT (DIFFERENT CRIME-BASE BUT RELEVANT BY ANALOGY TO ICC STATUTE, ARTICLE 8(2)(B)(VI) KILLING OR WOUNDING PERSONS *HORS DE COMBAT*)

The Applicant was convicted by the Hungarian courts for his participation in quelling a riot in Tata during the 1956 revolution.¹⁵³⁷

¹⁵²⁴ ECtHR, *Kononov v. Latvia*, [Grand Chamber Judgement](#), paras 15, 38, 189-191.

¹⁵²⁵ ECtHR, *Kononov v. Latvia*, [Grand Chamber Judgement](#), paras 15-16, 22-24.

¹⁵²⁶ ECtHR, *Kononov v. Latvia*, [Grand Chamber Judgement](#), paras 17-19, 38, 191-192.

¹⁵²⁷ ECtHR, *Kononov v. Latvia*, [Grand Chamber Judgement](#), paras 17-19, 38, 191.

¹⁵²⁸ ECtHR, *Kononov v. Latvia*, [Grand Chamber Judgement](#), paras 21, 188, 193-194.

¹⁵²⁹ ECtHR, *Kononov v. Latvia*, [Grand Chamber Judgement](#), paras 22, 31, 33, 36-37, 146, 165, 192-194, 201-203, 216.

¹⁵³⁰ ECtHR, *Kononov v. Latvia*, [Grand Chamber Judgement](#), paras 32, 35, 38, 47-51, 196.

¹⁵³¹ ECtHR, *Kononov v. Latvia*, [Grand Chamber Judgement](#), paras 47-48, 51, 196.

¹⁵³² ECtHR, *Kononov v. Latvia*, [Grand Chamber Judgement](#), paras 47-51, 52, 85, 91, also 196, 199.

¹⁵³³ ECtHR, *Kononov v. Latvia*, [Grand Chamber Judgement](#), paras 191, 203-204, 216.

¹⁵³⁴ ECtHR, *Kononov v. Latvia*, [Grand Chamber Judgement](#), para. 216.

¹⁵³⁵ ECtHR, *Kononov v. Latvia*, [Grand Chamber Judgement](#), paras 201-202, 216.

¹⁵³⁶ ECtHR, *Kononov v. Latvia*, [Grand Chamber Judgement](#), para. 216. See also *ibidem*, para. 235.

¹⁵³⁷ ECtHR, *Korbely v. Hungary*, [Grand Chamber Judgement](#), paras 2, 9, 11, 20, 27, 35.

According to the Hungarian courts, he had commanded a 15-strong squad in an assignment to regain control of a police building which had been taken over by insurgents.¹⁵³⁸ He had shot, and ordered his men to shoot, at an insurgent and several people died or were injured.¹⁵³⁹

The Applicant had been convicted under Hungarian domestic law's treatment of these homicides as so-called "crimes against humanity" supposedly falling under Common Article 3 of the Geneva Conventions [sic].¹⁵⁴⁰ The conviction was based on international law.¹⁵⁴¹ In determining the issue of whether the offence which the applicant was ultimately convicted of had been defined with sufficient accessibility and foreseeability, the ECtHR examined the question whether, based on the domestic courts' own findings, it could reasonably be said that the victim of the alleged offence was taking no active part in the hostilities and had laid down his arms such that his killing would have been prohibited under accepted international law standards.¹⁵⁴²

The domestic courts' findings showed that the deceased had secretly been carrying a handgun and had not clearly and unequivocally signaled an intention to surrender.¹⁵⁴³ Instead, he had embarked on an animated quarrel with the Applicant before drawing his gun with unknown intentions.¹⁵⁴⁴ This is when he had been shot.¹⁵⁴⁵ Under commonly accepted international law standards applicable at the time, the ECtHR was not satisfied that the deceased could be said to have laid down his arms.¹⁵⁴⁶ It had not been shown that it was foreseeable that the applicant's acts constituted a crime under international law.¹⁵⁴⁷

c. Definition of killing or wounding persons *hors de combat* (Subjective Elements)¹⁵⁴⁸

763. The subjective elements of killing or wounding persons *hors de combat* are : (1) the perpetrator intended to kill, cause death or injure, or was aware that death or injury would occur in the ordinary course of events from his act or omission; and (2) the perpetrator was aware of the factual circumstances that established the victim's *hors de combat* status.¹⁵⁴⁹

764. Again, the crime of killing or wounding persons *hors de combat*¹⁵⁵⁰ shares, with the war crime of wilful killing / murder,¹⁵⁵¹ an element of intending to kill or cause death, or intending to inflict grievous bodily harm with awareness that death would occur in the ordinary course of events. As such, jurisprudence elaborating on wilful killing

¹⁵³⁸ ECtHR, *Korbely v. Hungary*, [Grand Chamber Judgement](#), paras 11-12, 21.

¹⁵³⁹ ECtHR, *Korbely v. Hungary*, [Grand Chamber Judgement](#), paras 15, 21.

¹⁵⁴⁰ ECtHR, *Korbely v. Hungary*, [Grand Chamber Judgement](#), paras 21, 74, 76.

¹⁵⁴¹ ECtHR, *Korbely v. Hungary*, [Grand Chamber Judgement](#), paras 23. See also *ibidem*, para. 73.

¹⁵⁴² ECtHR, *Korbely v. Hungary*, [Grand Chamber Judgement](#), paras 73-77, 86-90.

¹⁵⁴³ ECtHR, *Korbely v. Hungary*, [Grand Chamber Judgement](#), paras 14, 88, 90-91.

¹⁵⁴⁴ ECtHR, *Korbely v. Hungary*, [Grand Chamber Judgement](#), paras 14-15, 91.

¹⁵⁴⁵ ECtHR, *Korbely v. Hungary*, [Grand Chamber Judgement](#), para. 91.

¹⁵⁴⁶ ECtHR, *Korbely v. Hungary*, [Grand Chamber Judgement](#), para. 91.

¹⁵⁴⁷ ECtHR, *Korbely v. Hungary*, [Grand Chamber Judgement](#), para. 95.

¹⁵⁴⁸ This section details the subjective elements for this war crime as detailed under international law. However, the general part of the CCU identifies subjective elements that apply to crimes. See Articles 23, 24 and 25 of the CCU. It will be necessary to consider the relevance of the subjective elements in the general part of the CCU when considering the elements of this crime as applied under Article 438 CCU.

¹⁵⁴⁹ [ICC Elements of Crimes](#), Article 8(2)(b)(vi); [ICC Statute](#), Article 30.

¹⁵⁵⁰ Per [ICC Statute](#), Article 8(2)(b)(vi).

¹⁵⁵¹ Cf. [ICC Statute](#), Articles 8(2)(a)(i), 8(2)(c)(i).

may assist in interpreting this common element in relation to killing or wounding persons *hors de combat*.

765. **The perpetrator intended to kill, cause death or injure, or was aware that death or injury would occur in the ordinary course of events from his act or omission.**

766. If the injury or death is accidental (not the foreseeable consequence of the actions or omissions of the perpetrator) then the conduct of the perpetrator would not constitute killing or wounding a person *hors de combat*. On the other hand, premeditation would not be required for the war crime of killing or wounding a person *hors de combat* to be established.¹⁵⁵²

767. **The perpetrator was aware of the factual circumstances that established the *hors de combat* status.**¹⁵⁵³ Some commentary suggests that not only are attacks forbidden against persons who are known to be *hors de combat*, but also against those who, in the circumstances should be recognised to be *hors de combat*, i.e. what a reasonable person should have recognised.¹⁵⁵⁴

768. This is consistent with the wording of Article 41(1) of [Additional Protocol I](#), and may be true in terms of IHL violations. To enter a war crime conviction, however, the perpetrator's intent and knowledge, including awareness of the factual circumstances establishing *hors de combat* status, must be proved to the criminal standard.¹⁵⁵⁵ Mistakes of fact exclude criminal responsibility if they negate the mental element required by the crime.¹⁵⁵⁶

d. Contextual Elements

769. In addition, as with all war crimes, it is necessary to demonstrate the following contextual elements:

- i. There was an international armed conflict;¹⁵⁵⁷
- ii. The conduct took place in the context of and was associated with an international armed conflict;¹⁵⁵⁸ and
- iii. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.¹⁵⁵⁹

¹⁵⁵² Under [ICTY Statute](#), Articles 2(a) and 3 wilful killing/murder but relevant by analogy to [ICC Statute](#), Article 8(2)(b)(vi) killing or wounding persons *hors de combat*: ICTY, [Celebici Trial Judgement](#), para. 433 (“The Trial Chamber is further instructed by the plain, ordinary meaning of the word ‘wilful’, as found in the Concise Oxford English Dictionary, which is ‘intentional, deliberate’. There is, on this basis, no divergence of substance between the use of the term ‘wilful killing’ and the French version, ‘l’homicide intentionnel’. (...) The essence to be derived from the usage of this terminology in both languages is simply that death should not be an accidental consequence of the acts of the accused.”); ICTY, [Brdanin Trial Judgement](#), para. 386 (“The Trial Chamber finds that the *mens rea* for murder and wilful killing does not require premeditation”).

¹⁵⁵³ [ICC Statute](#), Article 30(3); [ICC Elements of Crimes](#), Article 8(2)(b)(vi), Element 3.

¹⁵⁵⁴ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 383, para. 273.

¹⁵⁵⁵ [ICC Statute](#), Article 30; [Additional Protocol I](#), Article 85(3)(e).

¹⁵⁵⁶ [ICC Statute](#), Article 32.

¹⁵⁵⁷ See above, paras 188-189.

¹⁵⁵⁸ See above, paras 190-198. See also [ICC Elements of Crimes](#), Article 8(2)(b)(vi).

¹⁵⁵⁹ See above, para. 199. See also [ICC Elements of Crimes](#), Article 8(2)(b)(vi).

ii. Making improper use of distinctive signs (ICC Statute, Article 8(2)(b)(vii))

APPLICABILITY: THE WAR CRIME OF MAKING IMPROPER USE OF DISTINCTIVE SIGNS CAN BE CONSIDERED TO BE CRIMINALISED UNDER ARTICLE 438(1) OF THE CCU, AS IT IS SUBSUMED UNDER THE NOTIONS OF “USE OF METHODS OF THE WARFARE PROHIBITED BY INTERNATIONAL INSTRUMENTS” AND “OTHER VIOLATIONS OF RULES OF THE WARFARE RECOGNIZED BY INTERNATIONAL INSTRUMENTS CONSENTED TO BY BINDING BY THE VERKHOVNA RADA (PARLIAMENT) OF UKRAINE” (PARAS [770-774](#)).

Elements of the crime: To convict a perpetrator making improper use of distinctive signs as a war crime the following elements must be established:

(1) Objective elements

- The perpetrator used a distinctive sign, which are classifiable into four types or categories of signs (paras [776-777](#)).
- Such use was improper (paras [778-784](#)).
- The conduct resulted in death or serious personal injury (para. [785](#)).

(2) Subjective elements

- The perpetrator meant to engage in the conduct of using the distinctive sign, in the manner described in the elements above depending on the type or category of sign, and/or meant to cause the consequence associated with such use, as described in the elements above depending on the type or category of sign (para. [787](#)).
- The perpetrator knew or, depending on the type or category of sign, should have known of the prohibited nature of the improper use of the sign (para. [788](#)).
- The perpetrator knew that the conduct could result in death or serious personal injury (paras [789-790](#)).

(3) Contextual elements

- There is an international armed conflict (para. [791](#)).
- The conduct of the perpetrator took place in the context of and was associated with the conflict (para. [791](#)).
- The perpetrator was aware of the factual circumstances that established the existence of an armed conflict (para. [791](#)).

a. Applicability under Article 438

770. Article 438 of the CCU does not explicitly mention the war crime of making improper use of distinctive signs. However this offence may be subsumed within “use of methods of warfare prohibited by international instruments” to which Article 438(1) refers. The Verkhovna Rada of Ukraine has ratified the instruments that prohibit making improper use of distinctive signs. Given this, it may also be subsumed within “any other violations of rules of warfare recognized by international instruments

consented to be binding by the Verkhovna Rada of Ukraine” to which Article 438(1) refers. This violation has been recognised as a war crime. It may be concluded that the violation may be considered criminalised under Article 438.

771. **Making improper use of distinctive signs is a method of warfare and a violation of rules of warfare recognised by international treaties ratified by Ukraine.** Improper use of distinctive emblems and signs is a prohibited “method of warfare”.¹⁵⁶⁰ This serious violation of IHL applicable in international armed conflict is sourced from Article 23(f) of the [Hague Regulations](#).¹⁵⁶¹ The violation is also sourced from Articles 37(1)(a), (d), 38 and 39(2) of [Additional Protocol I](#).¹⁵⁶² Ukraine is a State Party to the 1907 Hague Convention (IV) with its Annexed Regulations and to Additional Protocol I.¹⁵⁶³ Given this, violation of this prohibition may also be subsumed as “other violations of rules of warfare recognized by international instruments consented to be binding by the Verkhovna Rada of Ukraine” prong of Article 438(1).
772. **Recognition as a war crime.** Further, this violation is recognised as a war crime, with the status of customary international law. Part of the violation is recognised as a war crime and grave breach of Additional Protocol I under Article 85, as concerns distinctive emblems of the Red Cross/Red Crescent movement or other protective signs recognised by the Geneva Conventions or Additional Protocol I.¹⁵⁶⁴ The ICRC’s Customary Law Study considers the balance of the violation’s criminalisation as customary.¹⁵⁶⁵ The International Military Tribunal (IMT) at Nuremberg considered that

¹⁵⁶⁰ ICRC, *Casebook: How Does Law Protect in War?*, A to Z Glossary “Methods of Warfare”; Kalshoven and Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, 4th Edition, ICRC and Cambridge University Press, 2011, pp 33, 37-38, 92, 96.

¹⁵⁶¹ [Hague Regulations](#), Article 23(f) (“In addition to the prohibitions provided by special Conventions, it is especially forbidden [...] To make improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention.”), 24 (“Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible.”).

¹⁵⁶² [Additional Protocol I](#), Articles 37(1)(a), (d) (“1. It is prohibited to kill, injure or capture an adversary by resort to perfidy [...] The following acts are examples of perfidy: (a) the feigning of an intent to negotiate under a flag of truce or of a surrender [...] (d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.”), 37(2) (“2. Ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law [...]”), 38 (“1. It is prohibited to make improper use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other emblems, signs or signals provided for by the Conventions or by this Protocol. It is also prohibited to misuse deliberately in an armed conflict other internationally recognized protective emblems, signs or signals, including the flag of truce, and the protective emblem of cultural property. 2. It is prohibited to make use of the distinctive emblem of the United Nations, except as authorized by that Organization.”), 39(2) (“It is prohibited to make use of the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks or in order to shield, favour, protect or impede military operations.”).

¹⁵⁶³ Ukraine acceded to the 1907 Hague Convention (IV) on 29 May 2015, and ratified Additional Protocol I on 25 January 1990. ICRC, IHL Database, Treaties, States Parties and Commentaries, 1907 [Hague Convention \(IV\)](#); [Additional Protocol I](#). Note that the violation also has the status of customary international law. ICRC, IHL Database, Customary IHL, [Rule 58. Improper Use of the White Flag of Truce](#), [Rule 59. Improper Use of the Distinctive Emblems of the Geneva Conventions](#), [Rule 60. Improper Use of the United Nations Emblem or Uniform](#), [Rule 61. Improper Use of Other Internationally Recognized Emblems](#), [Rule 62. Improper Use of the Flags or Military Emblems, Insignia or Uniforms of the Adversary](#).

¹⁵⁶⁴ [Additional Protocol I](#), Article 85(1), (3)(f), (5).

¹⁵⁶⁵ ICRC, IHL Database, Customary IHL, [Rule 156. Definition of War Crimes](#) (“War crimes include the following serious violations of international humanitarian law: [...] making improper use of distinctive emblems indicating protected status, resulting in death or serious personal injury; making improper use of the flag, the military insignia or

violations of the 1907 Hague Convention (IV)'s Annexed Regulations were war crimes because these treaty rules had crystallised into customary law.¹⁵⁶⁶

773. Finally, making improper use of distinctive signs is expressly codified as a war crime in Article 8(2)(b)(vii) of the [ICC Statute](#).¹⁵⁶⁷
774. These factors support a finding that making improper use of distinctive signs is criminalised under Article 438 of the CCU.

b. Definition of making improper use of distinctive signs (Objective Elements)

775. The objective elements of making improper use of distinctive signs are : (1) The perpetrator used a distinctive sign, which are classifiable into four types or categories of signs; (2) Such use was improper, with details depending on the type or category of sign and the context; and (3) The conduct resulted in death or serious personal injury.¹⁵⁶⁸
776. **The perpetrator used a distinctive sign, which are classifiable into four types or categories of signs.** Namely the perpetrator used a flag of truce;¹⁵⁶⁹ a flag, insignia or uniform of the hostile party;¹⁵⁷⁰ a flag, insignia or uniform of the United Nations (UN);¹⁵⁷¹ or the distinctive emblems of the Geneva Conventions.¹⁵⁷²

The flag of truce is white. It indicates intention to communicate or negotiate with the adversary, but it is also used to indicate the suspension of hostilities usually for a fixed time, or surrender.¹⁵⁷³

Flags, insignia or uniforms of the UN include the blue UN flag, UN badges and UN helmets. They may be considered to also include other distinguishing marks identifying personnel of the military, police or civilian components of the UN or its specialized agencies, and vehicles, vessels, aircraft, buildings or other objects of the UN or its specialized agencies.¹⁵⁷⁴

uniform of the enemy resulting in death or serious personal injury; killing or wounding an adversary by resort to perfidy"). See also Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 392, para. 312 ("Article 85 para. 3 (f) Add. Prot. I makes it a grave breach to cause death or serious injury by perfidiously using, in violation of article 37 Add. Prot. I, the protective signs recognized by the Geneva Conventions or the Additional Protocol I, which also includes, inter alia, the distinctive emblems of the United Nations but excludes adversary signs."), p. 398, para. 340 ("In contrast to the flag of truce and the distinctive emblems of the Geneva Conventions, which identify for instance non-combatants or persons hors de combat, and the UN signs, which indicate a special status, the flag, military insignia and uniform of the adversary do not indicate any protected status under humanitarian law."), also pp 400-401, para. 345 including fn. 531, para. 350 including fn. 543.

¹⁵⁶⁶ IMT Nuremberg, *Göring et al.*, [Judgement delivered on 30 September and 1 October 1946](#); in 22 *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, pp 445, 467.

¹⁵⁶⁷ [ICC Statute](#), Article 8(2)(b)(vii).

¹⁵⁶⁸ [ICC Elements of Crimes](#), Article 8(2)(b)(vii)-1, -2, -3, and -4.

¹⁵⁶⁹ [ICC Elements of Crimes](#), Article 8(2)(b)(vii)-1, Element 1.

¹⁵⁷⁰ [ICC Elements of Crimes](#), Article 8(2)(b)(vii)-2, Element 1.

¹⁵⁷¹ [ICC Elements of Crimes](#), Article 8(2)(b)(vii)-3, Element 1.

¹⁵⁷² [ICC Elements of Crimes](#), Article 8(2)(b)(vii)-4, Element 1.

¹⁵⁷³ See [Hague Regulations](#), Article 32; Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, pp 392, 397, paras 309, 335.

¹⁵⁷⁴ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, pp 401-402, para. 354.

The distinctive emblems of the Geneva Conventions refers principally to the red cross, the red crescent, and the red crystal or third protocol emblem.¹⁵⁷⁵ They identify medical and spiritual personnel, medical units and transport, as well as personnel and property of the components of the International Movement of the Red Cross and Red Crescent.¹⁵⁷⁶

777. Commentary notes that improper use of the foregoing signs, or expressing their effect, through modern means of communication, including *e.g.* radio, could be covered *mutatis mutandis*.¹⁵⁷⁷
778. **The use was improper, with details depending on the type or category of sign and the context.**
779. *Improper use of flag of truce.* As concerns the flag of truce, the perpetrator made such use in order to feign an intention to negotiate when there was no such intention on the part of the perpetrator.¹⁵⁷⁸ Commentary suggests the phrase “in a manner prohibited under the international law of armed conflict” equates to improperly gaining a military advantage.¹⁵⁷⁹
780. *Improper use of flags, insignia or uniforms of the hostile party.* As concerns flags, insignia or uniforms of the hostile party, the perpetrator made such use in a manner prohibited under the international law of armed conflict while engaged in an attack.¹⁵⁸⁰ Commentary suggests the phrase “in a manner prohibited under the international law of armed conflict” equates to improperly gaining a military advantage.¹⁵⁸¹ Notably, the IHL prohibition on the use of these items, depends in part on whether they are used in air, naval, or land warfare.
781. In air warfare false signs are always prohibited and have always been prohibited.¹⁵⁸² In naval warfare false signs are permitted before attacking.¹⁵⁸³ In land warfare: (1) It

¹⁵⁷⁵ See images in ICRC’s pdf. versions of Additional Protocol I, [Annex I](#), Article 4 Fig. 2; and [Additional Protocol III](#), Articles 2-3, Annex. The red lion and sun has not been used by any states since 1980. For fuller explanation and history about these and other emblems, see ICRC, IHL Database, Treaties, States Parties and Commentaries, [Additional Protocol III](#).

¹⁵⁷⁶ [Geneva Convention I](#), Articles 24-27, 38-44; [Geneva Convention II](#), Articles 22, 24-25, 27, 36-39, 41-44; [Geneva Convention IV](#), Articles 18-22; [Additional Protocol I](#), Articles 8, 18, 22-23.

¹⁵⁷⁷ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 397, para. 336; Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, p. 199; referenced in CILRAP CMN Case Matrix Network, [Knowledge Hub: Means of Proof Digest](#), Article 8(2)(b)(vii)-1-3.

¹⁵⁷⁸ [ICC Elements of Crimes](#), Article 8(2)(b)(vii)-1, Element 2; also [ICRC Commentary on Additional Protocol I](#), p. 458, para. 1552 (“To raise the white flag without a reason or for the sole purpose of deflecting attention away from a military operation in progress, or for other purposes conflicting with the law of armed conflict, such as threatening not to give quarter, constitutes a breach and may give rise to sanctions.”).

¹⁵⁷⁹ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, pp 394-395, 397, paras 322, 326, 335.

¹⁵⁸⁰ [ICC Elements of Crimes](#), Article 8(2)(b)(vii)-2, Element 2.

¹⁵⁸¹ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, pp 394-395, 398, paras 321-322, 326, 341.

¹⁵⁸² Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 400, para. 346, including fn. 539.

¹⁵⁸³ [Additional Protocol I](#) Article 37(3) (“Nothing in this Article or in Article 37, paragraph 1 (d), shall affect the existing

is clear that false signs cannot be used while engaged in an attack; (2) It is not clear exactly the extent to which false signs can be used other than while engaged in an attack, including preparation and the events leading thereto.¹⁵⁸⁴

782. In addition, for Ukraine, under Article 39(2) of [Additional Protocol I](#) “[i]t is prohibited to make use of the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks *or in order to shield, favour, protect or impede military operations*”.¹⁵⁸⁵

EXAMPLE OF THE IMPROPER USE OF FLAGS, INSIGNIA OR UNIFORMS OF THE HOSTILE PARTY: DUTCH CASE NO. 3271, NOTE I/66 BY DR. LITAWSKI, LEGAL OFFICER¹⁵⁸⁶

The Accused German officer had ordered the Accused soldier and four other soldiers to carry out an operation that entailed: (1) disguising themselves as Dutch Royal Mounted Police, (2) going to a Dutch railway bridge on the border on the day Germany invaded the Netherlands; and (3) removing an explosive charge that had been placed there to forestall the German crossing.

The UN War Crimes Commission’s Committee I considered such deception a ruse of war or stratagem recognised under Article 24 of the 1907 Hague Regulations; but which was improper when used during the time of actual attack or defense in violation of Article 23(f) of the Regulations. The meaning of attack or defense was interpreted expansively to include wearing the Dutch uniform when the invasion was underway and there was ongoing fighting, in general.

783. *Improper use of flags, insignia or uniforms of the UN.* As concerns flags, insignia or uniforms of the UN, the perpetrator made such use in a manner prohibited under the international law of armed conflict.¹⁵⁸⁷ Commentary suggests the phrase “in a manner prohibited under the international law of armed conflict” equates to improperly gaining a military advantage.¹⁵⁸⁸

generally recognized rules of international law applicable to [...] the use of flags in the conduct of armed conflict at sea.”); [San Remo Manual on International Law Applicable to Armed Conflicts at Sea](#), Article 110 (“Ruses of war are permitted. Warships and auxiliary vessels, however, are prohibited from launching an attack whilst flying a false flag.”); Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 400, para. 345 including fns 532-534; quoting Politakis, ‘Stratagems and the prohibition of perfidy with a special reference to the laws of war at sea’ 45 *Austrian Journal of Public and International Law* 253, pp 272-301, 307.

¹⁵⁸⁴ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, pp 398, 400-401 paras 341, 347.

¹⁵⁸⁵ [Additional Protocol I](#), Article 39(2) (emphasis added). See also background in [ICRC Commentary on Additional Protocol I](#), pp 466-467, paras 1573-1575; Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck Hart Nomos, 2016, p. 398, para. 340.

¹⁵⁸⁶ Dutch [Case No. 3271, Note I/66](#) by Dr. Litawski, Legal Officer; in United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, 1948, pp 490-491. For an illustration of legal and factual difficulties in the treatment of permissible ruse versus prohibited improper use, see also General Military Government Court of the United States Zone of Germany, *Skorzeny et al. Trial*, 18 August–9 September 1947; in United Nations War Crimes Commission, Vol. IX ed. *Law Reports of Trials of War Criminals* 90, 1949, pp 90-93; cf. against *Skorzeny et al. Review*, 14 April 1948.

¹⁵⁸⁷ [ICC Elements of Crimes](#), Article 8(2)(b)(vii)-3, Element 2; also [Additional Protocol I](#), Article 38(2) (“It is prohibited to make use of the distinctive emblem of the United Nations, *except as authorized by that Organization*” (emphasis added).

¹⁵⁸⁸ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck

784. *Improper use of Distinctive emblems of the Geneva Conventions.* As concerns the distinctive emblems of the Geneva Conventions, the perpetrator made such use for combatant purposes, meaning purposes directly related to hostilities and not including medical, religious or similar activities, in a manner prohibited under the international law of armed conflict.¹⁵⁸⁹ Commentary suggests the phrase “in a manner prohibited under the international law of armed conflict” equates to improperly gaining a military advantage.¹⁵⁹⁰

EXAMPLE OF A CONVICTION FOR THE IMPROPER USE OF DISTINCTIVE EMBLEMS OF THE GENEVA CONVENTIONS: UNITED STATES INTERMEDIATE MILITARY GOVERNMENT COURT AT DACHAU, GERMANY, TRIAL OF HEINZ HAGENDORF¹⁵⁹¹

The Accused was charged with having “wrongfully used the Red Cross emblem in a combat zone by firing a weapon at U.S. soldiers from an enemy ambulance displaying such emblem”.

The Court found that the German ambulance drove at high speed through the village of Henyelez. The Accused, a passenger, fired multiple shots at several U.S. soldiers. The Court did not accept the Accused’s account that it was his ambulance that had been machine-gunned by the U.S. soldiers, and that he had not fired.

The Accused was convicted on the basis of Article 23(f) of the 1907 Hague Regulations, and the 1929 Geneva Convention. The Commentator on the case stated that “misuse of the Red Cross emblem is a specific violation of the terms of The Hague and Geneva Conventions. It is hard to conceive of a more flagrant misuse than the firing of a weapon from an ambulance by personnel who were themselves protected by such emblems and by the Conventions, in the absence of an attack upon them.”

785. **The conduct resulted in death or serious personal injury.** The [ICC Statute](#) and [Elements of Crimes](#)’ wording “*resulted in*” might suggest a less direct causal link than article 85 para. 3 of Additional Protocol 1 that requires that death or serious injury is “caused” by the improper use of a distinctive sign.¹⁵⁹² In this regard, commentary notes that it does not need to be the perpetrator improperly using the sign who themselves kills or injures the victim(s); it can be someone else entirely who kills or injures.¹⁵⁹³ The death or serious personal injury may be that of any person as a con-

Hart Nomos, 2016, pp 394-395, paras 322, 326.

¹⁵⁸⁹ [ICC Elements of Crimes](#), Article 8(2)(b)(vii)-4, Element 2 including fn. 42.

¹⁵⁹⁰ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, pp 394-395, 404 paras 321-322, 326, 361.

¹⁵⁹¹ United States Intermediate Military Government Court at Dachau, Germany, [Trial of Heinz Hagendorf](#); in United Nations War Crimes Commission, Vol. XIII ed. *Law Reports of Trials of War Criminals* 146, pp 146-148.

¹⁵⁹² Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 395, para. 328.

¹⁵⁹³ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 395, para. 328 (“Under article 8 para. 2 (b) (vii) Rome Statute, and in contrast to the war crime of perfidious killing or wounding, it need not be the person improperly using the sign, nor anyone of his or her party to the conflict, that kills or wounds an adversary.”); [ICRC Commentary on Additional Protocol I](#), p. 448, para. 1532 (“[Paragraph 1 of Article 38 of Additional Protocol I] is concerned only with the prohibition itself, but unlike the first sentence of Article 37 '(Prohibition of perfidy)', it has an absolute character”).

sequence of the improper use of the sign.¹⁵⁹⁴ As to the reference to “serious personal injury” commentary further notes that the term injury is commonly used to cover physical wounds or damage rather than damage to mental health.¹⁵⁹⁵ The [ICC Statute](#) and [Elements of Crimes](#)’ wording “serious personal injury” implies a higher level of severity than ‘injury’.

c. Definition of making improper use of distinctive signs (Subjective Elements)¹⁵⁹⁶

786. The subjective elements of making improper use of distinctive signs are : (1) The perpetrator meant to engage in the conduct of using the distinctive sign, in the manner described in the elements above depending on the type or category of sign, and/or meant to cause the consequence associated with such use, as described in the elements above depending on the type or category of sign; (2) The perpetrator knew or, depending on the type or category of sign, should have known of the prohibited nature of the improper use of the sign; and (3) The perpetrator knew that the conduct could result in death or serious personal injury.¹⁵⁹⁷

787. **The perpetrator meant to engage in the conduct of using the distinctive sign, in the manner described in the elements above depending on the type or category of sign, and/or meant to cause the consequence associated with such use, as described in the elements above depending on the type or category of sign.** This element of intentionality (“meant”) relates to the conduct and/or its consequences. It is separate from the two other *mens rea* prongs, namely: (1) “knew or should have known” relating to the prohibited nature of the improper use of the sign; and (2) “knowing that the conduct could result” in death or serious personal injury further below.

788. **The perpetrator knew or should have known of the prohibited nature of the improper use of the sign.** This subjective element “knew or should have known” applies to all “species” of the crime, except for UN signs.¹⁵⁹⁸ “Knew or should have known” is consistent with Ukrainian criminal law.¹⁵⁹⁹ As concerns flags, insignia or uniforms of

¹⁵⁹⁴ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 393 para. 319 (“[Unlike the crime of killing or wounding treacherously under Article 8(2)(b)(xi) of the ICC Statute, where] the person killed or wounded must be the person whose confidence was betrayed [...] or at least one of his or her party to the conflict, [...] [the crime of making improper use of distinctive signs resulting in death or serious personal injury under] article 8 para. 2 (b) (vii) applies to the killing or wounding of any person as an (even unintended, see below) consequence of the improper use.”).

¹⁵⁹⁵ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 395, para. 327 (“Article 8 327 para. 2 (b) (vii) Rome Statute requires that the improper use of the distinctive sign is ‘resulting in death or serious personal injury’. This wording partly derives from article 85 para. 3 Add. Prot. I, which requires the result of ‘death or serious injury to body or health’. Is the serious injury to health sufficient under the Rome Statute? While the Rome Statute does not clearly exclude this interpretation, the term ‘injury’ is commonly used to cover physical wounds or damage rather than damage to the mental health”).

¹⁵⁹⁶ This section details the subjective elements for this war crime as detailed under international law. However, the general part of the CCU identifies subjective elements that apply to crimes. See Articles 23, 24 and 25 of the CCU. It will be necessary to consider the relevance of the subjective elements in the general part of the CCU when considering the elements of this crime as applied under Article 438 CCU.

¹⁵⁹⁷ [ICC Elements of Crimes](#), Article 8(2)(b)(vii)-1, -2, -3, and -4; [ICC Statute](#), Article 30.

¹⁵⁹⁸ [ICC Elements of Crimes](#), Article 8(2)(b)(vii)-1, -2, and -4, Element 3.

¹⁵⁹⁹ CCU, Articles 23-25.

the UN it is necessary that the perpetrator actually knew of the prohibited nature of the use, because of the variable and regulatory nature of the relevant UN prohibitions.¹⁶⁰⁰

789. **The perpetrator knew that the conduct could result in death or serious personal injury.** This subjective element of “knowing that the conduct *could* result in death or serious personal injury” is a lower mental element than knowing death or serious personal injury *will* occur in the ordinary course of events under Article 30(3) of the [ICC Statute](#).¹⁶⁰¹

790. If the serious personal injury or death is not the foreseeable consequence of the conduct of the perpetrator then the conduct of the perpetrator would not constitute the war crime of making improper use of distinctive signs.¹⁶⁰²

d. Contextual Elements

791. In addition, as with all war crimes, it is necessary to demonstrate the following contextual elements:

- i. There was an international armed conflict;¹⁶⁰³
- ii. The conduct took place in the context of and was associated with an international armed conflict;¹⁶⁰⁴ and
- iii. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.¹⁶⁰⁵

¹⁶⁰⁰ [ICC Elements of Crimes](#), Article 8(2)(b)(vii)-3, Element 3.

¹⁶⁰¹ [ICC Statute](#), Article 30(3) (“For the purposes of this article, ‘knowledge’ means awareness that [...] a consequence will occur in the ordinary course of events. ‘Know’ and ‘knowingly’ shall be construed accordingly.”). See Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, pp 396-397, para. 332.

¹⁶⁰² Under [ICTY Statute](#), Articles 2(a) and 3 wilful killing/murder: ICTY, *Celebici Trial Judgement*, para. 433 (“death should not be an accidental consequence of the acts of the accused.”).

¹⁶⁰³ See above, paras [188-189](#).

¹⁶⁰⁴ See above, paras [190-198](#). See also [ICC Elements of Crimes](#), Article 8(2)(b)(vii).

¹⁶⁰⁵ See above, para. [199](#). See also [ICC Elements of Crimes](#), Article 8(2)(b)(vii).

- iii. Killing or wounding treacherously individuals belonging to the hostile nation or army (ICC Statute, Article 8(2)(b)(xi))

APPLICABILITY: THE WAR CRIME OF KILLING OR WOUNDING TREACHEROUSLY CAN BE CONSIDERED TO BE CRIMINALISED UNDER ARTICLE 438(1) OF THE CCU, AS IT IS SUBSUMED UNDER THE NOTIONS OF “USE OF METHODS OF THE WARFARE PROHIBITED BY INTERNATIONAL INSTRUMENTS” AND “OTHER VIOLATIONS OF RULES OF THE WARFARE RECOGNIZED BY INTERNATIONAL INSTRUMENTS CONSENTED TO BY BINDING BY THE VERKHOVNA RADA (PARLIAMENT) OF UKRAINE” (PARAS. 792-796).

Elements of the crime: To convict a perpetrator for killing or wounding treacherously as a war crime the following elements must be established:

(1) Objective elements

- The perpetrator invited the confidence or belief of one or more persons that they were entitled to, or were obliged to accord, protection under rules of international law applicable in armed conflict (paras. 798-802).
- The perpetrator killed, caused the death of or injured such person or persons (paras. 803-804).
- The perpetrator made use of that confidence or belief in killing or injuring such person or persons (para. 797).
- Such person or persons belonged to an adverse party (para. 806).

(2) Subjective elements

- The perpetrator intended to betray the confidence or belief as to protection under rules of international law applicable in armed conflict (para. 808).
- The perpetrator intended to kill, cause death or injure, or was aware that death or injury would occur in the ordinary course of events from his conduct (paras 809-811).

(3) Contextual elements

- There is an international armed conflict (para. 812).
- The conduct of the perpetrator took place in the context of and was associated with the conflict (para. 812).
- The perpetrator was aware of the factual circumstances that established the existence of an armed conflict (para. 812).

a. Applicability under Article 438

792. Article 438 of the CCU does not explicitly mention the war crime of killing or wounding treacherously. However this offence may be subsumed within “use of methods of warfare prohibited by international instruments” to which Article 438(1) refers. Ukraine has ratified the instruments that prohibit killing or wounding treacherously. Given this, it may also be subsumed within “any other violations of rules of warfare recognized by international instruments consented to be binding by the Verkhovna

Rada of Ukraine” to which Article 438(1) refers. This violation has been recognised as a war crime. It may be concluded that the violation may be considered criminalised under Article 438.

793. **Killing or wounding treacherously is a method of warfare prohibited by international treaties and a violation of rules of warfare recognised by international treaties ratified by Ukraine.** For the purpose of this crime, the terms “treacherous” and “perfidious” may be treated as synonymous.¹⁶⁰⁶ Perfidy is a prohibited “method of warfare”.¹⁶⁰⁷ This serious violation of IHL is set out in Article 23(b) of the [Hague Regulations](#).¹⁶⁰⁸ The violation is also sourced from Article 37 of [Additional Protocol I](#).¹⁶⁰⁹ Ukraine is a State Party to the 1907 Hague Convention (IV) with its Annexed Regulations and to Additional Protocol I.¹⁶¹⁰ Given this, this prohibition may also be considered an “other violation of rules of warfare recognized by international instruments consented to be binding by the Verkhovna Rada of Ukraine” prong of Article 438(1).
794. **Recognition as a war crime.** Killing or wounding by resort to perfidy is recognised as a war crime, with the status of customary international law. The ICRC’s Customary Law Study considers the violation’s criminalisation as customary.¹⁶¹¹ Perfidious use of distinctive emblems or protective signs, committed wilfully and causing death or serious injury, is also a grave breach of Additional Protocol I, and is therefore recognised as a war crime.¹⁶¹² The IMT at Nuremberg considered that violations of the 1907 Hague Convention (IV)’s Annexed Regulations generally were war crimes because these treaty rules had crystallised into customary law.¹⁶¹³
795. Finally, killing or wounding treacherously is expressly codified as a war crime in Article 8(2)(b)(xi) of the [ICC Statute](#).¹⁶¹⁴
796. The foregoing analysis supports a conclusion that killing or wounding treacherously is considered criminalised under Article 438 of the CCU.

¹⁶⁰⁶ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, pp 426-428, paras 450, 452 *et seq.* (e.g. “[...] Several authors consider that the prohibition of [treachery in] article 23 (b) Hague Regulations has been replaced or partially modified by [the prohibition of perfidy in] articles 37–39 Add. Prot. I. Others suggest that article 23 (b) Hague Regulations today must be interpreted as referring to the concept of perfidy.”), 455 (“the terms perfidy and treachery can be understood as synonyms.”).

¹⁶⁰⁷ ICRC, *Casebook: How Does Law Protect in War?*, A to Z Glossary, ‘Methods of Warfare’, ([link](#)); Kalshoven and Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, 4th Edition, ICRC and Cambridge University Press, 2011, pp 33, 37-38, 92, 94-95.

¹⁶⁰⁸ [Hague Regulations](#), Articles 23(b), 24.

¹⁶⁰⁹ [Additional Protocol I](#), Article 37.

¹⁶¹⁰ Ukraine acceded to the 1907 Hague Convention (IV) on 29 May 2015, and ratified Additional Protocol I on 25 January 1990. ICRC IHL Treaties Database, [1907 Hague Convention \(IV\)](#); [Additional Protocol I](#). Note that the violation also has the status of customary international law. ICRC, IHL Database, Customary IHL, [Rule 65. Killing, injuring or capturing an adversary by resort to perfidy is prohibited](#).

¹⁶¹¹ ICRC, IHL Database, Customary IHL, [Rule 156. Definition of War Crimes](#).

¹⁶¹² [Additional Protocol I](#), Article 85(1), (3)(f), (5).

¹⁶¹³ IMT Nuremberg, *Göring et al.*, [Judgement delivered on 30 September and 1 October 1946 in The Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, Part 22](#) (22 August 1946 to 1 October 1946), pp 445, 467.

¹⁶¹⁴ [ICC Statute](#), Article 8(2)(b)(xi) (international armed conflict). See also Article 8(2)(e)(ix) (non-international armed conflict).

b. Definition of killing or wounding treacherously (Objective Elements)

797. The objective elements of killing or wounding treacherously are: (1) The perpetrator invited the confidence or belief of one or more persons that they were entitled to, or were obliged to accord, protection under rules of international law applicable in armed conflict; (2) The perpetrator killed, caused the death of or injured such person or persons; (3) The perpetrator made use of that confidence or belief in killing or injuring such person or persons; (4) Such person or persons belonged to an adverse party.¹⁶¹⁵
798. **The perpetrator invited the confidence or belief of one or more persons that they were entitled to, or were obliged to accord, protection under rules of international law applicable in armed conflict.** The wording of this first element is directly sourced from Article 37(1) of Additional Protocol I.¹⁶¹⁶ Article 37(1) lists non-exhaustive acts that are examples of perfidy.

ADDITIONAL PROTOCOL I, ARTICLE 37: PROHIBITION OF PERFIDY

1. [...] Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:

- (a) the feigning of an intent to negotiate under a flag of truce or of a surrender;
- (b) the feigning of an incapacitation by wounds or sickness;
- (c) the feigning of civilian, non-combatant status; and
- (d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.

799. In armed conflict situations where combatants cannot distinguish themselves from the civilian population as required, they do not commit a perfidious act if they carry arms openly during military engagement and the time they are visible to the adversary while engaged in a military deployment preceding the launching of an attack.¹⁶¹⁷

¹⁶¹⁵ [ICC Elements of Crimes](#), Articles 8(2)(b)(xi), 8(2)(e)(ix). See also [ICRC Commentary on Additional Protocol I](#), pp 435-436, para. 1500.

¹⁶¹⁶ See also [San Remo Manual on International Law Applicable to Armed Conflicts at Sea](#), , para. 111 ("Perfidy is prohibited. Acts inviting the confidence of an adversary to lead it to believe that it is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, constitute perfidy. Perfidious acts include the launching of an attack while feigning: (a) exempt, civilian, neutral or protected United Nations status; (b) surrender or distress by, e.g., sending a distress signal or by the crew taking to life rafts.").

¹⁶¹⁷ [Additional Protocol I](#), Article 44(3) ("In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly: (a) during each military engagement, and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate. Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph

800. Suicide bombings may amount to the crime of killing or wounding treacherously.

CASE STUDY, SUICIDE BOMBINGS MAY AMOUNT TO PERFIDY: ICC, SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN, DECISION ON AUTHORIZATION OF INVESTIGATION¹⁶¹⁸

The Prosecution in its request for authorisation of an investigation¹⁶¹⁹ submitted the Taliban and other armed groups had committed war crimes including killing or wounding treacherously,¹⁶²⁰ on the basis of material facts including “attacks against personnel of the United Nations, NGOs and humanitarian institutions; suicide attacks resulting in the killing or in the wounding of members of Afghan forces and of soldiers of the International Security Assistance Force (‘ISAF’) [...]; and the use of child soldiers, in some cases in connection with suicide bombings”.¹⁶²¹

The Pre-Trial Chamber was satisfied that there was reasonable basis to believe that the incidents underlying the request occurred and that they may constitute crimes within the jurisdiction of the ICC.¹⁶²² Including that “such incidents may qualify [...] as war crimes – [including] [...] killing or wounding treacherously [...]”.¹⁶²³ (The Pre-Trial Chamber rejected the request for other reasons, on the basis investigation would not serve the interests of justice, which was then subject to interlocutory appeal.¹⁶²⁴)

801. Article 37(2) of Additional Protocol I explains, and lists non-exhaustive acts that are examples of, permissible ruses of war that do not amount to perfidy.

ADDITIONAL PROTOCOL I, ARTICLE 37: PROHIBITION OF PERFIDY

[...] 2. Ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict *and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law*. The following are examples of such ruses: the use of camouflage, decoys, mock operations and misinformation.

(Emphasis added.)

802. Commentary suggests ruses of war might thereby or also include: (1) deceiving the adversary about military strength, forces’ location and plans; (2) use of small units to simulate large forces; (3) putting up dummy weapons, installations or vehicles;

1 (c).”). For definition of combatants and civilians see further [Geneva Convention III](#), Article 4; [Additional Protocol I](#), Articles 43-44, 50-51.

¹⁶¹⁸ ICC, *Afghanistan Situation Investigation Decision*.

¹⁶¹⁹ Under [ICC Statute](#), Article 15(3).

¹⁶²⁰ Under [ICC Statute](#), Article 8(2)(e)(ix) (non-international armed conflict).

¹⁶²¹ ICC, *Afghanistan Situation Investigation Decision*, paras 18-20.

¹⁶²² Per [ICC Statute](#), Articles 15(4), 53(1)(a).

¹⁶²³ ICC, *Afghanistan Situation Investigation Decision*, paras 48, 60-61.

¹⁶²⁴ ICC, *Afghanistan Situation Investigation Decision*, para. 96, disposition p. 32; see ICC, *Afghanistan Situation, Judgment on the Appeal against the Decision on the Authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan*, 5 March 2020.

(4) surprise attacks, or simulating inactivity; and (5) transmitting false or misleading messages or signals.¹⁶²⁵

803. **The perpetrator killed, caused the death of or injured such person or persons.** The war crime of killing or wounding treacherously¹⁶²⁶ shares the element of killing one or more persons with the war crime of wilful killing / murder.¹⁶²⁷ As such, jurisprudence elaborating on wilful killing may assist in interpreting this common element in relation to killing or wounding treacherously.

804. Unlike the crime of wilful killing, causing injury is sufficient to commit the crime of killing or wounding treacherously. Killing would attract a higher penalty under Article 438(2) of the CCU, but it is not a necessary element of this crime. As with the crime of wilful killing, killing or wounding treacherously may be committed by action, and – at least in theory – possibly also by omission. To demonstrate this crime, evidence must show that one or more persons died or were physically injured “as a result of” the perpetrator’s conduct. Put otherwise, there must be a causal link between the perpetrator’s conduct and the person’s death or injury.¹⁶²⁸

805. The perpetrator’s conduct does not, however, need to be the sole cause of the victim’s death or injury. It is sufficient that the perpetrator’s conduct substantially contributed to the death or injury of the person(s).¹⁶²⁹

806. **Such person or persons belonged to an adverse party.** This element of the crime requires that the victim belonged to an adverse “party”.¹⁶³⁰ But the [ICC Statute’s](#) wording requires that the victim belonged to the “hostile nation or army”.¹⁶³¹ Commentary

¹⁶²⁵ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 429 para. 461 including fn. 712; referencing very extensive list in [ICRC Commentary on Additional Protocol I](#), pp 443-444, para. 1521.

¹⁶²⁶ Per [ICC Statute](#), Article 8(2)(b)(xi).

¹⁶²⁷ Cf. [ICC Statute](#), Article 8(2)(a)(i), 8(2)(c)(i).

¹⁶²⁸ Under [ICTY Statute](#), Articles 2(a) and 3 wilful killing/murder but relevant by analogy to [ICC Statute](#), Article 8(2)(b)(xi) killing or wounding treacherously: ICTY, *Kordic and Cerkez Appeal Judgement*, para. 36 (“The Appeals Chamber recalls that the elements of wilful killing under Article 2 of the Statute are the death of the victim as the result of the action(s) of the accused”); ICTY, *Celebici Trial Judgement*, para. 424 (“The first of these may be termed the actus reus – the physical act necessary for the offence. In relation to homicide of all natures, this actus reus is clearly the death of the victim as a result of the actions of the accused. The Trial Chamber finds it unnecessary to dwell on this issue, although it notes that omissions as well as concrete actions can satisfy the actus reus element”); ICTY, *Brdanin Trial Judgement*, paras 381, (“The death was caused by an act or omission of the accused, or of a person or persons for whose acts or omissions the accused bears criminal responsibility.”), 382 (“The actus reus consists in the action or omission of the accused resulting in the death of the victim.”).

¹⁶²⁹ Under [ICC Statute](#), Article 8(2)(a)(i) wilful killing but relevant by analogy to [ICC Statute](#), Article 8(2)(b)(xi) killing or wounding treacherously: ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, para. 296 (“The Chamber also adopts the ICTY conclusion that ‘the conduct of the accused must be a substantial cause of the death of the victim.’”). Under [ICTY Statute](#), Articles 2(a) and/or 3 wilful killing / murder but relevant by analogy to [ICC Statute](#), Article 8(2)(b)(xi) killing or wounding treacherously: ICTY, *Brdanin Trial Judgement*, para. 382 (“The Prosecution need only prove beyond reasonable doubt that the accused’s conduct contributed substantially to the death of the victim”); ICTY, *Karadzic Trial Judgement*, para. 446 (non-international armed conflict) (“With regard to the requisite causal nexus, the requirement that death must have occurred ‘as a result of’ the perpetrator’s act or omission does not require this to be the sole cause for the victim’s death; it is sufficient that the ‘perpetrator’s conduct contributed substantially to the death of the person’”).

¹⁶³⁰ [ICC Elements of Crimes](#), Article 8(2)(b)(xi), Element 5.

¹⁶³¹ [ICC Statute](#), Article 8(2)(b)(xi).

confirms this element should be understood to include enemy combatants and also the hostile nation's civilians.¹⁶³²

c. Definition of killing or wounding treacherously (Subjective Elements)¹⁶³³

807. The subjective elements of killing or wounding treacherously are : (1) The perpetrator intended to betray the confidence or belief as to protection under rules of international law applicable in armed conflict; and (2) The perpetrator intended to kill, cause death or injure, or was aware that death or injury would occur in the ordinary course of events from his conduct.¹⁶³⁴

808. **The perpetrator intended to betray the confidence or belief as to protection under rules of international law applicable in armed conflict.** Killing or wounding treacherously¹⁶³⁵ overlaps with improper use of distinctive signs resulting in death or serious personal injury.¹⁶³⁶ Some conduct may amount to both crimes.¹⁶³⁷ Conversely, this subjective element distinguishes this crime of killing or wounding treacherously, including *e.g.* by way of misuse of distinctive signs; from the crime of making improper use of distinctive signs resulting in death or serious personal injury, which only requires a lower mental element approaching negligence as to the prohibited nature of the improper use of the sign.¹⁶³⁸

809. **The perpetrator intended to kill, cause death or injure, or was aware that death or injury would occur in the ordinary course of events from his conduct.**¹⁶³⁹ The crime of killing or wounding treacherously¹⁶⁴⁰ shares, with the war crime of wilful killing / murder,¹⁶⁴¹ an element of intending to kill or cause death, or intending to inflict grievous bodily harm with awareness that death would occur in the ordinary course of events. As such, jurisprudence elaborating on wilful killing may assist in interpreting this common element in relation to killing or wounding treacherously.

810. On the basis of the foregoing, if the injury or death is accidental (not the foreseeable consequence of the conduct of the perpetrator) then the conduct of the perpetrator would not constitute killing or wounding treacherously. On the other hand, premed-

¹⁶³² Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 432, para. 466.

¹⁶³³ This section details the subjective elements for this war crime as detailed under international law. However, the general part of the CCU identifies subjective elements that apply to crimes. See Articles 23, 24 and 25 of the CCU. It will be necessary to consider the relevance of the subjective elements in the general part of the CCU when considering the elements of this crime as applied under Article 438 CCU.

¹⁶³⁴ [ICC Elements of Crimes](#), Article 8(2)(b)(xi), see also 8(2)(e)(ix); [ICC Statute](#), Article 30; [ICRC Commentary on Additional Protocol I](#), pp 435-436, para. 1500.

¹⁶³⁵ [ICC Statute](#), Article 8(2)(b)(xi).

¹⁶³⁶ [ICC Statute](#), Article 8(2)(b)(vii); see above paras. 770-79.

¹⁶³⁷ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 426, para. 449.

¹⁶³⁸ See *e.g.* ICRC Customary Law Study, [Rule 65. Perfidy](#) ("Definition of perfidy [...] This requirement of a specific intent to breach the adversary's confidence sets perfidy apart from an improper use, making perfidy a more serious violation of international humanitarian law."); Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 428, para. 458.

¹⁶³⁹ [ICC Statute](#), Article 30.

¹⁶⁴⁰ Per [ICC Statute](#), Article 8(2)(b)(xi).

¹⁶⁴¹ Cf. [ICC Statute](#), Articles 8(2)(a)(i), 8(2)(c)(i).

itation would not be required for the war crime of killing or wounding treacherously to be established.¹⁶⁴²

d. Contextual Elements

811. In addition, as with all war crimes, it is necessary to demonstrate the following contextual elements:
- i. There was an international armed conflict;¹⁶⁴³
 - ii. The conduct took place in the context of and was associated with an international armed conflict;¹⁶⁴⁴ and
 - iii. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.¹⁶⁴⁵

¹⁶⁴² Under [ICTY Statute](#), Articles 2(a) and 3 wilful killing / murder but relevant by analogy in this case to [ICC Statute](#), Article 8(2)(b)(xi) killing or wounding treacherously: ICTY, [Celebici Trial Judgement](#), para. 433 (“The Trial Chamber is further instructed by the plain, ordinary meaning of the word ‘wilful’, as found in the Concise Oxford English Dictionary, which is ‘intentional, deliberate’. There is, on this basis, no divergence of substance between the use of the term ‘wilful killing’ and the French version, ‘l’homicide intentionnel’. (...) The essence to be derived from the usage of this terminology in both languages is simply that death should not be an accidental consequence of the acts of the accused.”); ICTY, [Brdanin Trial Judgement](#), para. 386 (“The Trial Chamber finds that the *mens rea* for murder and wilful killing does not require premeditation”).

¹⁶⁴³ See above, paras [188-189](#).

¹⁶⁴⁴ See above, paras [190-198](#). See also [ICC Elements of Crimes](#), Article 8(2)(b)(xi).

¹⁶⁴⁵ See above, para. [199](#). See also [ICC Elements of Crimes](#), Article 8(2)(b)(xi).

- iv. Declaring that no quarter will be given (ICC Statute, Article 8(2)(b)(xii))

APPLICABILITY: DECLARING THAT NO QUARTER WILL BE GIVEN CAN BE CONSIDERED TO BE CRIMINALISED UNDER ARTICLE 438(1) OF THE CCU, AS IT IS SUBSUMED UNDER THE NOTIONS OF “USE OF METHODS OF THE WARFARE PROHIBITED BY INTERNATIONAL INSTRUMENTS” AND “OTHER VIOLATIONS OF RULES OF THE WARFARE RECOGNIZED BY INTERNATIONAL INSTRUMENTS CONSENTED TO BY BINDING BY THE VERKHOVNA RADA (PARLIAMENT) OF UKRAINE” (PARAS 813-816).

Elements of the crime: To convict a perpetrator of the war crime of declaring that no quarter will be given, the following elements must be established:

(1) Objective elements

- The perpetrator declared or ordered that there shall be no survivors (paras 818-819).
- Such declaration or order was given in order to threaten an adversary or to conduct hostilities on the basis that there shall be no survivors (paras. 820-821).
- The perpetrator was in a position of effective command or control over the subordinate forces to which the declaration or order was directed. (para. 822).

(2) Subjective elements

- The perpetrator intended to declare or order that no quarter will be given in order to threaten an adversary or to conduct hostilities on the basis that there shall be no survivors (paras. 823-824).

(3) Contextual elements

- There is an international armed conflict (para. 825).
- The conduct of the perpetrator took place in the context of and was associated with the conflict (para. 825).
- The perpetrator was aware of the factual circumstances that established the existence of an armed conflict (para. 825).

a. Applicability under Article 438

812. Article 438 of the CCU does not explicitly criminalise declaring that no quarter will be given. However, as outlined below, this conduct may be subsumed under “use of methods of the warfare prohibited by international instruments” and “other violations of rules of the warfare recognized by international instruments consented to by binding by the Verkhovna Rada (Parliament) of Ukraine” to which Article 438(1) of the CCU refers.

813. **Declaring that no quarter will be given as a method of warfare or as a violation of rules of warfare recognised by international treaties ratified by Ukraine.** Declaring that no quarter will be given (also known as denying quarter) is a “method of warfare” prohibited under IHL.¹⁶⁴⁶ This violation of IHL is applicable to international armed

¹⁶⁴⁶ ICRC, *Casebook: How Does Law Protect in War?* A to Z Glossary, “Methods of Warfare”; Kalshoven and Zegveld, *Con-*

conflicts and is set out in Article 23(d) of the [Hague Regulations](#).¹⁶⁴⁷ The prohibition is also set forth in Article 40 of [Additional Protocol I](#) which prohibits persons “to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis.”¹⁶⁴⁸ Ukraine is a State party to the 1907 Hague Convention (IV) including its Annexed Regulations and to Additional Protocol I.¹⁶⁴⁹

814. **Recognition as a war crime.** Declaring that no quarter will be given is recognised as a war crime in international armed conflict.¹⁶⁵⁰ After the First World War, it was listed as one of the violations of the laws and customs of war that could be subject to criminal prosecution by the Commission on responsibility of the authors of the War established in the context of the Conference of Versailles.¹⁶⁵¹ Declaring that no quarter will be given was also the object of prosecution in post-World War II cases.¹⁶⁵² The offence is codified as a war crime in international armed conflicts by Article 8(2) (b)(vi) of the [ICC Statute](#).¹⁶⁵³ The legal framework and practice of the ICC can serve as an additional source of interpretation to assess the scope and elements of the offence under Article 438 of the CCU.
815. All of these elements support a finding that a violation of the prohibition to declare that no quarter will be given is criminalised under article 438(1) of the CCU.

b. Definition of declaring that no quarter will be given (Objective Elements)

816. The objective elements of declaring that no quarter will be given are that the perpetrator (1) declared or ordered that there shall be no survivors (2) in order to threaten an adversary or to conduct hostilities on the basis that there shall be no survivors. In addition, (3) the perpetrator must be in a position of effective command or control.
817. **The perpetrator declared or ordered that there shall be no survivors.** In line with IHL and the elements of the crimes of the ICC Statute, it is prohibited to “declare” or “order” that no enemies’ lives shall be spared.¹⁶⁵⁴ The declaration or the order does not need to take a particular form and can be made publicly or privately.¹⁶⁵⁵

straints on the Waging of War: An Introduction to International Humanitarian Law, 4th Edition, ICRC and Cambridge University Press, 2011, pp 37-38.

¹⁶⁴⁷ [Hague Regulations](#), Article 23(c). See also ICRC, IHL Database, Customary IHL, [Rule 46. Orders or Threats that No Quarter Will Be Given](#).

¹⁶⁴⁸ [Additional Protocol I](#), Article 40.

¹⁶⁴⁹ Ukraine acceded to the 1907 Hague Convention (IV) on 29 May 2015, and ratified Additional Protocol I on 25 January 1990. ICRC IHL Treaties Database, 1907 [Hague Convention \(IV\)](#); [Additional Protocol I](#).

¹⁶⁵⁰ ICRC, IHL Database, Customary IHL, [Rule 156. Definition of War Crimes](#). See also ICRC, IHL Database, Customary IHL, [Rule 46. Orders or Threats that No Quarter Will Be Given](#).

¹⁶⁵¹ Report submitted to the Preliminary Conference of Versailles by the Commission on Responsibility of the Authors of the War and on Enforcement of Penalties, Versailles, 29 March 1919.

¹⁶⁵² See for instance, Canadian Military Court at Aurich, Germany, [The Abbaye Ardenne Case: Trial of S.S. Brigadeführer Kurt Meyer](#), 10-28 December 1945; in United Nations War Crimes Commission, Vol. IV ed. *Law Reports of Trials of War Criminals* 97 (1948), pp 98, 101-102, 106; United States, Military Tribunal at Nuremberg, [Von Leeb case \(The German High Command Trial\)](#), Judgement, 28 October 1948, p. 6. .

¹⁶⁵³ [ICC Statute](#), Article 8(2)(b)(vii). Declaring that no quarter shall be given is also codified as a war crime in a non-international armed conflict. See [ICC Statute](#), Article 8(2)(e)(x).

¹⁶⁵⁴ [Hague Regulations](#), Article 23(c); [Additional Protocol I](#), Article 40; [ICC Elements of Crimes](#), Article 8(2)(b)(xii).

¹⁶⁵⁵ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, para. 472; Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, para. 1483.

818. As to its content, the declaration or the order must indicate or express that “there shall be no survivors”. The expression “no quarter will be given” is directly derived from article 23(d) of the [Hague Regulations](#), while Article 40 of [Additional Protocol I](#) relies on a more modern formulation “there shall be no survivors” that is reflected in the ICC Elements of Crimes.¹⁶⁵⁶ Therefore, “declaring that no quarter will be given” shall be understood as a declaration/order expressing that “there shall be no survivors” meaning refusing to spare the life of conquered adversaries including civilians and persons *hors de combat*.¹⁶⁵⁷
819. **The perpetrator made the declaration/order in order to threaten an adversary or to conduct hostilities on the basis that there shall be no survivors.** The conduct of the perpetrator may meet this second element in two ways. First, the declaration/order has been used as a threat towards the adversaries to provoke their surrender or to terrorise them.¹⁶⁵⁸ In this case this can be considered require that the order/declaration is “made openly”.¹⁶⁵⁹ Second, the declaration/order is made to ensure that the hostilities are conducted without leaving survivors.¹⁶⁶⁰ The latter prohibition reflects the importance of the principle that military violence shall be strictly limited to what is required by military and that one cannot refuse to give quarter.¹⁶⁶¹
820. **Denying quarter is an inchoate crime.** As an inchoate crime, there is no need for the declaration or the order to be implemented.¹⁶⁶² The objective element is met by the declaration or the order itself. Therefore, there is no need that hostilities are in fact conducted at all or in a way that aims to leave no survivors, or that civilians or persons *hors de combat* are killed as a result of the declaration/order to leave no survivors. If the declaration or the order is carried out this conduct is likely to amount in addition to the crime of denying quarter, to other war crimes and in particular killing or wounding persons *hors de combat* and willful killing.¹⁶⁶³
821. **The perpetrator was in a position of effective command or control.** The elements of the crime under the ICC Statute require that the perpetrator was in a position of effective command or control over the subordinate forces to which the declaration or order was directed.¹⁶⁶⁴ While under IHL the prohibition of declaring that no quarter will be given shall be respected by everyone participating in the hostilities,¹⁶⁶⁵

¹⁶⁵⁶ [ICC Elements of Crimes](#), Article 8(2)(b)(xii).

¹⁶⁵⁷ [ICRC Commentary on Additional Protocol I](#), paras 1591, 1593. For a definition of person *hors de combat*, see above, paras. 749-769.

¹⁶⁵⁸ [ICRC Commentary on Additional Protocol I](#), para. 1594; also ICRC, IHL Database, Customary IHL, [Rule 46. Orders or Threats that No Quarter Will Be Given](#). See also Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, pp 433-434, para. 472.

¹⁶⁵⁹ Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, para. 1483.

¹⁶⁶⁰ Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, para. 1483.

¹⁶⁶¹ [ICRC Commentary to Additional Protocol I](#), paras 1591-1592.

¹⁶⁶² Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 436, paras 481-482.

¹⁶⁶³ ICRC, IHL Database, Customary IHL, [Rule 156. Definition of War Crimes](#); Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, pp 246-247; Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 436, paras 481-482. See above, paras. 749-769, 207-226.

¹⁶⁶⁴ [ICC Elements of Crimes](#), Article 8(2)(b)(xii).

¹⁶⁶⁵ ICRC, IHL Database, Customary IHL, [Rule 46. Orders or Threats that No Quarter Will Be Given](#), Summary (“While all those who take a direct part in hostilities must respect this rule, in practice it will be particularly relevant for

the correlating war crime reflects a narrower scope of applicability.¹⁶⁶⁶ Indeed, this element was included to avoid criminal prosecutions for declarations that were not serious or could not be effectively implemented because the perpetrator did not have the authority or influence over the forces to carry out the declaration or the order.¹⁶⁶⁷

c. Definition of declaring that no quarter will be given (Subjective Elements).¹⁶⁶⁸

822. The offence requires that the perpetrator knowingly and intentionally declare or order that no quarter will be given.¹⁶⁶⁹ Further, the declaration/order must be made with the intention to threaten an adversary or to conduct hostilities on the basis that there shall be no survivors.¹⁶⁷⁰

823. Since no result is required for declaring that no quarter will be given, there is no need to show that the perpetrator intended to kill, cause death or injure the victims or was aware that death or injury would occur in the ordinary course of events from his act or omission which is required for the war crimes of killing or wounding persons *hors de combat* or willful killing.¹⁶⁷¹

d. Contextual Elements

824. In addition, as with all war crimes, it is necessary to demonstrate the following contextual elements:

- i. There was an international armed conflict;¹⁶⁷²
- ii. The conduct took place in the context of and was associated with an international armed conflict;¹⁶⁷³ and
- iii. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.¹⁶⁷⁴

commanders.”).

¹⁶⁶⁶ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 485, para. 480.

¹⁶⁶⁷ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 485, para. 480.

¹⁶⁶⁸ This section details the subjective elements for this war crime as detailed under international law. However, the general part of the CCU identifies subjective elements that apply to crimes. See Articles 23, 24 and 25 of the CCU. It will be necessary to consider the relevance of the subjective elements in the general part of the CCU when considering the elements of this crime as applied under Article 438 CCU.

¹⁶⁶⁹ Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, para.1485.

¹⁶⁷⁰ Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, para.1485; Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 436, para. 483.

¹⁶⁷¹ See also above, paras. 629-649, 87-106.

¹⁶⁷² See above, paras [188-189](#).

¹⁶⁷³ See above, paras [190-198](#). See also [ICC Elements of Crimes](#), Article 8(2)(b)(xii).

¹⁶⁷⁴ See above, para. [199](#). See also [ICC Elements of Crimes](#) Article 8(2)(b)(xii).

- i. Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations (ICTY Statute, Article 3; ICC Statute, Article 8(2)(b)(xxiii))

APPLICABILITY: THE WAR CRIME OF USING CIVILIANS OR OTHER PROTECTED PERSONS AS SHIELDS MAY BE CONSIDERED CRIMINALISED UNDER ARTICLE 438 OF THE CCU AS IT IS SUBSUMED UNDER THE NOTIONS OF “USE OF METHODS OF THE WARFARE PROHIBITED BY INTERNATIONAL INSTRUMENTS” AND “OTHER VIOLATIONS OF RULES OF THE WARFARE RECOGNIZED BY INTERNATIONAL INSTRUMENTS CONSENTED TO BY BINDING BY THE VERKHOVNA RADA (PARLIAMENT) OF UKRAINE” (PARAS. 826-829).

Elements of the crime: To convict a perpetrator for the war crime of using protected persons as shields the following elements must be established:

(1) Objective elements

- The perpetrator moved or otherwise took advantage of the location of one or more civilians or other persons protected under the international law of armed conflict (paras 830-836)

(2) Subjective elements

- The perpetrator intentionally and knowingly moved or took advantage of the location of civilians or other protected person (para. 838).
- The perpetrator intended to shield a military objective from attack or shield, favour or impede military operations (para. 839).

(3) Contextual elements

- There is an international armed conflict (para. 840).
- The conduct of the perpetrator took place in the context and was associated the conflict (para. 840).
- The perpetrator was aware of the factual circumstances that established the existence of an armed conflict (para. 840).

a. Applicability under Article 438

825. Article 438 of the CCU does not explicitly criminalise the use of protected persons as shields. However, this conduct may be subsumed under “use of methods of the warfare prohibited by international instruments” and “other violations of rules of the warfare recognized by international instruments consented to by binding by the Verkhovna Rada (Parliament) of Ukraine” to which Article 438(1) of the CCU refers.

826. **Utilizing civilians and other protected persons to shield military objectives is a violation of the methods of warfare reflected in international treaties ratified by Ukraine.** Using civilians and protected persons as shields is qualified as a serious violation of IHL in international armed conflicts, as utilizing their presence to render

an area or military forces immune from attack is a method of warfare prohibited under IHL.¹⁶⁷⁵ The prohibition is reflected in several international treaties ratified by Ukraine:¹⁶⁷⁶ Article 23 of the [Geneva Convention III](#) (in relation to prisoners of war), Article 28 of the [Geneva Convention IV](#) (in relation to protected civilians), Article 51(7) of [Additional Protocol I](#) (in relation to civilians), and Article 12(4) of [Additional Protocol I](#) (in relation to medical units).¹⁶⁷⁷ Article 51(7) of [Additional Protocol I](#) is corollary to the fundamental principle of distinction [[Additional Protocol I](#), Article 48], and the protections afforded to civilians against dangers resulting from military operations [[Additional Protocol I](#), Article 51(1)].¹⁶⁷⁸ Given the above, the use of protected persons as shields constitutes a violation of the rules of warfare recognised by international instruments ratified by Ukraine.

827. **Recognition as a war crime.** Using civilians or other protected persons to shield military objectives is recognised as a war crime applicable in the context of international armed conflict.¹⁶⁷⁹ The offense is expressly codified as a war crime in Article 8(2)(b)(xxiii) of the ICC Statute applicable to international armed conflict.¹⁶⁸⁰ The ICTY considered that the use of protected persons as shields constitutes inhumane or cruel treatment and an outrage upon personal dignity.¹⁶⁸¹ These crimes are subsumed under

¹⁶⁷⁵ [Additional Protocol I](#), Article 51(7); ICRC, IHL Database, Customary IHL, [Rule 97. Human Shields](#); ICRC, How Does Law Protect in War, [Human Shields](#); ICRC, IHL Database, Customary IHL, [Rule 156. Definition of War Crimes](#).

¹⁶⁷⁶ Ukraine ratified the Geneva Conventions, 1949 on 3 August 1954 and Additional Protocol 1 on 25 January 1990. See ICRC, Treaties and States Parties, [Ukraine](#).

¹⁶⁷⁷ ICRC, IHL Database, Customary IHL, [Rule 97. Human Shields](#). With regard to non-international armed conflicts, the prohibition of using human shields can be read under Article 13(1) of [Additional Protocol II](#) (“the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations.”). See [ICRC Commentary on Additional Protocol II](#), para. 4772 (“The implementation of [general protection for the civilian population] requires that precautions are taken both by the party launching the attack during the planning, decision and action stages of the attack, and by the party that is attacked. For example, military installations should not be intentionally placed in the midst of a concentration of civilians with a view to using the latter as a shield or for the purpose of making the adverse party abandon an attack, without forgetting any other safety measures which are not explicitly laid down in Protocol II.”).

¹⁶⁷⁸ Schmitt, *Human Shields in International Humanitarian Law*, 47 *Columbia Journal of Transnational Law* 292, p. 302; Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 540, para. 744.

¹⁶⁷⁹ See ICRC, IHL Database, Customary IHL, [Rule 156. Definition of War Crimes](#) (“Using human shields is prohibited under customary international law but has also been recognized as a war crime by the International Criminal Tribunal for the former Yugoslavia, either as inhuman or cruel treatment, or as an outrage upon personal dignity. Its inclusion in the Statute of the International Criminal Court was uncontroversial.”) (footnotes omitted).

¹⁶⁸⁰ The [ICC Statute](#) does not include the use of protected persons as shields as a war crime in non-international armed conflicts. Article 8 para. 2(c)(iii) of the Statute prohibiting the taking of hostages in non-international armed conflicts could be utilized instead. See Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 540, para. 745.

¹⁶⁸¹ The ICTY determined that the use of prisoners of war as human shields constitutes inhumane treatment, which is defined as a grave breach of [Geneva Convention III](#). See ICTY, *Blaskic Appeal Judgement*, para. 653 (“the use of prisoners of war or civilian detainees as human shields is [...] prohibited by the provisions of the Geneva Conventions, and it may constitute inhuman or cruel treatment under Articles 2 and 3 of the [1993 ICTY] Statute respectively where the other elements of these crimes are met.”); ICTY, *Blaskic Trial Judgement*, para. 716 (“the Trial Chamber is of the view that on 20 April 1993, the villagers of Gacice served as human shields for the accused’s headquarters in Vitez. [...] As they were Muslim civilians or Muslims no longer taking part in combat operations, the Trial Chamber adjudges that, by this act, they suffered inhuman treatment (count 19) and, consequently, cruel treatment.”); ICTY, *Aleksovski Trial Judgement*, para. 229 (“the use of detainees as human shields or trench-diggers constitutes an outrage upon personal dignity protected by Article 3 of the Statute.”). In this case the conduct in question has been considered “an outrage upon personal dignity” in violation of Common Article 3 to the 1949 Geneva Conventions. See Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, pp 503-504, para. 743; ICTY, *Kordic and Cerkez Trial Judgement*, para. 800

Articles 2 and 3 of the ICTY Statute (grave breaches of the 1949 Geneva Conventions and violations of the laws and customs of war).

828. In sum, utilising the presence of a civilian or other protected person to render military objectives immune from attack is a prohibited method of warfare or a violation of the rules of warfare recognised by international instruments ratified by Ukraine and has been recognised internationally as a war crime. These factors support a finding that the use of the human shields is criminalised under Article 438(1) of the CCU.

b. Definition of using protected persons as shields (Objective Elements)

829. The objective elements of the war crime of using protected persons as shields requires that the perpetrator moved or otherwise took advantage of the location of one or more civilians or other persons protected under the international law of armed conflict.¹⁶⁸²

830. **Human shields.** According to the ICRC, the term “human shield(s)” refers to situations “where the presence of civilians or the movement of the civilian population, whether voluntary or involuntary, is used in order to shield military objectives from attack, or to shield, favor, or impede military operations.”¹⁶⁸³ Under the ICTY jurisprudence, which has considered the use of protected persons as shields to constitute inhumane or cruel treatment and an outrage upon personal dignity,¹⁶⁸⁴ the term “human shields” was used in a more limited manner to mean “the placement or detention of persons in areas where they may be exposed to combat operations, for the purpose of rendering certain areas or activities immune from military operations or armed attack.”¹⁶⁸⁵

831. **Protected persons.** The persons protected under the Geneva Conventions I-IV of 1949 are:

- Members of the armed forces who are wounded, sick and/or shipwrecked at sea; [[Geneva Convention I](#), Article 13; [Geneva Convention II](#), Article 13];
- Medical and religious personnel. [[Geneva Convention I](#), Articles 24, 25, 26; [Geneva Convention II](#), Articles 36 and 37; [Geneva Convention IV](#), Article 20].
- Prisoners of war; [[Geneva Convention III](#), Article 4];
- Civilians who at a given moment and in any manner whatsoever find themselves in the hands of a party to the armed conflict or Occupying Power of which they are not nationals; [[Geneva Convention IV](#), Article 4].

(“The Trial Chamber also finds that while detained the Muslims were, without any justification, used as hostages and human shields, and forced to dig trenches and that, as a result of the latter activity, a number were killed or wounded. The Trial Chamber, therefore, finds that the detained Bosnian Muslims were unlawfully confined and subjected to inhuman treatment.”).

¹⁶⁸² [ICC Elements of Crimes](#), Article 8(2)(b)(xxiii).

¹⁶⁸³ ICRC, How Does Law Protect in War, [Human Shields](#). The movement of protected persons shall be ordered by the competent authorities of a party to an international armed conflict and carried out in accordance with their instructions. See [ICRC Commentary on Additional Protocol I](#), para. 1988.

¹⁶⁸⁴ ICTY, *Blaskic Appeal Judgement*, para. 653; ICTY, *Blaskic Trial Judgement*, para. 716; ICTY, *Aleksovski Trial Judgement*, para. 229; ICTY, *Kordic and Cerkez Trial Judgement*, para. 800.

¹⁶⁸⁵ ICTY, *Mladic Trial Judgement*, Vol. III of V, para. 3245.

832. Using protected persons as shields can either be “active” (moving protected persons to a given location) or “passive” (taking advantage of their location).¹⁶⁸⁶
833. As recognised in the extracts from judgements in the text box below, the war crime under consideration does not require that the protected persons used as shields suffer harm.

**ICTY, *BLASKIC APPEAL JUDGEMENT*, PARA. 654
(FOOTNOTES OMITTED):**

“Using protected detainees as human shields constitutes a violation of the provisions of the Geneva Conventions regardless of whether those human shields were actually attacked or harmed. Indeed, the prohibition is designed to protect detainees from being exposed to the risk of harm, and not only to the harm itself.”

**ICTY, *KARADZIC TRIAL JUDGEMENT (VOL. I OF IV)*, PARA. 525
(FOOTNOTES OMITTED):**

“The prohibition of the use of human shields is not dependent on actual harm or attack.”

834. Commentators have suggested that the objective element of the crime does not require that the perpetrator achieved any military advantage from the use of human shields.¹⁶⁸⁷
835. As to voluntary human shields, it is debated whether their use violates the shielding prohibition. Some commentators consider that the presence of truly consenting voluntary human shields near otherwise targetable military objects or personnel does not give rise to an IHL violation on the part of the belligerents.¹⁶⁸⁸ In any event, as one commentator notes, the crime does not necessarily require that belligerents move protected persons to the military personnel or objects; the movement of military objectives close to the location of protected persons would also satisfy the objective elements.¹⁶⁸⁹ In such circumstances, it would be irrelevant to discuss things in terms

¹⁶⁸⁶ Schmitt, ‘[Human Shields in International Humanitarian Law](#)’, 47 *Columbia Journal of Transnational Law* 292, p. 302.

¹⁶⁸⁷ Van Schaak, [The Law and Policy of Human Shielding](#), in Williams and Ford (eds), *Complex Battlespaces: The Law of Armed Conflict and the Dynamics of Modern Warfare*, Oxford University Press, 2018, p. 788.

¹⁶⁸⁸ Schmitt, ‘[Human Shields in International Humanitarian Law](#)’, 47 *Columbia Journal of Transnational Law* 292, pp 318, 322; Supreme court of Israel, *The Public Committee against Torture in Israel et al. v. The Government of Israel et al.* [Judgement](#), para. 36 (“If [civilians serving as human shields] do so of their own free will, out of support for the terrorist organization, they should be seen as persons taking a direct part in the hostilities.”). See also USA, [The Department of Defense Law of War Manual](#), p. 270 (“Based on the facts and circumstances of a particular case, the commander may determine that persons characterized as voluntary human shields are taking a direct part in hostilities.”).

¹⁶⁸⁹ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, pp 504-505, para. 748.

of whether the protected persons were in the location voluntarily before the belligerents moved otherwise targetable personnel or objects to their location.¹⁶⁹⁰

CASE STUDY: EXAMPLES OF USING PROTECTED PERSONS AS SHIELDS

The practice of the ICTY has qualified the following acts as human shielding:

- “Physically ensuring or otherwise holding peacekeeping forces against their will at potential NATO air targets, including ammunition bunkers, a radar site and a communications centre.”¹⁶⁹¹
- “Detainees were forced to perform various dangerous military tasks [...] including digging trenches, building defences with sandbags, carrying wounded or killed [...] soldiers, carrying ammunition and explosives across the confrontation line, and placing them in front of [military] positions.”¹⁶⁹²
- Use of detainees as human shields to protect military headquarters from shelling.¹⁶⁹³
- Forcing detainees “to walk across the confrontation line wearing camouflage uniforms and carrying wooden rifles in the midst of a military operation involving heavy artillery and constant fire from both sides.”¹⁶⁹⁴
- Use of detainees “as human shields in diverse locations [...] in order to ensure the surrender of the villages whose inhabitants were predominantly Muslim.”¹⁶⁹⁵
- “Bosnian Muslim detainees were instructed to lead Serb Forces through an area, which had been mined, to recover dead bodies.”¹⁶⁹⁶
- Detainees were used as human shields “in order to extract dead and wounded soldiers.”¹⁶⁹⁷

c. Using protected persons as shields (Subjective Elements)¹⁶⁹⁸

836. As to the subjective element, the war crime of using protected persons as shields requires that the perpetrator: (1) intentionally and knowingly moved or took advantage of the location of one or more civilians or other protected persons; and (2) intended to shield a military objective from attack or shield, favour or impede military operations.¹⁶⁹⁹

¹⁶⁹⁰ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, pp 504-505, para. 748.

¹⁶⁹¹ ICTY, *Karadzic and Mladic Indictment*, para. 47.

¹⁶⁹² ICTY, *Naletilic and Martinovic Second Amended Indictment*, para. 37.

¹⁶⁹³ ICTY, *Blaskic Trial Judgement*, para. 716.

¹⁶⁹⁴ ICTY, *Naletilic and Martinovic Trial Judgement*, paras 283, 288.

¹⁶⁹⁵ ICTY, *Aleksovski Trial Judgement*, paras 122, 138.

¹⁶⁹⁶ ICTY, *Karadzic Trial Judgement (Vol.I of IV)*, para. 2534. In this case the use of protected persons as human shields has been considered to amount to an act of persecution as a crime against humanity. *Ibidem*, para. 2538.

¹⁶⁹⁷ ICTY, *Mladic Trial Judgement*, Vol. II of V, para. 1550. As in the case above, the use of human shields has been considered “an underlying act of persecution as a crime against humanity”. *Ibidem*, para. 3387.

¹⁶⁹⁸ This section details the subjective elements for this war crime as detailed under international law. However, the general part of the CCU identifies subjective elements that apply to crimes. See Articles 23, 24 and 25 of the CCU. It will be necessary to consider the relevance of the subjective elements in the general part of the CCU when considering the elements of this crime as applied under Article 438 CCU.

¹⁶⁹⁹ *ICC Elements of Crimes*, Article 8(2)(b)(xxiii); *ICC Statute*, Article 30; Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, para. 751. The ICTY jurisprudence has not defined the mens rea for the use of protected persons as shields. See ICTY, *Karadzic Trial Judgement (Vol.I of IV)*, para. 526, fn.1690.

837. **The perpetrator intentionally and knowingly moved or took advantage of the location of civilians or other protected persons.** This element requires “the deliberate use of the physical presence or physical movement of civilians for the purpose of shielding or favouring friendly military operations against enemy action or to impede enemy military operations.”¹⁷⁰⁰
838. **The perpetrator intended to shield a military objective from attack or shield, favour or impede military operations.** An attack or operation does not have to be actually deterred to establish this element.¹⁷⁰¹

d. Contextual Elements

839. In addition, as with all war crimes, it is necessary to demonstrate the following contextual elements:
- i. There was an international armed conflict;¹⁷⁰²
 - ii. The conduct took place in the context of and was associated with an international armed conflict;¹⁷⁰³ and
 - iii. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.¹⁷⁰⁴

¹⁷⁰⁰ Bothe, *New Rules for Victims of Armed Conflicts, Commentary on the two 1977 Protocols Additional to the Geneva Conventions of 1949*, 2nd Edition, Brill, 2013, p. 357.

¹⁷⁰¹ Van Schaak, [The Law and Policy of Human Shielding](#), in Williams and Ford (eds), *Complex Battlespaces: The Law of Armed Conflict and the Dynamics of Modern Warfare*, Oxford University Press, 2018, p. 788.

¹⁷⁰² See above, paras [188-189](#).

¹⁷⁰³ See above, paras [190-198](#). See also [ICC Elements of Crimes](#), Article 8(2)(b)(xii).

¹⁷⁰⁴ See above, para. [199](#). See also [ICC Elements of Crimes](#), Article 8(2)(b)(xii).

- ii. Employment of poison or poisoned weapons, prohibited gases, liquids, materials or devices (ICTY Statute, Article 3(a); ICC Statute, Articles 8(2)(b)(xvii)-(xviii))

APPLICABILITY: THE WAR CRIMES OF USING POISON OR POISONED WEAPONS, ASPHYXIATING, POISONOUS OR OTHER GASES CAN BE CONSIDERED CRIMINALISED UNDER ARTICLE 438 OF THE CCU AS IT IS SUBSUMED UNDER THE NOTION OF “OTHER VIOLATIONS OF RULES OF THE WARFARE RECOGNIZED BY INTERNATIONAL INSTRUMENTS CONSENTED TO BY BINDING BY THE VERKHOVNA RADA (PARLIAMENT) OF UKRAINE” (PARA. 842-845).

Elements of the crimes: to convict a perpetrator for the war crime of poison or poisoned weapons, asphyxiating, poisonous or other gases, the following elements must be established:

(1) Objective elements

- The perpetrator employed a substance or a weapon that released a substance as a result of its employment (para. 846).
- The substance was such that it caused death or serious damage to health in the ordinary course of events, through its toxic properties (para. 847).

OR

- The perpetrator employed a gas or other analogous substance or device (para. 848).
- the gas, substance or device was such that it caused death or serious damage to health in the ordinary course of events, through its asphyxiating or toxic properties (para. 849).

(2) Subjective elements

- The perpetrator intentionally and knowingly used poison or poisoned weapons (para. 851).

OR

- The perpetrator intentionally and knowingly used gas, or other analogous substance or device (para. 852).

(3) Contextual elements [applicable to all the offences]

- There is an international armed conflict (para. 853).
- The conduct of the perpetrator took place in the context and was associated with the conflict (para. 853).
- The perpetrator was aware of the factual circumstances that established the existence of an armed conflict (para. 853).

840. The employment of poison or poisoned weapons as well as asphyxiating, poisonous or other gases are listed as two separate offences under the ICC Statute, namely Article 8(2)(b)(xvii) and Article 8(2)(b)(xviii). As they share similar objective and subjective elements, the relevant legal analysis will be addressed in the same section.

a. Applicability under Article 438

841. Article 438 of the CCU does not explicitly criminalise the use of poison or poisoned weapons, and prohibited gases. However, the use of the above weapons may be subsumed under “other violations of rules of the warfare recognized by international instruments consented to by binding by the Verkhovna Rada (Parliament) of Ukraine” to which Article 438(1) of the CCU refers.
842. **Use of poison or poisoned weapons, asphyxiating, poisonous or other gases as serious violations of IHL reflected in international treaties ratified by Ukraine.** The above weapons are prohibited means of warfare under IHL instruments ratified by Ukraine.¹⁷⁰⁵ The use of poison constitutes a violation of the 1907 Hague Regulations prohibiting the use of poison and poisoned weapons,¹⁷⁰⁶ while the 1925 Geneva Protocol bans “the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices.”¹⁷⁰⁷ The above prohibitions have attained customary law status.¹⁷⁰⁸ Given the above, the use of poison or poisoned weapons, asphyxiating, poisonous or other gases constitute violations of the rules of warfare recognised by international instruments ratified by Ukraine.
843. **Recognition as war crimes.** Employing each of the above categories of weapons is recognised as a war crime applicable in the context of international armed conflict.¹⁷⁰⁹ The offenses are expressly codified as war crimes in Articles 8(2)(xvii)-(ix) of the ICC Statute applicable in international armed conflicts.¹⁷¹⁰ The ICRC Customary IHL Database specifies that the war crimes related to the use of prohibited weapons subject to the ICC’s jurisdiction “reflect the development of customary international law since the adoption of Additional Protocol I in 1977.”¹⁷¹¹ The “employment of poisonous weapons or other weapons calculated to cause unnecessary suffering” is also listed under Article 3 of the ICTY Statute (violations of the laws or customs of war) applicable in both international and non-international armed conflicts.¹⁷¹²

¹⁷⁰⁵ The employment of prohibited weapons may be subsumed under “other violations of rules of the warfare recognized by international instruments consented to by binding by the Verkhovna Rada (Parliament) of Ukraine” to which Article 438(1) of the CCU refers. Despite the differentiation between the terms “methods of warfare” and “means of warfare”, considering that the term “methods of warfare” encompasses the way in which weapons are employed, the use of poison, prohibited gases and bullets could also be subsumed under the “use of methods of the warfare prohibited by international instruments” to which Article 438(1) of the CCU refers. See [ICRC Commentary on Additional Protocol I](#), para. 1402; ICRC, How Does Law Protect in War, [Means and Methods of Warfare](#).

¹⁷⁰⁶ [Convention \(IV\) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land](#), Article 23(a). See ICRC, Treaties and States Parties, [Ukraine](#).

¹⁷⁰⁷ [Hague Declaration \(IV,2\) concerning Asphyxiating Gases, 29 July 1899; Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare](#). See also [Chemical Weapons Convention](#), Article XIII (“Nothing in this Convention shall be interpreted as in any way limiting or detracting from the obligations assumed by any State under the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925.”). See ICRC, Treaties and States Parties, [Ukraine](#).

¹⁷⁰⁸ ICRC, IHL Database, Customary IHL, [Rule 72. Poison](#) and [Rule 74. Chemical Weapons](#).

¹⁷⁰⁹ [ICC Statute](#), Article 8(2)(b)(xvii)-(xvii); ICRC, IHL Database, Customary IHL, [Rule 156. Definition of War Crimes](#).

¹⁷¹⁰ Following the amendment to Article 8 of the ICC Statute in 2010, the employment of poison, prohibited gases and prohibited bullets has been added to the list of war crimes applicable to non-international armed conflict. Review Conference of the ICC Statute, ASP ASP [Resolution RC/Res.5](#), Annex I, Amendment to article 8; [ICC Statute](#), Article 8(2)(e)(xiii)-(xv).

¹⁷¹¹ ICRC, IHL Database, Customary IHL, [Rule 156. Definition of War Crimes](#).

¹⁷¹² [ICTY Statute](#), Article 3; ICTY, [Tadic Interlocutory Appeal on Jurisdiction](#), para. 119 (“[...] elementary considerations

844. Employing poison or poisoned weapons, asphyxiating, poisonous or other gases constitute violations of the rules of warfare recognised by international instruments ratified by Ukraine and have been recognised internationally as war crimes. Accordingly, these factors support a finding that these violations are criminalised under Article 438(1) of the CCU.

b. Definition of employing prohibited weapons (Objective Elements)

i. Use of poison or poisoned weapons [ICC Statute, Article 8(2)(b)(xvii)]

845. **The perpetrator employed a substance or a weapon that released a substance as a result of its employment.**¹⁷¹³ Commentators have suggested that the material element of the crime not only concerns the use of poisoned weapons but also encompasses the poisoning of wells, water or food sources.¹⁷¹⁴ The International Court of Justice (ICJ) jurisprudence considered that the terms “poison or poisoned weapons” in the 1907 Hague Regulations and the 1925 Geneva Protocol do not encompass nuclear weapons.¹⁷¹⁵ Likewise, commentators have also suggested that biological weapons do not form part of the definition of “poison or poisoned weapons”.¹⁷¹⁶

846. **The substance was such that it causes death or serious damage to health in the ordinary course of events, through its toxic properties.** Commentators have specified that the war crime of employing poison or poisoned weapons establishes a threshold of harm linked to the effects of the substance used, namely causing “death or serious damage to health in the ordinary course of events”.¹⁷¹⁷ This requires “that the amount or rather concentration of the substance would in circumstances comparable to those in which it is intended to be used likely cause death or serious damage to health.”¹⁷¹⁸ As such, weapons that cause the above effect accidentally are excluded from the scope of the war crime.¹⁷¹⁹

of humanity and common sense make it preposterous that the use by State of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.”)

¹⁷¹³ [ICC Elements of Crimes](#), Article 8(2)(b)(xvii).

¹⁷¹⁴ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, pp 457-458, para. 575.

¹⁷¹⁵ ICJ, Legality of the Threat or Use of Nuclear Weapons, [Advisory Opinion](#), para. 55 (“The Court will observe that the Regulations annexed to the Hague Convention IV do not define what is to be understood by ‘poison or poisoned weapons’ and that different interpretations exist on the issue. Nor does the 1925 Protocol specify the meaning to be given to the term ‘analogous materials or devices’. The terms have been understood, in the practice of States, in their ordinary sense as covering weapons whose prime, or even exclusive, effect is to poison or asphyxiate. This practice is clear, and the parties to those instruments have not treated them as referring to nuclear weapons.”).

¹⁷¹⁶ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, pp 458-459, para. 578.

¹⁷¹⁷ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, pp 458-459, para. 578.

¹⁷¹⁸ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, pp 458-459, para. 578.

¹⁷¹⁹ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, pp 458-459, para. 578.

ii. Prohibited gases, liquids, materials or devices [ICC Statute, Article 8(2)(b)(xviii)]

847. **The perpetrator employed a gas or other analogous substance or device.**¹⁷²⁰ Commentators have understood the terms “liquids and materials” mentioned in Article 8(2)(b)(xviii) of the ICC Statute to be covered by the term “substance” in the elements of the crime.¹⁷²¹ The ICJ jurisprudence considered that the definition of “poison or poisoned weapons” in the 1907 Hague Regulations and the 1925 Geneva Protocol does not encompass nuclear weapons.¹⁷²² Commentators have also suggested that biological weapons do not fall within the material elements of the war crime.¹⁷²³
848. **The gas, substance or device was such that it causes death or serious damage to health in the ordinary course of events, through its asphyxiating or toxic properties.**¹⁷²⁴ Commentators have specified that the war crime establishes a threshold focusing on the agent’s effects, namely “causing death or serious damage to health in the ordinary course of events”, and that means of warfare that end up causing the above effect as a secondary result are excluded from the scope of this war crime.¹⁷²⁵
849. From the debates around the scope of this war crime during the drafting of the ICC Statute, commentators suggest it is to be understood that non-lethal riot agents would not usually fall within the scope of this war crime.¹⁷²⁶ That being said, commentators suggest that “insofar as a certain type of riot control agent has asphyxiating or toxic properties or is fashioned in a way to bring about death or serious damage to health in the ordinary course of events, the criminalisation of its use according to Article 8(2)(b)(xviii) of the Statute is not questionable.”¹⁷²⁷

¹⁷²⁰ [ICC Elements of Crimes](#), Article 8(2)(b)(xviii).

¹⁷²¹ Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary*, Cambridge: Cambridge University Press, 2003, p. 286, ft. 2; Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 463, para. 594.

¹⁷²² ICJ, *Legality of the Threat or Use of Nuclear Weapons*, [Advisory Opinion](#), para. 55 (“The Court will observe that the Regulations annexed to the Hague Convention IV do not define what is to be understood by ‘poison or poisoned weapons’ and that different interpretations exist on the issue. Nor does the 1925 Protocol specify the meaning to be given to the term ‘analogous materials or devices’. The terms have been understood, in the practice of States, in their ordinary sense as covering weapons whose prime, or even exclusive, effect is to poison or asphyxiate. This practice is clear, and the parties to those instruments have not treated them as referring to nuclear weapons.”).

¹⁷²³ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, pp 458-459, para. 578.

¹⁷²⁴ [ICC Elements of Crimes](#), Article 8(2)(b)(xviii).

¹⁷²⁵ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, pp 462-464, paras 591, 594.

¹⁷²⁶ The extent of the prohibition of riot control agents under international law and whether their use could fall under Article 8(2)(b)(xviii) of the ICC Statute led to substantive discussions during the Preparatory Commission. Considering that the elements of the war crime introduced a threshold as to the effects of the agent or substance used, namely causing death or serious damage to health, a footnote (“[n]othing in this element shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law with respect to development, production, stockpiling and use of chemical weapons”) was added therein to ensure that the more restrictive requirements included therein are specific to the ICC and not a reflection of international law. See Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, pp 462-463, para. 591.

¹⁷²⁷ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, pp 462-463, para. 591.

c. Definition of employing prohibited weapons (Subjective Elements)¹⁷²⁸

850. **Poison or poisoned weapons.** The offence requires that the perpetrator intentionally and knowingly employed poison or a weapon that releases this substance.¹⁷²⁹
851. **Prohibited gases, liquids, materials or devices.** The offence requires that the perpetrator intentionally and knowingly used a gas or other analogous substance or device.¹⁷³⁰

d. Contextual Elements

852. In addition, as with all war crimes, it is necessary to demonstrate the following contextual elements:
- i. There was an international armed conflict;¹⁷³¹
 - ii. The conduct took place in the context of and was associated with an international armed conflict;¹⁷³² and
 - iii. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.¹⁷³³

¹⁷²⁸ This section details the subjective elements for this war crime as detailed under international law. However, the general part of the CCU identifies subjective elements that apply to crimes. See Articles 23, 24 and 25 of the CCU. It will be necessary to consider the relevance of the subjective elements in the general part of the CCU when considering the elements of this crime as applied under Article 438 CCU.

¹⁷²⁹ [ICC Elements of Crimes](#), Article 8(2)(b)(xvii); [ICC Statute](#), Article 30.

¹⁷³⁰ [ICC Elements of Crimes](#), Article 8(2)(b)(xviii); [ICC Statute](#), Article 30.

¹⁷³¹ See above, paras [188-189](#).

¹⁷³² See above, paras [190-198](#). See also [ICC Elements of Crimes](#), Article 8(2)(b)(xvii)-(xviii).

¹⁷³³ See above, para. [199](#). See also [ICC Elements of Crimes](#), Article 8(2)(b)(xvii)-(xviii).

- iii. Employment of prohibited bullets (ICTY Statute, Article 3(a), ICC Statute, Articles 8(2)(b)(xix))

APPLICABILITY: THE WAR CRIME OF USING BULLETS THAT EXPAND OR FLATTEN EASILY IN THE HUMAN BODY CAN BE CONSIDERED CRIMINALISED UNDER ARTICLE 438 OF THE CCU AS IT IS SUBSUMED UNDER THE NOTION OF “OTHER VIOLATIONS OF RULES OF THE WARFARE RECOGNIZED BY INTERNATIONAL INSTRUMENTS CONSENTED TO BY BINDING BY THE VERKHOVNA RADA (PARLIAMENT) OF UKRAINE” (PARAS 854-857).

Elements of the crime: To convict a perpetrator for the war crime of using prohibited bullets, the following elements must be established:

(1) Objective elements

- The perpetrator employed certain bullets (para. 858).
- The bullets were such that their use violates the international law of armed conflict because they expand or flatten easily in the human body (para. 858).

(2) Subjective elements

- The perpetrator intentionally used prohibited bullets (para. 859).
- The perpetrator was aware that the nature of the bullets would uselessly aggravate human suffering (para. 859).

(3) Contextual elements

- There is an international armed conflict (para. 860).
- The conduct of the perpetrator took place in the context and was associated the conflict (para. 860).
- The perpetrator was aware of the factual circumstances that established the existence of an armed conflict (para. 860).

a. Applicability under Article 438

853. Article 438 of the CCU does not explicitly criminalise the use of prohibited bullets. However, as outlined above, the use of the above weapons may be subsumed under “other violations of rules of the warfare recognized by international instruments consented to by binding by the Verkhovna Rada (Parliament) of Ukraine” to which Article 438(1) of the CCU refers.

854. **Use of bullets that expand or flatten in the human body as serious violations of IHL reflected in international treaties ratified by Ukraine.** The use of bullets that expand or flatten in the human body is a prohibited means of warfare under IHL instruments ratified by Ukraine.¹⁷³⁴ The prohibition that was introduced by the 1899

¹⁷³⁴ As suggested, the employment of prohibited weapons may be subsumed under “other violations of the laws or customs of war envisaged by international agreements” to which Article 438(1) of the CCU refers. Despite the differentiation

Hague Declaration is also considered part of customary IHL.¹⁷³⁵ Given the above, the bullets that expand or flatten in the human body constitute violations of the rules of warfare recognised by international instruments ratified by Ukraine.

855. **Recognition as war crimes.** Employing bullets that expand or flatten in the human body is recognised as a war crime applicable in the context of international armed conflict.¹⁷³⁶ This offence is expressly codified as war crimes in Article 8(2) (ix) of the ICC Statute applicable in international armed conflicts.¹⁷³⁷ The ICRC Customary IHL Database specifies that the war crimes related to the use of prohibited weapons subject to the ICC’s jurisdiction “reflect the development of customary international law since the adoption of Additional Protocol I in 1977.”¹⁷³⁸ The “employment of poisonous weapons or other weapons calculated to cause unnecessary suffering” is also listed under Article 3 of the ICTY Statute (violations of the laws or customs of war) applicable in both international and non-international armed conflicts.¹⁷³⁹
856. In sum, employing bullets that expand or flatten in the human body constitute violations of the rules of warfare recognised by an international instrument ratified by Ukraine and has been recognised internationally as war crimes. Accordingly, these factors support a finding that this violation is criminalised under Article 438(1) of the CCU.

b. Definition of employing bullets that expand or flatten in the human body
(Objective Elements)

857. The objective elements of the crime require that: (1) **the perpetrator employed certain bullets**; and (2) **the bullets were such that their use violates the international law of armed conflict because they expand or flatten easily in the human body.**¹⁷⁴⁰ Commentators have suggested that the war crime not only criminalises the use of bullets that are designed to expand or flatten in the human body, but also those that are manipulated to achieve the above effect (e.g., by piercing standard bullets with incisions).¹⁷⁴¹ In addition, they note that the list of bullets mentioned in Article 8(2)

between the terms “methods of warfare” and “means of warfare”, considering that the term “methods of warfare” encompasses the way in which weapons are employed, the use of poison, prohibited gases and bullets could also be subsumed under the “use of methods of the warfare prohibited by international instruments” to which Article 438(1) of the CCU refers. See [ICRC Commentary on Additional Protocol I](#), para. 1402; ICRC, *How Does Law Protect in War*, [Means and Methods of Warfare](#).

¹⁷³⁵ [Declaration \(IV,3\) concerning Expanding Bullets](#). See ICRC, *Treaties and States Parties*, [Ukraine](#). See also, ICRC, IHL Database, Customary IHL, [Rule 77. Expanding Bullets](#).

¹⁷³⁶ [ICC Statute](#), Article 8(2)(b)(xvii)-(ix); ICRC, IHL Database, Customary IHL, [Rule 156. Definition of War Crimes](#).

¹⁷³⁷ Following the amendment to Article 8 of the ICC Statute in 2010, the employment of prohibited bullets has been added to the list of war crimes applicable to non-international armed conflict. Review Conference of the Rome Statute, ASP [Resolution RC/Res.5](#), Annex I, Amendment to article 8; [ICC Statute](#), Article 8(2)(e)(xiii)-(xv).

¹⁷³⁸ ICRC, IHL Database, Customary IHL, [Rule 156. Definition of War Crimes](#).

¹⁷³⁹ [ICTY Statute](#), Article 3; ICTY, *Tadic Interlocutory Appeal on Jurisdiction*, para. 119 (“[...] elementary considerations of humanity and common sense make it preposterous that the use by State of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.”).

¹⁷⁴⁰ [ICC Elements of Crimes](#), Article 8(2)(b)(xix).

¹⁷⁴¹ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 465, para. 601.

(b)(xix) of the ICC Statute (bullets with a hard envelope which does not entirely cover the core or is pierced with incisions) is not exhaustive.¹⁷⁴²

c. Definition of employing bullets that expand or flatten in the human body (Subjective Elements)¹⁷⁴³

858. The offence requires: (1) that the employment of bullets was carried out with intent;¹⁷⁴⁴ and (2) that the perpetrator was aware that the nature of the bullets was such that their employment would uselessly aggravate human suffering.¹⁷⁴⁵ With respect to this latter requirement, commentators suggest that the use of expanding bullets to obtain a military advantage cannot shield a perpetrator from liability.¹⁷⁴⁶

d. Contextual Elements

859. In addition, as with all war crimes, it is necessary to demonstrate the following contextual elements:

- i. There was an international armed conflict;¹⁷⁴⁷
- ii. The conduct took place in the context of and was associated with an international armed conflict;¹⁷⁴⁸ and
- iii. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.¹⁷⁴⁹

¹⁷⁴² Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, pp 465-466, para. 602.

¹⁷⁴³ This section details the subjective elements for this war crime as detailed under international law. However, the general part of the CCU identifies subjective elements that apply to crimes. See Articles 23, 24 and 25 of the CCU. It will be necessary to consider the relevance of the subjective elements in the general part of the CCU when considering the elements of this crime as applied under Article 438 CCU.

¹⁷⁴⁴ [ICC Elements of Crimes](#), Article 8(2)(b)(xix); [ICC Statute](#), Article 30.

¹⁷⁴⁵ [ICC Elements of Crimes](#), Article 8(2)(b)(xix).

¹⁷⁴⁶ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 467, para. 608.

¹⁷⁴⁷ See above, paras [188-189](#).

¹⁷⁴⁸ See above, paras [190-198](#). See also [ICC Elements of Crimes](#), Article 8(2)(b)(xix).

¹⁷⁴⁹ See above, para. [199](#). See also [ICC Elements of Crimes](#), Article 8(2)(b)(xix).

- iv. Intentionally using starvation of civilians as a method of warfare (ICC Statute, Article (8)(2)(b)(xxv))

APPLICABILITY: THE STARVATION OF CIVILIANS AS A METHOD OF WARFARE CAN BE CONSIDERED TO BE CRIMINALISED UNDER ARTICLE 438(1) OF THE CCU, AS IT IS SUBSUMED UNDER THE NOTIONS OF “USE OF METHODS OF THE WARFARE PROHIBITED BY INTERNATIONAL INSTRUMENTS” AND “OTHER VIOLATIONS OF RULES OF THE WARFARE RECOGNIZED BY INTERNATIONAL INSTRUMENTS CONSENTED TO BY BINDING BY THE VERKHOVNA RADA (PARLIAMENT) OF UKRAINE” (PARAS 861-864).

Elements of the crime: To convict a perpetrator for the war crime of starvation the following elements must be established:

(1) Objective elements

- The perpetrator deprived civilians of objects indispensable to their survival including by wilfully impeding relief supplies (paras 865-874).

(2) Subjective elements

- The perpetrator intentionally and knowingly deprived civilians of objects indispensable to their survival (para. 875).
- The perpetrator intended to starve civilians as a method of warfare (paras 876-877).

(3) Contextual elements

- There is an international armed conflict (para. 878).
- The conduct of the perpetrator took place in the context and was associated with the conflict (para. 878).
- The perpetrator was aware of the factual circumstances that established the existence of an armed conflict (para. 878).

a. Applicability under Article 438 of the CCU

860. Article 438 of the CCU does not explicitly criminalise the starvation of civilians as a method of warfare. However, as outlined below, this conduct may be subsumed under “use of methods of the warfare prohibited by international instruments” and “other violations of rules of the warfare recognized by international instruments consented to by binding by the Verkhovna Rada (Parliament) of Ukraine” to which Article 438(1) of the CCU refers.

861. **Use of starvation as a prohibited method of warfare and a serious violation of International Humanitarian Law reflected in international treaties ratified by Ukraine.** Starvation is a method of warfare prohibited under IHL.¹⁷⁵⁰ The use of starvation as

¹⁷⁵⁰ [Additional Protocol I](#), Article 54; [Additional Protocol II](#), Article 14; ICRC, IHL Database, Customary IHL, [Rule 53. Starvation as a Method of Warfare](#).

a method of warfare constitutes a serious violation of IHL in international armed conflicts.¹⁷⁵¹ The prohibition is reflected in Article 54(1) of [Additional Protocol I](#) ratified by Ukraine according to which “starvation of civilians as a method of warfare is prohibited.”¹⁷⁵² This general prohibition is specified in Article 54(2) which states that: “[i]t is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population [...] for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive”.¹⁷⁵³ The IHL rules governing the provision of humanitarian assistance to civilians in need are also related to the prohibition of starvation as a method of warfare.¹⁷⁵⁴ Given the above, the starvation of civilians as a method of warfare constitutes a violation of the rules of warfare recognised by international instruments ratified by Ukraine.

862. **Recognition as a war crime.** The use of starvation as a method of warfare is recognised as a war crime in international armed conflict with the status of customary international law.¹⁷⁵⁵ The offense is also expressly codified as a war crime in Article 8(2)(b)(xxv) of the ICC Statute applicable to international armed conflict.¹⁷⁵⁶ The legal framework of the ICC can therefore serve as an additional source of interpretation to assess the scope and the elements of the offence under Article 438(1) of the CCU.
863. In sum, starvation is a prohibited method of warfare under IHL, a violation of the rules of warfare recognised by international instruments ratified by Ukraine and has been recognised internationally as a war crime. These factors support a finding that a violation of the prohibition of using starvation as a method of warfare is criminalised under Article 438(1) of the CCU.

¹⁷⁵¹ [Additional Protocol I](#), Article 54; ICRC, IHL Database, Customary IHL, [Rule 156. War Crimes](#). Starvation of civilians as a method of combat is also prohibited during non-international armed conflicts. See [Additional Protocol II](#), Article 14.

¹⁷⁵² Ukraine ratified Additional Protocol I to the Geneva Conventions on 25 January 1990. See ICRC, Treaties, States Parties and Commentaries, [Ukraine](#).

¹⁷⁵³ [Additional Protocol I](#), Article 54(2).

¹⁷⁵⁴ [ICRC Commentary on Additional Protocol I](#), paras 2805, 2808 according to which Article 70(1) of [Additional Protocol I](#) (“relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions”) should be read together with Article 54 of Additional Protocol I prohibiting the use of starvation as a method of warfare.

¹⁷⁵⁵ ICRC, IHL Database, Customary IHL, [Rule 53. Starvation as a Method of Warfare](#); ICRC, IHL Database, Customary IHL, [Rule 156. Definition of War Crimes](#) (“The prohibition of using starvation of civilians as a method of warfare was considered a new rule at the time of the adoption of Additional Protocol I. However, practice since then has not only made this a customary rule, but its inclusion in the Statute of the International Criminal Court as a war crime if committed in an international armed conflict was not controversial. Destroying objects indispensable to the survival of the civilian population also reflects a customary prohibition. There had, in fact, been a prosecution relating to a case of destruction of crops in a scorched earth operation during the Second World War, although the basis of the prosecution was the destruction of property not required by military necessity. The prohibition of starvation is set forth in numerous military manuals. Many States have adopted legislation making starvation of civilians as a method of warfare an offence.”) (footnotes omitted).

¹⁷⁵⁶ In 2019, the ICC Statute was amended by the Assembly of the States Parties to include the war crime of starvation as a method of warfare in non-international armed conflict. See, [ASP Resolution ICC-ASP/18/Res.5](#), Annexes I and II.

b. Definition of using starvation as a method of warfare (Objective Elements)

864. The objective element of the war crime of using starvation as a method of warfare requires that the perpetrator (1) deprived (including by wilfully impeding relief supplies) (2) civilians of (3) objects indispensable to their survival.¹⁷⁵⁷
865. **Objects indispensable to survival.** Objects indispensable to survival include objects related to food and water like “foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation work” listed in Article 54 of [Additional Protocol I](#). The above list of objects is not exhaustive.¹⁷⁵⁸ Objects indispensable to survival could also extend to other essential objects such as medical supplies, clothing, bedding, shelter, and in certain instances, electricity sources like fuel.¹⁷⁵⁹ As the ICRC Commentary suggests, the term “objects indispensable to survival” should be understood as encompassing all “objects for subsistence” meaning “objects which are of basic importance for the population from the point of view of providing the means of existence.”¹⁷⁶⁰
866. **Deprivation of objects indispensable to survival.** Any act or omission that leads to the deprivation of an object indispensable to survival would meet the objective element of the crime. Article 54(2) of [Additional Protocol I](#) mentions specifically “attacking”, “destroying”, “removing” or “rendering useless” objects indispensable to survival.¹⁷⁶¹
867. The deprivation may also occur through omission.¹⁷⁶² For example, when an occupying power fails to meet its obligation to satisfy the needs of the civilian population including “[by bringing in] the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate.”¹⁷⁶³
868. The deprivation could be fulfilled by impeding relief supplies.¹⁷⁶⁴ Parties to an international armed conflict are primarily responsible for addressing the needs of the civilian population within their territory or subject to their control.¹⁷⁶⁵ When parties cannot meet the above obligation and the civilian population is inadequately supplied of goods essential to its survival,¹⁷⁶⁶ “relief actions which are humanitarian and impar-

¹⁷⁵⁷ [ICC Elements of Crimes](#), Article 8(2)(b)(xxv).

¹⁷⁵⁸ [ICRC Commentary on Additional Protocol I](#), para. 2103 (“the words ‘such as’ show that the list of protected objects is merely illustrative. An exhaustive list could have led to omissions or an arbitrary selection”).

¹⁷⁵⁹ [ICRC Commentary on Additional Protocol I](#), para. 2103; Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 513, para. 772.

¹⁷⁶⁰ [ICRC Commentary on Additional Protocol I](#), para. 2103; [ICRC Commentary on Additional Protocol II](#), para. 4803.

¹⁷⁶¹ [ICRC Commentary on Additional Protocol I](#), para. 2101. See also Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 514, para. 775.

¹⁷⁶² Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 516, para. 784.

¹⁷⁶³ [Geneva Convention IV](#), Article 55; [ICRC Commentary on Geneva Convention IV](#), p. 310; Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 516, para. 784.

¹⁷⁶⁴ [ICC Statute](#), Article 8(2)(b)(xxv); Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 514, para. 776.

¹⁷⁶⁵ UNOCHA, [Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict](#), 2016, p. 11.

¹⁷⁶⁶ UNOCHA, [Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict](#),

tial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the parties concerned in such relief actions.”¹⁷⁶⁷ Under IHL, parties to an armed conflict unlawfully impede humanitarian relief operations when (1) they arbitrarily withhold consent to an offer of impartial humanitarian service while they are unable to meet the essential needs of the population, or (2) when they fail to allow and facilitate the passage of humanitarian assistance.¹⁷⁶⁸

EXAMPLES THAT COULD CONSTITUTE “DEPRIVATION OF OBJECTS INDISPENSABLE TO SURVIVAL”

- The destruction of crops by defoliants.¹⁷⁶⁹
- Polluting water reservoirs with chemicals or other agents.¹⁷⁷⁰
- Airstrikes against farmland, food processing sites, marketplaces, storage facilities, and water supply facilities,¹⁷⁷¹ often repeatedly.¹⁷⁷²
- Repeated mortar shelling against Mills which constituted a major wheat storage and processing site.¹⁷⁷³
- Airstrike against a “tanker transporting a fresh supply of water for a village and crops.”¹⁷⁷⁴
- Planting of land and sea mines, which, amongst other, obstruct access to livelihood activities.¹⁷⁷⁵
- Airstrikes against fishing boats and fish-offloading ports.¹⁷⁷⁶

2016, p. 14.

¹⁷⁶⁷ [Additional Protocol I](#), Article 70; [Geneva Convention IV](#), Article 23. With regard to the law of occupation see [Geneva Convention IV](#), Articles 55, 56 and [Additional Protocol I](#), Article 69. Ukraine ratified the 1949 Geneva Conventions on 3 August 1954. See ICRC, [Treaties, States Parties and Commentaries, Ukraine](#).

¹⁷⁶⁸ [ICRC Q&A and lexicon on humanitarian access](#), p. 11; [ICRC Commentary on Additional Protocol I](#), para. 2805; UN-OCHA, [Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict](#), 2016, p. 48.

¹⁷⁶⁹ [ICRC Commentary on Additional Protocol I](#), para. 2101.

¹⁷⁷⁰ [ICRC Commentary on Additional Protocol I](#), para. 2101.

¹⁷⁷¹ Group of Eminent International and Regional Experts on Yemen, , [Report of the detailed findings of the Group of Eminent International and Regional Experts on Yemen](#), A/HRC/42/CRP.1, 3 September 2019, paras 752-753, 755; Group of Eminent International and Regional Experts on Yemen, [Report of the Group of Eminent International and Regional Experts on Yemen](#), A/HRC/48/20, 13 September 2021, para. 34; Mwatana for Human Rights and Global Rights Compliance, [Starvation Makers, The Use of Starvation by Warring Parties in Yemen](#), September 2021, pp 133-142.

¹⁷⁷² Mwatana for Human Rights and Global Rights Compliance, [Starvation Makers, The Use of Starvation by Warring Parties in Yemen](#), September 2021, pp 156-162.

¹⁷⁷³ Group of Eminent International and Regional Experts on Yemen, [Detailed findings of the Group of Eminent International and Regional Experts on Yemen](#), A:HRC/45/CRP.7, 29 September 2020, para. 118.

¹⁷⁷⁴ Group of Eminent International and Regional Experts on Yemen, [Detailed findings of the Group of Eminent International and Regional Experts on Yemen](#), A:HRC/45/CRP.7, 29 September 2020, para. 120.

¹⁷⁷⁵ Group of Eminent International and Regional Experts on Yemen, [Report of the detailed findings of the Group of Eminent International and Regional Experts on Yemen](#), A/HRC/42/CRP.1, 3 September 2019, para. 757; Group of Eminent International and Regional Experts on Yemen, [Detailed findings of the Group of Eminent International and Regional Experts on Yemen](#), A:HRC/45/CRP.7, 29 September 2020, paras 122-124.

¹⁷⁷⁶ Group of Eminent International and Regional Experts on Yemen, [Report of the detailed findings of the Group of Eminent International and Regional Experts on Yemen](#), A/HRC/42/CRP.1, 2 September 2019, paras 753, 756; Mwatana for Human Rights and Global Rights Compliance, [Starvation Makers, The Use of Starvation by Warring Parties in Yemen](#), September 2021, pp 180-192, 202 (“Fishing boats constitute objects indispensable to survival, as “they were necessary to catch fish to feed the owners of the boats, the individuals working for them, their families and other members of the civilian population.”).

- Interfering with humanitarian relief operations by “stealing or diverting food baskets; destroying food or storing it in a way that results in it being unfit for human consumption or until its expiration; [...] arbitrarily denying food aid by selectively providing it only to persons loyal to the controlling party to the conflict (to the detriment of others in need of that same aid); and distributing spoiled food.”¹⁷⁷⁷
- Obstructing the distribution of humanitarian aid through “(a) arrest and intimidation of aid workers; (b) non-respect of the independence of humanitarian organisations; (c) denial, delay or cancellation of visas; and (d) interference in the selection of beneficiaries and areas of operation.”¹⁷⁷⁸

869. **Proof of starvation is not required.** The objective element does not require that victims die from starvation or that they suffer as a result of the deprivation of indispensable objects.¹⁷⁷⁹ It is sufficient that “civilians are deprived of objects indispensable to their survival, that is, a deprivation that would cause them in the future to starve, without requiring that the deprivation takes its effect over time.”¹⁷⁸⁰

870. **Definition of Civilians.** The deprivation of objects indispensable to survival is unlawful when directed against civilians. Article 50(1) of [Additional Protocol I](#) defines civilians as any person who is not a combatant. Combatants are members of the armed forces of the parties to the armed conflict expect for medical and religious personnel.¹⁷⁸¹ Civilians enjoy general protection from military operations, unless and for such time as they directly participate in hostilities.¹⁷⁸²

871. **Exceptions.** In accordance with Article 54(3)(a) of [Additional Protocol I](#), it is permissible to target objects indispensable for the survival if they are used exclusively for the sustenance of the opposing forces. However, as noted by the ICRC Commentary “agricultural areas or drinking water installations are hardly likely to be used solely for the benefit of armed forces.”¹⁷⁸³

872. Concerning objects indispensable to survival that are used “in direct support of military action”, e.g., a food-storage barn that is used to provide cover to the enemy, Article 54(3)(b) of [Additional Protocol I](#) stipulates that they may be targeted as long

¹⁷⁷⁷ Group of Eminent International and Regional Experts on Yemen, [Detailed findings of the Group of Eminent International and Regional Experts on Yemen](#), A:HRC/45/CRP.7, 29 September 2020, para. 127; Panel of Experts on Yemen, [Final Report of the Panel of Experts on Yemen established pursuant to Security Council resolution 2140\(2014\)](#), S/2022/50, 26 January 2022, para. 137.

¹⁷⁷⁸ Panel of Experts on Yemen, [Final Report of the Panel of Experts on Yemen](#), S/2019/83, 25 January 2019, para. 168.

¹⁷⁷⁹ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 517, para. 790.

¹⁷⁸⁰ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 517, para. 790.

¹⁷⁸¹ [Additional Protocol I](#), Article 43 (2). See also [Geneva Convention III](#), Article 4(A) paras 2-6. See paras 641-670.

¹⁷⁸² [Additional Protocol I](#), Article 51(1), Article 51(3). The ICRC offers guidance in determining the acts that constitute direct participation in hostilities. Specifically, civilians are considered to be directly participating in hostilities when they carry out acts that meet the following criteria cumulatively: threshold of harm, direct causation, and belligerent nexus. ICRC, [Interpretative Guidance on the Notion of Direct Participation in Hostilities](#), p. 46. See above, See paras 641-670.

¹⁷⁸³ [ICRC Commentary on Additional Protocol I](#), para. 2112.

as the attack is not expected to cause the starvation of the civilian population or force their movement.¹⁷⁸⁴

873. The crime of using starvation as a method of warfare is likely to be considered in the context of sieges and blockades (including naval blockades). While sieges and blockades are not prohibited as such under IHL, they may only be imposed with a view to achieve a military advantage and not to cause the starvation of the civilian population.¹⁷⁸⁵

c. Definition of using starvation as a method of warfare (Subjective Elements)¹⁷⁸⁶

874. The subjective element of the war crime of using starvation as a method of warfare requires that the perpetrator: (1) intentionally and knowingly deprived civilians of objects indispensable to survival and (2) the perpetrator had the specific intent to starve civilians as a method of warfare.¹⁷⁸⁷

875. **Specific intent to starve civilians.** While it is not required to show that victims die from starvation, to convict a perpetrator for the war crime of starvation it must be shown that he/she had the specific intent to starve civilians as a method of warfare when depriving them of objects indispensable for survival. It aims to exclude conviction for unintended starvation as a result of mismanagement.¹⁷⁸⁸

876. **Specific intent to starve civilians “as a method of warfare”.** The reference to “method of warfare” in the subjective element of the crime would cover situations where the intention of the perpetrator(s) is to use starvation to accomplish a military advantage, for instance “to achieve a speedier subjection of a besieged town or village, as was medieval warfare practice, or to pressure the adversary to accept some other aim of the attacker, [...] [or] to force [civilians] to move out of a certain area in order to facilitate the control over that area.”¹⁷⁸⁹ More broadly, the reference to “method of warfare” could be interpreted as a “specific, tactical or strategic, way of conducting

¹⁷⁸⁴ [ICRC Commentary on Additional Protocol I](#), para. 2110; Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, pp 516-517, para. 786.

¹⁷⁸⁵ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, pp 515-516, paras 782-783; Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary*, Cambridge: Cambridge University Press, 2003, p. 366; [San Remo Manual on International Law Applicable to Armed Conflicts at Sea](#), 12 June 1994, paras 102-103; ICRC, IHL Database, Customary IHL, [Rule 53. Starvation as a Method of Warfare](#).

¹⁷⁸⁶ This section details the subjective elements for this war crime as detailed under international law. However, the general part of the CCU identifies subjective elements that apply to crimes. See Articles 23, 24 and 25 of the CCU. It will be necessary to consider the relevance of the subjective elements in the general part of the CCU when considering the elements of this crime as applied under Article 438 CCU.

¹⁷⁸⁷ [ICC Elements of Crimes](#), Article 8(2)(b)(xxv) which expressly mentions as a distinct element of the crime that the perpetrator intended to starve civilians as a method of warfare; [ICC Statute](#), Article 30.

¹⁷⁸⁸ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 518, para. 793.

¹⁷⁸⁹ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 518, para. 794.

hostilities,”¹⁷⁹⁰ but, as commentators suggest, “nothing more demanding than this is required.”¹⁷⁹¹

d. Contextual Elements

877. In addition, as with all war crimes, it is necessary to demonstrate the following contextual elements:

- i. There was an international armed conflict;¹⁷⁹²
- ii. The conduct took place in the context of and was associated with an international armed conflict;¹⁷⁹³ and
- iii. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.¹⁷⁹⁴

¹⁷⁹⁰ How Does Law Protect in War, [Conduct of Hostilities](#).

¹⁷⁹¹ Mwatana for Human Rights and Global Rights Compliance, [Starvation Makers, The Use of Starvation by Warring Parties in Yemen](#), September 2021, pp 102-103.

¹⁷⁹² See above, paras [188-189](#).

¹⁷⁹³ See above, paras [190-198](#). See also [ICC Elements of Crimes](#), Article 8(2)(b)(v).

¹⁷⁹⁴ See above, para. [199](#). See also [ICC Elements of Crimes](#), Article 8(2)(b)(v).

v. Unlawful Infliction of Terror on Civilians (ICTY Statute, Article 3)

APPLICABILITY: UNLAWFUL INFLICTION OF TERROR ON CIVILIANS IS NOT SPECIFICALLY LISTED UNDER ARTICLE 438 OF THE CCU. HOWEVER, IT IS SUBSUMED UNDER THE NOTION OF “USE OF METHODS OF THE WARFARE PROHIBITED BY INTERNATIONAL INSTRUMENTS”, OR ANY “OTHER VIOLATIONS OF RULES OF THE WARFARE RECOGNIZED BY INTERNATIONAL INSTRUMENTS CONSENTED TO BY BINDING BY THE VERKHOVNA RADA” (PARLIAMENT) OF UKRAINE” (PARAS [879-882](#)).

Elements of the crimes: To convict a perpetrator for unlawful infliction of terror on civilians as a war crime the following elements need to be established:

(1) Objective elements

- Acts or threats of violence resulting in grave consequences for the victims (paras [884-886](#)).
- Directed against the civilian population or individual civilians not taking direct part in hostilities (paras [887-888](#)).

(2) Subjective elements

- The perpetrator wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of the acts of violence or threats thereof (paras [890-892](#)).
- The perpetrator has the specific intent to spread terror among the civilian population (paras [894-894](#)).

(3) Contextual elements

- There is an international armed conflict (para. [895](#)).
- The conduct of the perpetrator took place in the context and was associated with the conflict (para. [895](#)).
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict (para. [895](#)).

a. Applicability under Article 438

878. Although not explicitly mentioned in Article 438 of the CCU, unlawful infliction of terror on civilians may be subsumed within “use of methods of the warfare prohibited by international instruments” and “any other violations of rules of warfare recognized by international instruments consented to be binding by the Verkhovna Rada of Ukraine” to which Article 438(1) refers. As explained below, the conduct is prohibited under international instruments ratified by Ukraine and this prohibition has been recognised as a war crime in both international and non-international armed conflicts. These factors support interpreting Article 438 of the CCU as criminalising violations of this IHL prohibition.

879. Unlawful infliction of terror on civilians is a violation of the laws of warfare recognised in international treaties ratified by Ukraine. Civilians are protected from attacks under Geneva Convention IV and [Additional Protocol I](#).¹⁷⁹⁵ Additionally, Article 51(2) of [Additional Protocol I](#) requires, in international armed conflicts, “[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”¹⁷⁹⁶ Spreading terror among the civilian population constitutes a prohibited method of warfare.¹⁷⁹⁷ The ICRC identified this prohibition as being one of customary international law.¹⁷⁹⁸ Ukraine has ratified Additional Protocol I.¹⁷⁹⁹ Therefore, for the purposes of Article 438 of the CCU, the prohibition against the infliction of terror on civilians is a violation of the laws of warfare recognised in an international instrument accepted as binding by the Ukrainian parliament.
880. **Recognition as a war crime.** While the [Statute of the ICTY](#) did not explicitly list the infliction of terror on civilians as a war crime under Article 3, it has been recognised as a principle of customary international law and as war crime under this Article.¹⁸⁰⁰ The [ICC Statute](#) does not include the infliction of terror on civilians within the listed war crimes under Article 8, however this does not negate the existence of this war crime under customary international law. Rather this limitation is borne out of the Assembly of States Parties’ failure to accept a definition of terrorism to be included within the Statute.¹⁸⁰¹
881. These factors support recognition of the criminalisation of unlawful infliction of terror on civilians under Article 438 of the CCU.

b. Definition of unlawful infliction of terror on civilians (Objective Elements)

882. The objective elements of the war crime of unlawful infliction of terror on civilians are: (1) acts or threats of violence resulting in grave consequences for the victims and

¹⁷⁹⁵ [Additional Protocol I](#), Articles 48 and 51(2).

¹⁷⁹⁶ [Additional Protocol I](#), Article 51(2). [Additional Protocol II](#), Article 13(2) contains a similar prohibition for non-international armed conflicts.

¹⁷⁹⁷ ICRC, How Does Law Protect in War, [Terror \(spreading of\)](#).

¹⁷⁹⁸ ICRC, IHL Database, Customary Law, [Rule 2. Violence Aimed at Spreading Terror among the Civilian Population](#). See also ICTY, [Galic Appeal Judgement](#), para. 86 (“the prohibition of terror against the civilian population as enshrined in Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II, was a part of customary international law from the time of its inclusion in those treaties”).

¹⁷⁹⁹ Ukraine ratified Additional Protocol I on 25 January 1990. ICRC, IHL Database, IHL Treaties, [Treaties and State Parties, Additional Protocol I](#).

¹⁸⁰⁰ ICTY, [D. Milosevic Appeal Judgement](#), paras 32-37; ICTY, [Galic Appeal Judgement](#), para. 86 (“the prohibition of terror against the civilian population as enshrined in Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II, was a part of customary international law from the time of its inclusion in those treaties”), paras 70-109; ICTY, [Galic Trial Judgement](#), paras 86-138 where the Trial Chamber found that unlawful infliction of terror on civilians met all four prongs of the Tadic test for an offense included under Article 3 (“a breach of the prohibition of terror against the civilian population gave rise to individual criminal responsibility pursuant to customary international law at the time of the commission of the offences”). Article 3(d) of the [SCSL Statute](#) and Article 4(d) of the [ICTR Statute](#) also explicitly list “[a]cts of terrorism” as a war crime.

¹⁸⁰¹ See Van Schaack and Slye, *International Criminal Law and Its Enforcement, Cases and Materials*, 4th Edition, Foundation Press, 2019, p. 762 (“Although early drafts contemplated the inclusion of the crime of terrorism, the ICC Statute (finalized in 1998) does not list terrorism as a separate crime over which it has subject matter jurisdiction. Nor is the crime of inflicting terror on the civilian population listed as a war crime in Article 8.”).

(2) directed against the civilian population or individual civilians not taking direct part in hostilities.¹⁸⁰²

883. **Acts or threats of violence resulting in grave consequences for the victims.** There is no exhaustive list of acts or threats of violence and “the nature of the acts of violence or threats thereof constitutive of the crime of terror can vary”.¹⁸⁰³ The ICRC cites as examples of conduct prohibited under this rule: “offensive support or strike operations aimed at spreading terror among the civilian population, indiscriminate and widespread shelling, and the regular bombardment of cities, but also assault, rape, abuse and torture of women and children, and mass killing.”¹⁸⁰⁴

884. The “acts or threats of violence” need not result in “actual infliction of death or serious harm to body or health”.¹⁸⁰⁵ What is required, however, is that the victims suffered grave consequences resulting from the acts or threats of violence. To establish the required gravity of these acts or threats of violence, it is sufficient to show that the victims suffered grave consequences, including but not limited to serious injury to body or health such as psychological damage.¹⁸⁰⁶

885. Moreover, “actual terrorisation of the civilian population is not an element of the crime.”¹⁸⁰⁷ Thus, it is not required to show a causal connection between the acts or threats of violence and terrorisation of the civilian population.

¹⁸⁰² ICTY, *Prlic et al. Appeal Judgement*, Vol. I of III, para. 424; ICTY, *D. Milosevic Appeal Judgement*, paras 31-36; ICTY, *Galic Appeal Judgement*, para. 106.

¹⁸⁰³ ICTY, *D. Milosevic Appeal Judgement*, para. 33 (“Whereas the nature of the acts of violence or threats thereof constitutive of the crime of terror can vary, the Appeals Chamber is satisfied that the *actus reus* of the crime of terror has been established in this case and does not find it necessary to explore the matter any further.”) (footnotes omitted).

¹⁸⁰⁴ ICRC, IHL Database, Customary Law, [Rule 2. Violence Aimed at Spreading Terror among the Civilian Population](#). For an example in the ICTY jurisprudence, see ICTY, *Galic Appeal Judgement*, para. 106 (“With regard to Galic’s claim that the Trial Chamber convicted him under Count 1 for ‘acts of violence’ while the facts alleged in the Indictment were concerned with a ‘protracted campaign of shelling and sniping upon civilians areas in Sarajevo’, the Appeals Chamber simply notes that Galic disregards the unambiguous finding of the Trial Chamber with regard to the *actus reus* of the crime of terror against the civilian population as charged, that is that ‘attacks by sniping and shelling on the civilian population and individual civilians not taking part in hostilities constitute acts of violence’. The Appeals Chamber finds that the sniping and shelling in question undoubtedly fall within the scope of ‘acts of violence’ contemplated under the definition of the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population.”) (footnotes omitted).

¹⁸⁰⁵ ICTY, *D. Milosevic Appeal Judgement*, , para. 33 (“The Appeals Chamber finds that the Trial Chamber misinterpreted the Galic jurisprudence by stating that ‘actual infliction of death or serious harm to body or health is a required element of the crime of terror’, and thus committed an error of law. Causing death or serious injury to body or health represents only one of the possible modes of commission of the crime of terror, and thus is not an element of the offence *per se*. What is required, however, in order for the offence to fall under the jurisdiction of this Tribunal, is that the victims suffered grave consequences resulting from the acts or threats of violence; such grave consequences include, but are not limited to death or serious injury to body or health. Accordingly, because the Trial Chamber established in the present case that all the incidents imputed to the SRK constituted unlawful attacks against civilians, and thus caused death or serious injury to body or health of civilians, the threshold of gravity required for the crime of terror based on those incidents has been met.”) (footnotes omitted).

¹⁸⁰⁶ ICTY, *D. Milosevic Appeal Judgement*, , para. 33 (“Causing death or serious injury to body or health represents only one of the possible modes of commission of the crime of terror, and thus is not an element of the offence *per se*. What is required, however, in order for the offence to fall under the jurisdiction of this Tribunal, is that the victims suffered grave consequences resulting from the acts or threats of violence; such grave consequences include, but are not limited to death or serious injury to body or health.”) (footnotes omitted); ICTY, *Prlic et al. Appeal Judgement*, Vol. I of III, para. 563.

¹⁸⁰⁷ ICTY, *Prlic et al. Appeal Judgement*, Vol. I of III, para. 563 (“the crime of unlawful infliction of terror involves cases in which ‘extensive trauma and psychological damage’ are caused by ‘attacks [which] were designed to keep the inhabitants in a constant state of terror’, the actual terrorisation of the civilian population is not an element of the

CASE-STUDY: WHILE THE ACTUAL TERRORISATION OF THE CIVILIAN POPULATION IS NOT AN ELEMENT OF THE CRIME IT MAY ASSIST IN ESTABLISHING THE GRAVITY REQUIREMENT OF THE ACTS OR THREATS OF VIOLENCE

Prlic et al. Appeal Judgement, Vol. I of III, para. 564 (footnotes omitted)

The Appeals Chamber notes, [...], that evidence of actual terrorisation may contribute to establishing other elements of the crime of terror. In the instant case, the Trial Chamber considered evidence regarding the terrifying effect on the civilian population, particularly evidence of the fear of the civilian population of East Mostar living under the deafening sound of HVO shelling and firing and them having to run for cover in the streets. It recalled this terrifying effect in its legal findings on unlawful infliction of terror on civilians, and while it did not expressly indicate why it, did so, the Appeals Chamber notes that it has previously held that psychological impact on a population may satisfy the required gravity threshold of the crime. The Appeals Chamber considers that a reasonable trier of fact could rely on the evidence regarding the terrifying effect on the civilian population outlined above for this purpose. In light of the fact that this psychological impact was therefore relevant to the Trial Chamber's legal conclusion that the crime of unlawful infliction of terror had been established, the Appeals Chamber considers that Praljak fails to show that the Trial Chamber erred in law in its reasoning.

886. **Directed against the civilian population or individual civilians not taking direct part in hostilities.** Acts or threats of violence do not include legitimate attacks on combatants.¹⁸⁰⁸ Inflicting terror is unlawful when directed against civilians. Article 50(1) of [Additional Protocol I](#) defines civilians as any person who is not a combatant. Combatants are members of the armed forces of the parties to the conflict except for medical and religious personnel.¹⁸⁰⁹ Civilians enjoy general protection from military operations, and remain protected against direct attack unless and for such time as they directly participate in hostilities.¹⁸¹⁰
887. Regarding the offender, a small number of States, including the United States, maintain that State actors cannot commit the crime of unlawfully inflicting terror.¹⁸¹¹ However,

crime of unlawful infliction of terror.”) (footnotes omitted); ICTY, *D. Milosevic Appeal Judgement*, para. 35 (“while ‘extensive trauma and psychological damage form part of the acts or threats of violence’, the ‘actual terrorisation of the civilian population is not an element of the crime’. It should be noted, however, that evidence of actual terrorisation may contribute to establishing other elements of the crime of terror.”) (footnotes omitted).

¹⁸⁰⁸ ICTY, *Galic Trial Judgement*, para. 139 (“With respect to the ‘acts of violence’, these do not include legitimate attacks against combatants but only unlawful attacks against civilians.”)

¹⁸⁰⁹ [Additional Protocol I](#), Article 43 (2). See also [Geneva Convention III](#), Article 4(A) paras 2-6. See above, See paras 641-670.

¹⁸¹⁰ [Additional Protocol I](#), Article 51(1), Article 51(2), Article 51(3). The ICRC offers guidance in determining the acts that constitute direct participation in hostilities. Specifically, civilians are considered to be directly participating in hostilities when they carry out acts that meet the following criteria cumulatively: threshold of harm, direct causation, and belligerent nexus. ICRC, [Interpretative Guidance on the Notion of Direct Participation in Hostilities](#), p. 46. See above, paras 641-670.

¹⁸¹¹ Beth Van Schaack, *Finding the Tort of Terrorism in International Law*, 28 Rev. Litig. 381, 410-11 (2008), para. 429. Cuba and Turkey also resist the notion of state terrorism. *Ibid.* para. 458; Van Schaack and Slye, *International Criminal Law and Its Enforcement, Cases and Materials*, 4th Edition. 2019, p. 739.

State actors and particularly, military commanders have consistently been charged with this crime before the ICTY and the SCSL.¹⁸¹²

c. Definition of unlawful infliction of terror on civilians (Subjective Elements)¹⁸¹³

888. As to the subjective elements of the war crime of unlawful infliction of terror on civilians, it requires the perpetrator to have: (1) the general intent to make the civilian population or individual civilians not taking direct part in hostilities the object of the acts of violence or threats thereof; and (2) the specific intent to spread terror among the civilian population.¹⁸¹⁴

**ICTY, D. MILOSEVIC APPEAL JUDGEMENT, PARA. 37
(FOOTNOTES OMITTED):**

“the *mens rea* of the crime of terror consists of the intent to make the civilian population or individual civilians not taking direct part in hostilities the object of the acts of violence or threats thereof, and of the specific intent to spread terror among the civilian population. While spreading terror must be the primary purpose of the acts or threats of violence, it need not be the only one.”

889. **The perpetrator wilfully made the civilian population or an individual civilian the object of acts or threats of violence.** This intent also includes that the perpetrator was aware or should have been aware of the civilian status of the persons attacked.¹⁸¹⁵ In cases of doubt as to the status of the persons attacked, the Prosecution must show that a reasonable person could not have believed that the individuals attacked were combatants.¹⁸¹⁶

890. **Specific intent to spread terror among the civilian population.** While actual terrorisation is not an element of this crime, evidence of the terrifying effect of the acts or threats of violence such as the psychological impact on the civilian population as well as evidence of actual terrorisation may be considered to establish the specific intent to spread terror.¹⁸¹⁷

¹⁸¹² See e.g. ICTY, *Prlic et al.* [Appeal Judgement](#), Vol. I of III, paras 4-9; ICTY, *D. Milosevic Appeal Judgement*, paras 2-3; SCSL, *Fofana Trial Judgement*, paras 1-3; ICTY, *Galic Appeal Judgement*, paras 2-3.

¹⁸¹³ This section details the subjective elements for this war crime as detailed under international law. However, the general part of the CCU identifies subjective elements that apply to crimes. See Articles 23, 24 and 25 of the CCU. It will be necessary to consider the relevance of the subjective elements in the general part of the CCU when considering the elements of this crime as applied under Article 438 CCU.

¹⁸¹⁴ ICTY, *Prlic et al. Appeal Judgement*, Vol. II of III, para. 2400; ICTY, *D. Milosevic Appeal Judgement*, para. 37.

¹⁸¹⁵ ICTY, *D. Milosevic Appeal Judgement*, para. 60 (“[...] [T]he Trial Chamber specified that in order to establish the *mens rea* for the offence of unlawful attacks against civilians (and thus for the crime of terror), it must be shown that the perpetrator was aware or should have been aware of the civilian status of the persons attacked.”).

¹⁸¹⁶ ICTY, *D. Milosevic Appeal Judgement*, para. 60 (“In cases of doubt, it held, the Prosecution must show that in the given circumstances, a reasonable person could not have believed that the individual attacked was a combatant.”) (footnotes omitted).

¹⁸¹⁷ ICTY, *Prlic et al. Appeal Judgement*, Vol. I of III, para. 562 (“Turning to Praljak's submissions related to the Trial Chamber's finding that the crime of unlawful infliction of terror was committed, the Appeals Chamber first recalls that the Trial Chamber was required to establish that the primary purpose of the acts or threats of violence committed in East Mostar was to spread terror among the civilian population and that the perpetrators of the crime acted with

ICTY, GALIC APPEAL JUDGEMENT, PARA. 104 (FOOTNOTES OMITTED):

[A]ctual terrorisation of the civilian populations is not an element of the crime. The *mens rea* of the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population is composed of the specific intent to spread terror among the civilian population. Further, the Appeals Chamber finds that a plain reading of Article 51(2) suggests that the purpose of the unlawful acts or threats to commit such unlawful acts need not be the only purpose of the acts or threats of violence. The fact that other purposes may have coexisted simultaneously with the purpose of spreading terror among the civilian population would not disprove this charge, provided that the intent to spread terror among the civilian population was principal among the aims. Such intent can be inferred from the circumstances of the acts or threats, that is from their nature, manner, timing and duration.

891. The subjective elements of the unlawful infliction of terror can be established through various factors including, but not limited to, the nature, duration, timing, and manner of the threats or acts of violence.¹⁸¹⁸ For example, the indiscriminate nature of an attack and/or evidence of the psychological impact of the threats or acts of violence on the population.¹⁸¹⁹

the specific intent to spread terror. The Appeals Chamber considers that Praljak ignores findings when submitting that, in light of the Trial Chamber's admission that the shelling was aimed at military targets, it failed to establish that the purpose of the shelling was to spread terror and that any HVO member had the specific intent to spread terror. Namely, the Trial Chamber found that the attack was indiscriminate as the HVO's shelling and firing were not limited to military targets; rather, the whole of East Mostar was subjected to daily and intense shelling and artillery fire in which heavy artillery was used. The indiscriminate nature of an attack was a reasonable factor for the Trial Chamber to consider in determining specific intent to spread terror. The Trial Chamber also considered, *inter alia*, the HVO's deliberate shelling and destruction of ten mosques in East Mostar. Finally, it expressly linked shelling and sniping as factors contributing to the terrorisation of the population of East Mostar. The Appeals Chamber considers that a reasonable trier of fact could conclude that HVO actions were conducted with the requisite specific intent to spread terror on these bases. Praljak fails to show that the Trial Chamber erred in this respect. His argument is dismissed.") (footnotes omitted).

¹⁸¹⁸ ICTY, *Prlic et al. Appeal Judgement*, Vol. II of III, para. 2400 ("While spreading terror must be the primary purpose of the acts or threats of violence, it need not be the only one and can be inferred from the 'nature, manner, timing, and duration' of the acts or threats.") (footnotes omitted).

¹⁸¹⁹ ICTY, *Prlic et al. Appeal Judgement*, Vol. I of III, paras 562-563; ICTY, *D. Milosevic Appeal Judgement*, para. 37 ("While spreading terror must be the primary purpose of the acts or threats of violence, it need not be the only one. The Galic Appeal Judgement suggests that such intent can be inferred from the 'nature, manner, timing and duration' of the acts or threats. However, this is not an exhaustive list of mandatory considerations but an indication of some factors that may be taken into account according to the circumstances of the case. Contrary to Milosevic's assertion, in the instant case the Trial Chamber did explicitly state and consider these factors. Furthermore, the Appeals Chamber rejects Milosevic's argument that the Trial Chamber could not take into account the evidence relative to the *actus reus* of the crime when establishing the *mens rea*. In this regard, the Appeals Chamber finds that both the actual infliction of terror and the indiscriminate nature of the attack were reasonable factors for the Trial Chamber to consider in determining the specific intent of the accused in this case.") (footnotes omitted).

CASE-STUDY: CONSIDERATIONS TO ESTABLISH THE SPECIFIC INTENT TO SPREAD TERROR *PRLIC ET AL. APPEAL JUDGEMENT, VOL. I OF III, PARA. 562 (FOOTNOTES OMITTED).*

“Turning to Praljak’s submissions related to the Trial Chamber’s finding that the crime of unlawful infliction of terror was committed, the Appeals Chamber first recalls that the Trial Chamber was required to establish that the primary purpose of the acts or threats of violence committed in East Mostar was to spread terror among the civilian population and that the perpetrators of the crime acted with the specific intent to spread terror. The Appeals Chamber considers that Praljak ignores findings when submitting that, in light of the Trial Chamber’s admission that the shelling was aimed at military targets, it failed to establish that the purpose of the shelling was to spread terror and that any HVO member had the specific intent to spread terror. Namely, the Trial Chamber found that the attack was indiscriminate as the HVO’s shelling and firing were not limited to military targets; rather, the whole of East Mostar was subjected to daily and intense shelling and artillery fire in which heavy artillery was used. The indiscriminate nature of an attack was a reasonable factor for the Trial Chamber to consider in determining specific intent to spread terror. The Trial Chamber also considered, *inter alia*, the HVO’s deliberate shelling and destruction of ten mosques in East Mostar. Finally, it expressly linked shelling and sniping as factors contributing to the terrorisation of the population of East Mostar. The Appeals Chamber considers that a reasonable trier of fact could conclude that HVO actions were conducted with the requisite specific intent to spread terror on these bases. Praljak fails to show that the Trial Chamber erred in this respect. His argument is dismissed.”

892. The specific intent to spread terror among the civilian population must be the primary purpose of the acts or threats of violence. However, spreading terror need not be the only purpose behind such acts or threats.

ICTY, *PRLIC ET AL. APPEAL JUDGEMENT, VOL. I OF III, PARA. 424 (FOOTNOTES OMITTED):*

“Other purposes of the unlawful acts or threats may have coexisted simultaneously with the purpose of spreading terror among the civilian population, provided that the intent to spread terror among the civilian population was principal among the aims. Such intent can be inferred from the ‘nature, manner, timing and duration’ of the acts or threats.”

893. The existence of military targets within an attack does not necessarily negate the finding that a perpetrator acted with the specific intent to spread terror.¹⁸²⁰

¹⁸²⁰ ICTY, *Prlic et al. Appeal Judgement*, Vol. I of III, para. 562 (“The Appeals Chamber considers that Praljak ignores findings when submitting that, in light of the Trial Chamber’s admission that the shelling was aimed at military targets, it failed to establish that the purpose of the shelling was to spread terror and that any HVO member had the specific intent to spread terror. Namely, the Trial Chamber found that the attack was indiscriminate as the HVO’s shelling and firing were not limited to military targets; rather, the whole of East Mostar was subjected to daily and intense shelling and artillery fire in which heavy artillery was used. The indiscriminate nature of an attack was a reasonable factor for the Trial Chamber to consider in determining specific intent to spread terror. The Trial Chamber also considered, *inter alia*, the HVO’s deliberate shelling and destruction of ten mosques in East Mostar. Finally, it expressly linked shelling and sniping as factors contributing to the terrorisation of the population of East Mostar.”)

d. Contextual Elements

894. In addition, as with all war crimes, it is necessary to demonstrate the following contextual elements:
- i. There was an international armed conflict;¹⁸²¹
 - ii. The conduct took place in the context of and was associated with an international armed conflict;¹⁸²² and
 - iii. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.¹⁸²³

The Appeals Chamber considers that a reasonable trier of fact could conclude that HVO actions were conducted with the requisite specific intent to spread terror on these bases.”) (footnotes omitted).

¹⁸²¹ See above, paras [188-189](#).

¹⁸²² See above, paras [190-198](#).

¹⁸²³ See above, para. [199](#).

- f) War Crimes against Humanitarian Personnel and Operations
- i. Intentionally directing attacks against personnel or objects involved in a humanitarian assistance or peacekeeping mission entitled to the protection under IHL (ICC Statute, Article 8(2)(b)(iii))

APPLICABILITY: INTENTIONALLY DIRECTING ATTACKS AGAINST PERSONNEL OR OBJECTS INVOLVED IN A HUMANITARIAN ASSISTANCE OR PEACEKEEPING MISSION ENTITLED TO THE PROTECTION UNDER IHL CAN BE CONSIDERED CRIMINALISED UNDER ARTICLE 438(1) OF THE CCU, AS IT IS SUBSUMED UNDER THE NOTION OF “OTHER VIOLATIONS OF RULES OF THE WARFARE RECOGNIZED BY INTERNATIONAL INSTRUMENTS CONSENTED TO BY BINDING BY THE VERKHOVNA RADA (PARLIAMENT) OF UKRAINE”. (PARAS [896-899](#)).

Elements of the crimes: To convict a perpetrator of attacks against personnel or objects involved in a humanitarian assistance or peacekeeping mission entitled to the protection under IHL as a war crime the following elements need to be established:

(1) Objective elements

- The perpetrator directed an attack (paras [901-902](#)).
- The object of the attack was personnel, installations, material, units or vehicles involved in a (a) humanitarian assistance or (b) peacekeeping mission in accordance with the Charter of the United Nations (paras [903-913](#)).
- Such personnel, installations, material, units or vehicles were entitled to that protection given to civilians or civilian objects under the international law of armed conflict (paras [914-916](#)).

(2) Subjective elements

- The perpetrator intentionally directed an attack (para. [918](#)).
- The perpetrator intended personnel or objects involved in a humanitarian assistance or peacekeeping mission to be the object of the attack (para. [919](#)).
- The perpetrator was aware of the factual circumstances that established the protection given to civilians or civilian objects under the international law of armed conflict (para. [920](#)).

(3) Contextual elements

- There is an international armed conflict (para. [921](#)).
- The conduct of the perpetrator took place in the context and was associated with the conflict (para. [921](#)).
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict (para. [921](#)).

a. Applicability under Article 438

895. Although not explicitly mentioned in Article 438 of the CCU, “attacks against personnel or objects involved in a humanitarian assistance or peacekeeping mission entitled to the protection under IHL” may be subsumed within “any other violations of rules of warfare recognized by international instruments consented to be binding by the Verkhovna Rada of Ukraine” to which Article 438(1) refers. As explained below, the conduct is prohibited under international instruments ratified by Ukraine and this prohibition has been recognised as a war crime. These factors support interpreting Article 438 CCU as criminalising violations of this IHL prohibition.
896. Intentionally directing attacks against personnel or objects involved in a humanitarian assistance or peacekeeping mission entitled to the protection under IHL is a violation of the laws of warfare recognised in international treaties ratified by Ukraine. Article 71(2) of [Additional Protocol I](#) ratified by Ukraine requires, “[personnel participating in relief actions] shall be respected and protected”.¹⁸²⁴ Although the Geneva Conventions and Additional Protocol I do not specially address the protection of peacekeeping missions, Article 7 of the Convention on the Safety of United Nations and Associated Personnel ratified by Ukraine states that “United Nations and associated personnel, their equipment and premises shall not be made the object of attack or of any action that prevents them from discharging their mandate”.¹⁸²⁵
897. **Recognition as a war crime.** Intentionally directing attacks against personnel or objects involved in a humanitarian assistance or peacekeeping mission entitled to the protection under IHL is recognised as a war crime in international armed conflict with the status of customary international law.¹⁸²⁶ The offence has been also codified as a

¹⁸²⁴ Ukraine ratified Additional Protocol I on 25 January 1990. See ICRC, IHL Database, Treaties, States Parties and Commentaries, [Additional Protocol I](#). See also ICRC, IHL Database, Customary IHL, [Practice relating to Rule 31, Ukraine](#) (referring to Ukraine’s Manual on the Application of IHL Rules of 11 September 2004, which states that “[a]ttacks against [personnel participating in humanitarian action] shall be prohibited” and that such attacks constitute “a serious violation of international humanitarian law”).

¹⁸²⁵ Ukraine ratified the Convention on the Safety of United Nations and Associated Personnel on 17 August 1995. United Nations Treaty Collection, [Convention on the Safety of United Nations and Associated Personnel](#). Attacks against peacekeeping personnel and objects have generally been condemned by States, including by Ukraine. ICRC, IHL Database, Customary IHL, [Rule 33. Personnel and Objects Involved in a Peacekeeping Mission](#). ICRC, IHL Database, Customary IHL, [Practice relating to Rule 33, Ukraine](#).

¹⁸²⁶ SCSL, *Sesay et al. Trial Judgement*, para. 218 (“The Chamber considers the condemnation and criminalisation of intentional attacks against personnel and objects involved in a humanitarian or a peacekeeping mission by States and international organisations, the finding of the ICRC and the inclusion of the offence in the ICC Statute in 1998 demonstrate State practice and *opinio juris*. The Chamber is also of the view that this offence is a particularisation of the general and fundamental prohibition in international humanitarian law, in both international and internal conflicts, against attacking civilians and civilian property. This Chamber is, therefore, satisfied that this offence existed in customary international law in both international and non-international conflicts and entailed individual criminal responsibility at the time of the acts alleged in the Indictment.”). ICRC, IHL Database, Customary IHL, [Rule 31. Humanitarian Relief Personnel](#), [Rule 32. Humanitarian Relief Objects](#) and [Rule 33. Personnel and Objects Involved in a Peacekeeping Mission](#); ICRC, IHL Database, Customary IHL, [Rule 156. Definition of War Crimes](#). For peacekeeping missions, see also [Convention on the Safety of United Nations and Associated Personnel](#), Article 9(1) (“The intentional commission of: (a) A murder, kidnapping or other attack upon the person or liberty of any United Nations or associated personnel; (b) A violent attack upon the official premises, the private accommodation or the means of transportation of any United Nations or associated personnel likely to endanger his or her person or liberty; ... shall be made by each State Party a crime under its national law.”).

war crime in Article 8(2)(b)(iii) of the ICC Statute applicable to international armed conflicts and in Article 4(b) of the Statute of the Special Court for Sierra Leone.¹⁸²⁷

898. These factors support recognition of the criminalisation of attacks against personnel or objects involved in a humanitarian assistance or peacekeeping mission entitled to the protection under IHL under Article 438 of the CCU.

b. Definition of attacks against personnel or objects involved in a humanitarian assistance or peacekeeping mission entitled to the protection under IHL (Objective Elements)

899. The objective elements of this crime are: (1) the perpetrator directed an attack; (2) the object of the attack was personnel, installations, material, units or vehicles involved in a (a) humanitarian assistance or (b) peacekeeping mission in accordance with the Charter of the United Nations; and (3) such personnel, installations, material, units or vehicles were entitled to that protection given to civilians or civilian objects under the international law of armed conflict.¹⁸²⁸

900. **The perpetrator directed an attack.** Since the ICC Statute and the Elements of Crimes do not include the definition of the term “attack”, the ICC and the SCSL relied on Article 49 of the Additional Protocol I, which defines the attack as “acts of violence against the adversary, whether in offence or in defence”.¹⁸²⁹ There is no requirement that the attack results in actual physical damage or injury to the personnel or objects,¹⁸³⁰ and

¹⁸²⁷ [ICC Statute](#), Article 8(2)(b)(iii); [SCSL Statute](#), Article 4(b). The ICC Statute also identifies this offence as a war crime in non-international armed conflicts, [ICC Statute](#), Article 8(2)(e)(iii).

¹⁸²⁸ [ICC Elements of Crimes](#), Article 8(2)(b)(iii). See also [ICC Elements of Crimes](#), Article 8(2)(e)(iii) in relation to the same offense in the context of non-international armed conflicts. The objective and subjective elements of this crime in international armed conflicts and in non-international armed conflicts are identical. Cases concerning Article 8(2)(e)(iii) of the ICC Statute or in the context of the non-international armed conflict in Sierra Leone may also apply *mutatis mutandis* to the present crime. Given this, this section refers to relevant case law arising in the context of non-international armed conflicts. See e.g., ICC, *Abu Garda Decision on the Confirmation of Charges*, para. 62 (quoting the ICC Elements of Crimes for the analogous crime arising from non-international armed conflict under Article 8(2)(e)(vii)); ICC, *Nourain and Jerbo Jamus Decision on the Confirmation of Charges*, para. 61 (reiterating the legal interpretation of each of the elements of the crime provided for in article 8(2)(e)(iii) of the ICC Statute as set out in the *Abu Garda* decision); SCSL, *Sesay et al. Trial Judgement*, para. 219 (providing the elements of the crime in the context of the non-international armed conflict in Sierra Leone).

¹⁸²⁹ [Additional Protocol I](#), Article 49. ICC, *Abu Garda Decision on the Confirmation of Charges*, paras 64-65 (“64. Taking into consideration the reference to ‘the established framework of international law’ in the chapeau of article 8(2)(e) of the [ICC] Statute, and the reference to the ‘applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict’ in article 21(1)(b) of the [ICC] Statute, the Majority is of the view that it must refer in this regard to the four Geneva Conventions adopted on 12 August 1949 and their two Additional Protocols adopted on 8 June 1977. 65. The term ‘attack’ is defined in article 49 of Additional Protocol I [...] as ‘acts of violence against the adversary, whether in offence or in defence.’”); See also above, paras [641-670](#), [671-688](#). But see *contra* Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, para. 1559 (“Attacks within the meaning of this offence are not limited to military operations under Article 49(1) of Additional Protocol I. Any type of use of force against humanitarian relief organizations and peacekeeping missions is covered. This derives from the underlying Convention on the Safety of United Nations and Associated Personnel, Article 9 of which obligates the treaty parties, among other things, to criminalize killing, kidnapping, and other attacks on the life and freedom of UN personnel as well as violent attacks endangering life or freedom against official bases, private accommodations, or transport of UN personnel. The list in Article 9 can be used to clarify the term ‘attack.’”) (footnotes omitted).

¹⁸³⁰ ICC, *Abu Garda Decision on the Confirmation of Charges*, para. 65 (“[...] article 8 (2)(e)(iii) of the Statute does not require any material result or any harmful impact on the personnel, installations, material, units or vehicles involved in the peacekeeping mission which are being targeted by the attack.”); SCSL, *Sesay et al. Trial Judgement*, paras 220

“the mere attack is the gravamen of the crime”.¹⁸³¹ The scope of the attack does not include threats.¹⁸³²

901. Another important part of this element is the necessity to establish a causal connection between the perpetrator and the attack. Put otherwise, “a causal link between the perpetrator’s conduct and the consequence is necessary, so that the concrete consequence, the attack in this case, can be seen as having been caused by the perpetrator”.¹⁸³³
902. **Personnel or objects (installations, material, units or vehicles) involved in a humanitarian assistance mission.** Since there is no specific definition of the term “humanitarian assistance mission” in treaties or case-law, Articles 70 and 71 of Additional Protocol I dealing with relief actions and relief personnel can provide a useful legal framework.

ADDITIONAL PROTOCOL I, ARTICLE 70: RELIEF ACTIONS

1. If the civilian population of any territory under the control of a Party to the conflict, other than occupied territory, is not adequately provided with the supplies mentioned in Article 69, *relief actions which are humanitarian and impartial in character and conducted without any adverse distinction* shall be undertaken, subject to the agreement of the Parties concerned in such relief actions. Offers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts. [...]

2. The Parties to the conflict and each High Contracting Party shall allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel provided in accordance with this Section, even if such assistance is destined for the civilian population of the adverse Party. (emphasis added)

903. The purpose of the humanitarian assistance mission is to provide the civilian population with supplies essential to their survival, such as food, medical supplies, clothing, bedding, means of shelter, and the means to transport them.¹⁸³⁴ In this regard, the prohibition of attacks against personnel or objects involved in humanitarian assistance is corollary of the prohibition of starvation, which prohibits the deprivation of objects indispensable to survival of civilians, including the wilful impediment of relief supplies.¹⁸³⁵

(“There exists no requirement that there be actual damage to the personnel or objects as a result of the attack.”), 1889; Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, pp 367-368, para. 222.

¹⁸³¹ SCSL, *Sesay et al. Trial Judgement*, para. 220.

¹⁸³² SCSL, *Sesay et al. Trial Judgement*, para. 1889 (“[T]hreats alone do not suffice to prove an act of violence.”).

¹⁸³³ ICC, *Abu Garda Decision on the Confirmation of Charges*, para. 66.

¹⁸³⁴ *Additional Protocol I*, Article 69(1); Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 369, para. 226.

¹⁸³⁵ The ICRC Customary IHL Database indicates that the safety and security of humanitarian relief personnel and objects are “an indispensable condition for the delivery of humanitarian relief to civilian populations in need threatened with starvation”. See ICRC, IHL Database, Customary IHL, , [Rule 31. Humanitarian Relief Personnel](#) and [Rule 32. Humanitarian Relief Objects](#) (“[A]ny attack on, destruction or pillage of relief objects inherently amounts to an impediment of humanitarian relief.”). See above, paras [860-879](#).

904. According to Article 71 of [Additional Protocol I](#), personnel participating in relief actions “shall be respected and protected”. Commentators suggest that protected humanitarian personnel may include “administrative staff, coordinators and logistic experts, doctors, nurses and other specialists and relief workers”.¹⁸³⁶ Humanitarian assistance could also encompass assistance by “non-governmental and inter-governmental organisations”, such as the ICRC¹⁸³⁷ and specialised agencies and programmes of the United Nations.¹⁸³⁸
905. Humanitarian assistance missions must be “in accordance with the Charter of the United Nations”.¹⁸³⁹ Such missions “shall not be regarded as interference in the armed conflict or as unfriendly acts”.¹⁸⁴⁰
906. **Personnel or objects (installations, material, units or vehicles) involved in a peacekeeping mission.** The UN Charter does not include a definition of the term “peacekeeping”.¹⁸⁴¹ The peacekeeping missions “are not static” and “their features may vary depending [...] on the context in which they operate”.¹⁸⁴² They have “evolved to be more complex and multifunctional”.¹⁸⁴³ Following these considerations, the ICC Pre-Trial Chamber has found that:

ICC, ABU GARDA [DECISION ON THE CONFIRMATION OF CHARGES](#), PARA. 71 (FOOTNOTES OMITTED)

71. [...] three basic principles are accepted as determining whether a given mission constitutes a peacekeeping mission, namely (i) consent of the parties; (ii) impartiality; and (iii) the non-use of force except in self-defence.

907. *Consent of the Parties.* The peacekeeping missions are deployed with the consent of the main Parties to the armed conflict, including the host State.¹⁸⁴⁴

¹⁸³⁶ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 369, para. 226.

¹⁸³⁷ See also below, paras [921-931](#).

¹⁸³⁸ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 369, para. 226.

¹⁸³⁹ [ICC Elements of Crimes](#), Article 8(2)(b)(iii)(2).

¹⁸⁴⁰ [Additional Protocol I](#), Article 70(1); ICJ, *Military and Paramilitary Activities in and against Nicaragua*, [Judgement](#), para. 242 (“There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law.”).

¹⁸⁴¹ See, however, [United Nations Peacekeeping Operations Principles and Guidelines](#), p. 18 (defining peacekeeping as follows: “Peacekeeping is a technique designed to preserve the peace, however fragile, where fighting has been halted, and to assist in implementing agreements achieved by the peacemakers. Over the years, peacekeeping has evolved from a primarily military model of observing cease-fires and the separation of forces after inter-state wars, to incorporate a complex mode of many elements — military, police and civilian — working together to help lay the foundations for sustainable peace.”).

¹⁸⁴² ICC, *Abu Garda* [Decision on the Confirmation of Charges](#), para. 71.

¹⁸⁴³ SCSL, *Sesay et al.* [Trial Judgement](#), para. 224.

¹⁸⁴⁴ ICC, *Abu Garda* [Decision on the Confirmation of Charges](#), para. 72 (“[T]he consent of the host State is a prerequisite for a peacekeeping mission to be stationed on its territory and [...] accordingly, such consent must be obtained. Consent of the main parties to the conflict is also sought in practice.”); SCSL, *Sesay et al.* [Trial Judgement](#), para. 226;

908. *Impartiality*. The peacekeeping missions must implement their mandate without favour or prejudice to any party and must adhere to the principles of the UN Charter and the objectives of their mandate.¹⁸⁴⁵ Impartiality should not be confused with neutrality or inactivity, and thus peacekeeping missions “should not condone actions by the parties that violate the undertakings of the peace process or international norms and principles”.¹⁸⁴⁶
909. *The non-use of force except in self-defence*. Peacekeeping missions are not an enforcement tool and thus, in principle, should not use force. They are only authorised to use force in self-defence. They “should only use force as a measure of last resort, when other means have failed”.¹⁸⁴⁷
910. It is important to distinguish the peacekeeping missions from “peace-enforcement” missions established by the UN Security Council under Chapter VII of the UN Charter. Since the latter has the authority to use offensive force beyond self-defence, their personnel are considered as combatants and thus legitimate targets in armed conflicts, and accordingly, they are not covered by the offence.¹⁸⁴⁸
911. In addition, the jurisprudence of the SCSL has added “defence of the mandate” as an exception to the use of force along with self-defence.¹⁸⁴⁹
912. Besides the peacekeeping missions established by the UN,¹⁸⁵⁰ Article 8(2)(b)(iii) of the ICC Statute also covers those established by regional organisations “in accordance with the Charter of the United Nations” such as the European Union,¹⁸⁵¹ the Organi-

ICJ, *Certain Expenses of the United Nations*, [Advisory Opinion](#), p. 164; [United Nations Peacekeeping Operations Principles and Guidelines](#), pp 31-32.

¹⁸⁴⁵ SCSL, *Sesay et al. Trial Judgement*, para. 227 (citing [Report of the Panel on United Nations Peace Operations](#), para. 50); [United Nations Peacekeeping Operations Principles and Guidelines](#), p. 33.

¹⁸⁴⁶ ICC, *Abu Garda Decision on the Confirmation of Charges*, para. 73; SCSL, *Sesay et al. Trial Judgement*, para. 227 (citing [United Nations Peacekeeping Operations Principles and Guidelines](#), p. 33).

¹⁸⁴⁷ SCSL, *Sesay et al. Trial Judgement*, para. 228; [United Nations Peacekeeping Operations Principles and Guidelines](#), p. 34.

¹⁸⁴⁸ ICC, *Abu Garda Decision on the Confirmation of Charges*, para. 74 (The Majority [...] notes the distinction between those peacekeeping missions which may only use force in self-defence and the so-called peace-enforcement missions established by the UN Security Council under Chapter VII of the UN Charter, which have a mandate or are authorized to use force beyond self-defence in order to achieve their objective.”); SCSL, *Sesay et al. Trial Judgement*, para. 230 (“[P]eacekeeping should be understood as distinct from enforcement actions authorised by the Security Council under Chapter VII. [...] By opposition to peacekeeping operations, enforcement action does not rely on the consent of the States concerned, but on the binding authority of the Security Council under Chapter VII.”); Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 370, para. 229.

¹⁸⁴⁹ SCSL, *Sesay et al. Trial Judgement*, paras 225, 228 (“It is now settled law that the concept of self-defence for these missions has evolved to include the ‘right to resist attempts by forceful means to prevent the peacekeeping operation from discharging its duties under the mandate of the Security Council.’”), 233 (“[T]he Chambers opines that the use of force by peacekeepers in self-defence in the discharge of their mandate, provided that it is limited to such use, would not alter or diminish the protection afforded to peacekeepers.”). See also [United Nations Peacekeeping Operations Principles and Guidelines](#), p. 31.

¹⁸⁵⁰ See e.g., SCSL, *Sesay et al. Trial Judgement* concerning attacks on the United Nations Mission in Sierra Leone (UN-AMSIL).

¹⁸⁵¹ [Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community](#) inserted Article 28 A, paragraph 1 of which reads as follows: “The common security and defence policy shall be an integral part of the common foreign and security policy. It shall provide the Union with an operational capacity drawing on civilian and military assets. The Union may use them on missions outside the Union for *peace-keeping*, conflict prevention and strengthening international security in accordance with the principles of the United Nations

sation for Security and Co-operation in Europe (OSCE), the African Union¹⁸⁵² or the Economic Community of West African States (ECOWAS).¹⁸⁵³

913. **Entitlement to protection given to civilians or civilian objects under IHL.** Personnel or objects involved in a humanitarian assistance or peacekeeping mission enjoy protection from attacks “as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict”.¹⁸⁵⁴
914. Peacekeepers and personnel involved in a peacekeeping mission (or in a humanitarian assistance mission) are considered to be civilians. Article 50(1) of [Additional Protocol I](#) defines civilians as any person who is not a combatant. Combatants are members of the armed forces of the parties to the armed conflict except for medical and religious personnel.¹⁸⁵⁵ Civilians enjoy general protection from military operations and from direct attacks, unless and for such time as they directly participate in hostilities.¹⁸⁵⁶ If they do so, they would become “legitimate targets for the extent of their participation in accordance with international humanitarian law”.¹⁸⁵⁷ The determination as to whether a person is directly participating in hostilities “must be carried out on a case-by-case basis”.¹⁸⁵⁸
915. The ICC and the SCSL have explained that, as with all civilians, the peacekeeping personnel’s protection from attacks does not cease if they only use armed force in exercise of their right to self-defence.¹⁸⁵⁹
916. According to the ICC jurisprudence, objects involved in humanitarian assistance or peacekeeping missions, i.e., the installations, material, units or vehicles, are entitled to protection given to civilian objects and are not military objectives “unless and for such time as their nature, location, purpose or use make an effective contribution to the military action of a party to a conflict and insofar as their total or partial de-

Charter. [...]” (emphasis added).

¹⁸⁵² In *Abu Garda Decision on the Confirmation of Charges* and *Nourain and Jerbo Jamus Decision on the Confirmation of Charges*, the ICC dealt with attacks on the African Union Mission in Sudan (AMIS).

¹⁸⁵³ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 370-371, para. 230.

¹⁸⁵⁴ [ICC Statute](#), Article 8(2)(b)(iii); [SCSL Statute](#), Article 4(b). This offence largely overlaps with attacks against civilians and civilian objects. See SCSL, *Sesay et al. Trial Judgement*, para. 218 (“[T]his offence is a particularisation of the general and fundamental prohibition in international humanitarian law, in both international and internal conflicts, against attacking civilians and civilian property.”); ICRC, IHL Database, Customary IHL, [Rule 156. Definition of War Crimes](#) (“[T]his war crime [under Article 8(2)(b)(iii) of the ICC Statute] is a special application of the war crimes of making the civilian population or individual civilians the object of attack and making civilian objects the object of attack.”). See also above, paras 641-670, 671-688.

¹⁸⁵⁵ [Additional Protocol I](#), Article 43 (2). See also [Geneva Convention III](#), Article 4(A) paras 2-6. See paras 641-670.

¹⁸⁵⁶ [Additional Protocol I](#), Article 51(1), (2) (3); SCSL, *Sesay et al. Trial Judgement*, para. 233; ICC, *Abu Garda Decision on the Confirmation of Charges*, para. 83.

¹⁸⁵⁷ SCSL, *Sesay et al. Trial Judgement*, para. 233

¹⁸⁵⁸ ICC, *Abu Garda Decision on the Confirmation of Charges*, paras 81 (listing examples of “direct participation in hostilities” identified by the ICTY in *Strugar Appeal Judgement*, para. 177, such as “bearing, using or taking up arms, taking part in military of hostile acts, activities, conducts or operations, armed fighting or combat, participating in attacks against enemy personnel, property or equipment, transmitting military information for the immediate use of a belligerent, and transporting weapons in proximity to combat operations.”) and 83.

¹⁸⁵⁹ SCSL, *Sesay et al. Trial Judgement*, para. 233; ICC, *Abu Garda Decision on the Confirmation of Charges*, para. 83.

struction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”.¹⁸⁶⁰

CASE STUDY: SCSL, *SESAY ET AL.* TRIAL JUDGEMENT, PARA. 234 (FOOTNOTES OMITTED)

To determine whether the peacekeeping personnel or objects of a peacekeeping mission are entitled to civilian protection, “the totality of the circumstances existing at the time of the alleged offence” must be considered. To this end, the SCSL has established a non-exhaustive list of criteria as follows:

- the relevant Security Council resolutions for the operation;
- the specific operational mandates;
- the role and practices actually adopted by the peacekeeping mission during the particular conflict;
- their rules of engagement and operational orders;
- the nature of the arms and equipment used by the peacekeeping force;
- the interaction between the peacekeeping force and the Parties involved in the conflict;
- any use of force between the peacekeeping force and the Parties in the conflict;
- the nature and frequency of such force and the conduct of the alleged victim(s) and their fellow personnel.

c. Definition of attacks against personnel or objects involved in a humanitarian assistance or peacekeeping mission entitled to the protection under IHL (Subjective Elements)¹⁸⁶¹

917. The subjective elements of this crime are: (1) the perpetrator intentionally directed an attack; (2) the perpetrator intended the personnel or objects involved in a humanitarian assistance or peacekeeping mission to be the object of the attack; and (3) the perpetrator was aware of the factual circumstances that established the protection given to civilians or civilian objects under the international law of armed conflict.¹⁸⁶²

918. The perpetrator intended the personnel or objects involved in a humanitarian assistance or peacekeeping mission to be the object of the attack. In addition to the standard *mens rea* requirement provided in Article 30 of the ICC Statute, this offence has a specific intent *mens rea*.¹⁸⁶³ The perpetrator must intend to make individual

¹⁸⁶⁰ ICC, *Abu Garda Decision on the Confirmation of Charges*, para. 89 (referring to ICTY, *Galic Trial Chamber Judgement*, para. 51: “In case of doubts as to whether an object which is normally dedicated to civilian purposes is being used to make an effective contribution to military action, it shall be presumed not to be so used. [...] such an object shall not be attacked when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including the information available to the latter, that the object is being used to make an effective contribution to military action.”); *Additional Protocol I*, Article 52(1) and (2)..

¹⁸⁶¹ This section details the subjective elements for this war crime as detailed under international law. However, the general part of the CCU identifies subjective elements that apply to crimes. See Articles 23, 24 and 25 of the CCU. It will be necessary to consider the relevance of the subjective elements in the general part of the CCU when considering the elements of this crime as applied under Article 438 of the CCU.

¹⁸⁶² *ICC Elements of Crimes*, Article 8(2)(b)(iii); *ICC Statute*, Article 30.

¹⁸⁶³ ICC, *Abu Garda Decision on the Confirmation of Charges*, para. 93 (“The Majority notes that this subjective element

civilians not taking direct part in the hostilities or the civilian population “the primary object of the attack”.¹⁸⁶⁴ Therefore, this offence encompasses *dolus directus* of the first degree.¹⁸⁶⁵

919. The perpetrator was aware of the factual circumstances that established the protection given to civilians or civilian objects under the international law of armed conflict.¹⁸⁶⁶ The evidence must establish that the perpetrator “must have known or had reason to know” that the personnel or objects were protected.¹⁸⁶⁷ In this regard, it is not necessary to establish that the perpetrator actually had legal knowledge of the protection to which the personnel and objects were entitled under IHL, but the perpetrator must have been aware of the factual basis for that protection.¹⁸⁶⁸

d. Contextual Elements

920. In addition, as with all war crimes, it is necessary to demonstrate the following contextual elements:
- i. There was an international armed conflict;¹⁸⁶⁹
 - ii. The conduct took place in the context of and was associated with an international armed conflict;¹⁸⁷⁰ and
 - iii. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.¹⁸⁷¹

is similar to that found in the Elements of Crimes for articles 8(2)(b)(i) and 8(2)(e)(i) concerning attacks on civilians, whether in international armed conflict or in armed conflict not of an international character. In this regard, the Chamber held in the *Katanga and Ngudjolo* case that, ‘in addition to the standard *mens rea* requirement provided in article 30 of the Statute, the perpetrator must intend to make individual civilians not taking direct part in the hostilities or the civilian population the object of the attack [...]’ (citing ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, para. 271). See also SCSL, *Sesay et al. Trial Judgement*, para. 232.

¹⁸⁶⁴ SCSL, *Sesay et al. Trial Judgement*, para. 232.

¹⁸⁶⁵ ICC, *Abu Garda Decision on the Confirmation of Charges*, para. 93.

¹⁸⁶⁶ ICC Statute, Article 30(3).

¹⁸⁶⁷ SCSL, *Sesay et al. Trial Judgement*, para. 235.

¹⁸⁶⁸ SCSL, *Sesay et al. Trial Judgement*, para. 235. See also ICC, *Abu Garda Decision on the Confirmation of Charges*, para. 994 (“The Majority is of the view that this fifth element under article 8(2)(e)(iii) of the Elements of Crimes excludes the defence of mistake of law provided for in article 32 of the Statute, as only knowledge in relation to facts establishing that the installations, material, units or vehicles and personnel were involved in a peacekeeping mission is necessary, and not legal knowledge pertaining to protection thereof.”).

¹⁸⁶⁹ See above, paras 188-189.

¹⁸⁷⁰ See above, paras 190-198. See also ICC Elements of Crimes, Article 8(2)(b)(iii).

¹⁸⁷¹ See above, para. 199. See also ICC Elements of Crimes, Article 8(2)(b)(iii).

- ii. Intentionally directing attacks against objects and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law (ICC Statute, Article 8(2)(b)(xxiv))

APPLICABILITY: INTENTIONALLY DIRECTING ATTACKS AGAINST OBJECTS AND PERSONNEL USING THE DISTINCTIVE EMBLEMS OF THE GENEVA CONVENTIONS IN CONFORMITY WITH INTERNATIONAL LAW CAN BE CONSIDERED CRIMINALISED UNDER ARTICLE 438(1) OF THE CCU, AS IT IS SUBSUMED UNDER THE NOTION OF “OTHER VIOLATIONS OF RULES OF THE WARFARE RECOGNISED BY INTERNATIONAL INSTRUMENTS CONSENTED TO BY BINDING BY THE VERKHOVNA RADA (PARLIAMENT) OF UKRAINE” (PARAS [921-925](#)).

Elements of the crimes: To convict a perpetrator intentionally directing attacks against objects and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law as a war crime the following elements need to be established:

(1) Objective element

- The perpetrator attacked one or more persons, buildings, medical units or transports or other objects using, in conformity with international law, a distinctive emblem or other method of identification indicating protection under the Geneva Conventions (paras [926-929](#)).

(2) Subjective element

- The perpetrator intended such persons, buildings, units or transports or other objects so using such identification to be the object of the attack (para. [930](#)).

(3) Contextual elements

- There is an international armed conflict (para. [931](#)).
- The conduct of the perpetrator took place in the context and was associated with the conflict (para. [931](#)).
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict (para. [931](#)).

a. Applicability under Article 438

921. Although not explicitly mentioned in Article 438 of the CCU, “intentionally directing attacks against objects and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law” may be subsumed within “any other violations of rules of warfare recognised by international instruments consented to be binding by the Verkhovna Rada of Ukraine” to which Article 438(1) refers. As explained below, the conduct is prohibited under international instruments ratified by Ukraine and this prohibition has been recognised as a war crime. These factors support interpreting Article 438 of the CCU as criminalising violations of this IHL prohibition.

922. Intentionally directing attacks against objects and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law is a violation of the laws of warfare recognised in international treaties ratified by Ukraine. Commentators have suggested that this offence finds its legal basis in various IHL provisions, including Articles 24-27, 36, 39-44 of the [Geneva Convention I](#), Articles 42-44 of the [Geneva Convention II](#), Articles 42-44 of [Geneva Convention III](#), Articles 18-22 [Geneva Convention IV](#), and Articles 8, 12, 15, 18, 23, 24, 38 of [Additional Protocol I](#).¹⁸⁷² All of which, Ukraine has ratified.¹⁸⁷³ Moreover the ICRC identified the protection from attack of persons, buildings, or objects using – in conformity with international law – a distinctive emblem of the Geneva Conventions as a principle of customary international law in both international and non-international armed conflicts.¹⁸⁷⁴ Therefore, for the purposes of Article 438 of the CCU, the prohibition against intentionally directing attacks against objects and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law is a violation of the laws of warfare recognised in an international instrument accepted as binding by the Ukrainian parliament.¹⁸⁷⁵
923. **Recognition as a war crime.** Article 8(2)(b)(xxiv) of the [ICC Statute](#) lists “[i]ntentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law” as a war crime when committed in international armed conflicts.¹⁸⁷⁶ Likewise, the ICRC recognises the offence as a war crime.¹⁸⁷⁷ While this prohibition is not specifically listed in the [ICTY Statute](#), to certain extent it is an extension of the protection of civilians from attack, which the ICTY recognised can only be lifted in certain circumstances.¹⁸⁷⁸
924. These factors support recognition of the criminalisation of intentionally directing attacks against objects and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law under Article 438 of the CCU.

¹⁸⁷² Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 506, paras 753-754; Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, pp 350-361.

¹⁸⁷³ Ukraine ratified the Geneva Convention on 3 August 1954 and Additional Protocol I and II on 25 January 1990. See ICRC, *Treaties, States Parties and Commentaries*, [Ukraine](#).

¹⁸⁷⁴ ICRC, IHL Database, Customary Law, [Rule 30. Persons and Objects Displaying the Distinctive Emblem](#) (“Attacks directed against medical and religious personnel and objects displaying the distinctive emblems of the Geneva Conventions in conformity with international law are prohibited.”); Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 506, para. 754.

¹⁸⁷⁵ Additionally, Ukraine included the prohibition against attacks on persons, objects, and buildings under the distinctive emblems of the Geneva Conventions in its 2004 Manual on the application of the rules of international humanitarian law in the Armed Forces of Ukraine. See [Manual on the application of the rules of international humanitarian law in the Armed Forces of Ukraine](#) adopted by the Order of the Minister of Defence of Ukraine of 11 September 2004 no. 400.

¹⁸⁷⁶ This prohibition is mirrored in Article 8(2)(e)(ii) of the [ICC Statute](#) applicable to non-international armed conflicts. ICRC, IHL Database, Customary Law, [Rule 156. Definition of War Crimes](#).

¹⁸⁷⁸ Specifically with respect to hospitals, the ICTY noted that “under Article 19 of the Fourth Geneva Convention, the special protection against attacks granted to civilian hospitals shall cease, subject to certain conditions, if the hospital [is used] to commit, outside [its] humanitarian duties, acts harmful to the enemy, for example if an artillery post is set up on top of the hospital.” See ICTY *Kupreskic et al.* [Trial Judgement](#), para. 523.

925. Neither the ICC nor the ICTY have adjudicated a case of intentionally directing attacks against objects and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law. However, it is notable that protection under this provision overlaps with the protection of civilians and civilian objects from attack as well as with the prohibition on intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.¹⁸⁷⁹ For example, a hospital displaying the red cross is protected: as a hospital (unless used to commit acts harmful to the enemy)¹⁸⁸⁰; as a civilian object;¹⁸⁸¹ as a place where the sick and wounded are collected;¹⁸⁸² and as a building displaying the distinctive emblem of the Geneva Conventions. Thus, even if a hospital is not displaying the distinctive emblem of the Geneva Conventions, it is still protected from attack and this protection is rooted in the prohibition against attacks on civilians and civilian objects and the protection of the sick and wounded.¹⁸⁸³

a. **Definition of Intentionally Directing Attacks Against Objects and Personnel using the Distinctive Emblems of the Geneva Conventions in conformity with International Law (Objective Elements)**

926. The ICC Elements of the Crimes list one single objective element vis-à-vis this offence, that is: the perpetrator attacked one or more persons, buildings, medical units or transports or other objects using, in conformity with international law, a distinctive emblem or other method of identification indicating protection under the Geneva Conventions.¹⁸⁸⁴ The analysis below will address the main components of this element, namely: (1) the perpetrator directed an attack, (2) the attack is against a building, person, or object displaying the distinctive emblem of the Geneva Conventions, and (3) the building, person, or object displaying the distinctive emblem is doing so in conformity with international law.

927. **The perpetrator directed an attack.** Pursuant to Article 49 of [Additional Protocol I](#), “attacks” are defined as “acts of violence against the adversary, whether in offence or in defence.”¹⁸⁸⁵

928. **The attack is against a building, person, or object displaying the distinctive emblem of the Geneva Conventions.** The emblems of the Geneva Conventions are the Red

¹⁸⁷⁹ See above, paras [641-670](#), [671-688](#), [727-748](#).

¹⁸⁸⁰ Article 19 of [Geneva Convention IV](#) states that “protection to which civilian hospitals are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy. Protection may, however, cease only after due warning has been given, naming, in all appropriate cases, a reasonable time limit, and after such warning has remained unheeded. The fact that sick or wounded members of the armed forces are nursed in these hospitals, or the presence of small arms and ammunition taken from such combatants and not yet handed to the proper service, shall not be considered to be acts harmful to the enemy.”

¹⁸⁸¹ See above, paras [641-670](#).

¹⁸⁸² See above, paras [727-748](#).

¹⁸⁸³ See for example, Articles 19-23 of [Geneva Convention I](#) protecting medical units and establishments and Article 18 of [Geneva Convention IV](#) protecting hospitals.

¹⁸⁸⁴ [ICC Elements of Crimes](#), Article 8(2)(b)(xxiv).

¹⁸⁸⁵ See Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, p. 544, para. 1442 (“The term “attack” corresponds to the offence of attacks on a civilian population”). See above, paras [641-670](#).

Cross, Red Crescent and the Red Crystal.¹⁸⁸⁶ Unless used unlawfully, each emblem equally qualifies for protection under international humanitarian law.¹⁸⁸⁷ A person, object, or building entitled to display the emblems of the Geneva Conventions must do so in a way that is identifiable to the perpetrator from as far away as possible.¹⁸⁸⁸

929. **The building, person, or object displaying the distinctive emblem of the Geneva Conventions is doing so lawfully.** Article 53 of [Geneva Convention I](#) provides that the emblems of the Geneva Convention can only be used by those objects and personnel “entitled” to do so.¹⁸⁸⁹ For example, Article 39 of [Geneva Convention I](#) requires, under “the direction of the competent military authority, the emblem [of the Red Cross, Red Crescent or Red Lion and Sun] shall be displayed on the flags, armlets and on all equipment employed in the Medical Service”.¹⁸⁹⁰ The 1949 Geneva Conventions list several specific persons, objects, and buildings – mostly of military, medical, religious, and relief entities – that are entitled to display the distinctive emblems of the Geneva Conventions including but not limited to medical personnel, staff of the National Red Cross Societies, military and hospital ships, clergy, and “persons regularly and solely engaged in the operation and administration of civilian hospitals”.¹⁸⁹¹ Any

¹⁸⁸⁶ Article 38 of [Geneva Convention I](#) (“the heraldic emblem of the red cross on a white ground, formed by reversing the Federal colours, is retained as the emblem and distinctive sign of the Medical Service of armed forces. Nevertheless, in the case of countries which already use as emblem, in place of the red cross, the red crescent or the red lion and sun on a white ground, those emblems are also recognized by the terms of the present Convention.”) The emblem of the red lion and sun was replaced by the red crescent in 2005. The red shield of David used by Israel, although not an officially recognised emblem may provide protection. ICRC, [Casebook: How Does Law Protect in War?](#), Emblems (Red Cross, Red Crescent and Red Crystal), Chapter 7.

¹⁸⁸⁷ Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 506, para. 755. Moreover, [Additional Protocol I](#) bestows similar protection to other ‘emblems/identifiers such as flashing blue lights of ambulances. additional protection. See Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 507, para. 754.

¹⁸⁸⁸ [ICRC Regulations on the use of the Emblem of the Red Cross or the Red Crescent by the National Societies](#), Article 6 (“The emblem used as a protective device must be identifiable from as far away as possible. It shall be as large as necessary under the circumstances. At night or when visibility is reduced, it may be lighted or illuminated. It shall as far as possible be made of materials rendering it recognizable by technical means of detection and displayed on flags or flat surfaces visible from as many directions as possible, including from the air.”)

¹⁸⁸⁹ Article 38 of [Geneva Convention I](#) (“The use by individuals, societies, firms or companies either public or private, other than those entitled thereto under the present Convention, of the emblem or the designation ‘Red Cross’ or ‘Geneva Cross’ or any sign or designation constituting an imitation thereof, whatever the object of such use, and irrespective of the date of its adoption, shall be prohibited at all times.”).

¹⁸⁹⁰ Similarly, ships are protected under Article 44 of [Geneva Convention II](#) (“[t]he distinguishing signs referred to in Article 43 [red cross, red crescent or red lion and sun on a white ground] can only be used, whether in time of peace or war, for indicating or protecting the ships therein mentioned, except as may be provided in any other international Convention or by agreement between all the Parties to the conflict concerned”).

¹⁸⁹¹ ICRC, IHL Database, Customary IHL, [Rule 59 Improper Use of the Distinctive Emblems of the Geneva Conventions](#). See e.g. Articles 24-27, 40-44 of [Geneva Convention I](#), Articles 22, 24-25, 27, 36-37, 42 of [Geneva Convention II](#), Articles 18, 20 of [Geneva Convention IV](#). See also Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 507, paras 756 (referring to following persons authorised to display the emblem: (1) medical personnel, staff engaged in administration of medical units and establishments, and chaplains; (2) staff of national red cross/Red Crescent societies and other authorised voluntary aid societies, and of neutral country red cross/Red Crescent societies; and (3) members of armed forces specially trained as orderlies, stretches bearers while so employed), 757 (referring to the following objects entitled to bear the emblem: (1) medical units and establishments, – medical transports; (2) medical aircraft; (3) hospital ships; (4) coastal rescue craft; and (5) hospital and safety zones and localities). See also See Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, p. 544, para. 1444 (“Those authorized to bear such distinctive emblems under the Geneva Conventions are medical personnel, administrators of medical units and facilities, chaplains, workers for national organizations of the Red

attack against buildings, persons or object improperly using the distinctive emblem of the Geneva Conventions would not fall within the scope of the offence.¹⁸⁹²

b. Definition of Intentionally Directing Attacks Against Objects and Personnel using the Distinctive Emblems of the Geneva Conventions in conformity with International Law (Subjective Elements)¹⁸⁹³

930. As for its subjective element, the offence requires that the perpetrator intended such persons, buildings, units or transports or other objects so using such identification in conformity with international law to be the object of the attack.¹⁸⁹⁴ According to commentators, this is in line with the requirements provided by Article 30 of the ICC Statute.¹⁸⁹⁵ Others suggested that the offence reflects the same *mens rea* standard of other attack offences.¹⁸⁹⁶

c. Contextual Elements

931. In addition, as with all war crimes, it is necessary to demonstrate the following contextual elements:

- i. There was an international armed conflict;¹⁸⁹⁷
- ii. The conduct took place in the context of and was associated with an international armed conflict;¹⁸⁹⁸ and
- iii. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.¹⁸⁹⁹

Cross or Red Crescent, employees of aid organizations from neutral states, and members of the armed forces trained as orderlies. Objects and institutions that may be so identified include medical facilities and equipment, such as hospitals, medical vehicles, medical ships and aircraft, hospital ships, and coastal rescue craft.”)

¹⁸⁹² Article 38(1) of [Additional Protocol I](#) (“improper use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other emblems, signs or signals provided for by the Conventions or by this Protocol. It is also prohibited to misuse deliberately in an armed conflict other internationally recognized protective emblems, signs or signals, including the flag of truce, and the protective emblem of cultural property.”) Additionally, Article 38(2) of [Additional Protocol I](#) requires that the “distinctive emblem of the United Nations” is only used as authorised by the United Nations. Improper use of the of distinctive emblems of the Geneva Conventions is laid out in ICRC [Rule 59 Improper Use of the Distinctive Emblems of the Geneva Conventions](#), including perfidy and use of emblem when not entitled to protection. ICRC, IHL Database, Customary IHL, [Rule 59 Improper Use of the Distinctive Emblems of the Geneva Conventions](#).

¹⁸⁹³ This section details the subjective elements for this war crime as detailed under international law. However, the general part of the CCU identifies subjective elements that apply to crimes. See Articles 23, 24 and 25 of the CCU. It will be necessary to consider the relevance of the subjective elements in the general part of the CCU when considering the elements of this crime as applied under Article 438 of the CCU.

¹⁸⁹⁴ [ICC Elements of Crimes](#), Article 8(2)(b)(xxiv).

¹⁸⁹⁵ [ICC Statute](#) Article 30 (“1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. 2. For the purposes of this article, a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. 3. For the purposes of this article, ‘knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. ‘Know’ and ‘knowingly’ shall be construed accordingly.”); Triffterer and Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, München: C.H. Beck; Oxford: Hart; Baden-Baden: Nomos, 2016, p. 507, para. 757.

¹⁸⁹⁶ See Werle and Jeßberger, *Principles of International Criminal Law*, 4th Edition, Oxford University Press, 2020, p. 545, para. 1445 (“The term ‘attack’ corresponds to the offence of attacks on a civilian population”). See above, paras [641-670](#).

¹⁸⁹⁷ See above, paras [188-189](#).

¹⁸⁹⁸ See above, paras [190-198](#). See also [ICC Elements of Crimes](#), Article 8(2)(b)(xxiv).

¹⁸⁹⁹ See above, para. [199](#). See also [ICC Elements of Crimes](#), Article 8(2)(b)(xxiv).

II. Crime of Aggression

A. Relevance of international law principles to adjudicate the crime of aggression in Ukraine under Article 437 of the Criminal Code of Ukraine

1. Aggression Under International Law

932. This section addresses the scope of Article 437 of the Criminal Code of Ukraine (CCU) including the applicability of relevant international instruments codifying the crime of aggression. These include the Charter of the United Nations (UN Charter),¹⁹⁰⁰ United Nations General Assembly Resolution 3314 “Definition of Aggression”¹⁹⁰¹ (UNGA Resolution 3314) and the ICC Statute.

933. The crime of aggression is explicitly criminalised under Article 437 of the CCU. The Article reads as follows:

- Planning, preparation or initiation of an aggressive war or armed conflict, or conspiring for any such purpose, — shall be punishable by imprisonment for a term of seven to twelve years.
- Waging an aggressive war or aggressive hostilities, — shall be punishable by imprisonment for a term of ten to fifteen years.

934. Article 437 thus contains two distinct offences: (1) planning, preparation or initiation an aggressive war; and (2) waging an aggressive war. The CCU does not specify the precise elements of either of these crimes, and the practice in Ukraine relating to this crime has been uneven and often contradictory. As such, judges should have recourse to the relevant international instruments, including the UNGA Resolution 3314 and the ICC Statute, when defining the crime of aggression under Article 437. There are, however, a number of key differences between the international definition of the crime of aggression and the CCU formulations, which will be identified below (see paras [974](#), [986-994](#)).

935. To determine the scope and application of the crime of aggression under Article 437 of the CCU, this section will: (1) provide an overview of the status of the crime of aggression under international law; and (2) assess to which extent the international instruments may be used to interpret the crime of aggression under the CCU.

a) Notion of the Crime of Aggression under International Law

936. The notion of aggression in international law finds its origins in the prohibition of the use of force. The *crime* of aggression prohibits the planning, preparation, initiation, and execution of an act of aggression by one State against another. This crime is a leadership crime, which means it is necessary that the perpetrator was in a leadership position in the State that committed the act of aggression.

¹⁹⁰⁰ [UN Charter](#).

¹⁹⁰¹ UN General Assembly [Resolution 3314 \(XXIX\) “Definition of Aggression”](#) of 14 December 1974.

937. The following sections provide an overview of the various international instruments and institutions which have elaborated on the elements of the crime of aggression. Whilst there is a lack of jurisprudence relating this crime, the UN Charter, the practice of the Nuremberg Tribunals, UNGA Resolution 3314 and the ICC Statute, in particular, provide clarification on the elements of the crime of aggression.

i. UN Charter: Prohibition of the Use of Force

938. The prohibition of aggression finds its origins in the prohibition of the use of force regulated by the UN Charter.¹⁹⁰² The UN Charter is the founding document of the United Nations, signed on 26 June 1945. The UN Charter was ratified by both Ukraine and Russia on 24 October 1945.¹⁹⁰³

939. The prohibition of the use of force is set out in Article 2(4) of the UN Charter and provides that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”.¹⁹⁰⁴ This prohibition relates to the conduct of States, and therefore relates to state responsibility.

940. The prohibition refers to the use of *armed* force (or military force) only.¹⁹⁰⁵ Further, the prohibition covers not only the direct use of force against another state, i.e., sending troops across the border, but also the participation of a State in the use of force by another State, or by armed groups / mercenaries.¹⁹⁰⁶

941. Crucially, the prohibition on the use of force is not absolute. The UN Charter provides for two justifications under which the use of armed force against another State may be lawful:

- a. **Self-Defence:** Under Article 51 of the UN Charter and customary international law, States are guaranteed the right of individual and collective self-defence.¹⁹⁰⁷ The use of armed force in self-defence is only lawful when carried out in response to an “armed attack”.¹⁹⁰⁸ When armed force is used in self-defence, such force must also be necessary and proportionate, and the UN Security Council must be informed.¹⁹⁰⁹

¹⁹⁰² McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2013, pp 34-35.

¹⁹⁰³ [Ratification of the UN Charter by States.](#)

¹⁹⁰⁴ [UN Charter](#), Article 2(4).

¹⁹⁰⁵ See [UN Charter](#), Preamble, para. 7, which identifies as one of the goals of the United Nations “to ensure, by acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest...”. See also Dorr, ‘Use of Force, Prohibition of’, *Max Planck Encyclopedia of Public International Law*, 2019, paras 11-12.

¹⁹⁰⁶ ICJ, *Armed Activities Judgement*, para. 162, citing UN General Assembly [Resolution 2625](#) (“Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations”): “no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State”.

¹⁹⁰⁷ [UN Charter](#), Article 51; ICJ, *Nicaragua Judgement*, paras 193-194.

¹⁹⁰⁸ ICJ, *Nicaragua Judgement*, para. 195.

¹⁹⁰⁹ ICJ, *Nicaragua Judgement*, para. 176; ICJ, *Nuclear Weapons Advisory Opinion*, para. 41; ICJ, *Armed Activities Judgement*, para. 147.

- b. **Security Council approval under Chapter VII:** If the UN Security Council determines that there is a threat to the peace, a breach of the peace, or an act of aggression (according to Article 39 of the UN Charter), it is authorised under Article 42 to “take such action by air, sea, or land forces as may be necessary to restore international peace and security”.¹⁹¹⁰ In such circumstances, Member States are bound to act under Article 48.¹⁹¹¹

942. Chapter VII of the UN Charter authorises the Security Council to take action in response to threats to the peace, breaches of the peace, and *acts of aggression*.¹⁹¹² Nonetheless, despite being vested with this power, the Security Council has never made a formal finding under Article 39 that an act of aggression has occurred.¹⁹¹³

ii. Charters and Practice of the Nuremberg and Tokyo Tribunals

943. The first codifications of the international *crime* of aggression resulting in individual criminal responsibility is contained in the 1945 Charter of the International Military Tribunal of Nuremberg (IMT). Article 6(a) of the Charter proscribes “crimes against peace”, defined as “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing”.¹⁹¹⁴

944. Article 5(a) of the 1948 Charter of the International Military Tribunal for the Far East contains virtually the same definition of “crimes of peace” except for two differences.¹⁹¹⁵ First, the Tokyo Charter specifies that the crime applies to both declared and undeclared wars. Second, the Tokyo Charter refers to war “in violation of *international law*”¹⁹¹⁶ alongside international treaties, agreements, or assurances.¹⁹¹⁷

945. The Nuremberg and Tokyo tribunals produced rich jurisprudence on the international crime of aggression.¹⁹¹⁸ In sum, the tribunals approached their analysis of whether an accused had committed the crime in two stages.¹⁹¹⁹ First, the tribunals considered whether or not Germany or Japan had engaged in an act of aggression (the State conduct element); then they determined whether the individual accused could be held individually criminally responsible (the individual conduct element).¹⁹²⁰ According to the Nuremberg Tribunal: “[t]o initiate a war of aggression [...] is not only an inter-

¹⁹¹⁰ [UN Charter](#), Article 42.

¹⁹¹¹ [UN Charter](#), Article 42.

¹⁹¹² [UN Charter](#), Article 39.

¹⁹¹³ See Dinstein, ‘Aggression’, *Max Planck Encyclopedia of Public International Law*, 2015, para. 9.

¹⁹¹⁴ [Nuremberg Charter](#), Article 6(a).

¹⁹¹⁵ [Tokyo Charter](#), Article 5(a).

¹⁹¹⁶ [Tokyo Charter](#), Article 5(a) (emphasis added).

¹⁹¹⁷ See McDougall, ‘The Crimes against Peace Precedent’ in Kress, *The Crime of Aggression: A Commentary*, Cambridge University Press, 2017, pp 52-53.

¹⁹¹⁸ See IMT Nuremberg, [Judgement of 1 October 1946](#); IMT Tokyo, [Judgement of 4 November 1948](#).

¹⁹¹⁹ Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law*, Oxford University Press, 2011, pp 179-180; McDougall, ‘The Crimes against Peace Precedent’ in Kress, *The Crime of Aggression: A Commentary*, Cambridge University Press, 2017, p. 52.

¹⁹²⁰ McDougall, ‘The Crimes against Peace Precedent’ in Kress, *The Crime of Aggression: A Commentary*, Cambridge University Press, 2017, p. 52.

national crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole”.¹⁹²¹

946. 1950: Nuremberg Principles. The definition of crimes against peace contained in Article 6(a) of the Nuremberg Charter was then included in the so-called Nuremberg Principles (Principle VI(a)) drafted by the International Law Commission (ILC) at the request of the UN General Assembly.¹⁹²² The Nuremberg Principles are considered reflective of customary international law.¹⁹²³

iii. UNGA Resolution 3314 “Definition of Aggression”

947. After decades of frustrated attempts to define the notion, on 14 December 1974, the UNGA adopted a definition of aggression in Resolution 3314.¹⁹²⁴ According to Article 5(2) “a war of aggression is a crime against peace. Aggression gives rise to international responsibility”. In this regard, the Definition distinguishes between an *act* of aggression, which gives rise to international responsibility for States, and a *war* of aggression, which is a “crime against international peace”.¹⁹²⁵
948. However, since the “Definition of Aggression” is contained an Annex to a UNGA Resolution 3314, and given that General Assembly resolutions are non-binding,¹⁹²⁶ it does not create legal obligations for States or individuals. The definition has, however, been relied upon by the Ukrainian Supreme Court and was replicated in the ICC Statute to define the crime of aggression (see below, paras [954](#), [959](#)).
949. Article 1 of the Annex to General Assembly Resolution 3314 contains the following broad definition of aggression: “Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition”.¹⁹²⁷ As may be seen, the definition largely resembles Article 2(4) of the UN Charter, but for a few notable differences.¹⁹²⁸

¹⁹²¹ IMT Nuremberg, [Judgement of 1 October 1946](#), p. 25.

¹⁹²² International Law Commission, ‘[Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal](#)’, *Yearbook of the International Law Commission*, 1950, vol. II, para. 97, Principle VI(a).

¹⁹²³ A. Cassese, ‘[Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal](#)’, 2009, *United Nations Audiovisual Library of International Law*, p. 5.

¹⁹²⁴ UNGA [Resolution 3314](#).

¹⁹²⁵ UNGA [Resolution 3314](#), Article 5(2). See, Dinstein, ‘Aggression’, *Max Planck Encyclopedia of Public International Law*, 2015, para. 13.

¹⁹²⁶ See [UN Charter](#), Article 10: “The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make *recommendations* to the Members of the United Nations or to the Security Council or to both on any such questions or matters” (emphasis added).

¹⁹²⁷ UNGA [Resolution 3314](#), Article 1.

¹⁹²⁸ See, Dinstein, ‘Aggression’, *Max Planck Encyclopedia of Public International Law*, 2015, para. 16: “But a comparison between the two texts shows that there are a number of variations: (i) the mere threat of force is excluded; (ii) the adjective ‘armed’ is interposed before the noun ‘force’; (iii) ‘sovereignty’ is mentioned together with the territorial integrity and the political independence of the victim State; (iv) the victim is described as ‘another’ rather than ‘any’ State; (v) the use of force is forbidden whenever it is inconsistent with the UN Charter as a whole, and not only with the Purposes of the UN; (vi) a linkage is created with the rest of the Definition of Aggression. Some of these points are of peripheral significance, others are of greater consequence.”

950. The most significant difference is that, unlike the Article 2(4) prohibition on the use of force, the UN General Assembly Resolution does not include the *threat* of force within its definition of aggression. In other words, whereas the threat of armed force by State against another State may constitute a violation of Article 2(4), this will not be classified as aggression under the definition contained in Resolution 3314 until such armed force is actually carried out.¹⁹²⁹
951. Resolution 3314 further emphasises that “[n]othing in this definition shall be construed as in any way enlarging or diminishing the scope of the [UN] Charter, including its provisions concerning cases in which the threat of force is lawful”.¹⁹³⁰ It follows that any lawful act of self-defence under Article 51, or indeed any use of armed force carried out pursuant to Security Council authorisation under Chapter VII of the UN Charter, will not be classified as an act of aggression.¹⁹³¹
952. Article 3 of the Definition provides a list of specific *acts* of aggression. The Article reads as follows:

UNGA RESOLUTION 3314, ARTICLE 3:

Any of the following acts, regardless of declaration of war, shall, be subject to and in accordance with the provisions of article 2, qualify as an act of aggression:

- a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- c) The blockade of the ports or coasts of a State by the armed forces of another State;
- d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

953. Article 4 of the Definition makes clear that this list is non-exhaustive.¹⁹³² The Article provides that “the Security Council may determine that other acts constitute aggres-

¹⁹²⁹ Dinstein, ‘Aggression’, *Max Planck Encyclopedia of Public International Law*, 2015, para. 6.

¹⁹³⁰ UNGA [Resolution 3314](#), Article 6.

¹⁹³¹ Dinstein, ‘Aggression’, *Max Planck Encyclopedia of Public International Law*, 2015, para. 20.

¹⁹³² UNGA [Resolution 3314](#), Article 4.

sion under the provisions of the Charter”.¹⁹³³ The same list was incorporated into the ICC Statute definition of the crime of aggression (see below).¹⁹³⁴

iv. ICC Statute

954. The most recent codification of the crime against aggression is contained in the ICC Statute of the International Criminal Court.¹⁹³⁵ Unlike the other three crimes over which the Court has jurisdiction (namely, genocide, crimes against humanity and war crimes), the crime of aggression was not defined when the ICC Statute was originally drafted. Instead, Article 5(2) provided that “The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to the crime”.¹⁹³⁶
955. The Review Conference was held in Kampala in 2010, during which Article 5(2) was removed from the ICC Statute and the crime of aggression was included in Article 8*bis*.¹⁹³⁷ However, the adoption of the Kampala amendments did not automatically trigger the Court’s jurisdiction over the crime of aggression. The amendments only enter into force for those states who accept the amendment, one year after they express such formal acceptance.¹⁹³⁸ After the required number of States ratified the amendment, the jurisdiction of the ICC over the crime of aggression was triggered on 17 July 2018.¹⁹³⁹ So far 43 States Parties have ratified the Kampala amendments.¹⁹⁴⁰
956. Ukraine has submitted two declarations to the ICC granting the Court jurisdiction over all crimes of genocide, crimes against humanity and war crimes committed on its territory from 21 November 2013.¹⁹⁴¹ The declarations do not extend the ICC’s jurisdiction to the crime of aggression. In any event, Russia is not a State Party to the ICC Statute (and has therefore not accepted the amendment), so the ICC is barred from exercising jurisdiction over the crime of aggression committed by its nationals,¹⁹⁴² regardless of whether the Court has jurisdiction over other international crimes on the territory of Ukraine.
957. Nonetheless, after the Kampala amendments, the ICC Statute and accompanying Elements of Crimes now provide useful guidance on the definition, interpretation

¹⁹³³ UNGA [Resolution 3314](#), Article 4.

¹⁹³⁴ [ICC Statute](#), Article 8*bis* (2).

¹⁹³⁵ See [ICC Statute](#), Article 8*bis*.

¹⁹³⁶ [ICC Statute](#), Article 5, fn. 1.

¹⁹³⁷ ICC, [Resolution RC/Res.6](#), “The Crime of Aggression” of 11 June 2010.

¹⁹³⁸ [ICC Statute](#), Article 121(5): “[i]n respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party’s nationals or on its territory”.

¹⁹³⁹ ICC, [Resolution ICC-ASP/16/Res.5](#), “Activation of the Jurisdiction of the Court over the Crime of Aggression” of 14 December 2017, para. 1.

¹⁹⁴⁰ The Global Campaign for Ratification and Implementation of the Kampala Amendments on the Crime of Aggression, [“Status of Ratification and Implementation of the Kampala Amendments on the Crime of Aggression: Update No. 36 \(information as of 3 February 2022\)”](#).

¹⁹⁴¹ Declaration of the Verkhovna Rada of Ukraine [“On the Recognition of the Jurisdiction of the International Criminal Court”](#) of 9 April 2014. The declaration is lodged by Ukraine under Article 12(3) of the ICC Statute.

¹⁹⁴² [ICC Statute](#), Article 15*bis* (5).

and application of the crime of aggression. Article 8bis of the ICC Statute defines the crime of aggression as the “planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations”.¹⁹⁴³ As may be seen, the ICC Statute definition of the crime of aggression contains a leadership criterion.¹⁹⁴⁴ This means that the crime can only be perpetrated by “a person who is in a position effectively to exercise control over or to direct the political or military action of a State” (see paras [986-994](#), paras [1008-1016](#)).¹⁹⁴⁵

958. Article 8bis(2) sets out the definition of an act of aggression which means “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations”. Article 8bis(2)(a)-(g) set out the *acts of aggression*.¹⁹⁴⁶ This definition replicates the definition contained in UNGA Resolution 3314.

959. The Elements of Crimes outline and detail the specific objective and subjective elements (*actus reus* and *mens rea*) of the prohibited conduct. The elements of the crime of aggression are as follows:¹⁹⁴⁷

- The perpetrator planned, prepared, initiated or executed an act of aggression.
- The perpetrator was a person in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.
- The act of aggression — the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations — was committed.
- The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations.
- The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations.
- The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.

v. Customary International Law

960. The International Court of Justice (ICJ) has held that the prohibition of the use of force as contained in the UN Charter is a norm of customary international law.¹⁹⁴⁸ It is also widely accepted that the prohibition has reached the status of *jus cogens*,¹⁹⁴⁹

¹⁹⁴³ [ICC Statute](#), Article 8bis (1).

¹⁹⁴⁴ [ICC Elements of Crimes](#), Article 8bis, Element 2.

¹⁹⁴⁵ [ICC Elements of Crimes](#) Article 8bis, Element 2.

¹⁹⁴⁶ UNGA [Resolution 3314](#).

¹⁹⁴⁷ [ICC Elements of Crimes](#), Article 8bis.

¹⁹⁴⁸ ICJ, *Nicaragua Judgement* para. 176.

¹⁹⁴⁹ ICJ, *Nicaragua Judgement*, para. 190; ICJ, *Oil Platforms Dissenting Opinion of judge Elaraby*, p. 291; ICJ, *Oil Platforms Separate Opinion of judge Simma*, para. 6; International Law Commission, *Commentary on the Draft Articles on the Law of Treaties*, 1966, Article 50, para. 1.

meaning a norm recognized by the international community as a whole from which no derogation is permitted.¹⁹⁵⁰

961. It is also generally accepted that the crime of aggression is a crime under customary international law.¹⁹⁵¹ In 2006, the UK House of Lords concluded that the crime of aggression was recognised as a crime under customary international law at the end of the 20th Century.¹⁹⁵² Nonetheless, there is disagreement as to the precise scope and elements of the crime under customary international law.¹⁹⁵³

b) Relationship between Article 437 of the CCU and international instruments on the crime of aggression

962. This section addresses the scope of Article 437 of the CCU including the applicability of the relevant international instruments codifying the crime of aggression. As discussed, these instruments include the UN Charter, the Charters and practice of the Nuremburg and Tokyo Tribunals, UNGA Resolution 3314, and the ICC Statute.

963. According to the ICC Statute, the “‘crime of aggression’ means planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an acts of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations”.¹⁹⁵⁴

964. As mentioned above, the crime of aggression is explicitly criminalised under Article 437 of the CCU. The Article reads as follows:

ARTICLE 437 OF THE CCU “PLANNING, PREPARATION AND WAGING OF AN AGGRESSIVE WAR”

1. Planning, preparation or initiation of an aggressive war or armed conflict, or conspiring for any such purpose, – shall be punishable by imprisonment for a term of seven to twelve years.
2. Waging an aggressive war or aggressive hostilities, – shall be punishable by imprisonment for a term of ten to fifteen years.

¹⁹⁵⁰ [Vienna Convention on the Law of Treaties of 23 May 1969](#), Article 53.

¹⁹⁵¹ Tan, *The Rome Statute as Evidence of Customary International Law*, Brill, 2022, p. 190; Brownlie, *International Law and the Use of Force by States*, Oxford University Press, 1981, pp 185-194; Dinstein, *War, Aggression and Self-Defence*, 5th Edition, Cambridge University Press, 2011; Glaser, ‘The Charter of the Nuremberg Tribunal and New Principles of International Law’ in Mattraux (ed), *Perspectives on the Nuremberg trial*, Oxford University Press, 2008, pp 67-69; Coracini, ‘Evaluating Domestic Legislation on the Customary Crime of Aggression Under the Rome Statute’s Complementarity Regime’ in Stahn and Sluiter (eds), *The Emerging Practice of the International Criminal Court*, Brill, 2009, p. 725; Cassese *et al* (eds), *Cassese’s International Criminal Law*, 3rd Edition, Oxford University Press, 2013, pp 142-143.

¹⁹⁵² UKHL, *R v Jones et al*[2006], paras 12-19, 44, 59.

¹⁹⁵³ See Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd Edition, OUP, 2016, p. 303. Notably, during the 2010 Kampala Review Conference at the ICC, the US Legal Advisor warned that the Article 8*bis* definition of the crime “does not truly reflect customary international law”, unlike the ICC Statute formulations of the other core crimes: Koh, Legal Advisor, US Department of State, “[Statement at the Review Conference of the International Criminal Court](#)”, Kampala, 4 June 2010.

¹⁹⁵⁴ [ICC Statute](#), Article 8*bis*(1).

965. Article 437 of the CCU does not set out the elements of the crime of aggression under Ukrainian law. Nonetheless, as will be discussed in more detail below, Article 437 covers similar conduct to that prohibited by the international crime of aggression, albeit with some critical difference.

i. [Applicability of ICL instruments and practice: whether Article 437 can be read in conjunction with the ICC Statute and Elements of Crimes](#)

966. Since Article 437 of the CCU is a codification of the international crime of aggression, international interpretations of the crime of aggression are relevant to the interpretation of the crime of aggression under Ukrainian law.

967. Against this background, relying on specific international instruments that codify the crime of aggression, including the UN Charter, the Charters and practice of the Nuremburg and Tokyo Tribunals, UNGA Resolution 3314 and the ICC Statute, can assist judges in assessing the exact scope of Article 437 and, eventually, selecting the acts that can attract criminal responsibility. As discussed in more detail in [Chapter I, Part I, Section I.B.2.b](#) “Applicability of international criminal law instruments: whether Article 438 of the CCU can be read in conjunction with the ICTY and ICC Statutes and practice”, it is possible to refer to international legal framework and practices, including the ICC, to interpret Ukrainian law.

968. More specifically, analysis of Ukrainian jurisprudence under Article 437 reveals a practice of relying on international definitions of the crime of aggression to delineate the parameters of the offence. Notably, Ukrainian Courts have relied on international instruments to interpret Article 437 on several occasions, including UNGA Resolution 3314,¹⁹⁵⁵ the Nuremburg Principles,¹⁹⁵⁶ and the ICC Statute.¹⁹⁵⁷

969. One justification for this approach put forward by the Supreme Court (Case No. 415/2183/20) was the principle of legal certainty flowing from Article 8 of the Constitution of Ukraine, and Article 7(1) of the ECHR.¹⁹⁵⁸ In Case No. 415/2182/20 of 3 February 2022, the Supreme Court recognised the argument that allowing Article 437 to apply to a wider range of subjects than the international legal prohibition of aggression could result in convictions under Article 437 that would be “clearly incompatible with the requirement of certainty of criminal law, which follows from Article 8 of the Constitution of Ukraine and Article 7(1) of the 1950 Convention on the Protection of Human Rights and Fundamental Freedoms”.¹⁹⁵⁹ As discussed at paragraph X, however, the Supreme Court ultimately referred this issue to the Grand Chamber of the Supreme Court which is yet to issue its decision.

¹⁹⁵⁵ [Resolution of](#) Criminal Court of Cassation, Case No. 756/4855/17 of 6 December 2021; [Judgement](#) of Obolonskyi District Court of Kyiv, Case No. 756/4855/17, 24 January 2019.

¹⁹⁵⁶ [Judgement](#) of Obolonskyi District Court of Kyiv, Case No. 756/4855/17, 24 January 2019.

¹⁹⁵⁷ [Order](#) of the Supreme Court, Case No. 415/2182/20, 3 February 2022.

¹⁹⁵⁸ [Chapter I, Part I, Section I.B.2.b](#) “Applicability of international criminal law instruments: whether Article 438 of the CCU can be read in conjunction with the ICTY and ICC Statutes and practice”, para. about “Relying on the ICTY/ICC Statutes and practice via the application of Article 7 of the ECHR”.

¹⁹⁵⁹ [Order](#) of the Supreme Court, Case No. 415/2182/20, 3 February 2022.

ii. Article 437 criminalises conduct which amounts to the crime of aggression under international law

970. The second consideration is to what extent Article 437 covers the same conduct as and is compatible with the crime of aggression under international law. Although Article 437 of the CCU does not set out the elements of the crime of aggression under Ukrainian law, the text of the article and the practice of Ukrainian Courts reveals that it covers similar conduct to that prohibited by the international crime of aggression, albeit with some critical differences. Consequently, as discussed, the elaboration of the objective and subjective elements of the crime of aggression in international law (see below, paras. [1000-1047](#)), are directly relevant as an interpretative tool for Article 437.

971. In this respect, there are three main aspects to consider: 1) the conduct which can amount to the crime of aggression; 2) the definition of aggression; and 3) who can be held responsible for an act of aggression.

a. The Conduct Capable of Attracting Criminal Responsibility

972. Taken together, both paragraphs of Article 437 criminalise the following conduct:

- i. The **planning** of an aggressive war or armed conflict;
- ii. The **preparation** of an aggressive war or armed conflict;
- iii. The **initiation** of an aggressive war or armed conflict;
- iv. **Conspiring** for the planning, preparation or initiation of an aggressive war or armed conflict; and
- v. **Waging** an aggressive war or aggressive hostilities.

973. This sets out the same conduct as contained in the Charter of the International Military Tribunal of Nuremberg, which included “planning, preparation, initiation or waging”, and “participation in a common plan or conspiracy for the accomplishment of any of the foregoing”.¹⁹⁶⁰ The Charter of the International Military Tribunal for the Far East and the 1950 Nuremberg Principles followed this definition.¹⁹⁶¹ Similarly, the ICC Statute includes “planning, preparation, initiation or execution”.¹⁹⁶² Although the ICC Statute does not specify conspiracy, such conduct would be covered by the modes of liability set out in the ICC Statute.¹⁹⁶³

974. Article 437 contains no further explanation as to the interpretation of the type of conduct capable of attracting criminal responsibility. The jurisprudence provides some guidance, however.

975. In Case No. 235/89/16-k of 6 March 2018, the Court held that the material elements of the offences set out in Article 437 would include management actions for the implementation of aggressive plans, in particular, general management of all forces involved in war or military conflict, management of armed forces or military opera-

¹⁹⁶⁰ [Nuremberg Charter](#), Article 5(a).

¹⁹⁶¹ [Tokyo Charter](#), Article 6(a); [Nuremberg Principles](#), Principle VI(a).

¹⁹⁶² [ICC Statute](#), Article 8*bis* (1).

¹⁹⁶³ [ICC Statute](#), Article 25.

tions, etc.¹⁹⁶⁴ After the aggressive war has already been initiated, an individual may still be held responsible under Article 437 for changing the existing plans or formulating new plans for the ongoing armed conflict, or planning additional military action.¹⁹⁶⁵

976. In another case, the Svativ District Court in the Luhansk region acquitted the accused as there was no evidence that they took managerial actions for the implementation of aggressive plans, took leadership over the armed forces involved in the armed conflict, conducted military operations, made changes to the plan of war or military conflict, or created plans for military action.¹⁹⁶⁶ In other words, to find an accused responsible for the crime of aggression under Article 437, it must be established that they engaged in one of these activities.
977. Additional guidance can be found in the Resolution in Case No. 235/89/16-k, where the Donetsk Court of Appeal upheld the acquittal of a Russian citizen accused under Article 437(2) (*waging* an aggressive war) for carrying out food preparation tasks at checkpoints of DPR illegal armed formations.¹⁹⁶⁷ In contrast, in a separate case, the Donetsk Court of Appeal upheld the guilty verdicts under Article 437(2) of two persons who, based on prior conspiracy, joined an illegal armed formation where they served as tank crew members.¹⁹⁶⁸ The Court held that the actions of the defendants aimed at storing the tank, keeping it in good condition, and being ready to repel a Ukrainian attack as part of an illegal armed formation indicate that they committed actions related to waging an aggressive war.¹⁹⁶⁹ As mentioned below, however, the latter decision is incompatible with the international crime of aggression, which can only be committed by those in leadership positions.¹⁹⁷⁰
978. In the absence of further jurisprudence, and to aid further understanding of the conduct which gives rise to the crimes against aggression, judges may turn to the practice of international instruments and institutions to determine which type of conduct may be criminalised under Article 437.

b. The Definition of Aggressive War / Act of Aggression

979. Second, while Article 437 does not define “aggressive war” or “aggressive hostilities”, and analysis of Ukrainian law and practice reveals the incorporation of international definitions of aggression. In particular, Article 1 of the Law of Ukraine “On Defence of Ukraine” which offers a definition aggression in the context of the on the use of force and the jurisprudence of Ukrainian Courts relating to the crime of aggression confirms that the UNGA Resolution 3314 definition (and by extension the ICC Statute definition which replicates the Resolution definition) are applicable.
980. As discussed previously, both the UNGA Resolution 3314 definition and the ICC Statute define aggression as “the use of armed force by a State against the sovereignty,

¹⁹⁶⁴ [Resolution](#) of Donetsk Region Appeal Court (Bakhmut), Case No. 235/89/16-k, 6 March 2018.

¹⁹⁶⁵ [Resolution](#) of Donetsk Region Appeal Court (Bakhmut), Case No. 235/89/16-k, 6 March 2018.

¹⁹⁶⁶ [Order](#) of Svativ District Court, Case No. 642/6196/17, 29 October 2020.

¹⁹⁶⁷ [Resolution](#) of Donetsk Region Appeal Court (Bakhmut), Case No. 235/89/16-k, 6 March 2018.

¹⁹⁶⁸ [Resolution](#) of Donetsk Region Appeal Court (Mariupol), Case No. 263/15014/15-k, 16 May 2018.

¹⁹⁶⁹ [Resolution](#) of Donetsk Region Appeal Court (Mariupol), Case No. 263/15014/15-k, 16 May 2018.

¹⁹⁷⁰ [ICC Statute](#), Article 8*bis*; [ICC Elements of Crimes](#), Article 8*bis*, Element 2.

territorial integrity or political independence of another State, or in any manner inconsistent with the Charter of the United Nations”.¹⁹⁷¹ Both definitions contain a non-exhaustive list of acts which qualify as acts of aggression.¹⁹⁷²

981. To begin with, the definition of “armed aggression against Ukraine” provided in Article 1 of the Law of Ukraine “On Defence of Ukraine” reflects the UNGA definition of aggression to a large extent.¹⁹⁷³ The Ukrainian definition includes all acts listed in subparagraphs (a) to (g) of the UNGA definition, they are just phrased as though the respective acts were being carried out against Ukraine.
982. In addition, Ukrainian courts have also recognised international definitions of aggression. In the trial of former Ukrainian President Viktor Yanukovich under Article 437, the Court referred to and relied upon the definition of aggression set out in UNGA Resolution 3314.¹⁹⁷⁴ In another case, the Obolonskyi District Court of Kyiv qualified Russia’s act of aggression against Ukraine by referring to the acts of aggression listed in Article 3 of the UNGA Resolution 3314.¹⁹⁷⁵ In the same case, the Court referred to the Nuremberg Principles¹⁹⁷⁶ in finding that the aggressive element of a war can be manifested in the goal of the state that started the war to occupy or conquer the territory of another state, in its entirety or in part.¹⁹⁷⁷
983. Crucially, Ukrainian jurisprudence has emphasised that the concepts of “aggression” and “aggressive war” are not identical. Specifically, this jurisprudence has established that aggressive war is a type of aggression, and that aggressive war is distinguished by the scale of actions, the combination of the use of armed forces with other means (economic, diplomatic, ideological, informational), and the formulation and implementation of certain political tasks, in particular the occupation of part of the territory of a sovereign state.¹⁹⁷⁸ This approach mirrors the UNGA Resolution 3314 definition which specifies that “[a] war of aggression is a crime against international peace. Aggression gives rise to international responsibility” (see above, para. 948).¹⁹⁷⁹ Similarly, under the ICC Statute, in order to amount to the *crime* of aggression, the *act* of aggression must, by its character, gravity and scale, constitute a manifest violation

¹⁹⁷¹ UNGA [Resolution 3314](#), Article 1; [ICC Statute](#), Article 8bis(2).

¹⁹⁷² UNGA [Resolution 3314](#), Article 3(a)-(g); [ICC Statute](#), Article 8bis(2)(a)-(g).

¹⁹⁷³ Law of Ukraine “[On Defence of Ukraine](#)” of 6 December 1991 No. 1932-XII, Article 1. Note, the differences in wording exist because the Ukrainian law definition is with respect to acts of aggression “against Ukraine”. The law therefore describes the examples of acts of aggression as if they were being carried out against Ukraine. For instance, with respect to the first category of aggression: i. [Law of Ukraine “On Defence of Ukraine”](#): “invasion or attack of armed forces of other states or group of the states *on the territory of Ukraine*, and also occupation or annexation of part of *the territory of Ukraine*” (emphasis added); ii. [UNGA Definition](#): “(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof”.

¹⁹⁷⁴ UNGA [Resolution 3314](#), Article 3; [Resolution](#) of Criminal Court of Cassation, Case No. 756/4855/17 of 6 December 2021.

¹⁹⁷⁵ [Judgement](#) of Obolonskyi District Court of Kyiv, Case No. 756/4855/17, 24 January 2019.

¹⁹⁷⁶ UN General Assembly [Resolution No. 95\(I\) “Affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal”](#) of 11 December 1946.

¹⁹⁷⁷ [Judgement](#) of Obolonskyi District Court of Kyiv, Case No. 756/4855/17, 24 January 2019.

¹⁹⁷⁸ [Resolution](#) of Criminal Court of Cassation, Case No. 756/4855/17 of 6 December 2021; [Judgement](#) of Obolonskyi District Court of Kyiv, Case No. 756/4855/17, 24 January 2019.

¹⁹⁷⁹ UNGA [Resolution 3314](#), Article 5(2).

of the Charter of the United Nations.¹⁹⁸⁰ In other words, whereas all *acts* of aggression will lead to state responsibility under international law, a minimum level of gravity is required to trigger individual criminal responsibility under both Article 437 and international law.

984. In sum, although Article 437 omits a definition of “aggressive war” for its purposes, the jurisprudence indicates that it can be interpreted in line with the UNGA Resolution 3314 definition (and therefore Article 8*bis* of the ICC Statute which reiterates the UNGA Resolution definition). Accordingly, the practice under international instruments and of international institutions in defining aggression can be used as an interpretive tool by the Ukrainian judges to clarify Article 437.

c. The Role of the Perpetrator (Leadership Requirement)

985. As discussed above, the international crime of aggression contains a leadership requirement. According to the ICC Statute, the international crime of aggression can only be perpetrated by “a person who is in a position effectively to exercise control over or to direct the political or military action of a State which committed the act of aggression”.¹⁹⁸¹ This element was also established in the jurisprudence of the Nuremberg tribunal.¹⁹⁸²

986. However, the text of Article 437 contains no such requirement, and on first reading, it appears as though any person can be held responsible for planning, preparing or initiating an aggressive war under the CCU, including low-ranking officials and even foot soldiers. The absence of this leadership requirement raises questions as to its compatibility with international standards.

987. Ukrainian jurisprudence remains unsettled on the matter. The Order of the Supreme Court in Case No. 415/2182/20 considered both offences set out in Article 437 and concluded that the question surrounding whether those who actually control the political and military actions of State can be subject to Article 437 is an extraordinary legal issue which should be determined by the Grand Chamber of the Supreme Court.¹⁹⁸³ The Supreme Court recognised that there was ambiguous application of Article 437 in the judicial practice of the courts of first and appellant instances due to the vagueness of Article 437, which has a negative effect on the principle of legal certainty requiring its referral to the Grand Chamber of the Supreme Court.¹⁹⁸⁴ The Grand Chamber is yet to rule on this issue.

988. According to the Supreme Court order, while the provisions of Article 437 do not contain any restriction or additional features relating to the subject of the criminal offence, some criminal law scientists have argued that although nothing in the text of Article 437 limits the scope of the offence to those in leadership positions, in practice

¹⁹⁸⁰ [ICC Elements of Crimes](#), Article 8*bis*, Element 5.

¹⁹⁸¹ [ICC Statute](#), Article 8*bis*; [ICC Elements of Crimes](#), Article 8*bis*, Element 2.

¹⁹⁸² International Law Commission, “[Principles of International Law recognized in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal, with commentaries](#)”, 1950, para. 117.

¹⁹⁸³ [Order](#) of the Supreme Court, Case No. 415/2182/20, 3 February 2022.

¹⁹⁸⁴ [Order](#) of the Supreme Court, Case No. 415/2182/20, 3 February 2022.

only a person who is actually able to exercise control over the political or military actions of a state can commit the crime.¹⁹⁸⁵ This finding was based on the following considerations:

- i. The material elements of Article 437 — “planning”, “preparing”, “initiating”, or “waging” an aggressive war — are inextricably linked with the leadership nature of the crime; and
- ii. Extending the scope of the crime beyond those in leadership positions would be incompatible with the international formulation of the offence, and thus in violation of the principle of certainty in criminal law.¹⁹⁸⁶

989. As noted by the Supreme Court, however, Ukrainian courts have applied Article 437 unevenly in practice. In some cases, courts have held that the objective elements of the crime (planning, preparing, initiating or waging an aggressive war) can only be carried out by an official of the armed forces or other military formations, as well as a high-level state authority which, by virtue of its powers, is capable of carrying out the relevant act.¹⁹⁸⁷ This approach is largely consistent with international practice, as discussed below.

990. On the other hand, there is a pattern of ordinary soldiers and lower-level commanders being convicted for the crime of waging an aggressive war under Article 437(2) of the CCU.¹⁹⁸⁸ As an example, in its decision in Case No. 263/1504/15-k, the Donetsk Court of Appeal left unchanged the guilty verdict against two persons convicted under Article 437(2). The convicted individuals joined an illegal armed formation and served as members of a tank crew, where they kept and maintained the tank for the purpose of repelling any potential attack by the Ukrainian armed forces.¹⁹⁸⁹

991. In addition to being incompatible with international practice, and therefore in violation of the principle of certainty in criminal law,¹⁹⁹⁰ this approach raises several concerns. First, the sentence prescribed under paragraph 2 of Article 437 (i.e., lower-level commanders waging aggressive war) is *higher* than that prescribed under paragraph 1 (leadership involved in planning, preparing and initiating).¹⁹⁹¹ Such a result contradicts the fundamental principle of criminal law that punishment shall be commensurate with the character and gravity of the crime.¹⁹⁹²

992. Second, this approach is contrary to the principle of combat immunity, which bars the prosecution of combatants for merely participating in the hostilities.¹⁹⁹³ Indeed,

¹⁹⁸⁵ [Order](#) of the Supreme Court, Case No. 415/2182/20, 3 February 2022.

¹⁹⁸⁶ [Order](#) of the Supreme Court, Case No. 415/2182/20, 3 February 2022.

¹⁹⁸⁷ [Resolution of](#) Dnipro Court of Appeal, Case No. 426/1211/17, 24 January 2022; [Order](#) of Svativ District Court, Case No. 642/6196/17, 29 October 2020; [Resolution](#) of Donetsk Region Appeal Court (Bakhmut), Case No. 235/89/16-k, 6 March 2018.

¹⁹⁸⁸ [Judgement](#) of Artemivsk City District Court of the Donetsk region, Case No. 219/10228/15-к, 22 August 2019; [Judgement](#) of Illichivsk District Court of Mariupol, Donetsk region, Case No. 221/2405/15-к, 24 November 2017; [Judgement](#) of Bilokurakyne District Court of the Luhansk region, Case No. 409/2799/16-к, 13 December 2016..

¹⁹⁸⁹ [Judgement](#) of Bilokurakyne District Court of the Luhansk region, Case No. 409/2799/16-к, 13 December 2016.

¹⁹⁹⁰ See above, para. 969.

¹⁹⁹¹ CCU, Article 437. The prescribed sentence under paragraph 1 is seven to ten years, whereas the prescribed sentence under paragraph 2 is ten to fifteen years.

¹⁹⁹² See ICTY, *Todorovic Sentencing Judgement*, para. 29.

¹⁹⁹³ [Additional Protocol I](#), Article 43(2): “Members of the armed forces of a Party to a conflict [...] are combatants, that is

an important aspect of the leadership element of the international crime of aggression is that the principle of combatant immunity is protected.¹⁹⁹⁴ In the context of aggressive wars, provided that ordinary soldiers on the side of the aggressive State comply with the laws of international armed conflict, they benefit from immunity from prosecution.¹⁹⁹⁵ The conduct of members of the armed forces who participate in the ensuing aggressive war is governed by IHL, meaning they can be prosecuted for violations of IHL (but not their participation in combat).¹⁹⁹⁶ The principle of combatant immunity is an important barrier to the prosecution of ordinary soldiers for the crime of aggression under Article 437, even in the absence of a codified leadership requirement.

993. In conclusion, the test of Article 437 is not in itself incompatible with international instruments defining aggression. However, the lack of a leadership requirement has led to uneven practice. The Grand Chamber of the Supreme Court has yet to decide whether the crime can be committed exclusively by those who are able to exercise control over the political or military actions of a state — in such case the leadership requirement will be an element of the crime of aggression under Article 437. In such a case, judges will have therefore to turn to international instruments and jurisprudence — in particular the ICC Statute and Elements of Crimes — which, as discussed below, properly establish who can be prosecuted for the crime of aggression. Such an approach is compliant with Ukrainian law.

B. Definition of the Crime of Aggression under International Law and applicability to Article 437 of the CCU

1. Introduction

994. This section analyses the elements of war crimes under international criminal law and specifies how the relevant objective and subjective elements can be subsumed under Article 437 of the CCU.
995. Despite a lack of jurisprudence, the objective and subjective elements of the crime of aggression can be deciphered from the interpretation and practice of various international instruments and institutions, most notably the Charters and practice of the Nuremburg and Tokyo Tribunals, the Nuremburg Principles, UNGA Resolution 3314 and the ICC Statute.
996. As described above, international law defines the crime of aggression as the “planning, preparation, initiation or execution, by a person in a position effectively to

to say, they have the right to participate directly in hostilities”. See also ICRC, “Immunities”, How Does Law Protect in War.

¹⁹⁹⁴ Dannenbaum, ‘The Criminalization of Aggression and Soldiers’ Rights’ 29 *European Journal of International Law* 859, p. 868.

¹⁹⁹⁵ Jackson and Akande, ‘The right to life and the *jus ad bellum*: belligerent equality and the duty to prosecute acts of aggression’, 71 *International and Comparative Law Quarterly* 453, p. 2.

¹⁹⁹⁶ [Geneva Convention I](#), Article 2: “the present Convention shall apply to all cases of declared war or any other armed conflict which may arise between two or more High Contracting Parties”. See also [Geneva Convention II](#), Article 2; [Geneva Convention III](#), Article 2; [Geneva Convention IV](#), Article 2.

exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations”.¹⁹⁹⁷

997. An act of aggression is further defined by UNGA Resolution 3314 and the ICC Statute as “the use of force by a State against the sovereignty, territorial integrity or political independence of another State, or in any many inconsistent with the Charter of the United Nations”.¹⁹⁹⁸ Both documents contain the same list of individual acts which can amount to an “act of aggression”.¹⁹⁹⁹

998. As described above (paras 966-970), Article 437 and the practice of the Ukrainian Courts in this regard largely confirm the applicability of international definitions of the crime against aggression. However as noted, Ukrainian jurisprudence regarding the subjects of Article 437 is uneven and the Grand Chamber of the Supreme Court is yet to rule on the issue.

SUMMARY OF THE CRIME OF AGGRESSION

- The crime of aggression prohibits the planning, preparation, initiation, and execution of an act of aggression by one State against another.
- This crime is a leadership crime, which means it is necessary that the perpetrator was in a leadership position in the State that committed the act of aggression.
- To convict a perpetrator for the crime of aggression the following elements need to be established:

(1) Objective elements

- The perpetrator planned, prepared, initiated or executed an act of aggression (para. 1000).
- The perpetrator was in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression (para. 1007).
- The act of aggression—the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations—was committed (para. 1016).
- The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations (para. 1036).

(2) Subjective elements

- The perpetrator intended to plan, prepare, initiate or execute an act of aggression (para. 1041).
- The perpetrator was aware of the fact that they were in a position to effectively exercise control over or to direct the political or military action of the State which committed the act of aggression (para. 1044).
- The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations (para. 1045);
- The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations (para. 1046).

¹⁹⁹⁷ ICC Statute, Article 8bis(1). See also, [Nuremberg Charter](#), Article 5(a); [Tokyo Charter](#), Article 6(a); [Nuremberg Principles](#), Principle VI(a).

¹⁹⁹⁸ UNGA [Resolution 3314](#), Article 1; ICC Statute, Article 8bis(2).

¹⁹⁹⁹ UNGA [Resolution 3314](#), Article 3(a)-(g); ICC Statute, Article 8bis(2)(a)-(g).

2. Elements of the Crime of Aggression

a) Definition of the Crime of Aggression (Objective Elements)

999. As to the objective elements, the crime of aggression requires that: 1) the perpetrator planned, prepared, initiated or executed an act of aggression; 2) the perpetrator was a person in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression; 3) the act of aggression was committed; and 4) the act of aggression, by its nature, gravity and scale, constituted a manifest violation of the Charter of the United Nations.
1000. **The perpetrator planned, prepared, initiated or executed an act of aggression.** To establish that the crime of aggression has occurred, the evidence must prove that the perpetrator planned, prepared, initiated or executed an act of aggression.²⁰⁰⁰ As described above (see paras 973-974), Article 437 sets out the same conduct, since “waging” is interchangeable with “executing”. Article 437 additionally includes “conspiracy” which is considered in the Section on Modes of Liability, see below para. 1403. The below can therefore be used to interpret the conduct under Article 437.
1001. While upon first reading it may seem as though the inclusion of the terms “planning” and “preparation” mean that a perpetrator can be held responsible for the crime of aggression even if the act of aggression itself is not carried out, this would be incompatible with Element Three (see below, para. 1017) which requires that “[t]he act of aggression [...] was committed”.²⁰⁰¹
1002. The Nuremberg tribunal failed to explain whether the positive actions of the accused fell within the categories of “planning”, “preparing”, “initiating” or “waging” a war or aggression.²⁰⁰² The tribunal did, however, identify the individual conduct of each accused which led to their criminal responsibility. It can therefore provide some guidance as to the type of individual conduct which can lead to criminal responsibility for the crime of aggression.
1003. **“Planning”** refers to the individual’s participation in the planning of the act of aggression, which ultimately must take place for the first element to be satisfied.²⁰⁰³ Planning could involve, for example, participation in meetings in which plans for the use of force are formulated,²⁰⁰⁴ or involvement in the planning of military operations.²⁰⁰⁵

²⁰⁰⁰ [ICC Elements of Crimes](#), Article 8bis, Element 1. See also, [Nuremberg Charter](#), Article 5(a); [Tokyo Charter](#), Article 6(a); [Nuremberg Principles](#), Principle VI(a).

²⁰⁰¹ [ICC Elements of Crimes](#), Article 8bis, Element 3. See also Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd Edition, OUP, 2016, p. 308.

²⁰⁰² McDougall, ‘The Crimes Against Peace Precedent’ in Kress, *The Crime of Aggression: A Commentary*, Cambridge University Press, 2017, 49, p. 85.

²⁰⁰³ Triffterer & Ambos (eds), *Rome Statute of the International Criminal Court: a Commentary*, 3rd Edition, C.H. Beck, Hart, Nomos, 2016, pp 588-589.

²⁰⁰⁴ McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2013, p. 187.

²⁰⁰⁵ IMT Nuremberg, [Judgement of 1 October 1946](#), pp 131-133.

1004. **“Preparation”** refers to the taking of concrete steps to implement the plan.²⁰⁰⁶ This could involve a range of activities such as facilitating the necessary economic or military capacities, including acquiring weapons, readying troops at the border or liquidating assets to fund a war.²⁰⁰⁷ Preparation could also take the form of political or diplomatic activities, such as establishing military alliances or concealing the State’s aggressive intentions in multilateral fora to gain a military advantage.²⁰⁰⁸ Nuremberg jurisprudence indicates that economic preparation alone is sufficient to lead to a conviction for the crime of aggression.²⁰⁰⁹
1005. **“Initiation”** refers to the actual commencement of the use of armed force, in one of the manners described in paragraph 2 of Article 8bis of the ICC Statute,²⁰¹⁰ and **“execution”** covers all acts carried out to advance the act of aggression after it has formally commenced.²⁰¹¹
1006. The Nuremberg tribunal jurisprudence indicates that **“waging”** an aggressive war, like **“execution”** under the ICC Statute, consists of actions taken after the initiation of the hostilities.²⁰¹² In this regard, the Nuremberg tribunal found an accused responsible for **“the formulation and execution of occupation policies in the Occupied Eastern Territories”**.²⁰¹³ **“Execution”** therefore appears to cover acts such as the establishment of occupation authorities, and the governing of territory occupied as a result of aggressive war.²⁰¹⁴

IMT NUREMBERG, JUDGEMENT OF 1 OCTOBER 1946, PP 132-133

In the fifteen years he commanded it, Raeder built and directed the German Navy; he accepts full responsibility until retirement in 1943 [...]

Raeder received the directive of 24th June, 1937, from von Blomberg requiring special preparations for war against Austria. He was one of the five leaders present at the Hozsbach Conference of 5th November, 1937 [...]

²⁰⁰⁶ Greenspan, *The Modern Law of Land Warfare*, University of California Press, 1959, p. 455; Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 589.

²⁰⁰⁷ McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2013, p. 187. See also IMT Nuremberg, [Judgement of 1 October 1946](#), pp 108-109.

²⁰⁰⁸ McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2013, p. 187.

²⁰⁰⁹ See IMT Nuremberg, [Judgement of 1 October 1946](#), pp 122-123, where the tribunal found Funk responsible for crimes against peace for “participat[ing] in the economic preparation for certain of the aggressive wars”.

²⁰¹⁰ [ICC Statute](#), Article 8bis.

²⁰¹¹ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 590.

²⁰¹² McDougall, ‘The Crimes Against Peace Precedent’ in Kress, *The Crime of Aggression: A Commentary*, Cambridge University Press, 2017, 49, p. 86.

²⁰¹³ IMT Nuremberg, [Judgement of 1 October 1946](#), p. 114.

²⁰¹⁴ IMT Nuremberg, [Judgement of 1 October 1946](#), p. 143.

Raeder received directive on “Fall Grün” and the directives on “Fall Weiss” beginning with that of 3rd April, 1939; the latter directed the Navy to support the Army by intervention from the sea. He was also one of the few chief leaders present at the meeting of 23rd May, 1939. He attended the Obersalzberg briefing of 22nd August, 1939.

The conception of the invasion of Norway first arose in the mind of Raeder and not that of Hitler. Despite Hitler’s desire, as shown by his directive of October, 1939, to keep Scandinavia neutral, the Navy examined the advantages of naval bases there as early as October. Admiral Karls originally suggested to Raeder the desirable aspects of bases in Norway. A questionnaire, dated 3rd October, 1939, which sought comments on the desirability of such bases, was circulated within SKL. On 10th October Raeder discussed the matter with Hitler; his War Diary entry for that day says Hitler intended to give the matter consideration. A few months later Hitler talked to Raeder, Quisling, Keitel and Jodl; OKW began its planning and the Naval War Staff worked with OKW staff officers. Raeder received Keitel’s directive for Norway on 27th January, 1940, and the subsequent directive of 1st March, signed by Hitler.

[...]

It is clear from this evidence that Raeder participated in the planning and waging of aggressive war.

1007. **The perpetrator was a person in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.** This element is known as the “leadership requirement”. Under the ICC Statute and the ICC Elements of Crimes, only persons in leadership positions of a State committing an act of aggression can be prosecuted for this criminal offence.²⁰¹⁵ This element was also established in the jurisprudence of the Nuremberg tribunal, as concluded by the International Law Commission in its commentary to the Nuremberg Principles: “The Commission understands the expression [“waging” an aggressive war] to refer only to high-ranking military personnel and high State officials, and believes that this was also the view of the tribunal”.²⁰¹⁶
1008. As discussed above (see paras 986-994), despite the fact that the text of Article 437 does not contain this leadership requirement and some practice before the Ukrainian Courts of prosecuting lower-level perpetrators, the Supreme Court has recognised the possibility that the crime can only be committed by those who are able to exercise control over the political or military actions of a state and referred the legal issue to the Grand Chamber of the Supreme Court. If the Grand Chamber of the Supreme Court upholds such position, it will confirm that the leadership requirement is an element of the crime of aggression under Article 437.
1009. In such case, judges will have to consider whether the perpetrator is “a person who is in a position effectively to exercise control over or to direct the political or military action of a State which committed the act of aggression”.²⁰¹⁷ More than one person within the leadership hierarchy of a State may meet these criteria.²⁰¹⁸

²⁰¹⁵ ICC Statute, Article 8bis(1); ICC Elements of Crimes, Article 8bis, Element 2.

²⁰¹⁶ ILC, “Principles of International Law recognized in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal, with commentaries”, 1950, para. 117.

²⁰¹⁷ ICC Statute, Article 8bis(1); ICC Elements of Crimes, Article 8bis, Element 2.

²⁰¹⁸ ICC Elements of Crimes, fn. 75.

1010. This includes, at the very least, heads of State and government, ministers of defence and other military leaders, such as high-level commanders and generals, and may also include individuals who qualify as exercising such control or direction.²⁰¹⁹ The IMT Nuremberg rejected the defendant's arguments that Hitlers complete dictatorship absolved all others of responsibility.²⁰²⁰

IMT NUREMBERG, JUDGEMENT OF 1 OCTOBER 1946, PP 57-58

The argument that such common planning cannot exist where there is a complete dictatorship is unsound. A plan in the execution of which a number of persons participate is still a plan, even though conceived by only one of them; and those who execute the plan do not avoid responsibility by showing that they acted under the direction of the man who conceived it. Hitler could not make aggressive war by himself. He had to have the co-operation of statesmen, military leaders, diplomats, and business men. When they, with knowledge of his aims, gave him their cooperation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent because Hitler made use of them, if they knew what they were doing. That they were assigned to their tasks by a dictator does not absolve them from responsibility for their acts. The relation of leader and follower does not preclude responsibility here any more than it does in the comparable tyranny of organized domestic crime.

1011. The use of the term “effectively” signifies that what matters is the factual (*de facto*) capability of the perpetrator rather than their formal (*de jure*) rank or title.²⁰²¹ This means that heads of State who perform only ceremonial functions, and who are unable to participate in the decision-making process behind the act of aggression, cannot be held responsible for the crime.²⁰²² In practice, in order to establish whether an individual may be held responsible for the crime of aggression, legal title alone is not necessarily determinative. Judges must analyse the role the individual plays in the decision-making process in practice, before determining whether the level of control/influence they can exert is sufficient.

1012. The IMT Nuremberg adopted this approach, focusing on function rather than form. In other words, the Tribunal looked at what the accused *actually did* to contribute to the aggressive war.²⁰²³ For instance, the IMT convicted Dönitz of crimes against peace even though in the lead up to the war, “he was a line officer performing strictly tactical duties”.²⁰²⁴ The Tribunal acknowledged that, as leader of the German U-boat arm, Dönitz may not have been involved in the initial planning process. The centrality of

²⁰¹⁹ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 591.

²⁰²⁰ IMT Nuremberg, [Judgement of 1 October 1946](#), pp 57-58.

²⁰²¹ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 591.

²⁰²² Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 591.

²⁰²³ McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2013, pp 82-85.

²⁰²⁴ IMT Nuremberg, [Judgement of 1 October 1946](#), p. 128.

the U-boat arm to the war effort, however, alongside other factors shows that he was active in waging aggressive war.²⁰²⁵

1013. The International Law Commission has clarified that the leadership requirement “must be understood in the broad sense, that is to say, as referring, in addition to the members of a Government, to persons occupying high-level posts in the military, the diplomatic corps, political parties and industry”.²⁰²⁶ Accordingly, in line with customary international law, it appears as though high level industry or religious leaders may be held responsible for the crime of aggression, provided they are in a position to control and influence government policy.²⁰²⁷
1014. The absence of ICC jurisprudence on the crime of aggression makes it difficult to determine precisely how far-reaching the personal jurisdiction of the crime would be. However, as discussed above (see para. 991), certain cases before the Ukrainian Courts would not meet the leadership requirement as set established by international instruments and practice. For example, Alexander Alexandrov and Yevgeny Yerofeyev, who were both convicted for aggression under Article 437 of the CCU for their role in the armed conflict between the Russian controlled separatists in Donbas and the Ukrainian forces in 2015.²⁰²⁸ It is likely that such cases would *not* satisfy the leadership requirement under international law.²⁰²⁹ The men were members (of the rank Captain and Sergeant) of the Russian Special Forces, and would, therefore, not have been in a position effectively to exercise control over or to direct the political or military action of the State, as required by the ICC Statute.²⁰³⁰
1015. Finally, the leadership clause is not applied only to principal perpetrators, but also to accessories. Therefore, persons that participate in the crime in a less direct manner, such as through aiding and abetting, will only be held responsible for this offence if they too fulfil the leadership requirement.²⁰³¹
1016. **The act of aggression was committed.** This element requires it to be established that an act of aggression was committed, namely “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations”.²⁰³² The definition of aggression, and the acts which qualify as acts of aggression, are contained in Article 8bis(2),²⁰³³ which replicates the definition contained in UNGA Resolution

²⁰²⁵ IMT Nuremberg, [Judgement of 1 October 1946](#), p. 128.

²⁰²⁶ International Law Commission, [Draft Code of Crimes against the Peace and Security of Mankind, Commentary](#) (1996), p. 43, para. 2.

²⁰²⁷ See, Hajdin, ‘The Nature of Leadership in the Crime of Aggression: The ICC’s New Concern?’ 17 *International Criminal Law Review* 543, 2017; Heller, ‘Retreat From Nuremberg: The Leadership Requirement in the Crime of Aggression’ 18 *European Journal of International Law* 477, 2007; Clark, ‘Individual Conduct’ in Kress, *The Crime of Aggression: A Commentary*, Cambridge University Press, 2016, p. 565.

²⁰²⁸ [Judgement](#) of Obolonskyi District Court of Kyiv, Case No. 756/4855/17, 24 January 2019; Judgement of Holosiyivsky District Court of Kyiv, Case No. 752/15787/15-к, 18 April 2016.

²⁰²⁹ K. Heller, ‘[Creating a Special Tribunal for Aggression Against Ukraine is a Bad Idea](#)’, *Opinio Juris*, 7 March 2022.

²⁰³⁰ ‘[Ukraine Finds Russian ‘Soldiers’ Guilty of Waging War](#)’, BBC, 18 April 2016.

²⁰³¹ [ICC Statute](#), Article 25 (3bis).

²⁰³² [ICC Statute](#), Article 8bis (2); [ICC Elements of Crimes](#), Article 8bis, element 3; UNGA [Resolution 3314](#), Article 1.

²⁰³³ [ICC Statute](#), Article 8bis(2); [ICC Elements of Crimes](#), Article 8bis, Introduction, para. 1.

3314.²⁰³⁴ As discussed above (see paras [969](#), [980](#), [983-985](#)), Ukrainian Courts have relied upon this interpretation when defining “aggressive war” under Article 437.

ICC STATUTE, ARTICLE 8BIS

[...]

2. For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:
 - a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
 - b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
 - c) The blockade of the ports or coasts of a State by the armed forces of another State;
 - d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
 - e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
 - f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
 - g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

1017. The term “**use of armed force**” means that only *armed* force, and not, for instance, political or economic force, can amount to an act of aggression.²⁰³⁵ This definition is narrower in scope than Article 2(4) of the UN Charter, in that only the *use* of force would qualify, as opposed to *threats* of force, which are prohibited by the UN Charter.²⁰³⁶

1018. The definition also provides that the act of aggression must have been carried out “**by a State**”, meaning private actors cannot perpetrate the crime of aggression.²⁰³⁷ Whether a State can be held responsible for the use of force on the part of private

²⁰³⁴ UNGA [Resolution 3314](#), Article 3.

²⁰³⁵ Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd Edition, OUP, 2016, p. 314; Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 604.

²⁰³⁶ [UN Charter](#), Article 2(4): “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”. See Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 604.

²⁰³⁷ Sayapin, *The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State*, Asser Press, 2014, p. 260.

actors will depend on whether the conduct of such actors is attributable to that State under the law of State responsibility.²⁰³⁸ This means that the perpetrator was either “completely dependent” upon, or operating under the “effective control” of the State.²⁰³⁹

1019. **“Complete dependence”** means that, although an actor might be legally separate from the state, in practice they operate as an instrument of that state.²⁰⁴⁰ It requires judges to look beyond the legal status of the entity and evaluate the practical reality of its relationship with the state, and whether they are “so closely attached as to appear to be nothing more than its agent”.²⁰⁴¹
1020. To establish **“effective control”**, it is necessary to determine whether the State not only equipped and/or financed the non-state actor and supervised its actions, but also provided specific instructions to that group or exercised control over each operation in which the alleged violations occurred.²⁰⁴² In such circumstances, the use of armed force of a non-state armed group may constitute a “use of armed force by a State” for the purposes of the first element of the crime of aggression. Indeed, as discussed below, such a scenario is accounted for in paragraph 2(g) of Article 8*bis*.
1021. In addition, to constitute an act of aggression, the evidence must establish that the use of armed force was against the **sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the UN Charter**.²⁰⁴³ The wording here is similar to the general international law prohibition of the use of force provided in Article 2(4) of the UN Charter.²⁰⁴⁴ In effect, “territorial integrity” and “political independence” encompass any armed attack which impacts another State’s *de facto* control over its territory, or attempts to control its organs and influence their capacity to decide.²⁰⁴⁵ “In any other manner inconsistent with the Charter of the United Nations” means that a use of force may constitute an act of aggression if carried out in such a manner as to render it incompatible with the provisions of the UN Charter governing the use of force.²⁰⁴⁶
1022. This means that it is necessary to examine whether a State resorted to armed force as a legitimate exercise of self-defence under Article 51 of the UN Charter, or whether such a State used armed force pursuant to Security Council authorisation under

²⁰³⁸ See Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 605; ILC, [Draft Articles on Responsibility of States for Internationally Wrongful Acts](#), 2001.

²⁰³⁹ International Law Commission, [Draft Articles on Responsibility of States for Internationally Wrongful Acts](#), 2001, Articles 4 and 8; ICJ, *Nicaragua Judgement*, 1986, paras 109, 115; ICJ, *Bosnian Genocide Judgement*, 2007, paras 391-393, 399-400, 406.

²⁰⁴⁰ ICJ, *Nicaragua Judgement*, 1986, para. 109; ICJ, *Bosnian Genocide Judgement*, 2007, paras 391-393; ILC, [Draft Articles on Responsibility of States for Internationally Wrongful Acts](#), 2001, Article 4.

²⁰⁴¹ ICJ, *Bosnian Genocide Judgement*, 2007, para. 205.

²⁰⁴² ICJ, *Nicaragua Judgement*, 1986, para. 115; ICJ, *Bosnian Genocide Judgement*, 2007, paras 399-400; ILC, [Draft Articles on Responsibility of States for Internationally Wrongful Acts](#), 2001, Article 8.

²⁰⁴³ [ICC Statute](#), Article 8*bis* (2); UNGA [Resolution 3314](#), Article 1.

²⁰⁴⁴ [UN Charter](#), Article 2(4); Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, pp 605-606.

²⁰⁴⁵ Blay, ‘Territorial Integrity and Political Independence’, *Max Planck Encyclopedia of Public International Law*, March 2010, paras 8-9.

²⁰⁴⁶ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 607.

Chapter VII of the UN Charter. If the use of force satisfies either of these exceptions, it will not be considered an act of aggression:

- a. **Self-defence:** the use of armed force by a State against another State will not constitute an act of aggression if carried out as a legitimate exercise of individual or collective self-defence under Article 51 of the UN Charter.²⁰⁴⁷ According to international law, any use of force carried out in self-defence must be necessary in response to an attack, and proportionate (i.e., not excessive) in respect of that attack.²⁰⁴⁸
- b. **Authorisation under Chapter VII:** the UN Security Council, acting under its Chapter VII powers, may authorise a use of force.²⁰⁴⁹ The use of force by a State under such circumstances could not constitute an act of aggression.

1023. Finally, judges should note that that the list of “**any of the following acts**” provided in Article 8bis(2) of the ICC Statute and Article 3 of UNGA Resolution 3314 is not exhaustive.²⁰⁵⁰ Indeed, UN General Assembly Resolution 3314 (“Definition of Aggression”) makes it clear that “[t]he acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter”.²⁰⁵¹

1024. For example, as discussed below, Article 8bis(2)(a) of the ICC Statute and Article 3(a) of UNGA Resolution 3314 only cover situations of occupation resulting from *unlawful* invasions.²⁰⁵² However, a military occupation brought about as a result of *lawful* use of force (such as one carried out in self-defence) will become an *unlawful* use of force when the occupation is no longer necessary. This in turn will become an act of aggression which is not listed.²⁰⁵³ Another example could be attacks on embassies or consulates.²⁰⁵⁴ In the *Tehran Hostages* case, the International Court of Justice repeatedly referred to the seizure of the US embassy in Tehran and the taking of hostages as an “armed attack”.²⁰⁵⁵

1025. Each of the acts of aggression listed under Article 8bis(2) of the ICC Statute, and Article 3 of UNGA Resolution 3314 will now be discussed.

²⁰⁴⁷ [UN Charter](#), Article 51: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security”.

²⁰⁴⁸ ICJ, *Armed Activities Judgement*, 2005, para. 147; ICJ, *Nicaragua Judgement*, 1986, para. 176.

²⁰⁴⁹ See e.g., UN Security Council [Resolution 1973](#) of 17 March 2011, which authorized the use of force in Libya.

²⁰⁵⁰ UN, [Report on the Special Committee on the Question of Defining Aggression 1 February – 5 March 1971](#), pp 23-24; Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 606; Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd Edition, OUP, 2016, pp 313-314.

²⁰⁵¹ UNGA [Resolution 3314](#), Article 4.

²⁰⁵² See below, paras. [1026-1028](#).

²⁰⁵³ Kress, *The Crime of Aggression: A Commentary*, Cambridge University Press, 2017, pp 451-453.

²⁰⁵⁴ Kress, *The Crime of Aggression: A Commentary*, Cambridge University Press, 2017, pp 451-453.

²⁰⁵⁵ ICJ, *Tehran Hostages Judgement*, , paras 57, 64, 91.

i. Invasion or attack by the armed forces of a State (Article 8bis(2)(a))

1026. The first listed act of aggression is “[t]he invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof”. According to the Separate Opinion of judge Simma in the International Court of Justice’s (ICJ) *Armed Activities* case, the Ugandan invasion of the Democratic Republic of the Congo (DRC) is a “textbook example” of this type of act.²⁰⁵⁶

ICJ, ARMED ACTIVITIES (DRV V. UGANDA) JUDGEMENT

153. The evidence has shown that the UPDF traversed vast areas of the DRC, violating the sovereignty of that country. It engaged in military operations in a multitude of locations, including Bunia, Kisangani, Gbadolite and Ituri and many others. These were grave violations of Article 2, paragraph 2, of the Charter.

[...]

165. In relation to the first of the DRC’s final submissions, the Court accordingly concludes that Uganda has violated the sovereignty and also the territorial integrity of the DRC. Uganda’s actions equally constituted an interference in the internal affairs of the DRC and in the civil war there raging. The unlawful military intervention by Uganda was of such a magnitude and duration that the Court considers it to be a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the Charter.

1027. Situations of military occupation also fall within this category. As set out in Article 42 of the 1907 Hague Regulations: “[t]erritory is considered occupied when it is actually placed under the authority of the hostile army”.²⁰⁵⁷

1028. Russia’s military attack on Ukraine commencing on 24 February 2022 is widely recognised to constitute such an act of aggression.²⁰⁵⁸ It is widely recognised that Russia has been occupying Crimea since 27 February 2014.²⁰⁵⁹ In addition, there is evidence that Russia attacked Donbas in July 2014, and thereafter occupied parts of Donetsk and Luhansk by proxy through the so-called “Donetsk and Luhansk People’s Republics”.²⁰⁶⁰

²⁰⁵⁶ ICJ, *Armed Activities Separate Opinion of judge Simma*, para. 3

²⁰⁵⁷ [Hague Regulations](#), 1907, Article 42. See also, ICJ, *Construction of a Wall Advisory Opinion*, para. 78; ICC, *Katanga Trial Judgement*, para. 1179; ICC, *Lubanga Decision on the Confirmation of Charges*, para. 212.

²⁰⁵⁸ Permanent Mission of Ukraine to the United Nations in New York, [“Russian Aggression”](#); RULAC, [“International Armed Conflict in Ukraine”](#); Kress, *The Crime of Aggression: A Commentary*, Cambridge University Press, 2016 (“It is difficult to see how it could be denied that the Russian Federation’s 2014 ‘bloodless invasion’ of part of the territory of Ukraine attained the requisite gravity and scale”); [“Russia G8 status at risk over ‘incredible act of aggression’ in Crimea, says Kerry”](#), *Guardian*, 2 March 2014.

²⁰⁵⁹ GRC, [“International Law and Defining Russia’s Involvement in Crimea and Donbas”](#), 13 February 2022, pp 40-42; RULAC, [“Military occupation of Ukraine by Russia”](#).

²⁰⁶⁰ GRC, [“International Law and Defining Russia’s Involvement in Crimea and Donbas”](#), 13 February 2022, pp 294-296.

ii. Bombardment or the Use of Any Weapons (Article 8bis(2)(b))

1029. The second listed act of aggression is “[b]ombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State”. “Any weapons” does not distinguish between conventional weapons, weapons of mass destruction or any other kind of weapon.²⁰⁶¹ “Bombardment” is “any attack from land, sea, or air bases with heavy weapons which, like artillery, missiles, or aircraft, are capable of destroying enemy targets at a greater distance beyond the battle lines”.²⁰⁶²

iii. Blockade of Ports or Coasts (Article 8bis(2)(c))

1030. The third listed act of aggression indicates that an act of aggression may take the form of “blockade of the ports or coasts of a State by the armed forces of another State”. A “blockade” is defined as “a belligerent operation to prevent vessels and/or aircraft of all nations, enemy and neutral, from entering or exiting specified ports, airports, or coastal areas belonging to, occupied by, or under the control of an enemy nation”.²⁰⁶³ Israel’s naval blockade against the Gaza strip provides an instructive example.²⁰⁶⁴

iv. Attack on the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State (Article 8bis(2)(d))

1031. This act is distinguished from the listed act under subparagraph (2)(a) in that the attack need not occur on the territory of the attacked State.²⁰⁶⁵ Accordingly, this provision covers attacks against a State’s military positions abroad, including on disputed territory.²⁰⁶⁶ For example, in the *Oil Platforms* case, the ICJ determined that the mining of a single military vessel might constitute an armed attack giving rise to the inherent right of self-defence.²⁰⁶⁷

v. Violations of conditions of presence in a territory

1032. It is relatively common for the military forces of one State to be located on another State’s territory as a result of a stationing agreement.²⁰⁶⁸ Russia’s stationing agreement with Ukraine allowing the presence of the Black Sea Fleet would be an example.²⁰⁶⁹ According to subparagraph (2)(e), an act of aggression might occur where a State uses its armed forces present on another State’s territory in contravention of the terms of such an agreement, or where such troops extend their presence on the territory of the

²⁰⁶¹ UN, [Report on the Special Committee on the Question of Defining Aggression 1 February – 5 March 1971](#), para. 20.1..

²⁰⁶² McDonald and Bruha, ‘Bombardment’, *Max Planck Encyclopedia of Public International Law*, 2011, para. 1.

²⁰⁶³ Von Heinegg, ‘Blockade’, *Max Planck Encyclopedia of Public International Law*, 2015, para. 1.

²⁰⁶⁴ See, ICC OTP, [Situation on Registered Vessels of Comoros, Greece and Cambodia](#), Article 53(1) Report, 6 November 2014, paras 30-34.

²⁰⁶⁵ Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd Edition, OUP, 2016, p. 316.

²⁰⁶⁶ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, pp 612-613.

²⁰⁶⁷ ICJ, *Oil Platforms Judgement*, para. 72.

²⁰⁶⁸ Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd Edition, OUP, 2016, p. 316.

²⁰⁶⁹ Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd Edition, OUP, 2016, p. 316. See also, ECtHR, *Ukraine v. Russia (re Crimea) Judgement*, paras 202-208.

receiving State after the expiration of the agreement.²⁰⁷⁰ For example, in relation to the Black Sea Fleet Agreement, the European Court of Human Rights (ECtHR) found that Russia had violated its terms by using its forces outside the parameters of the agreed deployment sites, and in contravention of the duty of cooperation provided for by the agreement.²⁰⁷¹

vi. Allowing territory to be used for an act of aggression (Article 8bis(2)(f))

1033. Subparagraph (2)(f) defines the following act of aggression: “[t]he action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State”. According to this provision, in a situation where a State consents to the presence of another State’s troops on its territory, who then proceed to carry out an act of aggression against a third State, the consenting State may itself have committed an act of aggression.²⁰⁷² For example, Belarus has been accused of committing an act of aggression by allowing the Russian attack against Ukraine on 24 February to originate from its territory.²⁰⁷³

vii. Sending armed bands, groups, irregulars, or mercenaries (Article 8bis(2)(g))

1034. The final act of aggression listed in paragraph 2 of Article 8bis is: “[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein”.

1035. In the ICJ’s *Nicaragua* judgement, the Court held that it “sees no reason deny that, in customary international law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces”.²⁰⁷⁴

1036. **The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations.** According to this element, not every act of aggression will amount to the crime of aggression.²⁰⁷⁵ The ICJ in *Nicaragua* held that it was necessary to distinguish “the most grave forms of the use of force (those constituting an armed attack) from other less grave forms”.²⁰⁷⁶ In this regard, the threshold necessary for the crime of aggression would not be met by border skirmishes or “mere frontier incidents”.²⁰⁷⁷

²⁰⁷⁰ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, pp 613-614.

²⁰⁷¹ ECtHR, *Ukraine v. Russia (re Crimea)* [Judgement](#), paras 325-327.

²⁰⁷² Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd Edition, OUP, 2016, p. 316.

²⁰⁷³ See, N. Reetz, ‘[Belarus is Complicit in Russia’s War of Aggression](#)’, *EJIL:Talk!*, 1 March 2022.

²⁰⁷⁴ ICJ, *Nicaragua* [Judgement](#), 1986, para. 195.

²⁰⁷⁵ Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd Edition, OUP, 2016, p. 310.

²⁰⁷⁶ ICJ, *Nicaragua* [Judgement](#), 1986, para. 191; ICJ, *Oil Platforms* [Judgement](#), para. 51.

²⁰⁷⁷ ICJ, *Nicaragua* [Judgement](#), 1986, para. 195. See also, Eritrea-Ethiopia Claims Commission, [Partial Award: Jus Ad Bellum – Ethiopia’s Claims 1-8 of 19 December 2005](#), para. 11.

1037. Two Understandings adopted at the 2010 Kampala Conference are relevant to the interpretation of this element. According to Understanding 6, it is necessary to consider all circumstances of a particular use of force, including the gravity of the acts and their consequences.²⁰⁷⁸ According to Understanding 7, “the three components of character, gravity and scale must be sufficient to justify a “manifest” determination”.²⁰⁷⁹
1038. Accordingly, when assessing whether an *act* of aggression reaches the threshold necessary to trigger individual criminal responsibility, judges must analyse the “manifest” nature of the act through consideration of the following factors:
- a. **“by its character”**: this concerns the nature of the act. It is necessary to determine the subjective aim of the perpetrator,²⁰⁸⁰ and whether the act amounts to an “incontrovertible breach of Article 2(4)” of the UN Charter.²⁰⁸¹
 - b. **“gravity and scale”**: this refers to the intensity of the act.²⁰⁸² “Gravity” requires an assessment of the amount of damage caused.²⁰⁸³ “Scale” refers to the “level or magnitude” of the act.²⁰⁸⁴ This requires judges to assess the geographical and temporal parameters of the act, i.e., the longer an act of aggression continues, and the larger the affected area, the larger its scale.²⁰⁸⁵
1039. Due to the absence of ICC jurisprudence, the precise threshold required to constitute a manifest violation remains ambiguous.²⁰⁸⁶ In sum, to satisfy this element, judges should seek to demonstrate that the relevant act constitutes a clear violation of the UN Charter (i.e., not a lawful exercise of self-defence or authorised by the Security Council), that it caused a high level of destruction and that it was temporally and/or geographically widespread.

b) Definition of the crime of aggression (subjective elements)

1040. Under the subjective element, the crime of aggression requires that: (1) the perpetrator intended to plan, prepare, initiate or execute an act of aggression; (2) the perpetrator was aware of the fact that they were in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression; (3) the perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations; and (4) the perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.

²⁰⁷⁸ ICC, [Resolution RC/Res.6](#), "The Crime of Aggression" of 11 June 2010, Annex III, Understanding 6.

²⁰⁷⁹ ICC, [Resolution RC/Res.6](#), "The Crime of Aggression" of 11 June 2010, Annex III, Understanding 7.

²⁰⁸⁰ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 597.

²⁰⁸¹ McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2013, p. 128.

²⁰⁸² Kress, *The Crime of Aggression: A Commentary*, Cambridge University Press, 2016, p. 511.

²⁰⁸³ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 597.

²⁰⁸⁴ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 598.

²⁰⁸⁵ Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 598; Kress, *The Crime of Aggression: A Commentary*, Cambridge University Press, 2016, p. 520.

²⁰⁸⁶ See, McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2013, p. 125.

1041. **The perpetrator intended to plan, prepare, initiate or execute an act of aggression.** Although not expressly stated under Article 437, according to the commentaries, the crime of planning, preparing, initiating and waging an aggressive war can be committed with direct intent only (CCU, Article 24).²⁰⁸⁷
1042. Similarly, under the ICC Statute, the conduct of the accused — be it planning, preparation, initiation or execution — must have been carried out with *intent*.²⁰⁸⁸ The Commentary to the International Law Commission’s 1996 Draft Code of Crimes states that “[t]he mere fact of participating in an act of aggression is, however, not enough to establish the guilt of a leader or organiser. Such participation must have been intentional and have taken place knowingly as part of a plan or policy of aggression”.²⁰⁸⁹
1043. Intent requires that the perpetrator meant to engage in the conduct of planning, preparing, initiating or executing the act of aggression.²⁰⁹⁰ In practice, given that perpetrators of the crime of aggression must satisfy the leadership requirement,²⁰⁹¹ it is difficult to imagine a situation where such a perpetrator plans, prepares for, initiates, or executes an act of aggression without intent.²⁰⁹²
1044. **The perpetrator was aware of the fact that they were in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.** Given that the leadership requirement is a circumstance element, and no other *mens rea* element is specified in the Elements of Crimes, Article 30(3) of the ICC Statute applies.²⁰⁹³ This means that the perpetrator must have had knowledge (or awareness) that they were in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression. In this regard, it is difficult to conceive of a situation in which an accused satisfies the leadership requirement but lacks knowledge of their position.²⁰⁹⁴
1045. **The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations.** According to the Elements of Crimes, “[t]here is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of force was inconsistent with the Charter of the United Nations”.²⁰⁹⁵ Judges should consider the following examples of relevant facts:²⁰⁹⁶

²⁰⁸⁷ M. Khavroniuk, [Commentary to Article 437 of the CCU](#), para. 4 in M. Melnyk and M. Khavroniuk (eds) *et al.*, *Scientific and Practical Commentary to the Criminal Code of Ukraine*, 2009.

²⁰⁸⁸ [ICC Statute](#), Article 30(2)(a).

²⁰⁸⁹ ILC, [Draft Code of Crimes against the Peace and Security of Mankind, Commentary](#) (1996), p. 43.

²⁰⁹⁰ See [ICC Statute](#), Article 30(2)(a); ICC, [Katanga Trial Judgement](#), para. 774.

²⁰⁹¹ [ICC Elements of Crimes](#), Article 8bis, Element 2. See above, paras 1007-1015.

²⁰⁹² McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2013, p. 193.

²⁰⁹³ [ICC Statute](#), Article 30(3). See McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2013, p. 190.

²⁰⁹⁴ McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2013, pp 192-193.

²⁰⁹⁵ [ICC Elements of Crimes](#), Article 8bis, Introduction, para. 2.

²⁰⁹⁶ [Non-paper by the Chairman on the Elements of Crimes, Explanatory Note](#), June 2009 SWGCA Report, Annex II, Appendix II, para. 20. See also, McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2013, p. 191.

- a. The fact that the use of force was directed against another State;
- b. The existence or absence of a Security Council Resolution;
- c. The content of the Security Council resolution; and
- d. The existence or absence of a prior or imminent attack by another State.

1046. **The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.** As with the previous mental element, the ICC Elements of Crimes states that “[t]here is no requirement to prove that the perpetrator has made a legal evaluation as to the “manifest” nature of the violation of the Charter of the United Nations”.²⁰⁹⁷ The drafters have noted that this element is necessary to account for situations where the perpetrator is aware of the facts establishing that the use of force amounts to an act of aggression, but is not aware of the facts that establish a manifest violation.²⁰⁹⁸ This could occur where a perpetrator is aware of a movement of troops across a State order, but is unaware of the scale of the attack.²⁰⁹⁹

²⁰⁹⁷ [ICC Elements of Crimes](#), Article 8bis, Introduction, para. 4.

²⁰⁹⁸ McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2013, pp 191-192.

²⁰⁹⁹ [Non-paper by the Chairman on the Elements of Crimes, Explanatory Note](#), June 2009 SWGCA Report, Annex II, Appendix II, para. 25.

III. Genocide

A. Relevance of international law principles to adjudicate genocide in Ukraine under Article 442 of the Criminal Code of Ukraine

1. Genocide under international law

1047. This section addresses the scope of Article 442 of the Criminal Code of Ukraine (CCU) and assesses the applicability of the relevant international instruments codifying genocide. These instruments include the Genocide Convention, the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY), the Statute of the International Criminal Tribunal for Rwanda (ICTR) and the Statute of the International Criminal Court (ICC).
1048. As discussed in more detail below, Article 442 covers the same conduct as prohibited under the international instruments. As such, these international instruments, and the jurisprudence which has interpreted them, can assist judges in assessing the exact scope of Article 442 and, eventually, selecting the acts that can attract criminal responsibility.
1049. To assess the applicability of these international instruments to Ukraine, this section will: (1) provide an overview of the status of genocide under international law and the nature of the relevant international instruments; and (2) assess to which extent these instruments can be used in the Ukrainian domestic legal system.

a) Notion and structure of genocide

1050. Genocide is comprised of a specific set of prohibited acts under international criminal law (underlying acts) that must be committed with an intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such (common subjective element).²¹⁰⁰ The existence of a specific intent on the part of the perpetrator “to destroy, in whole or in part, a national, ethnical, racial, or religious group”²¹⁰¹, as such differentiates genocide from ordinary or domestic crimes and from crimes against humanity and war crimes.

i. Identification and classification of genocide in international law

1051. Various international instruments and institutions have developed the definition of genocide and its legal elements. The United Nations (UN) and the international criminal tribunals – through their statutes and jurisprudence – have played a major role in the development of genocide as a legal concept. The practice of the international courts and tribunals, in particular, has gradually developed a legal framework aimed at identifying the specific violations that qualify as genocide and their elements.

²¹⁰⁰ [Genocide Convention](#), Article 2; [ICC Statute](#), Article 6; [ICTY Statute](#), Article 4; [ICTR Statute](#), Article 2.

²¹⁰¹ [Genocide Convention](#), Article 2.

1052. 1948: The Convention for the Prevention and Punishment of the Crime of Genocide. Article II of the Genocide Convention, adopted by the UN General Assembly on 9 December 1948, defined genocide as “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group”.²¹⁰² Ukraine ratified the Genocide Convention on 15 November 1954.²¹⁰³ According to the International Court of Justice (ICJ), the Convention’s definition of genocide reflects customary international law.²¹⁰⁴
1053. 1993/1994: The Statutes and practice of ICTY and ICTR. The Statutes of the ICTY and ICTR both include a definition of genocide which is identical to that included in the Genocide Convention.²¹⁰⁵ The ICTY and ICTR have issued a number of important judgements addressing a range of issues relevant to the interpretation of genocide and its elements.²¹⁰⁶ For each act of genocide, the *ad hoc* tribunals have elaborated on and explained the objective and subjective elements.²¹⁰⁷ The authority of the decisions of the ICTY and ICTR is also demonstrated by the fact that they have been relied upon by other international courts and tribunals including by the European Court of Human Rights²¹⁰⁸ and the ICJ.²¹⁰⁹
1054. 1998: ICC Statute. Like the Statutes of the ICTY and ICTR, the ICC Statute reproduces the definition of genocide contained in the Genocide Convention. Accordingly, the ICC Statute defines “genocide” as “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
- a. Killing members of the group;
 - b. Causing serious bodily or mental harm to members of the group;
 - c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
 - d. Imposing measures intended to prevent births within the group;
 - e. Forcibly transferring children of the group to another group.”²¹¹⁰
1055. The ICC legal framework also provides a detailed list of the specific elements of each act of genocide through the so-called “[Elements of Crimes](#)” (see above, [Chapter I, Part I, Section I.B.1.b.](#)) “Identification and classification of war crimes in international

²¹⁰² [Genocide Convention](#), Article 2.

²¹⁰³ United Nations Treaty Collection, Statutes of Treaties.

²¹⁰⁴ ICJ, *Bosnia Genocide Judgement*, para. 161.

²¹⁰⁵ [ICTY Statute](#), Article 4; [ICTR Statute](#), Article 2.

²¹⁰⁶ Triffterer & Ambos, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 128.

²¹⁰⁷ See below, para. 1085.

²¹⁰⁸ See for instance, ECtHR, *Simsic v. Bosnia and Herzegovina* [Decision](#), paras 8-13, 23; ECtHR, *Murtazaliyeva v. Russia* [Judgement](#), paras 72-78.

²¹⁰⁹ See for instance, ICJ, *Bosnia v. Serbia, Application of the Genocide Convention* [Judgement](#), paras 188, 190, 195, 198-200, 344; ICJ, *Croatia v. Serbia, Application of the Genocide Convention* [Judgement](#), paras 142, 146-147, 157-158.

²¹¹⁰ [ICC Statute](#), Article 6.

law”). In relation to genocide, the elements outlined will be discussed in more detail below (see paras [1065-1067](#)).

b) Relationship between Article 442 of the CCU and the international instruments on genocide

1056. This section addresses the scope of Article 442 of the CCU including the applicability of the relevant international instruments codifying the crime of genocide. As discussed above, these instruments include the Genocide Convention, the Statute of the ICTY, the Statute of the ICTR and the Statute of the ICC.

1057. The Genocide Convention, ICC Statute and Statutes of the *ad hoc* Tribunals define genocide as “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; causing serious bodily or mental harm to the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; and forcibly transferring children of the group to another group”.²¹¹¹

1058. Genocide is prohibited under Article 442 of the CCU. Genocide is defined in the CCU as a “wilfully committed act for the purpose of total or partial destruction of any national, ethnic, racial, or religious group by extermination of members of any such group or inflicting grave bodily injuries on them, creation of life condition aimed at total or partial physical destruction of the group, decrease or prevention of childbearing in the group, or forceful transferring of children from one group to another”.²¹¹²

1059. The phrase “[w]ilfully committed act for the purpose of total or partial destruction” is analogous to the requirement under international law that the act must be committed with the “intent to destroy, in whole or in part”.²¹¹³

1060. The underlying acts of genocide described in Article 442 of the CCU — namely “extermination of members of any such group or inflicting grave bodily injuries on them, creation of life condition aimed at total or partial physical destruction of the group, decrease or prevention of childbearing in the group, or forceful transferring of children from one group to another” — cover the same underlying acts as those codified as amounting to the crime of genocide under the international law instruments.

i. Applicability of international criminal law instruments: whether Article 442 of the CCU can be read in conjunction with the ICTY and ICC Statutes and practice

1061. As discussed above, Article 442 of the CCU covers the same conduct which is codified under international law as genocide. Against this background, relying on specific international instruments that codify the crime of genocide, including the Genocide Convention and ICTR/ICTY/ICC framework, can assist judges in assessing the exact

²¹¹¹ [Genocide Convention](#), Article 2; [ICC Statute](#), Article 6; [ICTY Statute](#), Article 4; [ICTR Statute](#), Article 2.

²¹¹² CCU, Article 442.

²¹¹³ [Genocide Convention](#), Article 2; [ICC Statute](#), Article 6; [ICTY Statute](#), Article 4; [ICTR Statute](#), Article 2.

scope of Article 422 and, eventually, selecting the acts that can attract criminal responsibility.

1062. The Genocide Convention was ratified by Ukraine on 15 November 1954,²¹¹⁴ meaning that Ukraine has consented to be bound by its provisions.²¹¹⁵ According to Article 1 of the Convention, Ukraine recognises that genocide is a “crime under international law which they undertake to prevent and punish”. Moreover, the Convention’s definition of genocide reflects customary international law.²¹¹⁶ Customary law is binding on all states, including Ukraine.²¹¹⁷
1063. The ICTR/ICTR Statutes and the ICC Statute reproduce the definition contained in the Genocide Convention, and their practice further clarifies its scope. As discussed in [Chapter I, Part I, Section I.B.2.b](#)) “Applicability of international criminal law instruments: whether Article 438 of the CCU can be read in conjunction with the ICTY and ICC Statutes and practice”, it is possible under Ukrainian law to rely upon the ICC and ICTY/ICTR legal frameworks and practice to interpret Article 442.

B. Definition of the crime of genocide under international law and applicability under article 442 of the CCU

1064. This section analyses the elements of genocide under international criminal law and specifies how the relevant underlying acts can be subsumed under Article 442 of the CCU.
1065. Genocide occurs when: (1) an act of genocide – i.e., killing, causing seriously bodily or mental harm, deliberately inflicting conditions of life to bring about physical destruction, imposing measures intended to prevent birth, or forcibly transferring children (**underlying acts**) – is; (2) committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group (**common element**).²¹¹⁸
1066. Paras [1068-1085](#) below will address the main features of the common elements of genocide, while paras [1086-1135](#) below will detail the relevant elements of the prohibited acts.

²¹¹⁴ United Nations Treaty Collection, Statutes of Treaties.

²¹¹⁵ See Vienna Convention on the Law of Treaties, Articles 11, 14.

²¹¹⁶ ICJ, *Bosnia Genocide Judgement*, para. 161.

²¹¹⁷ See Dr. Jacob Kellenberger, President of the International Committee of the Red Cross, ‘Foreword’ in Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law, vol. I: Rules*, Cambridge University Press, 2009, pp xv-xvii. The only exception to this rule is in the event that a state has openly and persistently objected to such a custom. See Dr. Abdul G. Koroma, judge at the International Court of Justice, ‘Foreword’ in Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law, vol. I: Rules*, Cambridge University Press, 2009, pp xviii-xix.

²¹¹⁸ [Genocide Convention](#), Article 2; [ICC Statute](#), Article 6; [ICTY Statute](#), Article 4; [ICTR Statute](#), Article 2.

1. Common Elements of Genocide

SUMMARY COMMON ELEMENTS

- The common elements of genocide separate acts of genocide from ordinary crimes, war crimes and crimes against humanity.
- For an act to constitute genocide it must be committed with an *intent* to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such. All acts of genocide require the establishment of the common elements.
- Accordingly, the common elements of genocide are:
 - The victim(s) belong to a particular national, ethnic, racial or religious group (para. 1070);
 - The perpetrator(s) intended to destroy, in whole or in part, that national, ethnic, racial or religious group, as such (para. 1074); and
- In addition, the ICC Elements of Crimes include the following contextual element for genocide, which is not present in the Genocide Convention or *ad hoc* tribunal Statutes.
 - The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction (para. 1081).

a) Introduction

1067. For an act to constitute genocide under international law, it must be committed with an intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such.²¹¹⁹ This is often referred to as the *special* or *specific intent* requirement.²¹²⁰
1068. The requirement under Article 442 of the CCU that the perpetrator “[w]ilfully committed an act for the purpose of total or partial destruction” is analogous to the requirement found in international law that the act must be committed with the “intent to destroy, in whole or in part”. As such, Article 442 covers broadly the same contextual elements as international criminal law.

²¹¹⁹ [ICC Statute](#), Article 6.

²¹²⁰ See e.g., ICTY, [Jelisić Appeal Judgement](#), paras 45-46; ICTR, [Akayesu Trial Judgement](#), para. 497.

ICTR, *AKEYESU TRIAL JUDGEMENT*, PARAS 497-498.

Contrary to popular belief, the crime of genocide does not imply the actual extermination of group in its entirety, but is understood as such once any one of the acts mentioned in Article 2(2) (a) through 2(2)(e) [ICTR Statute] is committed with the special intent to destroy “in whole or in part” a national, ethnical, racial or religious group.

Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demand that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in “the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”.

b) Definition of the common elements of genocide

1069. According to the ICC Elements of Crimes, the common elements of genocide are:²¹²¹

- The victim(s) belong to a particular national, ethnic, racial or religious group;
- The perpetrator(s) intended to destroy, in whole or in part, that national, ethnic, racial or religious group, as such; and
- The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

i. The Victim(s) Belong to a Particular National, Ethnic, Racial or Religious Group

1070. The victims of genocide must belong to one of the four enumerated groups contained in the Genocide Convention and international criminal statutes, namely a national, ethnic, racial or religious group.²¹²²

1071. These groups have been defined as follows:

- **National groups** comprise individuals sharing a recognised/perceived legal bond of common citizenship recognised in law (i.e., under the legal system of a State) or by the international community, and a shared understanding and reciprocity of rights and duties.²¹²³
- **Ethnic groups** comprise individuals sharing a common language, traditions, history, social structures and culture, including, for instance, tribal customs and traditional links to land.²¹²⁴
- **Racial groups** comprise individuals who share “hereditary physical traits” (for instance, color of skin) “often identified with a geographic region, irrespective of linguistic, cultural, national or religious factors”.²¹²⁵

²¹²¹ ICC [Elements of Crimes](#), Article 6.

²¹²² [Genocide Convention](#), Article 2; [ICC Statute](#), Article 6; [ICTY Statute](#), Article 4; [ICTR Statute](#), Article 2.

²¹²³ ICTR, *Akayesu Trial Judgement*, para. 512.

²¹²⁴ ICC, *Al Bashir Decision on the Prosecution's Application for a Warrant of Arrest*, para. 137; International Commission of Inquiry on Darfur, [Report to the United Nations Secretary-General](#), pp 117, 127 (fn. 183), 129; ICTR, *Akayesu Trial Judgement*, para. 513.

²¹²⁵ ICTR, *Akayesu Trial Judgement*, para. 514; ICTR, *Kayishema et Ruzindana Trial Judgement*, para. 98.

- **Religious groups** comprise individuals who share the same religion, mode of worship or religious beliefs.²¹²⁶

1072. Membership can be established either on an objective or subjective basis.²¹²⁷ The **objective approach** requires an assessment of whether the targeted group has certain characteristics that objectively point to the existence of a separate national, ethnic, racial or religious group.²¹²⁸ Whereas, under the **subjective approach**, the national, ethnic, racial or religious groups are distinguished on the basis of how they are perceived by the members of the group themselves, and others (including the perpetrators), in light of the particular political and social context in which they find themselves.²¹²⁹

1073. The group targeted for genocide cannot be defined in negative terms, i.e., for characteristics they do not possess.²¹³⁰

ICTY, *BRDANIN TRIAL JUDGEMENT*, PARA. 684-685 (FOOTNOTES OMITTED)

The correct determination of the relevant protected group has to be made on a case-by-case basis, consulting both objective and subjective criteria. This is so because subjective criteria alone may not be sufficient to determine the group targeted for destruction and protected by the Genocide Convention, for the reason that the acts identified in subparagraphs (a) to (e) of Article 4(2) [ICTY Statute] must be in fact directed against “members of the group”.

In addition, the Trial Chamber agrees with the *Stakic* Trial Chamber that, “[i]n cases where more than one group is targeted, it is not appropriate to define the group in general terms, as for example, ‘non-Serbs’”. It follows that the Chamber disagrees with the possibility of identifying the relevant group by exclusion, i.e.: on the basis of “negative criteria”.

ii. The Perpetrator Intended to Destroy, in Whole or in Part, that National, Ethnic, Racial or Religious Group, as Such

1074. The second common element sets out a specific mental element for the crime of genocide. Thus, the evidence must establish that the prohibited criminal acts of genocide were committed with a **specific intent on the part of the perpetrator to destroy, in whole or in part**, a particular national, ethnic, racial or religious group,

²¹²⁶ ICTR, *Akayesu Trial Judgement*, para. 514; ICTR, *Kayishema et Ruzindana Trial Judgement*, para. 98.

²¹²⁷ ICTR, *Semanza Trial Judgement*, para. 317; ICTY, *Jelusic Trial Judgement*, paras 69-71; ICTY, *Brdanin Trial Judgement*, para. 684; ICTY, *Blagojevic et Jokic Trial Judgement*, para. 667.

²¹²⁸ ICC, *Al Bashir Decision on the Prosecution’s Application for a Warrant of Arrest*, paras 135-137; ICTR, *Semanza Trial Judgement*, paras 23, 137 (fn. 152).

²¹²⁹ ICTY, *Jelusic Trial Judgement*, para. 70; ICTY, *Krstic Trial Judgement*, para. 557; ICTR, *Gacumbitsi Trial Judgement*, para. 254; ICTR, *Rutaganda Trial Judgement*, para. 56.

²¹³⁰ ICTY, *Karadzic Trial Judgement*, para. 541; ICTY, *Stakic Appeal Judgement*, paras 16-17. See also, ICTY, *Jelusic Trial Judgement*, paras 71-72.

as such.²¹³¹ This specific genocidal intent must be established in addition to proof of intent to commit the underlying act.²¹³²

1075. A finding of genocide does not require the actual extermination of the group in its entirety, but is, instead, satisfied if one of the acts of genocide (see below, para. 1086) is committed with the *intent to destroy*.²¹³³ In other words, it must be shown that the perpetrator sought to achieve the destruction of a group, in whole or in part.²¹³⁴
1076. The intent must go beyond mere discriminatory targeting but instead be directed towards the *destruction* of the group as a “separate and distinct entity”.²¹³⁵ The perpetrator must have intended to destroy the group **in whole or in part**, i.e., to destroy at least a substantial part of the group, regardless of the ultimate number of victims.²¹³⁶ Whether the targeted group is substantial enough may be determined by factors including the numeric size of the targeted part of the group relative to the overall group, the prominence within the group of the targeted part of the group, and the area of the perpetrators’ activity and control as well as the possible extent of their reach.²¹³⁷
1077. The perpetrator must have targeted the victims due to their membership in the group, with the ultimate aim of destroying the group (as indicated by the words “**as such**”).²¹³⁸ This does not preclude cases where the perpetrator was motivated by other factors as well, such as a personal motive of sexual gratification, or to obtain personal economic benefits, political advantage or some form of power.²¹³⁹
1078. The destruction must be physical or biological (rather than mere cultural destruction).²¹⁴⁰ Biological destruction is geared toward “the regenerative power of the group”, whereas physical destruction aims at “the annihilation of the existing group”.²¹⁴¹
1079. While it may be unlikely, although possible, that the judge will be presented *direct* evidence of the perpetrator’s specific intent, such intent can be inferred from the facts

²¹³¹ ICC Statute, Article 6.

²¹³² ICTY, *Krstic Appeal Judgement*, para. 20; ICTY, *Popovic et al. Trial Judgement*, para. 808. See also, ICJ, *Bosnia Genocide Judgement*, para. 186.

²¹³³ CTR, *Akayesu Trial Judgement*, paras 518, 520. See also, ICTR, *Rutaganda Trial Judgement*, paras 59-61; ICTR, *Kamukamba Trial Judgement*, para. 16.

²¹³⁴ ICTY, *Jelusic Trial Judgement*, para. 81; ICTY, *Krstic Trial Judgement*, para. 550.

²¹³⁵ See e.g., ICTY, *Popovic et al. Trial Judgement*, para. 1312; ICTY, *Brdanin Trial Judgement*, para. 698.

²¹³⁶ ICTY, *Krstic Appeal Judgement*, para. 12; MICT, *Mladic Appeal Judgement*, para. 576; ICTR, *Kayishema et Ruzindana Trial Judgement*, para. 97; ICTR, *Bagilishema Trial Judgement*, para. 64; ICTY, *Krstic Trial Judgement*, para. 590; ICTR, *Gatete Trial Judgement*, para. 582. See also, ICTR, *Ndindiliyimana et al. Trial Judgement*, para. 2072.

²¹³⁷ ICTY, *Krstic Appeal Judgement*, paras 12-14; ICTY, *Brdanin Trial Judgement*, paras 701-702; ICTY, *Popovic et al. Appeal Judgement*, para. 422.

²¹³⁸ ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro Judgement*, para. 193; ICTY, *Stakic Trial Judgement*, para. 521; ICTY, *Tolimir Trial Judgement*, para. 746; ICTR, *Muhimana Trial Judgement*, para. 500; ICTR, *Kajelijeli Trial Judgement*, para. 813; ICTR, *Muvunyi Trial Judgement*, para. 485.

²¹³⁹ ICTY, *Jelusic Appeal Judgement*, para. 49; ICTR, *Niyitegeka Appeal Judgement*, para. 53; ICTY, *Jelusic Trial Judgement*; Human Rights Council, “*They Came to Destroy: ISIS Crimes Against the Yazidis*”, 15 June 2016, A/HRC/32.CRP.2, para. 158.

²¹⁴⁰ ICTY, *Krstic Trial Judgement*, para. 580; International Commission of Inquiry on Darfur, *Report to the United Nations Secretary-General*, pp 4, 53, 124 (fn. 176), 129, 160.

²¹⁴¹ Global Justice Center, “*Beyond Killing: Gender, Genocide, & Obligations Under International Law*”, December 2018, p. 34.

and circumstances.²¹⁴² Intent can be inferred either from the words or deeds of the perpetrator and may be demonstrated by a pattern of purposeful action.²¹⁴³ Where the judge relies solely on circumstantial evidence, a finding of genocidal intent “must be the only reasonable inference from the totality of the evidence”.²¹⁴⁴

1080. Evidence of discriminatory intent may include the following non-exhaustive list:

- **Statements of the perpetrator, including where they contain no explicit appeal to commit genocide but still constitute direct incitement to commit genocide within the particular context;**²¹⁴⁵
- **The general context of the situation:** for example, the systematic commission of culpable acts directed against the targeted group committed by the same perpetrator or by others or the unstable environment/violent atmosphere that existed between the perpetrator’s group and the targeted group;²¹⁴⁶
- The repetition of destructive and discriminatory acts;²¹⁴⁷
- **The deliberate, discriminatory and systematic** targeting of the victims and their property due to their membership in the group and the exclusion of the members of other groups from targeting;²¹⁴⁸
- **The nature, severity, scale and geographic reach** of the crimes committed against the members of the group, including the weapons employed and the extent of bodily injury.²¹⁴⁹ The scale and intensity of sexual violence may also evidence a genocidal intent, particularly where such violence causes the victims to be “so traumatized that they can no longer contemplate a procreative relationship, even after their return to their own group”.²¹⁵⁰
- **The organisation or planning aimed** towards the targeting of the group;²¹⁵¹

²¹⁴² ICTY, *Jelisić Appeal Judgement*, para. 47; ICTR, *Seromba Appeal Judgement*, para. 176; ICTR, *Nahimana et al. Appeal Judgement*, para. 524; ICTR, *Muhimana Appeal Judgement*, para. 32; ICTR, *Gacumbitsi Appeal Judgement*, paras 40-41; ICTR, *Rutaganda Appeal Judgement*, para. 525; ICTR, *Akayesu Trial Judgement*, para. 523; ICTY, *Sikirica et al. Judgement on Defence Motions to Acquit*, para. 46; ICTR, *Kayishema et Ruzindana Trial Judgement*, para. 93.

²¹⁴³ ICTR, *Kayishema et Ruzindana Trial Judgement*, para. 93; ICTR, *Muhimana Trial Judgement*, para. 496; ICTR, *Gacumbitsi Trial Judgement*, para. 252; ICTR, *Kajelijeli Trial Judgement*, para. 806; ICTR, *Simba Trial Judgement*, para. 413.

²¹⁴⁴ ICTR, *Nyiramasuhuko et al. Trial Judgement*, para. 5732; *See also*, ICTR, *Bizimungu et al. Trial Judgement*, para. 1958; ICTR, *Ndahimana Trial Judgement*, para. 804.

²¹⁴⁵ ICTR, *Bizimungu et al. Trial Judgement*, para. 1974; ICTR, *Karempera et Ngirumpatse Trial Judgement*, paras 1597-1598; ICTR, *Nyiramasuhuko et al. Trial Judgement*, para. 6012; ICTR, *Nzabonimana Trial Judgement*, para. 1712.

²¹⁴⁶ ICTR, *Akayesu Trial Judgement*, para. 523; ICTR, *Ndindabahizi Trial Judgement*, para. 460; ICTR, *Muhimana Trial Judgement*, para. 496; *Nyiramasuhuko et al. Trial Judgement*, para. 5732. *See also*, ICTR, *Bizimungu et al. Trial Judgement*, para. 1958; ICTR, *Ndahimana Trial Judgement*, para. 804; ICTR, *Nyiramasuhuko et al. Appeal Judgement*, para. 1029.

²¹⁴⁷ ICTY, *Jelisić Appeal Judgement*, para. 47. *See also*, ICTR, *Gatete Trial Judgement*, para. 583; ICTR, *Nyiramasuhuko et al. Trial Judgement*, para. 5732. *See also*, ICTR, *Bizimungu et al. Trial Judgement*, para. 1958; ICTR, *Ndahimana Trial Judgement*, para. 804; ICTR, *Kalimanzira Trial Judgement*, para. 731; ICTR, *Muvunyi Trial Judgement*, para. 29.

²¹⁴⁸ ICTY, *Krstić Trial Judgement*, paras 546-547, 594-595, 597; ICTY, *Brdanin Trial Judgement*, para. 983; ICTR, *Kayishema et Ruzindana Trial Judgement*, para. 93; ICTR, *Kalimanzira Trial Judgement*, para. 731; ICTR, *Muvunyi Trial Judgement*, para. 29.

²¹⁴⁹ ICTR, *Akayesu Trial Judgement*, para. 523; ICTR, *Muhimana Trial Judgement*, para. 496; ICTR, *Ndindabahizi Trial Judgement*, para. 461; ICTY, *Sikirica et al. Judgement on Defence Motions to Acquit*, para. 94; ICTR, *Kayishema et Ruzindana Trial Judgement*, para. 93.

²¹⁵⁰ Global Justice Center, “[Beyond Killing: Gender, Genocide, & Obligations Under International Law](#)”, December 2018, p. 35.

²¹⁵¹ ICTY, *Popović et al. Trial Judgement*, paras 1314-1318, 1399; ICTR, *Nzabonimana Trial Judgement*, paras 1527, 1538.

- The use of derogatory language toward members of the targeted group and the number of victims;²¹⁵² and
- **The political doctrine** (outlined by the measures, policies, speeches or projects of the perpetrator(s)) which gave rise to the criminal acts.²¹⁵³

ICTR, *NYIRAMASUHU* ET AL. TRIAL JUDGEMENT, PARA. 5732 (FOOTNOTES OMITTED)

The jurisprudence accepts that, in most cases, genocidal intent will be proved by circumstantial evidence. Such intent may be inferred from a number of facts and circumstances, including the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts. Evidence of limited and selective assistance towards a few individuals does not generally preclude a reasonable finding of the requisite intent to commit genocide. When based on circumstantial evidence, any finding that the accused had genocidal intent must be the only reasonable inference from the totality of the evidence.

iii. The Conduct took Place in the Context of a Manifest Pattern of Similar Conduct Directed Against that Group or was Conduct that Could Itself Effect such Destruction

1081. The Genocide Convention does not expressly require this contextual element,²¹⁵⁴ and neither do the Statutes or case law of the *ad hoc* tribunals require the existence of a plan or policy as an element of the crime of genocide.²¹⁵⁵ Consequently, within these frameworks, it is irrelevant whether the conduct was capable of posing any concrete threat to the existence of the targeted group, or a part of the targeted group.²¹⁵⁶

1082. However, the ICC Elements of Crimes require that “the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction”.²¹⁵⁷ As such, before the ICC, the crime of genocide occurs only “when the threat against the existence of the targeted group, or part thereof, becomes concrete and real, as opposed to just being latent or hypothetical”.²¹⁵⁸

²¹⁵² ICTR, *Kayishema et Ruzindana Trial Judgement*, para. 93; ICTR, *Kajelijeli Trial Judgement*, para. 806; ICTR, *Gacumbitsi Trial Judgement*, para. 253.

²¹⁵³ ICTR, *Akayesu Trial Judgement*, para. 524.

²¹⁵⁴ *Genocide Convention*, Article 2; ICC, *Al Bashir Decision on the Prosecution’s Application for a Warrant of Arrest*, para. 117.

²¹⁵⁵ *ICTY Statute*, Article 4; *ICTR Statute*, Article 2; ICTY, *Jelusic Trial Judgement*, para. 100; ICTR, *Akayesu Trial Judgement*, para. 520, 523. *See also*, ICTY, *Krstic Appeal Judgement*, para. 224; ICTY, *Popovic et al. Trial Judgement*, para. 829. *See also*, ICC, *Al Bashir Decision on the Prosecution’s Application for a Warrant of Arrest*, para. 119.

²¹⁵⁶ ICTY, *Krstic Trial Judgement*, para. 133; ICTR, *Akayesu Trial Judgement*, para. 498; ICTR, *Kayishema et Ruzindana Trial Judgement*, para. 170; ICC, *Al Bashir Decision on the Prosecution’s Application for a Warrant of Arrest*, para. 119.

²¹⁵⁷ ICC *Elements of Crimes*, Article 6(b); ICC, *Al Bashir Decision on the Prosecution’s Application for a Warrant of Arrest*, para. 123.

²¹⁵⁸ ICC, *Al Bashir Decision on the Prosecution’s Application for a Warrant of Arrest*, para. 124.

1083. This requires that:

- a. the conduct of the perpetrator took place in the context of other conduct that was large in scale, systematic and that followed a similar pattern (i.e., “a manifest pattern of similar conduct”).²¹⁵⁹ This includes the initial acts of a pattern that became obvious only later (i.e., an emerging pattern).²¹⁶⁰ This is an objective qualification.²¹⁶¹
- b. if there was not a manifest pattern of similar conduct, the conduct must have been of a nature and gravity that could itself effect such destruction. In other words, the conduct of the perpetrator must be severe enough to destroy the group, in whole or in part, on its own, for example, through the use of a weapon of mass destruction.²¹⁶²
- c. The perpetrator must be aware that the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.²¹⁶³

1084. The CCU follows the Genocide Convention and does not expressly contain this contextual element. Consequently, it is not required that judges make a finding that the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction for the crime of genocide to be established.

2. Underlying Acts of Genocide

1085. The Genocide Convention, ICC Statute and Statutes of the *ad hoc* Tribunals list the underlying acts of genocide as: killing members of the group; causing serious bodily or mental harm to the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; and forcibly transferring children of the group to another group.²¹⁶⁴

²¹⁵⁹ ICC, *Al Bashir Second Decision on the Prosecution's Application for a Warrant of Arrest*, para.16; ICC, *Al Bashir Decision on the Prosecution's Application for a Warrant of Arrest*, Separate and Partly Dissenting Opinion of judge Anita Usacka, para. 19; Cryer *et al.*, *An Introduction to International Criminal Law and Procedure*, 2nd Edition, Cambridge University Press, 2010, p. 218.

²¹⁶⁰ ICC *Elements of Crimes*, Article 6, Introduction (a).

²¹⁶¹ ICC *Elements of Crimes*, Article 6, Introduction (b).

²¹⁶² Oosterveld in Lee (ed.) *The International Criminal Court—Elements of Crimes and Rules of Procedure and Evidence*, Piragoff, 2001, p. 46, n. 28.

²¹⁶³ See *ICC Statute*, Article 30(3).

²¹⁶⁴ *Genocide Convention*, Article 2; *ICC Statute*, Article 6; *ICTY Statute*, Article 4; *ICTR Statute*, Article 2.

- a) Killing members of the group (Genocide Convention, Article 2(a); ICC Statute, Article 6(a); ICTY Statute, Article 4(2)(a); ICTR Statute, Article 2(2)(a))

APPLICABILITY: THE ACT OF GENOCIDE BY KILLING MEMBERS OF THE GROUP IS SUBSUMED UNDER THE NOTION OF “EXTERMINATION OF MEMBERS OF ANY SUCH GROUP” UNDER ARTICLE 442 OF THE CCU (PARA. 1086).

Elements of the crimes: To convict a perpetrator for genocide by killing members of the group the following elements need to be established:

(1) Objective element

- The perpetrator killed one or more persons (para. 1088).

(2) Subjective element

- The perpetrator intended to kill one or more persons (para. 1092).

(3) Common elements

- Such person or persons belonged to a particular national, ethnical, racial or religious group (see above, para. 1070).
- The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group (see above, para. 1074).

For the ICC only:

- The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction (see above, para. 1081).

i. Applicability under Article 442

1086. Article 442 of the CCU, includes “extermination of members of any such group” as an underlying act of genocide. This language covers the same conduct as “killing members of the group”, as codified as an act of genocide under the Genocide Convention, ICC Statute and the Statutes of the *ad hoc* tribunals.²¹⁶⁵

1087. The objective and subjective elements of the act of genocide of killing are identical to the war crime of wilful killing (see [Chapter 1, Part I, Section I.C.3.b.i.](#) “Wilful killing (ICTY Statute, Article 2(a); ICC Statute, Article 8(2)(a)(i))”) and the crime against humanity of murder (see [Chapter 1, Part I, Section IV.B.3.b](#) “Crime against Humanity of Murder (ICC Statute, Article 7(1)(a); ICTY Statute, Article 5(a); ICTR Statute, Article 3(a); SCSL Statute, Article 2(a))”).²¹⁶⁶

²¹⁶⁵ [Genocide Convention](#), Article 2(a); [ICC Statute](#), Article 6(a); [ICTY Statute](#), Article 4(2)(a); [ICTR Statute](#), Article 2(2)(a).

²¹⁶⁶ ICTY, [Brdanin Trial Judgement](#), paras 381, 689.

ICTY, *BRDANIN TRIAL JUDGEMENT*, PARA. 381

Save for some insignificant variations in expressing the constituent elements of the crime of murder and wilful killing [...], the jurisprudence of this Tribunal has consistently defined the essential elements of these offences as follows:

1. The victim is dead;
2. The death was caused by an act or omission of the accused, or of a person or persons for whose acts or omissions the accused bears criminal responsibility; and
3. The act was done, or the omission was made, by the accused, or a person or persons for whose acts or omissions he bears criminal responsibility, with an intention:
 - To kill, or
 - To inflict grievous bodily harm or serious injury, in the reasonable knowledge that such act or omission was likely to cause death.

ii. Definition of Killing Members of the Group (Objective element)

1088. The objective element of this act of genocide, requires that the perpetrator killed one or more person.²¹⁶⁷ In other words, the perpetrator caused the death of the victim, directly or indirectly, through an act or omission.²¹⁶⁸ There must be proof of result (i.e., the death of the victim)²¹⁶⁹ and the perpetrator's conduct must have been a substantial cause of the death of the victim.²¹⁷⁰

1089. Killing by *direct* methods includes acts such as shooting to death, killing with machetes, killing by a grenade, shelling causing death, arson causing death and beatings causing death. Whereas, killing by *indirect* methods includes more broadly deaths which result from serious bodily or mental harm (*see also* Article 6(b), below) or from “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part” such as inflicting a subsistence diet, withholding medical supplies and systematic expulsions (*see also* Article 6(c), below).²¹⁷¹

1090. Suicide can amount to killing if the perpetrator's actions or omission “induced the victim to take actions which resulted in his death, and that his suicide was either intended, or was an action of a type which a reasonable person could have foreseen as a consequence.”²¹⁷²

²¹⁶⁷ ICC [Elements of Crimes](#), Article 6(a).

²¹⁶⁸ ICC [Elements of Crimes](#), fn. 3; ICC, *Katanga et Chui Decision on the Confirmation of Charges*, para. 287. *See also*, ICTY, *Brdanin Trial Judgement*, para. 739, where the ICTY established that the meaning of “killing” as an element of genocide is identical to the material elements of other similar international crimes, e.g., war crimes and crimes against humanity involving acts of “killing”.

²¹⁶⁹ ICTY, *Karadzic Trial Judgement*, para. 542; ICTY, *Brdanin Trial Judgement*, para. 688; ICTY, *Stakic Trial Judgement*, para. 514.

²¹⁷⁰ ICTY, *Celebici Trial Judgement*, para. 424.

²¹⁷¹ *Attorney-General of Israel v. Eichmann Judgement*, para. 196. *See also*, Global Justice Center, “[Beyond Killing: Gender, Genocide, & Obligations Under International Law](#)”, December 2018, p. 16.

²¹⁷² ICTY, *Krnojelac Trial Judgement*, para. 329.

1091. The death of the victim can be established by uncovering and identifying their corpse;²¹⁷³ however, it is “not necessary that a victim’s body has been recovered to prove that the victim is dead”.²¹⁷⁴ Accordingly, circumstantial evidence is enough to provide a “reasonable inference” that a victim is dead.²¹⁷⁵ Such evidence includes: the lack of contact by the victim with family or friends; the fact that the victim was last seen in an area that was attacked; the existence of a pattern of mistreatment of other victims by the perpetrator(s); and the coinciding or nearly coinciding time of death of other victims.²¹⁷⁶

iii. Definition of Killing Members of the Group (Subjective element)

1092. For the subjective element it must be established that the perpetrator had **intent**.²¹⁷⁷ Such intent will be proven when: (1) the perpetrator acted deliberately or failed to act (**intent to conduct**) to cause the death of one or more persons or where they were aware that this would occur in the ordinary course of events (**intent to consequence**).²¹⁷⁸

1093. It is required that the perpetrator *meant* to engage in the acts or omissions which caused the death of one or more persons.²¹⁷⁹ In other words, they deliberately acted or failed to act.²¹⁸⁰ With regard to the consequence, i.e., that one or more persons were killed, it must be shown that the perpetrator meant to cause the deaths or was aware that they would occur in the ordinary course of events.²¹⁸¹

1094. At the *ad hoc* tribunals, this intent was interpreted to mean the “death of a victim resulting from an act or omission of the accused committed with the intention to kill or to cause serious bodily harm which he/she should reasonably have known might lead to death”²¹⁸², i.e., it was a probable consequence of their act or omission.²¹⁸³ At the ICC, a higher standard is required, namely that it was virtually certain that the death would occur.²¹⁸⁴

²¹⁷³ ICC, *Bemba Decision on the Confirmation of Charges*, para. 132.

²¹⁷⁴ ICTY, *Halilovic Trial Judgement*, para. 37.

²¹⁷⁵ ICTY, *Halilovic Trial Judgement*, para. 37.

²¹⁷⁶ ICTY, *Lukic et Lukic Trial Judgement*, para. 904.

²¹⁷⁷ ICC Statute, Article 30(2)(a) and (b); *See also*, ICJ, *Bosnia v. Serbia, Application of the Genocide Convention Judgement*, para. 186; Commentary on Article 17 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind, ILC Report 1996, Yearbook of the International Law Commission, 1996, vol. II, Part Two, p. 44, para. 5. *See also*, ICTY, *Stakic Trial Judgement*, para. 515; ICTY, *Karadzic Trial Judgement*, para. 447 ICTR, *Semanza Trial Judgement*, para. 319; ICTR, *Bagilishema Trial Judgement*, paras 55, 57-58; ICTR, *Musema Trial Judgement*, para. 155; ICTR, *Rutaganda Trial Judgement*, paras 49-50; ICTR, *Kayishema et Ruzindana Trial Judgement*, para. 103; ICTR, *Akayesu Trial Judgement*, paras 500-501; *See also*, *Kayishema et Ruzindana Appeal Judgement*, para. 151.

²¹⁷⁸ ICC Statute, Article 30(2)(a) and (b); ICC, *Katanga Trial Judgement*, paras 774, 781.

²¹⁷⁹ ICC Statute, Article 30(2)(a).

²¹⁸⁰ ICC, *Katanga Trial Judgement*, para. 774.

²¹⁸¹ ICC Statute, Article 30(2).

²¹⁸² ICTY, *Krstic Trial Judgement*, para. 485.

²¹⁸³ ICTY, *Karadzic Trial Judgement*, paras 447-448. ICTY, *Krstic Trial Judgement*, para. 485; ICTY, *Brdanin Trial Judgement*, paras 381, 690; ICTY, *Celebici Appeal Judgement*, paras 422-423; ICTY, *Celebici Trial Judgement*, paras 424-439; ICTY, *Blaskic Trial Judgement*, para. 217; ICTY, *Kupreskic Trial Judgement*, paras 560-561; ICTY, *Kordic et Cerkez Trial Judgement*, paras 235-236; ICTY, *Kvočka et al. Trial Judgement*, para. 132; ICTY, *Krnojelac Trial Judgement*, para. 324; ICTY, *Vasiljevic Trial Judgement*, para. 205; ICTY, *Naletilic Trial Judgement*, para. 248; ICTY, *Stakic Trial Judgement*, para. 747 with reference to paras 631, 584-587. For ICTR jurisprudence, *see* ICTR, *Kayishema et Ruzindana Trial Judgement*, para. 140; ICTR, *Bagilishema Trial Judgement*, paras 84-85.

²¹⁸⁴ *See* ICC, *Katanga Trial Judgement*, paras 775-776.

1095. Given that genocide already requires the special intent of the perpetrator to destroy the national, ethnical, racial or religious group, in whole or in part, there is no requirement to prove a further element of premeditation in the killing.²¹⁸⁵

- b) Causing Serious Bodily or Mental Harm (Genocide Convention, Article 2(b); ICC Statute, Article 6(b); ICTY Statute, Article 4(2)(b); ICTR Statute, Article 2(2)(b))

APPLICABILITY: THE ACT OF GENOCIDE BY CAUSING SERIOUS BODILY AND MENTAL HARM IS BROADLY COVERED BY THE PHRASE “INFLECTING GRAVE BODILY INJURIES ON THEM” UNDER ARTICLE 442 OF THE CCU (PARA. 1096).

Elements of the crimes: To convict a perpetrator for genocide by causing serious bodily or mental harm the following elements need to be established:

(1) Objective element

- The perpetrator caused serious bodily or mental harm to one or more persons (para. 1098)

(2) Subjective element

- The perpetrator intended to cause serious bodily or mental harm to one or more persons (para. 1102).

(3) Common elements

- Such person or persons belonged to a particular national, ethnical, racial or religious group (see above, para. 1070).
- The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group (see above, para. 1074).

For the ICC only:

- The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction (see above, para. 1081).

i. Applicability under Article 442

1096. Article 442 of the CCU includes genocide by “inflicting grave bodily injuries on them”. This language covers broadly the same conduct as “causing serious bodily and mental harm”, as codified as an act of genocide under the Genocide Convention, ICC Statute and Statutes of the *ad hoc* tribunals.²¹⁸⁶

1097. Grave injuries as codified in Article 442 can be interpreted synonymously with serious harm as contained in international law. Although Article 442 does not explicitly mention mental harm, in order to ensure this provision is interpreted in light of

²¹⁸⁵ ICTY, *Stakic Trial Judgement*, para. 515; ICTR, *Semanza Trial Judgement*, para. 319; ICTR, *Kajelijeli Appeal Judgement*, para. 29; ICTR, *Ntagerura et al. Trial Judgement*, para. 664; ICTR, *Kajelijeli Trial Judgement*, para. 813; ICTR, *Simba Trial Judgement*, para. 414; ICTR, *Muvunyi Trial Judgement*, para. 486.

²¹⁸⁶ *Genocide Convention*, Article 2; *ICC Statute*, Article 6; *ICTY Statute*, Article 4; *ICTR Statute*, Article 2.

international law, the phrase “bodily injuries” should be interpreted broadly to also cover mental harm.

ii. Definition of Serious Bodily or Mental Harm (Objective element)

1098. The objective element of this act of genocide requires that the perpetrator caused serious bodily or mental harm to one or more persons.²¹⁸⁷ This requires proof of a result.²¹⁸⁸
1099. **Bodily harm** involves the infliction of serious physical injury on a victim.²¹⁸⁹ This refers to “acts of physical violence that seriously injure the health, cause disfigurement, or any serious injury to the external or internal organs or senses”.²¹⁹⁰ **Mental harm** involves the infliction of psychological injury that goes beyond “minor or temporary impairment of mental faculties”.²¹⁹¹ It can be caused by “the infliction of strong fear or terror, intimidation or threat”.²¹⁹²
1100. The bodily or mental harm must be serious.²¹⁹³ The harm must “go beyond temporary unhappiness, embarrassment or humiliation and inflict grave and long-term disadvantage to a person’s ability to lead a normal and constructive life”.²¹⁹⁴ However, it is not required that the injury is permanent or irremediable.²¹⁹⁵

²¹⁸⁷ ICC [Elements of Crimes](#), Article 6(b).

²¹⁸⁸ ICTY, [Karadzic Trial Judgement](#), para. 543; ICTY, [Tolimir Trial Judgement](#), para. 737; ICTY, [Popovic et al. Trial Judgement](#), para. 811; ICTY, [Brdanin Trial Judgement](#), para. 688; ICTY, [Stakic Trial Judgement](#), para. 514.

²¹⁸⁹ ICTR, [Kamuhanda Trial Judgement](#), para. 633; ICTY, [Karadzic Trial Judgement](#), para. 544.

²¹⁹⁰ ICTR, [Kayishema et Ruzindana Trial Judgement](#), para.109; ICTR, [Ntagerura et al. Trial Judgement](#), para. 664; ICTR, [Muhimana Trial Judgement](#), para. 502; ICTR, [Gacumbitsi Trial Judgement](#), para. 291; ICTR, [Semanza Trial Judgement](#), para.321.

²¹⁹¹ ICTY, [Krstic Trial Judgement](#), para. 510; ICTR, [Kamuhanda Trial Judgement](#), paras 633-634.

²¹⁹² ICTR, [Seromba Appeal Judgement](#), para. 46; ICTR, [Kajelijeli Trial Judgement](#), para. 815; ICTR, [Kayishema et Ruzindana Trial Judgement](#), para. 110; ICTR, [Semanza Trial Judgement](#), para. 321.

²¹⁹³ ICTR, [Seromba Appeal Judgement](#), para. 46; ICTR, [Kajelijeli Trial Judgement](#), para. 814; ICTY, [Tolimir Appeal Judgement](#), para. 201; [Karadzic Trial Judgement](#), para. 543; ICTY, [Krajisnik Trial Judgement](#), para. 862.

²¹⁹⁴ ICTY, [Tolimir Appeal Judgement](#), para. 201; ICTY, [Karadzic Trial Judgement](#), para. 543.

²¹⁹⁵ ICTR, [Semanza Trial Judgement](#), para. 320; ICTR, [Rutaganda Trial Judgement](#), para. 51; ICTR, [Kajelijeli Trial Judgement](#), para. 815.

CASE STUDY: EXAMPLES OF SERIOUS BODILY AND MENTAL HARM

While there is no exhaustive list of acts that can constitute serious bodily and mental harm as an act of genocide, the Tribunals of the ICTR and ICTY have considered the following acts amount to serious bodily and mental harm:

- torture;²¹⁹⁶
- inhumane or degrading treatment;²¹⁹⁷
- sexual violence, including rape;²¹⁹⁸
- interrogations combined with beatings;²¹⁹⁹
- threats of death;²²⁰⁰
- harm that damages or causes disfigurement or serious injury;²²⁰¹
- mental trauma caused by being captured, kidnapped, or subjected to threats of death;²²⁰²
- mental trauma caused by being forcibly separated from family and forced deportation;²²⁰³ and
- mental trauma caused by the circumstances surrounding sexual violence.²²⁰⁴

1101. Rape and other forms of sexual violence have been recognised as amounting to serious bodily and mental harm as an act of genocide by the ICTR and ICTY.²²⁰⁵ Within the context of the Rwanda genocide it was recognised that “sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole”.²²⁰⁶ Moreover, the sexual violence was a “step in the process of the destruction” of the protected group, more specifically “destruction of the spirit, of the will to

²¹⁹⁶ ICTY, *Brdanin Trial Judgement*, para. 690; ICTR, *Kayishema et Ruzindana Trial Judgement*, paras 108-109; ICTR, *Ntagerura et al. Trial Judgement*, para. 664; ICTR, *Muhimana Trial Judgement*, para. 502; ICTR, *Gacumbitsi Trial Judgement*, para. 291; ICTR, *Semanza Trial Judgement*, para. 320.

²¹⁹⁷ ICTY, *Brdanin Trial Judgement*, para. 690; ICTR, *Kayishema et Ruzindana Trial Judgement*, paras 108-109; ICTR, *Ntagerura et al. Trial Judgement*, para. 664; ICTR, *Muhimana Trial Judgement*, para. 502; ICTR, *Gacumbitsi Trial Judgement*, para. 291; ICTR, *Semanza Trial Judgement*, para. 320.

²¹⁹⁸ See, e.g., *Akeyesu Trial Judgement*, para. 731; ICTR, *Kamemera Trial Judgement*, paras 1665-1668; ICTY, *Stakic Trial Judgement*, para. 516; ICTY, *Krstic Trial Judgement*, para. 513. See also, ICTR, *Kayishema et Ruzindana Trial Judgement*, para. 108; ICTR, *Seromba Appeal Judgement*, para. 46; ICTY, *Karadzic Rule98 Judgement*, para. 37; ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro Judgement*, para. 319.

²¹⁹⁹ ICTY, *Brdanin Trial Judgement*, para. 690; ICTR, *Kayishema et Ruzindana Trial Judgement*, paras 108-109; ICTR, *Ntagerura et al. Trial Judgement*, para. 664; ICTR, *Muhimana Trial Judgement*, para. 502; ICTR, *Gacumbitsi Trial Judgement*, para. 291; ICTR, *Semanza Trial Judgement*, para. 320.

²²⁰⁰ ICTY, *Brdanin Trial Judgement*, para. 690; ICTR, *Kayishema et Ruzindana Trial Judgement*, paras 108-109; ICTR, *Ntagerura et al. Trial Judgement*, para. 664; ICTR, *Muhimana Trial Judgement*, para. 502; ICTR, *Gacumbitsi Trial Judgement*, para. 291; ICTR, *Semanza Trial Judgement*, para. 320.

²²⁰¹ ICTY, *Brdanin Trial Judgement*, para. 690; ICTR, *Kayishema et Ruzindana Trial Judgement*, paras 108-109; ICTR, *Ntagerura et al. Trial Judgement*, para. 664; ICTR, *Muhimana Trial Judgement*, para. 502; ICTR, *Gacumbitsi Trial Judgement*, para. 291; ICTR, *Semanza Trial Judgement*, para. 320.

²²⁰² ICTY, *Tolimir Appeal Judgement*, para. 206; ICTY, *Tolimir Trial Judgement*, paras 754-755.

²²⁰³ ICTY, *Tolimir Trial Judgement*, para. 756; ICTY, *Tolimir Appeal Judgement*, paras 209-210.

²²⁰⁴ ICTR, *Rukundo Trial Judgement*, para. 388.

²²⁰⁵ See, e.g., *Akeyesu Trial Judgement*, para. 731; ICTR, *Kamemera Trial Judgement*, paras 1665-1668; ICTY, *Stakic Trial Judgement*, para. 516; ICTY, *Krstic Trial Judgement*, para. 513. See also, ICTR, *Kayishema et Ruzindana Trial Judgement*, para. 108; ICTR, *Seromba Appeal Judgement*, para. 46; ICTY, *Karadzic Rule98 Judgement*, para. 37; ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro Judgement*, para. 319.

²²⁰⁶ ICTR, *Akeyesu Trial Judgement*, para. 731; ICTR, *Kamemera Trial Judgement*, paras 1665-1668.

live, and of life itself”.²²⁰⁷ The ICC Elements of Crimes now explicitly recognises that serious bodily and mental harm may include rape and sexual violence.²²⁰⁸

ICTR, AKAYESU TRIAL JUDGEMENT, PARAS 731-732

With regard, particularly, to the acts [...] [of] rape and sexual violence, the Chamber wishes to underscore the fact that in its opinion, they constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways to inflict harm on the victim as he or she suffers both bodily and mental harm. In light of all the evidence before it, the Chamber is satisfied that the acts of rape and sexual violence described above, were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times, often in public, in the Bureau Communal premises or in other public places, and often by more than one assailant. These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.

iii. Definition of Causing Serious Bodily or Mental Harm (Subjective element)

1102. For the subjective element it must be established that the perpetrator had **intent**.²²⁰⁹ Such intent will be proven when: (1) the perpetrator acted deliberately or failed to act (**intent to conduct**) to cause serious bodily or mental harm to one or more persons or they were aware that this would occur in the ordinary course of events (**intent to consequence**).²²¹⁰

1103. The conduct requires that the perpetrator *meant* to engage in the acts or omissions which caused the serious bodily or mental harm life.²²¹¹ In other words, they deliberately acted or failed to act.²²¹² In regard to the consequence, i.e., that a person or persons experienced serious bodily or mental harm, it must be shown that the perpetrator meant to cause the harm to occur or was aware that they would occur in the ordinary course of events.²²¹³

1104. In relation to awareness that the consequence would occur in the ordinary course of events, the ICC requires virtual certainty that the events would occur.²²¹⁴ At the ICTY, it

²²⁰⁷ ICTR, *Akayesu Trial Judgement*, para. 732.

²²⁰⁸ ICC *Elements of Crimes*, Article 6(b), fn. 3.

²²⁰⁹ *ICC Statute*, Article 30(2)(a) and (b). *See also*, ICJ, *Bosnia v. Serbia, Application of the Genocide Convention Judgement*, para. 186; Commentary on Article 17 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind, ILC Report 1996, Yearbook of the International Law Commission, 1996, vol. II, Part Two, p. 44, para. 5; ICTY, *Karadzic Trial Judgement*, para. 543; ICTY, *Tolimir Trial Judgement*, para. 737; ICTY, *Popovic et al. Trial Judgement*, para. 811; ICTY, *Brdanin Trial Judgement*, para. 690; ICTY, *Krstic Trial Judgement*, para. 513.

²²¹⁰ *ICC Statute*, Article 30(2)(a) and (b); ICC, *Katanga Trial Judgement*, para. 774.

²²¹¹ *ICC Statute*, Article 30(2)(a).

²²¹² ICC, *Katanga Trial Judgement*, para. 774.

²²¹³ *ICC Statute*, Article 30(2).

²²¹⁴ *See* ICC, *Katanga Trial Judgement*, para. 775-776.

was recognised that, in a situation where the perpetrator intended to kill the victims, rather than cause serious bodily or mental harm, “the terrible bodily and mental suffering of the few survivors clearly was a natural and foreseeable consequence”.²²¹⁵

- c) Inflict Conditions of Life calculated to Bring about Physical Destruction (Genocide Convention, Article 2(c); ICC Statute, Article 6(c); ICTY Statute, Article 4(2)(c); ICTR Statute, Article 2(2)(c))

APPLICABILITY: THE ACT OF GENOCIDE BY INFLICTING CONDITIONS OF LIFE CALCULATED TO BRING ABOUT PHYSICAL DESTRUCTION IS BROADLY COVERED BY THE PHRASE “CREATION OF LIFE CONDITIONS AIMED AT TOTAL OR PARTIAL PHYSICAL DESTRUCTION OF THE GROUP” UNDER ARTICLE 422 OF THE CCU (PARA. 1105).

Elements of the crimes: To convict a perpetrator for genocide by inflicting conditions of life calculated to bring about physical destruction the following elements need to be established:

(1) Objective elements

- The perpetrator inflicted certain conditions of life upon one or more persons (para. 1107).
- The conditions of life were calculated to bring about the physical destruction of that group, in whole or in part (para. 1109).

(2) Subjective elements

- The perpetrator intended to inflict certain conditions of life upon one or more person (para. 1113).
- The perpetrator knew that the conditions were calculated to bring about the physical destruction of the group (para. 1115).

(3) Common elements

- Such person or persons belonged to a particular national, ethnical, racial or religious group (see above, para. 1070).
- The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group (see above, para. 1074).

For the ICC only:

- The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction (see above, para. 1081).

i. Applicability under Article 442

1105. Article 442 of the CCU includes genocide by “creation of life conditions aimed at total or partial physical destruction of the group”. This language covers the same conduct as “inflicting conditions of life calculated to bring about physical destruction”, as cod-

²²¹⁵ ICTY, *Krstic Trial Judgement*, para. 635.

ified as an act of genocide under the Genocide Convention, ICC Statute and Statutes of the *ad hoc* tribunals.²²¹⁶

ii. Definition of Inflicting Conditions of Life (Objective elements)

1106. The objective elements of this act of genocide requires it to be proved that: (1) the perpetrator inflicted certain conditions of life upon one or more persons; and (2) the conditions of life were calculated to bring about the physical destruction of that group, in whole or in part.²²¹⁷
1107. **The perpetrator inflicted certain conditions of life upon one or more persons.** According to the ICC Elements of Crimes, the phrase “conditions of life” includes, but is not limited to, “deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes”.²²¹⁸ These conditions must have been of a nature that would not immediately lead to the death of the victims, but, instead, to a slow death for the victims over a certain period of time.²²¹⁹
1108. This act of genocide does not require proof of a result attained, meaning that it is not required to prove the conditions actually lead to death or serious bodily or mental harm.²²²⁰ Where such a result is established, the appropriate charge would be genocide by killing (see above, paras 1087-1096), or genocide by causing serious bodily or mental harm (see above, paras 1097-1105).²²²¹

ICTY, *TOLIMIR APPEALS JUDGEMENT*, PARA. 228 [FOOTNOTES OMITTED]

[...] [S]ubparagraph (c) of the same Article [Article 4(2), ICTY Statute] purports to capture those methods of destruction that do not immediately kill the members of the group, but which, ultimately, seek their physical destruction. The chambers of the Tribunal and the ICJ have listed several acts as examples of such methods of destruction that could potentially meet the threshold of Article 4(2)(c) of the Statute and Article II(c) of the Genocide Convention, including deprivation of food, medical care, shelter or clothing, lack of hygiene, systematic expulsion from homes, or subjecting members of the group to excessive work or physical exertion. Notably, killings, which are explicitly mentioned as a separate genocidal act under Article 4(2)(a) of the Statute, may not be considered as a method of inflicting upon the protected group conditions of life calculated to bring about its destruction under Article 4(2)(c) of the Statute.

²²¹⁶ [Genocide Convention](#), Article 2; [ICC Statute](#), Article 6; [ICTY Statute](#), Article 4; [ICTR Statute](#), Article 2.

²²¹⁷ ICC [Elements of Crimes](#), Article 6(c).

²²¹⁸ ICC [Elements of Crimes](#), Article 6(c), fn. 4.

²²¹⁹ ICTR, [Akayesu Trial Judgement](#), para. 505; ICTR, [Rutaganda Trial Judgement](#), para. 52; ICTY, [Tolimir Appeal Judgement](#), paras 225-226.

²²²⁰ ICTY, [Karadzic Trial Judgement](#), para. 546; ICTY, [Popovic et al. Trial Judgement](#), para. 814; ICTY, [Brdanin Trial Judgement](#), para. 691; ICTY, [Stakic Trial Judgement](#), para. 517.

²²²¹ ICTY, [Karadzic Trial Judgement](#), para. 546; ICTY, [Tolimir Appeal Judgement](#), paras 227-228; ICTY, [Brdanin Trial Judgement](#), para. 905, fn. 2255. See also Eichmann Jerusalem District Court Judgement, para. 196, limiting the charge of imposing living conditions upon Jews calculated to bring about their physical extermination to persecution of Jews who had survived the Holocaust and ruling that Jews who were not saved should not be included “as if, in their case, there were two separate actions: first, subjection to living conditions calculated to bring about their physical

CASE STUDY: EXAMPLES OF CERTAIN CONDITIONS OF LIFE

While there is no exhaustive list of acts that can constitute certain conditions of life, the practice of the ICTR and ICTY has considered the following acts satisfy this element:²²²²

- Deprivation of adequate food and water;
- Systematic expulsion of members of the group from their homes or deportation;
- Lack of sufficient living accommodation;
- Lack of sufficient clothing, sanitation and hygiene;
- Conditions of detention, including severe overcrowding, deprivation of nourishment, and lack of access to medical care;
- Excessive work or physical exertion; or
- Denial of the right to medical services.

Although rape and sexual violence has not historically been prosecuted as a "condition of life calculated to bring about the physical destruction of a group",²²²³ in one case before the ICTR rape was recognised as such a condition.²²²⁴ The ICJ has also indicated that rape could be a condition of life calculated to bring about the physical destruction of a group.²²²⁵

1109. **The conditions of life were calculated to bring about the physical destruction of the group.** This element is designed to ensure that, although the measures did not immediately kill the members of the group, they ultimately sought their physical destruction.²²²⁶
1110. The “physical destruction” of the group means the actual destruction of the group (for instance through the deaths of its members), as opposed to “the destruction of the national, linguistic, religious, cultural or other identity of the group”.²²²⁷ As such, these acts should be distinguished from acts which were designed to bring about the

destruction, and later the physical destruction itself”.

²²²² ICC [Elements of Crimes](#), Article 6(c), fn. 4; ICTY, [Tolimir Appeal Judgement](#), paras 225-226; ICTR, [Kayishema et Ruzindana Trial Judgement](#), paras 115-116; ICTR, [Akayesu Trial Judgement](#), para. 506; ICTR, [Rutaganda Trial Judgement](#), para. 52; ICTY, [Brdanin Trial Judgement](#), paras 691, 912, 920, 928; ICTY, [Stakic Trial Judgement](#), para. 517; ICTY, [Karadzic Trial Judgement](#), para. 547; ICTY, [Karadzic Rule98 Judgement](#), para. 49; ICJ, [Croatia v. Serbia, Application of the Genocide Convention Judgement](#), para. 161.

²²²³ Global Justice Center, ["Beyond Killing: Gender, Genocide, & Obligations Under International Law"](#), December 2018, p. 25.

²²²⁴ ICTR, [Kayishema et Ruzindana Trial Judgement](#), paras 115-116.

²²²⁵ The ICJ confirmed that rape can be a condition to fall under [Genocide Convention](#), Article 2(c). However, in the [Judgement](#) where this notion was confirmed there was insufficient evidence. ICJ, [Republic of Croatia v. Republic of Serbia Judgement](#), paras 362-364; Global Justice Center, ["Beyond Killing: Gender, Genocide, & Obligations Under International Law"](#), December 2018, p. 25.

²²²⁶ ICTY, [Tolimir Appeal Judgement](#), para. 228; ICTY, [Karadzic Trial Judgement](#), para. 546. Note that the term "calculated" (“is not a reference to the *mens rea* of the perpetrator — the conditions may well have been calculated by a third party to have this effect (for instance, in cases in which a military commander orders the perpetrator to impose an insufficient diet on inmate of a detention camp). This aspect, relating to the nature of the conditions, is a circumstantial element; the perpetrator must have had knowledge of it as defined in Article 30(3) of the ICC Statute.”); Klamberg, [Commentary on the Law of the International Criminal Court](#), Torkel Opsahl Academic EPublisher, 2017.

²²²⁷ ICTY, [Stakic Trial Judgement](#), para. 518. See also, ICTY, [Tolimir Appeal Judgement](#), paras 225-226.

dissolution of the group.²²²⁸ However, it is not necessary to establish that the conduct actually succeeded in the physical destruction of the group.²²²⁹

1111. In determining whether the conditions of life were calculated to bring about physical destruction, particularly in the absence of direct evidence of the perpetrator's intent, judges should consider whether there was an "objective probability of these conditions leading to the physical destruction of the group" by evaluating:²²³⁰

- The nature of the conditions imposed;
- The length of time the members of the group have been subjected to such conditions;
- The characteristics of the group, such as its vulnerability; and
- The cumulative effect of the conditions on the victims.

iii. Definition of Certain Conditions of Life (Subjective element)

1112. The subjective element requires that the perpetrator acted with **intent** and **knowledge**. Such intent and knowledge will be proven when the perpetrator: (1) deliberately acted or failed to act (**intent to conduct**) to cause the conditions of life or they were aware that the conditions of life would occur in the ordinary course of events (**intent as to consequence**);²²³¹ and (2) was aware of the circumstance that the conditions were calculated to bring about the physical destruction of the group exists (**knowledge of circumstance**).²²³²

1113. **The perpetrator deliberately acted or failed to act in order to cause the conditions of life or where they were aware the condition of life would occur in the ordinary course of events.** The term "*deliberately* inflicting on the group conditions of life" which is contained in the Genocide Convention, ICC Statute and Statutes of the *ad hoc* tribunals confirms that intent is the relevant *mens rea* standard for this crime.²²³³

1114. The conduct requires that the perpetrator *meant* to engage in the acts or omissions which caused the conditions of life.²²³⁴ In other words, they deliberately acted or failed to act.²²³⁵ In regard to the consequence, i.e., that the "conditions must have been inflicted",²²³⁶ it must also be shown that the perpetrator had the requisite intent, i.e.,

²²²⁸ ICTY, *Tolimir Appeal Judgement*, paras 225-226; ICTY, *Karadzic Trial Judgement* para. 547.

²²²⁹ ICTY, *Tolimir Appeal Judgement*, paras 225-226; ICTY, *Karadzic Trial Judgement* para. 546; ICTY, *Stakic Trial Judgement*, para. 517.

²²³⁰ ICTY, *Brdanin Trial Judgement*, paras 906, 970-971 (fn. 2444); ICTY, *Karadzic Trial Judgement*, para. 548; *Attorney-General of Israel v. Eichmann Judgement*, paras 129-130.

²²³¹ *ICC Statute*, Article 30(2).

²²³² *ICC Statute*, Article 30(3).

²²³³ *Genocide Convention*, Article 2(c); *ICC Statute*, Article 6(c); *ICTY Statute*, Article 4(2)(c); *ICTR Statute*, Article 2(2)(c). See also, ICJ, *Bosnia v. Serbia, Application of the Genocide Convention Judgement*, para. 186; Commentary on Article 17 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind, ILC Report 1996, Yearbook of the International Law Commission, 1996, vol. II, Part Two, p. 44, para. 5.

²²³⁴ *ICC Statute*, Article 30(2)(a).

²²³⁵ ICC, *Katanga Trial Judgement*, para. 774.

²²³⁶ Klamberg, *Commentary on the Law of the International Criminal Court*, Torkel Opsahl Academic EPublisher, 2017, p. 26.

that they *meant* to cause the consequence or were aware that it would occur in the ordinary course of events.²²³⁷ The ICC requires that awareness that the consequence would occur in the ordinary course of events requires virtual certainty that the events would occur.²²³⁸

1115. The perpetrator knew of the circumstance that the conditions were calculated to bring about the physical destruction of the group exists. The requirement that the conditions of life were *calculated* to bring about the destruction of the group (see above, para. 1110), does not refer to the *mens rea* of the perpetrator, since the conditions could have been calculated by a third party to destroy the group (e.g., where a military commander has ordered the perpetrator to impose an insufficient diet on detainees).²²³⁹ Rather, the nature of the conditions is a circumstance,²²⁴⁰ and therefore requires that the perpetrator has knowledge, i.e., that the perpetrator had awareness that the circumstances existed.²²⁴¹

²²³⁷ [ICC Statute](#), Article 30(3).

²²³⁸ See ICC, [Katanga Trial Judgement](#), para. 775-776.

²²³⁹ Klamberg, *Commentary on the Law of the International Criminal Court*, Torkel Opsahl Academic EPublisher, 2017, p.27.

²²⁴⁰ Klamberg, *Commentary on the Law of the International Criminal Court*, Torkel Opsahl Academic EPublisher, 2017, p.27.

²²⁴¹ [ICC Statute](#), Article 30(3).

- d) Genocide by Imposing Measures Intended to Prevent Births (Genocide Convention, Article 2(d); ICC Statute, Article 6(d); ICTY Statute, Article 4(2)(d); ICTR Statute, Article 2(2)(d))

APPLICABILITY: THE ACT OF GENOCIDE BY IMPOSING MEASURES INTENDED TO PREVENT BIRTHS IS BROADLY COVERED BY THE PHRASE “DECREASE OR PREVENTION OF CHILDBEARING IN THE GROUP” IN ARTICLE 442 OF THE CCU (PARA. 1116).

Elements of the crimes: To convict a perpetrator for genocide by inflicting conditions of life calculated to bring about physical destruction the following elements need to be established:

(1) Objective elements

- The perpetrator imposed certain measures upon or more persons (para. 1118).
- The measures imposed were intended to prevent births within that group (para. 1119).

(2) Subjective elements

- The perpetrator intended to impose certain measures on one or more persons (para. 1122).
- The perpetrator knew that the measures imposed were intended to prevent births within that group (para. 1124).

(3) Common elements

- Such person or persons belonged to a particular national, ethnical, racial or religious group (see above, para. 1070).
- The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group (see above, para. 1074).

For the ICC only:

- The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction (see above, para. 1081).

i. Applicability under Article 442

1116. Article 442 of the CCU includes genocide by “decrease or prevention of childbearing in the group”. This language covers the broadly same conduct as “inflicting measures intended to prevent births”, as codified as an act of genocide under the Genocide Convention, ICC Statute and Statutes of the *ad hoc* tribunals.²²⁴²

²²⁴² [Genocide Convention](#), Article 2(d); [ICC Statute](#), Article 6(d); [ICTY Statute](#), Article 4(2)(d); [ICTR Statute](#), Article 2(2)(d).

ii. Definition of Imposing Measure Intended to Prevent Births (Objective elements)

1117. The objective elements of this act of genocide require that: (1) the perpetrator inflicted certain measures upon one or more persons; and (2) the measures imposed were intended to prevent births within a group.²²⁴³
1118. **The perpetrator inflicted certain measures upon one or more person.** Such measures could be both physical and mental:
- **Physical measures** include: forced sterilisation; sexual mutilation; forced birth control; compulsory abortion; segregation of sexes; and obstacles to marriage.²²⁴⁴
 - **Mental measures** are those which may leave the physical ability of the victim to procreate intact, but which have mental consequences that prevent them from doing so as a result of traumatic experiences.²²⁴⁵
1119. **The measures imposed were intended to prevent births within a group.** The nature of the measure (i.e., its intention to prevent births within the group) is a circumstantial element, and could refer to the intent of a third party rather than the perpetrator.²²⁴⁶
1120. Such intention can be inferred from the nature of the measure imposed (i.e., the physical or mental measures), or the circumstances under which it was imposed.²²⁴⁷ For instance, in patriarchal societies where membership of a group is determined by paternal lineage, rape in order to deliberately impregnate a woman by a member of another group would satisfy this element.²²⁴⁸ Similarly, rape could be intended to prevent births when “the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate”.²²⁴⁹

²²⁴³ ICC [Elements of Crimes](#), Article 6(d).

²²⁴⁴ ICTR, [Akayesu Trial Judgement](#), para. 507; ICTR, [Rutaganda Trial Judgement](#), para.53; UN Doc. E/623/Add.2; UN Doc. E/447, p. 26; UN Doc. A/C.6/SR.82; Triffterer and Ambos (eds), *ICC Statute of the International Criminal Court: A Commentary*, 3rd Edition C.H. Beck, Hart, Nomos ,2016, p. 139.

²²⁴⁵ ICTR, [Akayesu Trial Judgement](#), paras 507-508.

²²⁴⁶ Klamberg, *Commentary on the Law of the International Criminal Court*, Torkel Opsahl Academic EPublisher, 2017, p 27.

²²⁴⁷ See generally on intent being inferred from the circumstances: ICTR, [Akayesu Trial Judgement](#), para. 523; ICTY, [Sikirica et al. Judgement on Defence Motions to Acquit](#), para. 46; ICTR, [Kayishema and Ruzindana Trial Judgement](#), para. 93. See also, ICTR, [Akayesu Trial Judgement](#), para. 507, which placed its analysis of measures intended to prevent births within the context of "patriarchal societies".

²²⁴⁸ ICTR, [Akayesu Trial Judgement](#), para. 507.

²²⁴⁹ ICTR, [Akayesu Trial Judgement](#), para. 508.

ICTR, AKAYESU TRIAL JUDGEMENT, PARAS 507-508 [FOOTNOTES OMITTED]

For the purposes of interpreting Article 2(2)(d) of the [ICTR] Statute, the Chamber holds that the measures intended to prevent births within the group, should be construed as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages. In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births with a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group.

Furthermore, the Chamber notes that measures intended to prevent births within the group may be physical, but can also be mental. For instance, rape can be a measure intended to prevent births when the person raped refused subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.

iii. Definition of Imposing Measure Intended to Prevent Births (Subjective element)

1121. The subjective element requires that the perpetrator acted with **intent** and **knowledge**. Such intent and knowledge will be proven when: (1) the perpetrator deliberately acted or failed to act (**intent to conduct**) to cause the measures or was aware that the measures would occur in the ordinary course of events (**intent as to consequence**),²²⁵⁰ and (2) the perpetrator was aware of the circumstance that the measures were intended to prevent births within the group (**knowledge of circumstance**).²²⁵¹
1122. **The perpetrator deliberately acted or failed to act to cause the measures or was aware that the measures would occur in the ordinary course of events.** That the perpetrator imposed certain measures (see above, para. 1119), envisages both a conduct and consequence.
1123. The conduct therefore requires that the perpetrator *meant* to engage in the acts or omissions which caused the conditions of life.²²⁵² In other words, they deliberately acted or failed to act.²²⁵³ In regard to the consequence, i.e., that the measures were imposed on the group, it must be shown that the perpetrator meant to cause the measures to occur or was aware that they would occur in the ordinary course of events.²²⁵⁴ The ICC requires that awareness that the consequence would occur in the ordinary course of events requires virtual certainty that the events would occur.²²⁵⁵
1124. **The perpetrator knew that the measures were intended to prevent births within the group.** The requirement that the measures were *intended* to prevent births within the group is a circumstantial element which could refer to the intent of a third party

²²⁵⁰ [ICC Statute](#), Article 30(2).

²²⁵¹ [ICC Statute](#), Article 30(3).

²²⁵² [ICC Statute](#), Article 30(2)(a).

²²⁵³ ICC, [Katanga Trial Judgement](#), para. 774.

²²⁵⁴ [ICC Statute](#), Article 30(2).

²²⁵⁵ See ICC, [Katanga Trial Judgement](#), paras 775-776.

(other than the perpetrator).²²⁵⁶ The required subjective element for the perpetrator is therefore that they at least had knowledge of this circumstance, i.e., they had awareness that the circumstance existed (i.e., that the measures were intended to prevent births).²²⁵⁷

- e) Genocide by Forcibly Transferring Children (Genocide Convention, Article 2(e); ICC Statute, Article 6(e); ICTY Statute, Article 4(2)(e); ICTR Statute, Article 2(2)(e))

APPLICABILITY: THE ACT OF GENOCIDE BY FORCIBLY TRANSFERRING CHILDREN IS COVERED BY THE PHRASE “FORCEFUL TRANSFERRING OF CHILDREN FROM ONE GROUP TO ANOTHER” UNDER ARTICLE 442 OF THE CCU (PARA. 1125).

Elements of the crimes: To convict a perpetrator for genocide by forcibly transferring children the following elements need to be established:

(1) Objective elements

- The perpetrator forcibly transferred one or more persons (para. 1127).
- The transfer was from that group [i.e., a national, ethnical, racial or religious group] to another (para. 1128).
- The person or persons were under the age of 18 (para. 1129).

(2) Subjective elements

- The perpetrator knew, or should have known, that the person or persons were under the age of 18 years (para. 1131).
- The perpetrator intended to forcibly transfer one or more persons (para. 1132).
- The perpetrator intended to transfer the persons from one protected group to another or was aware that this would occur in the ordinary course of events (para. 1134).

(3) Common elements

- Such person or persons belonged to a particular national, ethnical, racial or religious group (see above, para. 1070).
- The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group (see above, para. 1074).

For the ICC only:

- The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction (see above, para. 1081).

²²⁵⁶ Klamberg, *Commentary on the Law of the International Criminal Court*, Torkel Opsahl Academic EPublisher, 2017, p. 27.

²²⁵⁷ [ICC Statute](#), Article 30(3).

i. Applicability under Article 442

1125. Article 442 of the CCU includes genocide by “forceful transferring of children from one group to another”. This language covers the same conduct as “forcibly transferring children”, as codified as an act of genocide under the Genocide Convention, ICC Statute and Statutes of the *ad hoc* tribunals.²²⁵⁸

ii. Definition of Forcibly Transferring Children (Objective elements)

1126. The objective elements of this act of genocide require that: (1) the perpetrator forcibly transferred one or more persons; (2) the transfer was from that group [i.e., a national, ethnic, racial or religious group] to another; and (3) the person or persons were under the age of 18.²²⁵⁹

1127. **The perpetrator forcibly transferred one or more persons.** This element requires proof of result, i.e., the person or persons were actually transferred. The term “forcibly” is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment.²²⁶⁰ Indeed, it has been recognised that this provision sanctions both direct acts of forcible physical transfer, and “acts of threats or trauma which lead to the forcible transfer of children from one group to another”.²²⁶¹

ICTR, RUTAGANDA TRIAL JUDGEMENT, PARA. 54

The Chamber is of the opinion that the provisions of Article 2(2)(e) of the [ICTR] Statute, on the forcible transfer of children from one group to another, are aimed at sanctioning not only the direct act of forcible physical transfer, but also any acts of threats or trauma which would lead to the forcible transfer of children from one group to another.

1128. **The transfer was from one protected group to another.**²²⁶² This provision seeks to prevent children from being removed and estranged from their own group. Indeed, when transferred to another group, children grow up separate from their own group and become alien to their cultural identity, including their language and traditions, which endangers the social existence of the group in question.²²⁶³ Additionally, the biological existence of the group is endangered since the transferred children would

²²⁵⁸ [Genocide Convention](#), Article 2(e); [ICC Statute](#), Article 6(e); [ICTY Statute](#), Article 4(2)(e); [ICTR Statute](#), Article 2(2)(e).

²²⁵⁹ [ICC Elements of Crimes](#), Article 6(e).

²²⁶⁰ [ICC Elements of Crimes](#), Article 6(e), fn. 5.

²²⁶¹ ICTR, *Akayesu Trial Judgement*, para. 509; ICTR, *Rutaganda Trial Judgement*, para. 54. ICTR, *Kayishema et Ruzindana Trial Judgement*, para. 118.

²²⁶² [Genocide Convention](#), Article 2(e); [ICC Statute](#), Article 6(e); [ICTY Statute](#), Article 4(2)(e); [ICTR Statute](#), Article 2(2)(e).

²²⁶³ Werle and Jeßberger, *Principles of International Criminal Law*, Oxford University Press, 2020, p. 307.

likely not reproduce within their own group.²²⁶⁴ Accordingly, transfers done within the same group fall outside the scope of this prohibition.

1129. **The person or persons were under the age of 18.** This may be established through the victim's identification documents or official State records. It may also be inferred from their physical appearance, general physical development (e.g., factors such as height and voice) and overall behaviour.²²⁶⁵

iii. Definition of Forcibly Transferring Children (Subjective element)

1130. The subjective elements of this act of genocide require that the perpetrator: (1) knew, or should have known, that the person or persons were under the age of 18 years (**knowledge**); (2) deliberately acted or failed to act (**intent to conduct**) in order to forcibly transfer one or more persons, or was aware the measures would occur in the ordinary course of events (**intent to consequence**); and (3) the perpetrator meant to transfer the persons from one protected group to another or was aware that this would occur in the ordinary course of events (**intent to consequence**).

1131. **The perpetrator knew, or should have known, that the persons were under the age of 18.** The ICC Elements of Crimes establishes that a lower *mens rea* standard than knowledge is sufficient for this element. It requires only that the perpetrator "should have known" that the person or persons were under 18 years.²²⁶⁶ This can be established if, for example, the perpetrator lacked actual knowledge because they did not act with sufficient diligence in the relevant circumstances.²²⁶⁷ In this sense, the burden is on the perpetrator to ascertain the age of the persons they forcibly transfer.²²⁶⁸ A consistent pattern of forcibly transferring children under the age of 18 is sufficient to give perpetrators notice that there is a significant probability that the victim was under the age of 18.²²⁶⁹

1132. **The perpetrator deliberately acted or failed to act in order to forcibly transfer one or more persons, or was aware the measures would occur in the ordinary course of events.** That the perpetrator forcibly transferred one or more persons (see above, para. 1128) envisages both a conduct and consequence.

1133. The conduct requires that the perpetrator *meant* to engage in the acts or omissions that forcibly transferred the victims.²²⁷⁰ In other words, they deliberately acted or failed to act.²²⁷¹ In regard to the consequence, i.e., that the victims were forcibly transferred, it must be shown that the perpetrator meant to cause the forcible transfer or was aware that the person or persons would be forcibly transferred in the ordinary course of events.²²⁷²

²²⁶⁴ Werle and Jeßberger, *Principles of International Criminal Law*, Oxford University Press, 2020, p. 307.

²²⁶⁵ ICC, *Lubanga Trial Judgement*, para. 641.

²²⁶⁶ ICC *Elements of Crimes*, Article 6(e), 5th element.

²²⁶⁷ See, *mutatis mutandis*, ICC, *Katanga et Chui Decision on the Confirmation of Charges*, para. 252(ii).

²²⁶⁸ See, *mutatis mutandis*, SCSL, *Sesay et al. Trial Judgement*, para. 1704.

²²⁶⁹ See, *mutatis mutandis*, SCSL, *Sesay et al. Trial Judgement*, para. 1745.

²²⁷⁰ ICC Statute, Article 30(2)(a).

²²⁷¹ ICC, *Katanga Trial Judgement*, para. 774.

²²⁷² ICC Statute, Article 30(2)(b).

1134. **The perpetrator meant to transfer the persons from one protected group to another or was aware that this would occur in the ordinary course of events.** That the persons were transferred from one group to another is a consequence, and therefore requires the perpetrator to have intent. In other words, the perpetrator must have meant the transfer to be from one protected group to another, or that they were aware this would occur in the ordinary course of events.²²⁷³

²²⁷³ [ICC Statute](#), Article 30(2)(b).

IV. Crimes Against Humanity

A. Relevance of international law principles to adjudicate crimes against humanity in Ukraine

1. Crimes against humanity under international law

1135. Currently, Ukrainian legislation does not criminalise crimes against humanity.²²⁷⁴ However, there is a possibility that in the future (either through the entering into force of a Bill to incorporate crimes against humanity²²⁷⁵ or the establishment of a hybrid mechanism with jurisdiction over crimes against humanity) Ukrainian judges will be called upon to adjudicate upon these crimes.

1136. This section addresses the applicability of the relevant international instruments codifying crimes against humanity. These instruments include the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY), the Statute of the International Criminal Tribunal for Rwanda (ICTR) and the Statute of the International Criminal Court (ICC).

1137. To assess the applicability of these international instruments to Ukraine, this section will: (1) provide an overview of the status of crimes against humanity under international law and the nature of the relevant international instruments; and (2) assess to which extent such instruments can be used in the Ukrainian domestic legal system.

a) Notion and structure of crimes against humanity

1138. Crimes against humanity are a specific set of prohibited acts under international criminal law (underlying acts) that occur in the context of a widespread or systematic attack directed against any civilian population (contextual element). The existence of a widespread or systematic attack and the link between that attack and the conduct in question differentiates crimes against humanity from ordinary or domestic crimes.

i. Identification and classification of crimes against humanity in international law

1139. There is no dedicated international treaty on crimes against humanity as there is for genocide (see [Chapter 1, Part I, Section III. “Genocide”](#)) and war crimes (see [Chapter 1, Part I, Section I. “War Crimes”](#)). However, customary international law and various international instruments and institutions have developed and expanded upon the classification of crimes against humanity and their legal elements. In particular, international criminal tribunals have played a major role in the development of the law of crimes against humanity through their statutes and jurisprudence. Their practice

²²⁷⁴ Some of the individual crimes which can amount to a crime against humanity in certain contexts (such as murder, rape or enforced disappearance) are contained in the Criminal Code of Ukraine (CCU) as ordinary crimes. However, these do not currently require the contextual elements of crimes against humanity to be proven (i.e., that the conduct took place as part of a widespread or systematic attack directed against a civilian population).

²²⁷⁵ For example, Draft Bill 7290, if and when it enters into force, will introduce the category of crimes against humanity under Article 442-1 of the CCU.

has gradually developed a legal framework aimed at identifying the specific violations that qualify as crimes against humanity and their elements. The ICC reflects the latest consensus regarding crimes against humanity.

1140. 1945: Charter of the Nuremberg Tribunal. The adoption of the Charter of the Nuremberg Tribunal was one of the initial attempts at defining crimes against humanity, which, it is argued, was already an existing concept under customary international law.²²⁷⁶ Article 6(c) of the Charter defined crimes against humanity as “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”²²⁷⁷
1141. 1950: Nuremberg Principles. The definition of crimes against humanity contained in Article 6(c) of the Nuremberg Charter was then included in the so-called Nuremberg Principles (Principle VI(c)) drafted by the International Law Commission (ILC) at the request of the UN General Assembly.²²⁷⁸ The Nuremberg Principles are considered reflective of customary international law.²²⁷⁹
1142. 1954-1996: Draft Code of Crimes against the Peace and Security of Mankind. After the ILC produced its Report on the Nuremberg Principles, it prepared a draft “Code of Offences against the Peace and Security of Mankind” in 1954 and submitted a draft “Code of Crimes against the Peace and Security of Mankind” in 1991 (and a revision in 1996).²²⁸⁰ However, this Code has not been developed into an international instrument.²²⁸¹
1143. 1968: UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. Article I(b) of the Convention incorporates the Nuremberg Charter’s definition of crimes against humanity.²²⁸² Ukraine has ratified this Convention.²²⁸³
1144. 1993/1994: The statutes and practice of ICTY and ICTR. “Crimes against humanity” gained a broader definition with the promulgation of the statutes of the ICTY and ICTR in 1993 and 1994, respectively. Article 5 of the ICTY Statute frames crimes against humanity as the following crimes — (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political,

²²⁷⁶ Triffterer and Ambos (eds), *The ICC Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 154; Robinson, [Defining “Crimes Against Humanity” at the Rome Conference](#), vol. 93, Cambridge University Press, 1999, p. 44.

²²⁷⁷ [Nuremberg Charter](#), Article 6(c).

²²⁷⁸ ILC, [Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal](#), vol. II, 1950, para. 97.

²²⁷⁹ Cassese, [Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal](#), United Nations, 2009, p. 5.

²²⁸⁰ ILC, [Draft Code of Crimes against the Peace and Security of Mankind](#), 1996 UNGA 48th Session.

²²⁸¹ Robinson, [Defining ‘Crimes Against Humanity’ at the Rome Conference](#), p. 45.

²²⁸² [Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity](#), Article I(a).

²²⁸³ See [Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity](#).

racial and religious grounds; and (i) other inhumane acts – when committed in armed conflict, whether international or internal in character, and directed against any civilian population.²²⁸⁴ Article 3 of the ICTR formulates crimes against humanity as the following crimes – (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; and (i) other inhumane acts – when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.²²⁸⁵

1145. The practice of the ICTY and ICTR has played a major role in clarifying the elements of crimes against humanity. For each crime against humanity, the Appeal and/or Trial Chambers of both tribunals have elaborated on and explained the objective and subjective elements.²²⁸⁶ The authority of these decisions is also demonstrated by the fact that they have been relied upon by other international courts and tribunals including by the European Court of Human Rights²²⁸⁷ and the International Court of Justice.²²⁸⁸ It was also this jurisprudence that helped guide the delegations gathered at the Rome Conference to draft the Statute of the newly formed ICC.²²⁸⁹
1146. 1998: ICC Statute. The ICC Statute defines “crime against humanity” as: any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

ICC STATUTE, ARTICLE 7(1):

1. Murder;
2. Extermination;
3. Enslavement;
4. Deportation or forcible transfer of population;
5. Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
6. Torture;
7. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

²²⁸⁴ [ICTY Statute](#), Article 5.

²²⁸⁵ [ICTR Statute](#), Article 3.

²²⁸⁶ See below, sections dealing with the specific crimes against humanity.

²²⁸⁷ See for instance, ECHR, *Simsic v. Bosnia and Herzegovina* [Decision](#), paras 8-13, 23; ECHR, *Murtazaliyeva v. Russia* [Judgement](#), paras 72-78.

²²⁸⁸ See for instance, ICJ, *Bosnia v. Serbia*, *Application of the Genocide Convention* [Judgement](#), paras 188, 190, 195, 198-200, 344; ICJ, *Croatia v. Serbia*, *Application of the Genocide Convention* [Judgement](#), paras 142, 146-147, 157-158.

²²⁸⁹ Robinson, [Defining “Crimes Against Humanity” at the Rome Conference](#), vol. 93, Cambridge University Press, 1999, p. 45.

8. Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
9. Enforced disappearance of persons;
10. The crime of apartheid;
11. Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

1147. There are several notable differences between the definition of crimes against humanity in the ICC Statute, and the definitions contained in the ICTY/ICTR Statutes. The main difference between Article 7 of the ICC Statute and Article 5 of the ICTY Statute is that the ICTY Statute requires the conduct amounting to a crime against humanity to have a nexus to an armed conflict, whereas the ICC Statute requires no such connection, but, rather, only a connection to a “widespread or systematic attack directed against any civilian population”. However, according to the ICTY itself, “customary international law no longer requires a nexus between crimes against humanity and armed conflict”.²²⁹⁰ Additionally, while Article 3 of the ICTR Statute contains the same “widespread or systematic attack” formulation as Article 7 of the ICC Statute, the ICTR Statute requires that, for each crime to amount to a crime against humanity, it must be committed “on national, political, ethnic, racial or religious grounds”, which is not required by the ICTY or the ICC Statutes. Nevertheless, both the ICTY and ICTR have recognised that “discriminatory intent” is not required by customary international law for all crimes against humanity.²²⁹¹
1148. In addition, unlike the Statutes of the ICTY and ICTR, the ICC Statute included the following additional acts as amounting to a crime against humanity: sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity (in addition to rape); enforced disappearance; and the crime of apartheid.²²⁹²
1149. As mentioned above, the ICC Elements of Crimes outline the specific objective and subjective elements (*actus reus* and *mens rea*) of the prohibited conduct that must be established in order to prove that a crime against humanity has been committed. These elements will be discussed in more detail below (see paras 224-226).
1150. Customary international law: Customary international law is a set of rules that are binding on all States.²²⁹³ The list of crimes against humanity contained in Article 7(1) of the ICC Statute and their definitions are considered to “largely accord with the

²²⁹⁰ ICTY, *Tadic Decision on Jurisdiction*, paras 78, 140-141. See also, Robinson, *Defining “Crimes Against Humanity” at the Rome Conference*, vol. 93, Cambridge University Press, 1999, p. 46.

²²⁹¹ ICTY, *Tadic Appeal Judgement*, para. 288; ICTR, *Akayesu Appeal Judgement*, para. 464.

²²⁹² ICC Statute, Articles 7(1)(g), 7(1)(i) and 7(1)(k).

²²⁹³ ICJ, *North Sea Continental Shelf Judgement*, paras 71-74, 77. See also, Sassoli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar, 2019, p. 46.

traditional conception of crimes against humanity under customary international law”.²²⁹⁴

b) [Applicability of international criminal law on crimes against humanity to the Ukrainian domestic legal system](#)

1151. Ukraine has not ratified the ICC Statute. In addition, the CCU does not currently criminalise crimes against humanity.
1152. However, there is a possibility that in the future (either through the entering into force of a Bill to incorporate crimes against humanity or the establishment of a hybrid mechanism with jurisdiction over crimes against humanity) Ukrainian judges will be called upon to adjudicate upon these crimes. In particular, Draft Bill 7290 proposes to introduce crimes against humanity into the CCU under Article 442-1. If, and when, this Bill enters into force, Article 442-1(1) will provide that an act can constitute a crime against humanity if intentionally committed (inflicted) within the framework of a deliberate widespread or systematic attack on a civilian population. Against this background, relying on specific international instruments that codify crimes against humanity, including the ICTR/ICTY/ICC framework, can assist judges in assessing the exact scope of future legislation incorporating crimes against humanity and, eventually, selecting the acts that can attract criminal responsibility.
1153. In addition, crimes against humanity are reflected in customary international law, which is binding on all states, including Ukraine.²²⁹⁵ Therefore, Ukrainian judges may apply the definitions and elements of crimes against humanity that are reflective of customary international law when presiding over cases involving crimes against humanity.
1154. As such, as discussed in [Chapter I, Part I, Section I.B.2.b](#) “Applicability of international criminal law instruments: whether Article 438 of the CCU can be read in conjunction with the ICTY and ICC Statutes and practice”, if and when Ukrainian judges are called upon to adjudicate upon crimes against humanity, it is possible under Ukrainian law to rely upon customary international law and the ICC and ICTY/ICTR legal frameworks and practice to interpret the scope and application of crimes against humanity.

B. Definition of Crimes against Humanity under international law

1. Introduction

1155. This section analyses the elements of crimes against humanity under international criminal law and specifies how the relevant underlying acts of crimes against humanity

²²⁹⁴ Triffterer and Ambos (eds), *The ICC Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 158.

²²⁹⁵ See Kellenberger, [Foreword](#), *Customary International Humanitarian Law, vol. I: Rules*, Cambridge University Press, 2009, pp xv-xvii. The only exception to this rule is in the event that a state has openly and persistently objected to such a custom. See Koroma, [Foreword](#), *Customary International Humanitarian Law, vol. I: Rules*, Cambridge University Press, 2009, pp xviii-xix.

can be interpreted under Ukrainian law if and when legislation incorporating crimes against humanity (including Draft Bill 7290) enters into force.

1156. Crimes against humanity are: (1) a specific set of prohibited acts under international criminal law (**underlying acts**); that are (2) committed as part of a widespread or systematic attack directed against a civilian population (**contextual element**). For an act to be qualified as a crime against humanity, it must not only be committed as part of a widespread or systematic attack directed against a civilian population, but the perpetrator of the act must have knowledge of the attack.²²⁹⁶
1157. Paras [1159-1175](#) below will address the main features of the contextual element of crimes against humanity, while paras [1176-1402](#) below will detail the relevant elements of the prohibited underlying acts of crimes against humanity.

2. Contextual Elements of Crimes against Humanity

SUMMARY CONTEXTUAL ELEMENTS

- The contextual elements of crimes against humanity must always be established and are what separate crimes against humanity from ordinary crimes.
- The contextual elements of crimes against humanity are:
 - The conduct was committed as part of a widespread or systematic attack directed against a civilian population (para. [1160](#)); and
 - The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population (para. [1183](#)).
- To establish the first contextual element of crimes against humanity, the following must be proven:
 1. there was an attack directed against a civilian population (para. [1161](#));
 2. this attack was widespread or systematic (para. [1163](#));
 3. the attack was committed pursuant to or in furtherance of a State or organisational policy to commit such an attack (para. [1167](#)); and
 4. the conduct was committed as part of the attack (para. [1172](#)).

a) Introduction

1158. According to the ICC Statute, for an act to be qualified as a crime against humanity, it must be committed as part of a widespread or systematic attack directed against a civilian population, with knowledge of the attack.²²⁹⁷ An “attack directed against a civilian population” is defined as “a course of conduct involving the multiple commission of acts referred to in [Article 7] paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack”.²²⁹⁸

²²⁹⁶ ICC [Elements of Crimes](#), Article 7.

²²⁹⁷ ICC [Elements of Crimes](#), Article 7(1).

²²⁹⁸ ICC [Statute](#), Article 7(2)(a).

1159. While Ukrainian legislation does not currently criminalise crimes against humanity, if and when Draft Bill 7290 enters into force, Article 442-1 will provide that an act can constitute a crime against humanity if intentionally committed (inflicted) within the framework of a deliberate widespread or systematic attack on civilians. According to Note 1 to this provision, an attack on the civilian population is defined as “the commission of any of the acts referred to in this article against the civilian population in pursuance of or in support of a policy of a State or organisation aimed at committing such an attack”. This provision broadly reflects the contextual element of crimes against humanity recognised in the ICC Statute and customary international law.

b) **The Conduct was Committed as Part of a Widespread or Systematic Attack Directed Against a Civilian Population**

1160. To establish the first contextual element of crimes against humanity, the following must be proven: (1) there was an attack directed against a civilian population; (2) this attack was widespread or systematic; (3) the attack was committed pursuant to or in furtherance of a State or organisational policy to commit such an attack; and (4) the conduct was committed as part of the attack.

i. **There was an Attack Directed Against a Civilian Population**

1161. First, the evidence must demonstrate that there was an attack directed against a civilian population.²²⁹⁹ An attack is defined as a course of conduct comprising the multiple commission of acts amounting to crimes against humanity (e.g., those acts referred to in Article 7(1) of the ICC Statute) against a civilian population.²³⁰⁰ Random and isolated acts cannot satisfy this element.²³⁰¹

1162. Civilians must be the primary target of the attack,²³⁰² as opposed to members of the armed forces or other combatants.²³⁰³ A civilian population is defined as non-combatants, i.e., those persons who are not servicemen or servicewomen,²³⁰⁴ including both a State’s own nationals as well as the nationals of other States (see [Introduction, Sources of Law: International Humanitarian Law, International Human Rights Law and International Criminal Law, Section I.C.1.a\) “Combatants and Civilians”](#)).²³⁰⁵ The

²²⁹⁹ ICC, *Katanga Trial Judgement*, para. 1124; ICC, *Bemba Trial Judgement*, para. 165; ICTY, *Blagojevic & Jokic Trial Judgement*, para. 541; ICTY, *Tadic Appeal Judgement*, para. 248; ICTY, *Limaj et al. Trial Judgement*, para. 181; ICTY, *Kunarac Appeal Judgement*, para. 95.

²³⁰⁰ ICC Statute, Article 7(2)(a); ICC, *Katanga Trial Judgement*, para. 1101; ICC, *Ongwen Trial Judgement*, para. 2674; ICC, *Gbagbo Decision on Confirmation of Charges*, para. 209; ICTY, *Blagojevic & Jokic Trial Judgement*, para. 543; ICTY, *Kunarac Appeal Judgement*, para. 88.

²³⁰¹ ICC, *Ntaganda Appeal Judgement*, para. 430; ICTY, *Blagojevic & Jokic Trial Judgement*, para. 547; ICTY, *Kunarac Appeal Judgement*, paras 96, 100; ICTY, *Blaskic Appeal Judgement*, para. 101; ICTY, *Limaj et al. Trial Judgement*, para. 190; ICTY, *Kunarac et al. Trial Judgement*, para. 100.

²³⁰² ICC, *Katanga Trial Judgement*, para. 1104; ICC, *Ongwen Trial Judgement*, para. 2675; ICC, *Bemba Decision on Confirmation of Charges*, para. 76; ICTY, *Kunarac et al. Appeal Judgement*, paras 91-92; ICTY, *Karadzic Trial Judgement*, para. 478; MICT, *Seselj Appeal Judgement*, para. 69.

²³⁰³ ICC, *Katanga Trial Judgement*, paras 1102-1105; ICTY, *Tadic Trial Judgement*, para. 637; ICTY, *Kunarac et al. Trial Judgement*, para. 425.

²³⁰⁴ ICC, *Katanga Trial Judgement*, para. 1102; ICC, *Bemba Decision on Confirmation of Charges*, para. 78; ICTY, *Kunarac et al. Trial Judgement*, para. 425; ICTY, *Martic Appeal Judgement*, paras 291-302.

²³⁰⁵ ICC, *Katanga Trial Judgement*, para. 1103; ICTY, *Tadic Trial Judgement*, para. 635; ICTY, *Kunarac et al. Trial Judgement*, para. 423. See also, Cryer, et al. (eds), *An Introduction to International Criminal Law and Procedure*, 3rd Edition,

presence of non-civilians within a population that is composed primarily of civilians does not alter that population's civilian status.²³⁰⁶ The attack need not be military in nature.²³⁰⁷ However, it does not matter whether the perpetrator simultaneously conducted operations against military objects/personnel.²³⁰⁸

ii. The Attack was Widespread or Systematic

1163. Second, the evidence must demonstrate that the attack was either widespread or systematic.²³⁰⁹ It is important to note that while the widespread or systematic nature of the underlying act may provide evidence of this element,²³¹⁰ it is not necessary that the act was itself widespread or systematic. Instead, it is the *attack* against the civilian population, taken as a whole, which needs to be widespread or systematic.²³¹¹ In other words, a single act of rape or murder may be a crime against humanity if it was committed as part of a widespread and systematic attack.²³¹²

ICTR, AKAYESU TRIAL JUDGEMENT, PARA. 579 [FOOTNOTE OMITTED]

The Chamber considers that it is a prerequisite that the act [constituting a crime against humanity] must be committed as part of a widespread or systematic attack and not just a random act of violence. The act can be part of a widespread or systematic attack and need not be a part of both.

a. Widespread

1164. Whether an attack was widespread will depend upon whether it can be considered “large-scale” and the number of persons that were targeted.²³¹³ In assessing the wide-

Cambridge University Press, 2015, p. 241; Triffterer and Ambos (eds), *The ICC Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 174.

²³⁰⁶ ICC, *Katanga Trial Judgement*, para. 1105; ICC, *Ongwen Trial Judgement*, para. 2675; ICTY, *Jelusic Trial Judgement*, para. 54; ICTY, *Tadic Trial Judgement*, paras 638-639; ICTR, *Akayesu Trial Judgement*, para. 582; ICTR, *Kayishema et al. Trial Judgement*, para. 128.

²³⁰⁷ ICC, *Katanga Trial Judgement*, para. 1101; ICC, *Gbagbo Decision on Confirmation of Charges*, para. 209; ICC, *Bemba Decision on Confirmation of Charges*, para. 75; MICT, *Seselj Appeal Judgement*, para. 69; ICTY, *Kunarac Appeal Judgement*, para. 86; ICTR, *Nahimana et al. Appeal Judgement*, para. 916; ICC *Elements of Crimes*, Article 7, Introduction, para. 3.

²³⁰⁸ ICC, *Ntaganda Appeal Judgement*, para. 435. *See also*, ICTR, *Semanza Appeal Judgement*, para. 269 (“the ICTR Statute does not require that [crimes against humanity] be committed in the context of an armed conflict”).

²³⁰⁹ ICC, *Ongwen Trial Judgement*, para. 2680; ICTR, *Akayesu Trial Judgement*, para. 579; ICTR, *Musema Trial Judgement*, para. 203; ICC, *Bemba Decision on Confirmation of Charges*, para. 82; ICC, *Situation in the Republic of Kenya Investigation Authorisation Decision*, para. 94.

²³¹⁰ ICTY, *Brdanin Appeals Judgement*, para. 257; ICTY, *Brdanin Trial Judgement*, para. 159; ICTY, *Kordic and Cerkez Appeal Judgement*, para. 94; ICTY, *Blaskic Appeal Judgement*, para. 101; ICTY, *Kunarac Appeal Judgement*, para. 94.

²³¹¹ *See ICC Statute*, Article 7(2)(a) (“Attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack.”). *See also*, ICTR, *Gacumbitsi Appeal Judgement*, para. 102; ICTY, *Kunarac et al. Appeal Judgement*, para. 96; ICTY, *Kordic & Cerkez Appeal Judgement*, para. 94; ICTY, *Limaj et al. Trial Judgement*, para. 189.

²³¹² Ferro Ribeiro and van der Straten Ponthoz, *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict Best Practice on the Documentation of Sexual Violence as a Crime or Violation of International Law*, 2nd Edition, UK Foreign & Commonwealth Office, 2017, p. 45.

²³¹³ *See e.g.*, ICC, *Bemba Trial Judgement*, para. 163; ICC, *Katanga Trial Judgement*, para. 1123; ICC, *Gbagbo Decision on*

spread nature of an attack, all relevant facts should be considered, and focus should not be placed exclusively on quantitative or geographical criteria.²³¹⁴

CASE STUDY: "WIDESPREAD" ATTACK

The following factors may be indicative of a "widespread" attack:²³¹⁵

- the number of criminal acts committed during the attack;
- the logistics and resources involved in the attack;
- the number of victims;
- the temporal and geographic scope of the attack;
- the alteration of the ethnic, religious, racial or political composition of the overall population; or
- the cumulative effect of the attack on the population.

1165. Although there is no fixed minimum threshold in this regard, the ICC Prosecutor, for example, has previously considered that low intensity, sporadic attacks that were limited in geographical scope, and that resulted in fewer than 100 deaths and 500 assaults, might not be considered widespread.²³¹⁶ On the other hand, an attack that resulted in the deaths of around 1,200 civilians over a large geographic area would easily constitute a widespread attack.²³¹⁷

b. Systematic

1166. Whether an attack was systematic will depend upon whether it consisted of organized acts of violence, rather than spontaneous or random criminal acts.²³¹⁸ It may include an organized plan which follows a regular pattern resulting in the continuous commission of acts or the non-accidental repetition of acts.²³¹⁹ For instance, the targeting of a particular ethnic group with an established methodology would point to the systematic nature of an attack.²³²⁰

[Confirmation of Charges](#), para. 222; ICC, *Harun & Kushayb Decision on the Prosecution Application under 58(7) of the Statute*, para. 62; ICC, *Ongwen Trial Judgement*, para. 2681; ICC, *Ntaganda Trial Judgement*, para. 691; ICTY, *Kordic & Cerkez Appeal Judgement*, para. 94; ICTY, *Blagojevic & Jokic Trial Judgement*, paras 545-546; ICTY, *Limaj et al. Trial Judgement*, para. 183; MICT, *Seselj Appeal Judgement*, para. 57.

²³¹⁴ ICC, *Ongwen Trial Judgement*, para. 2681; ICC, *Bemba Trial Judgement*, para. 163; ICTY, *Blagojevic & Jokic Trial Judgement*, para. 545; ICTY, *Kunarac et al. Appeal Judgement*, paras 94-96.

²³¹⁵ ICC, *Situation in the Republic of Kenya Investigation Authorisation Decision*, para. 224; ICC, *Al Bashir Decision on the Prosecution's Application for a Warrant of Arrest*, para. 81; ICTY, *Blagojevic & Jokic Trial Judgement*, para. 546.

²³¹⁶ ICC OTP, [Report on Preliminary Examination Activities \(2015\)](#), 2015, paras 96-100, 301, 307.

²³¹⁷ ICC, *Katanga & Chui Decision on the Confirmation of Charges*, paras 410-412.

²³¹⁸ ICC, *Katanga Trial Judgement*, para. 1123; ICC, *Ongwen Trial Judgement*, para. 2682; ICC, *Ntaganda Trial Judgement*, para. 692; ICC, *Ruto et al. Decision on the confirmation of charges*, para. 179; ICTY, *Kordic & Cerkez Appeal Judgement*, para. 94; ICTY, *Blagojevic & Jokic Trial Judgement* paras 544-546. *See also*, ICTY, *Blaskic Trial Judgement*, para. 658; ICTY, *Brdanin Trial Judgement*, para. 135; ICTY, *Kunarac et al. Trial Judgement*, para. 429; ICTY, *Kunarac et al. Appeal Judgement*, para. 94; ICTY, *Blaskic Appeal Judgement*, para. 101.

²³¹⁹ ICC, *Katanga Trial Judgement*, para. 1162; ICTY, *Kordic & Cerkez Appeal Judgement*, para. 94; ICTY, *Blaskic Appeal Judgement*, para. 101; ICTY, *Kunarac Appeal Judgement*, para. 94.

²³²⁰ ICC, *Ntaganda Decision on Confirmation of Charges*, para. 24.

CASE STUDY: "SYSTEMATIC" ATTACK

Factors to consider in determining whether an attack was systematic include:²³²¹

- the existence of a pattern of criminal conduct;
- temporally and/or geographically repeated and coordinated attacks;
- the involvement of political or military authorities in the attack;
- the existence of a plan or policy targeting a civilian population;
- the adoption and institutionalisation of discriminatory procedures against a civilian population; and
- the means and methods used during the attack.

iii. The Attack was Committed Pursuant to or in Furtherance of a State or Organisational Policy to Commit such an Attack

1167. The ICTY/ICTR did not require the existence of a state or organisational policy as a separate legal element for crimes against humanity, although both Courts recognised that “the existence of a policy or plan may [...] be useful in establishing that the attack was directed against a civilian population and that it was widespread or systematic”.²³²²

1168. The ICC Statute, which represents the latest iteration of crimes against humanity, requires it to be established that the attack was committed pursuant to, or in furtherance of, a State or organisational policy to commit such an attack.²³²³ Similarly, Draft Bill 7290 requires an attack which is in “pursuance of or in support of a policy of a State or organisation aimed at committing such an attack”.²³²⁴

1169. This element requires there to be evidence which can establish that the attack was deliberately committed by a State or organisation in furtherance of a policy, as opposed to being spontaneous, random or isolated in character.²³²⁵

1170. The policy can be that of a State or an organisation. An **organisation** is a group that governs a specific territory or has a sufficient level of organisation and capabilities (i.e., a structure, hierarchy and material capacity) to coordinate a widespread or systematic attack against a civilian population.²³²⁶

²³²¹ ICC, *Gbagbo Decision on Confirmation of Charges*, paras 223-224; ICC, *Al Bashir Decision on the Prosecution's Application for a Warrant of Arrest*, paras 79-85; ICC, *Ruto et al. Decision on the confirmation of charges*, paras 1699, 181-182; ICTR, *Akayesu Trial Judgement*, para. 173; ICTR, *Semanza Appeal Judgement*, paras 268-269; ICTY, *Kunarac et al. Appeal Judgement*, para. 98.

²³²² ICTY, *Kunarac et al. Appeal Judgement*, para. 98; ICTR, *Semanza Trial Judgement*, para. 369.

²³²³ ICC Statute, Article 7(2)(a).

²³²⁴ Draft Bill 7290, Article 442-1.1, Note 1.

²³²⁵ ICC, *Katanga Trial Judgement*, para. 1113; ICC, *Bemba Trial Judgement*, para. 161; ICC, *Ongwen Trial Judgement*, para. 2678; ICC, *Gbagbo Decision on Confirmation of Charges*, para. 215; ICC, *Bemba Decision on Confirmation of Charges*, para. 81.

²³²⁶ ICC, *Katanga Trial Judgement*, para. 1119; ICC, *Ongwen Trial Judgement*, para. 2677; ICC, *Gbagbo Decision on Confirmation of Charges*, para. 217; ICC, *Bemba Decision on Confirmation of Charges*, para. 81; ICC, *Ruto et al. Decision on the confirmation of charges*, para. 185.

1171. A “**policy**” signifies that the State or organisation intended/meant to carry out an attack against a civilian population, whether through its actions or deliberate omissions.²³²⁷ An attack that was planned, directed, organised, promoted or actively encouraged by a State or organisation would satisfy this criterion, even if a policy was not formally adopted.²³²⁸ That said, the plan need not necessarily be pre-established, it may also “crystallise or develop only as actions are undertaken by the perpetrators”.²³²⁹ There is no prescribed requirement as to the content of the policy which would satisfy this element.²³³⁰

CASE STUDY: EXISTENCE OF A STATE OR ORGANIZATIONAL POLICY TO COMMIT AN ATTACK

Factors that might demonstrate the existence of a State or organisational policy to commit an attack include:²³³¹

- the identification and designation of victims by the accused prior to the attack;
- the preparation or mobilization of the armed forces prior to the attack;
- the allocation of substantial resources in preparation for the attack;
- public statements made prior to the attack;
- meetings among high-ranking officials of a State or organization prior to the attack where discussions of military nature (e.g., logistics and strategy) took place;
- the appointment of commanders responsible for the attack; and
- the recurrence of similar attacks.

iv. The Individual Conduct was Committed as Part of the Attack

1172. Finally, it must also be established that the individual criminal act (e.g., murder, torture, etc.) was committed as part of the attack directed against the civilian population. This can be assessed based on whether the conduct is similar to other acts committed during that attack.²³³² Consideration should be given to the characteristics, aims, nature and consequences of the acts concerned.²³³³ In other words, the act in question must not be isolated criminal conduct that “clearly differ[s]” from other constituent acts of the attack.²³³⁴

²³²⁷ ICC, *Katanga Trial Judgement*, para. 1108, 1113.

²³²⁸ ICC, *Ruto et al. Decision on the confirmation of charges*, para. 210; ICC, *Gbagbo Decision on Confirmation of Charges*, para. 214.

²³²⁹ ICC, *Ongwen Trial Judgement*, para. 2679; ICC, *Ntaganda Trial Judgement*, para. 674.

²³³⁰ ICC, *Katanga Trial Judgement*, para. 1106.

²³³¹ ICC, *Katanga Trial Judgement*, para. 1199; ICC, *Ongwen Trial Judgement*, para. 2679; ICC, *Ntaganda Trial Judgement*, para. 674; ICC, *Ruto et al. Decision on the confirmation of charges*, para. 219; ICC, *Ntaganda Decision on Confirmation of Charges*, paras 19-20; ICC, *Al Hassan Decision on Confirmation of charges*, para. 154; ICC, *Gbagbo Decision on Confirmation of Charges*, para. 218.

²³³² ICC, *Katanga Trial Judgement*, para. 1124; ICC, *Bemba Trial Judgement*, para. 165.

²³³³ ICC, *Ongwen Trial Judgement*, para. 2688; ICC, *Ntaganda Trial Judgement*, para. 696; ICC, *Katanga Trial Judgement*, para. 1124; ICC, *Bemba Trial Judgement*, para. 165; ICTY, *Blagojevic & Jokic Trial Judgement*, para. 547; ICTR, *Semanza Trial Judgement*, para. 326.

²³³⁴ ICC, *Katanga Trial Judgement*, para. 1124; ICC, *Bemba Trial Judgement*, para. 165; ICTY, *Kunarac et al. Appeal Judgement*, para. 100.

c) The Perpetrator Knew that the Conduct was Part of or Intended the Conduct to be Part of a Widespread or Systematic Attack Directed Against a Civilian Population

1173. To prove the second contextual element of crimes against humanity, it must be established that the perpetrator was aware that a widespread or systematic attack directed against a civilian population was taking place and that their action was part of that attack.²³³⁵ Accordingly, there must be proof that the perpetrator knowingly participated in the attack.²³³⁶
1174. That said, the evidence need not establish that the perpetrator had knowledge of all of the characteristics of the attack, nor the precise details of the plan or policy of the State or organization.²³³⁷ Moreover, motive is irrelevant; there is no requirement to demonstrate that the perpetrator subscribed to the State's or organization's criminal designs or intended their act to form a part of the attack.²³³⁸ It is sufficient that the perpetrator knowingly participated in the attack, i.e., that they knew that their actions were part of an attack on a civilian population.²³³⁹

ICC, KATANGA TRIAL JUDGEMENT, PARA. 1125 [FOOTNOTES OMITTED]

[T]he perpetrator must know that the act in question is part of the widespread or systematic attack against the civilian population. [This requires] proof that the perpetrator of the act knowingly participated in the attack directed against a civilian population; such knowledge constitutes the foundation of a crime against humanity as it elucidates the responsibility of the perpetrator of the act within the context of the attack considered as a whole. However, [...] the perpetrator [does not need to have] had knowledge of all of the characteristics of the attack or the precise details of the plan or policy of the State or organisation. Nor is it required that the perpetrator of the act subscribed to the State or the organisation's criminal design [...]. The perpetrator's motive is [irrelevant], it suffices to establish, in view of the context, knowledge of the particular fact that his or her act formed part of the attack.

²³³⁵ ICC, *Bemba Trial Judgement*, para. 167; ICC, *Katanga Trial Judgement*, para. 1123; ICC, *Bemba Decision on Confirmation of Charges*, para. 88; ICTY, *Kunarac et al. Appeal Judgement*, para. 102; ICTY, *Mrksic & Sljivancanin Appeal Judgement*, para. 41; ICTY, *Blagojevic & Jokic Trial Judgement*, para. 547; ICTY, *Limaj et al. Trial Judgement*, para. 190; ICTY, *Kunarac et al. Trial Judgement*, para. 100.

²³³⁶ ICC, *Katanga Trial Judgement*, para. 1125; ICTY, *Blagojevic & Jokic Trial Judgement*, para. 548; ICTY, *Milutinovic Trial Judgement*, para. 158; ICTR, *Semanza Trial Judgement*, para. 332; ICTR, *Bagilishema Trial Judgement*, para. 94.

²³³⁷ ICC, *Katanga Trial Judgement*, para. 1125; ICC, *Ongwen Trial Judgement*, para. 2691; ICTY, *Milutinovic Trial Judgement*, para. 158.

²³³⁸ ICC, *Katanga Trial Judgement*, para. 1125; ICTY, *Blagojevic & Jokic Trial Judgement*, para. 548; ICTR, *Kanyarukiga Appeal Judgement*, para. 262; ICTR, *Semanza Trial Judgement*, para. 332.

²³³⁹ ICC, *Katanga Trial Judgement*, para. 1125; ICC, *Bemba Trial Judgement*, para. 167; ICTY, *Blagojevic & Jokic Trial Judgement*, para. 548; ICTY, *Blaskic Appeal Judgement*, para. 124; ICTY, *Kunarac Appeal Judgement*, paras 99, 102.

3. Underlying Acts of Crimes against Humanity

a) Introduction

1175. As mentioned above, Ukrainian legislation does not currently criminalise crimes against humanity.²³⁴⁰ However, if and when Draft Bill 7290 enters into force, Article 442-1 of the CCU will introduce the underlying acts of crimes against humanity, which broadly correspond to those set out in the international instruments.

1176. Accordingly, the present section will provide an analysis of the underlying offences which amount to crimes against humanity under the international instruments and will rely on the legal framework of the international criminal courts and tribunals to interpret these offences.

1177. For each underlying act, the section will detail: (1) the objective elements of the offence under international criminal law (i.e., the physical element or *actus reus*); and (2) the subjective elements of the offence under international criminal law (i.e., the mental element or *mens rea*).

b) Crime against Humanity of Murder (ICC Statute, Article 7(1)(a); ICTY Statute, Article 5(a); ICTR Statute, Article 3(a); SCSL Statute, Article 2(a))

ELEMENTS OF THE CRIME: TO CONVICT A PERPETRATOR FOR MURDER AS A CRIME AGAINST HUMANITY THE FOLLOWING ELEMENTS NEED TO BE ESTABLISHED:

1. Objective element

- The perpetrator killed (caused death of) one or more persons (para. [1181](#)).

2. Subjective element

- The perpetrator intended to kill (cause the death of) one or more persons (para. [1186](#)).

3. Contextual elements

- The conduct was committed as part of a widespread or systematic attack directed against a civilian population (see above, para. [1160](#)).
- The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population (see above, para. [1173](#)).

²³⁴⁰ Some of the individual crimes which can amount to a crime against humanity in certain contexts (such as murder, rape or enforced disappearance) are contained in the CCU as ordinary crimes. However, these do not currently require the contextual elements of crimes against humanity to be proven (i.e., that the conduct took place as part of a widespread or systematic attack directed against a civilian population).

i. Applicability under Ukrainian Law

1178. International instruments prohibit murder as a crime against humanity,²³⁴¹ which occurs when a person kills or causes the death of another person in the context of a widespread and systematic attack on civilians (see above, paras [1140-1151](#)).
1179. Murder as a crime against humanity is not currently prohibited under Ukrainian law. This conduct is, however, covered by the ordinary crime of murder under Article 115 of the CCU, which prohibits “murder, that is willful unlawful causing death of another person”. Unlike the crime against humanity of murder, however, the CCU provision does not require the act of murder to have been committed in the context of a widespread or systematic attack directed against a civilian population (i.e., the contextual element).
1180. In addition, Draft Bill 7290 will introduce (if, and when, it comes into force) the specific crime against humanity of murder committed within the framework of a large-scale or systematic attack on civilians under Article 442-1.2(3) of the CCU. This provision broadly aligns with the objective, subjective and contextual elements of murder as a crime against humanity contained in the international instruments.

ii. Definition of Murder (Objective element)

1181. The objective element of this crime against humanity requires that **the perpetrator killed one or more persons**. Firstly, it must be proven that one or more persons were killed by the perpetrator. To establish that the perpetrator *killed or caused the death*²³⁴² of one or more persons, the evidence must demonstrate that: (1) a person is dead; and (2) there is a causal link between the perpetrator’s unlawful act or omission and that person’s death.²³⁴³

ICTY, *KVOCKA ET AL.* APPEAL JUDGEMENT, PARA. 261 [FOOTNOTES OMITTED]

[F]or the crime of murder under Article 3 of the [ICTY] Statute to be established, the Prosecutor bears the onus of proving:

- i. the death of a victim taking no active part in the hostilities;
- ii. that the death was the result of an act or omission of the accused or of one or more persons for whom the accused is criminally responsible; [...]

²³⁴¹ [ICC Statute](#), Article 7(1)(a); [ICTY Statute](#), Article 5(a); [ICTR Statute](#), Article 3(a); [SCSL Statute](#), Article 2(a). The crime against humanity of murder is also prohibited by the following international instruments: [Nuremberg Charter](#), Article 6(c); [Tokyo Charter](#), Article 5(c); [ECCC Law](#), Article 5.

²³⁴² ICC [Elements of Crimes](#), fn. 7 (“The term ‘killed’ is interchangeable with the term ‘caused death’”).

²³⁴³ ICC, *Ongwen Trial Judgement*, para. 2696; ICC, *Bemba Trial Judgement*, paras 87-88; ICC, *Katanga Trial Judgement*, paras 767-769; ICC, *Katanga & Chui Decision on the Confirmation of Charges*, para. 287; ICC, *Bemba Decision on Confirmation of Charges*, para. 132; ICTY, *Karadzic Trial Judgement*, para. 446; ICTY, *Kvočka et al. Appeal Judgement*, para. 261; ICTY, *Kordic and Cerkez Appeal Judgement*, para. 37; ICTR, *Akayesu Trial Judgement*, para. 589.

1182. To establish that a victim is dead, the victim's body does not need to have been recovered.²³⁴⁴ The death of the victim can be established either by identification of the victim's corpse²³⁴⁵ or by making inferences from the circumstances, such as:

- The lack of contact by the victim with family or friends;
- The fact that the victim was last seen in an area that was attacked;
- The existence of a pattern of mistreatment of other victims by the perpetrators; and
- The coinciding or nearly coinciding time of death of other victims.²³⁴⁶

1183. Where the case relies on circumstantial evidence to establish that a killing has taken place, it is not required to show the exact number,²³⁴⁷ nor precise identity,²³⁴⁸ of the alleged victims, as long as their death is the only reasonable conclusion that can be drawn from the evidence.²³⁴⁹

1184. However, to the extent possible, the evidence should identify:

- The location of the alleged murder;
- Its approximate date;
- The means by which the act was committed;
- The circumstances of the incident; and
- The perpetrator's link to the crime.²³⁵⁰

1185. To establish a causal link, the evidence must show that the relevant action or omission was a substantial – but not necessarily the sole – cause of death.²³⁵¹

iii. Definition of Murder (Subjective element)

1186. In regard to the subjective element, it is required that the perpetrator acted with **intent**,²³⁵² which will be established where: (1) the perpetrator intended to kill (cause the death of) one or more persons.

²³⁴⁴ ICC, *Ongwen Trial Judgement*, para. 2698; ICC, *Bemba Trial Judgement*, para. 88; ICC, *Katanga Trial Judgement*, para. 768; ICTY, *Krnjelac Trial Judgement*, para. 326; ICTY, *Halilovic Trial Judgement*, para. 37; ICTY, *Lukic & Lukic Decision on Milan Lukic's Notice of Verification of Alleged Victim Survivors and Application for Stay of Proceedings*, para. 29; ICTY, *Lukic & Lukic Appeal Judgement*, para. 149.

²³⁴⁵ ICC, *Bemba Decision on Confirmation of Charges*, para. 132.

²³⁴⁶ ICTY, *Lukic & Lukic Trial Judgement*, 20 July 2009, para. 904; ICTY, *Karadzic Trial Judgement*, fn. 1476; ICTY, *Kvočka et al. Appeal Judgement*, para. 260; ICTY, *Halilovic Trial Judgement*, para. 37; ICTY, *Krnjelac Trial Judgement*, para. 327.

²³⁴⁷ ICC, *Bemba Decision on Confirmation of Charges*, para. 134.

²³⁴⁸ ICC, *Bemba Trial Judgement*, para. 88; ICC, *Ongwen Trial Judgement*, para. 2698; ICC, *Katanga & Chui Decision on the Confirmation of Charges*, para. 422.

²³⁴⁹ ICC, *Bemba Trial Judgement*, para. 88; ICC, *Katanga Trial Judgement*, para. 768; ICC, *Bemba Decision on Confirmation of Charges*, para. 132; ICTY, *Krnjelac Trial Judgement*, para. 326; ICTY, *Halilovic Trial Judgement*, para. 37; ICTY, *Lukic & Lukic Decision on Milan Lukic's Notice of Verification of Alleged Victim Survivors and Application for Stay of Proceedings*, para. 29; ICTY, *Lukic & Lukic Appeal Judgement*, para. 149.

²³⁵⁰ ICC, *Ongwen Trial Judgement*, para. 2698; ICC, *Bemba Decision on Confirmation of Charges*, para. 133; ICTY, *Celebici Trial Judgement*, para. 424; ICTY, *Tolimir Appeal Judgement*, para. 126; ICTY, *Kvočka et al. Appeal Judgement*, para. 260; ICTY, *Karadzic Trial Judgement*, fn. 1476; ICTY, *Halilovic Trial Judgement*, para. 37; ICTY, *Krnjelac Trial Judgement*, para. 327.

²³⁵¹ ICC, *Katanga & Chui Decision on the Confirmation of Charges*, para. 296; ICTY, *Karadzic Trial Judgement*, para. 448; ICTY, *Krnjelac Trial Judgement*, paras 328-329; ICTY, *Celebici Trial Judgement*, para. 424.

²³⁵² *ICC Statute*, Article 30(2)(a); ICC, *Katanga Trial Judgement*, para. 774, 781; ICC, *Bemba Trial Judgement*, para. 90;

1187. **The perpetrator intended to kill (cause the death of) one or more persons.** Such intent will be established where: (1) the perpetrator meant to engage in the act or omission (i.e., deliberately acted or failed to act) (**intent to conduct**)²³⁵³ in order to cause the death of one or more persons; or (2) the perpetrator was aware that death would occur in the ordinary course of events (**intent to consequence**).²³⁵⁴
1188. At the *ad hoc* tribunals, this intent was interpreted to mean the “death of a victim resulting from an act or omission of the accused committed with the intention to kill or to cause serious bodily harm which he/she should reasonably have known might lead to death”, i.e., it was a probable consequence of their act or omission.²³⁵⁵ At the ICC, a higher standard is required, namely that it was **virtually certain** that the death would occur in the ordinary course of events.²³⁵⁶
1189. The intent to murder can be inferred from the circumstances, for example, the use of a firearm against an unarmed person,²³⁵⁷ or a deliberate artillery attack on a town occupied by civilians, which demonstrates that the perpetrators had knowledge of the probability that the attack would cause death.²³⁵⁸

ICTY, *Celebici Trial Judgement*, para. 439; ICTR, *Bagilishema Trial Judgement*, para. 84.

²³⁵³ ICC Statute, Article 30(2)(a); ICC, *Katanga Trial Judgement*, para. 774; ICTY, *Karadzic Trial Judgement*, paras 447-448; ICTY, *Kvočka et al. Appeal Judgement*, para. 261; ICTR, *Akayesu Trial Judgement*, para. 589.

²³⁵⁴ ICC Statute, Article 30(2)(a) and (b); ICC, *Katanga Trial Judgement*, para. 774, 781; ICC, *Bemba Trial Judgement*, para. 90; ICTY, *Stakic Appeal Judgement*, paras 236, 239; ICTR, *Akayesu Trial Judgement*, para. 589.

²³⁵⁵ ICTY, *Karadzic Trial Judgement*, paras 447-448; ICTY, *Krstic Trial Judgement*, para. 485; ICTY, *Brdanin Trial Judgement*, paras 381, 690; ICTY, *Celebici Appeal Judgement*, paras 422-423; ICTY, *Celebici Trial Judgement*, paras 424-439; ICTY, *Blaskic Trial Judgement*, para. 217; ICTY, *Kupreskic Trial Judgement*, paras 560-561; ICTY, *Kordic and Cerkez Trial Judgement*, paras 235-236; ICTY, *Kvočka et al. Trial Judgement*, para. 132; ICTY, *Krnojelac Trial Judgement*, para. 324; ICTY, *Vasiljevic Trial Judgement*, para. 205; ICTY, *Naletilic & Martinovic Trial Judgement*, para. 248; ICTY, *Stakic Trial Judgement*, para. 747 (with reference to paras 631, 584-587). For ICTR jurisprudence, see ICTR, *Kayishema et al. Trial Judgement*, para. 140; ICTR, *Bagilishema Trial Judgement*, paras 84-85.

²³⁵⁶ See ICC, *Katanga Trial Judgement*, paras 775-776.

²³⁵⁷ ICC, *Bemba Decision on Confirmation of Charges*, para. 138; ICTY, *Celebici Trial Judgement*, para. 903.

²³⁵⁸ ICTY, *Strugar Trial Judgement*, para. 240.

- c) Crime Against Humanity of Extermination (ICC Statute, Article 7(1)(b); ICTY Statute, Article 5(b); ICTR Statute, Article 3(b); SCSL Statute, Article 2(b))

ELEMENTS OF THE CRIME: TO CONVICT A PERPETRATOR FOR EXTERMINATION AS A CRIME AGAINST HUMANITY THE FOLLOWING ELEMENTS NEED TO BE ESTABLISHED:

(1) Objective elements

- The perpetrator killed one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population (para. 1194).
- The conduct constituted, or took place as part of, a mass killing of members of a civilian population (para. 1198).

(2) Subjective elements

- The perpetrator intended to kill one or more persons (para. 1203).
- The perpetrator was aware that their conduct constituted, or took place as part of, a mass killing of members of a civilian population (para. 1204).

(3) Contextual elements

- The conduct was committed as part of a widespread or systematic attack directed against a civilian population (see above, para. 1160).
- The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population (see above, para. 1173).

i. Applicability Under Ukrainian Law

1190. International instruments prohibit the crime against humanity of extermination,²³⁵⁹ which includes “the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population”.²³⁶⁰

1191. Extermination as a crime against humanity is not currently prohibited under Ukrainian law. However, Draft Bill 7290 will introduce (if, and when, it comes into force) the specific crime against humanity of extermination committed within the framework of a large-scale or systematic attack on civilians under Article 442-1.2(2) of the CCU. Note 2 to Article 442-1 defines extermination as “the deprivation of life of one or more persons by means of deliberately created living conditions aimed at the destruction of part of the population, including by deprivation of access to food or medicine”.

1192. This definition appears to require the intent to destroy part of a population (“deprivation of life...*aimed at the destruction of part of the population*”), which is not required by the international crime of extermination as defined by the ICC. As discussed below,

²³⁵⁹ [ICC Statute](#), Article 7(1)(b); [ICTY Statute](#) Article 5(b); [ICTR Statute](#) Article 3(b); [SCSL Statute](#), Article 2(b). The crime against humanity of extermination is also prohibited by a number of other international instruments: [Nuremberg Charter](#), Article 6(c); [Tokyo Charter](#), Article 5(c); [KSC & SPO Statute](#), Article 13(1)(b); [ECCC Law](#), Article 5.

²³⁶⁰ [ICC Statute](#), Article 7(2)(b).

there is no specific intent to destroy required for the crime of extermination – the crime is satisfied where the perpetrator intended to kill the victim and was *aware* this took place within the context of mass killings (see paras [1204](#), [1205](#)).

ii. Definition of Extermination (Objective elements)

1193. The objective elements of this crime against humanity requires that: (1) the perpetrator killed one or more persons; and (2) the conduct constituted, or took place as part of, a mass killing of members of a civilian population.

**ICTY, KARADZIC TRIAL JUDGEMENT, PARA. 483
[FOOTNOTES EXCLUDED]**

The *actus reus* of extermination consists of “the act of killing on a large scale”. This involves “any act, omission or combination thereof which contributes directly or indirectly to the killing of a large number of individuals”.

1194. **The perpetrator killed one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population.** To establish this element, it must be demonstrated that one or more persons were killed by the perpetrator. This may be proven using evidence of different methods of killing, showing that the perpetrator caused the death of the victim(s) either directly or indirectly.²³⁶¹
1195. To establish that the perpetrator *killed or caused the death* of one or more persons, the evidence must demonstrate that: (1) a person is dead; and (2) that there is a causal link between the perpetrator’s unlawful act or omission and that person’s death.²³⁶²
1196. This element is substantively the same as the first element of the crime against humanity of murder. The requirements to establish that one or more persons are dead, found above in paras [1183-1185](#), should be considered.
1197. In addition to direct killing, extermination may also be committed by inflicting conditions of life calculated to bring about the destruction of part of a population. These conditions usually lead to a slow death for the victim(s) over a certain period of time.²³⁶³

²³⁶¹ ICC [Elements of Crimes](#), fn. 8.

²³⁶² ICC, [Ongwen Trial Judgement](#), para. 2696; ICC, [Bemba Trial Judgement](#), paras 87-88; ICC, [Katanga Trial Judgement](#), paras 767-769; ICC, [Katanga & Chui Decision on the Confirmation of Charges](#), para. 287; ICC, [Bemba Decision on Confirmation of Charges](#), para. 132; ICTY, [Karadzic Trial Judgement](#), para. 446; ICTY, [Kvočka et al. Appeal Judgement](#), para. 261; ICTY, [Kordić and Cerkez Appeal Judgement](#), para. 37; ICTR, [Akayesu Trial Judgement](#), para. 589.

²³⁶³ ICTR, [Kayishema et al. Trial Judgement](#), para. 116.

CASE STUDY: EXAMPLES OF CONDITIONS OF LIFE CALCULATED TO BRING ABOUT THE DESTRUCTION OF PART OF A POPULATION

The following conditions may qualify as conditions of life calculated to bring about the destruction of part of a population:²³⁶⁴

- Deprivation of adequate food, water and medicine;
- Systematic expulsion of members of the group from their homes or deportation;
- Lack of proper accommodation;
- Lack of sufficient clothing, sanitation and hygiene;
- Excessive work or physical exertion;
- Denial of the right to medical services; and
- Conditions of detention, including severe overcrowding, deprivation of nourishment, and lack of access to medical care.

1198. **The conduct constituted, or took place as part of, a mass killing of members of a civilian population.** To establish the second element, it must be demonstrated that the killings constituted, or took place as part of, a mass killing of members of a civilian population.²³⁶⁵ In this respect, extermination differs from murder in that: (1) it requires an element of mass destruction;²³⁶⁶ and (2) it is directed against a population rather than individuals.²³⁶⁷

ICTR, *NTAKIRUTIMANA ET AL.* APPEAL JUDGEMENT, PARA. 516 [FOOTNOTES EXCLUDED]

In its Judgement, the Trial Chamber followed the Akayesu Trial Judgement in defining extermination as “a crime which by its very nature is directed against a group of individuals. Extermination differs from murder in that it requires an element of mass destruction, which is not required for murder.” The Appeals Chamber agrees with the Trial Chamber that the crime of extermination is the act of killing on a large scale. The expressions “on a large scale” or “large number” do not, however, suggest a numerical minimum.

1199. In doing so, it must be established that the killing formed a part of an extermination campaign that involved large-scale killings.²³⁶⁸ This includes situations where the kill-

²³⁶⁴ ICC Statute, Article 7(2)(b); ICC [Elements of Crimes](#), fn. 4. See also, ICTY, [Brdanin Trial Judgement](#), paras 691, 912, 918, 928; ICTR, [Rutaganda Trial Judgement](#), para. 52; ICTR, [Kayishema et al. Trial Judgement](#), paras 115-116; ICTY, [Karadzic Trial Judgement](#), para. 547; ICTY, [Stakic Trial Judgement](#), para. 517.

²³⁶⁵ ICC, [Al Bashir Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir](#), para. 96.

²³⁶⁶ ICTR, [Akayesu Trial Judgement](#), para. 591; ICTR, [Kajelijeli Trial Judgement](#), para. 890; ICTR, [Ntakirutimana et al. Appeal Judgement](#), para. 516; ICTY, [Krajisnic Trial Judgement](#), para. 716; ICTY, [Martić Trial Judgement](#), para. 62.

²³⁶⁷ ICTR, [Semanza Trial Judgement](#), para. 340; ICTR, [Akayesu Trial Judgement](#), para. 591; ICTY, [Vasiljevic Trial Judgement](#), paras 227, 232.

²³⁶⁸ Triffterer and Ambos (eds), *The ICC Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 188.

ings of the victims were the initial part of what later on turned out to be a campaign of mass killing.²³⁶⁹ That being said, the evidence must show that the relevant killings form part of the same operation, rather than an aggregation of unrelated and separate killings committed in different locations, by different perpetrators and over an extended period of time.²³⁷⁰

1200. Although extermination is the act of killing a large number of people, this does not suggest that a numerical minimum must be reached.²³⁷¹ An assessment of whether the element of massiveness has been reached will depend on a case-by-case analysis of all relevant factors.²³⁷² However, the scale of the killing required for extermination must be substantial, and responsibility for a single or a limited number of killings is insufficient.²³⁷³ Extermination has been found in relation to the killing of thousands of victims, as well as the killing of around 60 persons.²³⁷⁴

ICTR, *KAJELIJELI TRIAL JUDGEMENT*, PARA. 893

The Chamber is satisfied that a single killing or a small number of killings do not constitute an extermination. In order to give practical meaning to the charge as distinct from murder, there must in actual fact be a large number of killings, and the attack should have been directed against a group, such as a neighbourhood, as opposed to any specific individuals within it. However, the Chamber may consider evidence under this charge relating to the murder of specific individuals as an illustration of the extermination of the targeted group.

1201. As the act used to carry out the offence of extermination involves an element of mass destruction, this crime against humanity is closely related to the crime of genocide.²³⁷⁵ However, extermination is much broader in scope as it: (1) applies to situations where only some members of a group are killed but others are spared; and (2) can be directed against a wider array of groups of individuals, covering not only national, ethnical, racial and religious groups,²³⁷⁶ but also other groups including (but not limited to) political, social or linguistic groups or groups based on the individuals' sexual orientation.²³⁷⁷

²³⁶⁹ ICC [Elements of Crimes](#), Article 7(1)(b), fn. 10.

²³⁷⁰ ICTY, *Karadzic Trial Judgement*, para. 484; ICTY, *Tolimir Appeal Judgement*, para. 147; ICTR, *Karempera Appeal Judgement*, para. 661; ICTR, *Bagosora et al. Appeal Judgement*, para. 396.

²³⁷¹ ICTY, *Stakic Appeal Judgement*, para. 260; ICTY, *Blagojevic and Jokic Trial Judgement*, para. 574; ICTR, *Setako Trial Judgement*, para. 480.

²³⁷² ICTY, *Stakic Trial Judgement*, para. 640; ICTY, *Lukic & Lukic Appeal Judgement*, para. 538; ICTY, *Blagojevic and Jokic Trial Judgement*, para. 573; ICTR, *Nahimana et al. Trial Judgement*, para. 1061.

²³⁷³ ICTR, *Semanza Trial Judgement*, para. 340; ICTR, *Ntakirutimana et al. Trial Judgement*, paras 813-814; ICTY, *Vasiljevic Trial Judgement*, paras 227, 232.

²³⁷⁴ ICTY, *Lukic & Lukic Appeal Judgement*, para. 537.

²³⁷⁵ [ILC Draft Code of Crimes Against the Peace and Security of Mankind with commentaries](#), 1996, p. 48.

²³⁷⁶ These groups are expressly protected by the [Convention on the Prevention and Punishment of the Crime of Genocide](#), Article 2.

²³⁷⁷ Ambos, *The Treatise on International Criminal Law: vol. II: The Crimes of Sentencing*, Oxford University Press, 2014, pp 84-85.

iii. Definition of Extermination (Subjective element)

1202. The subjective element of the crime against humanity of extermination requires an **intent** to kill the victims, with **knowledge** that this took place as part of a mass killing of members of the civilian population.²³⁷⁸
1203. **The perpetrator intended to kill (cause the death of) one or more persons.** Such intent will be established where: (1) the perpetrator meant to engage in the act or omission (i.e., deliberately acted or failed to act) (**intent to conduct**)²³⁷⁹ in order to cause the death of one or more persons; or (2) the perpetrator was aware that death would occur in the ordinary course of events (i.e., it was virtually certain it would occur) (**intent to consequence**).²³⁸⁰ At the ICC, awareness that the consequence would occur in the ordinary course of events requires virtual certainty that the events would occur.²³⁸¹
1204. **The perpetrator was aware that their conduct constituted, or took place as part of, a mass killing of the civilian population.** Accordingly, the perpetrator must have knowledge that the circumstance surrounding their conduct existed, i.e., they must have been aware that their conduct constituted or took place as part of a mass killing of the civilian population.²³⁸²
1205. It should be noted that at the ICTY and ICTR, the *mens rea* of extermination was expressed as requiring that the perpetrator intended that a large number of individuals be killed or to have systematically subjected a large number of people to conditions of living that would lead to their deaths.²³⁸³ This differs from the ICC standard which only requires the perpetrator have intent to kill the victims, with awareness their conduct constituted or took place as part of a mass killing.
1206. As mentioned above, Draft Bill 7290 defines the subjective element of extermination as (“deprivation of life...*aimed at the destruction of part of the population*”). Ukrainian judges may therefore rely on the ICTY/ICTR definition of the subjective elements of extermination as more closely reflecting the law in Ukraine. Nonetheless, it should be borne in mind that international standards do not require the intent to kill a certain threshold number of victims²³⁸⁴ and, unlike genocide, does not require an intent to destroy the group or part of the group to which the victims belong, or pursuant to a pre-existing plan or policy.²³⁸⁵

²³⁷⁸ ICC Statute, Article 30(2)(a)-(b) and 30(3).

²³⁷⁹ ICC, *Katanga Trial Judgement*, para. 774.

²³⁸⁰ ICC Statute, Article 30(2)(a) and (b); ICC, *Katanga Trial Judgement*, paras 774, 781; ICC, *Bemba Trial Judgement*, para. 90.

²³⁸¹ See ICC, *Katanga Trial Judgement*, paras 775-776.

²³⁸² ICC Statute, Article 3(3).

²³⁸³ ICTY, *Karadzic Trial Judgement*, para. 485; ICTY, *Tolimir Trial Judgement*, para. 726; ICTR, *Simba Trial Judgement*, para. 422 (“Although extermination is the act of killing a large number of people, such a designation does not suggest that a numerical minimum must be reached. The mental element for extermination is the intent to perpetrate or to participate in a mass killing”); ICTR, *Mpambara Trial Judgement*, para. 10 (“the accused must intend by his actions to bring about the deaths on a large-scale”).

²³⁸⁴ ICTY, *Karadzic Trial Judgement*, para. 486; ICTY, *Stakic Appeal Judgement*, para. 260; ICTR, *Ntakirutimana et al. Appeal Judgement*, paras 516, 522. See also ICTY, *Tolimir Trial Judgement*, para. 726; ICTY, *Popovic et al. Trial Judgement*, para. 801; ICTY, *Krajisnik Trial Judgement*, para. 716.

²³⁸⁵ ICTY, *Karadzic Trial Judgement*, para. 486; ICTY, *Krstic Appeal Judgement*, para. 225; ICTY, *Tolimir Trial Judgement*,

ICTY, *KARADZIC TRIAL JUDGEMENT*, PARA. 486 [FOOTNOTES OMITTED]

In line with the jurisprudence on the *actus reus*, the *mens rea* of extermination similarly does not require the intent to kill a certain threshold number of victims. Additionally, there is no requirement that that act of extermination be carried out with the intent to destroy the group or part of the group to which the victims belong, or pursuant to a pre-existing plan or policy.

- d) Crime against Humanity of Enslavement (ICC Statute, Article 7(1)(c); ICTY Statute, Article 5(c); ICTR Statute, Article 3(c); SCSL Statute, Article 2(c))

ELEMENTS OF THE CRIME: TO CONVICT A PERPETRATOR FOR ENSLAVEMENT AS A CRIME AGAINST HUMANITY THE FOLLOWING ELEMENTS NEED TO BE ESTABLISHED:

(1) Objective element

- The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty (para. 1210).

(2) Subjective element

- The perpetrator intended to exercise any or all of the powers attaching to the right of ownership over one or more persons or to impose on them a similar deprivation of liberty (para. 1214).

(3) Contextual elements

- The conduct was committed as part of a widespread or systematic attack directed against a civilian population (see above, para. 1160).
- The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population (see above, para. 1173).

i. Applicability under Ukrainian Law

1207. International instruments prohibit the crime against humanity of enslavement,²³⁸⁶ which the ICC Statute defines as “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children”.²³⁸⁷

para. 726; ICTY, *Popovic et al. Trial Judgement*, para. 801; ICTY, *Stakic Trial Judgement*, para. 639; ICTY, *Vasiljevic Trial Judgement*, para. 227.

²³⁸⁶ ICC Statute, Article 7(1)(c); ICTY Statute Article 5(c); ICTR Statute Article 3(c); SCSL Statute, Article 2(c). The crime against humanity of enslavement is also prohibited by a number of other international instruments: *Convention to Suppress the Slave Trade and Slavery (1923)*, Article 2; *Nuremburg Charter*, Article 6(c); *Tokyo Charter*, Article 5(c); *1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, Article 1; ICCPR, Article 8; ECCC Law, Article 5; KSC & SPO Statute, Article 13(1)(c).

²³⁸⁷ ICC Statute, Article 7(2)(c).

1208. Enslavement as a crime against humanity is not currently prohibited under Ukrainian law. Nonetheless, the domestic crime of human trafficking is broad enough to cover much of the conduct prohibited by the crime against humanity of enslavement. This crime is covered by Article 149 of the CCU, which prohibits “[t]rafficking in human beings [...] for the purpose of exploitation [...]”. According to Note 1 to this provision, exploitation of human beings includes, *inter alia*, “forced labour or forced servicing, servitude or usages similar to servitude, servile status, involvement into indentured servitude”. Unlike the crime against humanity of enslavement, however, the CCU provision does not require the act of human trafficking to have been committed in the context of a widespread or systematic attack directed against a civilian population (i.e., the contextual element for crimes against humanity (see above, para. 1161)).
1209. In addition, Draft Bill 7290 will introduce (if, and when, it comes into force) the specific crime against humanity of enslavement, which prohibits the intentional commission (infliction) of conversion to slavery or human trafficking committed within the framework of a large-scale or systematic attack on civilians under Article 442-1.1(5) of the CCU. This provision should be interpreted to align with definition of the crime against humanity of enslavement contained in the international instruments.

ii. Definition of Enslavement (Objective element)

1210. The objective element of this crime against humanity requires that **the perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons**. This element requires the perpetrator to have purchased, sold, lent, or bartered the victim, or imposed a similar deprivation of liberty on him/her.²³⁸⁸
1211. Exercising powers attaching to the right of ownership means the use, enjoyment and disposal of a person who is regarded as property, by placing them in a situation of dependence and depriving them of any form of autonomy.²³⁸⁹ This definition is broad and includes “chattel” or “transactional” slavery.²³⁹⁰ However, the enslavement does not need to involve a commercial transaction,²³⁹¹ and includes imposing on the victim similar deprivations of liberty, such as by exacting forced labor or otherwise reducing them to a servile status,²³⁹² or “trafficking in persons, in particular women and children”.²³⁹³ Imposition of “similar deprivation of liberty” may take many forms and “may cover situations where the victims have not been physically confined, but were otherwise unable to leave as they would have nowhere else to go and fear for their lives”.²³⁹⁴

²³⁸⁸ ICC [Elements of Crimes](#), Article 7(1)(c), Element 1.

²³⁸⁹ ICC, *Katanga Trial Judgement*, para. 975.

²³⁹⁰ Cryer *et al.* (Eds.), *An Introduction to International Criminal Law and Procedure*, 3rd Edition, CUP, 2015, p. 473; ICTY, *Kunarac Appeal Judgement*, para. 117.

²³⁹¹ ICC, *Ongwen Trial Judgement*, para. 2713; ICC, *Katanga Trial Judgement*, para. 976; ICC, *Ntaganda Trial Judgement*, para. 952; SCSL, *Taylor Trial Judgement*, para. 420; SCSL, *Brima et al. Trial Judgement*, para. 709.

²³⁹² "Servile status" is defined as a person in the condition or status resulting from any of the institutions or practices of slavery. See, [1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery](#), Article 7(b).

²³⁹³ ICC [Elements of Crimes](#), Article 7(1)(c), fn. 11.

²³⁹⁴ ICC, *Ongwen Trial Judgement*, para. 2713; ICC, *Ntaganda Trial Judgement*, para. 952; SCSL, *Taylor Trial Judgement*, para. 420; SCSL, *Brima et al. Trial Judgement*, para. 709. See also, ICC, *Katanga Trial Judgement*, para. 977.

CASE STUDY: EXERCISE OF THE POWER OF OWNERSHIP

There is no exhaustive list of situations or circumstances that reflect the exercise of the power of ownership;²³⁹⁵ however, a case-by-case assessment should be made, taking into account the following factors, among others:²³⁹⁶

- detention or captivity and their respective duration;
- restrictions on any freedom of choice or movement;
- measures taken to prevent or deter escape;
- the use of threats, force, or other forms of physical or mental coercion;
- forced labor or subjecting the person to servile status;
- the exertion of psychological pressure or control;
- the victim's vulnerability;
- the socioeconomic conditions in which the power is exerted;
- the nature and control of the physical environment;
- assertion of exclusivity;
- the subjection to cruel treatment and abuse; or
- control of sexuality.

1212. The subjective nature of the deprivation of liberty — i.e., the victim's "perception of his or her situation as well as his or her reasonable fear"²³⁹⁷ — is also relevant to a determination of whether the crime against humanity of enslavement has been established. However, despite being a potentially helpful evidentiary factor in determining whether an accused's actions amount to enslavement, the (non-)consent of the victim is not an element of enslavement, which is, instead, exclusively concerned with the exercise of the rights of ownership over another person.²³⁹⁸

ICTY, *KUNARAC APPEAL JUDGEMENT*, PARA. 120

[T]he Appeals Chamber does not accept the premise that lack of consent is an element of the crime since, in its view, enslavement flows from claimed rights of ownership; accordingly, lack of consent does not have to be proved by the Prosecutor as an element of the crime. However, consent may be relevant from an evidential point of view as going to the question whether the Prosecutor has established the element of the crime relating to the exercise by the accused of any or all of the powers attaching to the right of ownership.

²³⁹⁵ ICC, *Katanga Trial Judgement*, para. 975; ICC, *Ntaganda Trial Judgement*, para. 952; ICTY, *Kunarac et al. Appeal Judgement*, para. 119; SCSL, *Sesay et al. Trial Judgement*, para. 160.

²³⁹⁶ ICC, *Ongwen Trial Judgement*, para. 2712; ICC, *Katanga, Trial Judgement*, para. 976; ICTY, *Kunarac et al. Trial Judgement*, paras 542-543; ICTY, *Kunarac et al. Appeal Judgement*, paras 119, 121; SCSL, *Sesay et al. Trial Judgement*, para. 160; SCSL, *Taylor Trial Judgement*, para. 420; ICC, *Ntaganda Trial Judgement*, para. 952.

²³⁹⁷ ICC, *Katanga Trial Judgement*, para. 977; SCSL, *Taylor Trial Judgement*, para. 420.

²³⁹⁸ ICTY, *Kunarac et al. Appeal Judgement*, paras 120-123.

1213. Judges should note that there is no minimum period during which time the victim must be enslaved in order for an exercise of the power of ownership to amount to the crime against humanity of enslavement.²³⁹⁹

iii. Definition of Enslavement (Subjective element)

1214. In regard to the subjective element, it is required that the perpetrator acted with **intent**, which will be established where: (1) perpetrator intended to exercise any or all of the powers attaching to the right of ownership over one or more persons or to impose on them a similar deprivation of liberty.

1215. **The perpetrator intended to exercise any or all of the powers attaching to the right of ownership over one or more persons or to impose on them a similar deprivation of liberty**. Such intent will be established where: (1) the perpetrator meant to engage in the act or omission (i.e., deliberately acted or failed to act) (**intent to conduct**) in order to exercise any or all of the powers attaching to the right of ownership over one or more persons or to impose on them a similar deprivation of liberty; or (2) the perpetrator was aware that the exercise of the powers of ownership or a deprivation of liberty would occur in the ordinary course of events (**intent to consequence**).²⁴⁰⁰ At the ICC, awareness that the consequence would occur in the ordinary course of events requires virtual certainty that the events would occur.²⁴⁰¹

1216. Note that it is not a requirement of enslavement to prove that the perpetrator “intended to detain the victims under constant control for a prolonged period of time”.²⁴⁰²

²³⁹⁹ ICC, *Ongwen Trial Judgement*, para. 2714; ICTY, *Kunarac et al. Appeal Judgement*, para. 121.

²⁴⁰⁰ ICC Statute, Article 30(2)(a) and (b); ICC, *Katanga Trial Judgement*, para. 774; ICTY, *Kunarac et al. Appeal Judgement*, para. 122; ICTY, *Krnjelac Trial Judgement*, para. 350; SCSL, *Taylor Trial Judgement*, para. 419.

²⁴⁰¹ See ICC, *Katanga Trial Judgement*, paras 775-776.

²⁴⁰² ICTY, *Kunarac et al. Appeal Judgement*, para. 122.

- e) Crime against Humanity of Deportation and Forcible Transfer (ICC Statute, Article 7(1)(d); ICTY Statute, Article 5(d); ICTR Statute, Article 3(d); SCSL Statute, Article 2(d))

ELEMENTS OF THE CRIME: TO CONVICT A PERPETRATOR FOR DEPORTATION AND FORCIBLE TRANSFER AS A CRIME AGAINST HUMANITY THE FOLLOWING ELEMENTS NEED TO BE ESTABLISHED:

(1) Objective elements

- The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts (para. 1220).
- Such person or persons were lawfully present in the area from which they were so deported or transferred (para. 1224).

(2) Subjective elements

- The perpetrator intended to deport or forcibly transfer one or more persons (para. 1228).
- The perpetrator was aware of the factual circumstances that established the lawfulness of the person or persons presence in the area from which they were so deported or transferred (para. 1230).

(3) Contextual elements

- The conduct was committed as part of a widespread or systematic attack directed against a civilian population (see above, para. 1160).
- The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population (see above, para. 1173).

i. Applicability under Ukrainian Law

1217. International instruments prohibit deportation and forcible transfer of the population,²⁴⁰³ which occurs when persons are forcibly displaced by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.²⁴⁰⁴

1218. The crime against humanity of deportation and forcible transfer is not currently criminalized under Ukrainian law. However, Draft Bill 7290 will introduce (if, and when, it comes into force) into the CCU the crimes against humanity of deportation (Article 442-1.1(2)) and forcible transfer (Article 442-1.1(3)) of the population committed within the framework of a large-scale or systematic attack on civilians. This includes the forced relocation or transfer (eviction) of one or more persons, in the absence of grounds provided by international law, from the area in which they were

²⁴⁰³ [ICC Statute](#), Article 7(1)(d); [ICTY Statute](#), Article 5(d); [ICTR Statute](#), Article 3(d); [SCSL Statute](#), Article 2(d). The crime against humanity of deportation is also prohibited by the following international instruments: [Nuremberg Charter](#), Article 6(c); [Tokyo Charter](#), Article 5(c); and [ECCC Law](#), Article 5. Deportation or forcible transfer is also prohibited as a war crime under Article 8(2)(a)(vii) and Article 8(2)(b)(viii) of the [ICC Statute](#).

²⁴⁰⁴ [ICC Statute](#), Article 7(2)(d).

legally located to the territory of another state (deportation) or another area within the same state (forcible transfer). As such, Draft Bill 7290 will integrate the definition of the crime of deportation and forcible transfer as a crime against humanity contained in the international instruments.

ii. Definition of Deportation or Forcible Transfer (Objective elements)

1219. The objective elements of this crime against humanity requires that: (1) the perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another state or location, by expulsion or other coercive acts; and (2) such person or persons were lawfully present in the area from which they were so deported or transferred.
1220. **The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another state or location, by expulsion or other coercive acts.** First, it must be established that one or more persons were *deported* to another State or *transferred* to another location within a State.²⁴⁰⁵ Note, however, that while deportation normally requires the individual(s) to be transferred across a State border (i.e., a *de jure* border) to another State, in certain circumstances transfer across a *de facto* border may also amount to deportation.²⁴⁰⁶ Accordingly, it must be proven that one or more acts that the perpetrator performed produced the effect of deporting or forcibly transferring the victim(s).²⁴⁰⁷

ICTY, STAKIC APPEAL JUDGEMENT, PARA. 300 [FOOTNOTES OMITTED]

The crime of deportation requires the displacement of individuals across a border. The default principle under customary international law with respect to the nature of the border is that there must be expulsion across a *de jure* border to another country [...]. The Appeals Chamber also accepts that under certain circumstances displacement across a *de facto* border may be sufficient to amount to deportation. In general, the question whether a particular *de facto* border is sufficient for the purposes of the crime of deportation should be examined on a case by case basis in light of customary international law.

²⁴⁰⁵ The difference between deportation and forcible transfer is that deportation requires movement to another state. See, ICC, [Decision on the ‘Prosecution’s Request for a Ruling on Jurisdiction under Article 19\(3\) of the Statute’](#), para. 55; ICTY, [Stakic Appeal Judgement](#), para. 278; MICT, [Seselj Appeal Judgement](#), fn. 538.

²⁴⁰⁶ ICTY, [Stakic Appeal Judgement](#), para. 289; ICTY, [Krajisnik Trial Judgement](#), para. 723.

²⁴⁰⁷ ICC, [Ntaganda Trial Judgement](#), para. 1047; ICC, [Ruto et al. Decision on the confirmation of charges](#), para. 245; ICTY, [Popovic et al. Trial Judgement](#), para. 893.

CASE STUDY: EXAMPLES OF "EXPULSION OF OTHER COERCIVE ACTS"

The following may indicate that coercion was used to deport or transfer the victims:²⁴⁰⁸

- Physical force or fear of violence;
- Duress;
- Detention;
- Psychological oppression;
- Abuse of power;
- Taking advantage of a coercive environment;
- Deprivation of fundamental rights;
- Other crimes against humanity or war crimes such as, killing, torture, enforced disappearance, destruction and looting of property;
- Sexual violence;
- Ill-treatment or untenable living conditions.

1221. The deportation or transfer must be by expulsion or other coercive acts.²⁴⁰⁹ Thus, there must be a genuine lack of choice on the part of the individuals displaced.²⁴¹⁰ While individuals may agree, or even request, to be removed from an area, this is insufficient if the consent was not given voluntarily or as a result of individual free will.²⁴¹¹ Only if the person genuinely wishes to leave would a displacement be considered lawful and thus absolve the perpetrator of criminal responsibility.²⁴¹²

1222. To determine whether this element has been met, the prevailing situation and atmosphere should be considered, as well as other relevant circumstances, such as the victims' vulnerability or the existence of a coercive environment (e.g., a rise in tension and fear coupled with an increase in military presence).²⁴¹³ However, incidental displacement as a result of an entirely lawful attack, or collateral consequences of a lawful attack, does not amount to forcible transfer or displacement.²⁴¹⁴

²⁴⁰⁸ ICC [Elements of Crimes](#), Article 7(1)(d), fn. 12; ICTY, [Naletilic & Martinovic Trial Judgement](#), para. 519; ICTY, [Karadzic Trial Judgement](#), paras 528-529; ICC, [Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19\(3\) of the Statute'](#), para. 61; Triffterer and Ambos (eds), *The ICC Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 347.

²⁴⁰⁹ ICC [Elements of Crimes](#), Article 7(1)(d); ICTY, [Stakic Appeal Judgement](#), para. 279; ICTY, [Krnojelac Trial Judgement](#), para. 475; ICTY, [Krnojelac Appeal Judgement](#), para. 233; ICTY, [Krstic Trial Judgement](#), para. 528.

²⁴¹⁰ ICC, [Ntaganda Trial Judgement](#), para. 1056; ICTY, [Stakic Appeal Judgement](#), para. 279; ICTY, [Krnojelac Trial Judgement](#), para. 475; ICTY, [Kunarac Trial Judgement](#), para. 453.

²⁴¹¹ ICC, [Ntaganda Trial Judgement](#), para. 1056; ICTY, [Prlic et al. Trial Judgement](#), para. 50; ICTY, [Karadzic Trial Judgement](#), para. 489; ICTY, [Stakic Appeal Judgement](#), paras 277, 279; ICTY, [Krnojelac Appeal Judgement](#), para. 229.

²⁴¹² ICTY, [Naletilic & Martinovic Trial Judgement](#), para. 519; ICTY, [Karadzic Trial Judgement](#), para. 489; ICTY, [Stakic Appeal Judgement](#), paras 279, 282; ICTY, [Krnojelac Appeal Judgement](#), para. 229.

²⁴¹³ ICC, [Ntaganda Trial Judgement](#), para. 1056; ICTY, [Stakic Appeal Judgement](#), para. 282; ICTY, [Stakic Trial Judgement](#), paras 85, 707; ICTY, [Karadzic Trial Judgement](#), para. 489; ICTY, [Krnojelac Appeal Judgement](#), para. 229.

²⁴¹⁴ ICC, [Ntaganda Trial Judgement](#), para. 1056; ICTY, [Stakic Appeal Judgement](#), para. 281; ICTY, [Krajisnik Trial Judgement](#), para. 724.

1223. It must also be demonstrated that the deportation or transfer occurred without grounds permitted under international law.²⁴¹⁵ There are some limited grounds permitted under international law which exist during armed conflict and during peacetime:
- c. During armed conflict, temporary displacement (or “evacuation”) of civilians for humanitarian or imperative military reasons is permitted.²⁴¹⁶ In such situations, displaced persons must be returned to their homes as soon as the situation allows.²⁴¹⁷ Nevertheless, it is unlawful to use so-called “imperative military reasons” as a pretext to “evacuate” a civilian population from an area or State and, subsequently, seize control over that territory.²⁴¹⁸ Additionally, while forcible removal for humanitarian reasons is justifiable in certain situations, it is not justified where the humanitarian crisis that caused the displacement is itself the result of the perpetrator’s own unlawful activity.²⁴¹⁹
 - d. During peacetime, deportations or transfers that are necessary to protect national security, public order or public health and morals, or the rights and freedoms of others may be permitted.²⁴²⁰ Such displacement may also be necessary for humanitarian reasons in case of epidemics or natural disasters, unless the perpetrator’s own activity caused the humanitarian crisis.²⁴²¹
1224. **Such person or persons were lawfully present in the area from which they were so deported or transferred.** The second element of this crime against humanity requires the judge to consider whether the victims were lawfully (under both domestic and international law) residing in the territory from which they were deported or forcibly transferred.²⁴²²
1225. Nationals of a State have a right to reside in the territory of their own State.²⁴²³ Further, although international instruments do not provide a general right to aliens to enter the territory of a State, a State’s power to restrict entry to its territory is not unlimited.²⁴²⁴

²⁴¹⁵ ICTY, *Popovic et al. Trial Judgement*, para. 891; ICTY, *Krajisnik Trial Judgement*, para. 723; ICC, *Ruto et al. Decision on the confirmation of charges*, para. 243.

²⁴¹⁶ Fourth Geneva Convention, Article 49; ICTY, *Karadzic Trial Judgement*, para. 492; ICTY, *Prlic et al. Trial Judgement*, paras 52-53; ICTY, *Popovic et al. Trial Judgement*, para. 903 (citing ICTY, *Stakic Appeal Judgement*, para. 287); ICTY, *Karadzic Trial Judgement*, paras 524, 526.

²⁴¹⁷ *Geneva Convention IV*, Article 49(2); ICTY, *Stanisic & Simatovic Trial Judgement*, para. 994; ICTY, *Krajisnik Trial Judgement*, para. 725; ICTY, *Popovic et al. Trial Judgement*, para. 901.

²⁴¹⁸ ICTY, *Karadzic Trial Judgement*, para. 492; ICTY, *Popovic et al. Trial Judgement*, para. 901; ICTY, *Blagojevic and Jokic Trial Judgement*, para. 597.

²⁴¹⁹ ICTY, *Karadzic Trial Judgement*, para. 492; ICTY, *Popovic et al. Trial Judgement*, para. 903 (citing ICTY, *Stakic Appeal Judgement*, para. 287); MICT, *Mladic Appeal Judgement*, para. 356.

²⁴²⁰ *ICCPR*, Article 12(3).

²⁴²¹ ICTY, *Popovic et al. Trial Judgement*, para. 903 (citing ICTY, *Stakic Appeal Judgement*, para. 287); ICTY, *Blagojevic and Jokic Trial Judgement*, para. 600.

²⁴²² ICTY, *Popovic et al. Trial Judgement*, para. 900; ICTY, *Tolimir Trial Judgement*, para. 797; ICTY, *Blagojevic and Jokic Trial Judgement*, para. 595; ICTY, *Djordjevic Trial Judgement*, paras 1613, 1616.

²⁴²³ *ICCPR*, Article 12.

²⁴²⁴ Triffterer and Ambos (eds), *The ICC Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 264 (citing Human Rights Committee, *General Comment No. 15/27*, para. 5: “in certain circumstances an alien may enjoy the protection of the [ICCPR] even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise”).

1226. Moreover, the requirement that persons be “lawfully present” does not impose a requirement on the victim to demonstrate residency as a legal standard.²⁴²⁵ Therefore, whether an individual has lived in a location for a sufficient period of time to meet the requirements for residency or whether he or she has been accorded such status under immigration laws is irrelevant.²⁴²⁶ For example, this protection extends to people who have come to live in a community, including internally displaced persons.²⁴²⁷ Instead, the rule is intended to exclude situations where individuals are occupying houses or premises unlawfully.²⁴²⁸

ICTY, *POPOVIC ET AL. TRIAL JUDGEMENT*, PARA. 903 [FOOTNOTES OMITTED]

The Trial Chamber is of the view that the words “lawfully present” should be given their common meaning and should not be equated to the legal concept of lawful residence. [...] Clearly the protection is intended to encompass, for example, internally displaced persons who have established temporary homes after being uprooted from their original community. In the view of the Trial Chamber, the requirement for lawful presence is intended to exclude only those situations where the individuals are occupying houses or premises unlawfully or illegally and not to impose a requirement for “residency” to be demonstrated as a legal standard.

iii. Definition of Deportation and Forcible Transfer (Subjective element)

1227. The subjective element for the crime against humanity of deportation and forcible transfer requires **intent** and **knowledge**, which will be established when: (1) the perpetrator intended to deport or forcibly transfer one or more persons; and (2) the perpetrator was aware of the factual circumstances that established the lawfulness of the person or persons presence in the area from which they were so deported or transferred.

1228. **The perpetrator intended to deport or forcibly transfer one or more persons.** Such intent can be established where: (1) the perpetrator meant to engage in acts or omissions (i.e., deliberately acted or failed to act) (**intent to conduct**)²⁴²⁹ in order to cause the deportation or transfer of one or more persons; or (2) the perpetrator was aware that deportation or transfer would occur in the ordinary course of events (**intent to consequence**).²⁴³⁰ At the ICC, awareness that the consequence would occur in the ordinary course of events requires virtual certainty that the events would occur.²⁴³¹

²⁴²⁵ ICTY, *Popovic et al. Trial Judgement*, para. 900.

²⁴²⁶ ICTY, *Popovic et al. Trial Judgement*, para. 900.

²⁴²⁷ ICC, *Ntaganda Trial Judgement*, para. 1069; ICTY, *Popovic et al. Trial Judgement*, para. 900; ICTY, *Djordjevic Trial Judgement*, para. 1616.

²⁴²⁸ ICTY, *Popovic et al. Trial Judgement*, para. 900; ICTY, *Dordevic Trial Judgement*, paras 1616, 1640.

²⁴²⁹ ICC, *Katanga Trial Judgement*, para. 774; ICTY, *Karadzic Trial Judgement*, para. 493; ICTY, *Tolimir Trial Judgement*, para. 801.

²⁴³⁰ ICC Statute, Article 30(2)(a) and (b); ICC, *Katanga Trial Judgement*, para. 774.

²⁴³¹ See ICC, *Katanga Trial Judgement*, paras 775-776.

1229. The general *mens rea* required for this crime against humanity is the intent to forcibly displace one or more persons across a *de jure* or *de facto* border in relation to deportation, and the intent to forcibly displace one or more persons within a national border in relation to forcible transfer.²⁴³² However, neither deportation nor forcible transfer require the perpetrator to have the intent that the victims be displaced permanently, only that they be intentionally displaced.²⁴³³
1230. **The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.** The ICC Elements of Crimes also set out a specific subjective element for the crime against humanity of deportation or forcible transfer. Accordingly, it must be demonstrated that the perpetrator was aware of the facts that established the lawfulness of the victims' presence in the area from which they were transferred or deported. There is no need to demonstrate that the perpetrator made any legal determination concerning the lawfulness of the victim's presence.²⁴³⁴ For instance, the fact that the perpetrator was aware that the displaced persons were residing in the relevant territory for a prolonged period could be sufficient.

²⁴³² ICTY, *Karadzic Trial Judgement*, para. 493; ICTY, *Prlic et al. Trial Judgement*, para. 58; ICTY, *Popovic et al. Trial Judgement*, para. 904; ICTY, *Tolimir Trial Judgement*, para. 801.

²⁴³³ ICTY, *Karadzic Trial Judgement*, para. 493; ICTY, *Prlic et al. Trial Judgement*, para. 57; ICTY, *Popovic et al. Trial Judgement*, para. 904; ICTY, *Stakic Appeal Judgement*, para. 317; ICTY, *Brdanin Appeal Judgement*, para. 206; ICTY, *Tolimir Trial Judgement*, para. 801.

²⁴³⁴ Triffterer and Ambos (eds), *The ICC Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 265.

- f) Crime against Humanity of Imprisonment (ICC Statute, Article 7(1)(e); ICTY Statute, Article 5(e); ICTR Statute, Article 3(e); SCSL Statute, Article 2(e))

ELEMENTS OF THE CRIME: TO CONVICT A PERPETRATOR FOR IMPRISONMENT AS A CRIME AGAINST HUMANITY THE FOLLOWING ELEMENTS NEED TO BE ESTABLISHED:

(1) Objective elements

- The perpetrator imprisoned one or more persons or otherwise severely deprived one or more persons of physical liberty (para. 1234).
- The gravity of the conduct was such that it was in violation of fundamental rules of international law (para. 1235).

(2) Subjective elements

- The perpetrator intended to imprison one or more persons or otherwise severely deprive one or more persons of physical liberty (para. 1239).
- The perpetrator was aware of the factual circumstances that established the gravity of the conduct (para. 1240).

(3) Contextual elements

- The conduct was committed as part of a widespread or systematic attack directed against a civilian population (see above, para. 1160).
- The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population (see above, para. 1173).

i. Applicability under Ukrainian Law

1231. International instruments prohibit the crime against humanity of imprisonment,²⁴³⁵ which occurs when a person imprisons one or more persons or otherwise severely deprives one or more persons of physical liberty.²⁴³⁶

1232. Imprisonment as a crime against humanity is not currently prohibited under Ukrainian law. However, Draft Bill 7290 will introduce (if, and when, it comes into force) the specific crime against humanity of illegal imprisonment within the framework of a large-scale or systematic attack on civilians under Article 442-1.1(7) of the CCU. This provision should be interpreted to align with the definition of the crime against humanity of imprisonment contained in the international instruments.

²⁴³⁵ ICC Statute, Article 7(1)(e); ICTY Statute Article 5(e); ICTR Statute Article 3(e); SCSL Statute, Article 2(e). The crime against humanity of imprisonment is also prohibited by a number of other international instruments: ECCC Law, Article 5; KSC & SPO Statute, Article 13(1)(e).

²⁴³⁶ ICC Elements of Crimes, Article 7(2)(e), Element One.

ii. Definition of Imprisonment (Objective elements)

1233. The objective elements of this crime against humanity requires that: (1) the perpetrator imprisoned one or more persons or otherwise severely deprived one or more persons of physical liberty; and (2) the gravity of the conduct was such that it was in violation of fundamental rules of international law.²⁴³⁷

1234. **The perpetrator imprisoned one or more persons or otherwise severely deprived one or more persons of physical liberty.** To satisfy the first element of the crime against humanity of imprisonment, it must be established that the accused imprisoned one or more persons or otherwise severely deprived one or more persons of physical liberty. “Imprisonment” under this provision is to be understood as “arbitrary detention”, which means that an individual was deprived of liberty without due process of law (discussed further under Element Two, below).²⁴³⁸ Other deprivations of physical liberty, which must be considered “severe” to satisfy this element, may include, for example, house arrest, restriction to a closed city, or similarly severe restrictions, including internment in concentration or detention camps or other forms of long-term detention.²⁴³⁹

CASE STUDY: "SEVERE" DEPRIVATION OF LIBERTY

The following factors, *inter alia*, may be indicative that a deprivation of liberty was sufficiently "severe" so as to amount to the crime against humanity of imprisonment:²⁴⁴⁰

- whether the detainee was subjected to torture or other cruel, inhuman or degrading treatment, including crimes of sexual violence, or other intimidation;
- whether the initial arrest was lawful (e.g., whether it was based on a valid warrant of arrest, whether the detainees were informed of the reasons for their detention, whether the detainees were ever formally charged, and whether they were informed of any procedural rights);
- the duration of the deprivation of liberty;
- whether the detention was secret;
- whether the detainee was cut off from the outside world; and/or
- whether the detention was part of a series of repeated detentions.

1235. **The gravity of the conduct was such that it violated fundamental rules of international law.** To prove the second element of this crime against humanity, it must

²⁴³⁷ ICC [Elements of Crimes](#), Article 7(1)(d). See also, ICTY, *Prlic et al.* [Appeal Judgement](#), para. 471; ICTY, *Gotovina et al.* [Trial Judgement](#), para. 1815; ICTY, *Stanisic & Simatovic* [Trial Judgement](#), para. 78; ICTY, *Krajisnik* [Trial Judgement](#), para. 752; ICTY, *Kordic & Cerkez* [Appeal Judgement](#), para. 116; ICTY, *Martic* [Trial Judgement](#), paras 87-88.

²⁴³⁸ ICTY, *Kordic and Cerkez* [Trial Judgement](#), para. 302. Note that a deprivation of liberty may still be considered arbitrary under international law, even if it is in accordance with national law. See, Triffterer and Ambos (eds), *The ICC Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 199.

²⁴³⁹ ICTY, *Kordic and Cerkez* [Trial Judgement](#), para. 299; ICTY, *Prlic et al.* [Trial Judgement](#), para. 473; ICTY, *Blaskic* [Trial Judgement](#), paras 684, 691, 700; ICTR, *Ntagerura et al.* [Trial Judgement](#), para. 702.

²⁴⁴⁰ ICTY, *Kordic and Cerkez* [Trial Judgement](#), paras 592, 609, 623, 625, 792-793; ICTY, *Kordic and Cerkez*, paras 592-594, 605, 610; ICTY, *Prlic et al.* [Trial Judgement](#), para. 473; ICTY, *Blaskic* [Trial Judgement](#), para. 700; ICTR, *Ntagerura et al.* [Trial Judgement](#), para. 702. See also, Triffterer and Ambos (eds), *The ICC Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 202.

be established that the imprisonment or deprivation of liberty was arbitrary²⁴⁴¹ and that this arbitrary detention was sufficiently grave as to violate fundamental rules of international law.

1236. Detention will be arbitrary under international law when:²⁴⁴²

- there is no legal basis for the deprivation of liberty;
- the deprivation of liberty results from the exercise of specified rights and freedoms (such as the rights to freedom of speech, conscience, assembly, association, and movement); or
- the total or partial non-observance of international human rights norms relating to the right to a fair trial is of such gravity as to give the deprivation of liberty or imprisonment an arbitrary character.

1237. Further, arbitrary detention will be sufficiently grave when it violates fundamental rules of international law. This entails more than minor procedural errors in legal due processes and requires, at a minimum, that the detention resulted in a violation of internationally recognized human rights.²⁴⁴³

CASE STUDY: "GRAVE" DEPRIVATION OF LIBERTY

A deprivation of liberty will be “grave” if it is accompanied by a violation of internationally recognized human rights, including, *inter alia*:

- the guarantees of the right to a fair trial, such as the right to prompt access to families, counsel, independent medical attention and a judge;²⁴⁴⁴
- the right to have the lawfulness of one’s detention promptly determined by a court and to be released if the detention was unlawful;²⁴⁴⁵
- the right to an independent, impartial and competent court;²⁴⁴⁶

²⁴⁴¹ ICTY, *Kordic & Cerkez Trial Judgement*, paras 299, 302; ICTY, *Krnjelac Trial Judgement*, para. 113. See also, Triffterer and Ambos (eds), *The ICC Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 201. Arbitrary imprisonment will not include lawful deprivations of liberty, including “lawful arrest, conviction following trial, lawful deportation or extradition procedures, quarantine, and, during armed conflict, assigned residence, internment on security grounds and internment of prisoners-of-war”. See, Cryer *et al.* (Eds.), *An Introduction to International Criminal Law and Procedure*, 3rd Edition, CUP, 2015, p. 475.

²⁴⁴² Report of UN Working Group on Arbitrary Detention, “Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment – Report of the Working Group on Arbitrary Detention, Annex I: Revised Methods of Work”, 19 December 1997, E/CN.4/1998/44, p. 16; ICTR, *Ntagerura et al. Trial Judgement*, para. 702; ICTY, *Prlic et al. Trial Judgement*, paras 471, 473.

²⁴⁴³ Triffterer and Ambos (eds), *The ICC Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 202.

²⁴⁴⁴ See, UNGA, “United Nations Standard Minimum Rules for the Treatment of Prisoners”, 13 May 1977, A/RES/70/175, Rules 27, 58; CoE, *European Prison Rules*, Council of Europe Publishing, June 2006, paras 23.1, 24.1, 41.1; UNGA, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment of 1988, Principle 15; [ICCPR](#), Article 9(3).

²⁴⁴⁵ ³⁶² UNGA, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment of 1988, Principles 9-13; [ICCPR](#), Article 9(3).

²⁴⁴⁶ [UDHR](#), Articles 3, 10; UNGA, Basic Principles on the Role of Lawyers.

- the right to representation by counsel;²⁴⁴⁷ and
- the right to an appeal.²⁴⁴⁸

1. Definition of Imprisonment (Subjective element)

1238. The subjective elements for the crime against humanity of imprisonment require **intent** and **knowledge**, which will be established when: (1) the perpetrator intended to imprison one or more persons or otherwise severely deprive one or more persons of physical liberty; and (2) the perpetrator was aware of the factual circumstances that established the gravity of the conduct.

1239. **The perpetrator intended to imprison one or more persons or otherwise severely deprive one or more persons of physical liberty.** Such intent can be established where: (1) the perpetrator meant to engage in acts or omissions (i.e., deliberately acted or failed to act) (**intent to conduct**)²⁴⁴⁹ in order to cause the imprisonment or deprivation of physical liberty of one or more persons; or (2) the perpetrator was aware that imprisonment or deprivation of physical liberty would occur in the ordinary course of events (**intent to consequence**).²⁴⁵⁰ At the ICC, awareness that the consequence would occur in the ordinary course of events requires virtual certainty that the events would occur.²⁴⁵¹

1240. **The perpetrator was aware of the factual circumstances that established the gravity of the conduct.** The ICC Elements of Crimes also set out a specific subjective element for the crime against humanity of imprisonment or other severe deprivation of physical liberty. Accordingly, it must be established that the perpetrator was aware (i.e., had knowledge) of the factual circumstances that established the gravity of the conduct. However, it is not required that the perpetrator completed any legal evaluation as to whether their actions were in violation of fundamental rules of international law.²⁴⁵²

²⁴⁴⁷ UNGA, Basic Principles on the Role of Lawyers, para.1.

²⁴⁴⁸ CoE, *European Prison Rules*, Council of Europe Publishing, June 2006, para. 61.

²⁴⁴⁹ ICC, *Katanga Trial Judgement*, para. 774; ICTY, *Krajisnik Trial Judgement*, para. 752; ICTY, *Krnjelac Trial Judgement*, para. 115.

²⁴⁵⁰ ICC Statute, Article 30(2)(a) and (b); ICC, *Katanga Trial Judgement*, para. 774.

²⁴⁵¹ See ICC, *Katanga Trial Judgement*, paras 775-776.

²⁴⁵² Nilsson, *Article 7(1)(e) in Klamberg (ed), Commentary on the Law of the International Criminal Court*, 1st Edition, Torkel Opsahl Academic Publisher, 2017, pp 47-48.

- g) Crime against Humanity of Torture (Convention against Torture, Articles 1 and 2; ICC Statute, Article 7(1)(f); ICTY Statute, Article 5(f); ICTR Statute, Article 3(f); SCSL Statute, Article 2(f))

ELEMENTS OF THE CRIME: TO CONVICT A PERPETRATOR FOR TORTURE AS A CRIME AGAINST HUMANITY THE FOLLOWING ELEMENTS NEED TO BE ESTABLISHED:

(1) Objective element

- The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons (para. [1250](#)).

(2) Subjective elements

- The perpetrator intended to inflict severe physical or mental pain or suffering upon one or more persons (para. [1254](#)).
- The perpetrator intended to inflict the pain or suffering for a specific purpose, i.e., obtaining information or a confession, punishing, intimidating or coercing the victim or a third person, or discriminating, on any ground, against the victim or a third person (para. [1255](#)).

(3) Contextual elements

- The conduct was committed as part of a widespread or systematic attack directed against a civilian population (see above, para. [1160](#)).
- The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population (see above, para. [1173](#)).

i. Applicability under Ukrainian Law

1241. International instruments prohibit the crime against humanity of torture.²⁴⁵³ However, the elements of the crime against humanity of torture differ between the Convention against Torture (CAT), the ICTY/ICTR and the ICC. Accordingly, for the reasons discussed below, this Benchbook will rely on the definition of the crime against humanity of torture as found to be reflective of customary international law by the ICTY and the ICTR. As also discussed below, this definition most closely aligns with the definition of torture contained in Article 127 of the CCU.

1242. The CAT defines torture as:

²⁴⁵³ [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#), Article 1 and 2; [ICC Statute](#), Article 7(1)(f); [ICTY Statute](#), Article 5(f); [ICTR Statute](#), Article 3(f); [SCSL Statute](#), Article 2(f). The crime against humanity of torture is also prohibited in the following international legal instruments: [ECCC Law](#), Article 5; [KSC & SPO Statute](#), Article 13(1)(f). In addition, the following human rights treaties prohibit torture: [UN Declaration on the Protection of All Persons from Being Subjected to Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment](#); [ICCPR](#), Articles 4, 7; [European Convention on Human Rights](#) (ECHR), Article 3. Torture is also prohibited as a war crime under Article 8(2)(a)(ii) and Article 8(2)(c)(i) of the [ICC Statute](#).

CONVENTION AGAINST TORTURE, ARTICLE 1:

‘[T]orture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any person based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

1243. Early in its jurisprudence, the ICTY Trial Chamber undertook a comprehensive study of the crime of torture and adopted an authoritative definition of torture as a crime against humanity, which it indicated is reflective of customary international law.²⁴⁵⁴ This definition is set out as follows:

ICTY, *KUNARAC ET AL.* APPEAL JUDGEMENT, PARA. 142 [FOOTNOTES OMITTED]

With reference to the Torture Convention and the case-law of the Tribunal and the ICTR, the Trial Chamber adopted a definition [of the crime against humanity of torture] based on the following constitutive elements:

- i. The infliction, by act or omission, of severe pain or suffering, whether physical or mental.
- ii. The act or omission must be intentional.
- iii. The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.

1244. Accordingly, while a portion of this definition of the crime against humanity of torture followed the definition contained in the CAT, both the ICTY and the ICTR found that the requirement that the torture was “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity” was not reflective of customary international law, and therefore did not include this as an element of the crime against humanity of torture.²⁴⁵⁵ In addition, neither the ICTY nor the ICTR included the requirement that an act of torture “does

²⁴⁵⁴ ICTY, *Kunarac Trial Judgement*, para. 497; ICTY, *Kunarac et al. Appeal Judgement*, para. 142. See also, ICTY, *Kvočka et al. Trial Judgement*, para. 141; ICTR, *Semanza Trial Judgement*, para. 343; ICTR, *Ntagerura et al. Trial Judgement*, para. 703.

²⁴⁵⁵ Note that, initially, the ICTY in the *Furundzija Appeal Judgement* (para. 11) said that the definition of torture in the Torture Convention, including the public official requirement, reflected customary international law. However, this was reversed by the ICTY in the *Kunarac et al. Appeal Judgement* (para. 146) where it was explained that the public official requirement was not a requirement outside the framework of the Torture Convention. This approach was affirmed by the ICTY in the *Kvočka et al. Appeal Judgement* (para. 284) and by the ICTR in the *Semanza Appeal Judgement* (para. 248).

not include pain or suffering arising only from, inherent in or incidental to lawful sanctions”,²⁴⁵⁶ which is required by the CAT and the ICC Statute.²⁴⁵⁷

1245. The definition of the crime against humanity of torture contained in the ICC Elements of Crimes requires that: (i) the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons; (ii) such person or persons were in the custody or under the control of the perpetrator; and (iii) such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.²⁴⁵⁸ Accordingly, while Element (i) of the ICC’s definition is also found in the customary international law definition of torture as a crime against humanity, as defined by the ICTY and ICTR, Elements (ii) and (iii) of the ICC’s definition are not considered part of the customary international law definition.²⁴⁵⁹
1246. Accordingly, the elements set out in this Benchbook are those contained in the CAT that have been found by the ICTY and ICTR to reflect customary international law.²⁴⁶⁰ As customary international law is binding on Ukraine,²⁴⁶¹ judges should ensure that the evidence presented to them meets each of the following elements. In addition, as seen below, the CCU’s definition of torture contained in Article 127 broadly correlates with the customary international law definition of torture.
1247. Currently, Ukrainian legislation does not criminalize the crime against humanity of torture. However, this conduct broadly correlates with the ordinary crime of torture under Article 127 of the CCU, which prohibits the “wilful causing of severe physical pain or physical or mental suffering by way of battery, martyrizing or other violent actions” for the purpose of inducing the victim or any other person to commit involuntary actions or the purpose of punishing him/her or any other person, as well as for the purpose of intimidation and discrimination of him/her of other person.
1248. The crime of torture under the CCU correlates to the crime against humanity of torture under customary international law as it requires the willful (i.e., intentional) infliction of physical or mental pain or suffering for a specific purpose. However, the ordinary crime of torture does not require the act of torture to be committed in the context of a widespread or systematic attack directed against a civilian population (i.e., the contextual element of crimes against humanity).

²⁴⁵⁶ See e.g., ICTY, *Kunarac et al. Appeal Judgement*, para. 142; ICTY, *Kvočka et al. Trial Judgement*, para. 141; ICTR, *Akayesu Trial Judgement*, paras 593-594; ICTR, *Semanza Trial Judgement*, para. 343.

²⁴⁵⁷ [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#), Article 1; [ICC Statute](#), Article 7(2)(e); ICC [Elements of Crimes](#), Article 7(1)(f), Element Three.

²⁴⁵⁸ ICC [Elements of Crimes](#), Article 7(1)(f).

²⁴⁵⁹ See, e.g., ICTY, *Kunarac Trial Judgement*, para. 482-484, 497; ICTY, *Kunarac Appeal Judgement*, paras 142-144; Triffterer and Ambos (eds), *The ICC Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 271; Cryer, et al. (eds), *An Introduction to International Criminal Law and Procedure*, 3rd Edition, Cambridge University Press, 2015, p. 251; Association for the Prevention of Torture and Center for Justice and International Law, "[Torture in International Law: A guide to jurisprudence](#)", 2008, p. 170. See also, [Convention Against Torture](#), Article 1(2).

²⁴⁶⁰ ICTY, *Kunarac et al. Appeal Judgement*, para. 146; ICTY, *Furundzija Appeal Judgement*, para. 111; ICTY, *Celebici Trial Judgement*, para. 459; ICTR, *Semanza Appeal Judgement*, para. 248; ICTR, *Akayesu Trial Judgement*, para. 593.

²⁴⁶¹ Customary international law is a set of rules binding on all States derived from the consistent conduct of States ("State practice") acting out of the genuine belief that the law – as opposed to, e.g., courtesy or political advantages – required them to act that way ("*opinio juris*"). ICJ, *North Sea Continental Shelf Judgement*, paras 71-74, 77. See also, Sassoli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar, 2019, p. 46.

1249. Additionally, Draft Bill 7290 will introduce (if, and when, it comes into force) the crime against humanity of torture committed within the framework of a large-scale or systematic attack on civilians under Article 442-1.1(8) of the CCU. Note 5 to Article 442-1 defines torture as “intentionally causing severe physical pain or physical or moral suffering to a person”. Draft Bill 7290 will integrate both the contextual elements and the specific elements of the crime of torture as a crime against humanity contained in the international instruments.

ii. Definition of Torture (Objective element)

1250. The objective element of the crime against humanity of torture requires that the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.

1251. **The perpetrator inflicted severe physical and mental pain or suffering upon one or more persons.** The starting point of proving torture is to establish that one or more persons have been subjected to severe pain or suffering. Such pain or suffering can be caused either by an act or omission of the perpetrator.²⁴⁶² The suffering may be either physical or mental, and it is not necessary to prove that the pain or suffering involved specific physical injury, impairment of a bodily function or death.²⁴⁶³

CASE STUDY: EXAMPLES OF ACTS OF TORTURE

The following acts have been found to constitute torture before international courts and tribunals:

- **Physical suffering:** beating; burning; mutilation; stabbing; hanging; holding a person in a painful position; electrocution; excessive exposure to heat or cold; being starved; rape and other sexual violence.²⁴⁶⁴
- **Mental suffering:** psychological abuse; forced nudity; placing an individual in an extremely stressful situation, such as confinement, isolation or darkness; threatening a person’s well-being or his/her family; threatening the victim or his/her family with sexual violence; forcing victims to watch executions of others or bury the bodies of their neighbors and friends; sleep deprivation.²⁴⁶⁵

1252. While there is no requirement for the pain or suffering to be visible or permanent,²⁴⁶⁶ it must meet a certain level of severity which results in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life, going beyond

²⁴⁶² ICC, *Ongwen Trial Judgement*, para. 2700; ICTY, *Celebici Trial Judgement*, para. 468; ICTY, *Kunarac et al. Appeal Judgement*, para. 142; ICTR, *Akayesu Trial Judgement*, para. 594.

²⁴⁶³ ICC, *Ongwen Trial Judgement*, para. 2701; ICTY, *Brdanin Appeal Judgement*, para. 251; ICTY, *Kunarac et al. Appeal Judgement*, para. 150; ICTY, *Furundzija Appeal Judgement*, para. 111; ICTY, *Naletilic & Martinovic Appeal Judgement*, para. 299.

²⁴⁶⁴ ICC, *Ongwen Trial Judgement*, paras 2984-2985, 3027-3028, 3073; ICTY, *Celebici Trial Judgement*, paras 481-486, 937-943, 963-965, 970-974; ICTR, *Akayesu Trial Judgement*, para. 597; ICTY, *Brdanin Appeal Judgement*, para. 257; ICTY, *Kunarac et al. Appeal Judgement*, paras 150-151; ICTR, *Semanza Trial Judgement*, paras 170, 209, 213, 486, 586.

²⁴⁶⁵ ICTY, *Celebici Trial Judgement*, paras 938-942, 958-964, 993-998; ICTY, *Furundzija Appeal Judgement*, para. 113; ICTY, *Kunarac et al. Appeal Judgement*, paras 150-151.

²⁴⁶⁶ ICC, *Ongwen Trial Judgement*, para. 2703; ICTY, *Kvočka et al. Trial Judgement*, para. 148; *Limaj et al. Trial Judgement*, para. 236.

temporary unhappiness, embarrassment or humiliation.²⁴⁶⁷ The severity requirement implies an “important degree of pain and suffering [which] may be met by a single act or by a combination of acts when viewed as a whole”.²⁴⁶⁸

CASE STUDY: ASSESSING THE "SEVERITY" OF ACTS OF TORTURE

To assess the severity of the pain and suffering inflicted by an alleged act of torture, the following should be considered:²⁴⁶⁹

- The nature, duration and context of the infliction of pain;
- The premeditation and institutionalization of the ill-treatment;
- The manner and method used by the perpetrator to cause the pain;
- The victim's age, sex and state of health;
- The position of inferiority of the victim;
- The physical and mental effect of the treatment on the victim; and
- The specific social, cultural and religious background of the victim.

iii. Definition of Torture (Subjective element)

1253. The subjective elements of the crime against humanity of torture require intent, which will be established when: (1) the perpetrator intended to inflict severe physical or mental pain or suffering upon one or more persons; and (2) the perpetrator intended to inflict the pain or suffering for a specific purpose, i.e., obtaining information or a confession, punishing, intimidating or coercing the victim or a third person, or discriminating, on any ground, against the victim or a third person.

1254. **The perpetrator intended to inflict severe physical or mental pain or suffering upon one or more persons.** This element sets out a specific subjective element for the crime against humanity of torture, which requires that the perpetrator “*intentionally* inflict[ed] severe pain or suffering”.²⁴⁷⁰ Accordingly, it must be established that the “perpetrator intended to act in a way which, in the normal course of events, would cause severe pain or suffering, whether physical or mental, to his victims.”²⁴⁷¹ Additionally, there is no need to demonstrate that the perpetrator knew that the pain or suffering they were inflicting was “severe”.²⁴⁷²

²⁴⁶⁷ ICC, *Ongwen Trial Judgement*, para. 2701; ICTY, *Naletilic & Martinovic Trial Judgement*, para. 342; ICTY, *Mrksic & Sljivancanin Trial Judgement*, para. 514; ICTY, *Kvočka et al. Trial Judgement*, para. 149; ICTY, *Limaj et al. Trial Judgement*, para. 236.

²⁴⁶⁸ ICC, *Ongwen Trial Judgement*, para. 2701

²⁴⁶⁹ ICTY, *Limaj et al. Trial Judgement*, para. 237; ICTY, *Mrksic & Sljivancanin Trial Judgement*, para. 514; ICTY, *Krnjelac Trial Judgement*, para. 182; ICTY, *Haridanaj et al. Trial Judgement*, para. 417; ICTY, *Kvočka et al. Trial Judgement*, para. 143.

²⁴⁷⁰ ICC Statute, Article 7(2)(e); ICTY, *Kunarac et al. Appeal Judgement*, paras 142, 153; ICTY, *Karadzic Trial Judgement*, para. 508; ICTR, *Akayesu Trial Judgement*, para. 594.

²⁴⁷¹ ICTY, *Kunarac et al. Appeal Judgement*, para. 153.

²⁴⁷² ICC, *Bemba Decision on Confirmation of Charges*, para. 194. See also, ICC *Elements of Crimes*, General Introduction, para. 4.

ICTY, *KARADZIC TRIAL JUDGEMENT*, PARA. 508 [FOOTNOTES OMITTED]

The perpetrator must intentionally act in such a way which, in the normal course of events, would cause severe pain or suffering, whether physical or mental, to the victim(s), in pursuance of one of the purposes prohibited by the definition of the crime of torture [...]. There is no requirement that the perpetrator acted in an official capacity as a state official or other person in authority.

1255. **The perpetrator intended to inflict the pain or suffering for a prohibited purpose.** This element requires the perpetrator to have inflicted the pain or suffering in order to obtain **information or a confession**, or to **punish, intimidate or coerce** the victim or a third person, or to **discriminate**, on any ground, against the victim or a third person (i.e., for a prohibited purpose).²⁴⁷³ Similarly, as discussed above, Article 127 of the CCU requires the torture to have been committed “for the purpose of inducing the victim or any other person to commit involuntary actions, including receiving from him/her or any other person **information or confession**, or for the purpose of **punishing** him/her or any other person for the actions committed by him/her or any other person or for committing of which he/she or any other person is suspected of, as well as for the purpose of **intimidation** and **discrimination** of him/her or other persons”.
1256. This list of prohibited purposes is non-exhaustive.²⁴⁷⁴ For example, “humiliating the victim” has also been considered to be a prohibited purpose.²⁴⁷⁵
1257. In addition, there is no requirement that the act of torture must be perpetrated *solely* for a prohibited purpose.²⁴⁷⁶ This means that, provided that one of the prohibited purposes is fulfilled, it is immaterial if the motivation behind the conduct was personal, such as sexual gratification in the case of rape as a method of torture.²⁴⁷⁷

²⁴⁷³ ICTY, *Kunarac Trial Judgement*, para. 497; ICTY, *Kunarac et al. Appeal Judgement*, para. 142; ICTY, *Martic Trial Judgement*, para. 74.

²⁴⁷⁴ ICTY, *Celebici Trial Judgement*, para. 470; ICTY, *Brdanin Trial Judgement*, para. 487; ICTY, *Martic Trial Judgement*, para. 77.

²⁴⁷⁵ ICTY, *Furundzija Trial Judgement*, para. 162.

²⁴⁷⁶ ICTY, *Celebici Trial Judgement*, para. 470; ICTY, *Brdanin Trial Judgement*, para. 487; ICTY, *Martic Trial Judgement*, para. 77; ICTY, *Karadzic Trial Judgement*, para. 508.

²⁴⁷⁷ ICTY, *Celebici Trial Judgement*, paras 470-471; ICTY, *Kunarac et al. Appeal Judgement*, para. 153; ICTY, *Brdanin Trial Judgement*, para. 487.

- h) Crime against Humanity of Rape (ICC Statute, Article 7(1)(g)-1; ICTY Statute, Article 5(g); ICTR Statute, Article 3(g); SCSL Statute, Article 2(g))

ELEMENTS OF THE CRIME: TO CONVICT A PERPETRATOR FOR RAPE AS A CRIME AGAINST HUMANITY THE FOLLOWING ELEMENTS NEED TO BE ESTABLISHED:

(1) Objective elements

- The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body (para. 1262).
- The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent (para. 1264).

(2) Subjective elements

- The perpetrator intended to invade the body of a person, by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body (para. 1272).
- The perpetrator was aware that the act was committed by force, by the threat of force or coercion, by taking advantage of a coercive environment, or against a person incapable of giving genuine consent (para. 1273).

(3) Contextual elements

- The conduct was committed as part of a widespread or systematic attack directed against a civilian population (see above, para. 1160).
- The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population (see above, para. 1173).

i. Applicability under Ukrainian Law

1258. International instruments prohibit the crime against humanity of rape when committed in the context of a widespread or systematic attack on civilians.²⁴⁷⁸

1259. Rape as a crime against humanity is not currently prohibited under Ukrainian law. This conduct is, however, covered by the ordinary crime of rape under Article 152 of the CCU, which prohibits “[c]ommitting sexual acts involving vaginal, anal or oral penetration into the body of another person using the genitals or any other item, without the voluntary consent of the victim (rape)”. Unlike the crime against humanity of rape, however, the CCU provision does not require the act of rape to have been committed in the context of a widespread or systematic attack directed against a civilian population (i.e., the contextual element).

²⁴⁷⁸ ICC Statute, Article 7(1)(g); ICTY Statute, Article 5 (g); ICTR Statute, Article 3(g); SCSL Statute, Article 2(g). The crime against humanity of rape is also prohibited under ECCC Law, Article 5. Rape is also prohibited as a war crime under ICC Statute, Articles 8(2)(b)(xxii) and 8(2)(e)(vi).

1260. In addition, Draft Bill 7290 will introduce (if, and when, it comes into force) the specific crime against humanity of rape committed within the framework of a large-scale or systematic attack on civilians under common Article 442-1.1(4) of the CCU. This provision broadly aligns with the contextual elements and the specific elements of the crime against humanity of rape contained in the international instruments.

ii. Definition of Rape (Objective elements)

1261. The objective elements of this crime against humanity requires that: (1) the perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body; and (2) the invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

1262. **The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.** To establish the first element of rape, it must be demonstrated that there was an invasion the body of a person through penetration. This is gender-neutral and accordingly includes same-sex penetration and both male and/or female perpetrators and victims.²⁴⁷⁹

ICC, NTAGANDA TRIAL JUDGEMENT, PARA. 933.

The concept of "invasion" is intended to be broad enough to be gender-neutral. Accordingly, "invasion", in the Court's legal framework, includes same-sex penetration, and encompasses both male and/or female perpetrators and victims.

1263. Any form of penetration, however slight, is enough to complete the crime.²⁴⁸⁰ As such, in the case of vaginal rape, penetration of the labia majora would be sufficient. There are two forms of penetration covered by this element:

- Penetration of any part of the body with a *sexual organ*.²⁴⁸¹ This is a broad definition which not only covers the penetration of the vagina or anus, but also covers oral penetration (i.e., penetration of the mouth).²⁴⁸² In addition, the penetration

²⁴⁷⁹ ICC, *Ntaganda Trial Judgement*, para. 933; ICC, *Bemba Trial Judgement*, para. 100; ICC, *Ntaganda Decision on the Confirmation of Charges*, para. 52; SCSL, *Sesay et al. Trial Judgement*, para. 146.

²⁴⁸⁰ See, ICC *Elements of Crimes*, Article 7(1)(g)-1; ICTY, *Kunarac et al. Appeal Judgement*, para. 127; ICTY, *Furundzija Trial Judgement*, para. 185; ICTR, *Kajelijeli Trial Judgement*, paras 912-915; ICTR, *Semanza Trial Judgement*, paras 344-346.

²⁴⁸¹ See, ICC *Elements of Crimes*, Article 7(1)(g)-1; ICC, *Bemba Trial Judgement*, para. 101; ICTY, *Furundzija Trial Judgement*, paras 183-185; ICTY, *Celebici Trial Judgement*, para. 1066; ICTR, *Gacumbitsi Trial Judgement*, para. 321.

²⁴⁸² ICC, *Bemba Trial Judgement*, para. 101; SCSL, *Sesay et al. Trial Judgement*, para. 146; ICTY, *Furundzija Trial Judge-*

may be of any part of the body of the *victim or the perpetrator*.²⁴⁸³ Consequently, a rape may occur where any part of the perpetrator's body has been penetrated by a sexual organ.

- Penetration of the *anal or genital opening of the victim with any object or any other part of the body*.²⁴⁸⁴ This covers penetration with something other than a sexual organ which could include penetration with either other body parts, for example a hand, or an object.²⁴⁸⁵

1264. **The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.**²⁴⁸⁶ This element provides for the circumstances and conditions which give the penetration a criminal character.²⁴⁸⁷

1265. The coercive behavior or environment may be directed towards the victim or a third person.²⁴⁸⁸ The judge should consider the context in which the penetration took place to assess whether at least one of these coercive behaviours or circumstances existed: i.e., (1) force; (2) threat of force or coercion; (3) by taking advantage of a coercive environment; or (4) against a person incapable of giving genuine consent.²⁴⁸⁹ It is likely several intersecting behaviours or circumstances will be in play at the same time or across a period of time which will amount to an environment in which consent is not possible.

1266. It is not necessary to prove the victim's lack of consent,²⁴⁹⁰ and there is no requirement that the victim resisted.²⁴⁹¹ In fact, it is common for there to be no physical

ment, paras 183-185; ICTY, *Celebici Trial Judgement*, para. 1066.

²⁴⁸³ ICC *Elements of Crimes*, Article 7(1)(g)-1; ICTY, *Kunarac et al. Appeal Judgement*, para. 127; ICTR, *Kajelijeli Trial Judgement*, para. 913; ICTR, *Gacumbitsi Trial Judgement*, para. 321.

²⁴⁸⁴ ICC *Elements of Crimes*, Article 7(1)(g)-1; ICTY, *Kunarac et al. Appeal Judgement*, para. 127; ICTR, *Kajelijeli Trial Judgement*, para. 913; ICTR, *Gacumbitsi Trial Judgement*, para. 321.

²⁴⁸⁵ ICTR, *Akayesu Trial Judgement*, para. 596; SCSL, *Sesay et al. Trial Judgement*, para. 146; ICTR, *Gacumbitsi Trial Judgement*, para. 321.

²⁴⁸⁶ ICC *Elements of Crimes*, Article 7(1)(g)-1; ICC, *Ntaganda Trial Judgement*, para. 934; ICC, *Bemba Trial Judgement*, para. 102; ICTY, *Kunarac et al. Appeal Judgement*, paras 129-130; ICTR, *Akayesu Trial Judgement*, para. 598; ICTR, *Semanza Trial Judgement*, para. 344.

²⁴⁸⁷ ICC, *Bemba Trial Judgement*, para. 102; ICC, *Katanga Trial Judgement*, para. 964; ICTY, *Kunarac et al. Appeal Judgement*, para. 127; ICTR, *Kajelijeli Trial Judgement*, para. 913.

²⁴⁸⁸ Women's Initiative for Gender Justice, "*The Hague Principles on Sexual Violence*", 2019, p. 47; ICC *Elements of Crimes*, Articles 7(1)(g)-1, 8(2)(b)(xxii)-1 and 8(2)(e)(vi)-1, Element Two. See also, ICC, *Ntaganda Trial Judgement*, para. 944; *Kunarac et al. Appeal Judgement*, para. 130; ICTY, *Kunarac et al. Trial Judgement*, para. 711; ICTR, *Rukundo Trial Judgement*, para. 384.

²⁴⁸⁹ ICC, *Ongwen Trial Judgement*, para. 2709; ICC, *Ntaganda Trial Judgement*, para. 934; ICC, *Katanga Trial Judgement*, para. 965; *Kunarac et al. Appeal Judgement*, para. 129; ICTR, *Akayesu Trial Judgement*, para. 688; ICTR, *Bagosora et al. Trial Judgement*, para. 2199.

²⁴⁹⁰ ICC, *Ongwen Trial Judgement*, para. 2709 (citing ICC, *Ntaganda Trial Judgement*, para. 934; ICC, *Katanga Trial Judgement*, para. 965; *Kunarac et al. Appeal Judgement*, para. 131; ICTR, *Muhimana Trial Judgement*, para. 546. See also, ICC *Rules of Procedure and Evidence*, Rules 70 and 71.

²⁴⁹¹ ICC, *Ongwen Trial Judgement*, para. 2709 (citing ECCC, *Kaing Guek Eav (alias Duch) Trial Judgement*, para. 363; SCSL, *Taylor Trial Judgement*, para. 416; ICTY, *Kunarac et al. Appeal Judgement*, para. 128. See also, IACtHR, *Fernández Ortega et al. v. Mexico Trial Judgement*, para. 115.

resistance because of a variety of psychological factors or because the victim fears further violence on the part of the perpetrator.²⁴⁹²

1267. Coercive circumstances need not be evidenced by a show of physical force,²⁴⁹³ instead threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion.²⁴⁹⁴ Where physical force does occur, it does not need to reach a significant level, such as “excessive” or “life-threatening physical force”.²⁴⁹⁵ A threat need not be a threat of physical force, but may be a threat of other harm. The threat itself is sufficient as long as it creates a reasonable fear in the victim that they or a third person will be harmed.²⁴⁹⁶

ICTY, *KUNARAC ET AL. APPEAL JUDGEMENT*, PARA. 129 [FOOTNOTES OMITTED]

Force or threat of force provides clear evidence of non-consent, but force is not an element per se of rape. In particular, [...] there are “factors ‘other than force’ which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim”. A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force.

1268. Perpetrators will often employ more subtle behaviors and coercion, such as inducements or bullying (e.g., verbal or psychological abuse or controlling behaviour) to create or exploit vulnerabilities in victims and make them dependent on, or subordinate to, their abuser.²⁴⁹⁷

²⁴⁹² ECtHR, *M.C. v. Bulgaria* [Judgement](#), para. 164.

²⁴⁹³ ICC [Elements of Crimes](#), Article 7(1)(g)-1; ICC, *Ongwen* [Trial Judgement](#), para. 2710; ICC, *Ntaganda* [Trial Judgement](#), para. 934; ICC, *Bemba* [Trial Judgement](#), para. 103; ICTR, *Akayesu* [Trial Judgement](#), para. 688; ICTY, *Celebici* [Trial Judgement](#), para. 937; ICTY, *Kunarac et al.* [Appeal Judgement](#), para. 129; SCSL, *Taylor* [Trial Judgement](#), para. 416; ICTY, *Prlic et al.* [Trial Judgement](#), para. 70; ICTY, *Furundžija* [Trial Judgement](#), para. 82; ICTR, *Muhimana* [Trial Judgement](#), para. 297. *See also*, [Istanbul Convention](#), Article 36; [Istanbul Convention Explanatory Report](#), Article 36, para. 192; ECtHR, *M.C. v. Bulgaria* [Judgement](#), paras 161, 163; Committee on the Elimination of Discrimination Against Women, “General Recommendation No 35 on gender-based violence against women, updating general recommendation No. 19”, 14 July 2017, [CEDAW/C/GC/35](#), para. 33.

²⁴⁹⁴ ICC, *Ongwen* [Trial Judgement](#), para. 2710; ICC, *Ntaganda* [Trial Judgement](#), paras 934-935; ICC, *Katanga* [Trial Judgement](#), para. 965; ICC, *Bemba* [Trial Judgement](#), paras 105-106; ICTY, *Kunarac et al.* [Appeal Judgement](#), para. 130; ICTR, *Rukundo* [Trial Judgement](#), para. 382.

²⁴⁹⁵ Amnesty International, “[Rape and Sexual Violence: Human Rights Law and Standards in the International Criminal Court](#)” (2011), p. 18.

²⁴⁹⁶ ICTY, *Furundžija* [Trial Judgement](#), para. 174; ICTY, *Kunarac et al.* [Appeal Judgement](#), para. 130; ICTY, *Kunarac et al.* [Trial Judgement](#), para. 711; ICTR, *Rukundo* [Trial Judgement](#), paras 383-384, 388.

²⁴⁹⁷ ECtHR, *M.C. v. Bulgaria* [Judgement](#), para. 146; ICC, *Ongwen* [Trial Judgement](#), para. 2710.

CASE STUDY: COERCION

The following is a non-exhaustive list of examples of coercion:

- “fear of violence, duress, detention, psychological oppression or abuse of power”;²⁴⁹⁸
- “intimidation, extortion and other forms of duress that prey on fear or desperation”;²⁴⁹⁹
- detention (whether legal or illegal);²⁵⁰⁰
- regular violence committed against detainees (including sexual violence);²⁵⁰¹
- capture and restraint of victims;²⁵⁰²
- psychological violence; and
- promises made to the victim, including promises relating to education or employment or promises to spare or benefit family members.²⁵⁰³

1269. In addition, coercion may be inherent in certain circumstances, such as armed conflict or occupation or the military presence of hostile forces amongst the civilian population.²⁵⁰⁴ Several factors may contribute to creating a coercive environment, such as the number of people involved in the commission of the crime, whether the rape is committed during or immediately following a combat situation or is committed together with other crimes.²⁵⁰⁵ For example, in the *Ntaganda* case before the ICC, soldiers engaged in sexual violence in the immediate aftermath of the armed group’s takeover of certain villages in the Democratic Republic of the Congo, and the rapes coincided with the commission of other crimes by the soldiers against the inhabitants of the villages.²⁵⁰⁶

1270. Finally, there are certain situations in which a person is incapable of giving free, voluntary, and genuine consent. This may be due to induced (including from drugs or alcohol whether administered to the victim or self-administered), natural or age-related causes.²⁵⁰⁷

²⁴⁹⁸ ICC [Elements of Crimes](#), Article 7(1)(g)-6, Element 1, Article 8(2)(b)(xxii), Element 2, Article 8(2)(e)(vi)-6, Element 2; ICC, *Katanga Trial Judgement*, para. 965; ICC, *Ntaganda Trial Judgement*, para. 934; ACHPR, [Guidelines on Combating Sexual Violence](#), p. 14.

²⁴⁹⁹ ICC, *Ongwen Trial Judgement*, para. 2710; *Ntaganda Trial Judgement*, para. 935; ICTR, *Akayesu Trial Judgement*, para. 688; ICTY, *Kunarac et al. Trial Judgement*, para. 747.

²⁵⁰⁰ ICC, *Ntaganda Trial Judgement*, para. 934; ICC, *Katanga & Chui Decision on the Confirmation of the Charges*, para. 434; ICTY, *Kvočka et al. Trial Judgement*, paras 98, 555; ICTY, *Kunarac et al. Appeal Judgement*, para. 132; ICTY, *Kunarac et al. Trial Judgement*, paras 464, 542, 574; ECtHR, *Menesheva v. Russia Judgement*.

²⁵⁰¹ ICTY, *Kunarac et al. Trial Judgement*, para. 574; ICTY, *Kvočka et al. Trial Judgement*, para. 561; ECtHR, *Salmanoğlu & Polattaş v. Turkey Judgement*.

²⁵⁰² ICC, *Ntaganda Trial Judgement*, para. 943.

²⁵⁰³ ICTY, *Kvočka et al. Trial Judgement*, para. 551.

²⁵⁰⁴ ICC, *Ongwen Trial Judgement*, para. 2710; ICC, *Ntaganda Trial Judgement*, para. 935; ICTY, *Kunarac et al. Appeal Judgement*, para. 130.

²⁵⁰⁵ ICC, *Ongwen Trial Judgement*, para. 2710; ICC, *Ntaganda Trial Judgement*, paras 935, 945; ICC, *Bemba Trial Judgement*, para. 104; ICTY, *Kunarac et al. Appeal Judgement*, para. 130; ICTR, *Bagosora et al. Trial Judgement*, para. 2199; ICTR, *Semanza Trial Judgement*, para. 344; ICTR, *Rukundo Trial Judgement*, paras 383-385.

²⁵⁰⁶ ICC, *Ntaganda Trial Judgement*, para. 945.

²⁵⁰⁷ ICC [Elements of Crimes](#), fns 16, 51, 64; *Bemba Trial Judgement*, para. 107; *Ntaganda Trial Judgement*, para. 981; *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Trial Judgement, 2 March 2009 (*Sesay et al. Trial Judgement*), para. 148; *M.C. v. Bulgaria*, para. 79. See also, [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 59; WHO, [Guidelines for Medico-Legal Care for Victims of Sexual Violence](#), Chapter 2, pp 7-8, 11-12;

iii. Definition of Rape (Subjective element)

1271. The subjective element for the crime against humanity of rape requires **intent and knowledge**,²⁵⁰⁸ which will be established when: (1) the perpetrator intended to invade the body of a person, by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body; and (2) the perpetrator was aware (ally certain) that the act was committed by force, by the threat of force or coercion, by taking advantage of a coercive environment, or against a person incapable of giving genuine consent.
1272. **The perpetrator intended to invade the body of a person, by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.** Such intent can be established where: (1) the perpetrator meant to engage in acts or omissions (i.e., deliberately acted or failed to act) (**intent to conduct**)²⁵⁰⁹ in order to cause the sexual penetration of a person; or (2) the perpetrator was aware that the invasion would occur in the ordinary course of events (**intent to consequence**).²⁵¹⁰ At the ICC, awareness that the consequence would occur in the ordinary course of events requires virtual certainty that the events would occur.²⁵¹¹
1273. **The perpetrator knew that the act was committed by force, by the threat of force or coercion, by taking advantage of a coercive environment, or against a person incapable of giving genuine consent.**²⁵¹² This requires that the perpetrator was aware of that coercive circumstances existed. This can be inferred from the circumstances. The perpetrator must know the circumstance(s) exist but it is not required that the perpetrator completed the legal evaluation, but **simply that the accused was aware of the relevant facts.**²⁵¹³

CPS, "[What is Consent?](#)", p. 2.

²⁵⁰⁸ See, [ICC Statute](#), Article 30(2) and 30(3); ICC, [Katanga Trial Judgement](#), para. 970; ICC, [Bemba Trial Judgement](#), para. 111-112; ICTR, [Muvunyi Trial Judgement](#), para. 522; ICTR, [Semanza Trial Judgement](#), para. 346; ICTY, [Kunarac et al. Appeal Judgement](#), para. 127; SCSL, [Sesay et al. Trial Judgement](#), para. 150. See also, ICTY, [Kunarac et al. Trial Judgement](#), para. 460.

²⁵⁰⁹ [ICC Statute](#), Article 30(2)(a); ICC, [Katanga Trial Judgement](#), para. 774; ICTY, [Kunarac et al. Appeal Judgement](#), para. 127; ICTR, [Semanza Trial Judgement](#), para. 346; ICTR, [Bagosora et al. Trial Judgement](#), para. 2200.

²⁵¹⁰ [ICC Statute](#), Article 30(2)(b); ICC, [Katanga Trial Judgement](#), para. 774, 970; ICC, [Bemba Trial Judgement](#), para. 111.

²⁵¹¹ See ICC, [Katanga Trial Judgement](#), paras 775-776.

²⁵¹² ICC, [Bemba Trial Judgement](#), para. 112; ICC, [Katanga Trial Judgement](#), para. 970; ICTY, [Kunarac et al. Appeal Judgement](#), para. 127; ICTR, [Semanza Trial Judgement](#), para. 346; ICTR, [Bagosora et al. Trial Judgement](#), para. 2200.

²⁵¹³ ICC [Elements of Crimes](#), General Introduction, para. 4.

- i) Crime against Humanity of Sexual Slavery (ICC Statute, Article 7(1)(g)-2; SCSL Statute, Article 2(g))

ELEMENTS OF THE CRIME: TO CONVICT A PERPETRATOR FOR SEXUAL SLAVERY AS A CRIME AGAINST HUMANITY THE FOLLOWING ELEMENTS NEED TO BE ESTABLISHED:

(1) Objective elements

- The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty (para. 1278).
- The perpetrator caused such person or persons to engage in one or more acts of a sexual nature (para. 1279).

(2) Subjective elements

- The perpetrator intended to exercise any or all of the powers attaching to the right of ownership over one or more persons or to impose on them a similar deprivation of liberty (para. 1284).
- The perpetrator intended to cause such person or persons to engage in one or more acts of a sexual nature (para. 1285).

(3) Contextual element

- The conduct was committed as part of a widespread or systematic attack directed against a civilian population (see above, para. 1160).
- The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population (see above, para. 1173).

i. Applicability under Ukrainian Law

1274. International instruments prohibit the crime against humanity of sexual slavery when committed in the context of a widespread or systematic attack on civilians.²⁵¹⁴

1275. Sexual slavery as a crime against humanity is not currently prohibited under Ukrainian law. However, similar conduct may be criminalised under the ordinary crime of trafficking in human beings under Article 149 of the CCU, which prohibits “[t]rafficking in human beings [...] for the purpose of exploitation [...]”. According to Note 1 to this provision, exploitation of human beings includes, *inter alia*, all forms of sexual exploitation. Unlike the crime against humanity of sexual slavery, however, the CCU provision does not require the act of human trafficking to have been committed in the context of a widespread or systematic attack directed against a civilian population (i.e., the contextual element).

1276. While Draft Bill 7290 (if and when it enters into force) does not include sexual slavery as one of the acts specifically criminalised as a crime against humanity under the CCU, this conduct can nevertheless be prosecuted as the crime against humanity of

²⁵¹⁴ ICC Statute, Article 7(1)(g); SCSL Statute, Article 2(g). Sexual slavery is also prohibited as a war crime under ICC Statute, Articles 8(2)(b)(xxii) and 8(2)(e)(vi).

“conversion to slavery or human trafficking” under Article 442-1(1)(5) (see above, para. [1153](#)), since sexual slavery is a form of enslavement.²⁵¹⁵

ii. Definition of Sexual Slavery (Objective elements)

1277. The objective elements of this crime against humanity requires that: (1) the perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty; and (2) the perpetrator caused such person or persons to engage in one or more acts of a sexual nature.

1278. **The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.** See the discussion of this element under the crime against humanity of enslavement, above para. [1211](#)).

1279. **The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.** In addition to demonstrating that the perpetrator exercised the right of ownership, it must be established that the perpetrator caused the enslaved person to engage in an act or acts of a sexual nature.²⁵¹⁶ Sexual violence is an “additional element that, when combined with evidence of slavery, constitutes sexual slavery”.²⁵¹⁷

**SCSL, SESAY ET AL. TRIAL JUDGEMENT, PARA. 162
[FOOTNOTES OMITTED]**

To convict an Accused for this offence, the Prosecution must also prove that the Accused caused the enslaved person to engage in acts of a sexual nature. The acts of sexual violence are the additional element that, when combined with evidence of slavery, constitutes sexual slavery.

1280. This element concerns “the victim’s ability to decide the conditions in which he or she engages in sexual activity”.²⁵¹⁸ Accordingly, sexual slavery involves the exercise of ownership powers by the perpetrator over a person’s sexual autonomy.²⁵¹⁹ Sexual

²⁵¹⁵ Triffterer and Ambos (eds), *The ICC Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 212; ECOSOC, [Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery And Slavery-Like Practices During Armed Conflict](#), para. 30. See also, ICTY, *Kunarac et al. Trial Judgement*, para. 543 (listing “control of sexuality” in determining whether enslavement has been committed). While Jean Allain considers “sexual” to be an adjective to describe a form or type of enslavement, Sellers and Kestenbaum disagree, finding that sexual slavery, or, rather, sexual violence, including attacks on sexual integrity and reproductive autonomy, is indicia of exercise of ownership, or the actus reus, of enslavement (defined as slavery) in all its forms. P. Viseur Sellers and Getgen Kestenbaum, “Sexualized Slavery’ and Customary International Law’ in Sharon Weill (ed.) *et al.*, *The President on Trial: Prosecuting Hissène Habré*, Oxford University Press, 2020, p. 366; ICC, *Ongwen Trial Judgement*, para. 2715; IACtHR, *Lopez Soto v. Venezuela Judgement*, paras 176-179.

²⁵¹⁶ ICC, *Ongwen Trial Judgement*, para. 2715.

²⁵¹⁷ SCSL, *Taylor Trial Judgement*, para. 421, referring to SCSL, *Sesay et al. Trial Judgement*, para. 162.

²⁵¹⁸ ICC, *Katanga Trial Judgement*, para. 978; ICC, *Katanga & Chui Decision on the Confirmation of Charges*, para. 432, fn. 582.

²⁵¹⁹ ICC, *Ntaganda Trial Judgement*, para. 1204; ICC, *Katanga Trial Judgement*, paras 975, 981, 1013; ICC, *Ongwen Amici*

slavery may also encompass situations where women and girls are forced to share the existence of (i.e., coexist with) a person with whom they are forced to engage in acts of a sexual nature.²⁵²⁰

1281. Sexual slavery may include forceful sexual intercourse (i.e., rape – see above, para. [1259](#)),²⁵²¹ as well as other physical and non-physical acts of a sexual nature (i.e., enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence – see below, respectively paras [1287](#), [1298](#), [1311](#), [1319](#)).²⁵²² The “sexual” nature of an act may refer to acts that are carried out through sexual means or to acts that target a person’s sexuality.²⁵²³
1282. As the commission of the crime of sexual slavery may involve more than one perpetrator, the sexual acts need not have been perpetrated by the individual who exercised the rights attaching to ownership.²⁵²⁴

iii. Definition of Sexual Slavery (Subjective elements)

1283. The subjective elements for the crime against humanity of sexual slavery require **intent**,²⁵²⁵ which will be established when: (1) the perpetrator intended to exercise any or all of the powers attaching to the right of ownership over one or more persons; and (2) the perpetrator intended to cause such person or persons to engage in one or more acts of a sexual nature.
1284. **The perpetrator intended to exercise any or all of the powers attaching to the right of ownership over one or more persons or to impose on them a similar deprivation of liberty.** Such intent will be established where: (1) the perpetrator meant to engage in the act or omission (i.e., deliberately acted or failed to act) (**intent to conduct**) in order to exercise any or all of the powers attaching to the right of ownership over one or more persons or to impose on them a similar deprivation of liberty; or (2) the perpetrator was aware that a deprivation of liberty would occur in the ordinary course of events (**intent to consequence**).²⁵²⁶ At the ICC, awareness that the consequence would occur in the ordinary course of events requires virtual certainty that the events would occur.²⁵²⁷

[Curiae Observations on Sexual- and Gender-Based Crimes](#), para. 15.

²⁵²⁰ ICC, [Katanga Trial Judgement](#), para. 976.

²⁵²¹ ICC, [Ongwen Trial Judgement](#), para. 3047; ICC, [Ntaganda Trial Judgement](#), para. 955.

²⁵²² ICC, [Ongwen Trial Judgement](#), para. 2716. See also, ICTR, [Akeyesu Trial Judgement](#), para. 688; ICTY, [Furundžija Trial Judgement](#), para. 186; SCSL, [Brima et al. Trial Judgement](#), para. 720; ICTY, [Milutinovic et al. Trial Judgement](#), paras 194-5, 199; ICTR, [Rukundo Trial Judgement](#), para. 380; ICC OTP, “[2014 Policy Paper on Sexual and Gender-Based Crimes](#)”, p. 3; ECOSOC, [Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery And Slavery-Like Practices During Armed Conflict](#), paras 21-22.

²⁵²³ ICC, [Ongwen Trial Judgement](#), para. 2716; ECOSOC, [Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery And Slavery-Like Practices During Armed Conflict](#), para. 21.

²⁵²⁴ ICC, [Ntaganda Trial Judgement](#), para. 980. See also, ICC [Elements of Crimes](#), fns. 17, 52, 65.

²⁵²⁵ See, ICC Statute, Article 30(2) and 30(3); ICC, [Katanga & Chui Decision on the Confirmation of Charges](#), para. 433.

²⁵²⁶ ICC Statute, Article 30(2)(a) and (b); ICC, [Katanga Trial Judgement](#), paras 774, 981-982; ICC, [Katanga & Chui Decision on the Confirmation of Charges](#), para. 433.

²⁵²⁷ See ICC, [Katanga Trial Judgement](#), paras 775-776.

1285. **The perpetrator intended to cause such person or persons to engage in one or more acts of a sexual nature.** Such intent will be established where: (1) the perpetrator meant to engage in the act or omission (i.e., deliberately acted or failed to act) (**intent to conduct**) in order to force a person to engage in acts of a sexual nature; or (2) the perpetrator was aware that such a consequence would occur in the ordinary course of events (**intent to consequence**).²⁵²⁸ As mentioned, awareness that the consequence would occur in the ordinary course of events requires virtual certainty that the events would occur.²⁵²⁹

- j) Crime against Humanity of Enforced Prostitution (ICC Statute, Article 7(1)(g)-3; SCSL Statute, Article 2(g))

ELEMENTS OF THE CRIME: TO CONVICT A PERPETRATOR FOR ENFORCED PROSTITUTION AS A CRIME AGAINST HUMANITY THE FOLLOWING ELEMENTS NEED TO BE ESTABLISHED:

(1) Objective elements

- The perpetrator (i) caused one or more persons to engage in one or more acts of a sexual nature (para. 1290) (ii) by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent (para. 1291).
- The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature (para. 1292).

(2) Subjective elements

- The perpetrator intended to cause one or more persons to engage in one or more acts of a sexual nature (para. 1294).
- The perpetrator was aware that the act was committed by force, by the threat of force or coercion, by taking advantage of a coercive environment, or against a person incapable of giving genuine consent (para. 1295).
- The perpetrator intended that they or another person would obtain a pecuniary or other advantage in exchange for or in connection with the acts of sexual nature (para. 1296).

(3) Contextual elements

- The conduct was committed as part of a widespread or systematic attack directed against a civilian population (see above, para. 1160).
- The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population (see above, para. 1173).

²⁵²⁸ ICC, *Katanga Trial Judgement*, para. 774, 981-982; ICC, *Katanga & Chui Decision on the Confirmation of Charges*, para. 433.

²⁵²⁹ See ICC, *Katanga Trial Judgement*, paras 775-776.

i. Applicability under Ukrainian Law

1286. International instruments prohibit the crime against humanity of enforced prostitution when committed in the context of a widespread or systematic attack on civilians.²⁵³⁰
1287. Enforced prostitution as a crime against humanity is not currently prohibited under Ukrainian law. However, such conduct may be criminalised under the ordinary crime of pimping or engaging a person in prostitution under Article 303 of the CCU, which prohibits “[e]ngaging person in prostitution or compulsion to engage in prostitution, involving deceit, blackmail or vulnerable state of a person, with imposition of violence or threat of violence, or pimping”. However, unlike the crime against humanity of enforced prostitution, however, the CCU provision does not require the act of engaging in prostitution to have been committed in the context of a widespread or systematic attack directed against a civilian population (i.e., the contextual element).
1288. In addition, Draft Bill 7290 will introduce (if, and when, it comes into force) the specific crime against humanity of enforced prostitution (i.e., sexual exploitation) committed within the framework of a large-scale or systematic attack on civilians under Article 442-1.1(4) of the CCU. This provision broadly aligns with the definition of the crime against humanity of enforced prostitution contained in the international instruments.

ii. Definition of Enforced Prostitution (Objective elements)

1289. The objective elements of this crime against humanity requires that: (1) the perpetrator (i) committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature (ii) by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or took advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent; and (2) the perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.
1290. **The perpetrator (i) committed an act of a sexual nature against one or more persons or caused the person(s) to engage in an act of a sexual nature.** This element does not require the perpetrator to have been involved in the sexual act themselves but does require them to have caused the act of a sexual nature to occur.²⁵³¹ This may include rape, as well as other physical and non-physical acts of a sexual nature.²⁵³² For more information, see the crime against humanity of sexual violence, Element One, below (para. 1324).
1291. **The perpetrator (ii) committed the aforementioned act(s) by force, or by threat of force or coercion, or by taking advantage of a coercive environment or such**

²⁵³⁰ [ICC Statute](#), Article 7(1)(g); [SCSL Statute](#), Article 2(g). Enforced prostitution is also prohibited as a war crime under [ICC Statute](#), Articles 8(2)(b)(xxii) and 8(2)(e)(vi).

²⁵³¹ [ICC Elements of Crimes](#), Article 7(1)(g)-3, Element One.

²⁵³² Triffterer and Ambos (eds), *The ICC Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 215.

person's or persons' incapacity to give genuine consent.²⁵³³ For more information, see the crime against humanity of rape, Element Two, above (para. 333).

1292. **The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.**

To satisfy this element, it must be shown that the perpetrator or another person obtained or expected a monetary or other form of payment or advantage in exchange for or in connection with the acts of a sexual nature.²⁵³⁴ The crime of enforced prostitution might also cover situations in which a person is compelled to perform sexual acts in order to obtain something necessary for survival or to avoid further harm.²⁵³⁵

iii. Definition of Enforced Prostitution (Subjective elements)

1293. In relation to the subjective elements, the crime against humanity of enforced prostitution require intent and knowledge, which will be established where: (1) the perpetrator intended to cause one or more persons to engage in one or more acts of a sexual nature; (2) the perpetrator was aware that the act was committed by force, by the threat of force or coercion, by taking advantage of a coercive environment, or against a person incapable of giving genuine consent; and (3) the perpetrator intended that they or another person would obtain a pecuniary or other advantage in exchange for or in connection with the acts of sexual nature.

1294. **The perpetrator intended to cause one or more persons to engage in one or more acts of a sexual nature.** Such intent will be established where: (1) the perpetrator meant to engage in acts or omissions (i.e., deliberately acted or failed to act) (**intent to conduct**) in order to cause one or more persons to engage in one or more acts of a sexual nature; or (2) the perpetrator was aware that consequence would occur in the ordinary course of events (**intent to consequence**).²⁵³⁶ At the ICC, awareness that the consequence would occur in the ordinary course of events requires virtual certainty that the events would occur.²⁵³⁷

1295. **The perpetrator knew that the act was committed by force, by the threat of force or coercion, by taking advantage of a coercive environment, or against a person incapable of giving genuine consent.**²⁵³⁸ This requires that the perpetrator was aware of that coercive circumstances existed. This can be inferred from the circumstances. The perpetrator must know the circumstance(s) exist but it is not required that the perpetrator completed the legal evaluation, but **simply that the accused was aware of the relevant facts.**²⁵³⁹

²⁵³³ ICC [Elements of Crimes](#), Article 7(1)(g)-3, Element One; Triffterer and Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H.Beck Hart Nomos, 2016, p. 215.

²⁵³⁴ Triffterer and Ambos (eds), *The ICC Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, pp 215, 497.

²⁵³⁵ Triffterer and Ambos (eds), *The ICC Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 215.

²⁵³⁶ [ICC Statute](#), Article 30(2)(a) and (b); ICC, *Katanga Trial Judgement*, paras 774, 970; ICC, *Bemba Trial Judgement*, para. 111.

²⁵³⁷ See ICC, *Katanga Trial Judgement*, paras 775-776.

²⁵³⁸ ICC, *Bemba Trial Judgement*, para. 112; ICC, *Katanga Trial Judgement*, para. 970; ICTY, *Kunarac et al. Appeal Judgement*, para. 127.

²⁵³⁹ ICC [Elements of Crimes](#), General Introduction, para. 4.

1296. **The perpetrator intended that they or another person would obtain a pecuniary or other advantage in exchange for or in connection with the acts of sexual nature.** Such intent will be established where: (1) the perpetrator intended that they or another person would obtain a pecuniary or other advantage in exchange for or in connection with the acts of sexual nature (**intent to conduct**); or (2) the perpetrator was aware that they or another person would obtain a pecuniary or other advantage in the ordinary course of events (**intent to consequence**).²⁵⁴⁰ At the ICC, awareness that the consequence would occur in the ordinary course of events requires virtual certainty that the events would occur.²⁵⁴¹

k) Crime against Humanity of Forced Pregnancy (ICC Statute, Article 7(1)(g)-4; SCSL Statute, Article 2(g))

ELEMENTS OF THE CRIME: TO CONVICT A PERPETRATOR FOR FORCED PREGNANCY AS A CRIME AGAINST HUMANITY THE FOLLOWING ELEMENTS NEED TO BE ESTABLISHED:

(1) Objective element

- The perpetrator (i) confined one or more women (para. [1302](#)); (ii) forcibly made pregnant (para. [1303](#)).

(2) Subjective elements

- The perpetrator intended to confine one or more women forcibly made pregnant (para. [1306](#)).
- The perpetrator knew that one or more confined women had been made pregnant (para. [1307](#)).
- The perpetrator intended to affect the ethnic composition of any population or to carry out other grave violations of international law by confining one or more women forcibly made pregnant (para. [1308](#)).

(3) Contextual elements

- The conduct was committed as part of a widespread or systematic attack directed against a civilian population (see above, para. [1160](#)).
- The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population (see above, para. [1173](#)).

i. Applicability under Ukrainian Law

1297. International instruments prohibit the crime against humanity of forced pregnancy when committed in the context of a widespread or systematic attack on civilians.²⁵⁴² Forced pregnancy is defined in the ICC Statute as “the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This

²⁵⁴⁰ ICC Statute, Article 30(2)(a) and (b); ICC, *Katanga Trial Judgement*, para. 774.

²⁵⁴¹ See ICC, *Katanga Trial Judgement*, paras 775-776.

²⁵⁴² ICC Statute, Article 7(1)(g); SCSL Statute, Article 2(g). Forced pregnancy is also prohibited as a war crime under ICC Statute, Articles 8(2)(b)(xxii) and 8(2)(e)(vi).

definition shall not in any way be interpreted as affecting national laws relating to pregnancy”.²⁵⁴³

1298. Forced pregnancy as a crime against humanity is not currently prohibited under Ukrainian law. However, this may be criminalised under the ordinary crime of trafficking in human beings under Article 149 of the CCU, which prohibits “[t]rafficking in human beings [...] for the purpose of exploitation [...]”. According to Note 1 to this provision, exploitation of human beings includes, *inter alia*, forced pregnancy. However, unlike the crime against humanity of forced pregnancy, the CCU provision does not require the act of human trafficking to have been committed in the context of a widespread or systematic attack directed against a civilian population (i.e., the contextual element).
1299. In addition, Draft Bill 7290 will (if, and when, it comes into force) introduce the specific crime against humanity of forced pregnancy committed within the framework of a large-scale or systematic attack on civilians under Article 442-1.1(4) of the CCU. This provision broadly aligns with the definition of the crime against humanity of forced pregnancy contained in the international instruments.

ii. Definition of Forced Pregnancy (Objective elements)

1300. The objective elements of this crime against humanity requires that the perpetrator confined one or more women forcibly made pregnant. This can be split into two components: (i) unlawful confinement of one or more women; and (ii) the woman or women confined had been forcibly made pregnant.²⁵⁴⁴ The essence of the prohibition against forced pregnancy is in unlawfully placing the victim in a position in which she cannot chose whether to continue her pregnancy (i.e., forcibly depriving a woman of her reproductive autonomy).²⁵⁴⁵
1301. It should be noted that the sentence contained in the ICC Statute’s definition of forced pregnancy that the crime “shall not in any way be interpreted as affecting national laws related to pregnancy” does not add a new element to the crime by allays concerns that the forced pregnancy may be seen as legalizing abortion.²⁵⁴⁶
1302. **The perpetrator unlawfully confined one or more women.** It must first be demonstrated that the perpetrator unlawfully confined one or more women, i.e., the victim was subjected to deprivation of physical liberty contrary to standards of international law.²⁵⁴⁷ Deprivations of physical liberty may include, for example, imprisonment, house arrest, restriction to a closed city, or similar restrictions, including internment in concentration or detention camps.²⁵⁴⁸ The confinement does not need to occur for

²⁵⁴³ ICC Statute, Article 7(2)(f).

²⁵⁴⁴ ICC, *Ongwen Trial Judgement*, para. 2724.

²⁵⁴⁵ ICC, *Ongwen Decision on the Confirmation of the Charges*, para. 99; ICC, *Ongwen Trial Judgement*, para. 2722.

²⁵⁴⁶ ICC, *Ongwen Trial Judgement*, para. 2721.

²⁵⁴⁷ ICC, *Ongwen Trial Judgement*, para. 2724.

²⁵⁴⁸ ICTY, *Kordic and Cerkez Trial Judgement*, para. 299; ICTY, *Prlic et al. Trial Judgement*, para. 473; ICTY, *Blaskic Trial Judgement*, paras 684, 691, 700; ICTR, *Ntagerura et al. Trial Judgement*, para. 702.

a specific duration,²⁵⁴⁹ or reach a certain level of severity.²⁵⁵⁰ For more information on deprivation of liberty, see the crime against humanity of imprisonment, above (see para. 1232).

1303. **The woman or women confined had been forcibly made pregnant.** Second, it must be established that the confined woman or women were made forcibly pregnant by the perpetrator or another person.²⁵⁵¹ The forcible conception could have occurred prior to or during the unlawful confinement.²⁵⁵²
1304. Being “forcibly made pregnant” is understood as encompassing the same coercive circumstances described in the other sexual violence crimes contained in the ICC Statute and described above (see Element Two of the crime against humanity of rape, above (para 1265)).²⁵⁵³ Accordingly, “forcibly” in this context means “force, or threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against her or another person, or by taking advantage of a coercive environment, or that the woman made pregnant was a person incapable of giving genuine consent”.²⁵⁵⁴

ICC, ONGWEN TRIAL JUDGEMENT, PARA. 2723-2725 [FOOTNOTES OMITTED]

The crime of forced pregnancy, whether as a crime against humanity or a war crime, is committed when the perpetrator ‘confined one or more women forcibly made pregnant’. The forcible conception of the woman could occur prior to or during the unlawful confinement. The perpetrator need not have personally made the victim forcibly pregnant – confining a woman made forcibly pregnant by another is necessary and sufficient for the crime of forced pregnancy.

The material element of this crime can be split into two components. The first of these is ‘unlawful confinement’, which means that the woman must have been restricted in her physical movement contrary to standards of international law. The Elements of Crimes do not indicate a specific duration of confinement, nor do they specify that the deprivation of liberty be ‘severe’ as is explicitly required for the crime against humanity of imprisonment.

²⁵⁴⁹ ICC, *Ongwen Trial Judgement*, para. 2724.

²⁵⁵⁰ ICC, *Ongwen Trial Judgement*, para. 2724.

²⁵⁵¹ ICC, *Ongwen Trial Judgement*, paras 2725.

²⁵⁵² ICC, *Ongwen Trial Judgement*, para. 2723.

²⁵⁵³ ICC, *Ongwen Trial Judgement*, para. 2725; ICC, *Ongwen Decision on the Confirmation of the Charges*, para. 99. See also, ICC *Elements of Crimes*, Articles 7(1)(g)-1 Element One, 7(1)(g)-3 Element One, 7(1)(g)-6 Element One.

²⁵⁵⁴ ICC, *Ongwen Trial Judgement*, para. 2725.

The second component of the material element is that the woman has been ‘forcibly made pregnant’. This is understood as encompassing the same coercive circumstances described for other sexual violence crimes in the Statute. This means that the woman need not have been made pregnant through physical violence alone. ‘Forcibly’ in this context means force, or threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against her or another person, or by taking advantage of a coercive environment, or that the woman made pregnant was a person incapable of giving genuine consent. The existence of such coercive circumstances undermines the woman’s ability to give voluntary and genuine consent.

iii. Definition of Forced Pregnancy (Subjective elements)

1305. In relation to the subjective elements, the crime against humanity of forced pregnancy require that the perpetrator act with **intent** and **knowledge**,²⁵⁵⁵ which will be established when: (1) the perpetrator intended to confine one or more women forcibly made pregnant; (2) the perpetrator knew that one or more confined women had been made pregnant; and (3) the perpetrator intended to affect the ethnic composition of any population or to carry out other grave violations of international law by confining one or more women forcibly made pregnant.
1306. **The perpetrator intended to confine one or more women forcibly made pregnant.** Such intent can be established where: (1) the perpetrator meant to engage in acts or omissions (i.e., deliberately acted or failed to act) (**intent to conduct**)²⁵⁵⁶ in order to cause the confinement; or (2) the perpetrator was aware that the confinement would occur in the ordinary course of events (**intent to consequence**).²⁵⁵⁷ At the ICC, awareness that the consequence would occur in the ordinary course of events requires virtual certainty that the events would occur.²⁵⁵⁸
1307. **The perpetrator knew that one or more confined women had been made pregnant.** This will be established where the perpetrator was *aware* that one or more of the confined women had forcibly been made pregnant.²⁵⁵⁹
1308. **The perpetrator intended to affect the ethnic composition of any population or to carry out other grave violations of international law by confining one or more women forcibly made pregnant.** In addition, the crime against humanity of forced

²⁵⁵⁵ See ICC Statute, Article 30(2) and 30(3); ICC, *Katanga Trial Judgement*, para. 970; ICC, *Bemba Trial Judgement*, para. 111-112; ICTR, *Muvunyi Trial Judgement*, para. 522; ICTR, *Semanza Trial Judgement*, para. 346; ICTY, *Kunarac et al. Appeal Judgement*, para. 127; SCSL, *Sesay et al. Trial Judgement*, para. 150. See also, ICTY, *Kunarac et al. Trial Judgement*, para. 460.

²⁵⁵⁶ ICC Statute, Article 30(2)(a); ICC, *Katanga Trial Judgement*, para. 774; ICTY, *Kunarac et al. Appeal Judgement*, para. 127; ICTR, *Semanza Trial Judgement*, para. 346.

²⁵⁵⁷ ICC Statute, Article 30(2)(b); ICC, *Katanga Trial Judgement*, para. 774.

²⁵⁵⁸ See ICC, *Katanga Trial Judgement*, paras 775-776.

²⁵⁵⁹ ICC, *Bemba Trial Judgement*, para. 112; ICC, *Katanga Trial Judgement*, para. 970.

pregnancy requires a specific intent that in confining a forcibly impregnated woman,²⁵⁶⁰ the perpetrator had the specific intent of:²⁵⁶¹

- affecting the ethnic composition of any population, *or*
- carrying out other grave violations of international law, such as using the victim as a forced wife, committing rape, sexual enslavement, torture or other crimes under the ICC Statute, regardless of whether the perpetrator specifically intended to keep the woman pregnant.²⁵⁶²

1309. It is not necessary that the accused intended to keep the woman beyond these alternative intentions.²⁵⁶³ As such, the crime consists of the confinement of a forcibly pregnant woman in order to carry out other grave violations of international law, regardless of whether the accused specifically intended to keep the woman pregnant.²⁵⁶⁴

ICC, ONGWEN TRIAL JUDGEMENT, PARA. 2727, 2729

This requirement of special intent is phrased alternatively, meaning that the crime of forced pregnancy under the Statute is committed with the intent either to affect the ethnic composition of the population or to carry out other grave violations of international law, e.g., confining a woman with the intent to rape, sexually enslave, enslave and/or torture her.

[...]

On this understanding, the crime of forced pregnancy consists in the confinement of a forcibly pregnant woman in order to carry out other grave violations of international law, regardless of whether the accused specifically intended to keep the woman pregnant.

²⁵⁶⁰ This special intent does not apply to the act of forcibly impregnating the victim itself. ICC, *Ongwen Decision on the Confirmation of the Charges*, para. 99.

²⁵⁶¹ ICC, *Ongwen Trial Judgement*, paras 2726-2727.

²⁵⁶² ICC, *Ongwen Trial Judgement*, para. 2729.

²⁵⁶³ ICC, *Ongwen Trial Judgement*, para. 2728. Similarly, see, ICC, *Ongwen Decision on the Confirmation of the Charges*, para. 100.

²⁵⁶⁴ ICC, *Ongwen Trial Judgement*, para. 2729.

l) Crime against Humanity of Enforced Sterilization (ICC Statute, Article 7(1)(g)-5)

ELEMENTS OF THE CRIME: TO CONVICT A PERPETRATOR FOR ENFORCED STERILIZATION AS A CRIME AGAINST HUMANITY THE FOLLOWING ELEMENTS NEED TO BE ESTABLISHED:**(1) Objective elements**

- The perpetrator deprived one or more persons of biological reproductive capacity (para. 1313).
- The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent (para. 1314).

(2) Subjective elements

- The perpetrator intended to deprive one or more persons of biological reproductive capacity (para. 1316).
- The perpetrator knew that their conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent (para. 1317).

(3) Contextual elements

- The conduct was committed as part of a widespread or systematic attack directed against a civilian population (see above, para. 1160).
- The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population (see above, para. 1173).

i. Applicability under Ukrainian Law

1310. Enforced sterilization as a crime against humanity (i.e., when committed in the context of a widespread or systematic attack on civilians) was codified for the first time by the ICC Statute.²⁵⁶⁵ Enforced sterilization is defined in the ICC Elements of Crimes as a situation where a perpetrator deprives one or more persons of their biological reproductive capacity and this conduct is neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.²⁵⁶⁶

1311. Enforced sterilization as a crime against humanity is not currently prohibited under Ukrainian law. However, Draft Bill 7290 will (if, and when, it comes into force) introduce the specific crime against humanity of forced sterilisation committed within the framework of a large-scale or systematic attack on civilians under Article 442-1.1(4) of the CCU. This provision broadly aligns with the definition of the crime against humanity of forced pregnancy contained in the international instruments.

²⁵⁶⁵ [ICC Statute](#), Article 7(1)(g). Enforced sterilization is also prohibited as a war crime under [ICC Statute](#), Articles 8(2)(b)(xxii) and 8(2)(e)(vi). This conduct was also punished by the Nuremberg Tribunal in the context of medical experiments which occurred during the Second World War, particularly in concentration camps: *U.S. v. Brandt*, Trials of War Criminals Before Nuernberg Military Tribunals, vols I and II, Case No. 1.

²⁵⁶⁶ ICC [Elements of Crimes](#), Article 7(1)(g)-5.

ii. Definition of Enforced Sterilization (Objective elements)

1312. The objective elements of this crime against humanity requires that: (1) the perpetrator deprived one or more persons of biological reproductive capacity; and (2) the conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.
1313. **The perpetrator deprived one or more persons of biological reproductive capacity.**²⁵⁶⁷ A person's biological reproductive capacity can be deprived through the following means: a medical operation; the intentional use of chemicals for this effect; vicious rapes where the reproductive system has been destroyed; and forcible castration or other forms of severe genital mutilation carried out against men.²⁵⁶⁸ However, this does not include birth-control measures which have a non-permanent effect in practice.²⁵⁶⁹
1314. **The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.**²⁵⁷⁰ According to the ICC Elements of Crimes, "genuine consent' does not include consent obtained through deception."²⁵⁷¹

iii. Definition of Enforced Sterilization (Subjective elements)

1315. In relation to the subjective element, the crime against humanity of enforced sterilization require intent and knowledge,²⁵⁷² which will be established when: (1) the perpetrator intended to deprive one or more persons of biological reproductive capacity; and (2) the perpetrator knew that their conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.
1316. **The perpetrator intended to deprive one or more persons of biological reproductive capacity.** Such intent will be established where: (1) the perpetrator meant to engage in acts or omissions (i.e., deliberately acted or failed to act) (**intent to conduct**) in order to deprive one or more persons of their biological reproductive capacity; or (2) the perpetrator was aware that one or more persons would be deprived of their biological reproductive capacity in the ordinary course of events (**intent to consequence**).²⁵⁷³ At the ICC, awareness that the consequence would occur in the ordinary course of events requires virtual certainty that the events would occur.²⁵⁷⁴

²⁵⁶⁷ ICC [Elements of Crimes](#), Article 7(1)(g)-5, Element One.

²⁵⁶⁸ Klamberg, [Commentary on the International Criminal Court](#), Torkel Opsahl Academic EPublisher Brussels, 2017, p. 54; Triffterer and Ambos (eds), *The ICC Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 216; Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals*, Martinus Nijhoff, 1997, pp 91-92 ("forcible inability to reproduce is particularly prevalent in instances of exceedingly vicious rapes, multiple rapes, gang rapes, rapes of young children, rapes committed with foreign objects, and rapes perpetrated in unsanitary conditions which promote infections or disease.").

²⁵⁶⁹ ICC [Elements of Crimes](#), fn. 19.

²⁵⁷⁰ ICC [Elements of Crimes](#), Article 7(1)(g)-5, Element Two.

²⁵⁷¹ ICC [Elements of Crimes](#), fn. 20.

²⁵⁷² Klamberg, [Commentary on the International Criminal Court](#), Torkel Opsahl Academic EPublisher Brussels, 2017, p. 54; [ICC Statute](#), Articles 30(2), 30(3).

²⁵⁷³ [ICC Statute](#), Article 30(2)(a) and (b); ICC, [Katanga Trial Judgement](#), paras 774.

²⁵⁷⁴ See ICC, [Katanga Trial Judgement](#), paras 775-776.

1317. **The perpetrator knew that their conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.** To prove knowledge, it must be demonstrated that the perpetrator was aware that the act of depriving one or more persons of their biological reproductive capacity was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.²⁵⁷⁵

m) Crime against Humanity of Sexual Violence (ICC Statute, Article 7(1)(g)-6; SCSL Statute, Article 2(g))

ELEMENTS OF THE CRIME: TO CONVICT A PERPETRATOR FOR SEXUAL VIOLENCE AS A CRIME AGAINST HUMANITY THE FOLLOWING ELEMENTS NEED TO BE ESTABLISHED:

(1) Objective element

- The perpetrator (i) committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature (para. [1323](#)); (ii) by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent (para. [1324](#)).

(2) Subjective elements

- The perpetrator intended to commit an act of a sexual nature against one or more persons or to cause such person or persons to engage in an act of a sexual nature (para. [1326](#)).
- The perpetrator was aware that they would commit an act of a sexual nature or would cause a person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent (para. [1327](#)).

(3) Contextual elements

- The conduct was committed as part of a widespread or systematic attack directed against a civilian population (see above, para. [1160](#)).
- The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population (see above, para. [1173](#)).

i. Applicability under Ukrainian Law

1318. International instruments prohibit the crime against humanity of sexual violence when committed in the context of a widespread or systematic attack on civilians.²⁵⁷⁶

1319. Sexual violence as a crime against humanity is not currently prohibited under Ukrainian law. This conduct is, however, covered by the ordinary crime of sexual

²⁵⁷⁵ [ICC Statute](#), Article 30(3).

²⁵⁷⁶ [ICC Statute](#), Article 7(1)(g); [SCSL Statute](#), Article 2(g). Sexual violence is also prohibited as a war crime under [ICC Statute](#), Articles 8(2)(b)(xxii) and 8(2)(e)(vi).

violence under Article 153 of the CCU, which prohibits “[c]ommitting any sexual violence, not related to the penetration into another person’s body, without the voluntary consent of the victim (sexual violence)”. Unlike the crime against humanity of sexual violence, however, the CCU provision does not require the act of sexual violence to have been committed in the context of a widespread or systematic attack directed against a civilian population (i.e., the contextual element).

1320. In addition, Draft Bill 7290 will introduce (if, and when, it comes into force) the specific crime against humanity of sexual violence committed within the framework of a large-scale or systematic attack on civilians under common Article 442-1.1(4) of the CCU. This provision broadly aligns with the definition of the crime against humanity of sexual violence contained in the international instruments. However, as discussed below, the Draft Bill is wider in scope than the ICC Statute provision since it does not include a gravity threshold (Elements Two and Three of the ICC Elements of Crimes).

ii. Definition of Sexual Violence (Objective elements)

1321. The objective elements of this crime against humanity requires that: (1) the perpetrator (i) committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature (ii) by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent.

1322. The ICC Statute also requires that the perpetrator’s conduct was of a gravity comparable to other acts of sexual violence established under Article 7(1)(g) (e.g., rape; sexual slavery; enforced prostitution; forced pregnancy; and enforced sterilization) of the ICC Statute.²⁵⁷⁷ However, this “comparable gravity” requirement is unique to the ICC Statute, and is not an element of the crime in customary international law.²⁵⁷⁸ The statutes of other international courts/tribunals and legislation in some European jurisdictions do not require an act of sexual violence to be of “comparable gravity” to other crimes against humanity.²⁵⁷⁹ In addition, Article 442-1.1(4) of Draft Bill 7290 does not include the criterion that the sexual violence be “of comparable gravity”, thus leaving the door open for a broader application of the provision than its counterpart in the ICC Statute. As such, this element would not need to be established to prove the crime against humanity of sexual violence under Ukrainian law and so is not considered further in this Benchbook.

²⁵⁷⁷ [ICC Statute](#), Article 7(1)(g).

²⁵⁷⁸ [ICC Statute](#), Article 7(1)(g); ICC [Elements of Crimes](#), Article 7(1)(g)-6, Element Two; Cryer, et al. (eds), *An Introduction to International Criminal Law and Procedure*, 3rd Edition, Cambridge University Press, 2015, pp 251-252.

²⁵⁷⁹ See, [ICTY Statute](#), Article 5(g); [ICTR Statute](#), Article 3(g); [SCSL Statute](#), Article 2(g). See also, e.g., Germany, [Law Introducing the International Crimes Code](#), 2002, Section 7(1)(6); Spain, [Criminal Code](#), 2016, Article 607bis(2)(2).

ICTR, *AKAYESU TRIAL JUDGEMENT*, PARA. 688

The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.

1323. **The perpetrator (i) committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature.**²⁵⁸⁰ Conduct that is sexual in nature covers both physical and non-physical (i.e., psychological) acts with a sexual element.²⁵⁸¹ Thus, acts such as forced nudity may amount to sexual violence, even in the absence of physical contact.²⁵⁸² Acts of a sexual nature can be committed by and against any person regardless of age, sex or gender. This includes same-sex acts.²⁵⁸³ The perpetrator may commit the act of a sexual nature against one or more persons *or* cause the person to engage in an act of a sexual nature against themselves or a third party (including another person or an animal), or on a dead body.²⁵⁸⁴

²⁵⁸⁰ ICTY, *Dordevic Trial Judgement*, para. 1768; ICTY, *Celebici Trial Judgement*, para. 1065; ICTY, *Todorovic Sentencing Judgement*, paras 37-40.

²⁵⁸¹ ICTR, *Akayesu Trial Judgement*, para. 688; ICTY, *Furundzija Trial Judgement*, para. 186; SCSL, *Brima et al Trial Judgement*, para. 720; ICTY, *Milutinovic et al. Trial Judgement*, paras 194-195, 199; ICTR, *Rukundo Trial Judgement*, para. 380. *See also*, ICC OTP, *Policy Paper on Sexual and Gender-Based Crimes*, 2014, p. 3; UNCHR *Contemporary forms of slavery, systematic rape, sexual slavery and slavery like practices during armed conflict: Final Report*, paras 21-22.

²⁵⁸² ICTR, *Akayesu Trial Judgement*, para. 688; ICTY, *Kunarac et al. Trial Judgement*, paras 769, 772; ICTY, *Kvočka et al. Trial Judgement*, para. 170; ICTY, *Brdanin Trial Judgement*, para. 1013; SCSL, *Brima et al. Appeal Judgement*, para. 184. *See also*, UNCHR *Contemporary forms of slavery, systematic rape, sexual slavery and slavery like practices during armed conflict: Final Report*, para. 21 (“Sexual violence includes acts such as ‘forcing a person to strip naked in public’”); ICC OTP, *Report on Preliminary Examination Activities 2016* (14 November 2016), para. 94 (“In addition, detainees were forcibly maintained in a state of forced nudity, compelled to perform physical exercises naked [...]”); ICC OTP, *Policy Paper on Sexual and Gender-Based Crimes*, 2014, p. 3 (“An act of a sexual nature is not limited to physical violence, and may not involve any physical contact – for example, forced nudity”). Before, the ICC, the *Bemba* Arrest Warrant decision did not dispute the fact that forced nudity constitutes sexual violence; rather, the decision indicated that the alleged acts of forced nudity were not of sufficient gravity to prosecute: ICC, *Bemba Arrest Warrant Decision*, paras 39-40; Women’s Initiative for Gender Justice, “*The Hague Principles on Sexual Violence*”, 2019, pp 13-14.

²⁵⁸³ ICC, *Bemba Trial Judgement*, para. 100; ICC, *Ntaganda Trial Judgement*, para. 933. *See also*, ICC *Policy Paper on Sexual and Gender-Based Crimes*, 2014, fn. 6.

²⁵⁸⁴ Women’s Initiative for Gender Justice, “*The Hague Principles on Sexual Violence*”, 2019, p.8; ICC *Elements of Crimes*, Articles 7(1)(g)-6, 8(2)(b)(xxii)-6, and 8(2)(e)(vi)-6, Element One. *See e.g.*, ICTY, *Celebici Trial Judgement*, para. 1065; ICTY, *Todorovic Sentencing Judgement*, paras 38-40.

CASE STUDY: EXAMPLES OF "ACTS OF A SEXUAL NATURE"

Sexual violence can be committed through a multitude of different acts, including:

- castration, mutilation of sexual organs, forced circumcision and female genital mutilation;²⁵⁸⁵
- enforced prostitution;²⁵⁸⁶
- forced masturbation and any other forced touching that the survivor is compelled to perform on themselves or a third person;²⁵⁸⁷
- having someone undress completely or partially (i.e., forced nudity), including the removal of headwear in cultures where this has a sexual implication;²⁵⁸⁸
- having someone wear clothing with a sexual association;²⁵⁸⁹
- human trafficking for sexual exploitation and slavery;²⁵⁹⁰
- inspecting someone's genitals, anus, breasts or hymen without medical or similar necessity;²⁵⁹¹
- kissing or licking a person, especially a sexual body part;²⁵⁹²
- punishing someone for refusing to engage in sexual activity;²⁵⁹³
- rape (including gang rape, marital rape or "corrective" rape), which includes penetration of the vagina, anus or mouth by any part of the body or object (e.g., a stick);²⁵⁹⁴
- sexually harassing someone by engaging in (repeated) unwelcome sexual conduct which can be interpreted as offensive, humiliating or intimidating under the circumstances;²⁵⁹⁵
- threats of sexual violence or intimidation or causing someone to form reasonable apprehension, or fear, of acts of sexual violence;²⁵⁹⁶

²⁵⁸⁵ Women's Initiative for Gender Justice, '[The Hague Principles on Sexual Violence](#)', 2019, p. 10.

²⁵⁸⁶ [ICC Statute](#), Articles 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi).

²⁵⁸⁷ ICTY, *Brdanin Trial Judgement*, paras 1013, 1018; ICTY, *Celebici Trial Judgement*, paras 1062-1066; ICTY, *Todorovic Sentencing Judgement*, paras 39-40; ICTY, *Tadic Trial Judgement*, para. 198; [UNCHR Contemporary forms of slavery, systematic rape, sexual slavery and slavery like practices during armed conflict: Final Report](#), para. 22; ICC OTP, [Report on Preliminary Examination Activities 2016](#) (14 November 2016), para. 94.

²⁵⁸⁸ ICTY, *Kunarac et al. Trial Judgement*, paras 769; ICTY, *Furundzija Trial Judgement*, para. 272; ICTY, *Kvocka et al. Trial Judgement*, para. 170; ICTY, *Brdanin Trial Judgement*, para. 1013; ICTR, *Akayesu Trial Judgement*, para. 688; SCSL, *Brima et al. Appeal Judgement*, para. 184; OHCHR, [Conflict-Related Sexual Violence in Ukraine 14 March 2014 to 31 January 2017](#), para. 69; Women's Initiative for Gender Justice, '[The Hague Principles on Sexual Violence](#)', 2019, pp 10; ICC OTP, [Report on Preliminary Examination Activities 2016](#) (14 November 2016), para. 94.

²⁵⁸⁹ Women's Initiative for Gender Justice, '[The Hague Principles on Sexual Violence](#)', 2019, p. 9.

²⁵⁹⁰ ICTY, *Kunarac et al. Trial Judgement*, paras 775-782; ICC, *Ongwen Trial Judgement*, paras 3044-3049.

²⁵⁹¹ Women's Initiative for Gender Justice, '[The Hague Principles on Sexual Violence](#)', 2019, p. 10.

²⁵⁹² ICTY, *Stakic Trial Judgement*, para. 793; Women's Initiative for Gender Justice, '[The Hague Principles on Sexual Violence](#)', 2019, p. 10.

²⁵⁹³ Women's Initiative for Gender Justice, '[The Hague Principles on Sexual Violence](#)', 2019, p. 8.

²⁵⁹⁴ [ICC Statute](#), Articles 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi); ICTY, *Kunarac et al. Trial Judgement*, paras 759, 761, 817; ICTY, *Furundzija Trial Judgement*, paras 270-271; ICTY, *Kvocka et al. Trial Judgement*, paras 98, 100, 102; ICTY, *Brdanin Trial Judgement*, para. 1010; ICTY, *Simic Trial Judgement*, para. 721; ICTR, *Akayesu Trial Judgement*, paras 686, 688; ICC, *Ongwen Trial Judgement*, paras 3035-3043; Women's Initiative for Gender Justice, '[The Hague Principles on Sexual Violence](#)', 2019, p. 12.

²⁵⁹⁵ Women's Initiative for Gender Justice, '[The Hague Principles on Sexual Violence](#)', 2019, p. 9.

²⁵⁹⁶ ICTY, *Kvocka et al. Trial Judgement*, paras 98, 104; ICTY, *Brdanin Trial Judgement*, paras 1013, 1018; Women's Initiative for Gender Justice, '[The Hague Principles on Sexual Violence](#)', 2019, p. 8; OHCHR, [Conflict-Related Sexual Violence in Ukraine 14 March 2014 to 31 January 2017](#), paras 68, 74.

- touching a person in a sexual manner, for example, by giving or receiving massages;²⁵⁹⁷
- touching a person's sexual body parts, for example, touching their breasts or putting their hands inside the survivor's underwear or garment;²⁵⁹⁸ or
- violent acts to the genitalia (such as beating, burning, electrical shocks or blows), for example, electrocuting and driving objects into a person's penis.²⁵⁹⁹

1324. **The perpetrator (ii) used force, the threat of force or coercion, or took advantage of a coercive environment, or committed the sexual act against a person(s) incapable of giving genuine consent.** For more information, see the crime against humanity of rape, Element Two, above (para. 1265).

iii. Definition Sexual Violence (Subjective elements)

1325. In relation to the subjective elements, the crime against humanity of sexual violence require intent and knowledge,²⁶⁰⁰ which will be established when: (1) the perpetrator intended to commit an act of a sexual nature against one or more persons or to cause such person or persons to engage in an act of a sexual nature; and (2) the perpetrator was aware that they would commit an act of a sexual nature or would cause a person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.

1326. **The perpetrator intended to commit an act of a sexual nature against one or more persons or to cause such person or persons to engage in an act of a sexual nature.** Such intent can be established where: (1) the perpetrator meant to engage in acts or omissions (i.e., deliberately acted or failed to act) (**intent to conduct**)²⁶⁰¹ in order to commit an act of a sexual nature against one or more persons or to cause such person or persons to engage in an act of a sexual nature; or (2) the perpetrator was aware that one or more persons would be subjected to an act of a sexual nature in the ordinary course of events (**intent to consequence**).²⁶⁰² At the ICC, awareness that the consequence would occur in the ordinary course of events requires virtual certainty that the events would occur.²⁶⁰³

²⁵⁹⁷ ICTY, *Kvočka et al. Trial Judgement*, para. 99; ICTR, *Rukundo Trial Judgement*, para. 381; Women's Initiative for Gender Justice, 'The Hague Principles on Sexual Violence', 2019, p. 10; ICC OTP, *Report on Preliminary Examination Activities 2016* (14 November 2016), para. 94.

²⁵⁹⁸ Women's Initiative for Gender Justice, 'The Hague Principles on Sexual Violence', 2019, p. 10; OHCHR, *Conflict-Related Sexual Violence in Ukraine 14 March 2014 to 31 January 2017*, paras 80-81.

²⁵⁹⁹ ICTY, *Celebici Trial Judgement*, paras 1019, 1035, 1038-1040; ICTY, *Todorovic Sentencing Judgement*, para. 38; ICTY, *Simic Trial Judgement*, paras 695, 698; ICTY, *Naletilic and Martinovic Trial Judgement*, para. 450; ICTY, *Brdanin Trial Judgement*, para. 498; ICTY, *Tadic Trial Judgement*, para. 198; Women's Initiative for Gender Justice, 'The Hague Principles on Sexual Violence', 2019, p. 10; OHCHR, *Conflict-Related Sexual Violence in Ukraine 14 March 2014 to 31 January 2017*, paras 70-71.

²⁶⁰⁰ *ICC Statute*, Articles 30(2), 30(3).

²⁶⁰¹ *ICC Statute*, Article 30(2)(a); ICC, *Katanga Trial Judgement*, para. 774.

²⁶⁰² *ICC Statute*, Article 30(2)(b); ICC, *Katanga Trial Judgement*, para. 774; ICC, *Bemba Trial Judgement*, para. 111.

²⁶⁰³ See, ICC, *Katanga Trial Judgement*, paras 775-776.

1327. **The perpetrator knew that they would commit an act of a sexual nature or would cause a person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.** To prove such “knowledge”, it must be proven that the perpetrator was aware that the act of a sexual nature was committed by force, by the threat of force or coercion, by taking advantage of a coercive environment, or against a person incapable of giving genuine consent.²⁶⁰⁴ This can be inferred from the circumstances. However, this does not require the perpetrator to be aware of the legal character of the act in question, i.e. there is no need for the perpetrator to know that the act in question constituted a crime against humanity or an inhumane act.²⁶⁰⁵

- n) Crime against Humanity of Persecution (ICC Statute, Article 7(1)(h); ICTY Statute, Article 5(h); ICTR Statute, Article 3(h); SCSL Statute, Article 2(h))

ELEMENTS OF THE CRIME: TO CONVICT A PERPETRATOR FOR PERSECUTION AS A CRIME AGAINST HUMANITY THE FOLLOWING ELEMENTS NEED TO BE ESTABLISHED:

(1) Objective elements

- The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights (para. [1331](#)).
- The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such (para. [1334](#)).
- Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the ICC Statute, or other grounds that are universally recognised as impermissible under international law (para. [1336](#)).
- The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the ICC Statute or any crime within the jurisdiction of the ICC (para. [1338](#)).

(2) Subjective elements

- The perpetrator intended to severely deprive one or more persons of fundamental rights (para. [1342](#)).
- The perpetrator intended to discriminate against the person(s) based on political, racial, national, ethnic, cultural, religious, gender, or other universally recognised grounds (para. [1343](#)).

(3) Contextual elements

- The conduct was committed as part of a widespread or systematic attack directed against a civilian population (see above, para. [1160](#)).
- The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population (see above, para. [1173](#)).

²⁶⁰⁴ ICC Statute, Article 30(3); ICC, *Bemba Trial Judgement*, para. 111.

²⁶⁰⁵ ICC, *Ongwen Trial Judgement*, para. 2753.

i. Applicability under Ukrainian Law

1328. International instruments prohibit “persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law”.²⁶⁰⁶ The ICC Statute defines “persecution” as “the intentional and severe deprivation of fundamental rights of a group of persons due to their group identity or collectivity”.²⁶⁰⁷
1329. Persecution as a crime against humanity is not currently prohibited under Ukrainian law. However, Draft Bill 7290 will introduce (if, and when, it comes into force) the crime against humanity of persecution committed within the framework of a large-scale or systematic attack on civilians under Article 442-1.1(1) of the CCU. “Persecution” is defined in the Draft Bill as “the restriction of fundamental human rights on the basis of political, racial, national, ethnic, cultural, religious, sexual or other grounds of discrimination defined by international law”. As such, this provision will integrate the definition of the crime against humanity of persecution contained in the international instruments.

ii. Definition of Persecution (Objective elements)

1330. The objective elements of this crime against humanity requires that: (1) the perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights; (2) the perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such; (3) such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in Article 7(3) of the ICC Statute, or other grounds that are universally recognized as impermissible under international law; and (4) conduct was committed in connection with any crime against humanity referred to in Article 7(1) of the ICC Statute or any crime within the jurisdiction of the ICC.
1331. **The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.** To satisfy this element, it must be established that one or more persons were deprived of their fundamental rights, contrary to international law.²⁶⁰⁸ Fundamental rights are human rights established under customary international law and international human rights treaties.²⁶⁰⁹

²⁶⁰⁶ [ICC Statute](#), Article 7(1)(h); [ICTY Statute](#), Article 5(h); [ICTR Statute](#), Article 3(h); [SCSL Statute](#), Article 2(h). The crime against humanity of persecution is also prohibited under [ECCC Law](#), Article 5.

²⁶⁰⁷ [ICC Statute](#), Article 7(2)(g).

²⁶⁰⁸ ICC, *Ongwen* [Trial Judgement](#), para. 2733; ICTY, *Prlic et al.* [Appeal Judgement](#), para. 422; ICTY, *Blagojevic & Jokic* [Trial Judgement](#), para. 579; ICTY, *Kordic & Cerkez* [Appeal Judgement](#), para. 101; ICTR, *Semanza* [Trial Judgement](#), paras 347-348.

²⁶⁰⁹ ICC, *Ntaganda* [Trial Judgement](#), para. 991; ICTY, *Blaskic* [Appeal Judgement](#), para. 139; ICTY, *Karadzic* [Trial Judgement](#), para. 499; ICTY, *Brdanin* [Trial Judgement](#), para. 995; ICTY, *Krnojelac* [Trial Judgement](#), para. 434; Schabas, *The International Criminal Court: A Commentary on the ICC Statute*, 2nd Edition, Oxford University Press, 2016, p. 196. See also, ICC, *Ntaganda* [Decision on Confirmation of Charges](#), para. 58. The relevant international instruments include *inter alia*: (i) the Universal Declaration of Human Rights; (ii) the International Covenant on Civil and Political Rights; (iii) the International Covenant on Economic, Social and Cultural Rights; (iv) the European Convention on Human Rights.

1332. Broadly, these include violations that cause: (1) serious bodily and mental harm; (2) infringements against freedom; and (3) attacks against property.²⁶¹⁰ This may include a variety of rights, such as: the right to life; the right to personal liberty and security of the person; the right not to be subjected to torture or cruel, inhumane or degrading treatment; the right not to be subjected to arbitrary arrest, detention or exile; and the right to private property.²⁶¹¹ The deprivation of fundamental rights must be contrary to international law, meaning that no justification exists under international law for the violation.²⁶¹²

ICC, ONGWEN TRIAL JUDGEMENT, PARA. 2733

The first of these elements is that the perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights. Not every infringement of human rights is relevant but only a "severe deprivation" of a person's "fundamental rights contrary to international law" (emphasis added). This may include a variety of rights, such as the right to life, the right to personal liberty, the right not to be held in slavery or servitude, the right not to be subjected to torture or cruel treatment, inhuman or degrading treatment, and the right to private property.

CASE STUDY: EXAMPLES OF "PERSECUTION"

The following acts, among others, can amount to "persecution" when: carried out on discriminatory grounds, considered in conjunction with other acts and the contextual elements of crimes against humanity are fulfilled:

- murder;²⁶¹³
- attacks on civilians;²⁶¹⁴
- torture (e.g., physical violence, psychological violence, sexual violence, etc.);²⁶¹⁵

²⁶¹⁰ ICC, *Ongwen Trial Judgement*, para. 2733 ("fundamental rights [...] may include a variety of rights, such as the right to life, the right to personal liberty, the right not to be held in slavery or servitude, the right not to be subjected to torture or cruel treatment, inhuman or degrading treatment, and the right to private property.") See also, ICC, *Ntaganda Trial Judgement*, para. 991; ICTY, *Blaskic Trial Judgement*, para. 220; ICTY, *Kordic & Cerkez Appeal Judgement*, paras 104-109; ICTY, *Blagojevic & Jokic Trial Judgement*, paras 585-600; Triffterer and Ambos (eds), *The ICC Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 276.

²⁶¹¹ ICC, *Ongwen Trial Judgement*, para. 2733; ICC, *Ntaganda Trial Judgement*, para. 991; ICTY, *Blaskic Trial Judgement*, para. 220; ICTY, *Kordic & Cerkez Appeal Judgement*, paras 104-109; ICTY, *Blagojevic & Jokic Trial Judgement*, paras 585-600.

²⁶¹² ICC, *Ntaganda Trial Judgement*, para. 993; ICTY, *Kordic & Cerkez Appeal Judgement*, para. 103; ICTY, *Blaskic Appeal Judgement*, para. 139.

²⁶¹³ ICTY, *Stakic Trial Judgement*, para. 747; ICTY, *Kordic & Cerkez Appeal Judgement*, paras 106-109; ICTY, *Blaskic Appeal Judgement*, para. 143.

²⁶¹⁴ ICTY, *Kordic & Cerkez Appeal Judgement*, paras 104-105; ICTY, *Blaskic Appeal Judgement*, paras 156-159.

²⁶¹⁵ ICTY, *Brdanin Trial Judgement*, para. 1012; ICTY, *Stakic Trial Judgement*, paras 748-760; ICTY, *Karadzic Trial Judgement*, paras 505-513; ICTY, *Blaskic Appeal Judgement*, paras 154-155.

- pillage;²⁶¹⁶
- the denial of freedom of movement;²⁶¹⁷
- the denial of employment;²⁶¹⁸
- the invasion of privacy through arbitrary searches of homes;²⁶¹⁹
- unlawful arrest and detention;²⁶²⁰
- the denial of the right to judicial process;²⁶²¹ and
- the denial of equal access to public services (e.g., medical care).²⁶²²

1333. Additionally, it must be demonstrated that the deprivation was severe,²⁶²³ i.e., a serious, gross or blatant denial of fundamental rights.²⁶²⁴ Any act which, in and of itself, constitutes a crime against humanity will be considered a severe deprivation of fundamental rights.²⁶²⁵ In establishing this element, judges should look at the cumulative effect of the impugned act and assess whether or not rights have been clearly violated, how many individuals were targeted and to what extent individuals were deprived of their rights.²⁶²⁶

1334. **The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.** To satisfy this element, it must be established that the perpetrator targeted the victims due to the identity of a group or collectively.²⁶²⁷ Alternatively, it must be established that the

²⁶¹⁶ ICTY, *Stakic Trial Judgement*, paras 762-764; ICTY, *Brdanin Trial Judgement*, para. 1045; ICTY, *Kordic & Cerkez Appeal Judgement*, paras 108-109; ICTY, *Karadzic Trial Judgement*, paras 527-529; ICTY, *Blaskic Appeal Judgement*, paras 144-148.

²⁶¹⁷ ICTY, *Stakic Trial Judgement*, paras 770-773; ICTY, *Mladic Trial Judgement*, paras 3263-3266; ICTY, *Brdanin Trial Judgement*, paras 1042-1043, 1049; ICTY, *Brdanin Appeal Judgement*, paras 292-297; ICTY, *Brdanin Appeal Judgement*, paras 292-297; ICTY, *Karadzic Trial Judgement*, paras 535-536.

²⁶¹⁸ ICTY, *Stakic Trial Judgement*, paras 770-773; ICTY, *Mladic Trial Judgement*, paras 3263-3266; ICTY, *Brdanin Trial Judgement*, paras 1032-1041, 1049; ICTY, *Brdanin Appeal Judgement*, paras 292-297; ICTY, *Brdanin Appeal Judgement*, paras 292-297; ICTY, *Karadzic Trial Judgement*, paras 535-536.

²⁶¹⁹ ICTY, *Mladic Trial Judgement*, paras 3263-3266; ICTY, *Brdanin Appeal Judgement*, paras 292-297; ICTY, *Karadzic Trial Judgement*, paras 535-536.

²⁶²⁰ ICTY, *Mladic Trial Judgement*, paras 3263-3266; ICTY, *Brdanin Trial Judgement*, paras 1044-1045, 1049; ICTY, *Brdanin Appeal Judgement*, paras 292-297; ICTY, *Karadzic Trial Judgement*, paras 517-521, 535-536.

²⁶²¹ ICTY, *Stakic Trial Judgement*, paras 770-773; ICTY, *Mladic Trial Judgement*, paras 3263-3266; ICTY, *Brdanin Trial Judgement*, paras 1044-1045, 1049; ICTY, *Brdanin Appeal Judgement*, paras 292-297; ICTY, *Karadzic Trial Judgement*, paras 535-536.

²⁶²² ICTY, *Stakic Trial Judgement*, paras 770-773; ICTY, *Mladic Trial Judgement*, paras 3263-3266; ICTY, *Brdanin Trial Judgement*, paras 1046-1049; ICTY, *Brdanin Appeal Judgement*, paras 292-297; ICTY, *Karadzic Trial Judgement*, paras 535-536.

²⁶²³ ICC, *Ongwen Trial Judgement*, para. 2733; ICTY, *Blagojevic & Jokic Trial Judgement*, para. 580; ICTY, *Milutinovic Trial Judgement*, para. 178; ICTY, *Kupreskic Trial Judgement*, paras 605, 617-619; ICTY, *Kordic & Cerkez Appeal Judgement*, para. 671; ICTY, *Blaskic Appeal Judgement*, para. 135.

²⁶²⁴ ICC, *Ntaganda Trial Judgement*, para. 992; ICTY, *Kupreskic Trial Judgement*, paras 619-621; ICTY, *Kordic & Cerkez Appeal Judgement*, para. 671; ICTY, *Blaskic Appeal Judgement*, para. 135.

²⁶²⁵ ICC, *Ntaganda Trial Judgement*, para. 991; ICC, *Ntaganda Decision on the Confirmation of Charges*, para. 58; ICTY, *Kupreskic Trial Judgement*, paras 605, 615; ICTR, *Semanza Trial Judgement*, para. 349.

²⁶²⁶ ICC, *Ntaganda Trial Judgement*, para. 992; ICTY, *Kupreskic Trial Judgement*, paras 621-622; ICTY, *Kordic and Cerkez Trial Judgement*, para. 199; ICTR, *Semanza Trial Judgement*, para. 349.

²⁶²⁷ ICC, *Ongwen Trial Judgement*, para. 2734; ICC, *Ntaganda Trial Judgement*, para. 988; ICTY, *Blagojevic & Jokic Trial Judgement*, paras 582-583; ICTY, *Milutinovic Trial Judgement*, para. 177; ICTR, *Semanza Trial Judgement*, para. 350.

perpetrator targeted the group or collectivity itself.²⁶²⁸ The targeted group can be defined in a positive or negative manner, meaning the perpetrator can target certain individuals or groups for not belonging to a certain group.²⁶²⁹

1335. The members of the group or collectivity need only be “identifiable”, based either on objective criteria or the subjective notions or beliefs of the perpetrator regarding the victim’s membership to the relevant group or collectivity.²⁶³⁰ It is immaterial whether the victim(s) actually belonged to the group/collectivity in question, as long as they have been subjectively perceived as such and targeted by the perpetrator for that reason.²⁶³¹ It is possible for a victim to be targeted on the basis of a combination of more than one ground.²⁶³²

ICC, ONGWEN TRIAL JUDGEMENT, PARA. 2736

In evaluating the alleged status as a protected group, the particular political, social, and cultural context are relevant, as are, in addition to the objective factors relevant to the discriminatory ground alleged, the subjective perception of belonging of both the perpetrator and the victim.⁷¹⁹² It is noted, however, that while it must be demonstrated that the perpetrator targeted certain persons, a group, or a collectivity, based on one of the prohibited grounds, it is not required that all victims of the crime of persecution be members, sympathisers, allies of, or in any other way related to, the protected group.

1336. **Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the ICC Statute, or other grounds that are universally recognized as impermissible under international law.** To establish this element, it must be proven that the perpetrator targeted the victims on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law.²⁶³³

1337. The discriminatory targeting may be based on the following grounds:

- **Political:** A group can be described as political if its participants share membership in a political party, ideological political beliefs, an actual or perceived opposition, or

²⁶²⁸ ICTY, *Stakic Trial Judgement*, para. 747; ICTY, *Kordic & Cerkez Appeal Judgement*, paras 106-109; ICTY, *Blaskic Appeal Judgement*, para. 143.

²⁶²⁹ ICC, *Ongwen Trial Judgement*, para. 2735; ICC, *Ntaganda Trial Judgement*, para. 1009.

²⁶³⁰ ICC, *Ongwen Trial Judgement*, para. 2736; ICC, *Ntaganda Trial Judgement*, paras 1010-1011; ICC, *Situation in Bangladesh/Myanmar Authorisation Decision*, para. 102; Triffterer and Ambos (eds), *The ICC Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 221; ICTY, *Naletilic & Martinovic Trial Judgement*, para. 636 at fn. 1572; ICTY, *Milutinovic Trial Judgement*, para. 177; ICTY, *Krnojelac Appeal Judgement*, para. 185.

²⁶³¹ ICC, *Ntaganda Trial Judgement*, para. 1011; ICC, *Situation in Burundi Authorisation Decision*, para. 133; ICC, *Ruto et al. Decision on Confirmation of Charges*, para. 273; ICC, *Gbagbo Decision on Confirmation of Charges*, para. 204; ICTY, *Krnojelac Appeal Judgement*, para. 185; ICTY, *Naletilic & Martinovic Trial Judgement*, para. 636; Triffterer and Ambos (eds), *The ICC Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 221.

²⁶³² ICC, *Ntaganda Trial Judgement*, para. 1009.

²⁶³³ *ICC Statute*, Article 7(1)(h); ICTY, *Blagojevic & Jokic Trial Judgement*, para. 583; ICTY, *Milutinovic Trial Judgement*, para. 177; ICTY, *Naletilic & Martinovic Trial Judgement*, para. 636 at fn. 1572; ICTY, *Milutinovic Trial Judgement*, para. 177; ICTY, *Blaskic Appeal Judgement*, paras 131, 161; ICTY, *Kordic & Cerkez Appeal Judgement*, paras 101, 674.

dissenting views, to a particular political regime.²⁶³⁴ This ground includes targeting by reason of personal political affiliations, whether actual or merely perceived as such by the perpetrator.²⁶³⁵ Persecution on political grounds “may include various categories of persons, such as: officials and political activists; persons of certain opinions, convictions and beliefs; persons of certain ethnicity or nationality”.²⁶³⁶

- **Racial:** A racial group “is based on hereditary physical traits often identified with geography.”²⁶³⁷ Persecution based on racial grounds includes “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin”.²⁶³⁸
- **National:** The definition of a group based on national grounds is derived from characteristics that are “broader than citizenship and includes attributes of a group which considers that it is a nation even though the members of the group are located in more than one State”.²⁶³⁹ For example, a group of persons in a State may be targeted because they are nationals of another State.²⁶⁴⁰
- **Ethnic:** An ethnic group can be defined as one that shares a “common language and culture”,²⁶⁴¹ or a group which distinguishes itself as such (self-identification); or a group identified as such by others, including perpetrators of the crimes (identification by others).²⁶⁴² For example, an ethnic group may be defined by virtue of its shared language, tribal customs and traditional links to its lands.²⁶⁴³
- **Cultural:** A cultural group can be described as one that shares common customs, arts and social institutions.²⁶⁴⁴
- **Religious:** A religious group can be defined as one whose members share the same religion, denomination, mode of worship or common beliefs.²⁶⁴⁵ Persecution on religious grounds includes the targeting of individuals based on: their chosen or

²⁶³⁴ ICC, *Mbarushimana* [Decision on the Confirmation of Charges](#), para. 37; ICC, *Ruto et al.* [Decision on Confirmation of Charges](#), paras 273, 347; ICC, “[Report on Preliminary Examination Activities](#)”, 5 December 2019, para. 80.

²⁶³⁵ ICC, *Ongwen* [Trial Judgement](#), para. 2737 (citing ICC, *Situation in Burundi* [Authorisation Decision](#), para. 133; ECCC, *Kaing Guek (alias Duch)* [Appeal Judgement](#), para. 272.

²⁶³⁶ ECCC, *Kaing Guek (alias Duch)* [Appeal Judgement](#), para. 272.

²⁶³⁷ ICTR, *Kayishema et al.* [Trial Judgement](#), para. 98; ICTR, *Akayesu* [Trial Judgement](#), para. 514.

²⁶³⁸ Triffterer and Ambos (eds), *The ICC Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 224 (citing *International Convention on Elimination of All Forms of Racial Discrimination* (adopted in GA Res. 2106 A (XX) of 21 December 1965, entered into force 4 January 1969), Article 1).

²⁶³⁹ Triffterer and Ambos (eds), *The ICC Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 224.

²⁶⁴⁰ ICC, *Gbagbo* [Decision on Confirmation of Charges](#), para. 205; ICC, *Blé Goudé* [Decision on the Confirmation of Charges](#), para. 123; ICC, *Simone Gbagbo* [Decision on Arrest Warrant](#), para. 16. See also, Robinson, [Summary of Decisions of the International Criminal Court](#), 2022, p. 73

²⁶⁴¹ ICC, *Situation in Bangladesh/Myanmar* [Authorisation Decision](#), para. 103; ICTR, *Kayishema et al.* [Trial Judgement](#), para. 98; ICTR, *Akayesu* [Trial Judgement](#), para. 513.

²⁶⁴² ICTR, *Kayishema et al.* [Trial Judgement](#), para. 98.

²⁶⁴³ ICC, *Al Bashir* [Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir](#), para. 137; ICC, *Ntaganda* [Decision on the Confirmation of Charges](#), para. 58; ICC, *Amad Harun & Ali Kushayb* [Decision on the Prosecution Application under article 58\(7\) of the Statute](#), para. 74; ICC, *Muhammad Hussein* [Public redacted version of “Decision on the Prosecutor’s application under article 58 relating to Abdel Raheem Muhammad Hussein”](#), para. 11.A.

²⁶⁴⁴ Triffterer and Ambos (eds), *The ICC Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 224.

²⁶⁴⁵ ICC, *Situation in Bangladesh/Myanmar* [Authorisation Decision](#), para. 103; ICTR, *Kayishema et al.* [Trial Judgement](#), para. 98; ICTR, *Akayesu* [Trial Judgement](#), para. 515.

perceived religious affiliation; their failure to adhere to the religious beliefs or precepts of the perpetrator; or their lack of a religion.²⁶⁴⁶

- **Gender:** Under the ICC Statute, “gender” refers to the two sexes, male and female, within the context of society”.²⁶⁴⁷ The ICC Office of the Prosecutor’s Policy on the Crime of Gender Persecution notes that “[g]ender refers to sex characteristics and social constructs and criteria used to define maleness and femaleness, including their roles, behaviours, activities and attributes. As a social construct, gender varies within societies and from society to society and can change over time”.²⁶⁴⁸ Further, “[g]ender persecution is committed against persons because of sex characteristics and/or because of the social constructs and criteria used to define gender”.²⁶⁴⁹ This is widely considered to include persecution on account of sexual orientation or gender identity.²⁶⁵⁰
- **Other Grounds:** The insertion of “or other grounds” allows for persecution on grounds other than those expressly listed, provided that such grounds “are universally recognized as impermissible under international law”. The words “universally recognized” should be understood as “widely recognized”; it does not mean that all States must have recognized a particular ground as impermissible in order for it to form a ground of persecution.²⁶⁵¹ Such grounds may include age, sexual orientation or disability.²⁶⁵²

1338. **The conduct was committed in connection with any act referred to in Article 7, paragraph 1, of the ICC Statute or any crime within the jurisdiction of the ICC.** The conduct of the perpetrator that deprived the victims of their fundamental rights must have been committed in connection with another act enumerated in Article 7(1) (i.e., another crime against humanity listed in the ICC Statute) or any crime within the jurisdiction of the Court (i.e., genocide, war crimes or aggression).²⁶⁵³

1339. This essentially means that if there is an act which, in and of itself, is not a crime within the ICC Statute, but is carried out in connection with (or via) such crimes, judges may still consider this conduct to amount to persecutory conduct.²⁶⁵⁴ For example, restrictions placed on a particular group to curtail their rights to participate

²⁶⁴⁶ Triffterer and Ambos (eds), *The ICC Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 224. See e.g., ICC, *Gbagbo Decision on Confirmation of Charges*, paras 205; ICC, *Blé Goudé Decision on the Confirmation of Charges*, para. 123; ICC, *Simone Gbagbo Decision on Arrest Warrant*, para. 16.

²⁶⁴⁷ ICC Statute, Article 7(3).

²⁶⁴⁸ ICC-OTP, *Policy on the Crime of Gender Persecution*, p. 3.

²⁶⁴⁹ ICC-OTP, *Policy on the Crime of Gender Persecution*, p. 3.

²⁶⁵⁰ ICC-OTP, *Policy on the Crime of Gender Persecution*, p. 6. See also, ICC-OTP, *Policy Paper on Sexual and Gender Based Violence*, June 2014, p. 3; Grey et al., *Gender-based Persecution as a Crime against Humanity: The Road Ahead*, Oxford University Press, 2019, p.14.

²⁶⁵¹ Triffterer and Ambos (eds), *The ICC Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 226.

²⁶⁵² Schabas, *The International Criminal Court: A Commentary on the ICC Statute*, 2nd Edition, Oxford University Press, 2016, p. 198.

²⁶⁵³ ICC Statute, Article 7(1)(h); ICC *Elements of Crimes*, Article 7(1)(h), Element 4. See also, ICC, *Situation in Burundi Authorisation Decision*, para. 131; ICC, *Ongwen Trial Judgement*, para. 2730; ICC, *Ntaganda Trial Judgement*, para. 1023.

²⁶⁵⁴ ICTR, *Nahimana et al. Appeal Judgement*, paras 985-988; ICTY, *Kvočka Appeal Judgement*, para. 321; ICTY, *Kupreskic Trial Judgement*, paras 615(e), 622. See also, Schabas, *The International Criminal Court: A Commentary on the ICC Statute*, 2nd Edition, Oxford University Press, 2016, pp 199-200.

in social life (i.e., visits to public parks, theatres or libraries), or hate speech targeting a portion of the population on discriminatory grounds, are not severe enough, in and of themselves, to amount to persecution. However, they may be considered persecutory acts when considered in the context of a widespread attack on the civilian population during which other crimes against humanity are being committed and must be weighed for their cumulative effect.²⁶⁵⁵ Any discriminatory measure that does not have such a connection, however, would not amount to the crime against humanity of persecution.²⁶⁵⁶

1340. While this element appears specific to the ICC Statute, the ICTY's jurisprudence also requires that the acts underlying persecution as a crime against humanity, whether considered in isolation or in conjunction with other acts, must be of equal gravity to the crimes listed in Article 5 of the ICTY Statute (i.e., the other crimes against humanity).²⁶⁵⁷

iii. Definition of Persecution (Subjective elements)

1341. The subjective elements for the crime against humanity of persecution require intent,²⁶⁵⁸ which will be established when: (1) the perpetrator intended to severely deprive one or more persons of fundamental rights; and (2) the perpetrator intended to discriminate against the person(s) based on political, racial, national, ethnic, cultural, religious, gender, or other universally recognized grounds.

1342. **The perpetrator intended to severely deprive one or more persons of fundamental rights.** Such intent can be established where: (1) the perpetrator meant to engage in acts or omissions (i.e., deliberately acted or failed to act) (**intent to conduct**)²⁶⁵⁹ in order to severely deprive one or more persons of fundamental rights; or (2) the perpetrator was aware that a severe deprivation of fundamental rights of one or more persons would occur in the ordinary course of events (**intent to consequence**).²⁶⁶⁰ At the ICC, awareness that the consequence would occur in the ordinary course of events requires virtual certainty that the events would occur.²⁶⁶¹ In relation to the need for the deprivation of human rights to be "severe", this does not require the perpetrator to have completed a value judgement as to the severity of the deprivation inflicted.²⁶⁶²

1343. **The perpetrator intended to discriminate against the person(s) based on political, racial, national, ethnic, cultural, religious, gender, or other universally recognized grounds.**²⁶⁶³ To prove this subjective element, it must be established that the perpetrator deliberately targeted the victim *based on*, or *because*, they perceived the victim

²⁶⁵⁵ ICTR, *Nahimana et al.* [Appeal Judgement](#), paras 985-988; ICTY, *Kupreskic* [Trial Judgement](#), paras 615(e), 622.

²⁶⁵⁶ ICC, *Situation in Burundi* [Authorisation Decision](#), para. 131.

²⁶⁵⁷ ICTY, *Kordic & Cerkez* [Appeal Judgement](#), paras 102, 671; ICTY, *Blaskic* [Appeal Judgement](#), para. 160; ICTY, *Krnjelac* [Appeal Judgement](#), para. 221; ICTY, *Simic* [Appeal Judgement](#), para. 177; ICTY, *Brdanin* [Appeal Judgement](#), para. 296

²⁶⁵⁸ [ICC Statute](#), Articles 30(2), 30(3).

²⁶⁵⁹ [ICC Statute](#), Article 30(2)(a); ICC, *Katanga* [Trial Judgement](#), para. 774.

²⁶⁶⁰ [ICC Statute](#), Article 30(2)(b); ICC, *Katanga* [Trial Judgement](#), para. 774.

²⁶⁶¹ See ICC, *Katanga* [Trial Judgement](#), paras 775-776.

²⁶⁶² ICC, *Ongwen* [Trial Judgement](#), para. 2740.

²⁶⁶³ ICC, *Ongwen* [Trial Judgement](#), para. 2740; ICTY, *Blagojevic & Jokic* [Trial Judgement](#), para. 583; ICTY, *Milutinovic* [Trial Judgement](#), paras 176-177; ICTY, *Naletilic & Martinovic* [Trial Judgement](#), para. 638; ICTR, *Semanza* [Trial Judgement](#), para. 350; ICTR, *Akayesu* [Appeal Judgement](#), paras 464, 468.

as belonging to a particular group or collectivity.²⁶⁶⁴ In other words, the severe deprivation of fundamental rights must have been carried out with the *intent* to discriminate against the person(s) based on one of the listed grounds.²⁶⁶⁵ This intent may be inferred from the general behavior of the perpetrator, as well as the circumstances surrounding the commission of the crime.²⁶⁶⁶

1344. It does not matter whether the perpetrator also had personal motives for committing the acts, as such motives do not preclude a discriminatory intent.²⁶⁶⁷ In addition, the discriminatory intent may be based on intersecting grounds of persecution, such as race and gender.²⁶⁶⁸

ICTY, *PRLIC ET AL.* APPEAL JUDGEMENT, PARA. 422 [FOOTNOTES OMITTED]

Persecution as a crime against humanity requires evidence that the principal perpetrator had the specific intent to discriminate on one of [the enumerated] grounds. While the requisite discriminatory intent may not be inferred directly from the general discriminatory nature of an attack characterised as a crime against humanity, the “discriminatory intent may be inferred from such a context as long as, in view of the facts of the case, circumstances surrounding the commission of the alleged acts substantiate the existence of such intent”.

²⁶⁶⁴ ICC, *Ongwen Trial Judgement*, para. 2739 (citing ICC, *Al Hassan Decision on the Confirmation of Charges*, para. 671); ICTY, *Popovic et al. Trial Judgement*, para. 968; ICTY, *Karadzic Trial Judgement*, para. 500; ICTY, *Tadic Appeal Judgement*, para. 305; ICTY, *Blaskic Appeal Judgement*, para. 129; ICTY, *Prlic et al. Appeal Judgement*, para. 422; ICTY, *Kordic & Cerkez Appeal Judgement*, para. 674; ICTR, *Semanza Trial Judgement*, para. 350. See also, Schabas, *The International Criminal Court: A Commentary on the ICC Statute*, 2nd Edition, Oxford University Press, 2016, p. 172.

²⁶⁶⁵ ICC, *Ongwen Trial Judgement*, para. 2739; ICTY, *Prlic et al. Appeal Judgement*, para. 422; ICTY, *Kordic & Cerkez Appeal Judgement*, para. 674; ICTR, *Semanza Trial Judgement*, para. 350.

²⁶⁶⁶ ICC, *Ongwen Trial Judgement*, para. 2739 (citing ICC, *Al Hassan Decision on the Confirmation of Charges*, para. 671); ICTY, *Popovic et al. Trial Judgement*, para. 969; ICTY, *Kvočka Appeal Judgement*, para. 460; ICTY, *Prlic et al. Appeal Judgement*, para. 422.

²⁶⁶⁷ ICTY, *Dordevic Appeal Judgement*, para. 887.

²⁶⁶⁸ ICC, *Al Hassan Decision on the Confirmation of Charges*, para. 702.

- o) Crime against Humanity of Enforced Disappearance (Convention for the Protection of all Persons from Enforced Disappearance; ICC Statute, Article 7(1)(i))

ELEMENTS OF THE CRIME: TO CONVICT A PERPETRATOR FOR ENFORCED DISAPPEARANCE AS A CRIME AGAINST HUMANITY THE FOLLOWING ELEMENTS NEED TO BE ESTABLISHED:

(1) Objective elements

- The perpetrator:
 - (a) Arrested, detained or abducted one or more persons (para. 1355); *or* Refused to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons (para. 1360).
- And:
 - (a) Such arrest, detention or abduction was followed or accompanied by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons (para. 1355); *or*
 - (b) Such refusal was preceded or accompanied by that deprivation of freedom (para. 1356).
- Such arrest, detention or abduction was carried out by, or with the authorisation, support or acquiescence of, a State or a political organisation (para. 1365).
- Such refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons was carried out by, or with the authorisation or support of, such State or political organisation (para. 1358).

(2) Subjective elements

- The perpetrator intended to: (a) arrest, detain or abduct one or more persons; *or* (b) refuse to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons (para. 1370).
- The perpetrator knew that (para. 1371):
 - (a) Such arrest, detention or abduction would be followed in the ordinary course of events by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; *or*
 - (b) Such refusal was preceded or accompanied by that deprivation of freedom.
- The perpetrator knew that such arrest, detention or abduction was carried out by, or with the authorisation, support or acquiescence of, a State or a political organisation (para. 1374).

(3) Contextual elements

- The conduct was committed as part of a widespread or systematic attack directed against a civilian population (see above, para. 1160).
- The perpetrator knew that the conduct was part of or intended the conduct to be a part of a widespread or systematic attack directed against a civilian population (see above, para. 1173).

1345. Enforced disappearance is prohibited by the International Convention for the Protection of All Persons from Enforced Disappearance,²⁶⁶⁹ to which Ukraine is a State Party.²⁶⁷⁰ The Convention defines enforced disappearance as the “arrest, detention,

²⁶⁶⁹ [International Convention for the Protection of All Persons from Enforced Disappearance.](#)

²⁶⁷⁰ OHCHR, "[Ratification of 18 International Human Rights Treaties](#)".

abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law”.²⁶⁷¹

1346. In addition, Article 7(1)(i) of the ICC Statute prohibits the crime against humanity of enforced disappearance,²⁶⁷² which is defined as “the arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of, a State or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time”.²⁶⁷³

1347. The crime of enforced disappearance under the ICC Statute allows one, or several persons, to be prosecuted at different stages of the disappearance.²⁶⁷⁴ In sum, the crime consists of two major alternative types of conduct – deprivation of liberty (Element 1(a) or Element 2(b)) and withholding of information (Element 1(b) or Element 2(a)). Thus, there are two primary ways in which a perpetrator may be involved in the enforced disappearance that would lead to responsibility for the crime (where the remaining elements are also satisfied):

- **A perpetrator who arrested, detained or abducted one or more persons** (Element 1(a)), where this conduct was followed or accompanied by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons (Element 2(a)) which the perpetrator knew would occur in the ordinary course of events (Element 3(a)).
- **A perpetrator who refused to acknowledge the arrest, detention, or abduction, or to give information on the fate or whereabouts of such person(s)** (Element 1(b)), where this conduct was preceded or accompanied by a deprivation of freedom (Element 2(b)) of which the perpetrator was aware (Element 3(b)).

1348. Accordingly, depending on the facts, judges should be aware that a national or international prosecutor, when making their charging decisions, will either apply Elements 1(a), 2(a) and 3(a) **OR** Elements 1(b), 2(b) and 3(b) (as will be explained in more detail below). Both acts must have been carried out with the authorisation, support or acquiescence of a State or political organisation.

1349. In addition, the ICC Statute requires that the perpetrator intended to remove the victim from the protection of the law for a prolonged period of time.²⁶⁷⁵ This additional requirement (i.e., that the removal from the protection of the law is for a *prolonged period of time*) is unique to the ICC Statute. The Working Group on Enforced Disappearances has recommended that “the definition of enforced disappearance provided for by the ICC Statute be interpreted by the national authorities in line with the more

²⁶⁷¹ [International Convention for the Protection of All Persons from Enforced Disappearance](#), Article 1(2).

²⁶⁷² [ICC Statute](#), Article 7(1)(i).

²⁶⁷³ [ICC Statute](#), Article 7(2)(i).

²⁶⁷⁴ Kittichaisaree, *International Criminal Law*, Oxford University Press, 2001, p. 123.

²⁶⁷⁵ [ICC Statute](#), Article 7(2)(i).

adequate definition provided for in Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance.”²⁶⁷⁶ Article 2 of the Convention requires only that the person(s) are placed “outside the protection of the law”

i. Applicability under Ukrainian Law

1350. Currently, Ukrainian legislation does not criminalize the crime against humanity of enforced disappearance. It does however criminalize enforced disappearance as an ordinary crime under Article 146-1 of the CCU. The definition provided in Article 146-1 is similar to the ICC Statute and International Convention for the Protection of All Persons from Enforced Disappearance definitions. Specifically, the domestic crime of enforced disappearance involves “the arrest, detention, abduction or deprivation of liberty in any other form by a representative of a State, including a foreign one, with subsequent refusal to acknowledge the arrest, detention, abduction or deprivation of liberty in any other form or withholding the fate of such a person or place of residence”. As with the International Convention for the Protection of All Persons from Enforced Disappearance, Article 146-1 does not require that the persons are placed outside the protection of the law for a prolonged period of time. The CCU provision does not require the act of enforced disappearance to have been committed in the context of a widespread or systematic attack directed against a civilian population (i.e., the contextual element).
1351. Further, Draft Bill 7290 will introduce (if, and when, it comes into force) the crime against humanity of enforced disappearance committed within the framework of a large-scale or systematic attack on civilians under Article 442-1.1(6) of the CCU. Note 2 to Article 442-1 indicates that “[e]nforced disappearance in this article should be understood as the acts provided for in Article 146-1 of this Code”. The elements of this crime should be interpreted in line with the international instruments.
1352. As with the International Convention for the Protection of All Persons from Enforced Disappearance, and unlike the ICC Statute, these definitions do not require that the persons are placed outside the protection of the law for a *prolonged period of time*. As such, the requirement that the removal of the victim from the protection of the law be “for a prolonged period of time” is not required in any future domestic prosecution of enforced disappearance in Ukraine, whether under current Article 146¹ of the CCU, or Article 442¹(1)(6) of the CCU (if, and when, Draft Bill 2689 enters into force). Nevertheless, in line with international instruments, it must still be proven that the victim was placed “outside the protection of the law”.²⁶⁷⁷

ii. Definition of Enforced Disappearance (Objective elements)

1353. As mentioned above, the objective elements of this crime against humanity requires that:

²⁶⁷⁶ Report of the Working Group on Enforced or Involuntary Disappearances, "Best practices on enforced disappearances in domestic criminal legislation", 28 December 2010, A/HRC/16/48/Add.3, para. 15.

²⁶⁷⁷ [International Convention for the Protection of All Persons from Enforced Disappearance](#), Article 2. See also, Cryer, et al. (eds), *An Introduction to International Criminal Law and Procedure*, 3rd Edition, Cambridge University Press, 2015, p. 260.

- (1) The perpetrator either:
 - (a) arrested, detained or abducted one or more persons; and (b) such arrest, detention or abduction was followed or accompanied by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; *or*
 - (a) refused to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons; and (b) such refusal was preceded or accompanied by that deprivation of freedom;
- (2) such arrest, detention or abduction was carried out by, or with the authorization, support or acquiescence of, a State or a political organization; and
- (3) such refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons was carried out by, or with the authorization or support of, such State or political organization.

ICC, SITUATION IN BURUNDI PUBLIC REDACTED VERSION OF “DECISION PURSUANT TO ARTICLE 15 OF THE ROME STATUTE ON THE AUTHORIZATION OF AN INVESTIGATION INTO THE SITUATION IN THE REPUBLIC OF BURUNDI”, PARA. 118 [FOOTNOTES OMITTED]

The crime [of enforced disappearance] consists of two inseparably interrelated components: (i) the victim’s deprivation of liberty; and (ii) the ensuing denial or suppression of information. With regard to the first component, the Chamber understands the terms “arrest detention or abduction” to cover comprehensively any form of deprivation of liberty of a person against his or her will. The crime also includes the scenario in which a victim, initially arrested and detained lawfully, may be “disappeared” in custody. With regard to the second component, the Chamber holds that the refusal to acknowledge or give information encompasses outright denial or the giving of false information about the fate or whereabouts of the victim. Whether or not the victim’s family lodges a formal complaint, the State authorities are duty-bound to commence an impartial and thorough investigation *ex officio* without delay into the disappearance of the victim.

1354. Accordingly, the following sections will address: 1) the objective elements relevant to a perpetrator involved in the arrest, detention, or abduction of one or more persons; 2) the objective elements relevant to the perpetrator involved in the refusal to acknowledge the arrest, detention or abduction; and 3) the common objective elements.

a. A perpetrator who arrested, detained, or abducted one or more persons

1355. **The perpetrator arrested, detained or abducted one or more persons.** To satisfy Element 1(a), it must be established that the perpetrator’s conduct deprived a person or persons of their liberty. The phrasing of the international instruments anticipate that this will be conducted through “arrest, detention or abduction”, although it may also encompass “any form of deprivation of liberty of a person against his or her

will”.²⁶⁷⁸ This includes situations in which the individual was initially arrested or detained lawfully, but later disappeared in custody.²⁶⁷⁹

1356. The word “detained” is intended to include perpetrators who maintain an existing detention.²⁶⁸⁰ In other words, the perpetrator does not need to be involved in the initial arrest or abduction.

1357. **Element 2(a): Such arrest, detention or abduction was followed or accompanied by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person(s).** It must then be demonstrated that the deprivation of liberty (Element 1(a)) was accompanied by a refusal to acknowledge or to give information on the whereabouts of an individual.²⁶⁸¹ This requirement is “inseparably interrelated”²⁶⁸² with the requirement that a victim be deprived of their liberty and goes to one of the foundational aspects of the offence; that is, that friends and relatives of disappeared individuals are deprived of, or actively prevented from discovering, information regarding the fate or whereabouts of the persons concerned.²⁶⁸³

1358. A “refusal to acknowledge or provide information” will include situations in which the perpetrator denies outright that an arrest, detention or abduction has taken place, and situations in which they provide misleading or obfuscatory information regarding the fate or whereabouts of an individual.²⁶⁸⁴

1359. Finally, it should be stressed that, where disappearances have occurred, the State has an obligation to investigate and provide information as soon as possible, regardless of whether the family has lodged a complaint.²⁶⁸⁵ Until this occurs, and the fate or whereabouts of the individual is clarified, enforced disappearance will be considered as a continuous (or ongoing) crime.²⁶⁸⁶

²⁶⁷⁸ [International Convention for the Protection of All Persons from Enforced Disappearance](#), Article 2; ICC, *Situation in Burundi Public Redacted Version of “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi”, para. 118. See also, *Situation in Côte d’Ivoire*, ICC/02/11, Corrigendum to Decision Pursuant to Article 15 of the ICC Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire, 15 November 2011, paras 77-82.*

²⁶⁷⁹ ICC [Elements of Crimes](#), fn. 26; ICC, *Situation in Burundi Public Redacted Version of “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi”, para. 118.*

²⁶⁸⁰ ICC [Elements of Crimes](#), fn. 25.

²⁶⁸¹ [International Convention for the Protection of All Persons from Enforced Disappearance](#), Article 2; ICC [Elements of Crimes](#), Article 7(1)(i).

²⁶⁸² ICC, *Situation in Burundi Public Redacted Version of “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi”*, para. 118.

²⁶⁸³ ICC, *Situation in Burundi Public Redacted Version of “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi”*, para. 118.

²⁶⁸⁴ ICC, *Situation in Burundi Public Redacted Version of “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi”*, para. 118.

²⁶⁸⁵ [International Convention for the Protection of All Persons from Enforced Disappearance](#), Article 3; ICC, *Situation in Burundi Public Redacted Version of “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi”*, para. 118, fn. 303 and references cited therein.

²⁶⁸⁶ ICC, *Situation in Burundi Public Redacted Version of “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi”*, para. 121; UNHRC, *Quinteros v. Uruguay*, paras 7.3, 14; IACtHR, *Velasquez-Rodriguez v Honduras Judgement*, paras 155 and 181; IACtHR, *Goiburu et al. v. Peru Judgement*, para. 81; IACtHR, *Heliodoro Portugal v. Panama Judgement*, paras 34-35, 106-107; ECtHR, *El-Masri v. The Former Yugoslav Republic of Macedonia Judgement*, para. 240; ECtHR, *Varnava and Others v. Turkey Judgement*, para. 148.

- b. A perpetrator who refused to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person(s)

1360. **Element 1(b): The perpetrator refused to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons.** This element is satisfied where a perpetrator, who was not involved in the initial arrest, detention or abduction, subsequently refuses to provide acknowledgement of the detention or information on the fate or whereabouts of the victim.

1361. For more information on establishing this element, see Element 2(a), above.

1362. **Element 2(b): Such refusal was preceded or accompanied by that deprivation of liberty.** To establish this element, it must be demonstrated that the refusal to acknowledge the arrest, detention or abduction or to give information on the fate or whereabouts of the victim was preceded or accompanied by that deprivation of liberty.

1363. For more information on establishing this element, see Element 1(a), above.

c. Common objective elements

1364. The following elements need to be established irrespective of whether a person is responsible for the arrest, detention or abduction **OR** is responsible for refusing to acknowledge the fate of the disappeared person or to provide accurate information.

1365. **Element 4: Such arrest, detention or abduction was carried out by, or with the authorization, support or acquiescence of, a State or a political organization.** This element requires the arrest, detention or abduction to have been perpetrated by, or with the support or authorization of, a State or political organization.²⁶⁸⁷ Enforced disappearance is typically a “State crime” associated with the actions of the police or armed forces, or a State’s security service, or groups that are implementing State policies.²⁶⁸⁸

1366. However, it should be noted that, contrary to the approach taken in other relevant international instruments,²⁶⁸⁹ under the ICC Statute, the term “political organisations” includes other non-state actors. Although the precise meaning of the phrase “political organization” remains somewhat unclear, it has been convincingly argued that it

²⁶⁸⁷ [International Convention for the Protection of All Persons from Enforced Disappearance](#), Article 2; ICC, *Situation in Burundi Public Redacted Version of “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi”*, para. 119.

²⁶⁸⁸ When establishing a State/organisational nexus, it should be stressed that internal political instability or any other public emergency *may not* be invoked to justify the conduct of State agents: ICC, *Situation in Burundi Public Redacted Version of “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi”*, para. 119.

²⁶⁸⁹ See, [International Convention for the Protection of All Persons from Enforced Disappearance](#), Article 2; UN General Assembly, [Declaration on the Protection of All Persons from Enforced Disappearance](#) (28 February 1992) E/CN.4/RES/1992/29, Preamble. In broadening the definition in this way, the ICC Statute nonetheless achieves a balance between preserving the state-based or organisational character of the crime and the underlying rationale of international criminal law as a body of rules concerned with the personal responsibility of individuals, not just the interaction of the individual and the state, as in human rights law.

should be taken to mean (at least) “politically motivated organizations whose purpose is the commission of attacks constituting crimes against humanity”.²⁶⁹⁰

1367. **Element 5: Such refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons was carried out by, or with the authorization or support of, such state or political organization.**

In connection with Element Four, this element requires that the State or political organization must have also carried out, authorized or supported the refusal to acknowledge the deprivation of freedom.²⁶⁹¹

1368. For example, in *Velasquez-Rodriguez v Honduras*, the Inter-American Court of Human Rights found that the disappearance of Velásquez “was carried out by agents who acted under cover of public authority”. The conduct of the authorities referred to by the Court includes: the systematic denial by the authorities of any knowledge of the detention, whereabouts or fate of the victim when queried by the victim’s relatives, lawyer, etc.; the inability of military or government officials to prevent/investigate the disappearance, punish those responsible or help those interested discover the whereabouts and fate of the victim or the location of the remains; the lack of results produced by the investigative committee created by the government and military; and the fact that the judicial proceedings brought were processed slowly with a clear lack of interest, or dismissed entirely.²⁶⁹²

iii. Definition of Enforced Disappearance (Subjective elements)

1369. The subjective elements for the crime against humanity of enforced disappearance require intent and knowledge,²⁶⁹³ which will be established when: (1) the perpetrator intended to: (a) arrest, detain or abduct one or more persons, *or* (b) refuse to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons; (2) the perpetrator was aware that: (a) such arrest, detention or abduction would be followed in the ordinary course of events by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons, *or* (b) such refusal was preceded or accompanied by that deprivation of freedom; (3) the perpetrator was aware that such arrest, detention or abduction was carried out by, or with the authorization, support or acquiescence of, a State or a political organization; and (4) the perpetrator intended to remove such person or persons from the protection of the law.

1370. **The perpetrator intended to: (a) arrest, detain or abduct one or more persons, or (b) refuse to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons.** Such intent can be established where: (1) the perpetrator meant to engage in acts or omissions (i.e.,

²⁶⁹⁰ Stahn, *A Critical Introduction to International Criminal Law*, Cambridge University Press, 2019, p. 67.

²⁶⁹¹ [International Convention for the Protection of All Persons from Enforced Disappearance](#), Article 2; ICC [Elements of Crimes](#), Article 7(1)(i).

²⁶⁹² IACtHR, *Velasquez-Rodriguez v Honduras* [Judgement](#), paras 118, 147(d)(iv), 147(d)(v), 182. Similarly, see, IACtHR, *Godínez-Cruz v. Honduras* [Judgement](#), paras 124, 153(d)(iv), 153(d)(v), 192.

²⁶⁹³ [ICC Statute](#), Articles 30(2), 30(3); Klamberg, [Commentary on the International Criminal Court](#), Torkel Opsahl Academic EPublisher Brussels, 2017, p. 59.

deliberately acted or failed to act) (**intent to conduct**)²⁶⁹⁴ in order to arrest, detain or abduct one or more persons, *or* to refuse to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons; or (2) the perpetrator was aware that, in the ordinary course of events, they would arrest, detain or abduct one or more persons, *or* they would refuse to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons (**intent to consequence**).²⁶⁹⁵ At the ICC, awareness that the consequence would occur in the ordinary course of events requires virtual certainty that the events would occur.²⁶⁹⁶

1371. **Element 3(a): The perpetrator was aware that: (a) such arrest, detention or abduction would be followed in the ordinary course of events by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons, or (b) such refusal was preceded or accompanied by that deprivation of freedom.** To satisfy this element, it must be established that the perpetrator was aware that the arrest or detention would be followed in the ordinary course of events by a refusal to acknowledge the deprivation of liberty or to give information on the fate or whereabouts of such person or persons. The ICC Elements of Crimes indicates that “this element, inserted because of the complexity of this crime, is without prejudice to the General Introduction to the Elements of Crimes,”²⁶⁹⁷ i.e., that a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.²⁶⁹⁸ This means that, for this crime to have been committed, the perpetrator must have committed the acts of enforced disappearance with intent and knowledge as well as with the awareness outlined in this element.
1372. The ICC Statute requires the awareness that a deprivation of liberty is to “be followed in the ordinary course of events by a refusal”. Thus, the level of awareness required would exclude from the scope of application the police officer acting in good faith, but would include those who are aware of the likelihood of a “disappearance” even if they do not know specifically of any subsequent refusal to provide information.²⁶⁹⁹ Where the perpetrator maintained an existing detention, this element would be satisfied if the perpetrator was aware that such a refusal had already taken place.²⁷⁰⁰
1373. In general, judges need to assess the circumstances and facts surrounding the actions of the perpetrator in order to draw conclusions about whether or not the perpetrator was aware of an element of the crime.²⁷⁰¹
1374. **The perpetrator knew that such arrest, detention or abduction was carried out by, or with the authorization, support or acquiescence of, a State or a political orga-**

²⁶⁹⁴ ICC Statute, Article 30(2)(a); ICC, *Katanga Trial Judgement*, para. 774.

²⁶⁹⁵ ICC Statute, Article 30(2)(b); ICC, *Katanga Trial Judgement*, para. 774.

²⁶⁹⁶ See ICC, *Katanga Trial Judgement*, paras 775-776.

²⁶⁹⁷ ICC *Elements of Crimes*, fn. 27

²⁶⁹⁸ ICC *Elements of Crimes*, General Introduction, para. 2.

²⁶⁹⁹ Witschel and Rückert in Lee, *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, 2001, p. 103.

²⁷⁰⁰ ICC *Elements of Crimes*, fn. 28.

²⁷⁰¹ ICC, *Bemba Decision on Confirmation of Charges*, para. 263.

nization. To establish that the perpetrator had such knowledge, it must be proven that the perpetrator was aware that the arrest, detention or abduction (conducted by them, or that they refused to acknowledge or to give information on the fate or whereabouts of the person or persons arrested, detained or abducted) was carried out by, or with the authorization, support or acquiescence of, a State or a political organization.²⁷⁰²

1375. **Element 6: The perpetrator intended to remove such person or persons from the protection of the law.** This element sets out another specific mental requirement.²⁷⁰³ Accordingly, it must be established that the perpetrator intentionally deprived the person or persons of their liberty in order to remove them from the protection of the law. Removal from the protection of the law includes situations in which a victim is prevented from accessing judicial assistance or legal procedures.²⁷⁰⁴ This can often be established by considering the means by which the individual is deprived of their liberty. For example, abduction in unmarked cars with tinted windows;²⁷⁰⁵ capture or detention in desolate areas²⁷⁰⁶ or unofficial prisons;²⁷⁰⁷ or failing to register detainees' names,²⁷⁰⁸ may all be relevant considerations in this regard.²⁷⁰⁹ Similarly, other indicators may include the absence of any arrest warrant, the absence of records relating to detention, the absence of any criminal charge and the absence of evidence that any victim(s) were brought before a competent court or prosecuted (among others).²⁷¹⁰

²⁷⁰² ICC, *Bemba Trial Judgement*, para. 112; ICC, *Katanga Trial Judgement*, para. 970; ICTY, *Kunarac et al. Appeal Judgement*, para. 127.

²⁷⁰³ [International Convention for the Protection of All Persons from Enforced Disappearance](#), Article 2; ICC [Elements of Crimes](#), Article 7(1)(i). See also, Cryer, et al. (eds), *An Introduction to International Criminal Law and Procedure*, 3rd Edition, Cambridge University Press, 2015, p. 260: “In addition, the crime of enforced disappearance requires a particular intention, to remove a person from the protection of the law”.

²⁷⁰⁴ ICC, *Situation in Burundi Public Redacted Version of “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi”*, para. 120, fn. 305 and references cited therein.

²⁷⁰⁵ IACtHR, *Velasquez-Rodriguez v Honduras Judgement*, paras 99-100; IACtHR, *Godínez-Cruz v. Honduras Judgement*, paras 106, 110.

²⁷⁰⁶ IACtHR, *Godínez-Cruz v. Honduras Judgement*, para.154(b)(iii).

²⁷⁰⁷ IACtHR, *Godínez-Cruz v. Honduras Judgement*, para.153(d)(iii).

²⁷⁰⁸ ECtHR, *Kurt v Turkey Judgement*, para. 125; ECtHR, *Cakici v Turkey Judgement*, para. 105.

²⁷⁰⁹ ICC, *Situation in Burundi Public Redacted Version of “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi”*, para. 120.

²⁷¹⁰ Trial International, [Enforced Disappearance](#).

- p) Crime against Humanity of Apartheid (Convention on the Suppression and Punishment of the Crime of Apartheid, Article I; ICC Statute, Article 7(1)(j))

ELEMENTS OF THE CRIME: TO CONVICT A PERPETRATOR FOR APARTHEID AS A CRIME AGAINST HUMANITY THE FOLLOWING ELEMENTS NEED TO BE ESTABLISHED:

(1) Objective elements

- The perpetrator committed an inhumane act against one or more persons (para. [1381](#)).
- Such act was an act referred to in article 7, paragraph 1, of the ICC Statute, or was an act of a character similar to any of those acts (para. [1382](#)).
- The conduct was committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups (para. [1383](#)).

(2) Subjective elements

- The perpetrator intended to commit an inhumane act against one or more persons (para. [1387](#)).
- The perpetrator was aware of the factual circumstances that established the character of the act (para. [1388](#)).
- The perpetrator was aware that their conduct was committed in the context of an institutionalised regime of systematic oppression and domination (para. [1389](#)).
- The perpetrator intended to maintain such regime by that conduct (para. [1390](#)).

(3) Contextual elements

- The conduct was committed as part of a widespread or systematic attack directed against a civilian population (see above, para. [1160](#)).
- The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population (see above, para. [1173](#)).

i. Applicability under Ukrainian Law

1376. International instruments prohibit the crime against humanity of apartheid.²⁷¹¹ Most prominently, the Convention on the Suppression and Punishment of the Crime of Apartheid of 30 November 1973, to which Ukraine is a signatory,²⁷¹² defines apartheid as the commission of inhuman acts “for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them”.²⁷¹³

1377. The ICC, the first of the international courts and tribunals to include the crime against humanity of apartheid in its Statute, defines apartheid in a similar manner to the Convention as “inhumane acts of a character similar to those referred to in [Article 7(1)], committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and

²⁷¹¹ ICC Statute, Article 7(1)(k); [Convention on the Suppression and Punishment of the Crime of Apartheid](#), Article I.

²⁷¹² UN Treaty Collection, "[Status of Treaties: International Convention on the Suppression and Punishment of the Crime of Apartheid](#)".

²⁷¹³ [Convention on the Suppression and Punishment of the Crime of Apartheid](#), Article II.

committed with the intention of maintaining that regime”.²⁷¹⁴ However, as none of the ICC judgements issued thus far have addressed this crime, there is no case law from which to draw information on apartheid.²⁷¹⁵

1378. It has been debated whether the crime against humanity of apartheid is reflective of customary international law.²⁷¹⁶ According to some scholars, this is due to the initial reluctance of Western States to ratify the Apartheid Convention, the lack of clarity surrounding the precise definition of the crime and the lack of actual prosecutions involving this crime.²⁷¹⁷ Accordingly, it appears as if the *prohibition* of apartheid, directed towards States, is considered a rule of customary international law, while the *crime* of apartheid, directed towards individuals, is moving towards, but has not yet acquired, customary status.²⁷¹⁸ Nevertheless, even if the crime against humanity of apartheid is not currently reflective of customary international law, it is still applicable in Ukraine due to Ukraine’s ratification of the Apartheid Convention.

1379. Apartheid as a crime against humanity is not currently prohibited under Ukrainian law. However, Draft Bill 7290 will introduce (if, and when, it comes into force) the crime against humanity of apartheid committed within the framework of a large-scale or systematic attack on civilians under 442-1.2(1) of the CCU. Note 2 to Article 442-1 of Draft Bill 7290 indicates that “[t]he term “apartheid” is used in the meaning defined by the Convention on the Suppression and Punishment of the Crime of Apartheid of 30 November 1973”. As such, this provision will integrate both the contextual elements and the specific elements of the crime against humanity of apartheid contained in the international instruments.

ii. Definition of Apartheid (Objective elements)

1380. The objective elements of this crime against humanity requires that: (1) the perpetrator committed an inhumane act against one or more persons; (2) such act was an act referred to in Article 7(1) of the ICC Statute, or was an act of a character similar to any of those acts; and (3) the conduct was committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups.

²⁷¹⁴ [ICC Statute](#), Article 7(2)(h).

²⁷¹⁵ Klamberg, [Commentary on the International Criminal Court](#), Torkel Opsahl Academic EPublisher Brussels, 2017, p. 59.

²⁷¹⁶ Triffterer and Ambos (eds), *The ICC Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 234. See also, Baldwin, Human Rights Watch, '[Human Rights Watch Responds: Reflections on Apartheid and Persecution in International Law](#)', 9 July 2021.

²⁷¹⁷ Triffterer and Ambos (eds), *The ICC Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 234 at fn. 543.

²⁷¹⁸ Triffterer and Ambos (eds), *The ICC Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, pp 234-235; J. Duggard and J. Reynolds, '[Apartheid, International Law, and the Occupied Palestinian Territory](#)' 24(3) *European journal of International Law* 867, 2013, pp 882-883: “The customary status of the prohibition of apartheid is indicated by its location within general UN efforts aimed at the eradication of all forms of racial discrimination. [...] Although the majority of states [...] accept the general prohibition of apartheid in the International Convention for the Elimination of All Forms of Racial Discrimination and other treaties, fewer have ratified the Apartheid Convention [...]. The movement of the international crime of apartheid towards customary status reinforces the fact that the prohibition itself is established as a rule of customary international law.” See also, Baldwin, Human Rights Watch, '[Human Rights Watch Responds: Reflections on Apartheid and Persecution in International Law](#)', 9 July 2021.

1381. **The perpetrator committed an inhumane act against one or more persons.** Both the Convention on the Suppression and Punishment of the Crime of Apartheid and the ICC Statute require first that an inhumane act is committed. Whereas the ICC Statute does not provide an illustrative list of acts, Article II of the Convention provides a list of inhumane acts which amount to apartheid when committed for the purpose of establishing and maintaining domination by one racial group over another and systematically oppressing them.²⁷¹⁹ For a further discussion on inhumane acts, see the crime against humanity of other inhuman acts, Element One, below (para. 1395).

CONVENTION ON THE SUPPRESSION AND PUNISHMENT OF THE CRIME OF APARTHEID, ARTICLE II²⁷²⁰

For the purpose of the present Convention, the term “the crime of apartheid” [...] shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:

- (a) Denial to a member or members of a racial group or groups of the right to life and liberty of person:
 - (i) By murder of members of a racial group or groups;
 - (ii) By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;
 - (iii) By arbitrary arrest and illegal imprisonment of the members of a racial group or groups;
- (b) Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;

²⁷¹⁹ [Convention on the Suppression and Punishment of the Crime of Apartheid](#), Article II.

²⁷²⁰ [Convention on the Suppression and Punishment of the Crime of Apartheid](#), Article II. See also, Triffterer and Ambos (eds), *The ICC Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, pp 283-284 (“All the acts listed in article II of the Apartheid Convention as constituting apartheid are defined as ‘inhuman acts’ and there probably is a large degree of overlap between the concepts of ‘inhuman acts’ and ‘inhumane acts’. [...] Although some may contend that some of the [...] acts listed in article II, such as the denial of the right to work or to education, although, of course, very serious deprivations, are not of the same nature as the acts listed in article 7 para. 1 [of the ICC Statute], this contention overlooks the devastating impact on the lives of those denied these rights recognised by the Universal Declaration of Human Rights and guaranteed by the International Covenant on Economic, Social and Cultural Rights, and on the society deprived of the full potential of its members. Moreover, [...] many of these acts constitute the crime against humanity of persecution.”)

- (c) Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;
- (d) Any measures including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof;
- (e) Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;
- (f) Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.

1382. **Such act was an act referred to in Article 7(1) of the ICC Statute, or was an act of a character similar to any of those acts.** For a discussion of this element, see the crime against humanity of other inhuman acts, Element Two, below (para. 466). All inhumane acts mentioned in the Convention on the Prevention and Suppression of the Crime of Apartheid (see the grey box above) would fall under this element.²⁷²¹

1383. **The conduct was committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups.** The final objective element of the crime against humanity of apartheid will be established if the inhumane act (i.e., an act that is either one of the other crimes against humanity set out under Article 7(1) of the ICC Statute or of a similar character to those acts) was committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups. It is the term “institutionalised regime” that embodies the meaning of the crime against humanity of apartheid as it “criminalizes behaviour at the international level which is lawful or at least permitted through in official policy at the national level.”²⁷²²

1384. In addition, this element will only be established if the “oppression” and “domination”, interpreted according to their ordinary meaning,²⁷²³ are exerted by one racial group

²⁷²¹ [Convention on the Suppression and Punishment of the Crime of Apartheid](#), Article II.

²⁷²² Triffterer and Ambos (eds), *The ICC Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 284.

²⁷²³ Triffterer and Ambos (eds), *The ICC Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart,

over any other racial group or groups. The reference to “racial” groups is derived from the crime of apartheid’s origins as a State policy instituted in South Africa when a number of racially discriminatory policies were imposed on one racial group by another.²⁷²⁴ Neither the Apartheid Convention nor the ICC Statute define the term “racial group” in relation to the crime against humanity of apartheid.²⁷²⁵ However, one means of defining this term may be drawn from the International Convention on the Elimination of All Forms of Racial Discrimination, which sets out the widely accepted definition of “racial discrimination” as:

INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION, ARTICLE 1(1):

[T]he term ‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social cultural or any other field of public life.

1385. In addition, “racial group” is defined in relation to the crime against humanity of persecution and the crime of genocide as individuals who share “hereditary physical traits” (for instance, color of skin) “often identified with a geographic region, irrespective of linguistic, cultural, national or religious factors”.²⁷²⁶

iii. Definition of Apartheid (Subjective elements)

1386. The subjective elements for the crime against humanity of apartheid require intent and knowledge,²⁷²⁷ which will be established when: (1) the perpetrator intended to commit an inhumane act against one or more persons; (2) the perpetrator was aware of the factual circumstances that established the character of the act; (3); the perpetrator was aware that their conduct was committed in the context of an institutionalized regime of systematic oppression and domination; and (4) the perpetrator intended to maintain an institutionalized regime of systematic oppression and domination by committing an inhumane act against one or more persons.

1387. **The perpetrator intended to commit an inhumane act against one or more persons.** Such intent will be established where: (1) the perpetrator meant to engage in the act or omission — the inhumane act — (i.e., deliberately acted or failed to act) (**intent to**

2016, p. 284 (“According to one dictionary, to oppress is to ‘rule or treat [somebody] with continual injustice or cruelty’, and to dominate is to ‘to have control of or a very strong influence on (people, events, etc.)’”).

²⁷²⁴ Triffterer and Ambos (eds), *The ICC Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, pp 232, 284.

²⁷²⁵ Triffterer and Ambos (eds), *The ICC Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 284.

²⁷²⁶ ICTR, *Akayesu Trial Judgement*, para. 514; ICTR, *Kayishema & Ruzindana Trial Judgement*, para. 98.

²⁷²⁷ ICC Statute, Articles 30(2), 30(3); Klamberg, *Commentary on the International Criminal Court*, Torkel Opsahl Academic EPublisher Brussels, 2017, p. 59.

conduct); or (2) the perpetrator was aware that an inhumane act would occur in the ordinary course of events (**intent to consequence**).²⁷²⁸ At the ICC, awareness that the consequence would occur in the ordinary course of events requires virtual certainty that the events would occur.²⁷²⁹

1388. **The perpetrator was aware of the factual circumstances that established the character of the act.** To prove the perpetrator had such knowledge, it must be shown that the perpetrator was aware of the factual circumstances that established the character (i.e., the nature and gravity) of the inhumane act committed against the victim(s). However, this does not require the perpetrator to have been aware of the legal character of the act in question, i.e., there is no need for the perpetrator to know that the act in question constituted a crime against humanity or an inhumane act.²⁷³⁰
1389. **The perpetrator was aware that their conduct was committed in the context of an institutionalized regime of systematic oppression and domination.** To prove that the perpetrator had such knowledge, it must be shown that the perpetrator knew that they were committing inhumane acts in the context of an institutionalized regime of systematic oppression and domination.²⁷³¹ The evidence need not establish that the perpetrator had knowledge of all of the characteristics of the regime, it is sufficient that the perpetrator knew that their actions were part of an institutionalized regime of systematic oppression and domination.²⁷³²
1390. **The perpetrator intended to maintain an institutionalized regime of systematic oppression and domination by committing an inhumane act against one or more persons.** This element sets out the specific subjective element of the crime against humanity of apartheid,²⁷³³ which will be established where the perpetrator meant to engage in the act or omission (i.e., the inhumane act) in order to maintain an institutionalized regime of systematic oppression and domination against one or more persons (**intent to conduct**).²⁷³⁴

²⁷²⁸ ICC Statute, Article 30(2)(a) and (b); ICC, *Katanga Trial Judgement*, para. 774

²⁷²⁹ See ICC, *Katanga Trial Judgement*, paras 775-776.

²⁷³⁰ ICC, *Ongwen Trial Judgement*, para. 2753.

²⁷³¹ ICC Statute, Article 30(3).

²⁷³² For discussion of a similar element, see e.g., ICC, *Katanga Trial Judgement*, para. 1125; ICTY, *Blaskic Appeal Judgement*, para. 124.

²⁷³³ Klamberg, *Commentary on the International Criminal Court*, Torkel Opsahl Academic EPublisher Brussels, 2017, p. 59; Triffterer and Ambos (eds), *The ICC Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 285; Cryer, et al. (eds), *An Introduction to International Criminal Law and Procedure*, 3rd Edition, Cambridge University Press, 2015, p. 261.

²⁷³⁴ ICC Statute, Article 30(2)(a); Triffterer and Ambos (eds), *The ICC Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 285.

- q) Crime against Humanity of Other Inhumane Acts (ICC Statute, Article 7(1)(k); ICTY Statute, Article 5(i); ICTR Statute, Article 3(i); SCSL Statute, Article 2(i))

ELEMENTS OF THE CRIME: TO CONVICT A PERPETRATOR FOR OTHER INHUMANE ACTS AS A CRIME AGAINST HUMANITY THE FOLLOWING ELEMENTS NEED TO BE ESTABLISHED:

(1) Objective element

- The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act (para. 1394).
- Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the ICC Statute (para. 1397).

(2) Subjective element

- The perpetrator intended to inflict severe physical or mental pain or suffering upon one or more persons, by means of an inhumane act (para. 1400).
- The perpetrator was aware of the factual circumstances that established the character of the act (para. 1401).

(3) Contextual element

- The conduct was committed as part of a widespread or systematic attack directed against a civilian population (see above, para. 1160).
- The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population (see above, para. 1173).

i. Applicability under Ukrainian Law

1391. International instruments prohibit the crime against humanity of “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”.²⁷³⁵

1392. The crime against humanity of other inhumane acts is not currently prohibited under Ukrainian law. However, Draft Bill 7290 will introduce (if, and when, it comes into force) the crime against humanity of “moderate or severe bodily injury” committed within the framework of a large-scale or systematic attack on civilians under Article 442-1.1(9) of the CCU. While the wording is somewhat different from that contained in the international instruments (i.e., “moderate or severe bodily injury” compared to “great suffering, or serious injury to body or to mental or physical health”), this provision should be interpreted to integrate both the contextual elements and the specific elements of the crime against humanity of other inhumane acts contained therein.

²⁷³⁵ ICC Statute, Article 7(1)(k); ICTY Statute, Article 5(i); ICTR Statute, Article 3(i); SCSL Statute, Article 2(i). The crime against humanity of other inhumane acts is also prohibited in the following international legal instruments: Nuremburg Charter, Article 6(c); Tokyo Charter, Article 5(c); and ECCC Law, Article 5. Other inhumane acts is also prohibited as a war crime under Article 8(2)(a)(ii) of the ICC Statute.

ii. Definition of Other Inhumane Acts (Objective elements)

1393. The objective elements of this crime against humanity requires that: (1) the perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act; and (2) such act was of a character similar to any other act referred to in Article 7(1) the ICC Statute.
1394. **The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.** Firstly, to establish that a perpetrator's conduct amounted to an inhumane act, it must be proven that those actions caused great suffering or serious mental or physical injury to the victim, by means of an inhumane act.²⁷³⁶ This requires proof that: (i) the victim suffered serious bodily or mental harm; and (ii) the suffering was the result of an act or omission of the perpetrator.²⁷³⁷
1395. The victim must have suffered *serious* bodily or mental harm, which goes beyond temporary unhappiness, embarrassment or humiliation.²⁷³⁸ Additionally, while there is no requirement for the harm caused to be permanent or irremediable, it must result in grave and long-term disadvantage to a person's ability to lead a normal and constructive life.²⁷³⁹

ICTY, KRSTIC TRIAL JUDGEMENT, PARA. 513 [FOOTNOTES OMITTED]

The Trial Chamber finds that [the *actus reus* of] serious bodily or mental harm [...] is an intentional act or omission causing serious bodily or mental suffering. The gravity of the suffering must be assessed on a case by case basis and with due regard for the particular circumstances. In line with the *Akayesu* Judgement, the Trial Chamber states that serious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life. [...] [T]he Chamber holds that inhuman treatment, torture, rape, sexual abuse and deportation are among the acts which may cause serious bodily or mental injury.

1396. Accordingly, not every human rights violation will automatically be considered an "inhumane act".²⁷⁴⁰

²⁷³⁶ ICC, *Ongwen Trial Judgement*, para. 2743; ICC, *Katanga & Chui Decision on the Confirmation of Charges*, paras 453-454; ICTY, *Blagojevic & Jokic Trial Judgement*, para. 626; ICTY, *Kordic & Cerkez Appeal Judgement*, para. 117; ICTY, *Galic Trial Judgement*, para. 152; ICTY, *Krnojelac Trial Judgement*, para. 130; ICTR, *Kayishema et al. Trial Judgement*, para. 151.

²⁷³⁷ ICC, *Katanga & Chui Confirmation of Charges*, para. 454; ICTY, *Kordic & Cerkez Appeal Judgement*, para. 117; ICTY, *Krnojelac Trial Judgement*, para. 130; ICTY, *Krstic Trial Judgement*, para. 512; ICTR, *Kayishema et al. Trial Judgement*, para. 151.

²⁷³⁸ ICTY, *Krstic Trial Judgement*, para. 513; ICTY, *Kordic & Cerkez Appeal Judgement*, para. 117; ICTY, *Krnojelac Trial Judgement*, para. 131; ICTR, *Akayesu Trial Judgement*, para. 503.

²⁷³⁹ ICTY, *Krstic Trial Judgement*, para. 513; ICTY, *Krnojelac Trial Judgement*, para. 131; ICTY, *Blagojevic & Jokic Trial Judgement*, para. 627; ICTY, *Vasiljevic Trial Judgement*, para. 235; ICTR, *Akayesu Trial Judgement*, para. 502.

²⁷⁴⁰ ICC, *Katanga & Chui Confirmation of Charges*, para. 448; ICTY, *Popovic et al. Appeal Judgement*, para. 761; ICTR, *Nahimana et al. Appeal Judgement*, para. 985.

CASE STUDY: THE SEVERITY OF THE BODILY OR MENTAL HARM

To assess the severity of the suffering or injury, the following should be taken into account:²⁷⁴¹

- The nature, duration and context of the infliction of pain;
- The premeditation and institutionalization of the ill-treatment;
- The manner and method used by the perpetrator to cause the pain;
- The victim's age, sex and state of health;
- The position of inferiority of the victim;
- The physical and mental effect of the treatment on the victim; and
- The specific social, cultural and religious background of the victim.

1397. **Such act was of a character similar to any other act referred to in Article 7(1) of the ICC Statute.** The second element requires the act in question to be of a similar character (i.e., nature and gravity) to other crimes against humanity listed under Article 7(1) of the ICC Statute (i.e., murder, torture, extermination, enslavement, deportation or forcible transfer of population, imprisonment, sexual violence, etc.).²⁷⁴²
1398. Similarly, the ICTY and ICTR require that, for an act to amount to the crime against humanity of other inhumane acts, it must be of similar seriousness to the other crimes against humanity enumerated within each tribunal's statute.²⁷⁴³ Ordinarily, this will require the conduct to represent a serious violation of customary international law or basic norms of international human rights law in order to adhere to the principle of legality.²⁷⁴⁴

²⁷⁴¹ ICTY, *Krnjelac Trial Judgement*, para. 182; ICTY, *Kvočka et al. Trial Judgement*, paras 143, 149, 151; ICTY, *Prlic et al. Trial Judgement*, para. 78; ICTY, *Popovic et al. Appeal Judgement*, para. 763; ICTY, *Blagojevic & Jokic Trial Judgement*, para. 627; ICTY, *Galic Trial Judgement*, para. 153; ICTR, *Akayesu Trial Judgement*, para. 688.

²⁷⁴² ICC *Elements of Crimes*, Article 7(1)(k), fn 30. See also, ICC, *Ongwen Trial Judgement*, para. 2747.

²⁷⁴³ ICTY, *Blagojevic & Jokic Trial Judgement*, para. 626; ICTY, *Kordic & Cerkez Appeal Judgement*, para. 117; ICTR, *Kayishema et al. Trial Judgement*, paras 150-151; ICTR, *Muvunyi Decision on Muvunyi's Motion for Judgement of Acquittal*, para. 72.

²⁷⁴⁴ ICC, *Katanga & Chui Confirmation of Charges*, para. 448; ICTY, *Blagojevic & Jokic Trial Judgement*, para. 625.

CASE STUDY: EXAMPLES OF "OTHER INHUMANE ACTS"

The following is a non-exhaustive list of acts that have been deemed as qualifying as "other inhumane acts" before international tribunals:

- Forcible circumcision and penile amputation;²⁷⁴⁵
- Being chased and struck with machetes;²⁷⁴⁶
- Being forced to witness the killing of family members;²⁷⁴⁷
- Sniping civilians;²⁷⁴⁸
- Forced marriage or forced prostitution;²⁷⁴⁹
- Detention under severe conditions (e.g. lack of adequate food, hygiene and medical care);²⁷⁵⁰
- Forced undressing in public and making the victim sit in the mud, march or perform exercises;²⁷⁵¹
- Open humiliation, beatings and infliction of injuries;²⁷⁵²
- Forcible transfer;²⁷⁵³
- Mutilation of a dead body that caused mental suffering to eye-witnesses;²⁷⁵⁴ and
- Desecration of corpses.²⁷⁵⁵

iii. Definition of Other Inhumane Acts (Subjective elements)

1399. The subjective elements of the crime against humanity of other inhumane acts require intent and knowledge,²⁷⁵⁶ which requires that: (1) the perpetrator intended to inflict severe physical or mental pain or suffering upon one or more persons, by means of an inhumane act; and (2) perpetrator was aware of the factual circumstances that established the character of the act.

1400. **The perpetrator intended to inflict severe physical or mental pain or suffering upon one or more persons, by means of an inhumane act.** Such intent will be established where: (1) the perpetrator meant to engage in the act or omission (i.e., deliberately acted or failed to act) (**intent to conduct**) in order to cause one or more persons severe physical or mental pain or suffering; or (2) the perpetrator was aware

²⁷⁴⁵ ICC, *Muthaura et al. Decision on Confirmation of Charges*, para. 270.

²⁷⁴⁶ ICC, *Muthaura et al. Decision on Confirmation of Charges*, para. 272.

²⁷⁴⁷ ICC, *Muthaura et al. Decision on Confirmation of Charges*, paras 274-277.

²⁷⁴⁸ ICTY, *Galic Appeal Judgement*, para. 158.

²⁷⁴⁹ ICC, *Ongwen Trial Judgement*, paras 2741, 2744; ECCC, *Nuon Chea & Khieu Samphan Trial Judgement*, paras 740-749; ICTY, *Prlic et al. Trial Judgement*, para. 79.

²⁷⁵⁰ ICC, *Ongwen Trial Judgement*, para. 2744; ICTY, *Prlic et al. Trial Judgement*, para. 80; ICTY, *Krnjelac Trial Judgement*, para. 133; ICTY, *Kvočka et al. Trial Judgement*, para. 209; ECCC, *Kaing Guek Eav (alias Duch) Trial Judgement*, para. 372.

²⁷⁵¹ ICTR, *Akayesu Trial Judgement*, para. 697.

²⁷⁵² ICTR, *Muvunyi Trial Judgement*, para. 530; ICTY, *Prlic et al. Trial Judgement*, para. 79.

²⁷⁵³ ICTY, *Prlic et al. Trial Judgement*, para. 79.

²⁷⁵⁴ ICTR, *Kajelijeli Trial Judgement*, paras 934-936.

²⁷⁵⁵ ICTR, *Bagosora et al. Appeal Judgement*, para. 729.

²⁷⁵⁶ ICC Statute, Article 30(2)(a) and (b) and 30(3); ICC, *Katanga & Chui Confirmation of Charges*, para. 455; ICTY, *Blagojevic & Jokic Trial Judgement*, para. 628; ICTY, *Perisic Trial Judgement*, para. 112; ICTY, *Kordic & Cerkez Appeal Judgement*, para. 117; ICTY, *Krnjelac Trial Judgement*, para. 132; ICTR, *Kayishema et al. Trial Judgement*, para. 153.

that severe physical or mental pain or suffering would occur in the ordinary course of events (**intent to consequence**).²⁷⁵⁷ At the ICC, awareness that the consequence would occur in the ordinary course of events requires virtual certainty that the events would occur.²⁷⁵⁸

1401. **The perpetrator was aware of the factual circumstances that established the character of the act.**²⁷⁵⁹ To prove the perpetrator had such knowledge, it must be shown that the perpetrator was aware of the factual circumstances that established the character (i.e., the nature and gravity) of the inhumane act committed against the victim(s). However, this does not require the perpetrator to be aware of the legal character of the act in question, i.e. there is no need for the perpetrator to know that the act in question constituted a crime against humanity or an inhumane act.²⁷⁶⁰

²⁷⁵⁷ ICC Statute, Article 30(2)(a) and (b); ICC, *Katanga Trial Judgement*, para. 774; ICC, *Katanga & Chui Confirmation of Charges*, para. 455; ICTY, *Blagojevic & Jokic Trial Judgement*, para. 628; ICTY, *Perisic Trial Judgement*, para. 112; ICTY, *Kordic & Cerkez Appeal Judgement*, para. 117; ICTY, *Krnojelac Trial Judgement*, para. 132; ICTR, *Kayishema et al. Trial Judgement*, para. 153.

²⁷⁵⁸ See ICC, *Katanga Trial Judgement*, paras 775-776.

²⁷⁵⁹ ICC, *Katanga & Chui Confirmation of Charges*, para. 455.

²⁷⁶⁰ ICC, *Ongwen Trial Judgement*, para. 2753.

PART 2: OTHER ASPECTS OF SUBSTANTIAL INTERNATIONAL CRIMINAL LAW APPLICABLE IN THE CONTEXT OF DOMESTIC PROCEEDINGS

I. Modes of liability

A. Relevance of International Law Principles to Adjudicate Modes of Liability Under the Criminal Code of Ukraine

1402. This Section describes the ways in which perpetrators can be held responsible for their participation in international crimes through the modes of liability recognised under the Ukrainian Criminal Code (CCU). The modes of liability relevant to international crimes – including under Article 437 (waging an aggressive war – see Chapter 1, Part I, Section II.), Article 438 (war crimes – see Chapter 1, Part I, Section I.), and Article 442 (genocide – see Chapter 1, Part I, Section III.) – are set out in Articles 18 and 26 to 31. In addition, some forms of commission under Articles 426, 438 and 442 are *de facto* analogous or comparable to certain well-established modes of liability under international criminal law (ICL) (i.e., ordering the commission of war crimes, command responsibility for the commission of war crimes, and incitement to genocide).
1403. While these modes of liability, in the majority of cases, do not differ from the modes of liability applicable when ordinary crimes are committed, an examination of the modes of liability which have been developed in ICL can shed light on how the modes under the CCU may operate in the context of mass atrocity and war crimes cases. Accordingly, this Section seeks to analyze how the modes of liability under the CCU can be interpreted in line with international law to illustrate how they can effectively capture the conduct of perpetrators (including remote perpetrators) of international crimes. The relevant international instruments and practice which have developed modes of liability include customary international law, the statute of the International Criminal Tribunal for the former Yugoslavia (ICTY), the statute of the International Criminal Tribunal for Rwanda (ICTR) and the statute of the International Criminal Court (ICC).
1404. This Section will: (1) outline the modes of liability under the CCU; (2) outline the modes of liability under ICL and discuss the applicability of these modes to the adjudication of international crimes under Ukrainian law; and (3) outline the definition of these modes and draw comparisons between the modes provided for under the CCU and those set out under ICL. Accordingly, sub-section (3) has been divided into a discussion of principal liability; liability for groups, organised groups and criminal organisations; accessory liability; ordering the commission of war crimes; command responsibility; and incitement to genocide.

B. Modes of Liability under the CCU

1405. The CCU provides for a variety of modes of liability which are applicable generally (i.e., to all crimes listed in the Code including ordinary crimes and international crimes) under Articles 18, 27-28.
1406. The “criminal offender” (or perpetrator) is defined in Article 18 of the CCU as “a sane person who has committed a criminal offense at the age when criminal liability may arise under this Code”. Each crime listed in the CCU defines the acts or omissions that the perpetrators must commit to be held liable as the principal (or co-principal).²⁷⁶¹
1407. Chapter VI of the CCU sets out the provisions relating to complicity. Under Article 26 of the CCU, “[c]riminal complicity shall mean the wilful co-participation of several criminal offenders in an intended criminal offence.” Article 27 further defines the modes of liability relating to accomplices and Article 28 sets out the liability for criminal offences “committed by a group of persons, or a group of persons upon prior conspiracy, or an organised group, or a criminal organisation”.

ARTICLE 27. TYPES OF ACCOMPLICES

1. Organizer, abettor and accessory, together with the principal offender, are deemed to be accomplices in a criminal offense.
2. The principal (or co-principal) is the person who, in association with other criminal offenders, has committed a criminal offense under this Code, directly or through other persons, who cannot be criminally liable, in accordance with the law, for what they have committed.
3. The organizer is a person who has organized a criminal offense (or criminal offenses) or supervised its (their) preparation or commission. The organizer is also a person who has created an organized group or criminal organization, or supervised it, or financed it, or organized the covering up of the criminal activity of an organized group or criminal organization.
4. The abettor is a person who has induced any other accomplice to a criminal offense, by way of persuasion, subornation, threat, coercion or otherwise.
5. The accessory is a person who has facilitated the commission of a criminal offense by other accomplices, by way of advice, or instructions, or by supplying the means or tools, or removing obstacles, and also a person who promised in advance to conceal a criminal offender, tools or means, traces of crime or criminally obtained things, to buy or sell such things, or otherwise facilitate the covering up of a criminal offense.

[...]

²⁷⁶¹ See, [CCU](#), Article 29.

ARTICLE 28. CRIMINAL OFFENSE COMMITTED BY A GROUP OF PERSONS, OR A GROUP OF PERSONS UPON PRIOR CONSPIRACY, OR AN ORGANIZED GROUP, OR A CRIMINAL ORGANIZATION

1. A criminal offense shall be held to have been committed by a group of persons where several (two or more) principal offenders participated in that criminal offense, acting without prior conspiracy.
2. A criminal offense shall be held to have been committed by a group of persons upon prior conspiracy where it was jointly committed by several (two or more) persons who have conspired in advance, that is prior to the commencement of the offense, to commit it together.
3. A criminal offense shall be held to have been committed by an organized group where several persons (three or more) participated in its preparation or commission, who have previously established a stable association for the purpose of committing of this and other offense (or offenses), and have been consolidated by a common plan with assigned roles designed to achieve this plan known to all members of the group.
4. A criminal offense shall be held to have been committed by a criminal organization where it was committed by a stable hierarchical association of several persons (five and more), members or structural units of which have organized themselves, upon prior conspiracy, to jointly act for the purpose of directly committing of grave or special grave criminal offenses by the members of this organization, or supervising or coordinating criminal activity of other persons, or supporting the activity of this criminal organization and other criminal groups. (Article 28 as amended by Law No 270-VI (270-17) of 15.04.2008).

1408. Articles 29 to 31 expand upon the criminal liability of principals and accomplices to the commission of crimes.

1409. In addition, the CCU contains certain forms of commission under Articles 426, 438 and 442 which are comparable to well-established modes of liability under ICL. In sum, these include:

- i. “giving an order to commit any such action” which falls under Article 438, namely a violation of the rules of warfare (i.e., war crimes);
- ii. “omission of military authorities” under Article 426, which is a criminal offence when perpetrated by Ukrainian military or other military-related government officials.²⁷⁶² While there is no explicit equivalent in the CCU for similar responsibility of the adversary’s superior or military commanders’ “failure to act”, such conduct can fall under Article 438 since such conduct is codified in Additional Protocol I,²⁷⁶³ i.e., a “violation of the rules of warfare recognised by international instruments consented to as binding by the Verkhovna Rada”.
- iii. “public calls to genocide, and also making any materials with calls to genocide for the purpose of distributions, or distribution of such materials” under Article 442(2).

²⁷⁶² CCU, Article 401(2).

²⁷⁶³ Additional Protocol I, Articles 86 and 87.

C. Modes of Liability Under International Criminal Law

1. Notion and Structure of Modes of Liability Under International Criminal Law

1410. International crimes are committed against a backdrop of widespread, organised criminality that is often characterised by numerous overlapping types/levels of criminal responsibility. Whereas domestic criminal law typically focuses on principal perpetrators – i.e., those who pulled the trigger – responsibility for international crimes often lies with mid- and high-level perpetrators who contribute to the crime through multiple layers of decision-making. Given their role in causing or controlling events, these perpetrators (e.g., senior politicians, high-ranking military or security personnel, etc.) are often considered to be the “most” responsible for the commission of atrocity crimes, notwithstanding the fact that they did not physically commit those crimes themselves.²⁷⁶⁴
1411. To capture the responsibility of perpetrators of the mass, organised criminality which occurs in armed conflict situations, different international courts and tribunals have developed and incorporated different variations of modes of liability. Generally, as discussed below, these modes of liability fall under one of the following categories: principal liability (including modes of liability developed to reflect the commission of crimes by a co-perpetrators or groups); accomplice liability; command/superior responsibility; and incitement to genocide.

a) Identification and Classification of Modes of Liability Under International Law

1412. The statutes and jurisprudence of the international courts and tribunals, including the ICTY, the ICTR and the ICC, have played an instrumental role in defining the various modes of liability applicable to international crimes.
1413. 1945: Charter of the Nuremberg Tribunal. The Charter of the Nuremberg Tribunal (Nuremberg Charter) was one of the first international instruments to define the modes of liability for international crimes. After setting out the crimes that came under the jurisdiction of the Tribunal, Article 6 of the Nuremberg Charter states the following: “[l]eaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan”.²⁷⁶⁵ The Nuremberg Charter laid the foundation for the responsibility of those in high-ranking leadership positions for international crimes, even when far removed from the physical perpetration of such crimes.²⁷⁶⁶

²⁷⁶⁴ Osiel, *Making Sense of Mass Atrocity*, Cambridge University Press, 2009, p. 247; Stewart, ‘The End of Modes of Liability for International Crimes’ 25 *Leiden Journal of International Law* 165, 2012, pp 165-167.

²⁷⁶⁵ [Charter of the International Military Tribunal of Nuremberg](#), Article 6.

²⁷⁶⁶ See e.g., ICTY, *Tadic Trial Judgement*, para. 665: “the Military Tribunals in occupied Germany enforced the [Nuremberg] Charter’s principles under the terms of Article II, 2 of Control Council Law No. 10, which states: Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was [sic] an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part there in or (d) was connected with plans or enterprises involving its commission or (e) was a member of any organisation or group connected with the commission of any such crime”; Proceedings of a Military Court held at Hamburg, *File No. WO 235/525 Trial of Valentin Feurstein et*

1414. 1993/1994: The statutes and practice of the ICTY and ICTR. The modes of liability applicable to international crimes received further specification in the statutes of the ICTY and ICTR. Both instruments provide that “[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in [...] the present Statute, shall be individually responsible for the crime”.²⁷⁶⁷
1415. While the ICTY and ICTR statutes do not elaborate further on these modes of liability, the jurisprudence of each tribunal has gone a long way in developing, classifying and particularising the elements of the modes of liability. In particular, the ICTY developed a framework to distinguish principal liability from accomplice liability. Most critically, as discussed below in paras [1445-1447](#), the ICTY developed the mode of liability of “commission” to include “joint criminal enterprise” (JCE),²⁷⁶⁸ which was subsequently relied upon in other *ad hoc* tribunals.²⁷⁶⁹
1416. In addition, both Statutes provide for a form of command/superior responsibility according to which a military commander/civilian superior may be held responsible for crimes perpetrated by their subordinates if they “knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof”.²⁷⁷⁰
1417. In relation to genocide, the Statutes provided that the following acts were prohibited: conspiracy to genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity to commit genocide.²⁷⁷¹
1418. The modes of liability relied upon by the ICTY/ICTR are considered reflective of customary international law.²⁷⁷²

al: where (regarding the killing of prisoners of war (POWs)) it was stated that to be found guilty an accused “must have been concerned in the offence” which could include indirect participation, i.e. being “the cog in the wheel of events leading up to the result,” by giving orders or through other means [liability by way of contribution to a common purpose]; UN War Crimes Commission, [Case No. 60 \(The Dachau Concentration Camp Trial: Trial of Martin Gottfried Weiss and Thirty-Nine Others\)](#): where the 40 accused held positions in the hierarchy of running the Dachau concentration camp [liability based on contribution to a common design/plan to commit criminal acts through an organized system]; British Military Court for the Trial of War Criminals, Essen, [Case No. 8 The Essen Lynching case: Trial of Erich Heyer and Six Others](#): where the seven accused- including Captain Erich Heyer who gave instructions to transfer British POWs and for the escort to not interfere if civilians were to molest the POWs, which they did- were found to have been concerned in the killing of POWs [liability based on the contribution to the commission of an act that is outside the common purpose/design but a foreseeable consequence of effecting that purpose]. See further: ICTY, [Tadic Appeal Judgement](#) paras 195-213.

²⁷⁶⁷ [ICTY Statute](#), Article 7(1); [ICTR Statute](#), Article 6(1).

²⁷⁶⁸ See for the development of the mode: ICTY, [Tadic Appeal Judgement](#), para. 192-226.

²⁷⁶⁹ See e.g., SCSL, [Kondewa Decision and Order on the Defence Preliminary Motion for Defects in the Form of the Indictment](#), para. 9; SCSL, [Brima et al. Decision ad and Order on Defence Preliminary Motion for Defenct in the Form of the Indictment](#), para. 49; ICTR, [Ntakirutimana Appeal Judgement](#), para. 463; ICTR, [Karemera et al. Decision on Jurisdictional Appeals: Joint Criminal Enterprise](#), paras 13-16; ICTR, [Karemra & Ngirumpatse Appeal Judgement](#), para. 145, 623; SCSL, [Brima et al. Appeal Judgement](#), paras 72-80; SCSL, [Sesay et al. Appeal Judgement](#), paras 394, 400; [ICTY Statute](#), Article 7(3); [ICTR Statute](#), Article 6(3).

²⁷⁷⁰ [ICTY Statute](#), Article 4(3); [ICTR Statute](#), Article 3(3).

²⁷⁷¹ See e.g., ICTY, [Tadic Trial Judgement](#), para. 666-669; ICTY, [Oric Trial Judgement](#), para. 267; ICTY, [Tadic Appeals Judgement](#), paras 188-194; ICTY, [Celebici Appeal Judgement](#), paras 196-198; ICTR, [Hadžihasanovic et al. Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility](#), paras 31, 44; ICTR, [Ntakiruti-](#)

1419. 1998: ICC Statute. The ICC Statute sets out the most comprehensive list of modes of liability applicable to international crimes to date, which includes the following modes:
- i. Committed the crime (Article 25(3)(a)), which includes:
 - a. Commission of the crime as an individual (direct perpetration);
 - b. Commission of the crime jointly with another (co-perpetration);
 - c. Commission of the crime through another person, regardless of whether that other person is criminally responsible (indirect perpetration); and
 - d. Commission through other persons, together with co-perpetrators (indirect co-perpetration).
 - v. Ordered, solicited or induced the crime (Article 25(3)(b)).
 - vi. Aided, abetted or otherwise assisted the crime (Article 25(3)(c)).
 - vii. Contributed to the commission (or attempted commission) of a crime by a group of persons acting with a common purpose (Article 25(3)(d)).
 - viii. Directly and publicly incited others to commit genocide (Article 25(3)(e)).
 - ix. Failed to prevent, repress or submit to competent authorities the crimes committed by subordinates (command/superior responsibility) (Article 28(a) and (b), respectively).
1420. While the ICTY, ICTR and ICC all provide for principal liability of individuals whose connection to the commission of international crimes is more remote, they have done so in different ways. Unlike the ICTY/ICTR's reliance on the JCE principal,²⁷⁷³ the ICC relied on the concept of *control over a crime* to hold remote or higher-level perpetrators responsible (see below, paras [1448-1458](#)).²⁷⁷⁴ Accordingly, the ICC Statute and the jurisprudence of the ICC has distinguished between modes of liability as a principal perpetrator under Article 25(3)(a) and "other forms of accessory, as opposed to principal liability under Article 25(3)(b) to (d)".²⁷⁷⁵

2. Applicability of international law principles on modes of liability to the adjudication of international crimes under Ukrainian law

1421. To a certain extent, the CCU's provisions setting out the modes of liability applicable to international crimes (i.e., Articles 18, 27-31, and the offences under Articles 426, 438 and 442 that form *de facto* modes of liability) encompass much of the conduct incorporated into the modes of liability set out in international instruments and practice. At the same time, however, the plain wording of the CCU is not fully reflective of the broad range of roles performed by those who contribute to international

mana Trial Judgement, para. 819; ICTR, *Karamera et al. Decision on Motions for Judgement of Acquittal*, para. 15; ICTR, *Andre Rwamakuba Decision on Interlocutory Appeal regarding Application of Joint Criminal Enterprise to the Crime of Genocide*. See also, Goy, 'Individual Criminal Responsibility before the International Criminal Court: A Comparison with the *Ad Hoc* Tribunals' 12 *International Criminal Law Review* 1, 2012, p. 3.

²⁷⁷³ See e.g., ICC, *Lubanga Decision on the Confirmation of Charges*, para. 329; ICC, *Katanga Trial Judgement*, para. 1932.

²⁷⁷⁴ See e.g., ICC, *Ongwen Appeal Judgement*, para. 629; ICC, *Lubanga Appeal Judgement*, para. 469; ICC, *Bemba et al. Appeal Judgement*, para. 820; ICC, *Katanga Trial Judgement*, para. 1396; ICC, *Lubanga Decision on the Confirmation of Charges*, para. 338; ICC, *Katanga & Chui Decision on the Confirmation of Charges*, para. 488.

²⁷⁷⁵ ICC, *Lubanga Decision on the Confirmation of Charges*, para. 320; ICC, *Lubanga Decision concerning Pre-Trial Chamber I's Decision*, para. 78; ICC, *Mbarushimana Arrest Warrant Decision*, para. 30.

crimes, which — if interpreted narrowly — can significantly limit accountability for international crimes.

1422. For this reason, seeking guidance from the modes of liability under international law, and relying on thoroughly developed and well-tested interpretations of those principles, can assist judges in appropriately allocating responsibility for such crimes beyond principal perpetrators to fully grasp the realities of armed conflict and mass atrocities. Moreover, reliance on these principles will enable judges to capture the contributions of those who, while remote from the physical perpetration of the crimes, were nonetheless instrumental in their commission.
1423. Accordingly, while international instruments, principles and practice relating to modes of liability for international crimes are not, in and of themselves, binding upon Ukrainian judges, they can serve as useful guidance and an illustration for Ukrainian judges when ruling on liability for international crimes and interpreting the modes of liability under the CCU.
1424. Nevertheless, the question remains whether such an approach is compliant with Ukrainian law. While the application of international law to the CCU is discussed in more detail in [Chapter 1, Part I, Section I.B.2.b](#) “Applicability of international criminal law instruments: whether Article 438 of the CCU can be read in conjunction with the ICTY and ICC Statutes and practice”, four points are relevant to highlight:
- i. Many of the modes of liability developed by international law (including those recognised by the ICTY)²⁷⁷⁶ are reflective of customary international law, which is binding on all States, including Ukraine.²⁷⁷⁷ Therefore, such modes may be applied to perpetrators in the context of the Ukrainian armed conflict as long as the principle of legality is upheld, namely that the liability stems from a principle of law to which they were subject at the time, and it was reasonably foreseeable that they would be criminally liable.²⁷⁷⁸ In relation to JCE, which has been recognised as reflective of customary international law,²⁷⁷⁹ other domestic courts adjudicating international crimes have interpreted commission/perpetration to include the principle of JCE in line with the principle of legality.²⁷⁸⁰

²⁷⁷⁶ See e.g., ICTY, [Milutinovic Decision on Dragoljub Ojdanic’s Motion Challenging Jurisdiction—Joint Criminal Enterprise](#), para. 21 (one of the preconditions for a mode of liability to come within the ICTY’s jurisdiction is that, *inter alia*, “it must have existed under customary international law at the relevant time.”).

²⁷⁷⁷ See e.g., Dr Kellenberger, President of the International Committee of the Red Cross, ‘Foreword’ in Henckaerts and Doswald-Beck (eds), [Customary International Humanitarian Law, vol. I: Rules](#), CUP, 2009, pp xv-xvii. The only exception to this rule is in the event that a State has openly and persistently objected to such a custom. See, Dr Koroma, judge at the International Court of Justice, ‘Foreword’ in [Customary International Humanitarian Law, vol. I: Rules](#), CUP, 2009, pp xviii- xix. However, such an exception does not apply to Ukraine.

²⁷⁷⁸ See below, paras 1578-1585 for more information on the principle of legality. See also, [Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 — 1 October 1946](#), vol. I, p. 219 (“[T] here can be no punishment of crime without a pre-existing law”); [ICCPR](#), Article 15; [UDHR](#), Article 11(2); [ECHR](#), Article 7; ECtHR, [Kononov v. Latvia Judgement](#), para. 235; ECtHR, [Milankovic v. Croatia Judgement](#), paras 62-66.

²⁷⁷⁹ See e.g., ICTY, [Tadic Appeal Judgement](#), para. 220; ICTY, [Prlic et al. Judgement: vol. II](#), paras 587, 591; ICTY, [Tolimir Judgement](#), para. 281; ICTY, [Popovic et al Appeal Judgement](#), para. 1672; ICTY, [Brdanin Appeal Judgement](#), para. 363, 405.

²⁷⁸⁰ See e.g., Court of BiH, [Mejacic et al.](#), Case No. X-KRŽ-06/200, [Second Instance Verdict](#), 16 February 2009; Court of BiH, [Rasevic et al.](#), Case No. X-KRZ- 06/275, 1st Instance Verdict, 28 February 2008, pp 103-108 (English) pp 113-120 (Bosnian/Serbian/Croatian). The first instance reasoning was upheld on appeal, as noted by the ICTY Prosecutor: ICTY, [Rasevic et al. Prosecutor’s Final Progress Report](#), para. 6. See also, UN Interregional Crime and Justice Research

- ii. The European Court of Human Rights (ECtHR) has held that it does not violate the principle of legality to convict perpetrators for war crimes using modes of liability enshrined in customary international law.²⁷⁸¹ In the *Milankovic v. Croatia* case, for instance, the ECtHR confirmed the applicability of the mode of liability of command responsibility through generalised domestic prohibitions on war crimes, by virtue of its customary status.²⁷⁸² The lack of explicit codification is no bar to holding perpetrators accountable and judicial mechanisms may have recourse to customary law in interpreting and applying domestic provisions based on the general acceptance of the “gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence [under domestic law] and could reasonably be foreseen”.²⁷⁸³
- iii. The Constitutional Court of Ukraine has adopted the principle of taking a “friendly attitude” to international law according to which “the Constitutional Court of Ukraine takes into account the provisions of existing international treaties approved by the Verkhovna Rada of Ukraine and the practice of interpretation and application of these agreements by international bodies whose jurisdiction is recognised by Ukraine”.²⁷⁸⁴ In addition, Ukrainian Courts have established a practice of relying upon international instruments and practice when interpreting international law principles in their jurisprudence.²⁷⁸⁵
- iv. As the most persuasive authorities regarding the identification and interpretation of modes of liability internationally recognised, the statutes and practice of the *ad hoc* tribunals and the ICC offer a valuable interpreting guide. As will be seen below, there are numerous overlaps between the modes of liability applicable under the CCU and ICL, which can be taken as guidance in the application of domestic modes to international crimes.

1425. It follows that, when adjudicating international crimes cases and interpreting the modes of liability under the CCU, Ukrainian judges should, as far as possible, take guidance from international instruments and practice in order to account for the realities of armed conflict and the responsibility of remote perpetrators for the commission of mass atrocities.

D. Definition of the Modes of Liability under the CCU and ICL

1426. The CCU provides for two broad categories of modes of liability applicable to all criminal offences contained in the CCU, including international crimes, namely: principal and co-principal liability, and accomplice liability. Accomplice liability is

Institute, “[Modes of Liability: Commission & Participation](#)”, 2018, pp 45-59. See also, Bangladesh: International Crimes Tribunal-1, *Chief Prosecutor vs. Md. Abdul Aziz alias Habul & 2 Ors.* [Judgement](#), para. 365, 424.

²⁷⁸¹ ECtHR, *Milankovic v. Croatia* [Judgement](#), paras 52-66. See also, ECtHR, *Kononov v. Latvia* [Judgement](#)

²⁷⁸² ECtHR, *Milankovic v. Croatia* [Judgement](#), paras 52-66.

²⁷⁸³ ECtHR, *Milankovic v. Croatia* [Judgement](#), para. 59.

²⁷⁸⁴ Constitutional Court of Ukraine, [Decision](#) of 1 June 2016 No. 2-пп/2016, para. 2.3.

²⁷⁸⁵ See e.g., Order of the Supreme Court, Case No. 415/2182/20, 3 February 2022 where the Court relied on Article 8bis of the ICC Statute and other international instruments to interpret Article 437 of the CCU in line with the international crime of aggression. For more information, see above, paras [969](#)

also detailed in the provisions on crimes committed by groups of persons, organised groups or criminal organisations. In addition, various forms of commission specific to international crimes are contained in the respective provisions, namely: ordering war crimes, failure to act by military commanders (command responsibility), and incitement to genocide. Each will be discussed in turn below.

1. Principal and Co-Principal Liability

a) Applicability under the CCU

1427. Principal liability under the CCU covers the persons who directly committed the crime. Each crime listed in the CCU defines the acts or omissions that the perpetrators must commit to be held liable as the principal (or co-principal).²⁷⁸⁶ The subjective elements that the principal offender must satisfy are contained in Articles 24 and 25, generally, or specified in the provision setting out the specific offence.

1428. In addition, Article 27(2) covers co-principals who commit crimes “in association with other criminal offenders” either “directly or through others”. According to Article 26 “criminal complicity is the willful co-participation of several criminal offenders in an intended criminal offence”. Article 29(1) provides that the “principal (or co-principals) shall be criminally liable under that article of the Special Part of this Code which creates the offence he has committed”.

1429. Accordingly, principal liability extends to:

- i. The **direct perpetrator** (principal) who has committed the objective and subjective elements of the offence;²⁷⁸⁷
- ii. **Co-principals** who, in “association with other criminal offenders” have directly committed the offence, i.e., they have jointly committed the objective elements of the offence, and shared the subjective elements;²⁷⁸⁸
- iii. Perpetrators or co-perpetrators who have committed the criminal offence “**through other persons**, who cannot be criminally liable, in accordance with the law, for what they have committed”.²⁷⁸⁹

1430. Neither the CCU nor Ukrainian practice draw any substantial difference between principals and co-principals.²⁷⁹⁰ In order to be recognised as a co-principal, it is sufficient for a person to at least partially fulfil the *actus reus* of the crime together with (an)other person(s),²⁷⁹¹ with the necessary intent.²⁷⁹² The possible distribution of roles

²⁷⁸⁶ CCU, Article 29.

²⁷⁸⁷ CCU, Article 18 and the relevant offence under the CCU which sets out the acts or omissions which must be fulfilled.

²⁷⁸⁸ CCU, Article 26: “Criminal complicity is the wilful co-participation of several criminal offenders in an intended criminal offence”, and Article 27(2): “The principal (or co-principal) is the person who, in association with other criminal offenders, has committed a criminal offence under this Code, directly [...]”.

²⁷⁸⁹ CCU, Article 27(2): “The principal (or co-principal) is the person who, in association with other criminal offenders, has committed a criminal offence under this Code, [...] through other persons, who cannot be criminally liable, in accordance with the law, for what they have committed”.

²⁷⁹⁰ Dudorov and Havronyuk, *Criminal Law*, Vaite, 2014, p. 232.

²⁷⁹¹ Dudorov and Havronyuk, *Criminal Law*, Vaite, 2014, p. 232.

²⁷⁹² CCU, Article 29(1).

between co-perpetrators does not affect the legal qualification of the conduct. Further, even if they differ, the actions of co-perpetrators are considered legally identical.²⁷⁹³

b) Principal Liability under International Law

1431. Principal liability under ICL encompasses similar conduct to that recognised under the CCU. This Section will consider the interpretation of direct perpetrators and perpetrators who have committed the offence through others who are not criminally responsible. As discussed below (see paras 1443-1444), however, ICL has also developed various principles which further distinguish between principals and accomplices in order to assign responsibility to more remote perpetrators who act according to common plans or who control the commission of the crimes.

i. Direct Perpetration (Alone or Jointly with Others)

1432. Those who are considered direct perpetrators under ICL do not substantially differ from those who are considered (co)principals under the CCU. In particular, direct perpetration requires that the accused physically committed the crime and satisfied the mental element required by the crime in question.²⁷⁹⁴ The ICTY has recognised that the physical elements of this mode of liability are fulfilled when the “accused participated, physically or otherwise directly, alone or jointly with others, in the material elements of a crime provided for in the Statute”.²⁷⁹⁵ Thus there can be “several perpetrators in relation to the same crime where the conduct of each one of them fulfills the requisite elements of the definition of the substantive offence”.²⁷⁹⁶ A person may be jointly liable as the principal perpetrator where, for example, the accused participated physically in the material elements of the crime of murder, without the need to show whose bullets killed each victim.²⁷⁹⁷

1433. Such conduct would be covered under Articles 18 or 27(2) of the CCU in relation to a co-principal who “in association with other criminal offenders, has committed a criminal offence under this Code, *directly* [...]”.

ii. Perpetration Through Others Not Criminally Liable

1434. Principal liability of persons who commit crimes through other persons who cannot be held criminally responsible for the commission of those crimes is also recognised under ICL. In particular, the ICC Statute provides for the mode of liability of “commission through another” (i.e., indirect perpetration under Article 25(3)(a)). This includes situations where the perpetrator exercises control over the will of someone who

²⁷⁹³ Dudorov and Havronyuk, [Criminal Law](#), Vaite, 2014, p. 232.

²⁷⁹⁴ ICC, [Lubanga Decision on the Confirmation of Charges](#), para. 332(i); ICC, [Katanga & Chui Decision on the Confirmation of Charges](#), para. 488; ICTY, [Lukic & Lukic Trial Judgement](#), para. 897; ICTY, [Limaj et al. Trial Judgement](#), para. 509; ICTY, [Kunarac et al. Trial Judgement](#), para. 390; ICTY, [Naletilic & Martinovic Trial Judgement](#), para. 62; ICTY, [Krstic Trial Judgement](#), para. 601; ICTY, [Galic Trial Judgement](#), para. 168; ICTY, [Rutaganda Trial Judgement](#), para. 43.

²⁷⁹⁵ ICTY, [Lukic & Lukic Trial Judgement](#), para. 897; ICTY, [Limaj et al. Trial Judgement](#), para. 509; ICTY, [Haradinaj et al. Trial Judgement](#), para. 615.

²⁷⁹⁶ ICTY, [Kunarac et al. Trial Judgement](#), para. 390.

²⁷⁹⁷ ICTY, [Lukic & Lukic Appeal Judgement](#), para. 162; ICTY, [Limaj et al. Appeal Judgement](#), paras 47-50.

bears no criminal culpability for their actions.²⁷⁹⁸ This mode of liability requires that the accused: exerted control over the crime whose material elements were brought about by one or more persons; met the mental elements for the crime committed; and was aware of the factual circumstances allowing them to exert control over the crime through others.²⁷⁹⁹ Accordingly, given the control exerted by the indirect perpetrator, this mode of liability applies to situations where the direct perpetrator does not incur criminal responsibility (i.e., they lack the requisite *mens rea* to be found liable), despite the fact that they physically committed the crime.²⁸⁰⁰

1435. Such conduct would be covered under Article 27(2) of the CCU, which provides for liability of principals (or co-principals) who committed the crime through other persons who are not criminally liable. Such individuals can be, for example, persons: under the age of criminal responsibility; acting under irresistible coercion and extreme necessity; insane; or “innocent agents” (i.e., persons who, being misled about the true nature of the act, performed the *actus reus* of the crime lacking the requisite *mens rea*).²⁸⁰¹

EXAMPLES OF PERPETRATION THROUGH PERSONS WHO MAY NOT BE CRIMINALLY LIABLE UNDER ARTICLE 27(2)

Situation 1

Y (an artillery unit commander) provided his subordinates (operators of a GRAD MLRS) with coordinates for an attack which the subordinates believed were for military objectives, but where in fact known to Y as a residential area where no military objectives were present.

Situation 2

A, B, and C were pilots of strategic aviation aircraft. Upon the orders of D (their commander), each pilot launched several cruise missiles at targets which they believed to be military objectives. Eventually, however, these missiles hit a hotel complex in a small village where no military objectives were reportedly located.

To prove that war crimes were committed in each situation (e.g., attacking civilians or civilian objects), it is necessary to prove that the perpetrators of the attack *intentionally* directed the attack at the civilian population or civilian objects with the knowledge of their protected civilian status.

At trial, the GRAD operators or pilots could argue that they merely performed their commander’s (i.e., the indirect perpetrator) orders and were not aware of the civilian nature of the targets and, instead, were only aware of the technical characteristics of the attack (i.e., the coordinates). Instead, the commanders (Y and D) could be held responsible for the actions of the GRAD operators or pilots.

²⁷⁹⁸ ICC, *Ongwen Appeal Judgement*, para. 628; ICC, *Lubanga Decision on the Confirmation of Charges*, para. 332; ICC, *Katanga & Chui Decision on the Confirmation of Charges*, para. 488. It should be noted that this mode of liability also covers situations where the accused exercised control over an organised hierarchical organisation (see below, para. 1453).

²⁷⁹⁹ ICC, *Katanga Trial Judgement*, para. 1414.

²⁸⁰⁰ ICC, *Ongwen Appeal Judgement*, paras 627-628.

²⁸⁰¹ Dudorov and Havronyuk, *Criminal Law*, Vaite, 2014, pp 144-145. See also, ICC, *Ongwen Appeal Judgement*, para. 628, Cryer et al. (eds), *An Introduction to International Criminal Law and Procedure*, 3rd Edition, Cambridge University Press, 2015, p. 367.

2. Liability for Groups of Persons, Organised Groups and Criminal Organisations

a) Applicability under the CCU

1436. The CCU contains various provisions which expand upon how crimes can be committed by groups of persons, organised groups and criminal organisations, namely Articles 27(3), 28 and 30.

1437. According to Article 28 of the CCU:

- i. A criminal offence can be *committed* by a group of persons where at least two principal offenders participated in the criminal offence, without prior conspiracy.²⁸⁰²
- ii. A criminal offence can be committed by a group of persons *upon prior conspiracy* where it was jointly committed by at least two persons who have conspired in advance to commit it together.²⁸⁰³
- iii. A criminal offence can be committed by an organised group where at least three people participated in its perpetration or commission, who have previously established a stable association for the purpose of committing this and other offence(s) and have been consolidated by a *common plan* with assigned roles designed to achieve this plan which is *known* to all members of the group.
- iv. A criminal offence can be committed by a criminal organisation where it was committed by a *stable hierarchical association of at least five or more members or structural units which have organised themselves, upon prior conspiracy*, to jointly act for the *purpose* of directly committing grave or special grave criminal offences by members of this organisation, or supervising or coordinating criminal activity of other persons, or supporting the activity of this criminal organisation and other criminal groups.²⁸⁰⁴

1438. This provision does not establish a separate mode of liability. Rather, the conduct of a person committing a crime with a group of persons, in an organised group or criminal organisation, must fall under one of the modes listed under Article 27 (e.g., (co)principal, organiser, abettor, or accessory) in order to incur individual criminal responsibility.²⁸⁰⁵

1439. As with other forms of complicity under the CCU, to be held responsible under Article 28 (in connection with another relevant mode under Article 27) the accused must have committed the criminal offence intentionally.²⁸⁰⁶

1440. In addition, as discussed in more detail below (see para. 1460), under Article 27(3), an accused may be held responsible for organising a crime where they have “created an organised group or criminal organisation, or supervised it, or financed it, or organised the covering up of the criminal activity of an organised group or criminal organisation”. Article 30(1) further provides that the organiser will be criminally

²⁸⁰² [CCU](#), Article 28(1).

²⁸⁰³ [CCU](#), Article 28(2).

²⁸⁰⁴ [CCU](#), Article 28(4).

²⁸⁰⁵ Melnyk, [Scientific and Practical Commentary on Article 28 of the Criminal Code of Ukraine](#) (1 January 2009).

²⁸⁰⁶ [CCU](#), Article 26.

liable for the crimes committed by the organised group or criminal organisation if those crimes formed part of their intent.

1441. While these provisions are not directly comparable to any mode of liability under ICL, they do hold similarities with various principles which have been developed to assign responsibility to individuals who are responsible for the commission of international crimes as part of a group of persons or through organizations.

b) Liability for Persons acting in Groups or through Organisations in International Criminal Law

1442. ICL has developed different theories to recognise the responsibility of a “broad range of individuals who work together to bring to fruition massive and logistically complex crimes”.²⁸⁰⁷ In such cases, the case-law of the ICC and other international courts and tribunals supports taking a broad approach to the concept of “commission” to encompass leaders and organisers who do not physically perpetrate the criminal acts in question.²⁸⁰⁸ Only holding the perpetrators who directly carried out the material elements of the crimes would disregard the role of higher level perpetrators who made the commission of the crime possible, and to hold such perpetrators responsible only as accessories may not capture the degree of their culpability.²⁸⁰⁹ Accordingly, the international courts and tribunals have held that it is not necessary for such persons to carry out the crime personally and directly.²⁸¹⁰

1443. The *ad hoc* tribunals and the ICC have developed different theories relating to the joint commission of crimes. While these theories are not directly applicable to the CCU and do not provide direct comparisons to Article 28, they can provide judges with useful guidance on how international trials have approached the responsibility of individuals who commit crimes in groups of co-perpetrators or through organisations. In particular, these modes of liability may offer guidance to assess the scope of Article 28 – in particular in relation to the concepts of “conspiracy” or “common plan” and “organised group” or “stable hierarchical organisation” – and where Article 28 can appropriately be applied in connection to principal liability under the CCU (see above, para. [1428](#)) rather than accomplice liability (see below, para. [1460](#)).

i. ICTY/ICTR: Joint Criminal Enterprise

1444. The ICTY developed the mode of liability of “joint criminal enterprise” (JCE),²⁸¹¹ which was subsequently relied upon by other *ad hoc* tribunals.²⁸¹² This form of liability is

²⁸⁰⁷ Brammertz and Jarvis, *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Oxford University Press, 2016, p. 221, citing ICTY, *Tadic Appeal Judgement*, para. 192.

²⁸⁰⁸ Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd Edition, Oxford University Press, 2016, p. 570. See also, ICTY, *Tadic Appeal Judgement*, para. 192; ICC, *Lubanga Decision on the Confirmation of Charges*, para. 330; ICC, *Ongwen Appeal Judgement*, para. 627; SCSL, *Brima Appeal Judgement*, paras 72-80; ICTR, *Karemera et al. Appeal Judgement*, para. 145.

²⁸⁰⁹ ICTY, *Tadic Appeal Judgement*, para. 192.

²⁸¹⁰ ICC, *Lubanga Appeals Judgement*, para. 458; ICC, *Ongwen Appeal Judgement*, para. 627; ICTY, *Tadic Appeal Judgement*, para. 192; ICTY, *Kvočka et al. Appeal Judgement*, para. 112; ICTY, *Krnojelac Appeal Judgement*, para. 116; ICTR, *Ntakirutimana Appeal Judgement*, para. 466.

²⁸¹¹ See for the development of the mode: ICTY, *Tadic Appeal Judgement*, para. 192-226.

²⁸¹² See e.g., SCSL, *Kondewa Decision and Order on the Defence Preliminary Motion for Defects in the Form of the*

established in customary international law,²⁸¹³ and is viewed as a form of “commission”, which consequently results in principal liability.²⁸¹⁴ JCE has also been utilised by other domestic courts adjudicating on international crimes.²⁸¹⁵

1445. The ICTY developed three distinct categories of JCE liability. Each category has the same objective elements, namely: a plurality of persons; the existence of a common plan, design or purpose, which amounts to or involves the commission of a crime; and the participation of the accused in the common purpose by making a significant contribution to the commission of the crimes encompassed by the common purpose.²⁸¹⁶ A common criminal purpose need not have been previously arranged or formulated, but may materialise extemporaneously.²⁸¹⁷ The common purpose can be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.²⁸¹⁸ The direct perpetrator need not be a member of the JCE if it is shown that the crime can be imputed to another member of the JCE, and that this member – when using the direct perpetrator – acted in accordance with the common plan.²⁸¹⁹ The accused’s participation need not involve the commission of a specific crime (for example, murder, extermination, torture or rape), but may take the form of assistance in, or contribution to, the execution of the common purpose.²⁸²⁰

1446. The subjective (or mental) elements for each of the three categories varies:

- JCE I liability requires that the accused intended to perpetrate the crimes (this being the shared intent of all the co-perpetrators).²⁸²¹ For example, this would be relevant where the co-perpetrators formed a common plan to murder civilians,

[Indictment](#), para. 9; SCSL, *Brima et al. Decision ad and Order on Defence Preliminary Motion for Defenct in the Form of the Indictment*, para. 49; ICTR, *Ntakirutimana Appeal Judgement*, para. 463; ICTR, *Karemra et al Decision on Jurisdictional Appeals: Joint Criminal Enterprise*, paras 13-16; ICTR, *Karemra & Ngirumpatse Appeal Judgement*, para. 145, 623; SCSL, *Brima et al. Appeal Judgement*, paras 72-80; SCSL, *Sesay et al. Appeal Judgement*, paras 394, 400.

²⁸¹³ See e.g., ICTY, *Tadic Appeal Judgement*, para. 220; ICTY, *Prlic et al. Trial Judgement: vol. II*, paras 587, 591; ICTY, *Tolimir Appeal Judgement*, para. 281; ICTY, *Popovic et al. Appeal Judgement*, para. 1672; ICTY, *Brdanin Appeal Judgement*, para. 363, 405.

²⁸¹⁴ See e.g., ICTY, *Kvocka et al. Appeal Judgement*, paras 79-80; ICTR, *Seromba Appeal Judgement*, para. 182; ICTY, *Milutinovic et al. Decision on Dragoljub Ojdanic’s Motion Challenging Jurisdiction- Joint Criminal Enterprise*, paras 20, 31. See also, Brammertz and Jarvis, *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Oxford University Press, 2016, p. 222.

²⁸¹⁵ See e.g., Court of BiH, *Mejakic et al*, Case No. X-KRZ-06/200, [Second Instance Verdict](#), 16 February 2009; Court of BiH, *Rasevic et al*, Case No. X-KRZ- 06/275, 1st Instance Verdict, 28 February 2008, pp 103-108 (English)/pp 113-120 (Bosnian/Serbian/Croatian). The first instance reasoning was upheld on appeal, as noted by the ICTY Prosecutor: ICTY, *Rasevic et al Prosecutor’s Final Progress Report*, para. 6]. See also, UN Interregional Crime and Justice Research Institute, [Modes of Liability: Commission & Participation](#), 2018, pp 45-59; Bangladesh: International Crimes Tribunal-1, *Chief Prosecutor vs. Md. Abdul Aziz alias Habul & 2 Ors. Judgement*, para. 365, 424.

²⁸¹⁶ ICTY, *Tadic Appeal Judgement*, para. 227; ICTY, *Stanisic & Simatovic Appeal Judgement*, para. 77; ICTY, *Stakic Appeal Judgement*, para. 64; ICTY, *Stanisic & Zupljanin Appeal Judgement*, paras 110, 136; ICTY, *Popovic et al. Appeal Judgement*, para. 1378; ICTY, *Sainovic et al. Appeal Judgement*, para. 987; ICTY, *Brdanin Appeal Judgement*, para. 430.

²⁸¹⁷ ICTY, *Stakic Appeal Judgement*, para. 64; ICTY, *Tadic Appeal Judgement*, para. 227.

²⁸¹⁸ ICTY, *Dordevic Appeal Judgement*, para. 141, citing ICTY, *Krajisnik Appeal Judgement*, fn. 418; ICTY, *Brdanin Appeal Judgement*, para. 430. It is, therefore, not required, as a matter of law, that a trial chamber make a separate finding on the individual actions and the intent of each member of a joint criminal enterprise to establish that a plurality of persons acted together in implementing the common criminal purpose.

²⁸¹⁹ ICTY, *Martic, Appeal Judgement*, para. 168; ICTY, *Brdanin Appeal Judgement*, paras 413, 430.

²⁸²⁰ ICTY, *Stakic Appeal Judgement*, para. 64.

²⁸²¹ ICTY, *Tadic Appeal Judgement*, para. 228; ICTY, *Stakic Appeal Judgement*, para. 65; ICTY, *Brdanin Appeal Judgement*, para. 365; ICTY, *Krajisnik Appeal Judgement*, paras 200, 707; ICTY, *Stanisic & Simatovic Appeal Judgement*, para. 77.

and although each of them carried out a different role, they all shared the intent to murder civilians.

- JCE II liability involves the existence of an organised system of ill-treatment (such as a concentration camp or prison); the accused's awareness of the nature of that system; and the accused's participation in the enforcement of the system.²⁸²² For example, this would be relevant where prisoners held in a detention center were mistreated, the accused was aware of this system and contributed to its enforcement, for example, by being in charge of the administration of the center.
- JCE III liability renders an accused responsible for crimes falling outside the common purpose where: (1) it was *foreseeable* that such a crime might be committed by a member of the JCE (or one or more persons used by the accused or by any other member of the JCE) to further the common purpose; and (2) the accused willingly took that risk by joining or continuing to participate in the JCE.²⁸²³ For example, an accused would be liable for the crime of rape where they were part of a common plan to forcibly remove civilians from a village through the crimes of murder, torture and inhumane treatment, the accused made a contribution to this common plan, e.g., by training and deploying soldiers, and the rapes were a foreseeable consequence of the common plan.

CASE EXAMPLES – JCES

ICTY, *STAKIC APPEAL JUDGEMENT*, PARAS 66-85

In the *Stakic* case, Stakic was charged with participating in a campaign of persecutions, comprised of, inter alia, the crimes against humanity of deportation and forcible transfer (**JCE I**). The ICTY Appeals Chamber upheld the Trial Chamber's finding that there was a common purpose that "consisted of a discriminatory campaign to ethnically cleanse the Municipality of Prijedor by deporting and persecuting Bosnian Muslims and Bosnian Croats in order to establish Serbian control". The Appeals Chamber found that the accused acted in furtherance of the common purpose of the JCE and played an important role in it based on the following findings: as the highest representative of the civilian authorities, Stakic played a crucial role in the coordinated co-operation with the police and army in furtherance of the plan to establish a Serbian municipality in Prijedor; Stakic was one of the main actors in the persecutorial campaign; he actively participated in setting up and running the detention camps where mistreatment of detainees occurred; and he took an active role in the organization of the massive displacement of the non-Serb population out of Prijedor. Finally, the Appeals Chamber found that the accused shared the intent with the other JCE participants to further the common purpose and had the intent to commit the underlying crimes.

²⁸²² ICTY, *Tadic Appeal Judgement*, paras 202-203; ICTY, *Krnojelac Appeal Judgement*, para. 89; ICTY, *Vasiljevic Appeal Judgement*, para. 98.

²⁸²³ MICT, *Karadzic Appeal Judgement*, para. 433; ICTY, *Stanisic & Simatovic Appeal Judgement*, para. 77; ICTY, *Sainovic et al. Appeal Judgement*, para. 1557; ICTY, *Tadic Appeal Judgement*, para. 228; ICTY, *Stakic Appeal Judgement*, para. 65; ICTY, *Brdanin Appeal Judgement*, paras 365, 411.

ICTY, KVOCKA ET AL. APPEAL JUDGEMENT, PARAS 178-246

In the *Kvočka et al.* case, Kvočka was found guilty as a co-perpetrator of the following crimes as part of the joint criminal enterprise in Omarska camp (**JCE II**): persecution, murder and torture. The common purpose of the JCE in question was to persecute and subjugate non-Serb detainees. The ICTY Appeals Chamber upheld the Trial Chamber's findings that "Kvočka intentionally furthered the criminal system in place in Omarska camp and is therefore responsible for the crimes committed as part of the joint criminal enterprise."

The Appeals Chamber based its finding on the fact that Kvočka contributed to the daily operation and maintenance of the camp and, in doing so, allowed the system of ill-treatment to perpetuate itself, thereby furthering the common purpose. In relation to Kvočka's awareness of the purpose of the camp, the Appeals Chamber found that the harsh conditions, continuous beatings and widespread nature of the system of ill-treatment could not go unnoticed by someone working there, let alone by someone in a position of authority such as Kvočka. Finally, the Appeals Chamber found that, since the JCE at Omarska camp was the implementation of a system of discriminatory ill-treatment of non-Serb detainees, the intent to discriminate against the detainees and the intent to further the JCE constituted a single form of intent. Thus, the Trial Chamber's finding that Kvočka possessed intent to discriminate against the detainees (i.e., due to his awareness of, and participation in, the persecutory crimes committed) therefore encompassed his intent to further the JCE.

ICTY, SAINOVIC ET AL. APPEAL JUDGEMENT, PARAS 1575-1604

In the *Sainovic et al.* case the accused Sainovic, Lukic and Pavkovic were found guilty of committing, by virtue of their participation in a joint criminal enterprise, sexual assaults amounting to persecution in Beleg, Cirez/Qirez and Pristina/Prishtina in 1999 in Kosovo. The three accused were found guilty of participating in a joint criminal enterprise whose common purpose was to forcibly displace the Kosovo Albanian population within and without Kosovo through a widespread and systematic campaign of terror and violence, the natural and foreseeable consequence of which was the commission of sexual assaults (**JCE III**).

The Appeals Chamber found that the three accused were aware of various criminal and violent acts against the Kosovo Albanian population in 1998 and 1999 and, therefore, were aware of the context in which the forcible displacement took place. In particular, the Appeals Chamber found that Sainovic was aware of allegations of the use of excessive and disproportionate force by police and military forces, the displacement and harassment of civilians, property related crimes (such as looting and arson), and unspecified violations of international humanitarian law (including, allegations of attacks on the civilian population). He also received specific information about the commission of rapes at a meeting on 17 May 1999. Lukic (as Head of the Serbian Ministry of Internal Affairs (MUP) Staff and de facto commander of the MUP forces deployed in Kosovo) was found to have been aware that there were serious allegations of criminal activity by MUP forces in Kosovo in 1998 and to have received information about crimes being committed by MUP and Yugoslav army (VJ) members in 1999. Moreover, Lukic was found to have requested that detailed reports of serious crimes, including rape, be submitted to him and had been informed of/received reports about sexual assaults suffered by Kosovo Albanian women at the hands of VJ soldiers, men wearing military uniforms and a MUP reservist. Pavkovic frequently learned about sexual assaults committed by VJ and MUP forces during the NATO air campaign.

In light of these facts and findings the Appeals Chamber found that the accused must have been aware that sexual assaults could be committed on discriminatory grounds amidst the environment of ethnic animosity aimed at forcibly displacing Kosovo Albanians (during which Kosovo Albanian women forced out of their homes were rendered particularly vulnerable). The accused's participation in the joint criminal enterprise (Sainovic through his role in coordinating joint VJ and MUP operations, Lukic through his role as Head of the MUP Staff in Pristina/Prishtina, and Pavkovic through his position as Commander of the 3rd Army of the VJ) demonstrates that they acted in furtherance of the common purpose of the JCE while being aware of the possibility that sexual assaults could be committed, thus showing that they willingly took that risk.

ii. ICC: Control Theory

1447. Instead of relying on the principle of JCE developed by the *ad hoc* tribunals, the ICC has adopted the concept of *control over a crime* to hold remote or higher-level perpetrators of crime responsible as principal perpetrators.²⁸²⁴ Under this theory, people who are distanced from the actual scene of a crime may be held responsible for the crime where there is a finding that they masterminded the commission of the crime because they determined whether and how the crime would be committed.²⁸²⁵ More concretely, the perpetrators of the crime are those who controlled its commission and who were aware of the factual circumstances allowing them to exert such control.²⁸²⁶
1448. The ICC has recognised the following forms of commission (in addition to direct perpetration): co-perpetration; indirect perpetration; and indirect co-perpetration. Each form will be discussed, in turn, below.
1449. **Co-perpetration**²⁸²⁷ (commission jointly with another):²⁸²⁸ An accused may be held liable by virtue of the co-perpetration mode of liability if they make, “within the framework of a common plan, an essential contribution with the resulting power to frustrate the commission of the crime.”²⁸²⁹ According to the ICC Appeals Chamber, the control over the crime test “is a convincing and adequate approach to distinguish co-perpetration from accessorial liability because it assesses the role of the person in question *vis-à-vis* the crime.”²⁸³⁰
1450. As such, the objective elements of this mode require that the accused made an “essential contribution”²⁸³¹ to a common plan between the accused and at least one

²⁸²⁴ See e.g., ICC, *Ongwen Appeal Judgement*, para. 629; ICC, *Lubanga Appeals Judgement*, para. 469; ICC, *Bemba et al. Appeal Judgement*, para. 820; ICC, *Ntaganda Appeal Judgement*, para. 1041; ICC, *Katanga Trial Judgement*, para. 1396; ICC, *Lubanga Decision on the Confirmation of Charges*, para. 338; ICC, *Katanga & Chui Decision on the Confirmation of Charges*, para. 488.

²⁸²⁵ ICC, *Lubanga Trial Judgement*, para. 920; ICC, *Lubanga Decision on the Confirmation of Charges*, para. 330.

²⁸²⁶ ICC, *Lubanga Decision on the Confirmation of Charges*, para. 31; ICC, *Katanga Trial Judgement*, para. 1396.

²⁸²⁷ This is a form of perpetration under Article 25(3)(a) of the *ICC Statute*.

²⁸²⁸ This is a form of perpetration under Article 25(3)(a) of the *ICC Statute*.

²⁸²⁹ ICC, *Lubanga Appeals Judgement*, para. 469. See also, Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd Edition, Oxford University Press, 2016, p. 570.

²⁸³⁰ ICC, *Lubanga Appeals Judgement*, para. 469.

²⁸³¹ ICC, *Lubanga Appeal Judgement*, para. 473; ICC, *Katanga & Chui Decision on the Confirmation of Charges*, para. 525; ICC, *Blé Goudé Decision on the Confirmation of Charges*, para. 135.

other perpetrator that would result in the commission of the relevant crime in the ordinary course of events.²⁸³² The common plan between the individuals does not need to be specifically directed at the commission of a crime,²⁸³³ but must lead to the commission of one or more crimes.²⁸³⁴ In other words, the plan must be to commit the crimes or to engage in conduct which, in the ordinary course of events, would result in the commission of the crimes.²⁸³⁵ The common plan can be express or implied, previously arranged or materialise extemporaneously.²⁸³⁶ Its existence can be inferred from both direct and circumstantial evidence,²⁸³⁷ including the subsequent conduct of the accused.²⁸³⁸

1451. Ultimately, whether a particular contribution was “essential” will depend upon the nature and centrality of the role of, and the functions assigned to, the accused. Assessments in this regard are conducted on a case-by-case basis, considering the role of the accused in relation to the overall circumstances of the case.²⁸³⁹ The contribution of a co-perpetrator may have been performed before or during the execution of the crime.²⁸⁴⁰
1452. As to the subjective elements: the accused must have been aware that they provided an essential contribution and must have meant to commit the material elements of the crime resulting from the common plan or have been aware that, by implementing the common plan, the crime would “occur in the ordinary course of events”.²⁸⁴¹

²⁸³² ICC Statute, Article 25(3)(a). See also, ICC, *Lubanga Appeals Judgement*, para. 445; ICC, *Lubanga Trial Judgement*, paras 980-981; ICC, *Ongwen Trial Judgement*, para. 2786; ICC, *Ntaganda Prosecution request for notice to be given of a possible recharacterisation pursuant to regulation 55(2)*, para. 16

²⁸³³ ICC, *Lubanga Appeal Judgement*, para. 446.

²⁸³⁴ ICC, *Lubanga Appeal Judgement*, para. 445.

²⁸³⁵ ICC, *Ongwen Trial Judgement*, para. 2787; ICC, *Lubanga Trial Judgement*, para. 981; ICC, *Katanga Trial Judgement*, paras 1626-1627, 1630.

²⁸³⁶ ICC, *Lubanga Appeal Judgement*, para. 446; ICC, *Ntaganda Trial Judgement*, para. 775. ICC, *Bemba et al. Contempt Judgement*, para. 66; ICC, *Lubanga Trial Judgement*, para. 988.

²⁸³⁷ ICC, *Bemba et al. Contempt Judgement*, para. 66; ICC, *Lubanga Trial Judgement*, para. 988.

²⁸³⁸ ICC, *Bemba et al. Contempt Judgement*, para. 66; ICC, *Katanga & Chui Decision on the Confirmation of Charges*, para. 301; ICC, *Muthaura et al. Decision on the Confirmation of Charges*, para. 400.

²⁸³⁹ ICC, *Lubanga Trial Judgement*, paras 1000-1001.

²⁸⁴⁰ ICC, *Lubanga Appeals Judgement*, paras 469, 473; ICC, *Katanga & Chui Decision on the Confirmation of Charges*, para. 526; ICC, *Ruto et al. Decision on the Confirmation of Charges*, para. 306.

²⁸⁴¹ ICC, *Lubanga Trial Judgement*, para. 1013; ICC, *Bemba et al. Contempt Judgement*, para. 70; ICC, *Katanga & Chui Decision on the Confirmation of Charges*, para. 533; ICC, *Lubanga Decision on the Confirmation of Charges*, paras 363-364. See also, ICC, *Bemba Decision on Confirmation of Charges*, para. 371; ICC, *Ntaganda Appeal Judgement*, para. 1045.

CASE EXAMPLE – CO-PERPETRATION ICC, LUBANGA TRIAL JUDGEMENT, PARAS 1351-1357

In the *Lubanga* case before the ICC, the Trial Chamber found that Lubanga and his co-perpetrators agreed to, and participated in, a common plan to build an army for the purpose of establishing and maintaining political and military control over Ituri. This resulted, in the ordinary course of events, in the conscription and enlistment of boys and girls under the age of 15, and their use to participate actively in hostilities. Accordingly, Lubanga was found guilty as a **co-perpetrator** of the war crime of conscripting and enlisting child soldiers and using them to participate in active hostilities.

The Trial Chamber based this finding on the fact that, as President of the UPC/FPLC, Lubanga exercised an overall coordinating role over the activities of the UPC/FPLC, was involved in the planning of military operations, and played a critical role in providing logistical support (e.g., weapons, food, uniforms) to the FPLC. Lubanga also actively supported recruitment initiatives by giving speeches where he encouraged children, including those under the age of 15 years, to join the army. In addition, Lubanga personally used children under 15 as his bodyguards. The Chamber was satisfied beyond reasonable doubt that Thomas Lubanga acted with the intent and knowledge in the conscription and enlistment of child soldiers.

1453. **Indirect perpetration (commission through another).**²⁸⁴² Occurs where the accused controlled the will of those who carried out the crime.²⁸⁴³ This can occur in two scenarios: (1) where the accused exercised control over the will of someone who bore no criminal culpability for their actions (see para. 1435);²⁸⁴⁴ or (2) where the accused exercised control over an organised hierarchical organisation,²⁸⁴⁵ meaning that the “indirect perpetrator used at least part of the apparatus of power subordinate to them, so as to steer it intentionally towards the commission of the crime, without leaving one of the subordinates at liberty to decide whether the crime is to be executed”.²⁸⁴⁶
1454. According to the objective element of this mode of liability, it must be established that the accused exerted control over the crime whose material elements were brought about by one or more persons.²⁸⁴⁷ In relation to an organised group, this occurs where the accused has “functional domination”²⁸⁴⁸ over an organisational structure within

²⁸⁴² This is a form of perpetration under [ICC Statute](#), Article 25(3)(a).

²⁸⁴³ See e.g., ICC, *Ongwen Appeal Judgement*, para. 628; ICC, *Lubanga Appeal Judgement*, para. 465; ICC, *Lubanga Decision on the Confirmation of Charges*, para. 332.

²⁸⁴⁴ ICC, *Ongwen Appeal Judgement*, para. 628; ICC, *Katanga Trial Judgement*, para. 1402. This would occur when, for example, the direct perpetrator was a minor below the age of criminal responsibility; suffered from mental deficiency or impairment; were involuntarily intoxicated; or committed the act as “an inadvertent participant [...] acting under duress or mistake”: Cryer et al. (eds), *An Introduction to International Criminal Law and Procedure*, 3rd Edition, Cambridge University Press, 2015, p. 367.

²⁸⁴⁵ ICC, *Katanga Trial Judgement*, para. 1408-1409: the key requirement is the “functional automatism which propels the apparatus of power”, meaning “the superior’s orders are automatically executed, at least on account of the interchangeability of the potential physical perpetrators”. See also, ICC, *Ntaganda Decision on Confirmation of Charges*, para. 120; ICC, *Muthaura et al. Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, para. 36; ICC, *Simone Gbagbo Decision on the Prosecutor’s Application Pursuant to Article 58 for a warrant of arrest against Simone Gbagbo*, para. 28.

²⁸⁴⁶ ICC, *Ongwen Appeal Judgement*, para. 631; ICC, *Ongwen Trial Judgement*, para. 2784. See also, ICC, *Katanga Trial Judgement*, paras 1403-1406, 1411- 1412; ICC, *Ntaganda Trial Judgement*, para. 778.

²⁸⁴⁷ [ICC Statute](#), Article 25(3)(a); ICC, *Katanga Trial Judgement*, paras 1399, 1416.

²⁸⁴⁸ Cryer, *An Introduction to International Criminal Law and Procedure*, 3rd Edition, Cambridge University Press, 2015, p.

which they can use their authority and power to ensure compliance with their orders.²⁸⁴⁹ To establish that such control was present, the evidence must show:²⁸⁵⁰

- i. a clear **organisational hierarchy**, within which compliance with orders was rendered nearly automatic.²⁸⁵¹ This is demonstrated in situations where, if one member of the organisation refuses to comply, another will be available to step in and secure the execution of the order(s) issued.²⁸⁵² The nature of the organisation – including whether intensive, strict and violent training regimes or the routine invocation of disciplinary punishments – is also relevant;²⁸⁵³ and
- ii. that, within this hierarchy, the accused genuinely exerted “**control over the course of events occasioning the crime**” by conceiving the crime, overseeing its preparation at different hierarchical levels and/or controlling its performance and execution through the organisational apparatus.²⁸⁵⁴

1455. As to the subjective elements, the accused must have met the mental elements for the crime committed, and have been aware of the factual circumstances which allowed them to exert control over the crime through others.²⁸⁵⁵ At a minimum, this requires that the accused was aware of the organisational structure that enabled them to use another person to realise the material elements of the crime.²⁸⁵⁶

CASE EXAMPLE – INDIRECT PERPETRATION ICC, ONGWEN TRIAL JUDGEMENT, PARAS 2928-2973

In the *Ongwen* case before the ICC, Ongwen was found guilty of, *inter alia*, the war crime of attacking the civilian population, murder, cruel treatment and destruction of property as an **indirect perpetrator**. The ICC Trial Chamber found that, on Ongwen’s orders, LRA soldiers attacked the Lukodi IDP camp, targeted civilians within the camp (whom they shot, burnt and beat), and set civilian huts on fire. In concluding that these crimes were committed “through others”, the Trial Chamber found that Ongwen made the decision to attack the IDP camp, gathered LRA soldiers for that purpose and instructed the soldiers to attack everyone present. In addition, due to the conditions of recruitment, initiation and training, and service in the LRA, commanders such as Ongwen could rely on the execution of their orders by a reliable pool of persons. Accordingly, the Trial Chamber concluded that the conduct of the individual LRA fighters in the execution of the crimes during the attack must be attributed to Ongwen as his own.

368.

²⁸⁴⁹ ICC, *Katanga & Chui Decision on the Confirmation of Charges*, para. 514. In these situations, although it is likely that those directly committing the crime will bear criminal culpability, it is possible that certain direct perpetrators could be absolved of criminal responsibility. See, ICC, *Katanga Trial Judgement*, para. 1404.

²⁸⁵⁰ ICC, *Katanga Trial Judgement*, para. 1412.

²⁸⁵¹ ICC, *Katanga Trial Judgement*, para. 1408; ICC, *Ntaganda Decision on Confirmation of Charges*, para. 120.

²⁸⁵² ICC, *Katanga Trial Judgement*, para. 1408.

²⁸⁵³ ICC, *Katanga & Chui Decision on the Confirmation of Charges*, para. 518.

²⁸⁵⁴ ICC, *Katanga Trial Judgement*, para. 1412.

²⁸⁵⁵ *ICC Statute*, Article 25(3)(a); ICC, *Ongwen Appeal Judgement*, para. 249; ICC, *Katanga Trial Judgement*, para. 1399, 1413-1415.

²⁸⁵⁶ ICC, *Katanga Trial Judgement*, para. 1415.

In relation to the mental elements, the Chamber found that the nature of Ongwen's participation in the planning and execution of the attack could only have been undertaken intentionally. In addition, the Chamber found, on the basis of the instructions he provided to the LRA fighters prior to the attack, that Ongwen meant for civilians to be attacked, killed, abused, and for their property to be looted and destroyed.

1456. **Indirect co-perpetration** (commission jointly with another and through another person).²⁸⁵⁷ The objective elements of this mode require: (1) the existence of a common plan between the accused and co-perpetrators to commit the crimes or engage in conduct which would lead to their occurrence in the ordinary course of events; (2) the control by co-perpetrator(s) over persons who execute the crime by subjugating the will of the direct perpetrators (including an organised power apparatus through the automatic functioning of the apparatus); and (3) the accused, although not required to carry out the criminal conduct themselves, makes an essential contribution to it and has the resulting power to frustrate its commission.²⁸⁵⁸
1457. As to the subjective elements, the accused must have intended their essential contribution and have been mutually aware and accepted that the implementation of the common plan would result in the commission of the crimes, and be aware of the factual circumstances enabling them to exercise joint control over the commission of the crime through another person.²⁸⁵⁹

CASE EXAMPLE – INDIRECT CO-PERPETRATION ICC, NTAGANDA TRIAL JUDGEMENT, PARAS 808-811, 825, 852-857

In the *Ntaganda* case before the ICC, the accused Ntaganda was found guilty of crimes against humanity and war crimes, including murder, intentionally direct attacks against civilians and civilian objects, persecution, pillage, rape and sexual slavery, forcible transfer of the population, conscripting and enlisting child soldiers and destruction of property as an **indirect co-perpetrator**.

²⁸⁵⁷ This is a form of perpetration under [ICC Statute](#), Article 25(3)(a). This is a combination of the co-perpetration and indirect perpetration modes of liability.

²⁸⁵⁸ See e.g., ICC, *Ongwen Appeal Judgement*, para. 637-8; ICC, *Ongwen Trial Judgement*, para. 2787-2788; ICC, *Ntaganda Trial Judgement*, para. 774; ICC, *Muthaura et al. Decision on the Confirmation of Charges*, paras 297-298; ICC, *Ntaganda Decision on Confirmation of Charges*, para. 104, 121; ICC, *Al Bashir Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir*, para. 213.

²⁸⁵⁹ ICC, *Ongwen Trial Judgement*, para. 2788; ICC, *Ntaganda Trial Judgement*, para. 774.

The Chamber found that Ntaganda and other military leaders worked together and agreed in the common plan to drive out all members of the Lendu ethnicity from the localities targeted. By way of this agreement, the co-perpetrators meant the destruction and disintegration of the Lendu community, which inherently involved the targeting of civilians through acts such as killings and rape, as well as targeting public and private properties, and were virtually certain the implementation of the plan would lead to the recruitment of child soldiers and the rape and sexual slavery of these children. Further, the Trial Chamber found that the UPC/FPLC soldiers and Hema civilians were under the control of the co-perpetrators and used to execute the objective elements of the crimes.

The Trial Chamber found that Ntaganda made an essential contribution to the crimes based on a number of factors including: that he had a unique and central role in the setting up of the armed group that committed the crimes; the armed group's military campaign was largely dependent upon Ntaganda's personal involvement and commitment as one of the group's highest-ranking military figures; the assault on one village where crimes were committed was under Ntaganda's overall military command, after which the troops proceeded with the widespread commission of crimes, as planned by the co-perpetrator; and Ntaganda's direct orders to kill civilians and loot, his active role as an operational commander, and his proximity to the commanders and soldiers deployed, which resulted in the commission of the crimes.

3. Accessory Liability

1458. “Accessory liability” is a form of criminal responsibility an accused can incur for the criminal actions of another person if the accused has a sufficient connection to, or participation in, the crime.²⁸⁶⁰ Both the CCU and the international courts and tribunals have recognised several forms of accessory liability relevant to international crimes.

a) Applicability under the CCU

1459. The three accessory liability provisions under the CCU are set out in Article 27 as follows:

ARTICLE 27. TYPES OF ACCOMPLICES

3. An organiser shall mean person who has organised a criminal offence (or criminal offences) or supervised its (their) preparation or commission. An organiser shall also mean a person who has created an organised group or criminal organisation, supervised it, funded it, or organised the covering up of the criminal activity of an organised group or criminal organisation.
4. An abettor shall mean a person who has induced any other accomplice to a criminal offence, by way of persuasion, subornation, threat, coercion or otherwise.
5. An accessory shall mean a person who has facilitated the commission of a criminal offence by other accomplices, by way of advice, instructions, or by supplying the means or tools, or removing obstacles, and also a person who promised in advance to cover up a criminal offence, tools or means, traces of crime or criminally obtained things, to buy or sell such things, or otherwise facilitate the covering up of a criminal offence.

²⁸⁶⁰ See e.g., Thomson Reuters Practical Law, [Accessorial liability](#), 2023.

1460. Articles 29(2)-(5) of the CCU provide further clarification on the criminal liability of accomplices under the CCU.

ARTICLE 29. CRIMINAL LIABILITY OF ACCOMPLICES

2. An organiser, abettor and accessory shall be criminally liable under the respective part of Article 27 and the Article (part of the Article) of the Special Part of this Code that provides for the offence committed by a principal offender.
3. The features of character of a specific accomplice shall be criminated only upon such accomplice. Other circumstances that aggravate responsibility and are provided for by Articles of the Special Part hereof as the elements of a crime that affect the treatment of the principal offender's actions, shall be criminated only upon the accomplice who was conscious of such circumstances.
4. Should a principal offender commit an un consummated criminal offence, other accomplices shall be criminally liable for complicity in an un consummated crime.
5. Accessories shall not be criminally liable for the act committed by the principal offender, provided there was no part of their intent in that act.

1461. Accordingly, Articles 27(3)-(5) of the CCU cover three types of accessory liability: organising, abetting, and being an accessory, while Articles 26 and 29(5) provide that the organiser, abettor or accessory must have the intent that the crime be committed, which is shared with the principal. Article 29(2) explains that the organiser, abettor or accessory are criminally liable under the relevant paragraph of Article 27 and the article setting out the criminal offence. As discussed below (see para. 1475), similar conduct is captured by the modes of liability recognised under international criminal law, an examination of which can provide guidance on the application of these modes in the context of atrocity and conflict-related crimes.

i. Organising

1462. According to Article 27(3) of the CCU, the objective elements of this mode of liability require the organiser to: (1) organise the commission of a crime(s) or supervise its preparation or commission; or (2) create an organised group or criminal organisation, supervise it, finance it, or organise the cover-up of the criminal activity of an organised group or criminal organisation.²⁸⁶¹

1463. As to the subjective elements, the organiser must intend that the act constituting the criminal offence be committed. This is confirmed by Article 29(5) which states: “accomplices shall not be criminally liable for an act committed by the principal, where that act was no part of their intent”. In relation to organisers who create organised groups or criminal organisations, Article 30(1) confirms: “[a]n organiser of an organised group or criminal organisation shall be criminally liable for all the criminal offences committed by the organised group or criminal organisation, *if those were part of his intent*”.

²⁸⁶¹ CCU, Article 27(3).

EXAMPLES OF FORMS OF “ORGANISING” ACCORDING TO UKRAINIAN PRACTICE²⁸⁶²

- Engaging perpetrators, accomplices or other organisers in the commission of the crime;
- Distributing responsibilities between perpetrators, accomplices or other organisers;
- Otherwise pooling and coordinating efforts of accomplices and perpetrators (their placement/presence at the crime scene, determining the sequence of criminal acts, the form and procedure of communication between the accomplices during the crime’s commission);
- Determining the object of the offence;
- Developing a plan to commit a crime;
- Finding or adapting the means or instruments/tools for the crime’s commission;
- Ordering the commission of a crime;
- Removal of obstacles to the commission of a crime;
- Creating other pre-conditions for the commission of a crime;
- Instructing accomplices to commit relevant criminal acts (through actions or inactions);
- Developing measures to neutralise the activities of law enforcement agencies (e.g., through bribery, violence against employees or their relatives, their removal, or other blocking of their activities that may prevent the commission of a crime); or
- Determining the places to hide the accomplices after they have committed a crime, as well as places to conceal weapons, the means of committing the crime, traces of the crime, objects obtained by criminal means, etc.

1464. Based on these types of conduct, an organiser’s contribution to international crimes can vary depending on the nature of the crime, manner of its commission, types of forces involved, etc. In cases of low-level incidents of violence (e.g., murder of individual civilians, looting, etc.), it is unlikely that an organiser’s role will differ from the circumstances surrounding ordinary crimes under the CCU. For example, where a soldier organises his fellow servicemen to loot local civilian houses for personal gain – i.e., by devising a plan and allocating means (e.g., vehicles and arms) for these purposes – they can qualify as organisers.

1465. However, the situation is more intricate in cases of multi-episode or prolonged incidents, or in connection with, for instance, complex coordination of an attack (e.g., sieges of towns by different units), complicated planning or decision-making processes (e.g., the use of strategic aviation), or attacks involving the use of modern sophisticated weapons (e.g., multiple-rocket artillery or ground ballistic complexes). In such cases, those contributing to crimes might not seem to fit into the previously developed understanding of the form of “organising” under the CCU, which were more applicable to ordinary crimes (e.g., banditism, money laundering, etc.). Nonetheless, the wording of Article 27(3) – combined with previous judicial practice in Ukraine – is broad enough to encompass the multitude of ways that mid- and high-level pepe-

²⁸⁶² Resolution of the Supreme Court of Ukraine “[On the Practice of Consideration by Courts of Criminal Cases of Crimes Committed by Sustainable Criminal Associations](#)” of 23 December 2005 No. 13, para. 3; Andrushko, Arsenyuk and Tykhyi, Scientific and practical commentary to the Criminal Code of Ukraine (2009), [Commentary to Article 27 of the CCU](#).

trators may be involved in organising the commission of international crimes (which have been considered under various modes of liability by the international courts and tribunals. The box below provides some illustrative examples.

EXAMPLES OF SITUATIONS WHERE THE PERSON INVOLVED COULD POTENTIALLY QUALIFY AS AN "ORGANISER"

- A high-level politician who directed civilians fleeing violence to an area where they knew civilians were being attacked and who also sent armed reinforcements to that area to contribute to the attack.²⁸⁶³
- An armed soldier who accompanied two other armed soldiers (the direct perpetrators) and a number of detainees to an area where the direct perpetrators shot and killed the detainees.²⁸⁶⁴
- A commanding officer issuing an order for the withdrawal of his soldiers who were guarding POWs which provided paramilitary forces unrestrained physical access to the POWs and, thus, facilitated their murder.²⁸⁶⁵
- A mid-level officer who assembled police to launch an attack on a village during which time civilians were murdered and subjected to cruel treatment and civilian houses were destroyed (e.g., set ablaze).²⁸⁶⁶
- A leader of a group of soldiers who took women from a detention centre to a secondary location where they were further detained and raped by other soldiers.²⁸⁶⁷

²⁸⁶³ See e.g., ICTR, *Kalimanzira Trial Judgement*, paras 392-393. In this case, the Trial Chamber found that Kalimanzira personally encouraged thousands of civilians to take refuge in an area where he promised they would be protected. Instead of being protected, the civilians were attacked and killed in the presence of Kalimanzira, who also sought police and military reinforcements to assist in the attack. Accordingly, the Trial Chamber found Kalimanzira guilty of aiding and abetting genocide. For a detailed discussion of aiding and abetting, see para. 1484 below.

²⁸⁶⁴ See e.g., ICTY, *Vasilijevic Appeal Judgement*, para. 134. A portion of this case related to an incident during which Vasilijevic accompanied three of his fellow soldiers, who had captured seven Muslim men, to an area where these Muslim men were shot. While Vasilijevic did not carry out the murder of these men himself, he was armed and stood by as his fellow soldiers shot the men. Accordingly, the Appeals Chamber found Vasilijevic guilty of aiding and abetting murder. For a detailed discussion of aiding and abetting, see para. 1484 below.

²⁸⁶⁵ See e.g., ICTY, *Mrksic Trial Judgement*, paras 612, 620-622. In this case, the Trial Chamber found that Mrksic's order for the withdrawal of the only remaining soldiers guarding the POWs "had an immediate and direct effect on the commission of the murders that followed". The Trial Chamber therefore found that Mrksic aided and abetted the commission of the crime of murder. For a detailed discussion of aiding and abetting, see para. 1484 below.

²⁸⁶⁶ ICTY, *Boskoski and Tarculovski Appeal Judgement*, paras 130, 135, 138, 150, 153-154, 157. In this case, Tarculovski was found responsible for instigation on the basis of evidence suggesting (i) that he was responsible for the preparation of the operation with the predominant objective to indiscriminately attack civilians and their property; (ii) that he personally led this operation; (iii) that he was present in the village while the crimes were committed; and (iv) that he authorised the police members not to conduct an inspection in respect of the deaths of three men. For a detailed discussion of instigating, see para. 1479 below.

²⁸⁶⁷ See e.g., ICTY, *Kunarac et al. Trial Judgement*, paras 21, 22, 26, 28-33, 636-670. Amongst other offences, Dragoljub Kunarac, the commander of a volunteer unit of soldiers, was found guilty of aiding and abetting torture and rape by bringing girls to, and leaving them in, a house containing soldiers from his unit, knowing that the girls would then be raped. This occurred in the context of the military take-over of a town, where civilians were being held in various long- and short-term detention facilities across town. For a detailed discussion of aiding and abetting, see para. 1484 below.

- A commander of a detention facility who failed to provide adequate food, water, medical, toilet and sleeping facilities to detainees, despite no indication that resources were limited (i.e., organised inadequate facilities), thereby subjecting detainees to inhuman conditions and causing their willful suffering and cruel treatment.²⁸⁶⁸

1466. At the same time, in many war crimes cases, the mode of organising will overlap with the mode of ordering (i.e., a form of commission under Article 438 of the CCU (see para. 1497 below)). This can be the case where, for example, an artillery unit commander orders his subordinates to shell a residential area of a town with the knowledge of the civilian status of the targets, but also contributes to the attack by planning it, assigning tasks to the artillery machine operators, placing the operators in particular locations, etc. In other words, in many cases where commanders order the commission of war crimes, they are likely to also play an additional role in orchestrating their preparation by finding the means, distributing responsibilities and tasks, etc.

1467. Organising does not have an exact replication in the modes of liability recognised under ICL. However, organising under Article 27(3) of the CCU can be used to cover similar conduct as that captured by indirect perpetration or indirect co-perpetration (see para. 1435), planning (see para. 1476) and ordering (see para. 1499), and in some circumstances, aiding and abetting (see para. 1485) or contributing in any other way to the commission of a crime (see para. 1491).

ii. Abetting (CCU, Article 27(4))

1468. Article 27(4) refers to abettors who have “induced any other accomplice to a criminal offence, by way of persuasion, subornation, threat, coercion or otherwise”. In other words, abetting under the CCU involves instigating the crime through arousing the desire (belief in the desirability, profitability, need), causing the determination, or strengthening the intention of the direct perpetrator to commit a crime.²⁸⁶⁹

1469. As to the subjective elements of this mode, in line with Article 29(5), the abettor must have the requisite intent for the act committed by the principal (i.e., the criminal offence).

²⁸⁶⁸ ICTY, *Celebici Trial Judgement*, paras 1073-1119, 1123. The Trial Chamber here found Zdravko Mucic both directly and as a superior/commander, responsible for wilfully causing great suffering or serious injury to the body or health of detainees as well as for their cruel treatment, based on his *de facto* position of superior authority over the Celebici prison-camp (during the Bosnian war) and that “by virtue of this position [Mucic] was the individual with primary responsibility for, and the ability to affect, the conditions in the prison-camp” (See para. 1123 of the judgement). For a detailed discussion of principal (direct) liability and command responsibility, see para. 1512 below.

²⁸⁶⁹ Andrushko, Arsenyuk and Tykhyi, Scientific and practical commentary to the Criminal Code of Ukraine (2009), [Commentary to Article 27 of the CCU](#).

METHODS OF PERSUASION UNDER THE CCU

According to the CCU, the following are methods of persuading an accomplice to commit a crime:²⁸⁷⁰

- Persuasion – the systematic or one-time request of a person in need to commit a crime;
- Bribery – the provision or promise of material (money, property, transfer or preservation of property rights, exemption from property obligations, etc.) or other aid (employment assistance, solving certain life problems, exemption from criminal liability, etc.) in return for committing a crime;
- Threat – the intimidation of a person by threatening to cause physical, property, moral or other harm if they do not commit a crime;
- Coercion – soliciting another person to commit a crime by inflicting bodily harm or using other violence, damaging property belonging to them or their relatives, disseminating certain information about such a person, etc.; and
- Inclination in another way – the commission of any other acts by which the person incites the accomplice to commit the crime, including: instructions, orders, advice, appeals, etc.

1470. This mode may be useful in capturing the responsibility for remote perpetrators of international crimes in cases where they have exerted influence on the direct perpetrators to commit the crimes including, for example, those who have created an environment within their unit where the commission of international crimes is encouraged, those who have requested others to commit crimes, or those who have solicited others to commit crimes through coercion. This mode of liability covers similar conduct as the modes of liability of instigating, soliciting or inducing (see para. 1480), and aiding and abetting (see para. 1485) recognised by international courts and tribunals.

iii. Acting as an accessory (CCU, Article 27(5))

1471. Under Article 27(5), the objective elements of this mode of liability provide that an “accessory” is a person who either:²⁸⁷¹ (1) facilitated the commission of a criminal offence by other accomplices by providing advice, instructions, supplying the means or tools, or removing obstacles; or (2) promised in advance to conceal a criminal offence, tools or means used for the crime’s commission, traces of the crime or things obtained as a result of the crime, as well as to buy or sell such things, or otherwise facilitate the covering up of the crime.

1472. In accordance with Article 29(5), the subjective element of this mode requires that the accessory must have the intent for the act committed by the principal (i.e., the criminal offence).

²⁸⁷⁰ Andrushko, Arsenyuk and Tykhyi, Scientific and practical commentary to the Criminal Code of Ukraine (2009), [Commentary to Article 27 of the CCU](#).

²⁸⁷¹ [CCU, Article 27\(5\)](#).

EXAMPLES OF ACTING AS AN “ACCESSORY”

- A high-ranking administrative leader in a municipality who contributed to the continuation of a forced labor program by appointing the head of the relevant municipal department that was responsible for the program and who facilitated prisoner exchanges by appointing members of a prisoner exchange committee and by being consulted about the prisoner exchanges.²⁸⁷²
- The commander of a military engineering unit who provided his unit’s resources and equipment to mass execution sites, to excavate burial sites.²⁸⁷³
- A senior pastor who conveyed armed attacker to a complex where the attackers then killed civilians.²⁸⁷⁴
- An army chief who provided and supplied military equipment to local forces who committed crimes, including deportation and forcible transfer.²⁸⁷⁵

1473. This mode of liability finds similarities to aiding and abetting (see para. [1485](#)), or to contributing in any other way to the commission or attempted commission of a crime (see para. [1491](#)), recognised by international courts and tribunals.

b) Accessory Liability under international law

1474. As mentioned above, in addition to its inclusion in the CCU, accessory liability is also recognised in customary international law and the instruments and practice of the international courts and tribunals.²⁸⁷⁶ Accordingly, this Section will discuss the following modes of accessory liability: planning; instigating, soliciting or inducing; aiding and abetting; and other contributions to crimes.

i. Planning

1475. Planning is specifically listed as a mode of liability in the statutes of the ICTY and ICTR,²⁸⁷⁷ and is recognised under customary international law.²⁸⁷⁸ However, planning

²⁸⁷² ICTY, *Simic et al.* [Appeal Judgement](#), paras 153-155, 182-184, 189. In this case, Blagoje Simic, the President of the Bosanski Samac Municipal Board in Bosnia & Herzegovina, was found guilty of aiding & abetting the crime of persecutions of non-Serb civilians through their unlawful arrest and detention, forced labour and forced displacement (see para. 189 of the appeal judgement).

²⁸⁷³ ICTY, *Blagojevic and Jokic*, [Trial Judgement](#), paras 357, 567(j), 763, 766-767, 769-775. Dragan Jokic, Chief of Engineering and Engineering Company Commander in the Army of Republika Srpska (during the Bosnian war) was found guilty of aiding and abetting the mass executions of 2,700-4,200 victims by virtue of his sending and monitoring the deployment of Zvornik Brigade resources and equipment to mass execution sites to excavate burial sites.

²⁸⁷⁴ ICTR, *Ntakirutimana et al.* [Trial Judgement](#), paras 788-790. Elizaphan Ntakirutimana conveyed armed attackers to the Mugonero Complex in his vehicle on the morning of 16 April 1994 and these attackers proceeded to kill Tutsi refugees at the Complex. The accused knew that members of the Tutsi ethnicity were being targeted for attack, and that by transporting the attackers to the complex, he would be assisting in the attack. He was accordingly convicted of aiding and abetting the killing of and causing serious bodily or mental harm to the Tutsi victims.

²⁸⁷⁵ ICTY, *Milutinovic et al.* [Judgement \(vol. III of IV\)](#), paras 623-630. Dragoljub Ojdanic (Chief of the General Staff of the Yugoslav Army) was found guilty of aiding and abetting the deportation and forcible transfer of Albanian civilians by virtue of, *inter alia*, his arming of the non-Albanian population in Kosovo.

²⁸⁷⁶ See e.g., [ICC Statute](#), Article 25(3)(b)-(d); [ICTY Statute](#), Article 7(1); [ICTR Statute](#), Article 6(1).

²⁸⁷⁷ [ICTY Statute](#), Article 7(1); [ICTR Statute](#), Article 6(1).

²⁸⁷⁸ See e.g., ICTY, *Milutinovic et al.* [Decision on Dragoljub Ojdanic’s Motion Challenging Jurisdiction—Joint Criminal Enterprise](#), para. 21: due to the fact that one of the preconditions for a mode of liability to come within the ICTY’s jurisdiction is that, *inter alia*, “it must have existed under customary international law at the relevant time”.

is not recognised as a mode of liability under the ICC Statute, instead such conduct would likely be subsumed under the modes of liability of co-perpetration²⁸⁷⁹ (see para. 1433) and other contributions to crimes (see para. 1491).

1476. According to the jurisprudence of the ICTY and the ICTR, the objective element of “planning” requires that one or more persons “design the criminal conduct constituting one or more” crimes that are later perpetrated.²⁸⁸⁰ This may involve “formulating a method of design or action, procedure, or arrangement for the accomplishment of a particular crime” which is later perpetrated.²⁸⁸¹ It is sufficient to demonstrate that the planning was a factor that substantially contributed to such criminal conduct.²⁸⁸² In addition, it is not required to prove the accused’s presence at the crime scene to show that crimes were committed under the accused’s direction or according to their plan.²⁸⁸³
1477. As to the subjective elements, the individual planning the act must have had “the intent to plan the commission of a crime or, at a minimum, the awareness of the substantial likelihood that a crime [would] be committed in the execution of the acts or omissions planned”.²⁸⁸⁴

CASE EXAMPLE – PLANNING ICTY, KORDIC AND CERKEZ TRIAL JUDGEMENT, PARAS 493-494, 497, 829

In the *Kordic and Cerkez* case at the ICTY, one of the accused, Kordic was found guilty of, *inter alia*, the crime against humanity of persecution carried out by various means and methods, including, attacking a number of cities and towns; killing civilians; detention and ill treatment of civilians; forcible transfer; fomenting ethnic hatred; and plunder and destruction.

²⁸⁷⁹ At the ICC, the notion of liability by virtue of planning was discussed in the context that a co-perpetrator could make an essential contribution to the common plan at any stage, including the planning stage, see: ICC, *Ntaganda Appeal Judgement*, paras 22, 24, 1066; ICC, *Lubanga Appeal Judgement*, paras 7, 469; ICC, *Bemba et al. Trial Judgement*, para. 69; ICC, *Blé Goudé Decision on the Confirmation of Charges*, para. 134; ICC, *Al Hassan Arrest Warrant Decision*, para. 170. ICC judge Christine Van den Wyngaert has also noted that “‘Planning’ is also contained in several draft versions of this Court’s Statute, where it appears alongside the language of what becomes Article 25(3)(a) of the Statute”: ICC, *Chui Judgement pursuant to Article 74 of the Statute – Concurring Opinion of judge Christine Van den Wyngaert*, p. 10, fn. 22.

²⁸⁸⁰ ICTY, *Kordic & Cerkez Appeal Judgement*, para. 26; ICTY, *Milosevic Appeal Judgement*, para. 268;

²⁸⁸¹ ICTR, *Semanza Trial Judgement*, para. 380.

²⁸⁸² ICTY, *Kordic & Cerkez Appeal Judgement*, para. 26; ICTY, *Milosevic Appeal Judgement*, para. 268.

²⁸⁸³ ICTY, *Boskoski and Tarculovski Appeal Judgement*, para. 125.

²⁸⁸⁴ ICTY, *Kordic & Cerkez Appeal Judgement*, para. 31; ICTY, *Milosevic Appeal Judgement*, para. 273; ICTR, *Nahimana et al. Appeal Judgement*, para. 479.

Kordic was the political leader of the Bosnian Croats in Central Bosnia and was *de facto* associated with the military leadership. Accordingly, Kordic participated in the HVO (the military formation of the Bosnian Croats) attacks on, and take-over of, various municipalities. For example, to facilitate the HVO takeover of the municipality of Busovača, it was necessary to distribute the arms and equipment held in local Yugoslav National Army barracks. Kordic was involved in the planning necessary to take one of these barracks and in the removal of the arms and ammunition within. The ICTY Trial Chamber found that, while Kordic was not in the very highest echelons of the Bosnian Croat leadership, and he did not conceive of the campaign of persecution himself, Kordic was, nevertheless, a regional political leader and lent himself enthusiastically to the common design of persecution by planning, preparing and ordering those parts of the campaign which fell within his sphere of authority.

1478. Much of the conduct that would amount to “planning” could be subsumed under the mode of liability of “organising” under Article 27(3) of the CCU (see para 1463). A number of the different forms of organising recognised by Ukrainian practice – including distributing responsibilities, determining the object of the offence, developing a plan to commit a crime, finding or adapting the means/instruments/tools for the crime’s commission (see para. 1464) – can be interpreted to include conduct assigned under “planning” before the *ad hoc* tribunals and under customary international law. As to the *mens rea*, where crimes can be committed with indirect intent (i.e., where the accused foresaw socially dangerous consequences and although, they did not wish for them, they *consciously assumed their occurrence*), they can also arguably encompass the lower ICL standard (“awareness of the substantial likelihood that a crime [would] be committed in the execution of the acts or omissions planned”).

EXAMPLES OF “PLANNING”

Scenario 1

The accused, who maintained a tight chain of command within his unit, was actively engaged in making decisions on a number of issues for his unit, including the levels of ammunition and the selection of its members. While he did not devise the overall strategy for the armed forces of which his unit was a part, the accused was able to decide how his unit would implement that strategy and, in this regard, planned a sniping campaign that was implemented by his troops and made decisions on the deployment of weapons (e.g., the placement of artillery and the movement of air bomb launchers) and the methods of use of such weapons.²⁸⁸⁵

²⁸⁸⁵ See e.g., ICTY, *Milosevic Trial Judgement*, paras 959-963.

Scenario 2

The accused arranged for the transport of a group of people (who were supplied with police uniforms and weapons) to an area close to a village against which they were to launch a military operation. The accused participated in meetings during which he discussed the operation with the other participants and arranged for fire support from another unit for this operation. The accused personally led the group of police during the operation, who were well armed with a range of weapons, including grenades, rocket explosives and considerable quantities of gasoline and incendiary materials.²⁸⁸⁶

ii. Instigating, soliciting, inducing

1479. The Statutes of the *ad hoc tribunals* contain the mode of liability of “instigating”,²⁸⁸⁷ while the ICC Statute refers to “soliciting or inducing”.²⁸⁸⁸ These modes of liability cover functionally the same conduct, however there are some differences between their interpretation.

1480. The objective elements first require that the accused: “promoted” or “urged or encouraged” someone to commit a crime (instigating);²⁸⁸⁹ exerted influence over a direct perpetrator through strong reasoning, persuasion or any other conduct which prompted such person to commit a crime (“inducing”),²⁸⁹⁰ or asked or urged the direct perpetrator to commit the criminal act (“soliciting”).²⁸⁹¹ In addition, there must be a causal link between the instigation, inducement or solicitation and the crime committed. Before the ICC it is required that the inducement/solicitation had a *direct effect* on the commission or attempted commission of the crime;²⁸⁹² whereas the *ad hoc tribunals* required the instigation to have *substantially contributed* to the commission of the crime.²⁸⁹³ It is not a requirement that the prosecution “prove that the crime or underlying offence would not have been perpetrated but for the accused’s prompting”.²⁸⁹⁴

²⁸⁸⁶ See e.g., ICTY, *Boskoski and Tarculovski Appeal Judgement*, paras 151-154.

²⁸⁸⁷ *ICTY Statute*, Article 7(1)(b); and *ICTR Statute*, Article 6(1).

²⁸⁸⁸ *ICTY Statute*, Article 25(3)(b).

²⁸⁸⁹ ICTY, *Blaskic Trial Judgement*, para. 280; ICTY, *Kordic & Cerkez Appeal Judgement*, para. 27; ICTY, *Limaj et al. Trial Judgement*, para. 514; ICTR, *Bagilishema Appeal Judgement*, para. 30.

²⁸⁹⁰ ICC, *Bemba et al. Contempt Judgement*, para. 76.

²⁸⁹¹ ICC, *Bemba et al. Contempt Judgement*, para. 75.

²⁸⁹² *ICC Statute*, Article 25(3)(b); ICC, *Ntaganda Decision on the Confirmation of Charges*, para. 153. See also, Brammertz and Jarvis, *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Oxford University Press, 2016, p. 235, citing ICTY, *Kordic & Cerkez Appeal Judgement*, para. 27. This means that the accused’s actions must have prompted the direct perpetrator to commit the crime: ICC, *Bemba et al. Appeal Contempt Judgement*, para. 848; ICC, *Bemba et al. Contempt Judgement*, para. 81.

²⁸⁹³ ICTY, *Milutinovic et al. Trial Judgement*, para. 83; ICTY, *Kvocka et al. Trial Judgement*, para. 252; ICTR, *Nahimana et al. Appeal Judgement*, para. 480.

²⁸⁹⁴ ICTY, *Milutinovic et al. Trial Judgement*, para. 84; ICTY, *Kvocka et al. Trial Judgement*, para. 252; ICTR, *Nahimana et al. Appeal Judgement*, para. 480.

1481. The instigation, inducement or solicitation can be explicit or implicit,²⁸⁹⁵ and may include different forms such as speeches or creating an environment permissive of the commission of crime by subordinates, such as by giving *carte blanche* to commit crimes, by setting an example through their own conduct, or through notorious and persistent tolerance.²⁸⁹⁶ No superior-subordinate relationship between the accused and the direct perpetrator is required.²⁸⁹⁷ The influence is generally of a psychological nature (e.g., persuasion, enticement or promises), but may also take the form of physical pressure (e.g., coercion or threats) as long as the persuaded/coerced person still has the freedom to act and decide whether or not to commit the crime.²⁸⁹⁸
1482. As to the subjective elements, the ICC requires that the accused was aware that the crimes would be committed in the ordinary course of events.²⁸⁹⁹ On the other hand, the *ad hoc* tribunals require that the accused intended to provoke or induce the commission of the crime, or was aware of the substantial likelihood that the commission of a crime would be a probable consequence of their acts.²⁹⁰⁰

CASE EXAMPLE – INSTIGATING ICTY, BOSKOSKI AND TARCULOVSKI APPEAL JUDGEMENT, PARAS 2-3, 130, 135, 138, 150, 153-154, 157

In the *Boskoski and Tarculovski* case before the ICTY, Tarculovski, one of the accused, was found guilty of, *inter alia*, instigating the violations of the laws and customs of war (i.e., murder, wanton destruction and cruel treatment) that took place during an attack on the village of Ljuboten. At the relevant time, Tarculovski was a police officer in the President's Security Unit in the Ministry of Interior of the Former Yugoslav Republic of Macedonia.

The ICTY Appeals Chamber found that the Trial Chamber had properly concluded that Tarculovski's actions in the preparation and execution of the police operation in Ljuboten substantially contributed to the commission of the crimes that occurred during that operation (i.e., murder, cruel treatment, and setting civilian houses ablaze), and that he had the necessary *mens rea*. Tarculovski's role in preparing for and executing the operation included, *inter alia*: his participation in a meeting in which he and police and military representatives discussed the operation; a report and notes recording this meeting referring to the operation as his action or being led by him; a witness's evidence that the operation was planned by Tarculovski; Tarculovski's involvement in the preparation of the operation (e.g., he arranged for fire support from another unit and personally led the group of police during the operation); and the fact that Tarculovski was present in the village when the crimes were committed.

²⁸⁹⁵ ICTY, *Milutinovic et al.* [Trial Judgement](#), para. 83; ICTY, *Tolimir* [Trial Judgement](#), para. 902.

²⁸⁹⁶ Brammertz and Jarvis, *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Oxford University Press, 2016, p. 235, citing ICTY, *Galic* [Trial Judgement](#), para. 168. See also, Agirre Aranburu, 'Sexual Violence beyond Reasonable Doubt: Using Pattern Evidence and Analysis for International Cases' 23 *Leiden JIL*, 2010, pp 609, 614.

²⁸⁹⁷ ICC, *Bemba et al.* [Contempt Judgement](#), para. 77; ICTY, *Oric* [Trial Judgement](#), para. 272.

²⁸⁹⁸ Triffterer and Ambos, *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck, Hart, Nomos, 2016, p. 1003; MICT, *Seselj* [Appeal Judgement](#), para. 124.

²⁸⁹⁹ [ICC Statute](#), Article 25(3)(b); ICC, *Ntaganda* [Decision on the Confirmation of Charges](#), para. 153; Brammertz and Jarvis, *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Oxford University Press, 2016, p. 235, citing ICTY, *Kordic & Cerkez* [Appeal Judgement](#), para. 27.

²⁹⁰⁰ ICTY, *Kordic & Cerkez* [Appeal Judgement](#), paras 29, 32; ICTY, *Brdanin* [Trial Judgement](#), para. 269; ICTY, *Naletilic & Martinovic* [Trial Judgement](#), para. 60.

1483. This mode of liability is comparable to “abetting” under Article 27(4) of the CCU which includes inducing another person to commit a crime “by way of persuasion, subordination, threat, coercion or otherwise”. While “abetting” exists as a distinct mode of liability under ICL (discussed in more detail below, see para. 1485), the type of conduct covered by Article 27(4) – in particular, “persuasion”, “coercion” and “threat” – would appear to more closely relate to instigating, soliciting or inducing. Relevant *mens rea* considerations are the same as for Article 27(3) above (see paras 1463-1464). Particularly where crimes can be committed with indirect intent (i.e., where the accused foresaw socially dangerous consequences and although, they did not wish for them, they consciously assumed their occurrence), they can also arguably encompass the lower ICL standard (“awareness of the substantial likelihood that the commission of a crime would be a probable consequence of their acts.”).

EXAMPLES OF SOLICITING/INDUCING

Situation 1

During the occupation of a town, an experienced unit was reinforced with newly mobilised personnel. One of the newly arrived soldiers got acquainted with an experienced soldier (i.e., the accused) who advised him that a necessary step to becoming a real patriot and soldier was going into the town and killing a civilian. Initially, the soldier was indecisive, but eventually committed the crime due to the persuasion (threats in particular) that he faced from the accused.

Situation 2

The leader of a local occupation administration (i.e., the accused) made several inflammatory and discriminatory statements in which he advocated for the dismissal of a certain group from their employment and the expulsion of members of that group from the occupied territory. In light of the position of authority held by the accused, these statements prompted a number of soldiers to commit crimes against the civilian population (i.e., murder, rape, torture, etc.).

iii. Aiding and Abetting

1484. Under ICL, an accused may incur responsibility for aiding, abetting or otherwise assisting in the commission of a crime.²⁹⁰¹

1485. The objective elements of this mode of liability under international criminal law require that the accused aided, abetted or otherwise assisted in the commission of the crime or its attempted commission, including by providing the means for its commission.²⁹⁰² The assistance can be by an act or omission and may be given before, during or after the offence has been perpetrated.²⁹⁰³ Such assistance may take the form

²⁹⁰¹ ICC Statute, Article 25(3)(c); ICTY Statute, Article 7(1); and ICTR Statute, Article 6(1).

²⁹⁰² ICC, *Bemba et al. Contempt Judgement*, paras 83-84; ICC, *Bemba et al. Appeal Contempt Judgement*, para. 1325; ICC, *Al Mahdi Decision on Confirmation of Charges*, para. 26; ICC, *Ongwen Decision on the Confirmation of Charges*, para. 43; ICTY, *Aleksovski Appeal Judgement*, paras 163, 165; ICTY, *Popovic et al. Appeal Judgement*, para. 1732; ICTY, *Oric Trial Judgement*, paras 269, 282, 288; ICTY, *Blagojevic and Jokic Trial Judgement*, para. 726; ICTR, *Semanza Trial Judgement*, paras 385, 388.

²⁹⁰³ ICC, *Bemba et al. Contempt Judgement*, para. 96; ICTY, *Blagojevic and Jokic Trial Judgement*, para. 726.

of practical (or material) aid,²⁹⁰⁴ encouragement,²⁹⁰⁵ or the expression of sympathy for the commission of a crime.²⁹⁰⁶ It is not essential that the accused was personally present during the commission of the offence.²⁹⁰⁷ In addition, an accused may still be held liable for aiding and abetting where they provided their support indirectly through an intermediary, for example, when operating in a chain of command.²⁹⁰⁸

1486. Before the ICC, there is no minimum threshold of assistance that needs to be met in order to establish an accused's liability for aiding and abetting, nor are there any strict requirements regarding the effect of the assistance upon the commission of the crime. Ultimately, whether or not an accused's conduct amounts to "assistance" will depend upon the facts of each case, including the role of the accused in relation to that of the direct perpetrator(s).²⁹⁰⁹ However, before the *ad hoc* tribunals, "[t]he assistance need not have caused the act of the principal, but it must have had a **"substantial effect"** on the commission of the crime".²⁹¹⁰

1487. In regard to the subjective elements of aiding and abetting, the standard differs between the ICC and the *ad hoc* tribunals:

- Before the ICC, the evidence must demonstrate that the accused's acts were carried out "[f]or the purpose of facilitating the commission of such a crime".²⁹¹¹ It is not sufficient that the accused merely *knows* that their conduct will assist in the commission of the crime.²⁹¹² This may be demonstrated by, for example, evidence of the accused's explicit encouragement of the commission of the crime.²⁹¹³ In other cases, however, an accused may have little or no knowledge of the crimes if the direct perpetrator(s) are far removed from the accused and retain a high degree of autonomy over their activities.²⁹¹⁴ In addition to this specific mental element, it

²⁹⁰⁴ ICC, *Bemba et al.* [Contempt Judgement](#), para. 88; ICTY, *Popovic et al.* [Appeal Judgement](#), para. 1732; ICTY, *Kvocka et al.* [Trial Judgement](#), para. 253; ICTY, *Mrksic et al.* [Trial Judgement](#), para. 551; SCSL, *Sesay et al.* [Trial Judgement](#), para. 276; SCSL, *Taylor* [Trial Judgement](#), fn.1136.

²⁹⁰⁵ Encouragement need not be explicit, and will include situations in which the accused is present at the scene of the crime as a "silent spectator" capable of providing tacit encouragement "by [their] mere presence and authority": ICC, *Bemba et al.* [Contempt Judgement](#), para. 89; ICTR, *Kayishema and Ruzindana* [Appeal Judgement](#), paras 201-202; ICTR, *Semanza* [Trial Judgement](#), para. 385; MICT, *Ngirabatware* [Appeals Judgement](#), para. 150.

²⁹⁰⁶ ICC, *Bemba et al.* [Contempt Judgement](#), para. 89; ICTY, *Popovic et al.* [Appeal Judgement](#), para. 1732; ICTY, *Mrksic et al.* [Trial Judgement](#), para. 551; ICTY, *Kvocka et al.* [Trial Judgement](#), para. 254; ICTY, *Furundžija* [Trial Judgement](#), para. 231; ICTY, *Akayesu* [Trial Judgement](#), para. 484; SCSL, *Sesay et al.* [Trial Judgement](#), paras 276-277; SCSL, *Taylor* [Trial Judgement](#), fn. 1136.

²⁹⁰⁷ ICC, *Bemba et al.* [Contempt Judgement](#), para. 96; ICTY, *Oric* [Trial Judgement](#), para. 282; ICTY, *Furundžija* [Trial Judgement](#), para. 209; ICTR, *Kayishema and Ruzindana* [Appeal Judgement](#), para. 201; ICTR, *Rutaganda* [Trial Judgement](#), para. 43.

²⁹⁰⁸ ICC, *Bemba et al.* [Appeal Contempt Judgement](#), para. 1330; ICC, *Bemba et al.* [Contempt Judgement](#), para. 96; ICTY, *Oric* [Trial Judgement](#), para. 282; ICTY, *Blagojevic and Jokic* [Appeal Judgement](#), para. 127; ICTY, *Popovic et al.* [Appeal Judgement](#), para. 1784.

²⁹⁰⁹ ICC, *Bemba et al.* [Appeal Contempt Judgement](#), para. 1327; ICC, *Bemba et al.* [Contempt Judgement](#), para. 93; ICC, *Ongwen* [Decision on the Confirmation of Charges](#), para. 43.

²⁹¹⁰ ICTY, *Blagojevic and Jokic* [Trial Judgement](#), para. 726 (emphasis added); ICTY, *Popovic et al.* [Appeal Judgement](#), para. 1732; ICTY, *Karadzic* [Trial Judgement](#), para. 576; ICTY, *Furundžija* [Trial Judgement](#), para. 235; ICTR, *Rutaganda* [Trial Judgement](#), para. 43.

²⁹¹¹ ICC, *Ongwen* [Decision on the Confirmation of Charges](#), para. 43.

²⁹¹² ICC, *Bemba et al.* [Contempt Judgement](#), para. 97.

²⁹¹³ Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd Edition, Oxford University Press, 2016, p. 579.

²⁹¹⁴ See e.g., ICC, *Yekatom* [Decision on the Confirmation of Charges](#), para. 164, where the ICC Pre-Trial Chamber was unable to confirm aiding and abetting charges because "the Prosecutor failed to prove that the Anti-Bakala groups

must also be demonstrated that the accused had the requisite intent and knowledge in relation to the crime in question.²⁹¹⁵ This means that the accused must have at least been aware that the direct perpetrator's offence would occur in the ordinary course of events.²⁹¹⁶

- Before the *ad hoc* tribunals, on the other hand, the subjective element requires that the accused act “with the knowledge that his or her act(s) assist in the commission of the crime by the actual perpetrator(s)”.²⁹¹⁷ However, it is not a requirement that the accused knew the precise crime that was intended or the one that was actually committed; it is sufficient that they were aware that one of a number of crimes would probably be committed, provided that one of those crimes was in fact committed.²⁹¹⁸

CASE EXAMPLE – AIDING AND ABETTING ICTY, VASILJEVIC APPEAL JUDGEMENT, PARAS 1, 133-135

In the Vasiljevic case before the ICTY, Vasiljevic was found guilty of aiding and abetting murder as a war crime and a crime against humanity and for aiding and abetting inhumane acts as a crime against humanity. Vasiljevic's conviction arises from an incident where he assisted Milan Lukic (the leader of a violent paramilitary group that Vasiljevic was not a part of but was associated with) and two unidentified men in forcibly transporting seven Muslim men to the eastern bank of the Drina River, where they were shot. Five of the seven men died as a result of the shooting and two survived by falling into the river, pretending to be dead.

The Appeals Chamber found that Vasiljevic knew that the seven Muslim men were to be killed; that he walked armed with the group from the place where they had parked the cars to the Drina River; that he pointed his gun at the seven Muslim men; and that he stood behind the Muslim men with his gun together with the other three offenders shortly before the shooting started. The Appeals Chamber held that the only reasonable inference available on the totality of evidence is that Vasiljevic knew that his acts would assist the commission of the murders. Accordingly, the Appeals Chamber found that in preventing the men from escaping on the way to the riverbank and during the shooting, Vasiljevic's actions had a “substantial effect upon the perpetration of the crime”.

1488. While “abetting” is a distinct mode of liability under Article 27(4) of the CCU, abetting in that context appears to have a different meaning from its meaning under ICL. As discussed above (see para. 1481), abetting under Article 27(4) of the CCU is defined as “persuasion, subordination, threat [or] coercion”, and is thus more closely aligned with the “instigating, soliciting or inducing” mode of liability under ICL. However,

operating in areas far removed from the capital of Bangui were under the effective control of members of the National Coordination, including Ngaïssona. While the concerned Anti-Balaka groups were formally and politically under the umbrella of the National Coordination [...], they retained a high degree of autonomy in terms of operational matters, so much that the members of the National Coordination – most notably Ngaïssona – had limited, if any, knowledge and control over their criminal actions”.

²⁹¹⁵ ICC, *Bemba et al.* [Contempt Judgement](#), para. 98.

²⁹¹⁶ ICC, *Bemba et al.* [Contempt Judgement](#), para. 98.

²⁹¹⁷ ICTR, *Kajelijeli Trial Judgement*, para. 768; MICT, *Stanisic and Simatovic Trial Judgement: vol. II*, para. 1264; ICTY, *Oric Trial Judgement*, para. 288.

²⁹¹⁸ MICT, *Stanisic and Simatovic Trial Judgement: vol. II*, para. 1264; ICTR, *Kajelijeli Trial Judgement*, para. 768; ICTY, *Oric Trial Judgement*, para. 288.

Article 27(4) also mentions that abetting can be committed by other forms, leaving the list non-exhaustive. Thus, certain categories of assistance falling under “aiding and abetting” as it is defined under ICL could be charged as abetting under the CCU. The provision of material aid and assistance, however, would be more appropriately adjudicated under Article 27(5), which includes the facilitation of crimes through “advice, or instructions, or by supplying the means or tools, or removing obstacles” (see para. 1472).

1489. Pursuant to Article 26, acting as an abettor or an accessory under the CCU requires that the perpetrator intended the crimes. This is most closely aligned with the ICC’s requirement that the assistance be given “[f]or the purpose of facilitating the commission of such a crime”. However, where crimes can be committed with indirect intent (i.e., where the accused foresaw socially dangerous consequences and although, they did not wish for them, they consciously assumed their occurrence), they can also arguably encompass the lower ICTY standard (“with the knowledge that his or her act(s) assist in the commission of the crime by the actual perpetrator(s)”).

EXAMPLES OF AIDING, ABETTING OR OTHERWISE ASSISTING IN THE COMMISSION OR ATTEMPTED COMMISSION OF A CRIME

Situation 1

A bus driver who took civilians from one State to a filtration camp in another State, thereby assisting a party to the conflict in the commission of the crime of deportation.

Situation 2

A soldier guarding a house inside of which he was aware that his fellow soldiers had taken a woman to be raped. He was guarding the house to ensure no one attempted to intervene in the commission of the crime.

Situation 3

A soldier who heard that his comrades were planning to commit perfidy and gave them some advice on how to conduct it in a more efficient way and/or provided them with civilian clothes to commit the crime.

Situation 4

A functionary of the local occupation administration who provided soldiers in a detention facility with objects such as rope and that were used to inflict torture.

iv. Other contribution to crimes

1490. Under Article 25(3)(d) of the ICC Statute, an accused may be held liable for “other contributions to crimes” where they intentionally contribute to the commission or attempted commission of a crime in conjunction with another group of persons acting with a common purpose. Judges should note that this is not considered a mode of liability under the statutes of the ICTY or the ICTR.
1491. The objective elements of this crime require that: (1) the direct perpetrators who attempted or committed a crime belonged to a group acting with a common purpose;

and (2) the accused contributed to the crime in any way other than those identified in Article 25(3)(b) to (c) of the ICC Statute (i.e., other than by ordering, soliciting, inducing, or aiding and abetting).²⁹¹⁹

1492. The group of persons acting according to a common purpose need not be organized in a military, political or administrative structure,²⁹²⁰ and there is no requirement to prove that the accused was a member of this group.²⁹²¹ The common purpose of the group must involve an element of criminality, i.e., to commit a crime, or to commit a crime in the ordinary course of events.²⁹²² This can be established through evidence of the group's collective decisions, acts or omissions.²⁹²³ However, it is not necessary that the common purpose was previously arranged or formulated – it may have come about with little preparation and can be inferred from the subsequent concerted acts of the group.²⁹²⁴
1493. Contributions to the common purpose may be made either by members of the group or persons outside the group.²⁹²⁵ The accused's contribution must have a *material effect* on the commission of the crime to satisfy this mode of liability.²⁹²⁶ As such, although it need not be the sole determining factor in the commission of that crime,²⁹²⁷ contributions cannot be general, inconsequential or trivial in nature.²⁹²⁸ Nevertheless, it is not a requirement that the accused physically perpetrated the crime,²⁹²⁹ and their contribution may be connected to either the material (physical) elements of the crimes (i.e., provision of weapons), or to the subjective (mental) elements (i.e., encouragement).²⁹³⁰
1494. As to the subjective element, the accused must have meant to engage in the contribution.²⁹³¹ Moreover, the contribution must be made with the aim of furthering the common criminal purpose, where such purpose involves the commission of the crime or, in the alternative, it must be made with knowledge of the group's intention to commit the crime.²⁹³² An accused may only be held responsible for crimes that the group committed or attempted with the intention of realizing the common purpose.²⁹³³ For

²⁹¹⁹ ICC Statute, Article 25(3)(d); ICC, *Katanga Trial Judgement*, paras 1620, 1624; ICC, *Katanga Decision transmitting additional legal and factual material*, para. 16; ICC, *Mbarushimana Decision on the Confirmation of Charges*, fn. 640; ICC, *Muthaura et al. Decision on the Confirmation of Charges*, para. 421; ICC, *Ruto et al. Decision on the Confirmation of Charges*, para. 351; ICC, *Ntaganda Decision on the Confirmation of Charges*, para. 158.

²⁹²⁰ ICC, *Katanga Trial Judgement*, para. 1626.

²⁹²¹ ICC, *Katanga Trial Judgement*, para. 1631.

²⁹²² ICC, *Katanga Trial Judgement*, paras 1626-1627, 1630.

²⁹²³ ICC, *Katanga Trial Judgement*, para. 1627.

²⁹²⁴ ICC, *Katanga Trial Judgement*, para. 1626.

²⁹²⁵ ICC, *Katanga Trial Judgement*, para. 1631; ICC, *Mbarushimana Decision on the Confirmation of Charges*, paras 272, 275.

²⁹²⁶ ICC, *Katanga Trial Judgement*, paras 1633-1634.

²⁹²⁷ ICC, *Katanga Trial Judgement*, paras 1633-1634.

²⁹²⁸ ICC, *Katanga Trial Judgement*, para. 1632.

²⁹²⁹ ICC, *Katanga Trial Judgement*, para. 1635.

²⁹³⁰ ICC, *Katanga Trial Judgement*, para. 1635.

²⁹³¹ ICC Statute, Article 25(3)(d); ICC, *Katanga Trial Judgement*, paras 1632, 1637-1639; ICC, *Mbarushimana Decision on the Confirmation of Charges*, para. 288.

²⁹³² ICC Statute, Article 25(3)(d).

²⁹³³ ICC, *Katanga Trial Judgement*, para. 1628-1630.

instance, the accused would not incur liability for opportunistic acts by the members of the group that do not have any connection to the common purpose.²⁹³⁴

CASE EXAMPLE – OTHER CONTRIBUTIONS THROUGH COMMON PURPOSE

ICC, KATANGA TRIAL JUDGEMENT, PARAS 1361, 1652-1691

In the *Katanga* case before the ICC, the Trial Chamber found that Katanga, the President of the Ngiti militia, made a significant contribution to the commission of the crimes of murder, attacking civilians, pillaging and destroying property, and rape that occurred during an attack on the village of Bogoro by the Ngiti militia. The Chamber concluded that the Ngiti militia was an organization that harbored its own design (i.e., common purpose) to attack the village of Bogoro in order to clear it of UPC troops and Hema civilians.

In addition, the Chamber found that, while Katanga did not organize the attack, he lent assistance to the militia to help facilitate the attack (and thus further the Ngiti combatant's common purpose) by liaising with other groups operating in the area to forge alliances between the militia and the military authorities in Beni, and by ensuring that the weapons and ammunition needed for the attack were received, securely stored and distributed in an organized manner among the militia's various commanders. Accordingly, the Chamber concluded that the accused's contribution had a significant influence on the occurrence and the manner of commission of the crimes committed by the militia during the attack and that he made this contribution intentionally.

1495. Since this mode of liability requires a group of persons to act with a common purpose, conduct falling under this mode may fall under Article 28(2)-(4) of the CCU, which, as discussed above (see para. 1437), requires an offence committed by a group of persons or an organised/criminal group to act in accordance with a prior conspiracy or common plan, in connection with the relevant mode of liability under Article 27. Like “other contributions” under the ICC Statute, Article 28 of the CCU does not specify the precise type of individual contributions that are necessary to find a person liable as a member of a criminal group/organisation.

EXAMPLES OF OTHER CONTRIBUTIONS TO CRIMES

Situation 1

Unit X of the armed forces attacked and took over a village. During this attack, soldiers targeted civilians, subjecting them to murder, ill treatment and rape. The accused, a politician, did not organize the attack, but he lent assistance to Unit X by liaising with non-state armed groups operating in the area to help facilitate the attack, and by supplying Unit X with the weapons and ammunition needed for the attack. The accused's contribution thus had a considerable influence on the occurrence of the attack and the manner of commission of the crimes committed by Unit X during the attack.

²⁹³⁴ ICC, *Katanga Trial Judgement*, para. 1630.

Situation 2

Military leaders, including Commander U, worked together and agreed to execute civilian leaders and activists in region Y. V, who was a commander in the adjacent region, was not part of this plan but was able to use his influence and rank, as well as his relationship with the military leaders in region Y, to provide provided ammunition and weapons to Commander U and his soldiers. Without Commander V's participation, the execution of civilians would not continue.

4. Ordering the commission of a war crime as a form of perpetration under Article 438 of the CCU

a) Applicability under the CCU

1496. International crimes are often committed by direct perpetrators on the orders of a superior.²⁹³⁵ While “ordering” forms a distinct mode of liability under ICL,²⁹³⁶ under Ukrainian law this mode of liability is incorporated into Article 438, which criminalises “giving an order” to commit the acts described in this provision, namely “cruel treatment of prisoners of war or civilians, deportation of civilian population for forced labour, pillage of national treasures on occupied territories, use of methods of warfare prohibited by international instruments, or any other violations of rules of the warfare recognised by international instruments consented to as binding by the Verkhovna Rada” (see above, [Chapter 1, Part I, Section I.A.](#) “Relevant domestic legislation under Ukrainian law: Article 438”). In other words, ordering the commission of a war crime gives rise to the principal liability of the perpetrator in the same way as the commission of the war crime itself.
1497. Given the lack of prior jurisprudence on cases involving Article 438, especially with the involvement of commanders, the concept of “ordering” has not received extensive interpretation to date. In addition, the provision does not further specify which conduct would fall under “ordering”, what forms the orders can take, what *mens rea* is required, etc. Therefore, the interpretation of ordering as a mode of liability by the international courts and tribunals can assist judges in determining the scope of this provision.

²⁹³⁵ Cryer, *An Introduction to International Criminal Law and Procedure*, 3rd Edition, Cambridge University Press, 2015, p. 359.

²⁹³⁶ See e.g., [ICC Statute](#), Article 25(3)(b).

EXAMPLES OF ORDERING

Situation 1

In the town of Z, Commander T passed on orders to soldiers in his unit to assist with an attack on civilians committed by Commander C and his soldiers. Intercepted calls between the soldiers reveal that Commander T gave no exact description of what type of assistance they should provide to Commander C and his soldiers. However, since commander T was aware that an attack on civilians was taking place in the town of Z, this vague order essentially gave the soldiers the green light to commit crimes against civilians.

Situation 2

After taking over town X, Commander N ordered his unit to go door to door looking for civilians, particularly men of military age, and to take those men to the local high school gymnasium for processing. Once at the high school gymnasium the men were detained and subjected to torture. Some of the men have not been released and their location is currently unknown.

Situation 3

Commander D and Commander E are planned to attack the town of F using a certain route. Through intercepted calls between soldiers, Commander E ordered his soldiers to help transport Commander D's soldier to the town of F, but also "to stay just in case there's any trouble and deal with it in the way you know how." These vague orders were interpreted by the soldiers to capture, beat, torture and execute civilians seen as hostile to the armed forces.

b) Ordering under International Law

1498. Ordering covers situations in which an accused (i.e., a person in a position of authority) gives an order to a subordinate to commit a crime, and that subordinate goes on to commit that crime.²⁹³⁷
1499. The objective elements of ordering require that: (1) the accused was in a position of *de jure* or *de facto* authority;²⁹³⁸ (2) the accused gave an instruction to commit a crime or to perform an act or omission in the course of which a crime was carried out;²⁹³⁹ and (3) there was a causal link between the instruction and the commission of the crime.²⁹⁴⁰

²⁹³⁷ ICTR, *Akayesu Trial Judgement*, para. 483; ICTY, *Blaskic Trial Judgement*, para. 281; ICTY, *Kordic and Cerkez Appeal Judgement*, para. 28; ICC, *Mudacumura Decision on the Prosecutor's Application under Article 58*, para. 63; ICC, *Ntaganda Decision on Confirmation of Charges*, para. 145; ICC, *Gbagbo Decision on Confirmation of Charges*, para. 244.

²⁹³⁸ ICC, *Ntaganda Decision on Confirmation of Charges*, para. 145; ICTY, *Kordic and Cerkez Appeal Judgement*, para. 28; ICTR, *Gacumbitsi Appeal Judgement*, paras 181-183; ICTY, *Limaj et al. Trial Judgement*, para. 515; ICTY, *Galic Trial Judgement*, para. 168; ICTY, *Krstic Trial Judgement*, para. 601; ICTR, *Akayesu Trial Judgement*, para. 483; ICTR, *Rutaganda Trial Judgement*, para. 39.

²⁹³⁹ ICC, *Mudacumura Decision on the Prosecutor's Application under Article 58*, para. 63; ICC, *Ntaganda Decision on the Confirmation of Charges*, para. 145; ICTY, *Karadzic Trial Judgement*, para. 573; ICTY, *Galic Appeals Judgement*, para. 176; ICTY, *Kordic and Cerkez Appeal Judgement*, para. 28; ICTR, *Gacumbitsi Appeal Judgement*, paras 181-183; ICTY, *Limaj et al. Trial Judgement*, para. 515; ICTY, *Galic Trial Judgement*, para. 168; ICTY, *Krstic Trial Judgement*, para. 601; ICTR, *Akayesu Trial Judgement*, para. 483; ICTR, *Rutaganda Trial Judgement*, para. 39.

²⁹⁴⁰ ICC, *Mudacumura Decision on the Prosecutor's Application under Article 58*, para. 63; ICC, *Ntaganda Decision on the Confirmation of Charges*, para. 145; ICC, *Gbagbo Decision on Confirmation of Charges*, para. 244; ICTY, *Milutinovic et al. Trial Judgement*, para. 88; ICTY, *Strugar Trial Judgement*, para. 332; ICTR, *Nahimana et al. Appeal Judgement*, para. 481.

1500. While the accused must have been in a position of authority,²⁹⁴¹ meaning there was a superior-subordinate relationship that gave the accused some level of control over the direct perpetrator at the time they issued an order,²⁹⁴² this position does not need to be legal, formal or permanent.²⁹⁴³ Further, the instruction need not be written or given in any particular form, and may be passed down the chain of command, rather than given directly by the accused to the direct perpetrator(s).²⁹⁴⁴ The existence of an instruction can be proven through circumstantial evidence, such as the existence of a large number of similar offences contemporaneously occurring within the same defined area.²⁹⁴⁵
1501. International courts and tribunals have also required there to be a causal link between the instruction and the crime committed. Before the ICC it must be established that the order had a *direct effect* on the commission or attempted commission of the crime.²⁹⁴⁶ Whereas, the *ad hoc* tribunals require that the accused's order was a factor that *substantially contributed* to the commission of the crime.²⁹⁴⁷ Nevertheless, neither the ICC nor the *ad hoc* tribunals require the order to be the sole cause of the crime.²⁹⁴⁸
1502. As to the subjective elements, the jurisprudence of the ICC and the *ad hoc* tribunals recognize that it is sufficient to establish that the accused was at least aware that the crime would be committed as a consequence of their instruction.²⁹⁴⁹ Before the ICC, the perpetrator must have “at least been aware that the offence(s) would be committed ‘in the ordinary course of events’ as a consequence of the realisation of his or her act or omission”.²⁹⁵⁰ The jurisprudence of the *ad hoc* tribunals, on the other hand, provides a lower threshold requiring that “an act or omission [was ordered]

²⁹⁴¹ ICC, *Ntaganda Decision on Confirmation of Charges*, para. 145; ICTY, *Kordic and Cerkez Appeal Judgement*, para. 28; ICTR, *Gacumbitsi Appeal Judgement*, paras 181-183.

²⁹⁴² ICTR, *Akayesu Trial Judgement*, para. 483; ICTY, *Blaskic Trial Judgement*, para. 278; ICC, *Ntaganda Decision on the Confirmation of Charges*, para. 120; ICTR, *Semanza Appeal Judgement*, para. 361; ICTR, *Niyiramasuhuko et al. Appeal Judgement*, para. 1915.

²⁹⁴³ ICC, *Ntaganda Decision on the Confirmation of Charges*, fn. 598; ICTY, *Karadzic Trial Judgement*, para. 573; ICTR, *Semanza Appeal Judgement*, para. 361.

²⁹⁴⁴ ICTY, *Karadzic Trial Judgement*, para. 573; ICC, *Mudacumura Decision on the Prosecutor's Application under Article 58*, para. 63.

²⁹⁴⁵ ICTY, *Boskoski & Tarculovski Appeals Judgement*, para. 164; ICTR, *Kamuhanda Appeals Judgement*, para. 74; ICTY, *Galic Appeals Judgement*, paras 170-171; ICTR, *Hategekimana Appeals Judgement*, para. 67.

²⁹⁴⁶ ICC, *Mudacumura Decision on the Prosecutor's Application under Article 58*, para. 63; ICC, *Ntaganda Decision on the Confirmation of Charges*, para. 145; ICC, *Gbagbo Decision on Confirmation of Charges*, para. 244.

²⁹⁴⁷ ICTY, *Milutinovic et al. Trial Judgement*, para. 88; ICTY, *Strugar Trial Judgement*, para. 332; ICTR, *Nahimana et al. Appeal Judgement*, para. 481.

²⁹⁴⁸ ICTY, *Milutinovic et al. Trial Judgement*, para. 88; ICTY, *Strugar Trial Judgement*, para. 332; ICC, *Ntaganda Decision on the Confirmation of Charges*, para. 145.

²⁹⁴⁹ ICC, *Ntaganda Decision on the Confirmation of Charges*, para. 145; ICTY, *Kordic and Cerkez Appeal Judgement*, para. 30.

²⁹⁵⁰ ICC, *Bemba et al. Contempt Judgement*, para. 82; ICC, *Ntaganda Decision on the Confirmation of Charges*, para. 153; ICC, *Mudacumura Decision on the Prosecutor's Application under Article 58*, para. 63. This may be established, for example, by demonstrating that the accused “knew with certainty” that the accused would carry out the crime through their prior conduct. See, ICC, *Bemba et al. Appeal Contempt Judgement*, para. 857: “having directed and approved the elicited coaching of witnesses, and having organised the payments and other assistance to the witnesses prior to their testimonies, Mr Bemba knew with certainty that Mr Kilolo would instruct the witnesses accordingly, and that the witnesses would, in turn, untruthfully testify in court as a consequence of his conduct”.

with the awareness of the *substantial likelihood* that a crime will be committed in the execution of that order.”²⁹⁵¹

1503. In some cases, it will be possible to establish that the accused *intended* the commission of the crime. For example, the accused may explicitly instruct or persuade the direct perpetrator to commit the offence.²⁹⁵² This can include, for example, an order to torture civilians to obtain information on the movement of enemy forces. However, in the reality of armed conflicts, especially in State armed forces with their formality and discipline, commanders rarely issue direct or express orders to commit crimes, e.g., to execute or rape civilians, or to specifically target civilian buildings with artillery. Even if they do, such evidence is extremely difficult to obtain: the higher-up the commander or political leader is, the more difficult, if not impossible, it will be. More commonly, perpetrators will issue indirect or implicit orders, requiring an assessment of whether they were aware that the crime would be committed as a consequence of their instruction.

CASE EXAMPLE – ORDERING

ICTY, *BLASKIC TRIAL JUDGEMENT*, PARAS 425, 435, 437, 442, 467, 474, 477, 495

In the *Blaskic* case before the ICTY, Blaskic was found guilty of **ordering** a number of attacks against the Muslim civilian population (during which civilians were murdered and their property was destroyed or pillaged). For example, one of Blaskic’s orders referred to “planned terrorist activities” on the part of the enemy, and to the risk of the enemy engaging in an open offensive designed to destroy everything Croatian. Thus, Blaskic issued a “combat command order to prevent attack activity by the enemy” and ordered units “to occupy the defence region, blockade villages and prevent all entrances to and exits from the villages”. The order further stated that “in the event of open attack activity by the Muslims”, those units should “neutralise them and prevent their movement with precise fire” in counterattack.

The Trial Chamber found that this order was “very clearly an order to attack” and that, despite being phrased as an order to “prevent attack”, no military objective justified the attack. In addition, the Chamber found that the crimes committed during the attack were committed by regular units of the Croatian Defence Council (HVO), particularly the Viteska Brigade, which was directly answerable to Blaskic. The Chamber also concluded that, due to the scale and uniformity of the crimes committed during the attack, it was impossible to argue that the crimes could have been committed by uncontrolled elements. Finally, the Chamber held that “the accused knew that the troops which he had used to carry out the order of attack [...] had previously been guilty of many crimes against the Muslim population of Bosnia” and, thus, he had reason to know that crimes had been, or were, about to be, committed and yet he took no action in response.

5. Command responsibility

1504. Command/superior responsibility refers to the responsibility of military commanders or civilian superiors for crimes committed by forces or subordinates acting under

²⁹⁵¹ ICTY, *Blaskic Appeal Judgement*, para. 42; ICTY, *Kordic and Cerkez Appeal Judgement*, para. 30.

²⁹⁵² ICC, *Bemba et al. Contempt Judgement*, para. 861.

their command, authority and control, which occurred because of their failure to exercise proper control over those forces/subordinates.²⁹⁵³ Responsibility of military commanders and civilian superiors for failure to prevent and punish crimes committed by their subordinates is codified in Articles 86 and 87 of Additional Protocol I and is a well-established principle of customary international humanitarian law (IHL).²⁹⁵⁴

ADDITIONAL PROTOCOL I, ARTICLE 86 – FAILURE TO ACT

1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.
2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

ADDITIONAL PROTOCOL I, ARTICLE 87 – DUTY OF COMMANDERS

1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.
2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.
3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.

²⁹⁵³ Cryer, et al. (eds), *An Introduction to International Criminal Law and Procedure*, 3rd Edition, Cambridge University Press, 2015, p. 368.

²⁹⁵⁴ [Additional Protocol I](#), Article 86(2); ICRC, Customary IHL Database, [Rule 153. Command Responsibility for Failure to Prevent, Repress or Report War Crimes](#).

ICRC, IHL DATABASE, CUSTOMARY IHL, RULE 153. COMMAND RESPONSIBILITY FOR FAILURE TO PREVENT, REPRESS OR REPORT WAR CRIMES

Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.

1505. The critical role that commanders and superiors play in the enforcement of the rules of IHL and military discipline,²⁹⁵⁵ as well as the fact that commanders are often those most responsible for the commission of crimes due to their acquiescence to patterns of criminal activity implemented by their subordinates, makes clear the importance of this principal and is reflected in its use by international courts and tribunals to hold military commanders responsible.²⁹⁵⁶

1506. Under IHL and ICL, command responsibility exists in dual, mutually complementary forms:²⁹⁵⁷

- as a mode of liability (e.g., as enshrined under Article 28(a) of the ICC Statute); and
- as a distinct criminal offence (i.e., a violation of a commander's "duty to act").

1507. As will be discussed below, the CCU does not currently refer to failure to act (i.e., command responsibility) for military commanders (other than in relation to Ukrainian military commanders²⁹⁵⁸) as either a mode of liability or a separate criminal offence. Nonetheless, such conduct can fall under Article 438 as it is codified in Additional Protocol I,²⁹⁵⁹ i.e., a "violation of the rules of warfare recognised by international instruments consented to as binding by the Verkhovna Rada".

²⁹⁵⁵ Ambos, *Treatise on International Criminal Law vol. I: Foundations and General Part*, 1st Edition, Oxford University Press, 2013, p. 198.

²⁹⁵⁶ See e.g., U.S. Supreme Court, *In re Yamashita*, 327 U.S. 1 (1946); Nuremberg Military Tribunal I, *Karl Brandt et al. Judgement*, p. 212: "the law of war imposes on a military officer in a position of command an affirmative duty to take such steps as are within his power and appropriate to the circumstances to control those under his command for the prevention of acts which are violations of the law of war"; ICTY Statute, Article 7(3), ICTY, *Celebici Trial Judgement*, paras 333-343, 346, Disposition; ICTY, *Hadžihasanovic and Kubura Appeal Judgement*; ICTR Statute, Article 6(3); ICTR, *Hategekimana Trial Judgement*; ICTR, *Bizimungu Appeal Judgement*; ICC Statute, Article 28, ICC, *Bemba Trial Judgement*; SCSL Statute, Article 6(3); ECCC Law Article 29.

²⁹⁵⁷ Meloni, 'Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?' 5 *Journal of International Criminal Justice* 619, 2007, p. 624. See also, Robinson, 'How Command Responsibility Got So Complicated: A Culpability Contradiction, Its Obfuscation, and a Simple Solution' 13 *Melbourne Journal of International Law* 1, 2012.

²⁹⁵⁸ Failure to act by Ukrainian military superiors is currently criminalised under Article 426 of the [Ukrainian Criminal Code](#), which criminalises "Omissions of military authorities", namely "Wilful failure to prevent a crime committed by a subordinate, or failure of a military inquiry authorities to institute a criminal case against a subordinate offender, and also wilful failure of a military official to act in accordance with his/her official duties, if it caused any significant damage".

²⁹⁵⁹ [Additional Protocol I](#), Articles 86 and 87.

a) Applicability under the CCU

1508. While Article 426 of the CCU provides for the criminal responsibility of Ukrainian military authorities for omissions — i.e., “wilful failure to prevent a crime committed by a subordinate, or failure of a military inquiry authorities to institute criminal proceedings against a subordinate offender, and also wilful failure of a military officer to act in accordance with his/her duties” — this crime constitutes a military crime (a crime against the established procedure of military service) and, thus, only Ukrainian commanders may be held responsible under this provision.²⁹⁶⁰ As such, it is currently not possible to prosecute Russian military commanders for their failure to act in Ukraine to prevent, suppress or punish violations of IHL.
1509. Nonetheless, Article 438 does offer the possibility of incorporating the separate offence of failure to act into the CCU by virtue of Articles 86 and 87 of Additional Protocol I, as the failure to act by military commanders is itself a “violation of the rules of warfare recognised by international instruments consented to as binding by the Verkhovna Rada”. Such an interpretation would overcome the current disparity whereby Ukrainian commanders can be prosecuted for their omissions while Russian commanders cannot.
1510. This understanding is based on the following analysis:
- Articles 86 and 87 of Additional Protocol I (read together) set out the doctrine of command responsibility, according to which alleged perpetrators (i.e., commanders) can be prosecuted for a failure to act.²⁹⁶¹
 - Ukraine is legally bound to incorporate command responsibility into its domestic law. In particular:
 - Ukraine is a State Party to Additional Protocol I,²⁹⁶² and therefore undertakes “to respect and to ensure respect for this Protocol in all circumstances”.²⁹⁶³ Ukraine thus has a duty to implement Articles 86 and 87 to ensure full respect for the Protocol.²⁹⁶⁴
 - Command responsibility finds legal basis in customary international law,²⁹⁶⁵ which is binding on all States, including Ukraine.²⁹⁶⁶ In relation to command

²⁹⁶⁰ [CCU](#), Article 401.

²⁹⁶¹ Commentary on the Additional Protocols, [Article 86](#), paras 3541-3542; ICTY, [Celebici Trial Judgement](#), para. 340; [Celebici Appeal Judgement](#), para. 237; ICRC, Customary IHL Database, [Rule 153. Command Responsibility for Failure to Prevent, Repress or Report War Crimes](#).

²⁹⁶² ICRC, [Treaties, States Parties and Commentaries: Ukraine](#). Ukraine ratified Additional Protocol I on 15 January 1990.

²⁹⁶³ [Additional Protocol I](#), Article 1.

²⁹⁶⁴ [Commentary on the Additional Protocols](#), Article 1, para. 39. See also, [VCLT](#), Article 26: “Every treaty in force is binding upon the Parties to it and must be performed by them in good faith”.

²⁹⁶⁵ ICTY, [Celebici Trial Judgement](#), para. 343; ICRC, Customary IHL Database, [Rule 153. Command Responsibility for Failure to Prevent, Repress or Report War Crimes](#). See also, ICTY [Blaskic Trial Judgement](#), para. 322; ICTY, [Brdanin Trial Judgement](#), para. 275; ICTY, [Strugar Trial Judgement](#), para. 357; Akayesu [Trial Judgement](#), paras 612-613.

²⁹⁶⁶ See, Dr Kellenberger, President of the International Committee of the Red Cross, ‘Foreword’ in Henckaerts and Doswald-Beck (eds), [Customary International Humanitarian Law, vol. I: Rules](#), Cambridge University Press, 2009, pp xv-xvii. The only exception to this rule is in the event that a State has openly and persistently objected to such a custom. See, Dr Koroma, judge at the International Court of Justice, ‘Foreword’ in Henckaerts and Doswald-Beck (eds), [Customary International Humanitarian Law, vol. I: Rules](#), Cambridge University Press, 2009, pp xviii-xix. However, such an exception does not apply to Ukraine.

responsibility the ECtHR has confirmed that a criminal conviction based on command responsibility, through generalized domestic prohibitions on war crimes, has a sufficiently clear basis in international law by virtue of its customary international law status and thus does not contradict the legality principle.²⁹⁶⁷

- Where there is a discrepancy between Ukraine’s domestic law and its international obligations pursuant to Additional Protocol I, it is required to interpret domestic law in line with its international law obligations.²⁹⁶⁸
- The provisions of Additional Protocol I are considered part of the normative laws of Ukraine by virtue of Article 9 of the Ukrainian Constitution, which states that: “[i]nternational treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine”.²⁹⁶⁹
- Article 3(5) of the CCU, which states that “[t]he laws of Ukraine on criminal liability shall be consistent with provisions of existing international treaties, ratified by the Verkhovna Rada of Ukraine”, further emphasizes that domestic law must be interpreted in light of international law.
- Article 438 of the CCU prohibits “Violation of rules of the warfare”, which includes “any other violations of rules of the warfare stipulated by international treaties, ratified by the Verkhovna Rada of Ukraine”. This Article is contained in Chapter XX on “Criminal Offences Against Peace, Security of Mankind and International Legal Order”, and therefore relates to substantive violations of the rules of warfare amounting to separate criminal offences. Article 438 refers to *any other violation* contained in international treaties binding on Ukraine and is not confined to definite lists of war crimes and therefore includes violations contained in Additional Protocol I. Since the failure to act of military commanders under Articles 86 and 87 can be interpreted as a separate offence, it can be incorporated into Article 438.
- The fact that command responsibility can be interpreted as a separate criminal offence is supported by:
 - A plain reading of Article 86 and 87 of Additional Protocol I, which supports the interpretation that command responsibility can be a separate criminal offence.²⁹⁷⁰ Article 86 establishes the individual criminal responsibility of commanders for the crimes committed by their subordinates where commanders fail to carry out this duty.²⁹⁷¹

²⁹⁶⁷ ECtHR, *Milankovic v. Croatia*, [Judgement](#), para. 57.

²⁹⁶⁸ [VCLT](#), Article 27.

²⁹⁶⁹ [Constitution of Ukraine](#) (Information of the Verkhovna Rada of Ukraine (VVR), 1996, № 30, p. 141) 28 June 1996, Article 9.

²⁹⁷⁰ See e.g., Meloni, ‘[Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?](#)’ 5 *Journal of International Criminal Justice* 619, 2007, p. 624; Robinson, ‘[How Command Responsibility Got So Complicated: A Culpability Contradiction, Its Obfuscation, and a Simple Solution](#)’ 13 *Melbourne Journal of International Law*, 2012; Jackson, ‘Command Responsibility’ in de Hemptinne, Roth and van Sliedregt (eds), *Modes of Liability in International Criminal Law*, Cambridge University Press, 2019, paras 8, 10.

²⁹⁷¹ ICTY, *Celebici Trial Judgement*, para. 340. Further, according to the International Committee of the Red Cross (ICRC) Commentary on Additional Protocol I, under Article 86(2), a commander can face disciplinary or penal sanction for failing to act with respect to breaches which are not grave breaches, and can also be subject to universal jurisdiction (i.e., “*aut dedere aut judicare*”) when they fail to act in relation to their subordinates’ grave breaches: ICRC Commentary on Additional Protocol I, [Article 86](#), para. 3542. Grave breaches are defined in: [First Geneva Convention](#), Article 50; [Second Geneva Convention](#), Article 50; [Third Geneva Convention](#), Article 130; [Fourth Geneva Convention](#), Article 147; and [Additional Protocol I](#), Article 85.

- Case law of the ICTY, which recognized the possibility that command responsibility could be a separate offence;²⁹⁷²
- Several national jurisdictions, which have also adopted this approach and have codified command responsibility as a separate offence within their legislation;²⁹⁷³
- An analogous reading of Article 426 of the CCU, which criminalises “Omissions of Military Authorities” as a separate criminal offence in relation to *Ukrainian military authorities*; and
- The ECtHR’s confirmation that a criminal conviction based on command responsibility, through generalized domestic prohibitions on war crimes, has a sufficiently clear basis in international law by virtue of its customary international law status.²⁹⁷⁴

ECTHR, *MILANKOVIC V. CROATIA*, JUDGEMENT, PARA. 66

[T]he applicant’s conviction for war crimes on the basis of his command responsibility had *tempore criminis* a sufficiently clear legal basis in international law, and **that it was foreseeable for him that his failure to prevent the war crimes committed by the police units under his command would make him criminally liable**. It also follows from these considerations that this conclusion applies regardless of whether those crimes were committed before or after the war in Croatia in the early 1990s became an international armed conflict. [emphasis added]

1511. As such, based on the analysis above, failure to act by commanders is criminalised as a specific war crime under Article 438. The following section set out the elements — as expanded upon by international practice — for command responsibility. In the alternative, many of the ways that commanders can be involved in the commission of international crimes — including their acquiescence to patterns of criminal activity implemented by their subordinates — can be subsumed under other modes of liability under the CCU, including ordering (see para. [1497](#)), organising (see para. [1463](#)), and abetting (see para. [1469](#)).

²⁹⁷² ICTY, *Celebici Appeal Judgement*, para. 237.

²⁹⁷³ See e.g., [Crimes Against Humanity and War Crimes Act](#), S.C. 2000, c. 24, Sections 5, 7 (Canada); *Gesetz zur Einführung des Völkerstrafgesetzbuches [Act to Introduce the Code of Crimes against International Law]* (Germany) 26 June 2002, Bundesgesetzblatt Jahrgang II, 2002 Nr 42, 2254, Sections 13, 14; [Serbian Criminal Code](#), 2019, Article 384; [Republic of Lithuania Law on the Approval and Entry into Force of the Criminal Code](#), 26 September 2000 No VIII-1968, Article 113¹.

²⁹⁷⁴ ECtHR, *Milankovic v. Croatia*, [Judgement](#), para. 57.

EXAMPLES OF COMMAND RESPONSIBILITY UNDER ARTICLE 438

Scenario 1

After units of the armed forces occupied town X, they began engaging in a campaign of violence against the local civilian population. The headquarters of the units' commander was located in the center of town, which meant that, every time he drove to his headquarters, he could see the result of this campaign, i.e., numerous corpses dressed in civilian clothes lying in the streets where they remained for days on end. The commander did nothing to investigate or punish the crime committed.

Situation 2

An exchanged POW reported that, when he was detained by the enemy, he saw soldiers bring the civilian goods they had stolen (e.g., jewelry, money, gadgets, etc.) to the detention center and heard them brag about forcing local women into sexual acts with them, all in the presence of their commander. The same soldiers continued to undertake such activities in various locations whilst operating under the command of the same commander, who took no action to prevent or repress their crimes.

Situation 3

After town B was seized by the armed forces, civilians were rounded up and "evacuated" from the town on buses. A number of those who were placed on these buses saw their fellow civilians get beaten up and mistreated if they refused to evacuate or even if they took too long to board the busses. These civilians also saw Commander Y observing the process as it was being implemented by his soldiers. Commander Y reported to his own commander about the "good work" his unit, and took no action to prevent the crimes.

b) Command responsibility under international law

1512. As mentioned above, command responsibility has been considered by the international courts and tribunals as a separate mode of liability. Nonetheless, the jurisprudence relating to this mode of liability is relevant for Ukrainian judges when addressing the scope of the "failure to act" of military commanders.
1513. Command responsibility refers to the responsibility of military commanders or civilian superiors for crimes committed by forces or subordinates acting under their command, authority and control, which occurred because of their failure to exercise proper control over those forces/subordinates.²⁹⁷⁵
1514. To establish a commander's responsibility for their failure to act, the following objective elements are required: (1) the accused was a military commander or civilian superior or person acting effectively as such; (2) the accused had effective command and control or effective authority and control over the forces who committed the crime(s) in question;²⁹⁷⁶ and (3) the accused failed to take the necessary and reasonable measures within their power to prevent or repress the commission of such

²⁹⁷⁵ Cryer, et al. (eds), *An Introduction to International Criminal Law and Procedure*, 3rd Edition, Cambridge University Press, 2015, p. 368.

²⁹⁷⁶ Noting that in accordance with Article 28(b) civilian superiors are only required to have "effective authority and control".

crimes, or failed to submit the matter to the competent authorities for investigation and prosecution.²⁹⁷⁷

1515. First, the accused must have been a military commander or civilian superior, or a person acting as such. The ICTY confirmed that Articles 86 and 87 are broad enough to include civilian superiors in a position of authority.²⁹⁷⁸ A civilian superior is one that exercises similar hierarchical authority over individuals as that required for command responsibility, but where a military or military-like structure cannot be established.²⁹⁷⁹ The commander or superior does not need to be formally or legally appointed, but their responsibility rests on whether they have effective command/authority and control over their subordinates.²⁹⁸⁰
1516. The terms “effective command” and “effective authority” have similar meanings, as both refer to the power or right to prevent and punish offences.²⁹⁸¹ However, while “effective *command*” refers to the existence of these rights because of an accused’s position within a chain of command, “effective *authority*” encompasses different means and methods by which military commanders might have the right to exercise power or influence.²⁹⁸² “Effective *control*” is common to both of these elements, and relates to the commander’s material ability to exercise this power or influence by preventing, repressing or punishing crimes committed by their subordinates, or to submit the matter to competent authorities for investigation or prosecution.²⁹⁸³ Such control is generally a manifestation of a (formal or informal) superior-subordinate relationship between the accused and their forces.²⁹⁸⁴

²⁹⁷⁷ [Additional Protocol I](#), Article 87(1); [ICC Statute](#), Article 28(a); ICTY, [Blagojevic & Jokic Trial Judgement](#), para. 790; ICTY, [Kordic and Cerkez Appeal Judgement](#), para. 827; ICTY, [Halilovic Trial Judgement](#), para. 56; ICTY, [Limaj et al. Trial Judgement](#), para. 520; ICTY, [Oric Trial Judgement](#), para. 294; ICC, [Bemba Decision on the Confirmation of Charges](#), para. 407; ICC, [Ntaganda Decision on the Confirmation of Charges](#), para. 164

²⁹⁷⁸ ICTY, [Celebici Appeal Judgement](#), paras 195 – 196; ICTY, [Prlic et al Decision to Dismiss the Preliminary Objections Against the Tribunal's Jurisdiction](#), para. 19; ICTY, [Oric Trial Judgement](#), para. 308; ICTY, [Aleskosvski Trial Judgement](#), para. 70. Accordingly, non-military members of governments, members of political parties or officials of corporations may incur liability under superior responsibility in relation to the criminal conduct of their subordinates: Triffterer and Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck, Hart, Nomos 2016, pp 1101-1102.

²⁹⁷⁹ Triffterer and Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck, Hart, Nomos 2016, p. 1101.

²⁹⁸⁰ ICC, [Bemba Trial Judgement](#), para. 177; ICTR, [Gacumbitsi Appeals Judgement](#), para. 143; ICTY, [Halilovic Appeal Judgement](#), para. 59; ICTY, [Celebici Appeal Judgement](#), para. 197; ICTY, [Hadžihasanovic & Kubura Trial Judgement](#), para. 79.

²⁹⁸¹ ICTY, [Popovic et al. Appeal Judgement](#), para. 1857; ICTY, [Oric Appeal Judgement](#), para. 159; ICTY, [Celebici Appeal Judgement](#), para. 197; ICC, [Bemba Trial Judgement](#), para. 180; ICC, [Bemba Decision on Confirmation of Charges](#), para. 413;

²⁹⁸² ICC, [Bemba Decision on Confirmation of Charges](#), paras 412-416.

²⁹⁸³ ICC, [Bemba Trial Judgement](#), para. 183; ICC, [Bemba Decision on Confirmation of Charges](#), para. 415; ICTY, [Celebici Trial Judgement](#), paras 190-198.

²⁹⁸⁴ ICTY, [Halilovic Appeals Judgement](#), para. 59.

EFFECTIVE CONTROL

The following is a non-exhaustive list of factors which may indicate that an alleged military commander possessed effective control:²⁹⁸⁵

- Their official position within the military structure and the actual tasks they carried out;
- Their power to issue orders, including their capacity to order forces or units under their command, whether under their immediate command or at lower levels, to engage in hostilities;
- Their capacity to ensure compliance with orders, including consideration of whether the orders were actually followed;
- Their capacity to re-subordinate units or make changes to the command structure;
- Their power to promote, replace, remove or discipline any member of their forces, and to initiate investigations;
- Their authority to send forces to locations where hostilities are taking place and withdraw them at any given moment;
- Their independent access to, and control over, the means to wage war, such as communications equipment and weapons;
- Their control over finances;
- Their capacity to represent the forces in negotiations or interact with external bodies or individuals on behalf of the group;
- Their representation of the ideology of the movement to which their subordinates adhere; and
- The fact that they have a certain level of profile, manifested through public appearance and statements.

1517. The final objective element requires that the accused “failed to act”, i.e., failed to take the necessary²⁹⁸⁶ and reasonable²⁹⁸⁷ measures within their power to:²⁹⁸⁸

- **Prevent** the commission of the crimes before they were committed (including their planning and preparation²⁹⁸⁹) by, for example: (1) ensuring that the relevant forces operated in accordance with the relevant rules of law, including issuing orders specifically meant to prevent crimes;²⁹⁹⁰ (2) taking disciplinary measures to prevent the commission of atrocities, including by suspending, excluding or redeploying violent subordinates; (3) protesting against criminal conduct and/or insisting before a superior authority that immediate action be taken; and (4)

²⁹⁸⁵ ICC, *Bemba Trial Judgement*, para. 88. See also, ICTY, *Halilovic Trial Judgement*, para. 58; ICTY, *Oric Trial Judgement*, para. 312; ICTY, *Hadžihasanovic & Kubura Trial Judgement*, para. 83; ICTY, *Celebici Appeal Judgement*, para. 206.

²⁹⁸⁶ **Necessary** measures in discharging these obligations are those that are appropriate and sufficient for the commander to genuinely discharge their duty to prevent, repress or punish: Generally, this will depend upon the type, severity and imminence of the crimes in question: ICC, *Bemba Trial Judgement*, para. 198; SCSL, *Taylor Trial Judgement*, para. 501.2

²⁹⁸⁷ **Reasonable** measures are those that reasonably fall within the commander’s material power to prevent, repress or punish the impugned conduct. This will depend upon the extent of the commander’s material ability to prevent or repress the commission of crimes, or to submit the matter to competent authorities for investigation: ICTY, *Karadžić Trial Judgement*, para. 588; ICC, *Bemba Decision on Confirmation of Charges*, para. 443; ICC, *Bemba Appeals Judgement*, para. 167.

²⁹⁸⁸ Where a commander has a duty to prevent crimes but fails to do so, punishment after the fact will not remedy the breach of this obligation: ICTY, *Oric Trial Judgement*, para. 326.

²⁹⁸⁹ ICTY, *Oric Trial Judgement*, para. 328.

²⁹⁹⁰ See e.g., ICTY, *Popovic et al. Appeal Judgement*, para. 1898

postponing military operations and/or conducting those operations in such a way as to lower/remove the risk of specific crimes being committed;²⁹⁹¹

- **Repress** (or subdue) the commission of crimes by, for example: (1) taking measures to prevent criminal acts that are in progress; (2) conducting investigations regarding previous crimes; (3) exercising disciplinary power; or (4) proposing a sanction to a superior or remitting the case to a judicial authority where the accused has no such power to do so themselves;²⁹⁹² or
- **Punish** crimes by at least investigating possible crimes to establish the facts, and if the superior has no power to sanction, by submitting the matter to a functioning authority competent to investigate and prosecute the acts, for example, where commanders lack the disciplinary authority to adequately redress the crime in question.²⁹⁹³

1518. In addition, the following subjective element must also be established: the accused either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes.²⁹⁹⁴ In other words, the accused either had actual knowledge of their forces' actions, or should have known about them.

1519. The actual knowledge of the accused cannot be presumed and must instead be established by direct or circumstantial evidence.²⁹⁹⁵ If the evidence is circumstantial, it must demonstrate an inference wherein the only reasonable conclusion is that the commander had actual knowledge or awareness regarding their subordinates' crimes.²⁹⁹⁶ It should be noted, however, that, in any case, it does not have to be shown that the commander knew the specific identities of the direct perpetrator(s),²⁹⁹⁷ nor that they mastered the precise details of the crimes to be committed.²⁹⁹⁸

1520. Where the evidence does not show that the accused knew that the crimes were committed or about to be committed by their subordinates, judges should consider whether the evidence demonstrates that the accused *should have known* this to be the case.²⁹⁹⁹ The factors considered when determining actual knowledge are also relevant

²⁹⁹¹ ICC, *Bemba Trial Judgement*, paras 202-204.

²⁹⁹² ICC, *Bemba Trial Judgement*, paras 205-207.

²⁹⁹³ ICC, *Bemba Trial Judgement*, para. 208; ICTY, *Halilovic Trial Judgement*, para. 97; ICTY, *Hadžihasanovic & Kubura Trial Judgement*, para. 1061; ICTY, *Hadžihasanovic & Kubura Appeal Judgement*, para. 154; ICTY, *Popovic et al. Trial Judgement vol. II*, para. 2053

²⁹⁹⁴ ICC Statute, Article 28(a); ICC, *Bemba Decision on Confirmation of Charges*, para. 407; ICTY, *Celebici Trial Judgement*, para. 346; ICTR, *Ndindiliyimana et al. Trial Judgement*, para. 126.

²⁹⁹⁵ ICC, *Bemba Trial Judgement*, para. 191; ICC, *Bemba Decision on Confirmation of Charges*, para.430; ICTY, *Blaskic Trial Judgement*, para. 307; ICTY, *Kordic and Cerkez Trial Judgement*, para. 427; ICTY, *Hadžihasanovic & Kubura Trial Judgement*, para. 94; ICTY, *Galic Appeal Judgement*, paras 171, 180 to 182.

²⁹⁹⁶ See e.g., ICC, *Bemba Trial Judgement*, para. 192; ICTY, *Vasiljevic Appeal Judgement*, para. 120; ICTY, *Celebici Appeal Judgement*, para. 458; ICTY, *Kordic and Cerkez Trial Judgement*, para. 427; and ICTY, *Blaskic Trial Judgement*, para. 307.

²⁹⁹⁷ ICC, *Bemba Trial Judgement*, para. 194; ICTR, *Ndindiliyimana et al. Trial Judgement*, p. 34 fn. 118; ICTY, *Blagojevic & Jokic Appeal Judgement*, para. 287.

²⁹⁹⁸ ICC, *Bemba Trial Judgement*, para. 194; ICTR, *Galic Appeal Judgement*, para. 377.

²⁹⁹⁹ ICC, *Bemba Trial Judgement*, para. 170; ICC, *Bemba Decision on Confirmation of Charges*, paras 407, 428. Note: The “should have known” standard of the ICC and “had reason to have known” standard of the *ad hoc* tribunals are not analogous, however, the ICC Pre-Trial Chamber in *Bemba* concluded that the *indica* developed under the “had reason to have known” standard may be useful in applying the “should have known standard”. See: ICC, *Bemba Decision*

to determining whether a commander “should have known” about the commission of crimes by their subordinates, or the risk of their occurrence.³⁰⁰⁰ The accused will be taken to have knowledge of the crimes if they had general information to put them on notice of possible crimes committed by their subordinates or of the possible occurrence of crimes, and such information was sufficient to justify further inquiry or investigation.³⁰⁰¹

CASE EXAMPLE – COMMAND RESPONSIBILITY ICTY, *CELEBICI TRIAL JUDGEMENT*, PARAS 2-5, 739, 764-767, 770, 772, 911, 1010, 1047, 1072, 1123

In the *Celebici* case before the ICTY, which related to the commission of war crimes in the Celebici prison-camp, the Trial Chamber found Mucic, one of the accused, responsible pursuant to command responsibility for, *inter alia*, murder, torture, willfully causing great suffering, and inhuman and cruel treatment.

The Trial Chamber found that Mucic was in a *de facto* position of superior authority over the Celebici prison-camp. The Chamber based this finding on the fact that Mucic had a deputy commander and prison guards subordinate to him and who executed his orders in the camp. Evidence supporting the fact that Mucic was able to exercise his *de facto* authority was derived from the fact that he had the authority to release detainees from the camp, he had authority over the guards and the ability to discipline them, and he controlled who visited the detainees.

Due to his position, the Trial Chamber found that Mucic knew or had reason to know of the violations of IHL committed in the camp, but failed to prevent these acts or punish the perpetrators. In this respect, the Trial Chamber found that, in addition to explicitly admitting to being aware that crimes were being committed in the camp, the Mucic also had imputed knowledge as a result of his deliberate absences from duty, which were frequent and regular, and he was aware that his subordinates would commit offences during such absences. Accordingly, the Trial Chamber concluded that the crimes committed in the Celebici prison-camp were so frequent and notorious that there is no way that Mucic could not have known or heard about them. Despite this, he did not institute any monitoring and reporting system whereby violations committed in the prison-camp would be reported to him nor did he punish anyone for mistreating prisoners.

6. Incitement to Genocide

a) Applicability under the CCU

1521. Article 442(2) of the CCU prohibits public incitement to genocide as well as the production and distribution of any materials inciting genocide. Incitement to genocide gives rise to the principal liability of the perpetrator in the same way they would incur liability for the commission of the acts of genocide. Incitement would also require the same intent as required under Article 442(1), i.e., “for the purpose of total or partial

[on Confirmation of Charges](#), para. 434. For the “had reason to have known” standard, see e.g., ICTY, *Celebici Appeal Judgement*, para. 223; ICTY, *Brđanin Trial Judgement*, para. 278; ICTR, *Ndindiliyimana et al. Trial Judgement*, para. 126. ICC, *Bemba Decision on Confirmation of Charges*, para. 434.

³⁰⁰¹ ICC, *Bemba Decision on Confirmation of Charges*, para. 434; ICTY, *Celebici Appeal Judgement*, para. 223; ICTY, *Brđanin Trial Judgement*, para. 278.

destruction of any national, ethnic, racial or religious group”, since incitement to genocide is contained within the provision prohibiting genocide (i.e., Article 442).

ARTICLE 442. GENOCIDE

2. Public incitement to genocide, and also production of any materials inciting to genocide for the purpose of distribution, or distribution of such materials shall be punishable by arrest for a term of up to six months, or imprisonment for a term of up to five years.

EXAMPLES OF INCITEMENT TO GENOCIDE UNDER ARTICLE 442(2)

Situation 1

In a publicized speech, the leader B repeatedly denied the existence of Country A, including by denying that Country A has a unique culture, language and people. In addition, B indicated that all who argue otherwise are Nazis who deserve punishment and need to be eradicated. Following these statements, attacks against the nationals of Country A increased and the attacks were found to amount to genocide.

Situation 2

Media reports in Country Y published statements made by the X accusing Country Z of committing atrocities against their people, particularly against people belonging to the same nationality as Country Y. X emphasized that Country Y and its armed forces therefore had a duty to act and take all means necessary to prevent further harm. He encouraged the armed forces to “seek out and ensure every last enemy is gone from this land”.

b) Incitement to Genocide Under International Law

1522. Incitement to commit genocide is established by proving that the accused intentionally directly and publicly incited others to commit genocide.³⁰⁰² Direct and public incitement involves the act of directly provoking another person to commit genocide through one of the following mediums: speeches; shouting or threats uttered in public or at public gatherings; the sale, distribution or display of written or printed material in public or at public gatherings; placards or posters; or through any other means of audio-visual communication.³⁰⁰³
1523. To determine whether the true meaning of a speech (or other medium) is to incite others to commit genocide, practitioners should examine how it was understood by the intended audience and evaluate, for example: the culture of the area in which the

³⁰⁰² ICTR, *Akayesu Trial Judgement*, paras 554-557; ICTR, *Nahimana et al. Appeal Judgement*, para. 677; ICTR, *Nyiramasuhuko et al. Trial Judgement*, paras 5985-5987. See also, Triffterer and Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck, Hart, Nomos 2016), pp 1016-1017.

³⁰⁰³ ICTR, *Nyiramasuhuko et al. Decision on Defence Motions for Acquittal Under Rule 98bis*, para. 109; ICTR, *Akayesu Trial Judgement*, para. 559.

speech was made; the nuances of the language used in, and the tone of, the speech; and whether the speech was given in the context of an already genocidal environment.³⁰⁰⁴

CASE EXAMPLE – INCITEMENT TO GENOCIDE ICTY, *AKAYESU TRIAL JUDGEMENT*, PARAS 672-675, 706, 729, 731

In the *Akayesu* case before the ICTR, the Trial Chamber found Akayesu guilty of incitement to commit genocide based on speeches he made at a meeting in which he called on the gathered population “to fight against the accomplices of the Inkotanyi”. These speeches, which effectively urged the killing of Tutsis, led to the widespread killing of Tutsis in Taba, where Akayesu was a leader. The Trial Chamber also found that the rapes committed around the Taba Bureau Communicational premises were an integral part of the process of the destruction of the Tutsi community, thereby forming an integral element of the genocide committed against them.

II. Defences

1524. This section sets out the various defences available to individuals accused of international crimes recognised under Ukrainian and international criminal law (ICL) to negate or mitigate their criminal responsibility.
1525. Under Ukrainian law, these defences are primarily, but not exclusively, set out under Articles 36 to 43-1 of the Criminal Code of Ukraine (CCU), while defences available under ICL are set out in the statutes and jurisprudence of the international courts and tribunals, including the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC). Some of the defences available under ICL overlap with those available under the CCU, whereas others are unique to international law and specific to the circumstances of international crimes.

A. Defences under the CCU

1526. Articles 36 to 43-1 of the CCU are the main provisions setting out the defences available under Ukrainian criminal law (i.e., the “circumstances excluding criminality of an act”) and can be summarised as follows:

³⁰⁰⁴ ICTR, *Nyiramasuhuko et al. Trial Judgement*, para. 5986; ICTR, *Akayesu Trial Judgement*, para. 557; ICTR, *Nahimana et al. Trial Judgement*, para. 1022.

CIRCUMSTANCES EXCLUDING THE CRIMINALITY OF AN ACT UNDER THE CCU

Article 36(1). Necessary defence: actions taken to defend the legally protected rights and interests of the defending person or another person, and also public interests and interests of the state against a socially dangerous trespass by inflicting such harm upon the trespasser as is necessary and sufficient in a given situation to immediately avert or stop the trespass, provided the limits of the necessary defence are not exceeded.

Article 37(1). Misread defence: actions resulting in a harm caused in the absence of any real socially dangerous trespass where the person, who misinterpreted the victim's actions, only mistakenly presumed the reality of such trespass.

Article 38(1). Apprehension of an offender: actions of the victim or other persons immediately following a trespass and aimed at the apprehending of the offender and bringing him/her to appropriate government authorities and which were not in excess of what was necessary for such apprehension shall not be deemed criminal.

Article 39(1). Extreme necessity: infliction of harm to legally protected interests in circumstances of extreme necessity, that is to prevent an imminent danger to a person or legally protected rights of that person or other persons, and also public interests or interests of the state, shall not be a criminal offence, where the danger could not be prevented by other means and where the limits of extreme necessity were not exceeded.

Article 40(1). Physical or mental coercion: a person's act or omission that caused harm to legally protected interests shall not be deemed a criminal offence, where that person acted under direct physical coercion that rendered him/her unable to be in control of his/her actions.

Article 41(1). Obeying an order or command: a person's act or omission that caused harm to legally protected interests shall be lawful where that person acted to obey a legal order or instructions.

Article 42(1). An act involving risk: no act (act or omission) in prejudice of legally protected interests shall be deemed a criminal offence where it was committed in circumstances of justified risk to achieve a significant purpose valuable to the community.

Article 43(1). Undertaking a special mission to prevent or uncover criminal activities of an organised group or criminal organization: a compelled causing of harm to legally protected interests by a person shall not be a criminal offence, where such person was undertaking a special mission, pursuant to law, by way of participation in an organised group or criminal organisation for the purpose of preventing or uncovering its criminal activities.

Article 43-1(1) and (3). Fulfilling the duty to protect the Motherland, independence and territorial integrity of Ukraine: an act (act or inaction) committed under conditions of martial law or during an armed conflict and aimed at repelling and deterring armed aggression of the Russian Federation or aggression of another country is not a criminal offence if it harmed the life or health of a person who carries out such aggression, or caused damage to the interests protected by the law, in the absence of signs of torture or the use of means of warfare prohibited by international law, other violations of the laws and customs of war provided for by international treaties, the binding consent of which was given by the Verkhovna Rada of Ukraine. [...] A person is not subject to criminal liability for the use of weapons (weapons), ammunition or explosives against persons who carry out armed aggression against Ukraine, and for damage or destruction of property in connection with this.

1527. In addition to these provisions, Article 17 (“voluntary renunciation in an unconsummated criminal offence”) and Article 19 (“criminal sanity”) of the CCU can also act as

additional defences. Accordingly, Article 17 stipulates that “[a] person who voluntarily renounced to consummate a criminal offence shall be criminally liable only if the actual act committed by that person comprised elements of any other offence”.³⁰⁰⁵ In addition, Article 19 provides that a person will not be criminally liable if, at the time they committed a socially dangerous act prescribed by the CCU, they were in the state of insanity, that is they were not aware of or could not control their acts (omissions) due to chronic mental disease, a temporary mental disorder, feeble-mindedness, or any other morbid mental condition.³⁰⁰⁶ However, such person may be subjected to compulsory medical measures upon a court decision.³⁰⁰⁷

1528. Finally, Article 66 of the CCU (“circumstances mitigating the punishment”) sets out additional grounds which do not entirely preclude criminal responsibility, but can mitigate the extent of an accused’s culpability. They include, for example, committing an offence: under the influence of threats, coercion or financial, official or other dependence; under the influence of extreme emotional disturbance caused by ill-treatment, degrading treatment, including of a systemic nature; or in excess of extreme necessity.³⁰⁰⁸
1529. A number of the aforementioned defences available under Ukrainian criminal law are also available under ICL. For example, the ICC Statute sets out the following grounds for excluding criminal responsibility:
- Abandonment of the effort to commit a crime (ICC Statute, Article 25(3)(f), similar to CCU, Article 17);
 - Mental disease or defect (ICC Statute, Article 31(1)(a), similar to CCU, Article 19);
 - Self-defence (ICC Statute, Article 31(1)(c), similar to CCU, Article 36);
 - Duress (ICC Statute, Article 31(1)(d), similar to CCU, Article 40); and
 - Superior orders and prescription of law (ICC Statute, Article 33, similar to CCU, Article 41).
1530. In the majority of cases, the application of these defences to situations where international crimes have been committed will not differ from situations in which ordinary crimes have been committed. Accordingly, judges should interpret the application of these defences in line with their knowledge of Ukrainian criminal law.
1531. However, to the extent that the treatment of these defences under ICL might contribute additional information, by illustrating the manner in which they might operate in the context of mass atrocity and war crimes cases, a number of these defences are addressed below.
1532. As discussed in previous sections (see e.g., para. [1425](#)), while international instruments and jurisprudence are not, in and of themselves, binding upon Ukrainian judges, they can serve as useful guidance and illustration for Ukrainian judges when ruling on liability for international crimes. This is due, in particular, to the fact that

³⁰⁰⁵ [Criminal Code of Ukraine](#) of 5 April 2001 No. 2341-III (CCU), Article 17(2).

³⁰⁰⁶ [CCU](#), Article 19(2).

³⁰⁰⁷ [CCU](#), Article 19(2).

³⁰⁰⁸ [CCU](#), Article 66.

the Constitutional Court of Ukraine has adopted the principle of taking a “friendly attitude” to international law,³⁰⁰⁹ and that Ukrainian courts have established a practice of relying upon international instruments and practice when interpreting international law principles in their jurisprudence.³⁰¹⁰

1. Notice of intent to raise defences

1533. As a preliminary matter, it should be noted that, under ICL, special disclosure obligations apply where an accused intends to raise circumstances excluding criminal responsibility. Judges should note that, while the Ukrainian Criminal Procedure Code (CPC) does not contain a similar provision, knowledge of this process may be interesting to consider, particularly in order to guarantee the fairness of the process.
1534. For instance, at the ICC, Rules 79 and 80 of the ICC Rules of Procedure and Evidence (ICC RPE) set disclosure obligations that arise where an accused intends to raise “grounds for excluding criminal responsibility”³⁰¹¹ provided for in the ICC Statute, as well as other “defences” derived from the Court’s applicable law (which may include, *inter alia*, customary principles of ICL, international humanitarian law and human rights law).³⁰¹² The notice must specify the names of witnesses and any other evidence upon which the accused intends to rely to establish the defence.³⁰¹³
1535. As regards timing, Rule 79(2) requires that notice of an accused’s intent to rely on such defences must be given “sufficiently in advance to enable the Prosecutor to prepare adequately and to respond”. It is the accused’s responsibility to notify their intention to the prosecution and the chamber “as soon as a determination to rely on such ground has been made”.³⁰¹⁴
1536. Importantly however, an accused’s failure to provide adequate notice under Rule 79 “shall not limit” their right to raise such defences and to present evidence.³⁰¹⁵ In this regard, it should be noted that an accused’s right to raise defences and to present admissible evidence before the Court is expressly enshrined in the ICC Statute.³⁰¹⁶
1537. It should be noted however that at both the ICTY and ICTR, it was held that inadequate notice of alibi – for instance, where notice was untimely, or insufficiently detailed – could negatively impact a chamber’s evaluation of the reliability of an alibi defence.³⁰¹⁷

³⁰⁰⁹ [Decision](#) of the Constitutional Court of Ukraine of 1 June 2016 No. 2-рп/2016, para. 2.3: “the Constitutional Court of Ukraine takes into account the provisions of existing international treaties approved by the Verkhovna Rada of Ukraine and the practice of interpretation and application of these agreements by international bodies whose jurisdiction is recognized by Ukraine”.

³⁰¹⁰ See e.g., Order of the Supreme Court, Case No. 415/2182/20, 3 February 2022 where the Court relied on Article 8bis of the ICC Statute and other international instruments to interpret Article 437 of the CCU in line with the international crime of aggression. For more information, see above, paras [969](#)

³⁰¹¹ Or raise the existence of an alibi; see, ICC [Rules of Procedure and Evidence](#), Rule 79(1)(a).

³⁰¹² See [ICC Statute](#), Article 21. See also, ICTY [Rules of Procedure and Evidence](#), Rule 67(C)-(D); ICTR [Rules of Procedure and Evidence](#), Rule 67.

³⁰¹³ See, ICC [Rules of Procedure and Evidence](#), Rule 79(1)(b).

³⁰¹⁴ See, ICC, *Katanga* [Decision on the “Prosecution’s Application Concerning Disclosure by the Defence Pursuant to Rules 78 and 79\(4\)”, para. 45.](#)

³⁰¹⁵ See, ICC [Rules of Procedure and Evidence](#), Rule 79(3).

³⁰¹⁶ See, [ICC Statute](#), Article 67(1)(e).

³⁰¹⁷ See e.g., ICTY, *Prosecutor v Tolimir* Decision on Prosecution Motion for Order Requiring Particulars of Accused’s

2. Self-Defence

1538. Elements of the CCU defences of “necessary defence” (Article 36) and “misread defence” (Article 39) can be found in Article 31(1)(c) of the ICC Statute, known as “self-defence”. The parameters of “self-defence” have been elaborated upon in the jurisprudence of the international courts and tribunals, and this caselaw may assist Ukrainian judges if an accused invokes one of these defences.

CCU, ARTICLE 36. NECESSARY DEFENCE

1. The necessary defence shall mean actions taken to defend the legally protected rights and interests of the defending person or another person, and also public interests and interests of the state, against a socially dangerous trespass, by inflicting such harm upon the trespasser as is necessary and sufficient in a given situation to immediately avert or stop the trespass, provided the limits of the necessary defence are not exceeded.
2. Every person shall have the right to necessary defence notwithstanding any possibility to avoid a socially dangerous trespass or request assistance of other persons or authorities.
3. The excess of necessary defence shall mean an intended causing of a grievous harm to the trespasser, which is not adequate to the danger of the trespass or circumstances of the defence. The excess of necessary defence shall entail criminal liability only in cases specifically prescribed in Articles 118 and 124 of this Code.
4. A person shall not be subject to criminal liability where that person was not able, due to high excitement, to evaluate if the harm caused by that person was proportionate to the danger of the trespass or circumstances of defence.
5. The use of weapons or other means or things for protection against an attack of an armed person or an attack of a group of persons, and also to avert an unlawful violent intrusion upon a dwelling place or other premises, shall not be treated as the excess of necessary defence and shall not entail criminal liability irrespective of the gravity of harm caused to the trespasser.

CCU, ARTICLE 37. MISREAD DEFENCE

1. The misread defence shall mean actions resulting in a harm caused in the absence of any real socially dangerous trespass where the person, who misinterpreted actions of the victim's, only mistakenly presumed the reality of such trespass.
2. The misread defence shall exclude any criminal liability for the harm caused only if the circumstances involved furnished reasonable grounds for the person to believe that there was a real trespass and that person was not and could not be aware that his/her presumption was mistaken.
3. Where a person was not and could not be aware that his/her presumption was mistaken, but acted in excess of defence justifiable under the circumstances of a real trespass, that person shall be criminally liable for the excess of necessary defence.
4. Where a person, under the circumstances, was not aware of, but ought to realize the absence of a real socially dangerous trespass, that person shall be criminally liable for the harm caused by recklessness.

¹Alibi Defence, para. 29; ICTR, *Kalimanzara* Appeal Judgement, paras 54-56.

ICC STATUTE, ARTICLE 31

GROUND FOR EXCLUDING CRIMINAL RESPONSIBILITY

In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

[...]

(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph[.]

1539. Under ICL, self-defence (or defence of another person or property) in response to an “imminent and unlawful use of force” must be “presently exercised or enduring”.³⁰¹⁸ Thus, preemptive strikes and retaliatory attacks in “self-defence” are excluded from the ambit of this defence.³⁰¹⁹
1540. The act of self-defence must also be “reasonable”, which implies a “necessary and efficacious response”, and “proportional” “to the degree of danger” faced, which implies that, when the degree of danger rises to the level of deadly threat or extreme bodily harm, defensive action with intent to kill would be permissible.³⁰²⁰
1541. Judges should also take note of the last sentence of Article 31(1)(c) of the ICC Statute, which distinguishes between collective and individual self-defence: “[t]he fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph.”³⁰²¹ In other words, the mere fact that an accused committed a crime within the context of a collective self-defence operation will, therefore, not, in and of itself, suffice to exclude criminal responsibility for that crime. In the same vein, the legality (or illegality) of a collective self-defence operation thus has no bearing on whether the conduct of an accused participant meets the test for individual self-defence under Article 31(1)(c).³⁰²²
1542. The ICTY has noted this element of the ICC Statute’s self-defence provision and emphasized that “military operations in self-defence do not provide a justification

³⁰¹⁸ Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp 1032-1033.

³⁰¹⁹ Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp 1032-1033.

³⁰²⁰ Kahn et al., *Archbold: International Criminal Courts, Practice Procedure and Evidence*, 5th Edition, Sweet & Maxwell, 2018, p. 1696.

³⁰²¹ Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 1033.

³⁰²² Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp 1033-1034.

for serious violations of international humanitarian law”, holding that that “any argument raising self-defence must be assessed on its own facts and in the specific circumstances relating to each charge”.³⁰²³

1543. Similarly, the ICTY has also rejected an accused’s argument that the charged criminal conduct was carried out in self-defence during a lawful domestic operation in the context of an internal armed conflict against an armed group, reiterating that “whether an attack was ordered as pre-emptive, defensive or offensive is from a legal point of view irrelevant [...]. The issue at hand is whether the way the military attack was carried out [during an armed conflict] was criminal or not”.³⁰²⁴
1544. Also note that, under the ICC Statute, in cases involving defence of property, self-defence can only be invoked if the following conditions are met: (1) it is invoked in response to a war crime charge (as opposed to a crime against humanity or genocide charge); and (2) the property in question “is essential for the survival of the person or another person or property which is essential for accomplishing a military mission”.³⁰²⁵ In this regard, Article 31(1)(c) is more specific than its CCU counterpart, Article 36(1).
1545. Where an accused is honestly mistaken as to the existence of a use of force or the degree of danger, the mistake of fact defence may be available (see para. 1591, below). Note that Article 37(1) of the CCU expressly sets out the circumstances in which a “mistake” defence, specifically within the context of self-defence, may be established. Likewise, Article 36(4) effectively provides for mistake where, “due to high excitement”, an accused was unable to correctly determine what would constitute an acceptably proportionate defensive response.

CASE EXAMPLE – SELF-DEFENCE ICTY, *STAKIC TRIAL JUDGEMENT*, PARA. 153

In the *Stakic* case at the ICTY, the issue of self-defence arose in relation to an incident in which a car full of Serb soldiers were allegedly fired upon at a checkpoint established to prevent entry into a town inhabited predominately by Bosnian Muslims. In response to this attack, the Serb forces launched a planned, coordinated, and sustained armed attack on the town in question.

The Trial Chamber recognized that the Serb soldiers did have a right to self-defence. However, the Trial Chamber found that “any armed response must be proportionate to the initial attack”, that responsive acts of self-defence must be “temporally connected with the initial attack”, and that “the launching of full-fledged military manoeuvres one day after the initial attacks does not fulfil this prerequisite for legal military acts of ‘self-defence’”.

In sum, the Trial Chamber found that the response of the Serb forces did not meet the requirements of this defence for the following reasons: the coordinated attack on the town was not a proportionate response; it was not the only option available (e.g., the Serb forces could have dispatched units to search for the alleged perpetrators instead); and the act of “self-defence” was not sufficiently temporally connected with the initial attack (i.e., the full-fledged attack was launched a full day after the initial attack at the checkpoint).

³⁰²³ ICTY, *Kordic & Cerkez Trial Judgement*, para. 450-452.

³⁰²⁴ ICTY, *Boskoski & Tarculovski Appeal Judgement*, para. 31.

³⁰²⁵ ICC Statute, Article 31(1)(c).

3. Necessity and duress

1546. Elements of the defences of “extreme necessity” (Article 39) and “physical or mental coercion” (Article 40) under the CCU can be found in Article 31(1)(d) of the ICC Statute, which sets out the “duress” defence.³⁰²⁶ The elements and principles of these inter-related defences have been considered and expanded upon in a (limited) number of ICL cases, which might assist Ukrainian judges if they encounter an invocation of these defences.

CCU, ARTICLE 39. EXTREME NECESSITY

1. Infliction of harm to legally protected interests in circumstances of extreme necessity, that is to prevent an imminent danger to a person or legally protected rights of that person or other persons, and also public interests or interests of the state, shall not be a criminal offense, where the danger could not be prevented by other means and where the limits of extreme necessity were not exceeded.
2. Any willful infliction of harm upon any legally protected interests, where such harm is larger than the harm thus prevented, is held to be in excess of extreme necessity.
3. A person shall not be criminally liable for exceeding the limits of extreme necessity where that person could not, as a result of high excitement raised by the danger, evaluate if the harm caused was proportionate to such danger.

CCU, ARTICLE 40. PHYSICAL OR MENTAL COERCION

1. A person's action or omission that caused harm to legally protected interests, is not to be held a criminal offense, where that person acted under direct physical coercion which rendered him or her unable to be in control of his/her actions.
2. The decision on a person's criminal liability for causing harm to legally protected interests, shall be made pursuant to provisions of Article 39 of this Code, where that person was subject to physical coercion, under which he/she was able to control his/her actions, and also subject to mental coercion.

³⁰²⁶ See also, on the "conflation" of duress and necessity in the ICC Statute, Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 1036.

ICC STATUTE, ARTICLE 31

GROUND FOR EXCLUDING CRIMINAL RESPONSIBILITY

A. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

[...]

1547. (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:
1548. (i) Made by other persons; or
(ii) Constituted by other circumstances beyond that person's control.

a) Necessity

1547. Necessity as a stand-alone defence under ICL (as distinct from coercion/duress and military necessity, both of which are addressed below (see paras [1549](#) and [1607](#), respectively)) was specifically rejected by the Special Court for Sierra Leone (SCSL). According to the reasoning of the SCSL Trial Chamber, necessity “cannot be accepted [...] as a defence in cases where Accused Persons are indicted for serious violations of International Humanitarian Law”.³⁰²⁷ In addition, the SCSL Appeals Chamber, has “emphasise[d] that rules of international humanitarian law apply equally to both sides of the conflict, irrespective of who is the ‘aggressor’”, and held that “it is no justification that the perpetrators of a crime against humanity were fighting for the restoration of democracy”.³⁰²⁸

³⁰²⁷ SCSL, *Fofana & Kondewa Sentencing Judgement*, para. 77.

³⁰²⁸ SCSL, *Fofana & Kondewa, Appeal Judgement*, para. 27.

CASE EXAMPLE – NECESSITY SCSL, FOFANA & KONDEWA SENTENCING JUDGEMENT, PARAS 23, 78-79, 80

In the *Fofana & Kondewa* case before the SCSL, Kondewa, one of the accused, was charged with, *inter alia*, murder of civilians, other inhumane acts, cruel treatment and pillage. Kondewa attempted to defend himself against these charges by arguing, *inter alia*, that he engaged in fighting the enemy armed forces out of "necessity" in order to restore the ousted democratically-elected president. However, the Trial Chamber found that "accepting the applicability of the defence of Necessity in prosecutions involving either war crimes or crimes against humanity, would negate the norms and fundamental principles protecting persons not taking part in hostilities and the victims of armed conflicts and consequently, compromise the objectives which International Humanitarian Law seeks to achieve". Accordingly, the Trial Chamber found Kondewa guilty of engaging in careful planning and premeditated killings of innocent and unarmed civilians.

b) Duress

1548. The defences of "extreme necessity" under the CCU and "duress" under the ICC Statute require that an accused be faced with danger or harm that is "imminent".
1549. According to the ICC Trial Chamber, the "imminence" requirement under Article 31(1)(d) of the ICC Statute refers to "the nature of the threatened harm, and not the threat itself".³⁰²⁹ Thus, "the threatened harm in question must be either to be killed immediately ('imminent death'), or to suffer serious bodily harm immediately or in an ongoing manner ('continuing or imminent serious bodily harm')".³⁰³⁰ This means that "duress is unavailable if the accused is threatened with serious bodily harm that is not going to materialise sufficiently soon."³⁰³¹ As such, an abstract danger or "an elevated probability that a dangerous situation might occur" is not sufficient to justify an invocation of the defence of duress.³⁰³²

³⁰²⁹ ICC, *Ongwen Trial Judgement*, para. 2582.

³⁰³⁰ ICC, *Ongwen Trial Judgement*, para. 2582.

³⁰³¹ ICC, *Ongwen Trial Judgement*, para. 2582.

³⁰³² ICC, *Ongwen Trial Judgement*, para. 2582.

ICC, ONGWEN APPEAL JUDGEMENT, PARAS 1422-1423 [FOOTNOTES OMITTED]

[T]he timing of the materialisation of the threat is linked to the terms “imminent” and “continuing” and that it is one of the criteria to take into account in the assessment of the existence of a threat.

[T]he Appeals Chamber is of the view that, while article 31(1)(d) of the [ICC] Statute also encompasses threats of “continuing” harm, which may occur at a later point in time, for a person to be compelled to commit a crime under the jurisdiction of the Court, the threat must be “present” and real at the time of the charged conduct, “that is, the materialization of the danger cannot lie too far in the future”. *It is insufficient for an accused to assert that he or she faced a general or blanket threat to his or her life.* [emphasis added]

1550. In addition, the mere possibility that an accused will be later subjected to disciplinary measures, however violent, will likely not meet the “imminence” requirement.³⁰³³ Indeed, the duress defence does not “provide blanket immunity to members of criminal organisations which have brutal systems of ensuring discipline as soon as they can establish that their membership was not voluntary.”³⁰³⁴

CASE EXAMPLE – DURESS ICC, ONGWEN TRIAL JUDGEMENT, PARAS 2586, 2668

The *Ongwen* case before the ICC, Ongwen was charged with a number of crimes, including, e.g., leading attacks on towns, sexual violence, forced marriage, and forced labor. Ongwen was a unit commander in the LRA whose leader, Joseph Kony, purportedly maintained strict control over all members through strict disciplinary rules that severely punished non-compliance with orders and tight supervision of commanders. To defend himself against the crimes he was charged with, Ongwen claimed that, due to the environment that existed within the armed group, he was under a continuing threat of imminent death and serious bodily harm.

However, the Trial Chamber found that there was no evidence to support Ongwen’s contention that he was subjected to any such threat at the time of his conduct. The Chamber reached this decision on the basis of the following findings: the impugned conduct did not relate to a single incident, but, rather, was complex and spanned years; the accused was, in fact, able to question orders made by Kony without facing harm; it was a realistic option available to him to leave the armed group; and Ongwen committed a number of the acts for which he was charged in private (e.g., rape).

1551. Similarly, the requirement under Article 31(1)(d) of the ICC Statute that the accused act “necessarily and reasonably” to avoid the threat implies that “there are no alternative, less intrusive measures at the disposal of [the accused]”.³⁰³⁵

³⁰³³ ICC, *Ongwen* [Decision on the Confirmation of Charges](#), para. 153.

³⁰³⁴ ICC, *Ongwen* [Decision on the Confirmation of Charges](#), para. 153. See also, ICC, *Ongwen* [Appeal Judgement](#), para. 1423, fn. 3171

³⁰³⁵ K. Ambos, *Treatise on International Criminal Law vol. 1: Foundations and General Part*, 2nd Edition, Oxford University Press, 2021, p. 473, cited in ICC, *Ongwen* [Appeal Judgement](#), para. 1423.

1552. Given the subjective aspect of the proportionality requirement in Article 31(1)(d), criminal responsibility may be excluded even where the accused caused a disproportionate harm (i.e., “a greater harm than the one sought to be avoided”), if they intended to avoid the greater harm that was ultimately occasioned.³⁰³⁶ This regard to subjectivity is reflected in Article 39(3) of the CCU, which appears to excuse an accused’s disproportionate response in circumstances where they were unable to properly evaluate the proportionality of their response due to “high excitement”.
1553. The existence of the threat must be “objectively assessed” and it must “exist in reality”.³⁰³⁷ In addition, “it must be established at least that a reasonable person in those circumstances would nonetheless apprehend the risk of serious harm [...] irrespective of whether the accused genuinely but mistakenly believed to be under threat”.³⁰³⁸ However, Articles 39 and 40 of the CCU are silent on the issue of whether the threat must be objectively present, or whether an accused’s subjective perception of a threat would suffice.
1554. It should also be noted that under Article 31(1)(d)(i)-(ii) of the ICC Statute, an accused is effectively barred from relying on duress if they “caused the danger”. In other words, “an accused cannot avail himself of the defence of duress if the situation was voluntarily brought about by himself”.³⁰³⁹

CASE EXAMPLE 2 – DURESS ECCC, *DUCH TRIAL JUDGEMENT*, PARAS 555-558.

In the *Duch* case before the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Trial Chamber considered a duress argument brought by the defendant, himself accused of war crimes and crimes against humanity committed at the notorious Khmer Rouge “S-21” Detention Centre, which he oversaw as chairman. While the Trial Chamber accepted that the accused “may have feared that he or his close relatives would be killed if his superiors found his conduct unsatisfactory”, it held that “[d]uress cannot [...] be invoked when the perceived threat results from the implementation of a policy of terror in which [the accused] has willingly and actively participated.”

1555. It should be noted that duress was not recognized as a complete defence before the ICTY. In *Erdemovic*, for example, the Appeals Chamber relied on, *inter alia*, the lack of consistent national practice on the issue of duress as a complete defence to the killing of innocent persons, and on the nature of the crimes within the ICTY’s mandate, i.e., the “most serious violations of international humanitarian law”, in finding that duress was a factor to be considered in mitigation only.³⁰⁴⁰

³⁰³⁶ Kahn *et al.*, *Archbold: International Criminal Courts, Practice Procedure and Evidence*, 5th Edition, Sweet & Maxwell, 2018, p. 1703.

³⁰³⁷ ICC, *Ongwen Appeal Judgement*, para. 1424.

³⁰³⁸ ICC, *Ongwen Appeal Judgement*, para. 1424.

³⁰³⁹ Cassese *et al.* (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp 1038-1039.

³⁰⁴⁰ Kahn *et al.*, *Archbold: International Criminal Courts, Practice Procedure and Evidence*, 5th Edition, Sweet & Maxwell, 2018, p. 1701, citing ICTY, *Erdemovic Appeal Judgement*, Joint Separate Opinion of judge McDonald and judge Vohrah, paras 72, 75-81.

1556. Before the ICC, in addition to constituting a ground for exclusion of criminal responsibility, duress can constitute a mitigating circumstance in sentencing.³⁰⁴¹ Accordingly, duress can amount to a mitigating circumstance where the action taken by the perpetrator to avoid the threat does not meet the thresholds of necessity or reasonableness, or where the specific mental element is not met.³⁰⁴² Similarly, duress (i.e., “the commission of an offence under influence of threats, coercion or financial, official or other dependence”) is also specifically listed as a circumstance mitigating punishment under Article 66(6) of the CCU.

4. Superior Orders

1557. Article 41 of the CCU (“obeying an order or command”) has its ICL counterpart in the “superior orders” defence. A comparative discussion of both is merited here given the likelihood that individuals accused of international crimes will seek to raise this defence for potentially criminal acts committed during wartime, citing their roles within existing military (and civilian) organizational structures and hierarchies.

CCU, ARTICLE 41. OBEYING AN ORDER OR COMMAND

- A. A person’s act or omission that caused harm to legally protected interests shall be lawful where that person acted to obey a legal order or instructions.
- B. An order or command shall be deemed lawful where it is duly issued by a respective person acting within his/her power and in its substance is not contrary to applicable laws and does not breach the constitutional rights and freedoms of the human being and citizen.
- C. A person shall not be criminally liable for disobeying a manifestly criminal order or command.
- D. A person, who obeyed a manifestly criminal order or command, shall be criminally liable on general grounds for the acts committed in pursuance of such order or command.
- E. Where a person was not and could not be aware of the criminal nature of an order or command, the criminal liability for the act committed in pursuance of such order or command shall arise only with respect to the person who gave the criminal order or command.

1558. The superior orders defence originates from military law and implies that, in principle, individuals can escape guilt for carrying out the orders of their superior or commander, in very limited circumstances.³⁰⁴³ However, in its initial forms under the Nuremburg Charter and the statutes of the ICTY and ICTR, superior orders was not considered a valid defence against criminal responsibility; rather, it was considered a mitigating factor in punishment.³⁰⁴⁴

³⁰⁴¹ See, ICC [Rules of Procedure and Evidence](#), Rule 145(2)(a)(i).

³⁰⁴² ICC, *Ongwen Sentencing Decision*, para. 108.

³⁰⁴³ Stahn, *A Critical Introduction to International Criminal Law*, Cambridge University Press, 2019, p. 155.

³⁰⁴⁴ Nuremburg Charter, Article 8; [ICTY Statute](#), Article 7(4); [ICTR Statute](#), Article 6(4). See also, Stahn, *A Critical Introduction to International Criminal Law*, Cambridge University Press, 2019, pp 148, 155-156; Klamberg, *Commentary on the Law of the International Criminal Court*, Torkel Opsahl Academic EPublisher, 2017, p. 336; Cassese, *International Criminal Law*, 3rd Edition, Oxford University Press, 2013, p. 229; Ansermet, ‘[Manifest Illegality and the ICC Superior Orders Defence: "Schuldtheorie" Mistake of Law Doctrine as an Article 33\(1\)\(c\)Panacea](#)’ 47 *Vanderbilt Law Review* 1425, 2014, p. 1448.

INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG, GERMANY, THE TRIAL OF THE MAJOR WAR CRIMINALS (H. M. ATTORNEY GENERAL BY HMSO, LONDON 1950), PART 22, P. 447

The provisions of [Article 8 of the Nuremburg Charter] are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the International Law of war has never been recognized as a defence to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of punishment. The true test [...] is not the existence of the order, but whether moral choice was in fact possible.

1559. While the ICC Statute still enshrines the liability of a subordinate for committing a crime pursuant to a superior's order, Article 33 does provide that a subordinate may be relieved of criminal responsibility in certain, limited circumstances:

ICC STATUTE, ARTICLE 33 SUPERIOR ORDERS AND PRESCRIPTION OF LAW

- B. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
- a) The person was under a legal obligation to obey orders of the Government or the superior in question;
 - b) The person did not know that the order was unlawful; and
 - c) The order was not manifestly unlawful.
- C. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

1560. As demonstrated by the wording of Article 33(1) (i.e., “shall not relieve that person of criminal responsibility *unless* [emphasis added]”), a subordinate who commits a crime within the jurisdiction of the ICC pursuant to a superior's order will be relieved of criminal responsibility only where the three cumulative conditions listed have been fulfilled.³⁰⁴⁵ However, see below regarding orders to commit genocide or crimes against humanity (para. [1572](#)).
1561. Given the similarity between the provisions on the superior orders defence within the CCU and the ICC Statute, ICC law and practice can provide guidance in interpreting the elements of this defence, and illustrate possible scenarios in which it might be invoked.

³⁰⁴⁵ Triffterer and Ambos, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, pp 1189-1190, 1193; Klamberg, *Commentary on the Law of the International Criminal Court*, Torkel Opsahl Academic EPublisher, 2017, p. 336; Cassese, *International Criminal Law*, 3rd Edition, Oxford University Press, 2013, p. 231; Cryer, et al. (eds), *An Introduction to International Criminal Law and Procedure*, 3rd Edition, Cambridge University Press, 2015, p. 412.

1562. Judges should also note that the defences of superior orders and duress (see para. 1549, above) are often used together, but they should be treated as distinct and separate from one another.³⁰⁴⁶

1563. The following sections will thus compare key aspects of the “superior orders” defence under Ukrainian law and under the ICC Statute.

a) The origin and legal nature of the order/instructions

CCU, ARTICLE 41(1), (2). OBEYING AN ORDER OR COMMAND

1. A person’s act or omission that caused harm to legally protected interests shall be lawful where that person acted to obey a legal order or instructions.

2. An order or command shall be deemed lawful where it is duly issued by a respective person acting within his/her power [...]

ICC STATUTE, ARTICLE 33(1)(A) – SUPERIOR ORDERS AND PRESCRIPTION OF LAW

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

- a. The person was under a legal obligation to obey orders of the Government or the superior in question [...]

1564. First, like the CCU, the ICC Statute requires a “connection” between the crime and the order. Thus, it must be demonstrated that the accused committed the crime in question “in order to comply with and execute the order”.³⁰⁴⁷ Accordingly, if the accused committed the crime independently from the order, they could not be relieved of criminal responsibility based on the superior orders defence.³⁰⁴⁸

1565. Under the ICC Statute, as well as the CCU, it must also be demonstrated that the accused “was under a legal obligation to obey orders of the Government or the superior in question”.³⁰⁴⁹ The obligation referred to in this condition must be derived from the

³⁰⁴⁶ ICTY, *Erdemovic Appeal Judgement*, para. 15; Klamberg, *Commentary on the Law of the International Criminal Court*, Torkel Opsahl Academic EPublisher, 2017, p. 336.

³⁰⁴⁷ Klamberg, *Commentary on the Law of the International Criminal Court*, Torkel Opsahl Academic EPublisher, 2017, p. 336.

³⁰⁴⁸ Triffterer and Ambos, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 1193.

³⁰⁴⁹ [ICC Statute](#), Article 33(1)(a).

domestic law under which the superior and subordinate operated.³⁰⁵⁰ In addition, this obligation must have existed at the time the accused decided to commit the crime.³⁰⁵¹

1566. Further, it is recommended that judges construe “order” broadly so as to include any kind of explicit or implied communication between a superior and a subordinate.³⁰⁵² However, the person issuing the order should have, in principle, a right to demand obedience, and the subordinate must be duty bound to follow the order.³⁰⁵³ Accordingly, “orders of a government” include orders issued by all branches of a legally established or *de facto* accepted Government of a State; likewise, by persons belonging to the Government and in charge of specific functions permitting them to act on behalf of a Government or one of its branches.³⁰⁵⁴ Further, such orders may be general (e.g., addressed to all citizens or persons under the power of the Government) or specific (e.g., addressed to an individual subordinate).³⁰⁵⁵ Thus, the superior orders defence applies to orders issued by, for example, “superiors” who are government ministers, as well as local military commanders.³⁰⁵⁶
1567. Under ICL, as under the CCU, this defence applies to both military *and* civilian orders.³⁰⁵⁷ At the ICTY, for example, it was held that “civilian superiors” should exercise substantially similar powers of control over subordinates as military superiors (albeit in the context of the mode of liability of superior/command responsibility, see above, para. [1513](#)).³⁰⁵⁸

³⁰⁵⁰ Klamberg, *Commentary on the Law of the International Criminal Court*, Torkel Opsahl Academic EPublisher, 2017, p. 336; Cryer, et al. (eds), *An Introduction to International Criminal Law and Procedure*, 3rd Edition, Cambridge University Press, 2015, p. 413.

³⁰⁵¹ Triffterer and Ambos, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 1194.

³⁰⁵² Triffterer and Ambos, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 1190; Klamberg, *Commentary on the Law of the International Criminal Court*, Torkel Opsahl Academic EPublisher, 2017, p. 336.

³⁰⁵³ Triffterer and Ambos, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 1191.

³⁰⁵⁴ Triffterer and Ambos, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 1191.

³⁰⁵⁵ Triffterer and Ambos, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 1191.

³⁰⁵⁶ Triffterer and Ambos, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 1191; ICC, *Situation in the Democratic Republic of Congo* [Judgement on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58”](#), paras 73-77.

³⁰⁵⁷ Triffterer and Ambos, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 1191.

³⁰⁵⁸ Kahn *et al.*, *Archbold: International Criminal Courts, Practice Procedure and Evidence*, 5th Edition, Sweet & Maxwell, 2018, p. 1698, citing ICTY *Celebici Trial Judgement*, para. 378.

b) “Manifest” unlawfulness

CCU, ARTICLE 41(2), (4). OBEYING AN ORDER OR COMMAND

2. An order or command shall be deemed lawful where it is duly issued by a respective person acting within his/her power and in its substance is not contrary to applicable laws and does not breach the constitutional rights and freedoms of the human being and citizen.

[...]

4. A person, who obeyed a manifestly criminal order or command, shall be criminally liable on general grounds for the acts committed in pursuance of such order or command.

ICC STATUTE, ARTICLE 33(1)(B) – SUPERIOR ORDERS AND PRESCRIPTION OF LAW

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless: [...]

(b) The order was not manifestly unlawful[.]

1568. Both the CCU and the ICC Statute require that the order pursuant to which an accused acted must not have been “manifestly” criminal/unlawful.

1569. Under the ICC Statute, the illegality of the order must be derived from the content of the order itself, i.e., to commit “a crime within the jurisdiction of the Court”.³⁰⁵⁹ In this regard, Article 41(2) of the CCU provides a more detailed definition of the lawfulness of an order (i.e., an order that, “in its substance is not contrary to applicable laws and does not breach the constitutional rights and freedoms of the human being and citizen”) and by extension, would appear to broaden the parameters of what might be considered an “unlawful” order or instruction.

1570. Nevertheless, under ICL, this condition sets a low threshold for an accused as the unlawfulness of the order must be “obvious, self-evident (even to a layperson) and incontestable”.³⁰⁶⁰ If there is doubt as to whether the order was *manifestly* unlawful, the order must be treated as if it were not manifestly unlawful, in favor of the accused.³⁰⁶¹

³⁰⁵⁹ Triffterer and Ambos, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 1194.

³⁰⁶⁰ Triffterer and Ambos, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 1195.

³⁰⁶¹ Triffterer and Ambos, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 1195.

GERMAN WAR TRIALS: JUDGEMENT IN CASE OF LIEUTENANTS DITHMAR AND BOLDT (1922) 16(4) AMERICAN JOURNAL OF INTERNATIONAL LAW 708 (LLANDOVERY CASTLE CASE), P. 722

It is certainly to be urged in favor of the military subordinates, that they are under no obligation to question the order their superior officer, and they can count upon its legality. But no such confidence can be held to exist, if such an order is universally known to everybody, including also to the accused, to be without any doubt whatever against the law.³⁰⁶²

1571. Lastly, Article 33(2) of the ICC Statute specifically provides that “orders to commit genocide or crimes against humanity are manifestly unlawful”.³⁰⁶³ Accordingly, the superior orders defence is only available in cases involving orders to commit war crimes and crimes of aggression.³⁰⁶⁴

c) The accused’s knowledge of the unlawfulness of the order

CCU, ARTICLE 41(5). OBEYING AN ORDER OR COMMAND

5. Where a person was not and could not be aware of the criminal nature of an order or command, the criminal liability for the act committed in pursuance of such order or command shall arise only with respect to the person who gave the criminal order or command.

ICC STATUTE, ARTICLE 33(1)(C) – SUPERIOR ORDERS AND PRESCRIPTION OF LAW

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless: [...]

(c) The accused did not know that the order was unlawful[.]

1572. The superior orders defence under both the CCU and the ICC Statute requires a subjective element: it must be established that the accused did not know that the order was unlawful.³⁰⁶⁵

³⁰⁶² Kahn *et al.*, *Archbold: International Criminal Courts, Practice Procedure and Evidence*, 5th Edition, Sweet & Maxwell, 2018, p. 1698, citing *Llandovery Castle* case.

³⁰⁶³ [ICC Statute](#), Article 33(2).

³⁰⁶⁴ Klamberg, *Commentary on the Law of the International Criminal Court*, Torkel Opsahl Academic EPublisher, 2017, p. 337; Cryer, *et al.* (eds), *An Introduction to International Criminal Law and Procedure*, 3rd Edition, Cambridge University Press, 2015, p. 414.

³⁰⁶⁵ [ICC Statute](#), Article 33(1)(b).

1573. Under ICL, this element of the exception will be fulfilled if the prosecution cannot prove that the accused had *positive* knowledge of the unlawfulness of the order.³⁰⁶⁶ Further, if there is any doubt as to the accused’s knowledge in this regard, they must be treated as if they were unaware of the unlawfulness of the order.³⁰⁶⁷ In addition, this condition will be fulfilled even if the accused ignored evidence indicating that the order was unlawful.³⁰⁶⁸ In this regard, the threshold necessary to meet this element is lower for an accused under ICL than under the CCU, which requires not only that an accused establish their actual unawareness of unlawfulness, but also imposes an additional negligence standard (i.e., “could not be aware of”).

d) Defence of mistake and superior orders

1574. It should be noted that Article 32(2) of the ICC Statute, which sets out the elements of the mistake of law defence (see para. 1597, below), expressly refers to the “superior orders” provision. Accordingly, Article 32(2) stipulates that mistake of law may “be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, *or as provided for in article 33*”.³⁰⁶⁹

1575. There are a number of ways in which an accused might argue mistake of fact and/or law in parallel with the superior orders defence. If an accused falsely believed that their superior’s order was “not manifestly unlawful”, this false belief may be differentiated in two ways: (1) if the accused was not aware of the facts surrounding the order, they would have acted under an error of facts, which means that the mistake of fact defence may be applicable (see below, para. 1591); or (2) if the accused made an incorrect legal assessment, they would have acted under an error of law, which means the mistake of law defence may be applicable (see below, para. 1591).³⁰⁷⁰

1576. For example, scenario (2) could arise in a situation in which a soldier killed a civilian on the basis of an order that they believed was lawful. In such a situation, the soldier would have acted with the requisite intent and, thus, fulfilled the objective and subjective elements of the war crime of killing civilians.³⁰⁷¹ However, by virtue of the superior orders defence, combined with the mistake of law defence (discussed in more detail below, see para. 1597), if the soldier cannot be found at fault for not recognising the unlawfulness of the order, the soldier’s mistaken belief that their superior’s order was lawful may relieve them of criminal responsibility for the war crime of killing civilians.³⁰⁷² Note however, in light of the additional “negligence”

³⁰⁶⁶ Triffterer and Ambos, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 1194.

³⁰⁶⁷ Triffterer and Ambos, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 1194.

³⁰⁶⁸ Triffterer and Ambos, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 1194.

³⁰⁶⁹ [ICC Statute](#), Article 32(2) (emphasis added).

³⁰⁷⁰ Triffterer and Ambos, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 1195; Ambos, ‘[Defences in international criminal law](#)’ in Brown (ed.), Cheltenham *et al.*, *Research Handbook on International Criminal Law*, Elgar, 2011, p. 323.

³⁰⁷¹ Ambos, ‘[Defences in international criminal law](#)’ in Brown (ed.), Cheltenham *et al.*, *Research Handbook on International Criminal Law*, Elgar, 2011, p. 323.

³⁰⁷² Ambos, ‘[Defences in international criminal law](#)’ in Brown (ed.), Cheltenham *et al.*, *Research Handbook on International Criminal Law*, Elgar, 2011, p. 323.

element required under the CCU (i.e. that the accused “could not be aware of the criminal nature of [the] order”), a subjective mistaken belief as to the unlawfulness of the order may be insufficient to exclude culpability on this basis (see below, paras [1594-1595](#), regarding negligence and mistake of law).

1577. In the same vein, the mistake of law defence may be applicable where an accused mistakenly believed they were under a “legal obligation to obey” (per Article 33(1)(a) of the ICC Statute) the superior order/instruction in question.³⁰⁷³

5. The principle of legality

1578. In addition to the specific defences listed above, i.e., those referred to as “circumstances excluding criminality” under the CCU, the potential also exists for an accused to invoke the principle of legality as a jurisdictional defence in war crimes trials in Ukraine. The principle of legality, and, specifically, its corollary maxims of *nullem crimen sine lege* (“no crime without law”) and *nulla poena sine lege* (“no penalty without law”), is a fundamental component of criminal justice and the rule of law.³⁰⁷⁴ This principle is enshrined in the CCU under Articles 3 through 5, as well as Articles 22 and 23 of the ICC Statute and Article 7 of the European Convention on Human Rights.³⁰⁷⁵

1579. An accused may invoke the principle of legality as a defence on the basis that portions of the wording of Article 438 are somewhat open-ended (i.e., the prohibitions against the “use of methods of the warfare prohibited by international instruments” and “any other violations of rules of the warfare stipulated by international treaties, ratified by the Verkhovna Rada of Ukraine”). Accordingly, an accused may invoke the principle of legality to argue that it was not sufficiently foreseeable that their conduct (charged under those portions of Article 438) was criminalised.

1580. According to the European Court of Human Rights (ECtHR), using the “blanket reference” or “legislation by reference” technique in criminalising acts or omissions is not, as such, incompatible with the principle of legality.³⁰⁷⁶ However, it is essential that the referencing provision (i.e., Article 438 of the CCU) and the referenced provision (i.e., the provisions of international treaties), read together, enable the accused to foresee, if need be with the help of appropriate legal advice, what conduct would make them criminally liable.³⁰⁷⁷ In such cases, the scope of the concept of foreseeability depends, to a considerable degree, on the content of the instrument at issue, the field it is designed to cover, and the number and status of the accused.³⁰⁷⁸

³⁰⁷³ Kahn *et al.*, *Archbold: International Criminal Courts, Practice Procedure and Evidence*, 5th Edition, Sweet & Maxwell, 2018, p. 1698.

³⁰⁷⁴ Triffterer and Ambos, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 950.

³⁰⁷⁵ [CCU](#), Article 3; [ICC Statute](#), Articles 22, 23; [European Convention on Human Rights](#), Article 7.

³⁰⁷⁶ See also, ECtHR, [Advisory Opinion](#) concerning the use of the “blanket reference” or “legislation by reference” technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law, para. 74.

³⁰⁷⁷ ECtHR, [Advisory Opinion](#) (29 May 2020), para. 74.

³⁰⁷⁸ ECtHR, [Advisory Opinion](#) (29 May 2020), paras 61, 67.

1581. In the context of war crimes trials, the critical question is whether, at the time of the offence, the laws and customs of war were sufficiently accessible and foreseeable to the accused.³⁰⁷⁹ In other words, the accused must be able to appreciate that their conduct is criminal in the sense generally understood, without reference to any specific provision.³⁰⁸⁰ This can be established based on, for example, the accused's status in the military; any special military education they have received; their position as a commanding officer; their awareness of the law of armed conflict; and, even more broadly, the flagrant and cruel nature of the impugned acts which should have led the accused to the understanding of their illegality.³⁰⁸¹

ECTHR, MILANKOVIC V. CROATIA JUDGEMENT, PARAS 62-65 [FOOTNOTES OMITTED]

62. As regards foreseeability and accessibility, the Court first reiterates that the scope of the concept of foreseeability depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed [...]. It furthermore reaffirms that, in the context of a commanding officer and the laws and customs of war, the concepts of accessibility and foreseeability must be considered together (ibid.).

63. In this light the Court affirms the ICTY's position in *Hadžihasanovic and Others* that, in cases such as the present one, foreseeability means that the accused must be able to appreciate that his conduct is criminal in the sense generally understood, without reference to any specific provision, and that accessibility does not exclude reliance being placed on a law which is based on custom (see paragraph 38 above).

64. Having regard to the flagrant unlawful nature of the war crimes committed by the police units under his command, the Court considers that even the most cursory reflection by the applicant would have indicated that, at the very least, the impugned omissions on his part risked involving command responsibility regardless whether those crimes were committed during international or internal conflict or by a military or non-military (police) commander [...].

65. That is especially so in the applicant's case having regard to:

- the fact that he was a police commander, and that persons carrying out a professional activity must proceed with a high degree of caution when pursuing their occupation and can be expected to take special care in assessing the risks that such activity entails [...];
- the domestic courts' finding that the applicant was a military-academy-educated officer who had thus known very well that his conduct could make him criminally liable [...]; and
- the fact that Croatia's declaration of independence had been adopted already on 25 June 1991 even though it came into effect only on 8 October 1991 [...].

1582. In the *Abd-Al-Rahman* case, the ICC Appeals Chamber endorsed the “accessible and foreseeable” test in rejecting the defence's jurisdictional challenge based on an alleged violation of the *nullum crimen sine lege* principle, enshrined in Article 22(1) of the ICC Statute and “fundamental in international law”.³⁰⁸² In finding that the accused was “in a position to understand and comply with his obligations in armed

³⁰⁷⁹ ECtHR, *Kononov v. Latvia* [Judgement](#), para. 235; ECtHR, *Milankovic v. Croatia* [Judgement](#), paras 62-66.

³⁰⁸⁰ ECtHR, *Milankovic v. Croatia* [Judgement](#), para. 63.

³⁰⁸¹ ECtHR, *Kononov v. Latvia* [Judgement](#), para. 235; ECtHR, *Milankovic v. Croatia* [Judgement](#), paras 62-66.

³⁰⁸² ICC, *Abd-Al-Rahman* [Judgement on the appeal of Mr Abd-Al-Rahman against the Pre-Trial Chamber II's "Decision on the Defence 'Exception d'incompétence' \(ICC-02/05-01/20-302\)"](#), paras 83, 85, 92.

conflict under international law”, the Appeals Chamber cited the accused’s career as a non-commissioned officer in the military; his senior role within the *Janjaweed* militia; his command over other deputies within the militia as well as within the Sudanese armed forces; and prior undertakings of the Sudanese government to comply with international humanitarian law (IHL).³⁰⁸³

1583. Accordingly, the open-ended formulation of Article 438 of the CCU is not inherently contrary to the foreseeability criterion of the principle of legality. Indeed, it clearly outlines the legal acts to which it refers (i.e., IHL treaties ratified by the Ukrainian parliament). Moreover, knowledge of IHL instruments today is widespread in the armed forces of modern States. Therefore, it is reasonable to expect that members of the armed forces, and other persons acting under the command/control of those forces, can and/or should be aware of the applicability and extent of the relevant IHL rules, and foresee the consequences of a violation of such rules.
1584. That being said, in war crimes cases involving actors such as private military contractors (including recruited prisoners) or poorly-trained, inexperienced conscripts who, arguably, may not necessarily be in a position to fully understand and comply with their obligations in armed conflict, the invocation of the principle of legality by such an accused may pose a unique challenge in the Ukrainian context. That being said, judges should note that the ECtHR has found that “even a private soldier could not show total, blind obedience to orders which flagrantly infringed not only domestic law, but internationally recognised human rights, in particular the right to life, a supreme value in the international hierarchy of human rights.”³⁰⁸⁴
1585. Lastly, bearing in mind the prohibition against the application of criminal liability by analogy within Article 3(4) of the CCU, it should be noted that the ICC Statute’s counterpart provision (Article 22(2)), in addition to prohibiting interpretation by analogy, expressly enshrines the principle of *in dubio pro reo* (“in case of ambiguity, the definition [of a crime] shall be interpreted in favour of the person being investigated, prosecuted, or convicted”).³⁰⁸⁵

B. Defences under ICL that are not explicitly included in the CCU

1586. In addition to the defences mentioned above, ICL enshrines a number of additional grounds that may exclude criminal responsibility which, due to the realities of international crimes, may be relevant during Ukrainian international crimes trials.

1. Mistake of fact and mistake of law

1587. Mistake of fact and mistake of law are two potential grounds for excluding criminal responsibility that are available under ICL but not explicitly mentioned under the

³⁰⁸³ ICC, *Abd-Al-Rahman Judgement on the appeal of Mr Abd-Al-Rahman against the Pre-Trial Chamber II’s “Decision on the Defence ‘Exception d’incompétence’ (ICC-02/05-01/20-302)”*, paras 85-90.

³⁰⁸⁴ ECtHR, *Kononov v. Latvia Judgement*, para. 236, citing ECtHR, *K.-H.W. v. Germany Judgement*, para. 75.

³⁰⁸⁵ See also, ICC, *Katanga Trial Judgement*, paras 53-55.

CCU (though both grounds are used and discussed in Ukrainian criminal law theory and practice).³⁰⁸⁶

1588. The defences of mistake of fact and mistake of law are expressly included in Article 32 of the ICC Statute.

ICC STATUTE, ARTICLE 32 MISTAKE OF FACT OR MISTAKE OF LAW

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.
2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.

1589. Under the ICC Statute, the material elements of a crime must be “committed with intent and knowledge”.³⁰⁸⁷ Pursuant to Article 32 of the ICC Statute, an accused may avoid criminal responsibility only if their mistake negates the mental element (i.e., the intent and/or knowledge) required by the crime, or, in relation to mistake of law only if their mistake relates to a relevant element of the “superior orders” defence (see para. [1558](#), above).

a) Mistake of fact

1590. A mistake of fact “implies that the defendant mistakenly interpreted a situation or the facts of the case”.³⁰⁸⁸ The “facts” about which an accused is mistaken must be contained in the definition of the crime (i.e., the “descriptive” as opposed to “normative” aspects of the definition).³⁰⁸⁹ For example, a person accused of killing civilians in an armed conflict (i.e., the war crime of attacking civilians, see above [Chapter 1, Part I, Section I.C.3.d.i](#). “Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities (ICC Statute, Article 8(2)(b)(i); ICTY Statute, Article 3)”) may invoke this defence by arguing that they honestly mistook the civilians for soldiers.³⁰⁹⁰ Given that an express element of that crime is an accused’s intention to make “a civilian population as such or individual civilians not taking part in hostilities” the object of the attack,³⁰⁹¹ as a result of

³⁰⁸⁶ See e.g., Antonyuk, ‘Factual Error and Placing in Danger in the Differentiation of Criminal Responsibility for an Uncompleted Crime’ *Criminal Law and Criminology* 286, 2020, p. 286; Dudorov and Havronyuk (eds), *Criminal law: Educational manual*, Vaite, 2014, pp 209-213.

³⁰⁸⁷ [ICC Statute](#), Article 30(1).

³⁰⁸⁸ Klamberg, *Commentary on the Law of the International Criminal Court*, Torkel Opsahl Academic EPublisher, 2017, p. 327.

³⁰⁸⁹ Triffterer and Ambos, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 1170.

³⁰⁹⁰ Klamberg, *Commentary on the Law of the International Criminal Court*, Torkel Opsahl Academic EPublisher, 2017, p. 327.

³⁰⁹¹ See, ICC, [Elements of Crimes](#), Article 8(2)(b)(i), Element Three.

said mistake of fact, the accused person would not have the requisite *mens rea*, and their criminal responsibility would thus be excluded.

1591. As another example, a person who launched an attack on a building not realising that it was a protected religious building (i.e., the war crime of attacking buildings dedicated to religion, see above [Chapter 1, Part I, Section I.C.3.d\)v](#). “Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives (ICC Statute, Article 8(2)(b)(ix)”) may invoke this defence as they would not possess the requisite mental element required by the crime.³⁰⁹² The burden rests on the accused to demonstrate that they were honestly mistaken.³⁰⁹³ An accused’s ability to demonstrate the reasonable nature of their mistake would increase their likelihood of success in this regard; however, reasonableness is not an express element of this defence.³⁰⁹⁴
1592. Under Ukrainian criminal law, the general rule for all types of factual error is that criminal liability will depend on what the accused was aware of, or should have been aware of, at the time they committed the act, or whether they could foresee the occurrence of socially dangerous consequences.³⁰⁹⁵ In this respect, Ukrainian criminal law corresponds with the limited applicability of Article 32(1), i.e., to the mental elements of crimes. The *mens rea* required under the ICC Statute (“intent and knowledge”) is likewise similar to that required under the CCU.³⁰⁹⁶
1593. A number of crimes under the ICC Statute encompass a negligence standard, in addition to the standard mental elements of intent and knowledge. For instance, for the war crime of using, conscripting or enlisting children, it must be established that an accused “knew or should have known that such person or persons were under the age of 15 years”.³⁰⁹⁷ Accordingly, in the absence of actual knowledge, it will therefore suffice if the prosecution establishes that an accused was negligent as to the age(s) of the children that they used, conscripted or enlisted.³⁰⁹⁸
1594. It follows that, for such crimes, mistake of fact will not automatically negate this mental element. Accordingly, a determination of whether the defence of mistake of fact will nevertheless succeed may depend upon whether the mistake was unavoidable or avoidable.³⁰⁹⁹ If it was unavoidable, it is likely that the additional mental element (e.g., negligence) would not be established and the defence would succeed.³¹⁰⁰ However, if

³⁰⁹² Triffterer and Ambos, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 1170.

³⁰⁹³ Klamberg, *Commentary on the Law of the International Criminal Court*, Torkel Opsahl Academic EPublisher, 2017, p. 329.

³⁰⁹⁴ Klamberg, *Commentary on the Law of the International Criminal Court*, Torkel Opsahl Academic EPublisher, 2017, p. 329.

³⁰⁹⁵ Dudorov and Havronyuk (eds), *Criminal law: Educational manual*, Vaite, 2014, p. 212.

³⁰⁹⁶ [ICC Statute](#), Article 30; [CCU](#), Articles 23 and 24.

³⁰⁹⁷ ICC, [Elements of Crimes](#), Article 8(2)(b)(xxvi), Element Three (emphasis added).

³⁰⁹⁸ See, ICC, [Elements of Crimes](#), Article 8(2)(b)(xxvi), Element Three.

³⁰⁹⁹ Triffterer and Ambos, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 1171. See also, Klamberg, *Commentary on the Law of the International Criminal Court*, Torkel Opsahl Academic EPublisher, 2017, p. 330.

³¹⁰⁰ Triffterer and Ambos, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart,

the mistake was avoidable (e.g., the mistake was due to negligence or imprudence), the mistake may be insufficient to negate the additional mental element and thus to exclude criminal responsibility.³¹⁰¹

1595. Judges should also be aware that, even if they ultimately determine that an accused's mistake of fact defence has not succeeded in excluding their criminal responsibility, the mistake may still amount to a circumstance that should be taken into account in mitigation of punishment.³¹⁰²

CASE STUDY: MISTAKE OF FACT

The US Military Court in *Calley v. Callaway* set out the following principle which may assist judges in determining whether an accused's state of mind indeed reflected a mistake of fact:

[T]o be exculpatory, the mistaken belief must be of such a nature that the conduct would have been lawful had the facts actually been as they were believed to be.³¹⁰³

Situation 1

Applying this principle to a situation in which the accused mistakenly thought they were attacking soldiers and not civilians, the mistake of fact defence may indeed succeed given that, if the facts had "actually been as they were believed to be" by the accused (i.e., had the attacked persons actually been soldiers), the accused's conduct would have been lawful as soldiers are considered lawful targets of attack during an armed conflict.³¹⁰⁴

Situation 2

Where an individual is accused of directing a missile attack on a civilian, if the accused genuinely (but mistakenly) believed that the attacked object was a military objective, this mistake of fact would exclude the qualification of the attack as the war crime of attacking civilian objects,³¹⁰⁵ which requires the accused to intentionally target a civilian object with the knowledge of the protected status of such object. Note, however, that such an attack may nonetheless constitute other violations of IHL, for instance, the failure to undertake precautionary measures to verify the target's nature.³¹⁰⁶

b) Mistake of law

1596. A mistake of law "implies that the defendant erroneously evaluated the law."³¹⁰⁷ For example, a person accused of killing civilians in an armed conflict may attempt to

2016, p. 1171.

³¹⁰¹ Klamberg, *Commentary on the Law of the International Criminal Court*, Torkel Opsahl Academic EPublisher, 2017, p. 330; Triffterer and Ambos, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 1171.

³¹⁰² Klamberg, *Commentary on the Law of the International Criminal Court*, Torkel Opsahl Academic EPublisher, 2017, p. 330; Triffterer and Ambos, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 1171. See also, [CCU](#), Article 66(2).

³¹⁰³ Klamberg, *Commentary on the Law of the International Criminal Court*, Torkel Opsahl Academic EPublisher, 2017, pp 330-331 citing US Military Court, *Calley v. Callaway*, 1975.

³¹⁰⁴ [Additional Protocol I](#), Article 43(2).

³¹⁰⁵ [ICC Statute](#), Article 8(2)(b)(ii); [Additional Protocol I](#), Article 52(1).

³¹⁰⁶ [Additional Protocol I](#), Article 57.

³¹⁰⁷ Klamberg, *Commentary on the Law of the International Criminal Court*, Torkel Opsahl Academic EPublisher, 2017, pp 327, 331.

invoke this defence by arguing that they did not know that the law prohibited killing civilians in an armed conflict.

1597. Under Ukrainian criminal law, in general, a mistake of law will not exclude criminal responsibility.³¹⁰⁸ Conversely, under the ICC Statute, mistake of law may exclude criminal liability in certain circumstances.³¹⁰⁹ However, the ICC’s approach to mistake of law is complicated by several nuances, which Ukrainian judges may want to take into consideration if they encounter an accused who invokes the mistake of law defence.
1598. According to the first part of sentence one of Article 32(2) of the ICC Statute, a mistake of law as to “whether a particular type of conduct is a crime” shall not be a ground for excluding criminal responsibility.³¹¹⁰ Thus, such a mistake would be an irrelevant error that will not exclude the criminal responsibility of the accused.³¹¹¹ Additionally, if the accused correctly evaluates certain conduct as criminal, but is mistaken about whether this conduct falls “within the jurisdiction of the ICC” (per the second part of sentence one of Article 32(2)), this too will not exclude their criminal responsibility as this knowledge is not an essential element of the crime.³¹¹² Similarly, under national law, an accused’s mistaken evaluation about which court is competent to prosecute the crime is also irrelevant to a determination of their criminal responsibility.³¹¹³

CASE EXAMPLE – MISTAKE OF LAW ICC, LUBANGA DECISION ON CONFIRMATION OF CHARGES, PARAS 304-305

In the *Lubanga* case before the ICC, the Pre-Trial Chamber rejected the defence’s argument that the accused was “unaware that voluntarily or forcibly recruiting children under the age of fifteen years and using them to participate actively in hostilities” would entail criminal responsibility under the ICC Statute on the basis of, *inter alia*, the limited scope of mistake of law as set out in the first sentence of Article 32(2): “[a] mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility”.

1599. Sentence two of Article 32(2) stipulates that mistake of law may be a valid ground for excluding criminal responsibility only if it negates the mental element required by the crime at issue (or where it affects relevant elements of the “superior orders” defence — see, para. 1558, above).³¹¹⁴ According to the ICC Pre-Trial Chamber, “the defence of mistake of law can succeed under article 32 of the Statute only if [an ac-

³¹⁰⁸ Dudorov and Havronyuk (eds), *Criminal law: Educational manual*, Vaite, 2014, pp 210-211.

³¹⁰⁹ [ICC Statute](#), Article 32(2).

³¹¹⁰ [ICC Statute](#), Article 32(2).

³¹¹¹ Triffterer and Ambos, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 1172.

³¹¹² Triffterer and Ambos, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 1172.

³¹¹³ Triffterer and Ambos, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 1172.

³¹¹⁴ [ICC Statute](#), Article 32(2).

cused] was unaware of a normative objective element of [a] crime as a result of not realising its social significance (its everyday meaning)".³¹¹⁵

1600. By way of example, if a person is not aware of the purpose for which “a flag of truce” is used – in other words, they do not realise its “social significance” – it follows that they cannot know of the “prohibited nature” of its (improper) use, as required by Article 8(2)(b)(vii) of the ICC Statute (see [Chapter 1, Part I, Section I.C.3.d\)ii](#). “Making improper use of distinctive signs (ICC Statute, Article 8(2)(b)(vii))”).³¹¹⁶
1601. There are only a few other legal elements in the ICC Statute, in addition to the aforementioned example, to which a mistake of law could relate. For instance, the prohibition against employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate under Article 8(2)(b)(xx) stipulates that such weapons, projectiles, material and methods must be, *inter alia*, “the subject of a comprehensive prohibition”.
1602. A mistake of law in this regard could arise in two scenarios, First, if the accused is unaware of any such prohibitive rule, they do not know the relevant facts, i.e., the basis upon which this legal element is built, and, therefore, they cannot be aware that their behavior violates this legal prohibition.³¹¹⁷ As such, this mistake of law would negate the accused’s mental element, i.e., their knowledge of the prohibition, and operate to exclude their criminal responsibility.³¹¹⁸ Conversely, however, a person could have the correct perception of the situation, i.e., be aware of the prohibition, but erroneously believe that the prohibition is not applicable to their conduct.³¹¹⁹ In this situation, the person would have made a legal judgement (or value judgement) that is not an element of the crime and, therefore, the mistake of law would be of no relevance and would not exclude the person’s criminal responsibility.³¹²⁰
1603. Note also that the inclusion of the word “may” in Article 32(2) appears to leave discretion to judges in relation to whether the mistake of law in question would exclude criminal responsibility.³¹²¹ Additionally, even if the mistake of law defence fails, judges can, nevertheless, take this mistake into consideration as a circumstance mitigating punishment.³¹²²

³¹¹⁵ ICC, *Lubanga Decision on Confirmation of Charges*, para. 316.

³¹¹⁶ Triffterer and Ambos, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 1172.

³¹¹⁷ Triffterer and Ambos, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 1173.

³¹¹⁸ Triffterer and Ambos, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 1173.

³¹¹⁹ Triffterer and Ambos, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 1173.

³¹²⁰ Triffterer and Ambos, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 1173.

³¹²¹ Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp 941-942.

³¹²² Triffterer and Ambos, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, pp 1173-1174. See also, [CCU](#), Article 66(2).

2. Defences embedded in the elements of international crimes

1604. In addition to the statutory defences listed above (e.g., necessary defence, physical or mental coercion), there are a number of additional “defences” available to an accused that can be derived from the elements of international crimes.
1605. For example, judges should be aware that an individual accused of attacking civilians or civilian objects,³¹²³ a common occurrence throughout the war in Ukraine, will likely attempt to defend their actions by arguing that they did not *intend* to attack *civilians* or *civilian* objects or, in relation to the latter, that the object was actually a “dual-use object”,³¹²⁴ and, thus, the object was a legitimate target for attack. In other words, an accused may argue that they did not possess the requisite *mens rea* for their conduct to amount to a war crime. Nevertheless, if the effects on the civilian population and/or civilian objects, in general, exceed the anticipated military advantage, the attack would still violate IHL and the lack of intent defence would fail (see also, the defence related to the principle of proportionality, discussed at para. [1610](#) 678, below).
1606. Another defence that judges may encounter frequently is that of “military necessity”. A number of war crimes specifically require, as an element of the crime, that it be established that the alleged criminal act(s) were “not justified by military necessity” — for instance, the war crimes of destruction or seizure of property.³¹²⁵ In a similar vein, the ICC Elements of Crimes specifically requires that, in relation to the war crime of pillaging, the pillaged property must be “appropriated for private or personal use”.³¹²⁶ Therefore, in accordance with the ICC Elements of Crimes and ICC case law, appropriation of property for reasons of military necessity cannot constitute pillaging.³¹²⁷

³¹²³ See e.g., [ICC Statute](#), Articles 8(2)(b)(i) and 8(2)(b)(ii).

³¹²⁴ A “dual-use object” is an object that serves both civilian and military functions and can therefore be legally targeted. Typical dual-use objects are transport systems such as roads, bridges and railways, but can also include, for example, a power station supplying electricity to a military base and a hospital. See, Bring, ‘International Humanitarian Law After Kosovo: Is Lex Lata Sufficient?’ (2002) 71 *Nordic Journal of International Law* 39, p. 42; Shue and Wippman, ‘Limiting Attacks on Dual-Uses Facilities Performing Indispensable Civilian Functions’ 35 *Cornell International Law Journal* 559, 2002, pp 563-566.

³¹²⁵ See e.g., ICC, [Elements of Crimes](#), Article 8(2)(a)(iv), Element Two; Article 8(2)(b)(xiii), Element Five. For more information on the elements of these crimes, including military necessity, see [Chapter 1, Part I, Section I.C.3.c.i](#). “Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly (ICTY Statute, Article 2(d); ICC Statute, Article 8(2)(a)(iv))”; [Chapter 1, Part I, Section I.C.3.c.iii](#). “Destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of war (Article 8(2)(b)(xiii) of the ICC Statute)”.

³¹²⁶ ICC, [Elements of Crimes](#), Article 8(2)(b)(xvi), Element Two.

³¹²⁷ See, ICC, [Elements of Crimes](#), Article 8(2)(b)(xvi), Element Two, fn 47; see also, ICC, *Ongwen Trial Judgement*, para. 2767.

WARCRIMES FOR WHICH THE "MILITARY NECESSITY" JUSTIFICATION MAY BE APPLICABLE

- War crime of destruction or seizure/appropriation of property.³¹²⁸
- War crime of pillaging.³¹²⁹

1607. “Military necessity” can be defined as “those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war”.³¹³⁰ However, it is only *imperative* reasons of military necessity, i.e., “the most serious reasons which are of an imperative nature”, that may justify the commission of the prohibited act.³¹³¹ In addition, judges should note that the invocation of military necessity as a defence will only be valid if military necessity is, itself, an element of the offense charged (i.e., it is not a general defence applicable to all war crimes).³¹³² Further, military necessity can never be used as a justification for attacking civilians or the civilian population as such.³¹³³

ICC, KATANGA TRIAL JUDGEMENT, PARA. 894 [FOOTNOTES OMITTED]

The Chamber observes that only “imperative” reasons of military necessity, where the perpetrator has no other option in this regard, could justify acts of destruction which would otherwise be proscribed [...]. To determine whether the destruction of property fell within military necessity, the Chamber will conduct a case-by-case assessment by considering, for example, whether the destroyed property was defended or whether specific property was destroyed.

1608. In certain (limited) circumstances, an additional defence that may be available to an accused is one based on a “state of necessity”, as opposed to military necessity, but framed in elements of the defence of duress. In this regard, Article 39(1) of the CCU (i.e., extreme necessity) could *prima facie* be of relevance. Accordingly, in the *Ongwen*

³¹²⁸ See e.g., [Hague Regulations](#), Article 23(g); [First Geneva Convention](#), Article 50; [Second Geneva Convention](#), Article 50; [Fourth Geneva Convention](#), Article 147; [CCU](#), Article 438; [ICC Statute](#), Articles 8(2)(a)(iv) and 8(2)(b)(xiii).

³¹²⁹ [ICC Statute](#), Article 8(2)(b)(xvi); ICC, [Elements of Crimes](#), Article 8(2)(b)(xvi), fn. 47. However, note that the requirement that the appropriation of property be for private or personal use is particular to the ICC (i.e., not part of customary or conventional IHL) (ICC, *Bemba Trial Judgement*, para. 120). Other tribunals have found this to be unduly restrictive to be an element of the crime of pillage (SCSL, *Brima et al. Trial Judgement*, para. 754). Therefore, in domestic prosecutions, proving this element may not be strictly necessary to establish the crime of pillaging. See e.g., [Fourth Geneva Convention](#), Article 33: “Pillage is prohibited”; [Hague Regulations](#), Article 28: “The pillage of a town or place, even when taken by assault, is prohibited”.

³¹³⁰ ICTY, *Kordic and Cerkez Appeals Judgement*, para. 686; ICC, *Katanga Trial Judgement*, para. 894.

³¹³¹ Triffterer and Ambos, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, Beck Hart, 2016, p. 443.

³¹³² ICC, *Katanga Decision on the Confirmation of Charges*, para. 318; Ambos, ‘[Defences in international criminal law](#)’ in Brown (ed), Cheltenham *et al.*, *Research Handbook on International Criminal Law*, Elgar, 2011, p. 325.

³¹³³ ICTY, *Galic Trial Judgement*, para. 44, fn. 76. See also, [Additional Protocol I](#), Article 51(2); Ambos, ‘[Defences in international criminal law](#)’ in Brown (ed.), Cheltenham *et al.*, *Research Handbook on International Criminal Law*, Elgar, 2011, p. 325.

case at the ICC, the Trial Chamber held that the mere fact that property appropriated by combatants was “essential to their survival, such as food”, does not, in and of itself, make the appropriation one of military necessity.³¹³⁴ However, in the ICC’s *Katanga* case, the defence sought to argue that the perpetrators of pillaging should be excluded from incurring criminal responsibility as the appropriated property in question was “essential to survival”, relying on the statutory defence of duress under Article 31(1)(c) of the ICC Statute.³¹³⁵ While the Trial Chamber rejected this argument on the facts, it did endorse the principle that “in the context of an actual or looming famine, a state of necessity may be an exception to the prohibition on the appropriation of public or private property”.³¹³⁶ Notably, in this case, the Trial Chamber held that, “[i]n specific situations, appropriation of livestock and food could, indeed, and on its own, constitute a response to a grave, ongoing or imminent threat to physical integrity.”³¹³⁷

1609. Similarly, the war crime of excessive incidental death, injury, or damage contains within it the IHL principle of proportionality,³¹³⁸ which prohibits the launching of an attack against a lawful military target that “may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”.³¹³⁹ Accordingly, an accused may attempt to defend themselves against such a charge by, for example, arguing that the result of the attack was not excessive in relation to the military advantage anticipated,³¹⁴⁰ or that they took all feasible precautions prior to launching the attack.³¹⁴¹ In relation to the former, judges must “assess the ‘military advantage’ from the attacker’s perspective, but the advantage must be definite and cannot in any way be indeterminate or potential.”³¹⁴² In relation to the latter, the relevant precautions judges will have to evaluate include, among others, the choice of the means and methods of warfare;³¹⁴³ the assessment of the effects of the attack;³¹⁴⁴ the suspension of an attack;³¹⁴⁵ and the provision of effective advance warning.³¹⁴⁶

³¹³⁴ See, ICC, *Ongwen Trial Judgement*, para. 2767;

³¹³⁵ See, ICC, *Katanga Trial Judgement*, para. 955.

³¹³⁶ See, ICC, *Katanga Trial Judgement*, para. 955. See also, ICTY, *Hadzihasanovic and Kubura Trial Judgement*, para. 53.

³¹³⁷ See, ICC, *Katanga Trial Judgement*, para. 956.

³¹³⁸ ICC Statute, Article 8(2)(b)(iv); *Additional Protocol I*, Article 57(2)(a)(iii). For more information on the elements of this crime, see *Chapter 1, Part I, Section I.C.3.d)iii*. “Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated (ICC Statute, Article 8(2)(b)(iv); ICTY Statute, Article 3)”.

³¹³⁹ *Additional Protocol I*, Article 51(5)(b); ICRC, Customary IHL Database, *Rule 14*.

³¹⁴⁰ ICC, *Elements of Crimes*, Article 8(2)(b)(iv), fn. 36 (“The expression ‘concrete and direct overall military advantage’ refers to a military advantage that is foreseeable by the perpetrator at the relevant time. Such advantage may or may not be temporally or geographically related to the object of the attack.”).

³¹⁴¹ *Additional Protocol I*, Article 57(1). See also, ICRC, *Commentary on the Additional Protocols*, Article 57, para. 2198.

³¹⁴² ICC, *Katanga Trial Judgement*, para. 893.

³¹⁴³ *Additional Protocol I*, Article 57(2)(a)(ii); ICRC, Customary IHL Database, *Rule 17*.

³¹⁴⁴ *Additional Protocol I*, Article 57(2)(a)(iii); ICRC, Customary IHL Database, *Rule 18*.

³¹⁴⁵ *Additional Protocol I*, Article 57(2)(b); ICRC, Customary IHL Database, *Rule 19*.

³¹⁴⁶ *Additional Protocol I*, Article 57(2)(c); ICRC, Customary IHL Database, *Rule 20*.

ADDITIONAL PROTOCOL I, ARTICLE 57

2. With respect to attacks, the following precautions shall be taken:

- a) those who plan or decide upon an attack shall:
 - (i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;
 - (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;
 - (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;
- b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;
- c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.

1610. Another example relates to missile or artillery attacks directed against the civilian population or civilian objects.³¹⁴⁷ The mere fact that damage was inflicted on civilian objects or that the attack resulted in civilian casualties is not determinative of whether a war crime was in fact committed; nor is it determinative of which war crime such an attack could be classified as. Indeed, while such an attack could amount to, *inter alia*, an intentional act of targeting civilians,³¹⁴⁸ or an indiscriminate or disproportionate attack,³¹⁴⁹ an accused could argue, to the contrary, that the damage to the civilian population or civilian objects was a proportionate, collateral effect of a lawful attack on a military objective and, thus, that no crime occurred. Likewise, as mentioned above (see para.1602), an accused may argue that they lacked the requisite intent to target civilians or civilian objects – for instance, by claiming that the intended target was a lawful military objective, but that due to malfunctioning of weapons or incorrect coordinates, the shell or missile hit a different area than intended – thus negating the accused’s liability. Accordingly, judges should carefully examine the elements of the relevant crimes, and assess whether the facts on the ground reasonably satisfy those elements.

³¹⁴⁷ See e.g., [ICC Statute](#), Articles 8(2)(b)(i) and 8(2)(b)(ii). See also [Chapter 1, Part I, Section I.C.3.d\)i](#). "Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities (ICC Statute, Article 8(2)(b)(i); ICTY Statute, Article 3)"; [Chapter 1, Part I, Section I.C.3.d\)ii](#). "Intentionally directing attacks against civilian objects, that is, objects which are not military objectives (ICC Statute, Article 8(2)(b)(ii); ICTY Statute, Article 3)".

³¹⁴⁸ [Additional Protocol I](#), Article 51(2) and 52; Customary IHL, [Rules 1 and 7](#); [ICC Statute](#), Article 8(2)(b)(i).

³¹⁴⁹ [Additional Protocol I](#), Articles 51(4)-(5) and 85(3)(b); [ICC Statute](#), Article 8(2)(b)(iv).

1611. The war crime of deportation and forcible transfer, which prohibits deporting or transferring one or more persons to another State or to another location, provides another example of a crime the elements of which can provide the basis of a potential defence.³¹⁵⁰ While such conduct is prohibited, the Fourth Geneva Convention, as well as the jurisprudence of the international courts and tribunals, provides for an exception according to which “the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand”.³¹⁵¹ Nevertheless, even where a deportation or transfer has been justified for reasons of securing the security of the population or for imperative military reasons, the displaced persons must be returned to their homes as soon as the situation allows.³¹⁵² In addition, to qualify as a war crime, the displacement must be forcible.³¹⁵³ Accordingly, as will be discussed in more detail below (see para. 1614), an individual accused of the war crime of deportation can also attempt to defend themselves against this charge by arguing that the persons they displaced left voluntarily (i.e., that they consented to the displacement).³¹⁵⁴

1612. As a final example, the war crime of unlawful confinement, which prohibits confining one or more protected persons to a certain location, contains an embedded “defence” that is also based on IHL.³¹⁵⁵ Specifically, the Fourth Geneva Convention and jurisprudence of the international courts and tribunals permit confinement of such persons, for a time, provided that the persons deprived of their liberty are confined “only if the security of the Detaining Power makes it absolutely necessary”.³¹⁵⁶ The following activities, *inter alia*, may justify confinement for reasons of security: direct participation in hostilities; espionage; sabotage; and intelligence sharing with the enemy State or enemy nationals.³¹⁵⁷ Nevertheless, even if judges are satisfied that one of these reasons of security are established on the facts, the accused must, nevertheless, have provided detainees the requisite procedural safeguards as set out in the Fourth Geneva Convention.³¹⁵⁸

³¹⁵⁰ ICC, [Elements of Crimes](#), Article 8(2)(a)(vii)-1, Element One. See also, [Fourth Geneva Convention](#), Articles 49(1), 147. For more information on the elements of this crime, see [Chapter 1, Part I, Section I.C.3.b\)ix](#). “Unlawful deportation or transfer (ICC Statute, Article 8(2)(a)(vii); ICTY Statute Article 2(g))”.

³¹⁵¹ [Fourth Geneva Convention](#), Article 49(2). See also, ICTY, *Stakic Appeal Judgement*, para. 284; ICTY, *Krstic Trial Judgement*, para. 524; ICTY, *Popovic et al. Trial Judgement*, para. 901; ICTY *Tolimir Trial Judgement*, para. 798; ICTY, *Stanisic and Simatovic Trial Judgement*, para. 994.

³¹⁵² [Fourth Geneva Convention](#), Article 49(2). See also, ICTY, *Stanisic and Simatovic Trial Judgement*, para. 994; ICTY, *Krstic Trial Judgement*, para. 524; ICTY, *Blagojevic & Jokic Trial Judgement*, para. 599; ICTY, *Krajisnik Trial Judgement*, para. 725.

³¹⁵³ [Fourth Geneva Convention](#), Article 49(1): “Individual or mass *forcible* transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive” (emphasis added).

³¹⁵⁴ Triffterer and Ambos, *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck, Hart, Nomos, 2016, pp 347-348; ICRC, *Commentary on the Fourth Geneva Convention*, 1956, [Article 49](#), p. 279.

³¹⁵⁵ ICC, [Elements of Crimes](#), Article 8(2)(a)(vii)-2, Element One. See also, [Fourth Geneva Convention](#), Articles 42, 78. For more information on the elements of this crime, see [Chapter 1, Part I, Section I.C.3.b\)x](#). “Unlawful confinement (ICC Statute, Article 8(2)(a)(vii); ICTY Statute Article 2(g))”.

³¹⁵⁶ [Fourth Geneva Convention](#), Articles 42, 78; ICTY, *Krnojelac Trial Judgement*, para. 123; ICTY, *Celebici Trial Judgement*, paras 576- 577; ICTY, *Prlic et al. Trial Judgement*, para. 134; ICRC, ‘[Internment in Armed Conflict: Basic Rules and Challenges](#)’ (25 November 2014), p. 3.

³¹⁵⁷ ICTY, *Prlic et al. Trial Judgement*, para. 65; ICRC, [Internment in Armed Conflict: Basic Rules and Challenges](#), 25 November 2014, p. 4.

³¹⁵⁸ [Fourth Geneva Convention](#), Articles 43 and 78. See also, ICTY, *Celebici Trial Judgement*, para. 583; ICTY, *Celebici Appeal Judgement*, para. 322; ICTY, *Prlic et al. Trial Judgement*, para. 136; Triffterer and Ambos, *The Rome Statute of*

ICTY, CELEBICI TRIAL JUDGEMENT, PARA. 583

The security of the State concerned might require the internment of civilians and, furthermore, the decision of whether a civilian constitutes a threat to the security of the State is largely left to its discretion. However, it must be borne in mind that the measure of internment for reasons of security is an exceptional one and can never be taken on a collective basis. An initially lawful internment clearly becomes unlawful if the detaining party does not respect the basic procedural rights of the detained persons and does not establish an appropriate court or administrative board as prescribed in article 43 of Geneva Convention IV.

3. Consent

1613. Another circumstance excluding criminality that judges may encounter is the defence of consent. This defence can only be invoked in relation to crimes that are committed against individuals (e.g., sexual offences or deprivation of liberty) as opposed to those that affect a broad range of individuals or the “collective” (e.g., attacks on civilians/civilian objects).³¹⁵⁹ However, the likelihood that the defence of consent will succeed in any event is rare given that, as will be demonstrated, a victims’ ability to consent will often be negated by the existence of coercive circumstances, and situations of armed conflict, such as that occurring in Ukraine, are characterized as being inherently coercive.³¹⁶⁰
1614. For instance, as briefly touched on above, the act of deportation and forcible transfer will only amount to a war crime if the displacement was forcible,³¹⁶¹ which is understood to include not only physical force, but also other means of physical or non-physical coercion.³¹⁶² Accordingly, an individual accused of committing the war crime of unlawful deportation or forcible transfer may defend themselves against this charge by arguing that the persons they displaced left voluntarily (i.e., that they consented to the displacement).³¹⁶³ Nevertheless, in a wartime setting such as that existing in Ukraine, it will be difficult for an accused to prove that no force was used given that the mere threat of force, or physical or mental coercion, will satisfy this element “if the targeted population facing this coercive climate or these threats, has no other choice but to leave its territory”.³¹⁶⁴ In addition, judges should be aware that

the International Criminal Court: A Commentary, 3rd Edition, Beck Hart, 2016, p. 350.

³¹⁵⁹ Ambos, ‘[Defences in international criminal law](#)’ in Brown (ed.), Cheltenham *et al.*, *Research Handbook on International Criminal Law*, Elgar, 2011, p. 327.

³¹⁶⁰ See e.g., Ambos, ‘[Defences in international criminal law](#)’ in Brown (ed.), Cheltenham *et al.*, *Research Handbook on International Criminal Law*, Elgar, 2011, p. 327; ICC, *Ongwen Trial Judgement*, para. 2710; ICC, *Ntaganda Trial Judgement*, para. 935; ICC, *Bemba Trial Judgement*, para. 104.

³¹⁶¹ [Fourth Geneva Convention](#), Article 49(1): “Individual or mass *forcible* transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive” (emphasis added).

³¹⁶² ICTY, *Naletilic & Martinovic Trial Judgement*, para. 519; ICTY, *Krstic Trial Judgement*, para. 528; ICTY, *Prlic et al. Trial Judgement*, para. 50.

³¹⁶³ Triffterer and Ambos, *Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition, C.H. Beck, Hart, Nomos, 2016, pp 347-348; ICRC, *Commentary on the Fourth Geneva Convention*, 1956, [Article 49](#), p. 279.

³¹⁶⁴ ICTY, *Prlic et al. Trial Judgement*, para. 50.

military commanders or political leaders cannot consent on behalf of the individual, for example during population exchange agreements.³¹⁶⁵

a) Consent and Sexual Violence Cases

1615. While consent is a common defence invoked in response to a charge of sexual violence-related crimes, as will be demonstrated, such a defence will likely fail as consent will often be negated by the existence of coercive circumstances, especially in relation to conflict-related sexual violence.

i. Consent under the CCU

1616. Articles 152, 153 and 154 of the CCU define the ordinary crimes of rape, sexual violence and compulsion to sexual intercourse, respectively, as occurring when a “sexual act” or “sexual violence” is committed without the “voluntary consent” of the victim. The explanatory note to the crime of rape specifies that “consent shall be deemed voluntary if it is the result of a person’s free act and deed, with due account of attending circumstances”.³¹⁶⁶ While this explanatory note fails to provide sufficient clarity on what amounts to involuntary consent,³¹⁶⁷ it is broad enough (particularly given the reference to “due account of attending circumstances”) to be interpreted in line with international standards as regards circumstances deemed to nullify consent, as set out below.

1617. Additionally, in light of the Constitutional Court’s principle of taking a “friendly attitude” to international law,³¹⁶⁸ and the Ukrainian Courts’ established practice of relying upon international instruments and practice when interpreting international law principles in their jurisprudence.³¹⁶⁹ War crimes under Article 438 of the CCU should also be interpreted in line with the elements of the sexual violence crimes as defined under ICL.³¹⁷⁰ As such, when evaluating cases involving sexual violence, judges should focus on coercion and coercive circumstances.

ii. Consent under ICL

1618. According to general principles of criminal law, “consent” can exclude criminal responsibility only if “the consenting victim is entitled to dispose exclusively of the (individual) legal interest protected by the offence or offences concerned.”³¹⁷¹ The applicability of the defence of consent in relation to ICL crimes is thus limited,

³¹⁶⁵ ICTY, *Naletilic & Martinovic Trial Judgement*, paras 522-523.

³¹⁶⁶ CCU, Article 152.

³¹⁶⁷ Dudorov, ‘[Ukrainian criminal law innovations regarding the liability for sex-delicts: some problematic aspects](#)’, *LexInform*, 4 February 2019; Dudorov, O. Didorenko Luhansk State University of Internal Affairs, [Crimes against sexual freedom and untouchability \(main provisions of criminal legal characteristics\)](#), 2018, p. 22.

³¹⁶⁸ Constitutional Court of Ukraine, [Decision](#) of 1 June 2016 No. 2-пr/2016, para. 2.3.

³¹⁶⁹ See e.g., Order of the Supreme Court, Case No. 415/2182/20, 3 February 2022 where the Court relied on Article 8bis of the ICC Statute and other international instruments to interpret Article 437 of the CCU in line with the international crime of aggression. For more information, see above, paras [969](#).

³¹⁷⁰ See e.g., [ICC Statute](#), Articles 7(2)(g) and 8(2)(b)(xxii).

³¹⁷¹ Ambos, ‘[Defences in international criminal law](#)’ in Brown (ed.), Cheltenham *et al.*, *Research Handbook on International Criminal Law*, Elgar, 2011, p. 327.

given that it only applies to those crimes directed at protecting individual interests, as opposed to those which operate to protect a collective interest (e.g., attacks on civilians/civilian objects).³¹⁷²

1619. With respect to crimes in relation to which the defence of consent may be applicable (e.g., sexual offences), it should be noted that the existence of a broader coercive environment would often operate to negate consent.³¹⁷³ Coercive environments may exist, for instance, when there is a military/security presence in the area;³¹⁷⁴ in situations of armed conflict or occupation; or in circumstances where other war crimes or crimes against humanity are being committed on an ongoing basis.³¹⁷⁵

ICC, NTAGANDA TRIAL JUDGEMENT, PARA. 935 [FOOTNOTES OMITTED]

Coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion, and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of hostile forces amongst the civilian population. Several factors may contribute to creating a coercive environment, such as, for instance, the number of people involved in the commission of the crime, or whether the rape is committed during or immediately following a combat situation, or is committed together with other crimes. In addition, in relation to the requirement of the existence of a “coercive environment”, it must be proven that the perpetrator’s conduct involved “taking advantage” of such a coercive environment.

1620. According to ICL, customary international law and international human rights law (IHRL), free, voluntary and genuine consent cannot be given in relation to a sexual act imposed by actual or threatened force; coercion (such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power); by a perpetrator taking advantage of a coercive environment (such as armed conflict or occupation); or where age, disability, illness, etc. has rendered the victim incapable of giving genuine consent.³¹⁷⁶ Therefore, under ICL and the CCU, where coercion or coercive circumstances have been found to exist, consent would not amount to a valid defence to sexual offences. Nor is lack of consent an element of the sexual offence crimes under ICL. In other words, prosecutors are not required to demonstrate the non-consent (i.e., by their words or deeds) of a victim of sexual offences.³¹⁷⁷

³¹⁷² Ambos, ‘[Defences in international criminal law](#)’ in Brown (ed.), Cheltenham *et al.*, *Research Handbook on International Criminal Law*, Elgar, 2011, p. 327.

³¹⁷³ Ambos, ‘[Defences in international criminal law](#)’ in Brown (ed.), Cheltenham *et al.*, *Research Handbook on International Criminal Law*, Elgar, 2011, p. 327.

³¹⁷⁴ See e.g., ICC, *Ongwen Trial Judgement*, para. 2710; ICC, *Ntaganda Trial Judgement*, para. 935; ICC, *Bemba Trial Judgement*, paras 103-104; ECOSOC, [Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict](#), para. 25.

³¹⁷⁵ See e.g., ICC, *Ongwen Trial Judgement*, para. 2710; ICC, *Ntaganda Trial Judgement*, para. 935; ICC, *Bemba Trial Judgement*, para. 104.

³¹⁷⁶ See e.g., ICC, [Elements of Crimes](#), Article 7(2)(g)-1, Element 2, Article 8(2)(b)(xxii)-1, Element 2; ICC, *Ongwen Trial Judgement*, para. 2709; ICC, *Ntaganda Trial Judgement*, para. 934; ICC, *Bemba Trial Judgement*, paras 105-106; ICC, *Katanga Trial Judgement*, para. 965; ECtHR, *M.C. v. Bulgaria Judgement*, para. 79, 90, 132, 181.

³¹⁷⁷ ICC, *Ongwen Trial Judgement*, para. 2709; ICC, *Ntaganda Trial Judgement*, para. 934; ICC, *Bemba Trial Judgement*,

ICC, ONGWENTRIAL JUDGEMENT, PARA. 2709 [FOOTNOTES OMITTED]

The establishment of one of the coercive circumstances or conditions set out in the second element is sufficient for penetration to amount to rape. It is not necessary to prove the victim's lack of consent and there is no requirement of resistance on the part of the victim.

THE ICC'S GUIDING PRINCIPLES OF EVIDENCE FOR CASES INVOLVING SEXUAL VIOLENCE

The above ICL consent standards have been partially codified in Rule 70 of the ICC Rules of Procedure and Evidence (ICC RPE), which set out guiding principles of evidence for cases involving sexual violence.³¹⁷⁸

In cases of sexual violence, the Court shall be guided by and, where appropriate, apply the following principles:

- (a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;
- (b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;
- (c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence;
- (d) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.

In addition, Rule 72 of the ICC RPE establishes a procedure to be followed in cases involving sexual offences, where an accused intends to elicit evidence of an alleged victim's consent (as well as evidence of a victim's prior or subsequent sexual conduct). In sum, prior notification describing the "substance of the evidence intended to be introduced or elicited," and the relevance of that evidence, must be provided to a Chamber, which will determine whether the evidence is admissible only after hearing *in camera* the views of the Prosecution, the defence, the witness and, where applicable, the victim or their legal representative. In making this determination, the Chamber must have regard to the statutory rights of an accused under IHRL, and must be guided by the principles set out in Rule 70.³¹⁷⁹

Lastly, Rule 71 of the ICC RPE acts as a bar to admission of evidence of prior or subsequent sexual conduct of a victim or witness. Notably, however, this prohibition is subject to an assessment of the probative value of the evidence, and the prejudice that the admission (or non-admission) of such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with Article 69(4) of the ICC Statute.

para. 106. For more information on the elements of the sexual violence war crimes, see [Chapter 1, Part I, Section I.C.3.b\)iv.](#) "Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity (ICC Statute, Article 8(2)(b)(xxii))".

³¹⁷⁸ See, ICC, [Rules of Procedure of Evidence](#), Rule 70(a)-(c).

³¹⁷⁹ See, ICC, [Rules of Procedure of Evidence](#), Rule 72.

The Ukrainian CPC does not contain similar standards; however, these principles can help guide Ukrainian judges when adjudicating conflict related sexual violence cases in order to ensure the proceedings of such cases adhere to international standards.

4. Linkage to the accused

1621. Cases involving international crimes, like all criminal cases, require prosecutors to present “linkage evidence” linking an accused to the violation in question.³¹⁸⁰
1622. Even where an accused is not alleged to have directly and physically perpetrated the elements of a crime, they may nevertheless be held responsible for its commission by virtue of one or more of the various modes of liability under the CCU and ICL (e.g., co-perpetrating, organizing, abetting, etc.) (see above, para. 1403). Which mode is applicable will depend on the factual matrix of the case and, in particular, the extent to which the accused is alleged to have contributed to the crime through chains of command and layers of decision-making. Therefore, in cases in which mid- or high-ranking politicians, military or security personnel are being tried, “linkage evidence” may be particularly nuanced due to defendants’ organizational and/or physical remoteness from the crimes in question.³¹⁸¹
1623. Regardless of the mode of liability pursued, judges must ensure that the linkage procedures followed by the prosecution in each case are fair and transparent, in order to safeguard the accused’s right to a fair trial.³¹⁸²
1624. Judges should also be aware that, with respect to such senior leadership cases, the accused may attempt to defend themselves not by challenging the factual existence of the crime-base itself (i.e., by arguing that the crime in question was not actually committed, or its respective legal elements have not been established), but rather by challenging the “linkage evidence”, and the chain(s) of responsibility purportedly linking the accused to the crime.³¹⁸³ Concretely, this means that defence strategies may turn on issues such as, *inter alia*, an accused’s knowledge of the facts and circumstances underpinning and surrounding the crimes; their roles within a given military or political hierarchy; and the manner in which their conduct (or omissions) and/or decisions contributed to the crimes.

³¹⁸⁰ OHCHR, [Who’s responsible? Attributing Individual Responsibility For Violations of International Human Rights and Humanitarian Law in United Nations Commissions Of Inquiry, Fact-Finding Missions And Other Investigations](#), 2018, pp 17, 48.

³¹⁸¹ OHCHR, [Who’s responsible? Attributing Individual Responsibility For Violations of International Human Rights and Humanitarian Law in United Nations Commissions Of Inquiry, Fact-Finding Missions And Other Investigations](#), 2018, pp 40, 48.

³¹⁸² See e.g., CPC, Articles 17, 20, 22, 24-25, 36, 42; [ECHR](#), Article 6; [ICCPR](#), Article 14; [Third Geneva Convention](#), Articles 99-108; [Additional Protocol I](#), Articles 45(3), 75.

³¹⁸³ ICTY, [ICTY Manual on Developed Practices](#), ICTY – UNICRI Publisher, 2009, p. 122.

CHAPTER II – PROCEDURAL ASPECTS

INTRODUCTION

1625. Whereas much of the Benchbook focuses on explaining international law, norms, and best practices governing war crimes and other international crimes to the Ukrainian judiciary, this section of the Benchbook consists of three chapters on procedural topics that were identified as of particular interest by the Ukrainian judges and the National School of Judges: (1) trials *in absentia*, (2) the admissibility and assessment of digital evidence; and (3) avoiding revictimisation in criminal proceedings.³¹⁸⁴ The judges were particularly interested in how these topics arise in the context of adjudicating war crimes, but, as the relevant chapters show, no special rules of law govern these topics to the extent they arise in war crimes trials. Rather, as procedural matters, they will be governed by the Ukrainian CPC. Accordingly, this chapter was prepared in close consultation with Ukrainian judges and the National School of Judges. Each chapter contains a section on Ukrainian domestic legal provisions and caselaw analysis as well as a section on international legal standards, best practices, and guidelines.
1626. Where applicable, the international sections for each of these topics draw from international legal standards binding in Ukraine, such as international human rights law as represented in the European Convention on Human Rights and the International Covenant on Civil and Political Rights. Each section also assesses relevant developments from international criminal tribunals in relation to these topics. While the practices and procedures of these tribunals are not binding law in Ukraine, they offer specific insight at the international level in dealing with these topics in criminal adjudications. In this regard, they may provide persuasive authority for Ukrainian judges considering these issues. Finally, the international sections also offer international best practices and guidelines to the extent available. These best practices and guidelines may also be persuasive authority in consideration of these issues.

³¹⁸⁴ Other aspects of criminal proceedings are addressed in other educational resources available at the NSJ.

PART I: TRIALS *IN ABSENTIA* – FAIR TRIAL STANDARDS

I. Ukrainian National Law Concerning Trials in absentia

A. Grounds for Special Pre-Trial Investigation

1627. The specifics of special pre-trial investigation of criminal offenses (*in absentia*) are provided for by Chapter 24-1 of the Criminal Procedure Code (CPC), “Specific Aspects of Special Pre-Trial Investigations of Criminal Offences” (Articles 297-1 – 297-5).
1628. A special pre-trial investigation may not be initiated in all criminal proceedings, but with respect to crimes specified in part 2 of Article 297-1 of the CPC, can be initiated when the suspect, except for a minor, hides from pre-trial investigation bodies and court in the temporarily occupied territory of Ukraine and in the territory of the state recognised by the Verkhovna Rada of Ukraine as the aggressor state, to avoid criminal liability and/or is declared internationally wanted.
1629. In addition, a special pre-trial investigation may also be initiated in the criminal proceedings concerning a crime committed by a suspect, in respect of whom the authorised body has adopted a decision to hand the suspect over for exchange as a prisoner of war and where such an exchange took place. Concurrently, under clause 28 of Article 3 of the CPC, “a person in respect of whom the authorized body has adopted a decision to hand them over for exchange as a prisoner of war” (in the meaning of this Code), is any person with a procedural status of a suspect, accused, or convicted who has been included by a respective authorised body in the list for exchange as a prisoner of war. Hence, based on this, special pre-trial investigation may be started only against a prisoner of war who was served with the notice of suspicion before the exchange. Before the exchange, such a person may be interrogated by a judge in the manner stipulated by Article 225 of the CPC.
1630. No special pre-trial investigation of crimes that are not specified in part 2 of Article 297-1 of the CPC is allowed, except when crimes have been committed by persons who hide from the investigation and court in the temporarily occupied territory of Ukraine and in the territory of the state recognised by the Verkhovna Rada of Ukraine as the aggressor state to evade criminal liability and/or who are declared internationally wanted, and if such crimes are being investigated together with the crimes referred to in this part within the same criminal proceedings, and the allocation of their records may adversely affect the comprehensiveness of the pre-trial investigation and trial.
1631. The special pre-trial investigation shall be conducted based on the resolution of the investigating judge considering the matter upon the motion filed by the prosecutor or by the investigator in coordination with the prosecutor.
1632. Article 207-2 of the CPC contains requirements for the motion of the investigator or prosecutor to conduct a special pre-trial investigation. Such motion shall include:
- 1) a brief description of circumstances related to the criminal offense that gave rise to filing the motion;

- 2) the legal classification of the criminal offense with the indication of the corresponding article (or part of the article) of the law of Ukraine on criminal liability;
- 3) the description of circumstances giving rise to suspicion that the person is responsible for a criminal offence, and reference to such circumstances;
- 4) *in cases stipulated by paragraph one of part two of Article 297-1 of the CPC (when the suspect is hiding from the investigation)* – information confirming that the suspect has left and/or stays in the temporarily occupied territory of Ukraine, the territory of the state recognised by the Verkhovna Rada of Ukraine as the aggressor state, and/or information on declaring him/her internationally wanted;

In cases stipulated by paragraph two of part two of Article 297-1 of the CPC (when the crime has been committed by a person handed over for exchange as a prisoner of war) – materials confirming that the authorised body has decided to hand the suspect over for exchange as a prisoner of war and also the facts of such exchange;

- 5) outline of circumstances proving that the suspect hides from investigation bodies and court to avoid criminal liability; and
- 6) list of witnesses whom the investigator or the public prosecutor considers it necessary to examine when the motion is to be considered.

B. Serving a Person with a Notice of Suspicion and Conducting Criminal Proceedings against such a Person

1633. Providing effective notice to the suspect of notification of suspicion and conduct of criminal proceedings under the special pre-trial proceedings against such a person is an important aspect of observing the right to a fair trial in the conduct of these special pre-trial proceedings.
1634. Article 297-4 of the CPC stipulates that the investigating judge shall refuse to grant a motion for a special pre-trial investigation if the prosecutor or investigator has failed to prove that the suspect is hiding from the investigation and court in the temporarily occupied territory of Ukraine or in the territory recognised by the Verkhovna Rada of Ukraine as an aggressor to avoid criminal liability and/or he/she is declared internationally wanted, and/or when an authorised body has adopted a decision to hand over the suspect for exchange as a prisoner of war and such exchange took place.
1635. Under Article 281 of the CPC, if, during the pre-trial investigation, the whereabouts of the suspect is unknown or he/she has left and/or stays in the temporarily occupied territory of Ukraine or outside Ukraine and does not appear without good reason at the summons of the investigator or public prosecutor, provided he/she was duly notified of such summons, then the prosecutor puts such a suspect on a wanted list.
1636. The general procedure of the summons in criminal proceedings is governed by Article 135 of the CPC. Under this article, a person shall be summoned to an investigator, public prosecutor, investigating judge, or court by means of a summons that shall be served on him/her or sent by mail, electronic mail, or facsimile communication, by telephone or cable. If the individual concerned is temporarily out of his/her place of residence, the summons shall be delivered against the signature to his/her adult

family member or to another individual who resides together with the addressee, to the homeowner association at the place of residence, or to the administration at the place of employment. The summons to a person residing abroad shall be served under an international treaty on legal assistance ratified by the Verkhovna Rada of Ukraine and, in the absence of the same – through the diplomatic (consular) mission.

1637. Under part 8 of Article 135 of the CPC, if the summons of an individual, in respect of whom there are sufficient grounds to believe that such an individual has left Ukraine and/or resides in the temporarily occupied territory of Ukraine, the territory of the state recognised by the Verkhovna Rada of Ukraine as the aggressor state, cannot be reasonably served on him/her under above rules, it shall be published in mass media of nationwide circulation and on the official website of the Prosecutor General's Office. In this case, the person shall be deemed to have been duly notified of the summons from the moment the summons is published in mass media of nationwide circulation and on the official website of the Prosecutor General's Office. If the person has defense counsel(s), a copy of the summons shall be sent to his/her defense counsel(s).
1638. Thus, even though the CPC contains the above list of means to summon a person to the investigator or court and serve a notice of suspicion, the law does not contain a clear standard for notifying the person thereof and formally links the presumption of notification of the suspect who is hiding from the investigation with the publication of the relevant announcement in the national media and on the website of the Prosecutor General's Office.
1639. The practice of investigating judges on this matter is varying, In some cases, judges deem it sufficient to notify a person by publishing a notice in the media and on the website of the Prosecutor General's Office, while in others, they cite additional justifications for the impossibility to notify a person other than through such publication. In some other cases, they emphasise that the prosecution, in addition to publishing announcements in the national media and on the website of the Prosecutor General's Office, used additional means that ensured effective notification of suspicion and conduct of criminal proceedings (see, for example, the ruling of Solomianskyi District Court of the city of Kyiv of September 12, 2022, in case No. 760/6081/22).
1640. This issue was also a matter of examination by the court of cassation in several cases, where the Supreme Court noted that in addition to the fulfillment of the above legal requirements concerning publishing announcements in the national media and website as defined by the law, the prosecution took other measures to ensure effective notice to the person of their criminal prosecution.
1641. For instance, **in case No. 242/3982/16-к**, where the accused was the president of the so-called supreme court of the so-called “DPR” (“Donetsk People's Republic”) PERSON_1 (citizen of the Russian Federation), the notification was made by sending summons with translation into Russian to his residence address in Moscow, sending a letter to the Consulate General of Russia in the city of Kharkiv, submitting an inquiry on international legal assistance to the competent Russian authorities (this step was taken before Russia's full-scale invasion of Ukraine in 2022), and making

a phone call at the number of the “reception office of the president of the supreme court” of so-called “DPR.”

1642. **In case No. 326/1358/18**, the Supreme Court noted that the pre-trial investigation body had taken all the statutory measures to duly notify PERSON_1 of the criminal proceedings against them and their summons to the investigation authorities. In particular, this was done by publishing the suspect’s summonses on the official website of the Security Service of Ukraine (SSU) and their repeated sending, as well as by notification of suspicion, at the place of his actual stay. In addition, the notice of suspicion and summons for PERSON_1 were served to his defender and, under part two of Article 135 of the CPC, at the suspect’s last place of registration, to the first deputy chair of the city council, the condominium association chair and *a witness who is engaged in continuous communication with PERSON_1*. Witness PERSON_6 confirmed the fact of PERSON_1’s awareness of the pre-trial investigation conducted against him. Additionally, corresponding procedural documents were sent via Viber to the phone number used by the suspect. Thus, summons and notices of suspicion were served to PERSON_1 pursuant to the CPC requirements. Relevant procedural documents were sent to the phone number used by the suspect via Viber as an additional measure, which did not replace other actions stipulated by the CPC but only reinforced them.
1643. In **case No. 759/5737/17** concerning the prosecution of a former Ukrainian judge who defected to the enemy and started working in the judiciary of the occupation authorities, the Supreme Court noted that during the pre-trial investigation, the prosecution took steps to notify this person of the criminal proceedings against her, including by sending the notice of suspicion to the email of the so-called “Arbitration Court of the Republic of Crimea” (vs.krm@sudrf.ru), where she was working, in addition to announcements on the official website of the Prosecutor General’s Office and in the *Uriadovyi Kurier* (Governmental Courier) newspaper.
1644. When it comes to the notice of suspicion to a person handed over for exchange as a POW, such notice, given the aforementioned provisions of clause 28, Article 3 of the CPC, must be served before the exchange. However, the law does not contain explicit indications of the need to explain to such person (including in writing) that criminal proceedings against them may continue in their absence even after the exchange. Since recent amendments to the CPC (Law No. 2472-IX of 28 July 2022) stipulated the possibility of special pre-trial investigation against such persons, such matters have not yet been considered at the cassation level, and there is no well-established case law on this matter. Meanwhile, it should be recommended to make such persons aware, through a signed acknowledgment, that criminal proceedings against them may be continued following their exchange, and also of the special aspects related to special pre-trial investigation procedures and special judicial proceedings, the specifics of exercising the right to defense, including by involving a defender of their own choice, and the notification about subsequent procedural actions in the given proceedings by publishing announcements in the national media and on the websites of the Prosecutor General’s Office and the courts that will consider such proceedings. Subject to such the suspect’s consent, their contact data (email, etc.) should be received for further communications concerning the case.

1645. Article 297-5 of the CPC governs the procedure for serving procedural documents to the suspect in conducting the special pre-trial investigation (i.e., once the investigative judge passes a ruling on the special pre-trial investigation).
1646. Under this article, in the event of a special pre-trial investigation, the summons shall be sent to the suspect at their last known place of residence or stay and must be published in the national mass media and on the website of the Prosecutor General's Office. Once the summons is published in the national mass media and on the website of the Prosecutor General's Office, the suspect is deemed to have duly reviewed its content.
1647. In the event of a special pre-trial investigation conducted because the authorised body decided to exchange the suspect as a POW, a summons to the suspect shall be published in the national mass media and on the website of the Prosecutor General's Office. Once the summons is published in the national mass media and on the website of the Prosecutor General's Office, the suspect is deemed to have duly reviewed its content.
1648. Copies of procedural documents subject to be served to the suspect shall be sent to the defender.

C. Grounds for and Specifics of the Special Judicial Proceedings

1649. The current CPC of Ukraine also provides for special judicial proceedings (*in absentia*), which is possible both after the special pre-trial investigation and when grounds for trial in absentia appear after the completion of a general pre-trial investigation.
1650. Under part three of Article 323 of the CPC, a trial in the criminal proceedings for crimes specified in part two of Article 297-1 of this Code may take place in the absence of the accused (*in absentia*), save for a minor, if the accused is hiding from the investigation and court in the temporarily occupied territory of Ukraine or in the state recognised by the Verkhovna Rada of Ukraine as the aggressor state to avoid criminal liability and/or is declared internationally wanted. Furthermore, such a trial is possible when the authorised body adopted a decision to hand over the accused for exchange as a POW and such exchange took place.
1651. Part three of Article 323 of the CPC defines that under such circumstances, the court shall give a ruling ordering special judicial proceedings against such accused following a motion of the public prosecutor supplemented by records proving that the accused was aware or must have been aware of the criminal proceedings that have been initiated.
1652. In the event of special judicial proceedings, the summons to the accused is sent to their last known place of residence or stay, and any procedural documents to be served to the accused are sent to their defender. Information on such documents and summons to the accused must be published in the national mass media pursuant to the provisions of Article 297-5 of this Code and on the official website of the court.

Once the summons is published in the national mass media and on the website of the court, the accused is deemed to have duly reviewed its content.

1653. In the event of a special pre-trial investigation conducted because the authorised body decided to exchange the suspect as a POW, the summons to the accused shall be published in the national mass media under provisions of Article 297-5 of the CPC of Ukraine and on the official website of the court, while procedural documents to be served to the accused shall be sent to the defender. Once the summons is published in the national mass media and on the website of the court, the accused is deemed to have duly reviewed its content.
1654. Under part five of Article 374 of the CPC of Ukraine, if a verdict is based on the results of criminal proceedings, in which there was a special pre-trial investigation or special judicial proceedings (*in absentia*), the court separately assesses whether the prosecution has taken all possible legal measures to respect the rights of the suspect or accused to defense and access to justice, taking into account the special legal aspects of such proceedings.

D. Assigning a Defender for the Accused as part of the Trial in absentia

1655. Under clause 8, part 2 of Article 52 of the CPC, the participation of the defense counsel of persons who are under special pre-trial investigation or special judicial proceedings is mandatory from the moment the corresponding procedural decision is made.
1656. A person against whom special pre-trial investigation or special judicial proceedings are being conducted (or other persons as per the request or consent of the suspect, or accused) may at any time involve a defender of their own choice (according to the general rule stipulated by Article 48 of the CPC). If such a person did not involve a defender, the Centre for Free Legal Aid must assign one upon the decision adopted by the investigator or prosecutor or the ruling of the investigating judge.
1657. Under the Law of Ukraine “On Free Legal Aid” (Article 23), the provision of secondary legal aid shall be terminated, and the person shall use the services of another defender in the case where such person was assigned a defender based on this Law. That is, as a general rule, the person shall be represented by a defender selected either by them or by another person upon their consent. However, in case No. 756/4855/17, because defenders selected by the accused repeatedly committed actions that had signs of abuse of rights to protract case consideration (frequent defaults in appearance at court hearings, dismissal of these defenders by the accused with their subsequent repeated involvement, etc.), the court of first instance, being guided by the common principles of criminal proceedings, engaged a defender assigned by the Centre for Free Legal Aid, who participated in the judicial proceedings along with defenders selected by the accused until the consideration of the case by the court of cassation was finished.
1658. Resolution of the Supreme Court of 13 June 2019 in case No. 607/9498/16-к, which the courts considered *in absentia*, established the violation of the right to defense due

to improper performance by the defender assigned by the Centre for Free Legal Aid of his duties (as the Supreme Court noted, he was “present at court hearings only formally”).

E. Actions of the Court in the Instances when the Accused who was Absent Appeared or was Delivered to the Court, and Right to Appeal

1659. Under part three of Article 323 of the CPC, if following the adoption of the ruling on special judicial proceedings, the accused appeared or was delivered to the court, the trial shall continue from the moment when such ruling was adopted according to the general rules stipulated by the CPC of Ukraine. Following the motion of the defense, the court shall continue the trial from the moment when the accused appears at the court hearing and shall repeatedly examine individual evidence that has been examined in the absence of the accused (if the defense asks for such examination of evidence).
1660. In case No. 756/4855/17, even though the judicial proceedings were conducted *in absentia*, to secure the right of the accused to personal participation in the court proceedings and being guided by common principles of criminal proceedings, courts of all instances granted the defender’s motion for the participation of the accused, who was hiding in the Russian Federation, in the trial via a video conference (including using his own technical means). However, the accused did not use this opportunity.
1661. Meanwhile, the current CPC of Ukraine does not provide for any specific procedure for a repeated hearing in the court of the first instance *once the verdict is adopted* if the accused (convicted) who was under the special judicial proceedings (*in absentia*) is detained or appears in court. Such persons may only make use of general appeal procedures in the courts of appeal or cassation or exercise their right to review the judgement in view of newly identified or exclusive circumstances (subject to corresponding circumstances, which are not specific to this category of cases).
1662. Therewith, part three of Article 400 of the CPC of Ukraine stipulates a special rule for resolving a matter of renewing a missed deadline for an appeal if the appeal is filed by a person subjected to special judicial proceedings (*in absentia*).
1663. Hence, based on this norm, if the appeal was submitted by the accused against whom the verdict had been passed following the results of the special judicial proceedings, the court shall extend the deadline if the accused has provided proof of good reasons stipulated by Article 138 of the CPC of Ukraine, and shall file an appeal along with files of the criminal proceedings to the court of appeal following the rules specified in Article 399 of this Code.
1664. Albeit this regulation does not specify the court (first instance court or court of appeal) that has to resolve the matter of deadline extension (and does not indicate the kind of deadline), its wording (“*the court shall extend the deadline [...] and file an appeal [...] to the court of appeal*”) indicates that it refers to the court of first instance and the deadline for appeal. Thus, the procedure for resolving matters of extending the

specified deadline in this category of proceedings differs from the general procedure where corresponding authorities are vested in the court of appeal (see, for example, the decision of Obolonskyi District Court of the city of Kyiv of 15 February 2022 and the decision of Kyiv Court of Appeal of 23 June 2022 in case No, 756/4855/17, the decision of Konstantynivskyi City District Court of Donetsk Oblast of 20 February 2020 in case No. 233/2982/17).

1665. Article 138 of the CPC of Ukraine, to which part three of Article 400 of the CPC of Ukraine refers, contains a general list of valid reasons for a person's default of appearance at the summons, which does not account for the specifics of the special judicial proceedings (*in absentia*), namely:
- 1) apprehension, pre-trial detention, or service of punishment;
 - 2) restriction of the freedom of movement under law or a court decision;
 - 3) force-majeure (epidemics, military hostilities, natural or any other similar disasters);
 - 4) absence of the summoned person at the place of his/her residence for a long time due to official or other travel, etc.;
 - 5) serious disease or sojourn in a healthcare facility in connection with treatment or pregnancy, provided that it is impossible to temporarily leave the facility;
 - 6) death of close relatives, family members, or any other close persons, or a serious threat to their life;
 - 7) untimely receipt of the summons; or
 - 8) other circumstances objectively preventing the appearance of a person when summoned.
1666. Provisions of part three of Article 400 and Article 138 of the CPC of Ukraine shall be interpreted and applied in a way that ensures the effective possibility for the accused who was absent during the consideration of their case in the court of first instance to exercise their right to appeal, on the one hand, but prevents the abuse of the right to appeal by the accused, who although absent during the trial in the court of first instance, was aware of it and did not exercise either the right to participate therein or the right to file an appeal within the time limit established by law, on the other hand.
1667. Therefore, when resolving the matter of extending the deadline for appeal under part three of Article 400 of the CPC of Ukraine, it is expedient to consider not only the fact of publication of relevant announcements in the national media and on the websites of the Prosecutor General's Office or court but also other circumstances proving actual awareness of the accused (convicted) of the suspicion (accusation) against them and of the conduct of criminal proceedings. Such consideration would include the analysis of the efficiency of the entire range of measures taken by the prosecution and the court to notify such a person.

II. International legal standards for trials in absentia

A. Introduction

1668. This chapter addresses international legal standards for trials *in absentia* held in circumstances where the accused does not make an appearance before the court at any stage of the proceedings. International legal standards governing trials *in absentia* come from international human rights law and are primarily concerned with the rights of the accused. Beyond these standards, there is no international law governing trials in absentia.
1669. There are no special rules for trials *in absentia* in the context of war crimes. To the contrary, as demonstrated in *Sanader v. Croatia* Judgement before the European Court of Human Rights (“ECtHR”), the same human rights law and concerns govern trials *in absentia* for the prosecution of war crimes as for any other domestic crime. After Nuremberg, in which a single *in absentia* prosecution occurred in the *Bormann* case, no other international tribunal prosecuting war crimes has permitted trials *in absentia* in circumstances where the accused has not made even an initial appearance before the court.
1670. Only the Special Tribunal for Lebanon (“STL”), an internationalised tribunal prosecuting Lebanese crimes, but not war crimes, has permitted and held trials *in absentia*. As demonstrated below, the STL’s legal framework for trials *in absentia* was designed to comply with international human rights law, specifically by requiring extensive efforts to ensure that accused persons have notice of the proceedings and by guaranteeing retrials for persons tried *in absentia*.

B. Trials in absentia under International Human Rights law applicable in Ukraine

1671. Trials *in absentia* are permissible under international human rights instruments ratified by Ukraine, but only under limited conditions and after the adoption of safeguards to ensure the accused’s rights are not violated.

1. There is a Right to be Present at one’s own Trial

1672. International Human Rights instruments binding in Ukraine guarantee an accused’s right to be present and participate in criminal proceedings against them. Specifically, an accused’s right to be present at his or her own trial is recognised in Article 14(3)(d) of the International Covenant on Civil and Political Rights (“ICCPR”) and in Article 6(3) of the ECHR.³¹⁸⁵

³¹⁸⁵ International Convention on Civil and Political Rights (ICCPR), Article 14(3)(d); ECHR, Article 6(3). Ukraine has ratified the ICCPR and the ECHR. See also, Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/G/32, 23 August 2007 (General Comment No. 32), para. 36; ECtHR, Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (criminal limb) (Article 6 Guide), para. 286; updated on 31 August 2022, ECtHR, *Sejdovic v. Italy*, Grand Chamber Judgement, para. 81.

2. Waiver and Notice

1673. The right to be present at one's own trial is not absolute. An accused may expressly or tacitly waive the right to be present, and, in such cases, a trial may be conducted *in absentia*.³¹⁸⁶ To be effective, waiver of the right to be present should be unequivocal and "knowing and intelligent".³¹⁸⁷ Where an accused has not been notified in person of criminal proceedings against them, waiver should not be presumed on the basis that the authorities have undertaken formal notice requirements.³¹⁸⁸
1674. While neither the ICCPR nor the ECHR confer on the accused a right to notice in a specific form,³¹⁸⁹ the ECtHR has ruled "that informing someone that a prosecution is being brought against him is a legal act of such importance that it must be carried out in accordance with procedural and substantive requirements capable of guaranteeing the effective exercise of the accused's rights; vague and informal knowledge cannot suffice."³¹⁹⁰ Whether the accused had sufficient knowledge of the proceedings such that, if they do not attend trial, they may be said to have effectively waived their right to be present will depend on the circumstances of each case.
1675. The ECtHR looks for "objective factors" that demonstrate that an accused person had sufficient knowledge of the proceedings against them such that they may be said to have waived their right to attend.³¹⁹¹ Although this will always be a case-specific determination, consideration of examples may assist in understanding the requirements of international human rights law in this regard.
1676. For example, in *Coniac v. Romania*, the authorities went to the accused's last place of residence several times, but the accused was outside the country and the authorities did not leave a summons or any other documents at the residence. The authorities spoke to the accused's then-wife, but they were in the process of a divorce by this time, so the ECtHR could not conclude that the accused's ex-wife had informed him of the proceedings. Under these circumstances, the ECtHR concluded that the authorities had not shown that the accused had sufficient knowledge of the proceedings to justify a conclusion that he had waived his right to participate.³¹⁹²
1677. In *M.T.B. v. Turkey*, the authorities delivered a summons to a former business address of the accused that was indicated on a cheque, and, upon learning the accused's business had left that address, mailed the summons and proceeded to trial *in absentia*. In determining that the authorities had not acted with sufficient diligence, the ECtHR noted that the accused was being tried as an individual and the acts of other government officials in relation to other legal matters showed that the accused's home

³¹⁸⁶ See e.g., ECtHR, [Article 6 Guide](#), para. 290; ECtHR, *Sejdovic v. Italy*, [Grand Chamber Judgement](#), para. 86.

³¹⁸⁷ See e.g., ECtHR, [Article 6 Guide](#), para. 290; ECtHR, *Sejdovic v. Italy*, [Grand Chamber Judgement](#), paras 86-87.

³¹⁸⁸ See e.g. ECtHR, [Article 6 Guide](#), para. 402; ECtHR, *Sejdovic v. Italy*, [Grand Chamber Judgement](#), para. 87; ECtHR, *Colozza v. Italy* [Judgement](#), para. 28.

³¹⁸⁹ See generally, [ICCPR](#), Article 14(3)(a); [ECHR](#), Article 6(3)(a); See also e.g. ECtHR, *Vyacheslav Korchagin v. Russia* [Judgement](#), para. 65..

³¹⁹⁰ See e.g. ECtHR, *Coniac v. Romania*, [Judgement](#), para. 51; ECtHR, *Sejdovic v. Italy*, [Grand Chamber Judgement](#), para. 99.

³¹⁹¹ See e.g., ECtHR, *Yeger v. Turkey* [Judgement](#), para. 33; ECtHR, *Sejdovic v. Italy*, [Grand Chamber Judgement](#), para. 100.

³¹⁹² See ECtHR, *Coniac v. Romania*, [Judgement](#), paras 53-55.

address was known to the government and that the accused had been located and arrested there in relation to a prior matter. Given this, the fact that the government's mode of service met the legal requirements under domestic law was not sufficient to relieve the State of its obligations under Article 6 of the ECHR.³¹⁹³

1678. More broadly, the ECtHR has observed that the absence of the accused from his or her place of residence combined with the fact that was untraceable do not in themselves show that he had actual knowledge of the existence of a trial against him.³¹⁹⁴

1679. In any case, even where the authorities have not provided sufficient notice, sometimes specific facts may demonstrate that an accused was aware of proceedings. The ECtHR has found that “[t]his may be the case, for example, where the accused states publicly or in writing that he does not intend to respond to summonses of which he has become aware through sources other than the authorities, or succeeds in evading an attempted arrest [...], or when materials are brought to the attention of the authorities which unequivocally show that he is aware of the proceedings pending against him and of the charges he faces.”³¹⁹⁵

3. The Right to be Defended by Counsel is Guaranteed in Trials in absentia

1680. The right to be defended by counsel is guaranteed in the ICCPR and the ECHR.³¹⁹⁶ Accused persons do not lose this right by not being present at trial.³¹⁹⁷ This includes the right to appoint counsel of one's own choosing.³¹⁹⁸

4. The Right to a Fresh Determination of the Legal and Factual Merits of a Charge

1681. The ECtHR has consistently ruled “that although proceedings that take place in the accused's absence are not of themselves incompatible with Article 6 of the Convention, a denial of justice nevertheless undoubtedly occurs where a person convicted *in absentia* is unable subsequently to obtain from the court which heard his case a fresh determination of the merits of the charge — in respect of both law and fact — where it has not been established that he waived his right to appear and to defend himself, or that he intended to escape trial”.³¹⁹⁹ The right to a fresh determination should be available to the accused or convicted person *at any time*, also after a final verdict.³²⁰⁰

³¹⁹³ ECtHR, *M.T.B. v. Turkey* [Judgement](#), paras 51-53.

³¹⁹⁴ ECtHR, *Sejdovic v. Italy*, [Grand Chamber Judgement](#), paras 96-100.

³¹⁹⁵ See e.g. ECtHR, *Shkalla v. Albania* [Judgement](#), para. 70; ECtHR, *Sejdovic v. Italy* [Grand Chamber Judgement](#), para. 99.

³¹⁹⁶ [ICCPR](#), Article 14(3)(d); [ECHR](#), Article 6(3)(c).

³¹⁹⁷ ECtHR, *Tolmachev v. Estonia* [Judgement](#), paras 48-57; ECtHR, *Kari-pekka Pietiläinen v. Finland*, [Judgement](#) of 22 September 2009, paras 31-32; ECtHR, *Sejdovic v. Italy* [Grand Chamber Judgement](#), para. 91; ECtHR, *Van Geyselhem v. Belgium*, [Judgement](#), para. 34.

³¹⁹⁸ ECtHR, *Lobzhanidze and Peradze v. Georgia* [Judgement](#), paras 80-91

³¹⁹⁹ See e.g. ECtHR, *Coniac v. Romania* [Judgement](#), para. 49; ECtHR, *Sejdovic v. Italy* [Grand Chamber Judgement](#), para. 82.

³²⁰⁰ UN Human Rights Council, Report on the human rights situation in Ukraine (16 November 2019–15 February 2020), A/HRC/43/CRP.7, 18 March 2020, para. 77.

1682. This may be achieved through a retrial or an appeal that allows for a fresh factual and legal determination. “Accordingly, the refusal to reopen proceedings conducted in the accused’s absence, without any indication that the accused has waived his or her right to be present during the trial, has been found to be a ‘flagrant denial of justice’ rendering the proceedings ‘manifestly contrary to the provisions of Article 6 or the principles embodied therein.’”³²⁰¹ “The Court has also held that the reopening of the time allowed for appealing against a conviction *in absentia*, where the defendant was entitled to attend the hearing in the court of appeal and to request the admission of new evidence, entailed the possibility of a fresh factual and legal determination of the criminal charge, so that the proceedings as a whole could be said to have been fair.”³²⁰²
1683. An accused cannot be obliged to surrender to custody in order to secure the right to be retried after being convicted *in absentia*.³²⁰³ While “it is open to the national authorities to assess whether the accused showed good cause for his absence or whether there was anything in the case file to warrant a finding that he had been absent for reasons beyond his control”, “a person charged with a criminal offence must not be left with the burden of proving that he was not seeking to evade justice or that his absence was due to *force majeure*.”³²⁰⁴

CASE STUDY: TRIALS IN ABSENTIA ARISING IN THE CONTEXT OF WAR CRIMES

ECtHR, *Sanader v. Croatia*, Application no. 66408/12, Judgement of 12 February 2015

In the case of *Sanader v. Croatia*, the European Court of Human Rights had occasion to adjudicate an application asserting a denial of fair trial rights from an applicant who was convicted *in absentia* of war crimes linked to the conflicts following the dissolution of the former Yugoslavia. The applicant accused had been out of the reach of the Croatian courts because, at the time that he was charged and tried, he was residing in occupied territory outside the control of the Croatian State (para. 75). With respect to the absence of notice to the accused, the court noted:

“Indeed, given the conditions of the escalating war in Croatia at the time and the fact that the applicant lived on territory which was outside the control of the domestic authorities it was impossible for them to notify him of the criminal proceedings or to secure his presence, and it was highly improbable that he could have had knowledge of the proceedings and that the reason for his absence from Sisak at the time was to avoid being tried. In such circumstances, it was possible under the relevant domestic law to hold a hearing *in absentia* if there were highly important reasons for doing so [...]. In the case at issue these reasons were associated with the necessity to effectively prosecute the serious war crimes committed against the prisoners of war [...]” (para. 76)

³²⁰¹ ECtHR, *Sanader v. Croatia* [Judgement](#), para. 71; ECtHR, *Sejdovic v. Italy* [Grand Chamber Judgement](#), para. 84.

³²⁰² See e.g. ECtHR, *Sejdovic v. Italy* [Grand Chamber Judgement](#), para. 85; ECtHR, *Coniac v. Romania* [Judgement](#), para. 57.

³²⁰³ See e.g. ECtHR, *Sanader v. Croatia* [Judgement](#), para. 70.

³²⁰⁴ See e.g. ECtHR, *Sanader v. Croatia* [Judgement](#), para. 74.

In those circumstances, the court made clear that it was permissible to hold a trial *in absentia*, noting “in the particular circumstances of the present case, given that the gravity of the crime at issue which, although not susceptible to statutory limitation periods, was commensurate with great public interest and the interest of the victims to see the justice being done, the Court accepts that holding a hearing in the applicant’s absence was not in itself contrary to Article 6.” (para. 77) That said, the court was also “also mindful of the applicant’s position, namely, the fact that it has not been shown that he had any knowledge of his prosecution and of the charges against him or that he sought to evade trial or unequivocally waived his right to appear in court.” (para. 77) In such circumstances, the court concluded that the applicant should be able to be heard in proceedings involving a fresh determination of the legal and factual merits of the case against him (para. 78).

The court proceeded to consider the two legal avenues for possible rehearing open to the applicant under existing Croatian law. It first considered a provision that conditioned retrial on the applicant’s presence, which had been interpreted as requiring those requesting a retrial to appear in person to request it and to provide an address in Croatia where they resided. If these conditions were not met, then the retrial was not possible. Moreover, this procedure only stayed the enforcement of the sentence, with the original conviction remaining intact until the completion of the retrial process. The court found this requirement of presence disproportionate because for those not residing in Croatia, this effectively required them to be subjected to imprisonment in order to obtain a retrial (paras 79-91).

The second provision required a demonstration of fresh evidence or facts before a criminal conviction, whether in the presence of the accused or *in absentia*, could be reopened. (para. 92) This was not a true retrial or appeal involving a fresh determination of the merits of the case, instead the applicant “was essentially required, simply in order to obtain a retrial, to challenge the factual findings of the final judgment by which he was convicted by submitting new facts and evidence of such a strength and significance that they could at the outset convince the court that he should be acquitted or convicted. Such demand appears disproportionate to the essential requirement of Article 6 that a defendant should be given an opportunity to appear at the trial and have a hearing where he could challenge the evidence against him [...], an opportunity which the applicant never had.” (para. 93) The court found that “this remedy did not guarantee effectively and with sufficient certainty that the applicant would have the opportunity of a retrial” (para. 94).

The court concluded that the accused’s right to a fair trial under Article 6 of the convention had been violated. “In the light of the foregoing, the Court considers that the applicant, who was tried *in absentia* and has not been shown to have sought to escape trial or to have unequivocally waived his right to appear in court, was not afforded with sufficient certainty the opportunity of obtaining a fresh determination of the merits of the charges against him by a court in full respect of his defence rights [...]” (paras 95-96).

C. Trials *in absentia* before the Special Tribunal for Lebanon

1684. The STL is the only post-Nuremberg internationalised criminal tribunal that permitted trials *in absentia* in circumstances where the accused did not appear before the tribunal at any stage. The STL’s legal framework for trials *in absentia* was designed to comply with international human rights law standards.
1685. Article 22 of the STL Statute mandates trials *in absentia* in circumstances where an accused has (1) waived their right to be present expressly and in writing; (2) has not been handed over to the STL by relevant State authorities; or (3) has “absconded or otherwise cannot be found and all reasonable steps have been taken to secure his

or her appearance before the Tribunal and to inform him or her of the charges confirmed by the Pre-Trial Judge.”³²⁰⁵ Article 22(2) mandates that the accused is notified or served with the indictment, or that notice is otherwise given through publication in the media and communication with the State of residence or nationality.³²⁰⁶ It also requires that the STL ensure that the accused is able to choose defence counsel or, where the accused has not assigned counsel, that the STL assigns counsel to represent the accused’s interests and rights.³²⁰⁷ Article 22(3) states that accused who are convicted *in absentia* and who have not designated counsel of their own choosing shall have the right to be retried in their presence before the STL unless they accept the conviction.³²⁰⁸

1686. The STL Rules of Procedure and Evidence provide further details regarding trials *in absentia*. Rule 104 states that proceedings are not *in absentia* if the accused appears before the STL “in person, by video-conference, or by counsel appointed or accepted by him”.³²⁰⁹ Rule 106(A) reiterates Article 22(1) of the Statute.³²¹⁰ Rule 76 establishes procedures for service of indictments to be undertaken in all cases, with subsection 76(E) governing the process for when reasonable attempts at service have failed.³²¹¹ Rule 76 *bis* governs the advertisement of the indictment in circumstances where personal service has failed.³²¹² Rules 105 *bis* and Rule 106(B) establish procedures for initiating trials in absentia.³²¹³ Rule 107 states that the rules for pre-trial, trial, and appellate proceedings apply *mutatis mutandis* to *in absentia* proceedings.³²¹⁴ Rules 108 and 109 establish procedures for circumstances where an accused appears during or after *in absentia* proceedings, respectively.³²¹⁵
1687. The STL issued three decisions to hold trials *in absentia*. In each of those decisions, the STL trial chambers determined that “all reasonable efforts” were made to serve the indictment on the accused or otherwise give them notice as well as to secure their appearances before the STL, and that the accused had absconded. In reaching these conclusions, the trial chambers relied on the tribunals efforts to notify the accused of proceedings and to procure their attendance through measures including the transmission of the indictment to the relevant authorities, ensuring its publication in the media, press releases and statements by STL representatives, including direct appeals from the STL President, as well as the issuance of domestic and international arrest warrants. The trial chambers also relied on extensive efforts by the Lebanese authorities, including multiple attempts to serve the accused persons at their last known residences, family homes, and places of employment, publication of the indictments in coordination with the STL, posting the indictments and images of the

³²⁰⁵ [STL Statute](#), Article 22(1).

³²⁰⁶ [STL Statute](#), Article 22(2).

³²⁰⁷ [STL Statute](#), Article 22(2).

³²⁰⁸ [STL Statute](#), Article 22(3).

³²⁰⁹ STL Rules of Procedure and Evidence (“[RPE](#)”), Rule 104.

³²¹⁰ [RPE](#), Rule 106(A).

³²¹¹ [RPE](#), Rule 76.

³²¹² [RPE](#), Rule 76 *bis*.

³²¹³ [RPE](#), Rules 105 *bis* and 106(B).

³²¹⁴ [RPE](#), Rule 107.

³²¹⁵ [RPE](#), Rules 108 and 109.

accused in public, and providing these documents to local officials in the accused's respective neighbourhoods.³²¹⁶

1688. The STL appeals chamber affirmed the trial chamber's determination in the first decision to hold trial *in absentia*.³²¹⁷ The STL appeals chamber also ruled that, under the STL framework, a notice of appeal from the *in absentia* conviction of one of the accused filed by defence counsel assigned by the STL to represent the accused's rights and interests was not admissible. Rather, the right to waive the right to retrial and initiate appeal proceedings was a personal right of the convicted person that only they could exercise.³²¹⁸

D. Conclusion

1689. International human rights standards binding in Ukraine permit trials *in absentia* with strict safeguards to ensure that the accused person has an opportunity to attend and present a defence. Nothing prevents an accused from waiving their right to attend trial. Unless that waiver is express, the ECHR requires that the State be able to demonstrate through objective factors that the accused must have known of the proceedings before there can be any finding of tacit waiver of the right to be present or of a deliberate attempt to evade justice. Compliance with legal requirements for notice, without further diligence to notify the accused and secure their attendance at trial, has been found insufficient to demonstrate that an accused has tacitly waived their right to be present or has deliberately sought to evade justice.
1690. Absent the existence of objective factors demonstrating tacit waiver of the right to be present or that the accused sought to evade justice, the ECHR requires that persons convicted *in absentia* have the opportunity to obtain a fresh determination of the legal and factual merits of the case, whether this be through retrial or through an appeal that enables such a fresh determination. Finally, the right to be defended by counsel applies equally to *in absentia* proceedings.

³²¹⁶ STL, *Prosecutor v. Ayyash et al.*, [Decision to Hold Trial In Absentia](#), paras 5-13, 23, 25-28, 30, 32, 33-34, 44, 46, 47-111; STL, *Prosecutor v. Merhi*, [Decision to Hold Trial In Absentia](#), paras 7-62, 81-82, 84-111; STL, *Prosecutor v. Ayyash*, [Decision to Hold Trial In Absentia](#), paras 10-19, 62-87, 90-125.

³²¹⁷ STL, *Prosecutor v. Ayyash et al.*, [Corrected Version of Decision on Defence Appeals Against Trial Chamber's Decision on Reconsideration of the Trial in Absentia Decision](#), paras 22-32, 46-52.

³²¹⁸ *Prosecutor v. Ayyash et al.*, [Decision on Admissibility of "Notice of Appeal on Behalf of Mr Ayyash Against Conviction and Sentence"](#), paras 52-56, 58, 61-62, 65, 68-71, 77-87, 95-97.

PART 2: THE ASSESSMENT OF DIGITAL EVIDENCE

I. Ukrainian National Law concerning the admissibility and assessment of digital evidence

A. Admissibility of Evidence

1691. Electronic evidence is information in electronic (digital form) form containing data on circumstances pertaining to the case, including electronic documents (in particular, but not limited to, text documents, graphics, plans, photographs, video and audio recordings), websites (webpages), text, multimedia and voice messages, metadata, databases, and other electronic data. Such data can be stored, in particular, on portable devices (memory cards, mobile phones, etc.), servers, backup systems, and other places of data storage in electronic form (including the Internet).³²¹⁹
1692. The possibility of using electronic evidence follows from the content of Article 84 of the Criminal Procedure Code of Ukraine (CPC), which does not stipulate any requirements for the form of evidence (evidence is factual data obtained in the manner prescribed by this Code, on the basis of which the investigator, public prosecutor, investigating judge and court establish the presence or absence of facts and circumstances relevant to criminal proceedings and subject to proof).
1693. The main criterion that qualify an evidence as an electronic one is its form, which is electronic (digital) form, as well as an indicative list of the electronic evidence that may be submitted during the proceedings.
1694. In addition, part 3 of Article 99 of the CPC of Ukraine mentions an electronic document in the context of the original and copies of evidence. Parts 1 and 3 of Article 99 of the CPC of Ukraine stipulate that a legal regime of the document applies to electronic documents.
1695. According to DSTU 7157:2010, “Information and documentation. Electronic editions. Basic types and edition notice,” approved by Order No. 8 of the State Committee of Ukraine for Technical Regulation and Consumer Policy, dated 11 March 2020, an electronic document is a document where information is presented in the form of electronic data and which requires computing equipment.
1696. For the purposes of criminal proceedings, given the provisions of the Law of Ukraine “On Electronic Documents and Electronic Document Circulation,” the admissibility of an electronic document as evidence cannot be denied exclusively based on its electronic form. Under Article 7 of this Law, if stored on several information media, each electronic sample shall be deemed an original electronic document. One electronic document may exist on different media. All electronic documents identical in their content may be viewed as originals and differ only by date and time of creation.

³²¹⁹ www.nsj.gov, c. 79

1697. An electronic document may be identified as the original by an authorised person who created such document (and may use specialised software to calculate the check-sum of the file and file catalog (CRC-sum and hash-sum files)), or through specialised research if there are sufficient grounds to do so.³²²⁰
1698. During the court hearing, the court has to study the original document, except for cases stipulated by part 4 Article 99 of the CPC of Ukraine: when the court determines as an original document its duplicate (a document made in the same way as its original copy), as well as copies of information contained in (automated) information systems, telecommunications systems, information and telecommunications systems, their integral parts, made by the investigator or public prosecutor with the involvement of a specialist.³²²¹
1699. An electronic file in the form of a video recorded on an optical disc is an original (representation) of an electronic document.³²²²
1700. Noteworthy, if videos were shared on the web without access or view restrictions, i.e., shared publicly for an unidentified and unlimited number of people, it does not mean they are inadmissible.³²²³

B. Evaluation of Evidence

1701. Any evidence is evaluated in terms of the presence of several quality criteria: appropriateness, sufficiency, reliability, and admissibility. The evaluation of the reliability of digital evidence is perhaps the most complicated issue. In fact, the reliability of evidence directly depends on the method of their collection and recording.
1702. The analysis or any other conclusion based on the evidence must tell the entire story and not conform to a more favorable or preferable view.
1703. When evaluating digital evidence, the court must verify its reliability and make sure that the facts and circumstances established based on this evidence are true.
1704. Establishing the reliability of electronic documents as sources of evidence may consist in verifying the technical condition of the technical information media, ascertaining information about the owner of the website, and social media account, and locating a technological device.³²²⁴
1705. Digital evidence must sufficiently prove the facts it certifies.

³²²⁰ The Resolution of the joint chamber of the Criminal Court of Cassation within the Supreme Court of Ukraine (hereinafter referred to as the CCC SC) dated 29 March 2021 in case No. 554/5090/16-к (proceedings No. 51-1878кмо20)

³²²¹ Resolution of the panel of judges of the Third Judicial Chamber of the CCC SC dated 15 January 2020 in case No. 161/5306/16-к (proceedings No. 51-3498км19).

³²²² Resolution of the panel of judges of the First Judicial Chamber of the CCC SC date 26 January 2021 in case No. 236/4268/18 (proceedings No. 1-3124км20).

³²²³ Resolution of the panel of judges of the Second Judicial Chamber of the CCC SC dated 30 April 2020 in case No. 640/19897/16-к (proceedings No. 51-6241км19).

³²²⁴ <https://dspace.lvduvs.edu.ua/handle/1234567890/3747>

1706. Methods used to collect evidence must be legal and proportionate to public interests.
1707. Identifying electronic evidence as means of proof with the physical medium of such a document is groundless since the characteristic feature of the electronic document is the lack of strict attachment to a specific physical medium.
1708. Primary information media and technical means used to retrieve information may be the subject of research by relevant specialists or experts in the order stipulated by this Code. The need to study the primary electronic document (digital file) may arise in case of substantiated doubt concerning the reliability of information (signs of changes or interference in the file content).³²²⁵
1709. The burden of proof of the authorship of the electronic message shall rest with the prosecution.
1710. The owner of the phone number, registrant of the email, social media account, or another electronic service used to send the electronic message is deemed a sender of the same. Provided that the prosecution proves that the electronic message was sent from the phone number, email, social media account, or other electronic service belonging to a specific person (if such person is a registrant), the sending of such message by this person should be presumed.³²²⁶
1711. Should there be reasonable doubts as to the authorship of the message, the court shall evaluate the specified evidence in combination with other evidence in the case. Furthermore, as per the initiative of the party to criminal proceedings, the court may take additional measures to verify these doubts by involving a specialist or assigning an examination.

C. Origin/Source of Evidence

1712. Sources of electronic evidence may vary and include different information media, monoblocks, mobile devices (mobile phones, tablet), digital cameras, routers, computer networks, global Internet network, audio and video recordings, etc. Put simply, any electronic device may serve as a source of evidence.
1713. Information is stored on the specified devices in the form of information objects (data) which include text and graphic documents; data in multimedia formats; information in the form of databases; and other applied supplements.
1714. Temporary files may also contain important information. Most text editors and database management systems create temporary files as a by product of normal software operation. Computer users usually do not realise the importance of creating these files because the software mostly destroys them at the end of the session. However, data containing these destroyed files may turn out to be the most valuable. Such files

³²²⁵ Resolution of the panel of judges of the First Judicial Chamber of the CCC SC dated 10 January 2023 in case No. 761/12730/14-к (proceedings No. 51-2202км18).

³²²⁶ <http://dspace.onua.edu.ua/bitstream/handle/11300/14924/Чванкін%20С.%20А.%20Доказове%20значення%20даних%20з%20електронних%20повідомлень....pdf?sequence=1&isAllowed=y>

may be restored if the source file was encrypted or the text document was printed without saving.

1715. There are external and internal data drives, as well as removable drives (CD, DVD drives) and various USB drives.
1716. Digital cameras and mobile phones widely use small memory cards (SD cards, micro SD cards, Compact Flash CF, etc.), which may contain a considerable amount of information.
1717. Extensive volumes of diverse information are stored on modern mobile devices — smartphones, tablets, and various players.
1718. In addition, video surveillance systems may store information on the facts and circumstances essential for criminal proceedings. Noteworthy, many IP cameras can contain information storage devices, which enable video recording and storage of video footage without connecting to a recorder. Many electronic devices can share information via local computer networks or the web.
1719. Therefore, researching dedicated devices (hubs, routers, switches, etc.) requires special knowledge.
1720. It is also worth considering that today, a vast volume of information is stored in the cloud, i.e., beyond the device's location.
1721. All diverse types of digital photographs have data that are built into the image file by default. The standard is called Exchangeable Image File Format or EXIF. EXIF data contain information on camera configurations.
1722. They contain evidentiary information consisting of the time and date when the photograph was taken, the camera brand and model, and its serial number. There is another potentially useful property that is worth knowing about. If the digital image was made using a device with GPS enabled, GPS coordinates would likely be included in the EXIF data.³²²⁷
1723. A Global Positioning System (GPS) is a much more accurate method for determining the phone's location, which calculates its location relative to the group of satellites in the geostationary orbit. To use this method, the GPS feature must be available and enabled on the phone, and the phone must be visible to the satellite (which might be complicated amidst urban buildings that may block the signal).
1724. Under suitable conditions, GPS may identify the phone's location with an accuracy of three to five meters, but on average, its accuracy constitutes five to eight meters.³²²⁸
1725. Working with digital evidence obtained through the use of drones becomes increasingly relevant in adjudicating war crime cases.

³²²⁷ www.nsj.gov, p. 74

³²²⁸ www.nsj.gov, p. 39

1726. Such data may be stored in several different formats, while GPS coordinates may be encrypted in several ways.
1727. Major developers of digital forensics software including Cellebrite (www.cellebrite.com), MSAB (www.msab.com), and Oxygen Forensics (www.oxygen-forensics.com) have integrated the option of memory image extraction from drones and their subsequent processing into their software products. This may include retrieving information from mobile apps used to operate the UAV.
1728. With data that can be retrieved from mobile apps for drone operation (installed on iOS or Android devices), one can view captured photographs and videos using timestamps and geo-coordinates, which visually show the location of the snapshot on the map and the moment when it was made.
1729. Hence, it is vital to note that information in the UAV memory is extensive and may be of great importance as digital evidence for law enforcement and the court.^{3229, 3230}
1730. Lately, open-source intelligence data has been widely used in Ukraine.
1731. Although digital records of war crimes were used in other conflicts, the use of open-source evidence has been brought to a new level during the investigations in Ukraine. We are witnessing systematic efforts of various stakeholders to do so, a new phenomenon in the modern history of war.³²³¹
1732. More and more organisations, particularly Bellingcat and Human Rights Watch, conduct online investigations using publicly available online content, also known as open-source intelligence (OSINT).
1733. Amnesty International's Citizen Evidence Lab focuses on the content showing attacks on civilian districts or infrastructure, including hospitals or schools, or on the use of indiscriminate and prohibited weapons, such as cluster bombs. Amnesty claims that to date, it has gathered thousands of video footage on alleged atrocities in Ukraine. Of these, about 50 incidents were fully verified by evidence from the scene. The Lab uses geolocation, metadata, satellite imagery, weapon expert opinions, and eyewitness accounts to confirm digital data.³²³²
1734. The CPC of Ukraine does not contain provisions on evidence obtained from open sources. Nonetheless, the lack of these provisions present no procedural obstacles for their use in criminal proceedings. After all, considering definitions of evidence and types of their procedural sources established in parts 1 and 2 of Article 84 of the CPC of Ukraine, one may assert that the content of evidence obtained from open sources may be identified and legally assessed based on provisions of part 1 of Chapter 4, "Evidence and Proving," "The concept of evidence, the issues of adequacy

³²²⁹ <https://forbes.ua/innovations/bilshe-y-bilshe-droniv-ukraina-namagaetsya-rozshiriti-dronnu-galuz-skilki-koshtue-zrobiti-dron-z-nulya-30082022-8012>

³²³⁰ www.inter-nauka.com

³²³¹ blogs.lse.ac.uk

³²³² www.euronews.com

and admissibility in recognition of information as evidence,” and other paragraphs of Chapter 4 governing separate procedural evidence types.

1735. Under part 1 of Article 93 of the CPC of Ukraine, evidence shall be collected by the parties to the criminal proceedings, the victim, and the representative of the legal entity that is subject to proceedings, in accordance with the procedure laid down in this Code. The prosecution shall collect evidence through investigatory (search) actions and covert investigatory (search) actions, by demanding and obtaining objects, documents, information, expert findings, audit and inspection reports from government authorities, local governments, enterprises, institutions, and organisations, officials, and individuals and by conducting other procedural actions specified by this Code (part 2, Article 93 of the CPC of Ukraine). The defense, victim, and representative of the legal entity that is subject to proceedings shall collect evidence through demanding and obtaining objects, copies of documents, information, expert reports, audit and inspection reports from government authorities, local governments, enterprises, institutions, organisations, officials and individuals; by initiating investigatory (search) actions, covert investigatory (search) actions, and other procedural actions, and also through other actions that would produce relevant and admissible evidence in court (part 3, Article 93 of the CPC of Ukraine).
1736. At the same time, despite the lack of precise legal regulation, court judgements show the common practice of collecting evidence using open sources, including social media and other web resources with publicly accessible content.
1737. Evidence like publicly accessible information from web resources was gathered through monitoring and search activities using search terms on the Internet. The process was recorded in the relevant web resource examination report.
1738. The following should be taken into account when assessing screenshots as evidence in considering war crime cases.
1739. A screenshot is an image obtained by a computer displaying the screen content seen by the user. Such an image is created from a recording of visible computer screen elements or another visual display device.
1740. Article 105 of the CPC stipulates that annexes to the minutes may include: 1) purpose-made copies or samples of objects, items, and documents; 2) written clarifications of specialists who participated in the procedural action concerned; 3) the verbatim record, audio or video recording of the procedural action concerned; 4) photo boards, diagrams, molds, computer data media, and other materials which clarify the content of the minutes. In the case under consideration, screenshots were annexes to the minutes of the procedural action. The court assessed them as belonging to the documents based on paragraph 3, part 2 of Article 99 of the CPC.
1741. The aforementioned procedural methods for registering electronic evidence are consistent with the provisions of the CPC, so their admission by the courts is justified.

1742. In addition, in some cases, having established the volume of evidence subject to examination and the procedure of their investigation, courts do not directly examine electronic information stored on technical media and limit their examination only to procedural documents describing the content of this information.
1743. Thus, even though the CPC is missing regulations governing procedural aspects of examining electronic evidence in criminal proceedings, under the current regulations of the criminal procedure law, electronic evidence is nevertheless procedurally registered as written evidence (a document or record of procedural actions and information media as an annex to the record) and physical evidence.
1744. The screenshot may also show not only the electronic document in the sense of Article 5 of the Law “On Electronic Documents and Electronic Documents Circulation” but also separate frames of video recordings, snippets of content on websites, webpages, social media, where the law does not regulate the procedure of making copies and their certification.
1745. Part 4 of Article 99 of the CPC refers to specific persons (investigator and prosecutor) who can make copies of information contained in (automated) information systems, telecommunications systems, information and telecommunications systems, their integral parts, and to the involvement of a specialist as a condition for recognising them as originals. In such a situation, viewing the website screenshot as a copy of the information contained in the information (automated) systems and not as its reflection, one can conclude that to make a screenshot as an annex to the protocol of web resource examination, a specialist must be involved. Instead, perceiving a screenshot as an image of the web resource allows viewing it as original evidence regardless of the form of its submission: whether in an electronic (digital) form on the electronic information media or in a printed (paper-back) form.
1746. In addition, it is expedient to consider that the screenshot-making feature is included in each Microsoft Word software package, which saves data automatically, and its use is a common feature that does not require any specialised knowledge.
1747. In case of doubts as to the integrity and credibility of information, saved as a screenshot of the web resource, or the need for specialised knowledge, these issues may be resolved by involving a specialist or scheduling an examination. The above indicates the possibility of perceiving a screenshot as an image of electronic evidence.³²³³
1748. When considering cases of war crimes, digital evidence in the form of electronic messages may constitute a significant share of the evidentiary record.
1749. Depending on the means of transmission, electronic messages can be divided into the following types: electronic messages transmitted via satellite connection in the GSM standard: SMS messages, MMS messages, voice messages; electronic messages sent via mobile messenger apps: Viber, WhatsApp, Telegram, etc.; electronic mes-

³²³³ The analysis of case law on using electronic evidence in criminal proceedings / compiled by the legal management (III) of the Department for Analytical and Legal Work of the Supreme Court secretariat. Kyiv, 2020. 54 p.

sages transmitted via email: electronic messages transmitted on social media; and electronic messages transmitted using other Internet services.³²³⁴

1750. Concerning the legal assessment when there is a difference between the time recorded by the recording device and the time of the crime, judges are unanimous that this does not render the evidence to be inadmissible.

D. Expert Conclusions

1751. Primary information media and technical means used to retrieve information may be examined by appropriate specialists or experts in the order stipulated by the CPC of Ukraine, should there be appropriate grounds for such examination.
1752. Case law materials show the incidence of cases when electronic (digital) materials are sent to experts for examination. For this purpose, the following examination types were conducted:
- computer forensic analysis;
 - phototechnical examination;
 - photo portrait examination; and
 - psychological and linguistic examination, etc.
1753. For instance, computer forensic analysis is an examination, which is a type of forensic engineering and which studies computer equipment and/or computer information media.
1754. Computer forensic analysis is conducted to determine the object's status as a computer tool, identify and study its role in the crime under investigation, and access information on electronic media with its subsequent comprehensive investigation.
1755. The subject of computer forensic analysis is facts (circumstances) that are relevant for the pre-trial investigation or court and are to be established based on the study of patterns of developing and operating computer systems enabling information processes.
1756. Objects of the computer forensic analysis are the following:
- personal computers (system unit), portable computers (laptops, netbooks);
 - any machine information media, peripheral devices, integrated systems, and any parts for all specified components (hardware units, expansion boards, etc.);
 - hardware and software systems, which require a comprehensive approach to considering hardware and software features;
 - network equipment (servers, workstations, file storage systems, etc.);
 - office peripherals (printers, scanners, multifunctional devices, modems, routers, hotspots, video surveillance systems, etc.);

³²³⁴ <http://dspace.onua.edu.ua/bitstream/handle/11300/14924/Чванкін%20С.%20А.%20Доказове%20значення%20даних%20з%20електронних%20повідомлень....pdf?sequence=1&isAllowed=y>

- software and software tools, their components (subsystems) and supporting analytical resources and technical documents (terms of reference, requirements, specifications, models, etc.), algorithms, separate software modules,
- software source texts, text and graphic documents (electronic), data in multimedia formats, produced using computer means;
- information in the database formats, logs (protocols) of specialised software operation, other applied supplements, and information data; and
- information hosted on the websites on the Internet.

1757. Key objectives of the computer forensic analysis include the following:

- establishing whether the computer and technical equipment are in working order;
- ascertaining circumstances related to the use of computer and technical equipment, information, and software;
- identifying information and software contained on computer media; and
- establishing the correspondence of software to specific versions or requirements for their development.

II. International legal standards concerning the admission and assessment of digital evidence

A. Introduction

1758. This chapter concerns international standards and best practices on the admission and assessment of digital evidence. As defined below, digital evidence covers a vast range of information; any electronic file derived from any electronic device qualifies as digital evidence, from a word document prepared on a personal computer to automatically generated call data records from a telecommunications service provider to satellite imagery from Google Earth to a video uploaded to YouTube.
1759. International law does not regulate the admission or assessment of evidence. It is left to national and international courts to devise their own rules. International and hybrid criminal courts have substantially similar rules and practices concerning the admission of evidence, and they apply these rules to all evidence. When faced with any non-oral evidence, including digital evidence, they consider similar factors in order to determine whether the particular item or information has sufficient probative value to be relied upon.
1760. These courts have only limited experience with examinable online open source information, but best practices developed primarily for investigators offer guidelines for verifying this information that may also be of use for judges. These guidelines ask investigators to analyse the source of the information, its content, and, to the extent possible, to undertake a more technical digital forensic analysis.
1761. This chapter begins by defining digital evidence, then surveys the evidentiary rules and practices of international and internationalised or hybrid courts concerning non

oral evidence, including digital evidence. It then considers best practices concerning online investigations for open source information, before concluding with a summary of the common considerations that emerge from these sources.

B. What is Digital Evidence?

1762. “Digital evidence” may be defined as “information transmitted or stored in a digital format that a party to a case may use at a proceeding”³²³⁵ or “information and data of value to an investigation that is stored on, received, or transmitted by an electronic device”³²³⁶. These broad definitions include information that originated in or was converted to a digital format, such as electronic files from a personal computer, mobile telephone call data records automatically generated by telecommunications service providers, satellite imagery from Google Earth, or videos and photographs taken from your mobile phone. It also includes information that has been subsequently digitised, including something as commonplace as a paper document or film photograph scanned to an electronic format.

1763. Digital information may derive from an “open” or a “closed” source.³²³⁷

BERKELEY PROTOCOL, PARA. 14:

Open source information encompasses publicly available information that any member of the public can observe, purchase or request without requiring special legal status or unauthorized access. Closed source information is information with restricted access or access that is protected by law, but which may be obtained legally through private channels, such as judicial processes, or offered voluntarily.

1764. More specifically, digital or online open source information is “information on the Internet, which can be accessed, for example, on public websites, Internet databases or social media platforms.”³²³⁸

³²³⁵ An Overview of the Use of Digital Evidence in International Criminal Courts (Working Paper) (Salzburg Workshop on Cyberinvestigations), 2013, p. 1. This definition encapsulates the distinction between information and evidence, where, in the context of criminal proceedings, evidence is a sub-category of information “that forms part of a trial in the sense that it used to prove or disprove the alleged crimes”. See Global Rights Compliance, [Basic Investigative Standards](#) for International Crimes, August 2019, p. 3. It is for the judges to determine whether digital information becomes digital evidence that they may consider in adjudicating criminal proceedings. For the purposes of this chapter, the terms “digital information” and “digital evidence” are used interchangeably to describe information that judges may be asked to assess in this manner.

³²³⁶ Putting Principles into Practice: Testing Open-Source Video as Evidence in the Criminal Courts of England and Wales: Lessons Learned from a Mock Voir Dire Hearing (GLAN/Bellingcat/supported by OSR4Rights) (2022) (“[GLAN/Bellingcat Report #1](#)”), p. 10, fn. 7.

³²³⁷ Human Rights Center, UC Berkeley School of Law and United Nations Human Rights Office of the High Commissioner, Berkeley Protocol on Digital Open Source Investigations, 2022 (“[Berkeley Protocol](#)”), para. 14. Open source intelligence, or OSINT, is “a sub-category of open source information that is collected and used for the specific purpose of aiding policymaking and decision-making, most often in a military or political context”. [Berkeley Protocol](#), para. 19.

³²³⁸ [Berkeley Protocol](#), para. 15. “Open source evidence is open source information with evidentiary value that may be admitted in order to establish facts in legal proceedings.” [Berkeley Protocol](#), para. 21.

1765. Given the relative novelty and increasing importance of online open source information as potential evidence in criminal proceedings, it may also assist to consider this category of information in further detail. Online open source information may be divided into “descriptive content and examinable content”.³²³⁹ Descriptive content is “narrative content” and “could range from a short news article to a lengthy NGO report containing witness interviews”. Its value is “more contingent on the trust placed in the author or organization that published it”.³²⁴⁰
1766. In contrast, “examinable content is material whose value is established by an analysis of the substantive content itself”, and it “could be anything from a Tweet to an entry on Wikimapia or an aftermath video”.³²⁴¹ Examinable content is the primary focus of “online open source investigation” of the sort conducted by Bellingcat, amongst other organisations and human rights groups.³²⁴² Online audio-visual content, or online information that “contains recordings of sound and/or photographic images (whether stills or videos)”, is of particular interest for open source investigations and may present particular evidentiary issues that will be discussed below.³²⁴³ Examinable content will often be “user generated content”, in the sense that it is “content generated or gathered by ordinary private individuals”.³²⁴⁴ These private individuals may be unknown, creating evidentiary issues that are also discussed below.

C. International Standards on Digital Evidence

1767. This sub-section addresses international standards on digital evidence. There are no international legal rules for the admission or assessment of digital evidence in criminal proceedings. International and internationalised courts have their own rules of evidence. As shown below, they are substantially similar, including similar practices for considering all non-oral evidence, meaning any evidence that does not come from a witness testifying to their own experiences in a courtroom. They have limited experience with online open source information, but international standards and best practices have been promulgated regarding the investigation and collection of such information. These rules, practices and standards are not binding on Ukraine, but, to the extent they are compatible with Ukrainian law on the admission and assessment of evidence, they may offer persuasive authority on the treatment of digital evidence.

1. There are no International Law Standards on Admission or Assessment of Digital Evidence Binding on Ukraine

1768. There is no international treaty on evidence or digital evidence, and no customary international law rules governing digital evidence. Neither the International Covenant on Civil and Political Rights (ICCPR) nor the ECHR has specific provisions concern-

³²³⁹ International Humanitarian Law & the Aerial Bombardment of Yemen: A study of the contribution of online open source investigations, a joint publication from Global Legal Action Network (“GLAN”) and Bellingcat (“[GLAN/Bellingcat Report #2](#)”), para. 13.

³²⁴⁰ [GLAN/Bellingcat Report #2](#), para. 13.

³²⁴¹ [GLAN/Bellingcat Report #2](#), para. 13.

³²⁴² [GLAN/Bellingcat Report #2](#), paras 12-13.

³²⁴³ [GLAN/Bellingcat Report #2](#), para. 14.

³²⁴⁴ [GLAN/Bellingcat Report #2](#), para. 14.

ing the admission or assessment of evidence in court proceedings. The ECtHR has noted, “while Article 6 of the [ECHR] guarantees the right to a fair hearing, it does not lay down any rules of admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national courts”.³²⁴⁵

2. International Criminal Tribunals Assess Digital Evidence According to the Same Practice as they do all Non-Oral Evidence

1769. International criminal tribunals have a long history of assessing non-oral evidence, including digital evidence. They apply the same rules governing the admission and assessment of evidence to all evidence and have developed standards and practices for assessing non-oral evidence that build on these rules of evidence. They have limited experience with online open source information.³²⁴⁶

a) Relevant rules of evidence before international tribunals

1770. International criminal tribunals have adopted general rules governing the admission and assessment of evidence, but they do not have specific rules for digital evidence. Under Article 69(4) of the ICC Statute, “[t]he Court may rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence”.³²⁴⁷

1771. Rule 89(C) of the ICTY Rules of Procedure and Evidence states “[a] Chamber may admit any relevant evidence which it deems to have probative value” and Rule 89(E) allows a Chamber to “request verification of the authenticity of evidence obtained out of court”.³²⁴⁸ Rule 89(C) of the [ICTR](#) Rules of Procedure and Evidence, Rule 105(C) of the [IRMCT](#) Rules of Procedure and Evidence, and Rule 149(C) of the [Special Tribunal for Lebanon’s](#) Rules of Procedure and Evidence are identical to ICTY Rule 89(C), and ICTR Rule 89(D), IRMCT Rule 105(E) and STL Rule 149(E) are identical to ICTY Rule 89(E).

1772. Before the ICC, trial chambers have applied a “three-part admissibility test” under which the chamber examines, “on a preliminary basis, whether the submitted materials (1) are relevant to the case; (2) have probative value; and (3) are sufficiently relevant and probative to outweigh any prejudicial effect that could be caused by their admission”.³²⁴⁹ This admissibility test demonstrates that the ICC’s test for admission

³²⁴⁵ See e.g., ECtHR, *Garcia Ruiz v. Spain* [Grand Chamber Judgement](#), para. 28; ECtHR, *Schenk v. Switzerland* [Judgement](#), para. 46.

³²⁴⁶ More specifically, international and hybrid international courts have limited experience with online open source information with examinable content, such as videos and images and other postings from social media. There are myriad examples of international courts admitting online open source information with descriptive or narrative content, such as NGO reports or media articles that were gathered online. But they have considered this information only for context and have not assessed the reliability of such material in detail. For these reasons, this section does not address this practice.

³²⁴⁷ [ICC Statute](#), Article 69.

³²⁴⁸ [ICTY Statute](#), Articles 89(C) and (E).

³²⁴⁹ See e.g., ICC, *Bemba* [Decision Admission of Materials into Evidence](#), para. 7.

of evidence is consistent with the relevant rules governing admissibility before the ICTY, ICTR, IRMCT and the STL.

1773. Applying this general law of evidence, international tribunals have identified factors for consideration when admitting or assessing what has been described as non-oral evidence. These factors generally relate to the probative value of the item or information offered into evidence. The assessment of probative value is “a fact-specific inquiry and may take into account innumerable factors, including the indicia of reliability, trustworthiness, accuracy or voluntariness that inhere in the item of potential evidence, as well as the circumstances in which the evidence arose. It may also take into account the extent to which the item has been authenticated.”³²⁵⁰ Ultimately, “the Chamber needs to be satisfied that the item is what it purports to be, either because this is evident on its face or because other admissible evidence demonstrates the item’s provenance.”³²⁵¹
1774. Non-oral evidence does not necessarily have to be authenticated in court by a witness.³²⁵²

ICC, BEMBA DECISION OF 8 OCTOBER 2012, PARA. 9:

[I]tems can also be (i) self-authenticating, if they are official documents publicly available from official sources; (ii) agreed upon by the parties as authentic; (iii) prima facie reliable if they bear sufficient indicia of reliability such as a logo, letter head, signature, date or stamp, and appear to have been produced in the ordinary course of the activities of the persons or organisations who created them; or (iv) in case the item itself does not bear sufficient indicia of reliability, shown to be authentic and reliable by the tendering party through provision of sufficient information to enable the Chamber to verify that the documents are what they purport to be.³²⁵³

1775. With non-oral evidence, including where “the individuals who originally supplied the information were not examined”, ICC chambers assess “the contents of each item of documentary evidence, its provenance, source or author, as well as the author’s role in the relevant events, and took into account the reported chain of custody from the time of the item’s creation until its submission to the Chamber, and any other relevant information”.³²⁵⁴ Where “authenticity and/or reliability has been challenged, the Chamber considered in its final assessment of the evidence and on a case-by-case basis all the relevant submissions and any testimonial evidence related to the authenticity of the items concerned”³²⁵⁵
1776. Before the ICTY, trial chambers follow the test laid out in Rule 89(C), quoted above, and “[t]here is no separate threshold requirement for the admissibility of documen-

³²⁵⁰ See e.g., ICC, *Bemba Decision Admission of Materials into Evidence*, para. 8.

³²⁵¹ See e.g., ICC, *Bemba Decision Admission of Materials into Evidence*, para. 8.

³²⁵² See e.g., ICC, *Bemba Decision Admission of Materials into Evidence*, para. 9.

³²⁵³ ICC, *Bemba Decision Admission of Materials into Evidence*.

³²⁵⁴ See e.g., ICC, *Bemba Trial Judgement*, paras 236-237; ICC, *Ntaganda Trial Judgement*, paras 56-57.

³²⁵⁵ See e.g., ICC, *Ntaganda Trial Judgement*, para. 57

tary evidence”.³²⁵⁶ Furthermore, “[i]n considering the reliability, the Trial Chamber will examine all indicia thereof. In the case of “statements” in the broad sense of the word, these indicia include aspects such as the truthfulness, voluntariness and trustworthiness of the evidence. A determination of the reliability of a piece of evidence will also consider the circumstances under which the evidence arose and the content of the evidence.”³²⁵⁷ Furthermore, the ICTY has identified “authenticity as a component of reliability”, and issues of reliability and the question whether a piece of evidence has sufficient indicia of reliability are factors in the assessment of whether evidence is probative.³²⁵⁸

1777. To further assist in demonstrating the approach of international criminal tribunals to assessing digital evidence, the following section considers a selection of relevant decisions and judgements assessing non-oral evidence, including digital evidence.

b) International criminal law judicial decisions assessing non-oral evidence, including digital evidence

1778. There are myriad examples of international criminal judicial decisions and judgements assessing non-oral evidence, including digital evidence. This section summarises the most relevant aspects of some of these decisions and judgements for a variety of categories of evidence.

i. Intercepts

1779. Audio intercept evidence has featured prominently in criminal cases before the ICTY. Although this evidence was not digital in origin, assessing it has raised issues of probative value similar to those that arise with digital evidence.

1780. In the *Tolimir* case, the trial chamber considered “intercepts to be a special category of evidence in that in and of themselves, they bear no *prima facie* indicia of authenticity or reliability, and as such these requirements must generally be fulfilled by hearing from the relevant intercept operators or the participants in the intercepted conversation”.³²⁵⁹ The trial chamber heard “numerous experienced and trained” intercept operators who “established the reliability of the intercept process” and were able to “speak to the authenticity of the intercepts”.³²⁶⁰ The trial chamber also considered it important that the accused had “ample opportunity to challenge the authenticity and reliability of this general collection of intercepts during the cross-examination of intercept operators called by the Prosecution to testify”.³²⁶¹

1781. In the *Blagojevic and Jokic* case, the Defence objected that audio intercept evidence was unreliable and lacked authenticity. The trial chamber rejected this challenge based on evidence admitted in the proceedings to demonstrate the reliability of the intercept

³²⁵⁶ See e.g., ICTY, *Naletilic and Martinovic Appeal Judgement*, para. 402.

³²⁵⁷ ICTY, *Blagojevic and Jokic Decision on Admissibility of Intercept-related Materials*, para. 15.

³²⁵⁸ ICTY, *Popovic et al. Decision on Admissibility of Intercepted Communications*, para. 34.

³²⁵⁹ *Tolimir Decision on Admissibility of Intercepts*, para. 14..

³²⁶⁰ ICTY, *Tolimir Decision on Admissibility of Intercepts*, para. 14.

³²⁶¹ ICTY, *Tolimir Decision on Admissibility of Intercepts*, para. 15.

evidence.³²⁶² The chamber relied on the in court testimony of six intercept operators and the statements of three additional intercept operators, who all provided “virtually identical descriptions of the procedures for monitoring, intercepting, transcribing, and processing” intercepted communications. All had worked as intercept operators through the time period relevant to the case, and their evidence showed that they were aware of the need for accuracy and acknowledged limits where intercepted communications could not be accurately transcribed.³²⁶³

1782. The trial chamber also relied on evidence from a witness from the ICTY Office of the Prosecutor concerning the “intercept project”, whereby prosecution personnel “worked to establish the reliability of the intercepts by cross-referencing them and by examining the internal consistency between the handwritten notebooks and the computer printouts resulting from when the intercepts were forwarded by the intercepting unit to its superior command”. Prosecution staff on the intercept project also cross-referenced intercepts with various documents, including military reports and aerial imagery, as well as other intercepts. This analysis supported the reliability of the intercepts.³²⁶⁴

1783. Finally, the trial chamber rejected a defence challenge based on the claim that tape-recorded material was generally not reliable because of the possibility that it could be tampered with and because the original audio-recordings had not been admitted into evidence (excerpts of audio recordings had been played in court to intercept officers, and transcripts of the intercepts as well as handwritten notebooks of intercept officers had also been put to them in court). Given the evidence before it demonstrating the probative value of the intercepts, the trial chamber did not consider it necessary for the prosecution to admit the audio-recordings into evidence or that it would be appropriate to exclude the intercept evidence.³²⁶⁵ The trial chamber ultimately relied on the intercept evidence in support of its factual findings in its final judgement.³²⁶⁶

1784. The trial chamber in the *Popovic et al.* case rejected a similar defence challenge to the authenticity and reliability of intercept evidence, relying on extensive in court testimony of intercept operators, who discussed the modalities of their work and were cross-examined by the defence.³²⁶⁷ As in the *Blagojevic and Jokic* case, the trial chamber relied on the prosecution’s intercept project, and the evidence of the witness who described it in detail.³²⁶⁸ Given the strength of the evidence corroborating the intercepts, the trial chamber was not persuaded by a defence expert witness on radio relay communications and also did not find that alleged gaps in the chain of custody undermined the reliability of the evidence such as to render it inadmissible. Given the corroboratory evidence, the trial chamber also rejected a defence claim of fabrication that was based on limited discrepancies and the passage of time between

³²⁶² ICTY, *Blagojevic and Jokic* [Decision on Admissibility of Intercept-related Materials](#), para. 26.

³²⁶³ ICTY, *Blagojevic and Jokic* [Decision on Admissibility of Intercept-related Materials](#), paras 21-23.

³²⁶⁴ ICTY, *Blagojevic and Jokic* [Decision on Admissibility of Intercept-related Materials](#), para. 24.

³²⁶⁵ ICTY, *Blagojevic and Jokic* [Decision on Admissibility of Intercept-related Materials](#), para. 25.

³²⁶⁶ See ICTY, *Blagojevic and Jokic* [Trial Judgement](#), paras 30, 38, 351, 464, 466, 510, 513, 763.

³²⁶⁷ ICTY, *Popovic et al.* [Decision on Admissibility of Intercepted Communications](#), paras 38-45.

³²⁶⁸ ICTY, *Popovic et al.* [Decision on Admissibility of Intercepted Communications](#), paras 46-53.

the recording of the intercepts and when they were provided to the prosecution.³²⁶⁹ The trial chamber reaffirmed its conclusions, rejected further defence challenges, and relied on intercepts for factual findings throughout its final trial judgement.³²⁷⁰

1785. Intercept evidence has also featured in cases before the ICC. The trial chamber in the *Ongwen* case assessed and relied on intercept evidence. In its judgement, the trial chamber summarised the extensive evidence of more than 20 witnesses, including intercept operators, prosecution analysts, and forensic specialists, who testified regarding the process of interception and related record-keeping, the content of the intercepts and accompanying logbooks, and the process by which the intercepts and logbooks were transferred to the ICC prosecution. Based on this extensive evidence demonstrating the probative value of the intercepts, the trial chamber rejected defence objections to the intercept evidence.³²⁷¹ The ICC appeals chamber upheld the trial chamber’s approach to assessing the reliability of the intercept evidence.³²⁷²
1786. In contempt proceedings arising from the *Bemba* case, the trial chamber assessed digital intercepts of mobile phone communications and communications to and from Mr. Bemba in the ICC Detention Centre. They were gathered by court order as part of the investigation into whether there had been a scheme to bribe witnesses. The mobile communications were intercepted by national authorities, who provided audio recordings and call logs to the ICC. The intercepts of Detention Centre calls were provided by the ICC Registry.³²⁷³
1787. The defence objected to the use of the intercepts on several grounds, including that the prosecution had failed to establish their authenticity and chain of custody, and had not called any witnesses to authenticate the Detention Centre intercepts. The trial chamber rejected these objections, noting that there was “an array of mutually reinforcing information confirming the accuracy of the intercepted communications”.³²⁷⁴ This included intercepted communications with inherent indicia of reliability, such as corporate watermarks of the telecommunications provider on call logs.³²⁷⁵ The trial chamber also noted that some of the Detention Centre communications begin with persons “identifying themselves as the ICC when connecting Mr Bemba’s calls”.³²⁷⁶
1788. The trial chamber judges were able to recognise voices in intercepts that corresponded with the attributed numbers in the logs. In some intercepted communications, the speakers touched on matters in the then-ongoing main criminal proceedings involving Mr Bemba, including discussing imminent witness testimony and matters only known to a limited number of people involved with the defence.³²⁷⁷ The trial chamber also relied on expert witness testimony regarding the call logs and data records.³²⁷⁸

³²⁶⁹ ICTY, *Popovic et al.* [Decision on Admissibility of Intercepted Communications](#), paras 54-73.

³²⁷⁰ ICTY, *Popovic et al.* [Decision on Admissibility of Intercepted Communications](#), paras 64-66, 1230-1237, *passim*.

³²⁷¹ ICC, *Ongwen* [Trial Judgement](#), paras 555-589, 614-810

³²⁷² ICC, *Ongwen* [Appeal Judgement](#), paras 531-570..

³²⁷³ ICC, *Bemba et al.* [Contempt Judgement](#), 19 October 2016, paras 214-215

³²⁷⁴ ICC, *Bemba et al.* [Contempt Judgement](#), para. 218.

³²⁷⁵ ICC, *Bemba et al.* [Contempt Judgement](#), para. 219.

³²⁷⁶ ICC, *Bemba et al.* [Contempt Judgement](#), para. 219.

³²⁷⁷ ICC, *Bemba et al.* [Contempt Judgement](#), para. 220.

³²⁷⁸ ICC, *Bemba et al.* [Contempt Judgement](#), para. 221.

1789. Given that the intercepts had been gathered pursuant to judicial orders, the case record itself assisted in authenticating them.³²⁷⁹ There were exhaustive formal chain of custody logs maintained by the Registry, and some materials had been unsealed in the presence of the defence.³²⁸⁰ The Registry also generated some of the challenged materials.³²⁸¹ Moreover, neither the defence nor the trial chamber could identify a single communication that was inconsistent with the corresponding log.³²⁸²
1790. The trial chamber concluded, “[i]n the light of all the information on authenticity before the Chamber, calling witnesses solely on such matters would have been a formal and useless exercise”.³²⁸³

ii. Video

1791. Video evidence has featured in a number of cases before various international tribunals, including before the ICC. In the *Lubanga* case, the trial chamber relied on video evidence introduced through two witnesses for a number of purposes, including to determine whether child soldiers appeared to be manifestly under the age of 15, the roles of children in the armed groups, and to demonstrate the presence of the accused and other leading figures in the presence of child soldiers.³²⁸⁴ The appeals chamber upheld the trial chamber’s reliance on video evidence to determine the age of child soldiers, ruling that there was no legal requirement for the video evidence to be corroborated and noting that the trial chamber exercised sufficient caution when relying on the video excerpts.³²⁸⁵
1792. In the *Ntaganda* case, the trial chamber also relied extensively on video evidence introduced into evidence by witnesses who testified to the content of the videos. The video evidence supported the trial chamber’s findings on the activities of the accused and other high-ranking members of armed groups, and also showed that children who were manifestly under the age of 15 were used as escorts of the accused.³²⁸⁶ The appeals chamber affirmed the trial chamber’s reliance on video evidence.³²⁸⁷
1793. Two recent matters before the ICC have involved open source video evidence sourced from social media. In the *Al-Mahdi* matter, the accused entered an admission of guilt to the war crime of attacking protected objects under Article 8(2)(e)(iv) of the ICC Statute. As a result, the accused did not challenge the evidence against him and the trial chamber did not assess the probative value of the video evidence in its written judgement. Article 65 of the ICC Statute does, however, require ICC trial chambers to assess whether an admission of guilt is “supported by the facts of the case”, con-

³²⁷⁹ ICC, *Bemba et al.* [Contempt Judgement](#), para. 222.

³²⁸⁰ ICC, *Bemba et al.* [Contempt Judgement](#), para. 222.

³²⁸¹ ICC, *Bemba et al.* [Contempt Judgement](#), para. 223.

³²⁸² ICC, *Bemba et al.* [Contempt Judgement](#), para. 224.

³²⁸³ ICC, *Bemba et al.* [Contempt Judgement](#), para. 225.

³²⁸⁴ ICC, *Lubanga* [Trial Judgement](#), paras 644, 710-718, 774, 779, 792-793, 854, 858, 860-862, 912, 915, 1122, 1193, 1209-1211, 1216, 1218, 1242-1245, 1249-1257, 1262, 1278, 1339-1344.

³²⁸⁵ ICC, *Lubanga* [Appeal Judgement](#), paras 207-230.

³²⁸⁶ ICC, *Ntaganda* [Trial Judgement](#), paras 104, 109, 204, 207, 213, 387-388, 1190, *passim*.

³²⁸⁷ ICC, *Ntaganda* [Appeal Judgement](#), paras 768-790.

sidering the admission itself “together with any additional evidence presented”.³²⁸⁸ In its judgement, the trial chamber “paid particular attention to whether evidence could establish the facts independently of the Accused’s admissions”.³²⁸⁹

1794. In setting out the “established facts of the case”, the trial chamber relied in part on open source video evidence to demonstrate the accused’s presence at attacks on multiple important and well-known cultural sites in Timbuktu.³²⁹⁰ In finding certain statements the accused made to journalists to be established, the trial chamber relied exclusively on open source video evidence.³²⁹¹ The trial chamber also relied on open source video evidence and media articles in support of a finding that the attacks against the sites “took place in the context of and were associated with the non-international armed conflict”.³²⁹²
1795. In the *Al-Werfalli* matter, the ICC issued two arrest warrants supported exclusively by video evidence from Facebook and social media. Under Article 58(1)(a) of the ICC Statute, a warrant of arrest may be issued where there are “reasonable grounds to believe” that a person has committed a crime within the ICC’s jurisdiction.³²⁹³ The pre-trial chambers found there was reasonable grounds to believe that Mr Al-Werfalli had committed crimes under the ICC Statute and that arrest warrants should be issued on the basis of the video evidence retrieved from social media.³²⁹⁴
1796. Given the stage of the proceedings, the pre-trial chambers did not assess the probative value of the video evidence. In the decision issuing the second warrant, the pre-trial chamber was, however, “satisfied that the [video showing the incident of killing] has sufficient indicia of authenticity in order to be relied on at this stage of the proceedings”.³²⁹⁵

AL-WERFALLI SECOND WARRANT, PARA. 18:

The Chamber notes, in particular, that the Prosecutor has submitted an expert report on the authentication of the video, prepared by a renowned, independent institute. Having analysed the video and its key frames, the report concluded that there were no traces of forgery or manipulation in relation to locations, weapons or persons shown in the video. The location has also been confirmed by a witness, who stated that the video was shot “[i]n front of the mosque at Al-Salmani” where [a] day before [...] there was a bombing”.³²⁹⁶

³²⁸⁸ ICC, *Al Mahdi Trial Judgement*, para. 27.

³²⁸⁹ ICC, *Al Mahdi Trial Judgement*, para. 29.

³²⁹⁰ ICC, *Al Mahdi Trial Judgement*, paras 38(i), (ii), (iii), (v), (vi), (vii), (viii), (ix) and (x); 40(iii), (v); 41.

³²⁹¹ ICC, *Al Mahdi Trial Judgement*, para. 46, fn. 101.

³²⁹² ICC, *Al Mahdi Trial Judgement*, para. 49, fn. 102.

³²⁹³ ICC, *Al-Werfalli First Warrant of Arrest*, para. 3.

³²⁹⁴ ICC, *Al-Werfalli First Warrant of Arrest*, paras 3, 25-29; ICC, *Al-Werfalli Second Warrant of Arrest*, paras 7, 33-36.

³²⁹⁵ ICC, *Al-Werfalli Second Warrant of Arrest*, para. 18.

³²⁹⁶ ICC, *Al-Werfalli Second Warrant of Arrest*.

iii. Aerial Imagery

1797. Satellite and aerial imagery has been admitted into evidence in a number of cases before international tribunals, particularly before the ICTY. To take one example, the trial chamber in the *Tolimir* case relied on aerial images provided by the United States government to demonstrate or corroborate the “locations of gravesites and reburial activities, buildings and vehicles, large groups of prisoners, and bodies”. The prosecution’s use of this evidence was conditioned on it not discussing “any information relating to the technical or analytical sources, methods, or capabilities of the systems, organizations, or personnel used to collect, analyse, or produce these imagery-derived products”. The accused challenged this evidence “on the grounds that no evidence was presented on their origin, the method of their creation, the manner of their editing, how to interpret them or whether they were delivered to the Prosecution in their original form or previously modified”.³²⁹⁷
1798. While the trial chamber acknowledged that it lacked evidence on the method of creation of the aerial imagery evidence, it nonetheless found them to be reliable and “of probative value”. Former prosecution investigators testified about the use of the aerial images, explaining how the aerial images “complemented forensic archaeological or anthropological reports”. The investigators used the aerial images to identify and locate gravesites, thereby demonstrating their authenticity. Moreover, the authenticity of the images was often corroborated by other witness testimony.³²⁹⁸

iv. Mobile Communications Records and Cellular Site Information

1799. In the *Ayyash et al.* proceedings before the STL, the trial chamber admitted and relied on extensive digital evidence of mobile communications data and related evidence concerning the locations of cell sites, as well as expert analysis of that evidence. The underlying digital evidence was provided by Lebanese mobile telecommunications providers upon request of the prosecution and other domestic and international law enforcement officials involved in the investigation prior to the formation of the STL. Before admitting and relying on it, the trial chamber required the prosecution to call witnesses representing the telecommunications providers who could provide evidence explaining the generation of call data records and cell site evidence, what these records showed, how they were stored, how they were used in their businesses, and the process of providing this evidence to the prosecution.³²⁹⁹
1800. The trial chamber also heard evidence from an independent expert witness retained by the prosecution to analyse the telecommunications evidence and provide opinions on it, as well as an expert, analysts, and investigators from the office of the prosecutor who testified regarding their work in analysing this evidence. Because much of the underlying digital call data records were unintelligible in the raw form in which they were provided to the prosecution, the trial chamber received them into evidence in the form of call sequence tables prepared by prosecution analysts who were required

³²⁹⁷ ICTY, *Tolimir Trial Judgement*, paras 67-70.

³²⁹⁸ ICTY, *Tolimir Trial Judgement*, paras 67-70.

³²⁹⁹ STL, *Ayyash et al. Trial Judgement*, paras 1566-1574, 1605-1620, 1624-1625.

to either testify *viva voce* or provide a written witness statement speaking to the methodology of preparing these tables. Given the complexity of the telecommunications evidence in the case, the trial chamber also admitted demonstrative evidence in the form of charts, graphs, diagrams and reports, power-point presentations, and extracts from software used to present the case in court.³³⁰⁰

1801. The assigned defence counsel in these *in absentia* proceedings challenged the reliability of the cell site evidence and, to a lesser extent, the call data records. They also challenged the reliability of the witnesses who testified on behalf of the telecommunications providers on a number of grounds, and the conclusions of the external and in-house expert witnesses and prosecution analysts.
1802. The trial chamber concluded that the witnesses who represented the large telecommunications service provider corporations could “provide evidence based upon a combination of personal knowledge, reviewing company records, documents and practices and communicating with other company personnel”:³³⁰¹

STL, AYYASH ET AL. TRIAL JUDGEMENT, PARAS 1846-1847

A witness testifying as the representative of such corporation can provide evidence even where they do not have personal knowledge, provided that this witness can attest that the testimony represents and is based on business record information. The role of a company representative is not confined to producing records and it is not unusual that such witnesses have a limited capacity to answer questions outside their direct knowledge.

[...]

The role of the company representatives in this case—who in both cases gave mixed evidence as to matters within their own personal knowledge and the matters of which they were informed by other employees or departments—is not confined to producing records.³³⁰²

1803. Based on the totality of their testimony, the trial chamber found their evidence probative.³³⁰³ The trial chamber considered that the witnesses “had sufficient personal knowledge, and consulted suitably qualified personnel at [the respective telecommunications corporations] as to matters outside of their personal knowledge, such as to allow it to assess and give appropriate weight to the specific telecommunications evidence on which the Prosecution relied to determine mobile users’ approximate locations or movements”.³³⁰⁴
1804. The trial chamber was satisfied that much of the telecommunications evidence constituted business records of the telecommunications service providers, which were

³³⁰⁰ STL, *Ayyash et al.* [Trial Judgement](#), paras 1566-1574, 1605-1620, 1624-1625.

³³⁰¹ STL, *Ayyash et al.* [Trial Judgement](#), para. 1846.

³³⁰² STL, *Ayyash et al.* [Trial Judgement](#).

³³⁰³ STL, *Ayyash et al.* [Trial Judgement](#), para. 1851.

³³⁰⁴ STL, *Ayyash et al.* [Trial Judgement](#), para. 1862.

generated, sometimes automatically, in the ordinary course of the service providers' businesses, thereby providing them with indicia of reliability.³³⁰⁵

1805. Given the “extensive evidence from Prosecution analysts and investigators who produced the call sequence tables of the methodology and the built-in internal checks and balances”, the trial chamber was satisfied that these tables reliably represented the underlying call data records.³³⁰⁶
1806. Based on the totality of the evidence, the trial chamber considered that an external expert's cell site analysis technique was “capable of providing sufficiently reliable assessments and results on which the Trial Chamber can rely in reaching a conclusion regarding the relevant mobiles' general locations and movements”, as well as the general reliability of the expert's overall evidence.³³⁰⁷
1807. It is also worth noting that the trial chamber considered the prosecution's use of an electronic presentation of evidence tool, the workings of which had been examined through a witness in trial, “significantly enhanced” its “understanding of the lengthy and complex evidence, thus ensuring a fair trial”.³³⁰⁸
1808. As noted above, an ICC trial chamber also assessed and relied on mobile telephone call data records and call sequence tables derived from them in the *Bemba et al.* contempt proceedings. The chamber heard the testimony of an expert witness who testified regarding the origins of the call data records and a prosecution analyst who testified to the process for creating call sequence tables from those call data records. The trial chamber was also able to confirm relevant details of telephone communications, “such as the speakers, relevant numbers and the date of the call”, through “its own independent assessment of the evidence”, which also included intercepts of phone calls.³³⁰⁹ Moreover, since the seizure of this material had been ordered by an ICC judge, procedural records in the case confirmed the authenticity and chain of custody of the call data records.³³¹⁰

v. WikiLeaks Documents

1809. In the *Ayyash et al.* case before the STL, the trial chamber declined to admit WikiLeaks documents where it did not have sufficient evidence to show that the documents were authentic diplomatic cables of the United States government.³³¹¹ In its decision, the trial chamber assessed “the authenticity of the WikiLeaks documents based on ‘whether a document is what it professes to be in origin and authorship’”.³³¹² The trial chamber rejected the defence request.

³³⁰⁵ STL, *Ayyash et al.* [Trial Judgement](#), para. 1998.

³³⁰⁶ STL, *Ayyash et al.* [Trial Judgement](#), paras 1996-1997.

³³⁰⁷ STL, *Ayyash et al.* [Trial Judgement](#), paras 2124, 2145.

³³⁰⁸ STL, *Ayyash et al.* [Trial Judgement](#), paras 2052-2058.

³³⁰⁹ ICC, *Bemba et al.* [Contempt Judgement](#), paras 213-214, 216, 221.

³³¹⁰ ICC, *Bemba et al.* [Contempt Judgement](#), para. 223.

³³¹¹ STL, *Ayyash et al.* [WikiLeaks Decision](#).

³³¹² STL, *Ayyash et al.* [WikiLeaks Decision](#), paras 9-13.

STL, AYYASH ET AL. WIKILEAKS DECISION, PARA. 40.

The Defence has not proved that the documents—apparently downloaded from the WikiLeaks website—are authentic U.S. diplomatic cables. The documents may be authentic, but the Trial Chamber has no evidence of the U.S. Government acknowledging their authenticity, or indeed their accuracy. And, directly to the point on the reliability of the documents, the Trial Chamber has no evidence that they accurately describe the events referred to in them. In fact, Mr Siniora and Mr Jumblatt both denied what is stated in the documents.³³¹³

1810. In support of its decision, the trial chamber noted even if it received the WikiLeaks documents into evidence, it “would face having the sworn testimony of two witnesses denying their contents, yet none affirming their accuracy. Without more, little weight could be given to them.”³³¹⁴

c) Additional Factors for Assessing Online Open Source Evidence

1811. As shown above, international criminal tribunals have extensive experience with assessing non-oral evidence, including digital evidence, but limited experience with online open source evidence. Given the potential importance of online open source evidence in assessing war crimes and other international crimes committed in Ukraine since the Russian invasion, it will assist to consider guidelines and best practices for the collection of online open source information.

1812. This section draws from the Berkeley Protocol, a set of international standards for researching online open source information developed by the University of California, Berkeley School of law and promulgated by the United Nations Office of the High Commissioner for Human Rights. This section also draws from materials prepared by Bellingcat, an organisation that specialises in online open source investigations as well as guidelines and reports prepared jointly by Bellingcat and the Global Legal Action Network (GLAN), a legal non-profit organisation. Their joint projects have focused on utilising online open source information for investigating international crimes and human rights violations, and include consideration of the admissibility and assessment of this information in criminal proceedings. While aimed primarily at researchers and investigators, these resources also offer valuable information for judges considering the assessment of such information when offered as evidence.³³¹⁵

1813. Under the Berkeley Protocol, verification of a specific open source item “is broken down into three separate considerations: the source, the digital item or file, and the content, which should be looked at collectively and compared for consistency”.³³¹⁶ Bellingcat’s open source analysis concerns specific verification techniques that fall

³³¹³ STL, *Ayyash et al.* [WikiLeaks Decision](#).

³³¹⁴ STL, *Ayyash et al.* [WikiLeaks Decision](#), para. 42.

³³¹⁵ While there are other guidelines for researching open source information, an exhaustive account of all guidelines and best practice documents is beyond the scope of this chapter.

³³¹⁶ [Berkeley Protocol](#), para. 176. For the purposes of the Protocol, verification is “the process of establishing the accuracy or validity of information that has been collected online”.

under the source and content analysis categories identified in the Berkeley Protocol. Moreover, Bellingcat has helpfully identified originality as a preliminary question that is somewhat distinct from source analysis.³³¹⁷ For the purposes of the following discussion, we will consider the following four broad categories of verification techniques that may be useful in assessing the authenticity and reliability of online open source information: (1) originality/provenance; (2) source analysis; (3) content analysis; and (4) technical analysis.

1814. Many of the techniques discussed below may be undertaken by lay researchers and investigators, and, in such circumstances, it will often be necessary for such a researcher or investigator to appear as a witness to discuss their methodology and techniques. As techniques become more technical, it may be necessary for an expert qualified in forensic video analysis or digital forensics to assist the court with an expert opinion.³³¹⁸

i. Originality/provenance

1815. A preliminary question is whether the open source item is original. This involves determining whether an item, like an image or video, has been used before.³³¹⁹ The Berkeley Protocol refers to this as the provenance of online information, in the sense of its earliest appearance online, or information regarding the offline origins of an item or information before it was shared online.³³²⁰

ii. Source analysis

1816. Source analysis is not a single verification technique, it is a category of verification techniques that seek to answer **who** is the source of the online item or information in question,³³²¹ and **why** information was posted online.³³²²

1817. Answering the who may also be referred to as “attribution”.³³²³ In this sense, “source” refers to the source of the digital information, “which might be a specific website, subscriber or user of a given account or platform, or the identity of the persons who authored, created or uploaded certain content.”³³²⁴ Because the sources of online information are often anonymous or use pseudonyms, this analysis may be challenging and, indeed, identifying who is the source may not always be possible.³³²⁵

1818. Where it is possible to identify the source, then, by answering why information was posted online, source analysis may enable assessment of the reliability and credibil-

³³¹⁷ [GLAN/Bellingcat Report #2](#), paras 15-16; See also Bellingcat: [A Beginner’s Guide to Social Media Verification](#), 1 November 2021.

³³¹⁸ Cf. [Berkeley Protocol](#), para. 201.

³³¹⁹ See Bellingcat: [A Beginner’s Guide to Social Media Verification](#).

³³²⁰ [Berkeley Protocol](#), para. 178.

³³²¹ Bellingcat: [A Beginner’s Guide to Social Media Verification](#); [GLAN/Bellingcat Report #2](#), para. 15.

³³²² Bellingcat: [A Beginner’s Guide to Social Media Verification](#).

³³²³ [Berkeley Protocol](#), para. 177.

³³²⁴ [Berkeley Protocol](#), para. 177. See also Bellingcat: [A Beginner’s Guide to Social Media Verification](#).

³³²⁵ [Berkeley Protocol](#), para. 177.

ity of the source.³³²⁶ Assessment of the source’s posting history and online presence, including affiliations and associations may reveal information relevant to these considerations such as “underlying motivations, interests or agendas, and the degree to which these might influence their veracity”.³³²⁷

1819. Even where the author or source of online information cannot be identified, there are other ways to authenticate online open source information.³³²⁸

iii. Content Analysis

1820. Content analysis is another broad category of verification techniques that seek to answer, among other questions, for example, **where** a photo or video was taken, or **when** it was captured.³³²⁹ It “is the process by which the information contained within a video, image, document or statement is assessed for its authenticity and veracity.”³³³⁰ This is an important aspect of the online open source investigative work undertaken by organisations such as Bellingcat and the Amnesty International Citizen Evidence Lab.³³³¹

1821. Content analysis may entail looking for unique or identifying features when attempting to verify visual data retrieved online, such as a video or photograph. These features may include, for example, “buildings, flora and fauna, people, symbols, and insignia”.³³³² It may also assist to identify “objectively verifiable information”, such as the “weather on a specific day, the name and rank of a commanding officer or the location of a building [...]”.³³³³

1822. For online open source imagery, geolocation seeks to answer where a photo or video was taken.³³³⁴ The Berkeley protocol defines geolocation as “the identification or estimation of the location of an object, an activity or the location from which an item was generated.” More generally, it is “the process of identifying the geographical location of a person, object or event”.³³³⁵ “Geolocation is achieved by comparing identifiable buildings or landscape features (mountains, roads) and other stationary objects (e.g. signposts, telephone poles, trees, seen in a video [or photo] with either or videos [or photos] of the same event or with satellite imagery.”³³³⁶

1823. For online open source imagery, chronolocation seeks to identify when a photo or video was captured.³³³⁷ Chronolocation involves corroborating “dates and times of the events depicted in a piece of information” by, for example, looking to the “length

³³²⁶ [Berkeley Protocol](#), para. 177.

³³²⁷ [Berkeley Protocol](#), paras 179-180. See also Bellingcat: [A Beginner’s Guide to Social Media Verification](#).

³³²⁸ [Berkeley Protocol](#), para. 177.

³³²⁹ Bellingcat: [A Beginner’s Guide to Social Media Verification](#).

³³³⁰ [Berkeley Protocol](#), para. 187.

³³³¹ See [GLAN/Bellingcat Report #2](#), paras 12-13; [citizenevidence.org](#) (last visited on 20/02/2023).

³³³² [Berkeley Protocol](#), para. 188.

³³³³ [Berkeley Protocol](#), para. 189.

³³³⁴ Bellingcat: [A Beginner’s Guide to Social Media Verification](#).

³³³⁵ [GLAN/Bellingcat Report #2](#), para. 15.

³³³⁶ [GLAN/Bellingcat Report #2](#), para. 15; see also [Berkeley Protocol](#), para. 191.

³³³⁷ Bellingcat: [A Beginner’s Guide to Social Media Verification](#).

of the shadows made by sunlight” to “determine the time of day a photograph was taken”.³³³⁸

1824. Another “crucial part of the verification process” involves “visual examination for internal and external consistency”.³³³⁹ As a general matter, this involves examining the content of online information for any internal contradictions and comparing it with other information for corroboration or contradiction.³³⁴⁰ For example, an online video can be broken into frames and examined for inconsistencies or “so-called ‘artefacts of manipulation’, indicative of digitally-generated manipulation”.³³⁴¹

iv. Technical analysis

1825. Turning to consideration of the digital item or file, there may be technical indicia of reliability. Determining whether this is the case involves a technical analysis of the item under consideration, including an analysis of underlying metadata.³³⁴² Technical evidence may involve assessing a number of sources of data. Such analysis will often involve the work of a digital forensic analyst, and it will often be necessary to call such an analyst as an expert in criminal proceedings if it becomes important to understand and assess their techniques.³³⁴³ While a detailed discussion of technical analysis is beyond the scope of this chapter, it may assist the judges to briefly consider metadata analysis.

BERKELEY PROTOCOL, PARA. 183:

“Technical analysis refers to the analysis of a digital item itself, whether it is a document, image or video. In order to test the integrity of a file, that is whether it has been digitally altered, manipulated or modified, open source investigators may find it appropriate to subject it to digital forensic examination, sometimes referred to as digital investigative analysis.”

1826. For the purposes of this sub-section, it may assist to think of metadata as data underlying the content of a digital item. Such data may be found embedded in a file, on a web page, or in underlying source code for an item of relevance. Metadata may be created by users who generate items, others who interact with the item, communications service providers, and the devices on which items are created, stored or viewed. Metadata may include details such as “the creator of a file, its date of creation, upload data, modifications, file size and geodata.” Where available, metadata may assist in demonstrating authenticity of online digital items, helping to show that an item is original as opposed to repurposed, as well as answering the who, where, and when of a digital item.³³⁴⁴

³³³⁸ [Berkeley Protocol](#), para. 191. See also [GLAN/Bellingcat Report #2](#), para. 15

³³³⁹ [GLAN/Bellingcat Report #2](#), para. 15; see also [Berkeley Protocol](#), paras 193-194.

³³⁴⁰ [Berkeley Protocol](#), paras 193-194.

³³⁴¹ [GLAN/Bellingcat Report #2](#), para. 15.

³³⁴² [Berkeley Protocol](#), paras 183-184.

³³⁴³ See e.g. [Berkeley Protocol](#), paras 183-184.

³³⁴⁴ See e.g. [Berkeley Protocol](#), para. 184.

1827. Unfortunately, with online open source information, “[s]ome metadata may be stripped before or during uploading, or as a result of using social media applications”. With respect to social media platforms and other websites, “[o]riginal metadata may be lost because platforms often transcode uploaded media to optimize them for online viewing, sharing or playback” resulting in the creation of new metadata that reflects “the new file, not the original.”³³⁴⁵

v. Chain of Custody and Storage

1828. In addition to standards for verifying online open source information, it is important to consider chain of custody and storage of information collected online. While these are matters for the investigators who have gathered the information, judges may want to be informed of these matters by the party seeking to rely on online open source information as evidence.³³⁴⁶

CASE STUDY. MH17 TRIAL, DISTRICT COURT OF THE HAGUE, VERDICT, 17 NOVEMBER 2022:

Although they were not international court proceedings and therefore do not speak to international standards concerning the assessment of digital evidence, the experience of the District Court of The Hague in The Netherlands in the recent MH17 trial provides a detailed example of the assessment of online open source photographic evidence, involving several of the techniques discussed above. This case study focuses on that example, and the English version of the relevant section of the judgment is quoted in full below:³³⁴⁷

6.2.2.1 Photographs of the Inversion trail

Flight MH17 crashed in eastern Ukraine at 16:20 on 17 July 2014. At 19:23 — about three hours after the crash of flight MH17 — a photograph of a vertical smoke trail was posted on the Twitter account ‘WowihaY’, together with the suggestion that the trail originated from the missile that had downed MH17. The person who posted the photograph on Twitter supplied the contact details of the creator of the photograph. This person was questioned (under his own name) as a witness and stated that he had taken two photographs from the balcony at his home in Torez after hearing two loud bangs, at 16:25 on 17 July 2014. Shortly afterwards, his statement continued, he went to the roof of his apartment building and also took photographs of the plume of smoke coming from the direction of the town of Hrabove (court: one of the crash sites). The creator of the photographs stated that he had sent the original digital photographs to a friend, who posted the photograph online. The said friend contacted the Ukrainian authorities and the SBU subsequently approached the witness. On 20 July 2014, the witness surrendered the camera and the memory card to the SBU and kept copies of the photographs. On 12 August 2014, the camera and memory card were seized by the investigation team.

³³⁴⁵ See e.g. [Berkeley Protocol](#), para. 184.

³³⁴⁶ See generally, [Berkeley Protocol](#), paras 167, 170.

³³⁴⁷ While this case study focuses on the use of particular online open source evidence in the MH17 case, it is important to note that the case involved extensive reliance and analysis of digital evidence. The JIT engaged in a variety of investigative and analytical techniques to verify the reliability of the digital evidence in this case.

Counsel for defendant Pulatov argued that the photographs should be excluded from evidence because they may have been manipulated. In support of this, it was argued that the creator of the photographs has Ukrainian sympathies, his friend who posted the photographs online and received the original photographs has ties to the ATO, and the camera and memory card were in the possession of the SBU before being handed over to the investigation team.

The court once again considers that although having sympathies for one of the parties to the conflict and the fact that information was submitted via the SBU does not exclude evidence, it is grounds for caution. Specifically with regard to the photographs of the inversion trail therefore, the court notes the following. Not only were the creator of the photographs, together with his wife, traced and questioned about when and where the photographs were taken and what happened to them, but also the camera, memory card and the photographs themselves were examined in a variety of ways by various agencies that have no interest in the outcome of the investigation. This examination related not only to what could allegedly be seen on the photograph, but also where and when the photograph was taken, and whether the image in the photograph could have been edited. These findings confirm the statements of the creator of the photographs, as demonstrated by the following.

The photographs and the camera/memory card used to take them and on which they were stored, were examined by the NFI. The NFI sees no indications that the image on the photographs in question was manipulated. According to the NFI, any alteration to the original image would be reflected in the format in which it is stored (it would change from NEF to for example jpeg) or in the NEF numbers of the photographs (the amended file receives a new NEF number), and this is not the case with the files on the seized camera/memory card. The NFI is not aware of any software that permits the targeted modification of the image content of NEF files. Although bytes can be inserted, deleted or overwritten, this is haphazard in nature and would be expected to result in a clearly observable disruption in the image, which has not been observed. In the court's opinion, this satisfactorily proves that the image itself was not manipulated. In this context, counsel for defendant Pulatov also referred to the statement of a witness who was at the scene and who allegedly observed that there were no electricity cables hanging at the location where the photographs were taken, while they can be seen on the photograph that is not zoomed in. However, the court considers this to be incorrect. The witness in question in fact specifically confirmed that he saw the cables hanging near the balcony.

To verify the metadata of the two photographs of the smoke trail, the KNMI conducted investigations into the time at which the photographs were taken. According to the metadata, the two photographs were taken at 16:25 (consistent with the statement from the witness), seven seconds apart. The KNMI was able to verify this time *inter alia* by comparing the photographs of the smoke cloud near the crash site taken shortly thereafter, from the roof, with a video recording of this smoke cloud, the starting time of which could be determined.

The court sees no reason to doubt the results of this investigation.

With reference to the comments of the KNMI regarding the nature of the trail (visible close to the horizon, vertically oriented, more highly developed near the horizon), the court concludes that the trail on the photographs is indeed an inversion trail and not a cloud or vapour trail from an aircraft. Given its shape and colour, the court sees no reason to assume that it could also be the result of the burning of a farm field, as argued by counsel for defendant Pulatov. On the contrary, the straight white striation combined with the grey cloud near the ground corresponds to the inversion trail appearing on photographs of the launch of a Buk missile.

On the basis of the investigation, in which, by drawing in features of the landscape recognisable on the photograph, on a satellite image of the surrounding area, it was possible to ascertain information about both the place where the photograph was taken and the direction from which the inversion trail originates, the court concludes that the photographs were indeed taken in Torez in a southeasterly direction, and that the inversion trail roughly originates from the direction of Pervomaiskyi. In view of the fact that the trail on the photograph is aiming straight up, it can be concluded that what the witness has stated in this regard, that the missile appeared to go straight over his residence, is correct. These conclusions, combined with the time at which the photographs were taken and assuming the position of MH17 at the time the aircraft disappeared from the radar, justify the opinion that these photographs show the inversion trail of a missile launched from the direction of Pervomaiskyi in the direction of MH17 at around the time that MH17 crashed. In view of the above, and since the creator of the photograph that was posted on Twitter under his own name has been questioned as a witness, the court does not consider it necessary to interview as a witness the user of the Twitter account ‘WowihaY’ as conditionally requested by counsel for defendant Pulatov. Accordingly, the court denies this request.

The court considers that an internet search conducted by the investigation team in 2016 for photographs taken in the town of Snizhne revealed two other photographs of a smoke trail. The photographic files were uploaded to a website with the upload date 17 July 2014 and have 17 July 2014 15:22:23+02:00 and 15:22:33+02:00 as their ‘File Modification Date’. In an email message, the uploader indicated that he discovered the photographs on a web (page) of Snezhnyanskiy news on 17 July 2014. According to the KNMI, the trail of cloud is exactly the same in structure and colour as the trail in the photograph from Torez. The cloud pattern on the photographs is also identical. The landscape features visible on the photograph place the photographer in a building in the centre of Snizhne and suggest that the inversion trail originated from a southerly direction. Here too, the inversion trail leads in the direction of MH17’s last observed position. In the court’s opinion, based on the similarities in shape, direction, stated time and direction of origin of the smoke trail, it may be assumed that these images feature the same inversion trail as seen in the aforementioned photograph from Torez. The fact that these photographs were taken separately, were quickly uploaded and were acquired by the investigation team at entirely different times and in entirely different ways mutually validates the authenticity of the images. The fact that the creator of the photographs from Snizhne has not been identified in no way detracts from this.

The court considers that the photographs from Torez and Snizhne each individually suggest only one direction for the origin of the inversion trail, but viewed in combination and taking into account the slope of the landscape, the lines indicating the direction intersect each other slightly west of Pervomaiskyi.

The aforementioned photographs of the inversion trail — in particular the photograph from Torez — are therefore an important source of evidence for the actual launching of a missile in the direction of MH17 shortly before it crashed, and for the location from which it was launched. These conclusions — based on the photographs — are further supported by many other pieces of evidence. The court will address that evidence below.

D. Conclusion

1829. While there are no binding international legal rules or standards governing the assessment of digital evidence, Ukrainian courts may find that the practices of international courts in assessing digital evidence as well as international standards and best practices for researching online open source information offer useful guidance. As

shown above, these practices show that the same principles for assessing non-oral evidence apply to the assessment of digital evidence.³³⁴⁸

1830. As demonstrated in the rules of international criminal tribunals, their judicial decisions, and the international standards for online open source researchers discussed above, probative value, which includes authenticity and reliability, is a primary concern for all non-oral evidence, including digital evidence and open source evidence. The practices of international courts and international standards identify a variety of factors relevant to considerations of probative value.
1831. Indicia of reliability or authenticity may arise from consideration of the source or content of a digital item, as well as more technical digital forensic analysis. As a general rule, it will be necessary to hear witness testimony which can speak to the evidence. Who that witness is will depend on the type of evidence and how it was collected and analysed, as well as the purpose for which it is admitted.
1832. Where the source of the evidence is known and available, that individual or, where it is an entity, such as the telecommunications service providers in the *Ayyash et al.* proceedings before the STL, or a representative of the entity, may be called to speak to the probative value of the evidence. However, even where a source is known, there may be sufficient indicia of reliability through other witnesses and evidence that it may not be necessary to hear from the source. This is demonstrated in the *Bemba* contempt proceedings, where the court did not consider it necessary to hear from the telecommunications service providers who generated call data records as well as in the *Tolimir* case involving aerial imagery, where the court was not able to hear from the providers of aerial imagery.
1833. Where the source is not known or otherwise unavailable, then it may be useful to hear from witnesses who worked with the evidence such as investigators, researchers or analysts. It will often be particularly helpful to hear evidence of the methodologies used to analyse and verify digital evidence. Where a party claims that digital evidence tends to demonstrate the existence of a fact, they should explain why that is the case in court. Again, the *Tolimir* and *Bemba* contempt proceedings provide examples, as does the STL practice in the *Ayyash et al.* proceedings, where a number of investigators and analysts testified regarding the practices and methodologies in generating analytical products or summaries derived from digital evidence. This will also be particularly important with information gathered through online open source investigation.
1834. It may also assist to hear from witnesses who, although not the source, can corroborate the contents of digital evidence from their own personal experiences. This was the case, for example, with the video evidence relied on in the *Lubanga* and *Ntaganda* proceedings.

³³⁴⁸ Cf. Documenting international crimes and human rights violations for accountability purposes: [Guidelines for civil society organisations](#) (Eurojust and the ICC Office of the Prosecutor), Heading 8, Documents and digital information, p. 32.

1835. Finally, where technical matters are at issue, whether they relate to investigative techniques or the workings of the digital evidence itself, it may be necessary or of assistance to hear from an expert witness. Experts featured in many of the cases discussed above, perhaps most prominently in the *Ayyash et al.* proceedings.

PART 3: PREVENTING REVICTIMISATION IN CRIMINAL PROCEEDINGS

I. Ukrainian Law Standards Relevant to Preventing Revictimisation in Criminal Proceedings

A. Admissibility and Acceptability of Witness Questioning at the Stage of Pre-Trial Proceedings in Criminal Proceedings

1. A Short Discussion of Relevant Legislative Provisions of the CPC of Ukraine

1836. The 2012 Criminal Procedure Court of Ukraine (CPC) was first harmonised with European legal standards and had a doctrine of “due legal procedure” applied thereto, where the direct examination by the court of testimony, objects, documents, and expert opinions is a vital component.

Parts 1 and 2 of Article 23 of the CPC *“The court shall examine evidence directly. The court shall take the testimonies of the participants to the criminal proceedings orally. Except as otherwise provided for by this Code, the information derived from testimonies, objects, and documents that have not been directly examined by court shall not be admitted as evidence. The court may admit as evidence testimonies which are not given directly in court only if it is provided for by this Code.”*

Part 1, clauses 3, 4, 5 of part 2, part 5 of Article 87 of the CPC *“Evidence obtained as a result of substantial violation of human rights and fundamental freedoms [...], as well as any other evidence received on the basis of information obtained as a result of substantial violation of human rights and fundamental freedoms, shall be deemed inadmissible. The court shall be required to recognize, in particular, the following acts as substantial violations of human rights and fundamental freedoms [...]: violation of the right of a person to defence; obtaining testimony or explanations from a person who has not been advised of his/her right to refuse to give evidence or answer questions, or if these were obtained in violation of this right; violating the right to cross-examination [...] Under martial law, provisions of this article shall be applicable with due consideration of special aspects established by [Article 615](#) of this Code.”*

part 4 of Article 95 of the CPC *“The court may base its findings only on testimonies taken directly during a court session or those obtained as prescribed by [Article 225](#) of this Code. The court shall not base its decisions on testimonies given to the investigator or public prosecutor, or refer to such, except when obtaining testimony under the procedure determined by [Article 615](#) of this Code.”*

1837. In this way, the legislator strived to prevent cases of obtaining testimony “needed” by the investigator or public prosecutor in the course of pre-trial investigation by using torture, threats, and psychological manipulations.

1838. Currently, the CPC has established a standard that is much stricter than the one required by the existing practice of the ECtHR and many Western jurisdictions. The CPC established a complete prohibition for the court to substantiate its conclusions with extrajudicial testimony, and therefore any person shall be interrogated by the court directly during the trial.
1839. In fact, we have a two-stage procedure for obtaining testimony to be used by the court to substantiate its conclusions: 1) obtaining information during the pre-trial investigation (by questioning by the investigator or public prosecutor during the pre-trial investigation); and 2) its direct perception by the court during the trial or by the investigating judge during the pre-trial investigation.
1840. Repeated interrogations of witnesses and victims cause them to re-experience negative emotions and thoughts of existing threats, which may lead to their re-victimisation. This directly affects the content and forms of testimony.
1841. The Supreme Court repeatedly emphasised the need to comply with the principle of direct examination of evidence, including in its resolutions of 1 February 2021 in case No. 127/4546/16-κ (proceedings No. 51-4127κM18)³³⁴⁹, and of 19 November 2019 in case No. 750 /5745/15-κ (proceedings No. 51-10195κM18)³³⁵⁰.
1842. The content of the principle of direct examination of evidence by the court of appeal differs from the content of this principle in the court of first instance, as it has its specifics. Thus, if the court of appeal only conducts a legal assessment of the situation but does not question facts in the case established by the court of first instance, then no new direct examination of evidence by this court is required. However, in a situation where the court of appeal hears a case and finds that arguments presented in the appeal of the participant in the criminal proceedings regarding the incompleteness of the trial (Article 410 of the CPC) and/or the inconsistency of conclusions of the court of first instance with the actual circumstances of criminal proceedings (Article 411 of the CPC) appear to be well-founded and require verification, such verification shall involve re-examining of the circumstances established during criminal proceedings, in compliance with the requirements of Article 404 of the CPC, which includes a direct examination and evaluation of evidence concerning such circumstances.
1843. Said conclusions are consistent with the opinion of the Supreme Court outlined in resolutions of 19 March 2019 in case No. 382/1058/15-κ (proceedings No. 51-2599 κM 18)³³⁵¹, as well as of 14 April 2021 in case No. 288/1418/17 (proceedings No. 51-6085κM20)³³⁵².
1844. **The principle of direct examination of evidence is not absolute.** As the provisions of Article 23 of the CPC are of the “blanket reference” character, it is necessary to ana-

³³⁴⁹ Resolution of the Supreme Court of 1 February 2021 in case No.127/4546/16-κ (proceedings No. 51-4127κM18). — URL: reyestr.court.gov

³³⁵⁰ Resolution of the Supreme Court of 19 November 2019 in case No. 750/5745/15-κ (proceedings No. №51-10195κM18). — URL: reyestr.court.gov

³³⁵¹ Resolution of the Supreme Court of 19 March 2019 in case No. 382/1058/15-κ (proceedings No. 51-2599κM18). — URL: reyestr.court.gov

³³⁵² Resolution of the Supreme Court of 14 April 2021 in case No. 88/1418/17 (proceedings No. 51-6085κM20). — URL: reyestr.court.gov

lyse other provisions of the criminal procedural law, which are related to establishing cases where the court of first instance has the right to admit as evidence testimony that was not the subject of its direct examination.

- I. Part 2 of Article 97 of the CPC** *“The court has the right to recognize hearsay testimony as admissible evidence irrespective of the possibility of interrogating the person who provided the initial explanations, under exceptional circumstances if such testimony is admissible evidence under other evidence admissibility rules.”*

1845. Such restriction of the principle of direct examination of testimony is only allowed in cases where the court is deprived of the opportunity to interrogate a person who provided initial explanations, on the grounds provided for in part 3 of Article 97 of the CPC of Ukraine.

1846. However, part two of Article 97 of the CPC of Ukraine stipulates that the court has the right to recognise hearsay testimony as admissible evidence, irrespective of the possibility of interrogating the person who provided the initial explanations, under exceptional circumstances if such testimony is admissible evidence under other evidence admissibility rules.

- II. Parts 1, 3–5 of Article 225 of the CPC** *“As an exception, when testimony is required to be obtained during pre-trial investigation and if, due to a threat to the person’s life and health, their serious illness, other circumstances that may prevent interrogating them in court or affect the completeness or reliability of testimony, a party to criminal proceedings or the representative of the legal entity against which such proceedings are conducted, has the right to file a motion with the investigating judge requesting such person to be interrogated in a court session, including simultaneous interrogation of two or more already interrogated persons [...]*
- A witness, a victim, or a person in respect of whom an authorized body has decided to exchange them as a POW may be interrogated under the procedure specified in this article [...]*

When delivering a judgment after a trial under criminal proceedings, the court may disregard evidence obtained under the procedure set forth in this Article only upon giving motives of such decision.

The court may, under trial, question a person who has been interrogated under the rules of this Article, if, inter alia, such interrogation has been conducted in the absence of the defense or if there is a need to clarify or take testimonies regarding any circumstances that were not clarified under interrogations held in the course of the pre-trial investigation.

To verify the veracity of the person’s testimonies and establish whether there are discrepancies with the testimonies given under this Article, such testimonies may be read out during their questioning in the course of a court hearing.”

1847. Article 225 of the CPC contains an institute of “court deposition of evidence”, which is new for Ukraine. Based on this, in case of danger that a particular piece of evidence may disappear, it is “deposited” for the court for further use during the trial on the merits. In other words, a witness or a victim is questioned by the investigating judge, and their testimony is subsequently regarded as evidence in the criminal proceedings.
1848. Part one of Article 225 of the CPC clearly defines two exceptional cases that serve as grounds for the party to criminal proceedings to file a motion for interrogation, in particular: (1) danger to the life or health of the witness or victim; or (2) their severe disease. However, the wording “other circumstances” used in this procedural rule indicates that the list of two such circumstances is not exhaustive, emphasising the possibility of making it impossible to interrogate a witness or a victim in court or to influence the completeness or reliability of their testimony.
1849. Assessment of the emotional state of the witness or victim resulting from the crime, as an exceptional case that may make it impossible to interrogate a person in court or affect the completeness or reliability of testimony, is a problematic issue in terms of considering motions for witness interrogation under Article 225 of the CPC. At the same time, the emotional state, in particular, psycho-emotional tension, which may lead to the development of mental disorders, is a circumstance that can make it impossible to interrogate a person in court or affect the completeness or reliability of testimony. Therefore, when considering motions for interrogation filed based on such grounds, the investigating judge should proceed from the fact that the danger to health also includes a threat to the person’s mental health³³⁵³.
1850. When assessing deposited testimony at the stage of the trial, the court takes note of the following aspects:
- assessment of the existence of legally defined grounds for the deposition procedure (danger to the life or health of a witness or a victim, their severe illness, or other circumstances that may make it impossible to interrogate them in court or may affect the completeness or reliability of the testimony);
 - assessment of compliance with the statutory interrogation procedure under Article 225 of the CPC of Ukraine (interrogation with the involvement of defense when a person was notified of suspicion at the time of its conduct; proper notification of the suspect, their defense counsel, statutory representative about the interrogation time and venue; warning on criminal liability for refusing to testify and giving knowingly false testimony; ensuring the interpreter’s participation when a person being questioned does not speak the language used to conduct criminal proceedings, etc.); and

³³⁵³ Summary of the High Specialised Court of Ukraine concerning the consideration of civil and criminal cases, “On the Practice of Resolving by Investigating Judges of Matters Related to Investigative (Search) Activities.” — URL: advokatrada.org

- reasonable doubts about the reliability of deposited testimony and the possibility of its elimination (in particular, when it contradicts other evidence that was examined at the court hearing).

1851. In case of justified doubts about the reliability of the deposited testimony, the court should decide on whether to repeatedly question the witness or the victim to clarify their testimony, which fully corresponds to provisions of part 4 of Article 96, and parts 4-5 of Article 225 of the CPC. If repeated interrogation is impossible, the court shall be guided by the principle outlined in part 4 of Article 17 of the CPC: “[a]ny doubt as to the proof of a person’s guilt shall be interpreted in this person’s favor”.

III. Part 11 of Article 615 of the CPC *“Testimony obtained during the interrogation of a witness or a victim, including simultaneous interrogation of two or more already interrogated persons, which is conducted during martial law, may be used as evidence in court exclusively when the course and results of such interrogation were recorded using available technical video recording means. Testimony obtained during the interrogation of a suspect, including simultaneous interrogation of two or more already interrogated persons in the criminal proceedings, which is conducted during martial law, may be used as evidence in court exclusively when such interrogation was participated by a defense counsel, and the course and results of such interrogation were recorded using available technical video recording means.”*

1852. Given that war crimes are crimes requiring actions here and now, and interrogation is one of the main tools for obtaining and recording information, the legislators introduced an exception to the general rule of direct examination of evidence.

1853. In the conditions of martial law, the risk to life and health exists for virtually everyone, especially in the territories located in proximity to hostilities. Therefore the court may use extrajudicial testimony to substantiate its conclusions, provided that procedural guarantees are observed, and the entire interrogation is videotaped. In particular, a video recording helps the court to make sure there is no illegal coercion and, in case of doubt, to exclude such evidence from proving guilt beyond a reasonable doubt. Whenever needed, the interrogation may be repeated in the court hearing (if it is possible to ensure the person’s participation in this court hearing).

2. A brief discussion of relevant court decisions

a) The approach of the Supreme Court to applying part 2 of Article 97 of the CPC

1854. In its Resolution of 17 January 2023 in case No. 753/13113/18 (proceedings No. 51-6κM21),³³⁵⁴ the Supreme Court noted that:

³³⁵⁴ Resolution of the Supreme Court of 17 January 2023 in case No. 753/13113/18 (proceedings No. 51-6κM21). — URL: reyestr.court.gov

“90. [...] when deciding on the admissibility of hearsay evidence, the court is obliged to consider, among other things, the circumstances under which primary explanations have been provided, whether these circumstances inspire confidence in their reliability, the persuasiveness of information concerning the fact of provision of primary explanations, the difficulty of refuting hearsay evidence for the party against whom they are directed, etc.

91. In addition, under part six of Article 97 of the CPC, hearsay evidence cannot be admissible evidence of the fact or circumstances for which they are provided if it is not supported by other evidence recognized as admissible according to rules other than the provisions of part two of this article.”

b) The approach of the Supreme Court to applying Article 225 of the CPC

1855. The Supreme Court, in its decision of 23 September 2019 in case No. 346/164/18 (proceedings No. 51-3561sk19)³³⁵⁵, noted that: “the court of appeal saw no reasons to consider unreliable the victim’s testimony, obtained in accordance with Art. 225 of the CPC, since the protocol of the questioning of the minor during the court hearing, shows that the investigating judge conducted the questioning with the involvement of the legal representative of the victim, the convict, and their defense counsel, in whose presence the victim was asked questions about the events related to this criminal proceedings. During the victim’s interrogation, the convict had a chance to ask questions, which he did not object to during the appellate consideration. The defense counsel also actively participated in the victim’s interrogation and asked questions related to case circumstances relevant to these criminal proceedings. The panel of judges of the court of cassation agrees with such an opinion.”

1856. In the decision of 30 April 2020 in case No. 640/19897/16-κ (proceedings No. 51-6241κM19)³³⁵⁶, the Supreme Court cited the following motives:

1857. “... in compliance with the specified requirements of the law, the court of first instance based its verdict on the testimony of witness PERSON_4, who was interrogated during the pre-trial investigation, based on Article 225 of the CPC of Ukraine and in compliance with the provisions of the specified law.

The defense counsel’s statement, according to which, the fact that the prosecutor refused to question the witness already questioned under Article 225 of the Criminal Code (CC) of Ukraine, excludes the possibility of further application by the prosecution and the court of this witness’ testimony in the justification of the court decision, is groundless [...].

As for the defense counsel’s references to the fact that during the pre-trial investigation, the interrogation of the specified witness was conducted in the absence of the defense, which resulted in the defense being deprived of the right to cross-examination, the panel of judges notes the following [...].

It follows from case files that the notice of suspicion to PERSON_1 was served on the latter

³³⁵⁵ The Ruling of the Supreme Court of 23 September 2019 in case No. 346/164/18 (proceedings No. 51-3561ck19). – URL: reyestr.court.gov

³³⁵⁶ Resolution of the Supreme Court of 30 April 2020 in case No.640/19897/16-κ (proceedings No. 51-6241κM19). – URL: reyestr.court.gov

on 26 May 2014, and the interrogation of the witness PERSON_4 took place on 6 May 2014. Therefore, the defense counsel's arguments in this respect are untenable.

Hence, in compliance with Article 95 of the CPC of Ukraine, the court based the verdict on the testimony of the witness PERSON_9.

1858. In the resolution of 13 January 2021 in case No. 539/379/18 (proceedings No. 51-5028KM20)³³⁵⁷, the Supreme Court reached the following conclusion: “The panel of judges also considers ill-founded the arguments of cassation complaints that the convicts’ right to defense has been violated due to the fact that the defense counsel was absent during the interrogation of witness PERSON_10 under Article 225 of the CPC of Ukraine [...].

Based on the audio recording of the interrogation of witness PERSON_10 examined by the court during the court hearing on 12 April 2018, their interrogation may be deemed to have taken place in the presence of suspects PERSON_9, PERSON_8, and PERSON_2, as well as in the presence of the victim PERSON_4, who had the opportunity to ask witness PERSON_10 questions. While the defense counsel of suspects, I. D. Lehkyi, was absent during this interrogation, however, in their statements, suspects noted the possibility of questioning witness PERSON_10 without the participation of their defense counsel.”

c) The approach of the Supreme Court to applying Article 615 of the CPC

1859. Article 615 of the CPC of Ukraine was supplemented with part eleven by Law No. 2201-IX of 14 April 2022; therefore, as of the time of writing the Handbook, there is no case law of the Supreme Court on the application of these provisions.

1860. However, it is worth reviewing the research on the procedural interview³³⁵⁸, which is a modern global trend aimed at increasing the efficiency of law enforcement agencies, as well as taking into account the conclusions of the Supreme Court regarding procedural guarantees in the resolution of 17 January 2023 in case No. 753/13113/18 (proceedings No. 51-6KM21)³³⁵⁹, namely:

“59. [...] in the case of using extrajudicial testimony, other aspects of the trial should be subjected to more thorough scrutiny. The greater the weight of the absent witness’s testimony for the final verdict of guilt, the more attention must be paid to ensuring the rights of the defense to balance this critical impediment to an effective defense [...].

62. *The Court deciding on the case must provide the defense with the amplest opportunities to refute this evidence, both in terms of methods used to obtain it, including the fulfillment of admissibility requirements and other procedural guarantees[20], and in terms of credibility, so that the opportunities of the accused to exercise effective defense were not violated to the extent that would undermine their right to a fair trial.[21] When assessing both individual evidence and their totality, courts must ensure a fair and proper evaluation of the reliability of this evidence, guided by the standard of belief “beyond a reasonable doubt.”*

³³⁵⁷ Resolution of the Supreme Court of 13 January 2021 in case No. 539/379/18 (proceedings No. 51-5028KM20). — URL: reyestr.court.gov

³³⁵⁸ Research on the procedural interview, conducted upon the initiative and with the organizational and financial support of the “Human Rights and Justice” Program of the International Renaissance Foundation. — URL: justtalk.com

³³⁵⁹ Resolution of the Supreme Court of 17 January 2023 in case No. 753/13113/18 (proceedings No. 51-6KM21). — URL: reyestr.court.gov

63. Therefore, in assessing whether the convict was guaranteed their right to a fair trial, the Court shall consider the restrictions of the defense on defending their position due to the impossibility of cross-examining the victim.

64. The ECtHR in the cases of *Al-Khawaja* [22] and *Schatschaschwili* [23] summarised its approaches to the effect of such a situation on the fairness of the trial as a whole.

65. As noted by the ECtHR, when applying these principles, three questions should be answered: (1) whether there were good reasons for the witness's absence and the admission of the absent witness's testimony as evidence; (2) whether the testimony of the absent witness was the sole or decisive basis for the verdict of guilty or had a significant effect on the finding; and (3) whether there were sufficient balancing factors, considering strict procedural safeguards, that compensated for the complication faced by the defense as a result of the admission of evidence that was not confirmed through cross-examination of witnesses and ensured that the trial was fair in its entirety.

66. The ECtHR also noted that the possibility to interrogate a prosecution witness, who is absent during the trial, at the stage of the pre-trial investigation is an important procedural guarantee that can compensate for the complications of the defense caused by such a witness's absence during the trial [...].

88. The court notes that when the testimony in the case circumstances is decisive, and its assessment also affects the evaluation of other evidence in the case, the lack of any analysis of such evidence is an explicit violation of the right to defense and clearly does not comply with the guarantees of a fair trial, especially under conditions where the defense is deprived of the opportunity to use cross-examination [...].

139. To meet the standard of proof beyond a reasonable doubt, it is not enough that the prosecution's version is merely more likely than the defense's version. The legislature requires that any reasonable doubt in the version of events presented by the prosecution be refuted by the facts established based on admissible evidence, and the only version that a reasonable and impartial person may use to explain the totality of facts established in court is the version of events that provides grounds for finding the person guilty of the charges brought."

B. The possibility to testify via video connection

1. A short discussion of relevant legislative provisions of the CPC of Ukraine

1861. Another restriction of the principle of direct examination of testimony during the trial concerns the possibility of obtaining and using the testimony of a victim or witness by the court by interrogating via a video conference while broadcasting from another room (remote pre-trial investigation).

**Part 1 of Article
232 of the CPC**

“Interrogation of individuals and identification of individuals or objects during a pre-trial investigation may be conducted in the mode of video conference involving transmission from other premises (remote pre-trial investigation) under the following circumstances:

certain individuals are not able to personally attend pre-trial proceedings for health or other valid reasons;

*safety of individuals needs to be guaranteed;
a younger minor or minor witness or a victim is interviewed;
such measures are necessary to ensure prompt pre-trial
investigation;
there are other grounds deemed sufficient by the investigator, public
prosecutor, or investigating judge.”*

**Parts 1 and 9 of
Article 336 of
the CPC**

*“Judicial proceedings may take place in a video conference format
(remote judicial proceedings) with transmission from another
premise, including beyond the court premises, if:
it is impossible for a participant in criminal proceedings to directly
attend judicial proceedings for the reason of health or for other valid
reasons;
safety of individuals needs to be guaranteed;
a younger minor or minor witness or a victim is interviewed;
such measures are necessary to ensure prompt judicial proceedings;
there are other grounds recognized as sufficient by the court [...]
Remote judicial proceedings may be conducted in accordance with
the rules of this Article in the courts of first, appellate, and cassation
instances in the course of judicial proceedings related to any issues,
the consideration of which falls within the jurisdiction of the court.”*

2. A brief discussion of relevant court decisions

1862. The Supreme Court, in its decision of 19 November 2019 in case No. 750/5745/15-κ (proceedings No. 51-10195κM18)³³⁶⁰, noted that: “certain flexibility is inherent in the principle of direct examination, like any other general principle, when applied in specific circumstances. Depending on the circumstances, this principle is implemented in various forms, as the court must coordinate it with other principles of the criminal process and/or the legitimate interests of society or individuals. For instance, the principle of direct examination is subject to certain legitimate restrictions in the case of interrogation of a person to whom security measures were applied or who is not physically present in the courtroom (Article 232 of the CPC), and such legitimate restrictions cannot be considered a violation of the principle of direct examination. Additionally, in most cases, courts of appeals and cassation base their conclusions on the testimony given in the court of first instance since multiple interrogations of the person in courts of different instances without valid reasons would not only be burdensome for such a person, participants, and society but would also contradict to the very essence of the system of different court instances.”

³³⁶⁰ Resolution of the Supreme Court of 19 November 2019 in case No. 750/5745/15-κ (proceedings No. №51-10195κM18). — URL: reyestr.court.gov

C. Other witness safeguarding measures

1. A short discussion of relevant legislative provisions of the CPC of Ukraine

1863. **The CPC mentions no special measures to prevent the traumatising of witnesses or victims.** Nor are there recommendations concerning the interaction during the interrogation of and communication with the category of vulnerable victims or witnesses. There are however, certain aspects designed to prevent a negative impact on mental health and re-traumatisation in the course of investigative and procedural activities with respect to younger minors or minors as witnesses or victims.

Part 1 of Article 59 *“If the victim is an individual who has not attained the age of majority or who is recognized, in accordance with the procedure established by law, as legally incapacitated or partially incapacitated, his/her statutory representative shall be involved in participating in a procedural action together with the individual concerned.”*

Part 9 of Article 224 of the CPC *“In criminal proceedings involving crimes against sexual freedom and sexual inviolability of a person, as well as crimes involving violence or threat of violence, two or more persons that have already been interrogated may not be interrogated concurrently to clarify the reasons for their testimonies’ divergence if a younger minor or minor is present at the interrogation together with the suspect.”*

Article 226 of the CPC *“A younger minor or a minor shall be interviewed in the presence of his/her statutory representative, an educator or psychologist, and, if necessary, a doctor.
An interview of a younger minor or a minor shall not last more than one hour without breaks and not more than two hours per day in general.
Persons who have not attained sixteen years of age shall be notified of their duty to give true testimony but shall not be warned of criminal liability for a refusal to give testimony and for deliberately misleading testimony.
Prior to interviewing, persons referred to in part 1 of this Article shall be notified of their duty to attend the interview, as well as their right to object to questions and to ask questions.”*

Article 227 *“If investigative (detective) actions are taken involving a younger minor or a minor, the presence of his/her statutory representative, an educator or psychologist, and, if necessary, a doctor shall be guaranteed.
Prior to an investigative (detective) action, a statutory representative, educator, psychologist, or doctor shall be notified of their right to ask the younger minor or minor clarifying questions upon permission.”*

In exceptional cases, if the participation of a statutory representative may harm the interests of a younger minor or minor witness or victim, the investigator or public prosecutor may, upon a motion of the younger minor or minor or proprio motu, limit the presence of a statutory representative at certain specific investigative (detective) actions or exclude him/her from participating in criminal proceedings, and invite another statutory representative for this purpose instead.”

Article 353 of the CPC

“A younger minor and, upon court’s discretion, a minor shall be examined as a witness in the presence of the statutory representative, educator or psychologist and, if necessary, a doctor.

The presiding judge shall inform the witness who has not attained the age of sixteen of his/her obligation to give true testimonies, but shall not warn him/her of criminal liability for refusal to testify and for deliberately misleading testimony, and shall not administer him/her an oath.

Before the beginning of the examination, the statutory representative, educator, psychologist, or doctor shall be informed of their duty to be present during the examination as well as of their right to object to questions and ask questions. The presiding judge shall have the right to dismiss the question asked.

Whenever it is necessary to impartially ascertain facts and/or protect the interests of the witness who is a younger minor or minor, he/she may, upon a court ruling, be examined outside the courtroom, in other premises, by using video conference (remote judicial proceedings).

A victim who is a younger minor or minor shall be examined in accordance with the rules set forth in this Article.”

1864. The analysis of the norms of the current criminal procedural legislation allows for concluding that when conducting investigative (search) activities and during court proceedings involving young children or minors, the following must be taken into account:

- the possibility to conduct interrogation not only at the pre-trial investigation venue but also in another child-friendly place (at the place of residence or education, in the Green Room, Barnabus center, etc.);
- involvement of statutory representatives, who can be parents (adoptive parents), and in their absence — guardians or caregivers of the person, other close relatives or family members of legal age, as well as representatives of guardianship and custody bodies, and institutions and organisations under whose guardianship or care the minor is;
- involvement of a psychologist, educator, and, when necessary, a doctor;
- questioning via a video conference and mandatory recording using technical video recording means (audio and video recording of the interrogation at the pre-trial investigation stage may be the subject of research during the trial, especially if the child is not interrogated in the course of the trial);

- time limits: questioning of a minor victim or witness cannot continue without a break for more than one hour, and in general — for more than two hours a day;
- persons who have not attained sixteen years of age shall be notified of their duty to give true testimony and shall not be warned of criminal liability for a refusal to give testimony and for deliberately misleading testimony; and
- ban on the interrogation involving a young child or minor witness or victim together with a suspect in criminal proceedings regarding crimes against sexual freedom and sexual integrity, crimes committed with the use of violence or threats of such violence.

1865. Ukrainian legislation does not clearly establish the rights of educators and psychologists, and there is no mechanism for selecting such specialists to participate in the interrogation of a minor. There exist no criteria that could satisfy the need for quality participation during such interrogation.

1866. The interrogation process via a video conference must be recorded using technical video recording means under part 9 of Article 232 of the CPC. A technical medium with video and audio recordings of the child's interrogation should be attached as an appendix to the court session log and files of the criminal proceedings. If the interrogation was conducted following Article 232 of the CPC, the technical medium shall be attached as an appendix to the official record of the child's interrogation.

1867. The CPC also contains provisions that, to a certain extent, refer to security measures in criminal proceedings, including those concerning victims and witnesses at risk of intimidation, possible retaliation, or repeated and secondary victimisation.

Clause 5, part 1 of Article 56 of the CPC *“Throughout the entire criminal proceedings, a victim shall have the right [...]:
in the presence of legitimate grounds, to have the security of himself/herself, his/her close relatives or family members, property and dwelling ensured.”*

Clause 8, part 2 of Article 66 of the CPC *“The witness may [...]:
file a motion for ensuring their security in cases stipulated by law.”*

Part 8 of Article 336 of the CPC *“A protected person may be questioned through video conference with such changes of appearance and voice that shall make his/her identification impossible.”*

Clauses 5, 9, 10, 14, and 15 of Article 352 of the CPC *“Upon the motion of a party to criminal proceedings or the witness him/herself, the witness concerned shall be examined in the absence of a certain already examined witness.”*

Under exceptional circumstances and to ensure the security of a witness to be examined, the court, proprio motu, or upon the motion of the parties to the criminal proceedings or of the witness himself/herself, shall give a reasoned ruling ordering the examination of the witness concerned by using technical means and from a different premise, including that which is outside the court premises, or in a different manner that makes his/her identification impossible, and shall ensure that parties to the criminal proceedings have an opportunity to ask questions and hear answers to them. If there is a danger that the witness's voice can be identified, the examination may be accompanied by voice distortion [...].

To ensure the security of the whistleblower, he/she shall be examined as a witness in compliance with the Law of Ukraine 'On Ensuring the Safety of Persons Participating in Criminal Proceedings' [...].

The witness may be examined repeatedly during the same or next court session upon his/her own motion, upon a motion of a party to criminal proceedings, or upon the court's initiative, particularly if, in the course of the trial, it emerged that the witness could give testimony regarding circumstances in respect of which he/she had not been examined [...].

The court may order simultaneous examination of two or more already examined participants to the criminal proceedings (witnesses, victims, the accused) to clarify the reasons for differences in their testimonies, and such examination shall be held with due account for the rules laid down in part nine of Article 224 of this Code [...]."

**Part 2 of
Article 353 of
the CPC**

"A victim shall be examined in compliance with the rules laid down in parts 2, 3, and 5–14 of Article 352 of this Code."

1868. **The CPC provides for the possibility of holding closed court hearings**, which is one of the procedural guarantees of non-disclosure of information about the private life of individuals, and also creates conditions for a full and comprehensive examination of all factual circumstances of criminal proceedings. After all, it is possible that a witness or a victim, fearing retaliation or the disclosure of information humiliating their honor and dignity, may keep silent about the circumstances essential for the proceedings and refrain from giving detailed information about the facts they are aware of. To prevent this, the legislators provided in Article 27 of the CPC the possibility of conducting criminal proceedings in the closed court hearing involving only the parties and other participants in the criminal proceedings.

**Part 2 of
Article 27 of
the CPC**

“The investigating judge and the court may decide to conduct criminal proceedings in a closed court session throughout the proceedings or a separate part thereof only in the cases as follows:

- 1) if the accused is a minor;*
- 2) court hearing on the criminal offense against sexual freedom or integrity;*
- 3) with a view to preventing disclosure of information on the private and family life of a person or circumstances which degrade human dignity;*
- 4) if conducting proceedings in the open court session may result in the disclosure of a secret protected by law;*
- 5) if there is a need to ensure the safety of persons involved in criminal proceedings.”*

This list is exhaustive and is not subject to extended interpretation.

2. A brief discussion of relevant court decisions

1869. The Supreme Court, in its decision of 6 March 2018 in case No. 686/12914/16-к (proceedings No. 51-173кМ18)³³⁶¹, noted that: “parts 1 and 4 of Article 354 of the CPC determine that the interrogation of a young child witness, and at the discretion of the court, a minor witness, shall be conducted in the presence of a statutory representative, an educator or a psychologist, and in cases when it is necessary to objectively clarify the circumstances and/or protect the rights of a young child or minor witness, upon the court’s order, such witness may be interrogated outside the courtroom in another room using a video conference (remote court proceedings) [...]. Additionally, as established by the court of appeal, the interrogation of the minor victim, considering their psychological state resulting from the crime committed against them and the presence of strangers during the interrogation, was conducted in compliance with part 10 of Article 352 of the CPC, and the Supreme Court agrees with this conclusion of the court.”

1870. In the resolution of 17 January 2023 in case No. 753/13113/18 (proceedings No. 51-6кМ21)³³⁶², the Supreme Court noted that: “48. the refusal of the court of first instance to interrogate the victim was justified under the circumstances of this case, the Court does not deem extrajudicial testimony of the victim obtained during the interview in the Green Room to be inadmissible in the meaning of part 1 taken together with clause 5 of part 2 of Article 87 of the CPC [...].

56. In this case, the defense did not cite any evidence on how the fact that the victim was interviewed by the psychologist significantly violated the rights of the defense under the case circumstances. Thus, the Court does not consider that the victim’s testimony was obtained by an “improper subject” to be a sufficient reason for recognizing the victim’s testimony during the interview in the Green Room as inadmissible.”

³³⁶¹ Resolution of the Supreme Court of 6 March 2018 in case No. 686/12914/16-к (proceedings No. 51-173кМ18). — URL: reyestr.court.gov

³³⁶² Resolution of the Supreme Court of 17 January 2023 in case No. 753/13113/18 (proceedings No. 51-6кМ21). — URL: reyestr.court.gov

1871. In this resolution, the Supreme Court noted that the child’s interview must be conducted by a person trained explicitly for such purposes: “*Competencies needed to perform such functions are contained in clause 42 of the United Nations Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime [...] 75. The verdict is missing the assessment of whether the interviewing psychologist had appropriate skills, just like any other information on her training for the performance of such a role.*”
76. There is also no assessment as to how well the invited psychologist understood the tasks of interviewing in the Green Room [...].
102. psychologist’s statements both in court and in the ‘professional opinion’ cannot be deemed the testimony of the witness in the meaning of Article 95 of the CPC and constitute an opinion or a conclusion by their nature [...].
104. If the conclusion or opinion does not concern facts reported by the witness but results from a certain examination, rules provided for the expert opinion should be applied to such a conclusion [...].
105. The Court agrees with the defense that such a conclusion is inadmissible as the psychologist that compiled it is not a forensic expert, i.e., her qualification in conducting such examinations is not duly confirmed. Hence, she bears no legal responsibility for conclusions reported by her to the Court.”

D. Judicial control over the witness’s interrogation

1. A short discussion of relevant legislative provisions of the CPC of Ukraine

1872. The judge has a key role in the court hearing since the judge actually manages the course of the hearing, and the evaluation of testimony depends on the judge.

Part 1 of Article 321 of the CPC “*The presiding judge shall manage the court session, ensure the sequence and order of procedural actions and that participants to criminal proceedings exercise their procedural rights and fulfill their duties, guide the trial towards assuring the ascertainment of all circumstances of criminal proceedings, removing from the trial everything which has no relevance for criminal proceedings.*”

Part 3 of Article 352 of the CPC “*The court shall control the progress of examination of witnesses, to avoid losing time in vain, protect witnesses from insults or prevent violations of examination rules.*”

Part 2 of Article 353 of the CPC “*A victim shall be examined in compliance with the rules laid down in parts 2, 3, and 5–14 of Article 352 of this Code.*”

1873. An investigation is a traumatic and stressful experience for vulnerable witnesses and victims, especially minors and victims of violence. One of the judge’s tasks during the questioning is to ensure a sense of security and refrain from re-traumatizing a person.

1874. To help judges and law enforcement officers, numerous Methodological guidelines³³⁶³, Memos³³⁶⁴, and Guides³³⁶⁵ on interviewing children who became witnesses and/or victims of a crime have been prepared, which contain detailed advice on the process of preparing for the interview and interviewing a child, as well as basic requirements for the specialist's behavior during child's interview.
1875. The Dutch protocol for working with witnesses is also a useful tool for judges (investigating judges), which will guarantee the protection of the interests of all participants in the interrogation.³³⁶⁶
1876. The presiding judge needs to avoid a formal approach to the interrogation of the victim or witness, as adverse changes in the latter's thinking and mood can have direct consequences for the interrogation. Paying attention to non-verbal signals — appearance, facial expressions, gaze, tone of voice, etc. — is critical.
1877. The CPC does not contain a separate article that would determine the powers of the presiding judge at the court hearing, including those aimed at preventing the traumatization of the victim/witnesses. At the same time, based on the analysis of the above guidelines, one can single out a list of the powers of judges (investigating judges), which is non-exhaustive and not directly regulated by law, to control the questioning of a person to avoid re-victimisation and, at the same time, prevent violating the rights of the accused, in particular:
- in preparing the interrogation of the victim/witness based on the available materials and/or information provided by the parties to the criminal proceedings, assess, whenever possible, their vulnerability (age; psychological issues; nature of the crime committed; fear of retaliation, etc.), as well as the importance of their interests and interests of each of the parties;
 - actively apply the possibility of conducting remote court proceedings defined in Articles 336, and 352 of the CPC, in particular, conducting an interrogation of the victim or witness using technical means from other premises, including the premises located outside the court;
 - in the event of an interrogation of the victim or witness from another room using technical means, with the consent of the parties to the criminal proceedings, consider the prosecutor's and the lawyer's possibility to submit their questions in writing for the judge (investigating judge) to ask during the interrogation; hold additional court hearings, as needed;
 - involve the psychologist as a specialist, as needed;

³³⁶³ Methodological guidelines for judges on the organization of work with children based on the Green Room methodology. — URL: www.unicef.org. Also, see Methodological guidelines for questioning children who witnessed and/or were victims of violence, as well as committed violence: Methodological handbook / Compiled by: D. Puras, O. Kalashnyk, O. Kochemyrska; T. Tsiuman; Under the general editorship: T. Tsiuman, Kyiv: Individual Entrepreneur KLYMENKO, 2015. — 114 p. — URL: rm.coe.int

³³⁶⁴ Memo for judges, "Peculiarities of Questioning a Minor Victim or Witness of Crime." — URL: drive.google.com

³³⁶⁵ Guide for specialists participating in the questioning of minor witnesses and victims, "How to Interview a Child." — URL: childfund.org

³³⁶⁶ The protocol for working with witnesses, prepared by the Information Center for Working with Witnesses *Kenniscentrum Getuigen*) and psychologist George Smith.

- strengthen the sense of physical safety of the witness or victim by taking measures regarding their arrival, presence in the courtroom, and departure;
- provide the person with information on the interrogation in advance (the purpose, procedure, and role of all participants in the interrogation; information on the building and the courtroom (whenever needed, provide the opportunity to visit the place of interrogation the day before), notify whether the interrogation is closed or open, about people to be present, etc.);
- observe and encourage other participants in criminal proceedings to adhere to the principles of justice (the best interests of the child, honor, dignity, protection against discrimination, etc.);
- create an atmosphere where the victim/witness will feel safe, monitor their well-being (nervousness, distraction, isolation or strong emotional reaction, etc.);
- make sure that questions during the interrogation are sensitive, respectful, non-judgmental, and non-offensive;
- ensure that questions are short, simple, without legal terms and double objections, and correspond to the educational level of the person;
- ensure that during the interrogation in court, a person is protected from any information that may harm their well-being;
- ensure that the interrogation in the court is adapted to the pace and duration of attention focus (provide breaks and make sure that the hearing does not last too long);
- ensure, to the extent possible, that the interrogation of the child takes place in a child-friendly environment that meets the “safe place” criterion, without the presence of the parties (whenever possible, in specialised courtrooms or outside the court, in Green Rooms, Barnahus centers, etc.);
- when needed, ensure that the interrogation of the victim/witness in court takes place without direct eye contact and communication with the suspect/accused;
- ensure the possibility of watching a video recording of the interrogation of the child or another vulnerable person in a pre-trial investigation to avoid additional traumatization during repeated interrogation in court;
- remove questions asked by participants in the court proceedings that are repeated, refer to personal life, are not related to a criminal offense, may embarrass or land in an awkward spot (due to cultural values and norms), or are aimed at intimidation, etc.

II. International law and standards relevant to preventing revictimisation in criminal proceedings

A. Introduction

1878. This chapter outlines international standards and guidelines relevant to preventing revictimisation of witnesses and victims as a result of their participation in criminal

proceedings.³³⁶⁷ While there are no international legal standards expressly governing the prevention of revictimisation, consideration of this issue and the availability of measures to address it raise issues of human rights law, including not only the rights of witness victims, but the limitations on those rights when they are necessarily balanced against the rights of accused persons in international criminal proceedings.

1879. While there are no special rules relevant to preventing revictimisation that arise specifically when adjudicating war crimes or other international crimes, international criminal tribunals have been concerned with the protection of witnesses and victims since their modern inception beginning with the UN Security Council’s adoption of the Statute of the ICTY. International criminal tribunals generally provide for protective measures for witnesses who are objectively at risk of harm, including specific measures for the most vulnerable victim-witnesses of sexual violence crimes. The ICC has taken innovative steps in this regard, including special measures short of formal protective measures that are more readily available for witnesses and comprehensive and detailed processes of witness familiarisation and vulnerability assessment that are, among other purposes, designed to facilitate witness testimony and minimise the possible trauma that may result from giving testimony.

B. What is Revictimisation?

1880. Revictimisation, or secondary victimisation, is “the victimisation that occurs not as a direct result of the criminal act but through the response of institutions and individuals to the victim.”³³⁶⁸ Given that this chapter is for judges, it focuses on avoiding revictimisation in the context of participation in criminal proceedings.

C. International legal standards relevant to preventing revictimisation

1881. There is no international law governing the prevention of revictimisation, *per se*. International legal standards relevant to revictimisation arise from international human rights law. Specifically, international human rights instruments binding in Ukraine guarantee an accused’s right to examine or have examined witnesses against him.³³⁶⁹ At the same time they recognise that criminal “proceedings should be organized in such a way as to not unjustifiably imperil the life, liberty or security of witnesses, and in particular those of victims called upon to testify, or their interests coming generally with the ambit of Article 8 of the Convention”.³³⁷⁰

³³⁶⁷ This chapter does not concern participating victims, *per se*, though it will be relevant to their experience, in particular where they are permitted to be dual status participating victims and witnesses who are called to give evidence as opposed to exercising the option of sharing their views and concerns.

³³⁶⁸ [Handbook on Justice for Victims: On the use and application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UNODCCP and Centre for International Crime Prevention](#), 1999, p. 9.

³³⁶⁹ [ICCPR](#), Article 14(3)(e); [ECHR](#), Article 6(3)(d). Ukraine has ratified the [ICCPR](#) and the [ECHR](#). See also, Human Rights Committee, [General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial](#), CCPR/C/G/32, 23 August 2007, para. 39; ECtHR, [Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial \(criminal limb\)](#), paras 222, 308, 495-537; updated on 31 August 2022. Ukraine has ratified the [ICCPR](#) and the [ECHR](#).

³³⁷⁰ See e.g., ECtHR, *Y. v. Slovenia* [Judgement](#), para. 103. See also [ECHR](#), Articles 3, 8; [ICCPR](#), Articles 6, 9, 17.

1. Relevant jurisprudence of the European Court of Human Rights

1882. The European Court of Human Rights (“ECtHR”) has identified relevant considerations for balancing the accused’s rights to examine the evidence against them with the legitimate interests of witnesses and victims. While this body of law is not concerned directly with revictimisation, the principles governing this balance between the accused’s rights and victims’ interests are highly relevant to this issue.
1883. As a preliminary matter, to the extent this involves the admission of evidence, the ECtHR has consistently noted that “the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them”.³³⁷¹
1884. Under Article 6(3)(d) of the ECHR, an accused has a general right to examine the evidence against him in a public hearing.³³⁷²

ECTHR, *AL-KHAWAJA AND TAHERY V. THE UNITED KINGDOM*, GRAND CHAMBER JUDGEMENT, PARAS 118, 127

“[B]efore an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe upon the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings. These principles particularly hold true when using witness statements obtained during police inquiry and judicial investigation at a hearing.”

[...]

“The underlying principle is that the defendant in a criminal trial should have an effective opportunity to challenge the evidence against him. This principle requires not merely that a defendant should know the identity of his accusers so that he is in a position to challenge their probity and credibility but that he should be able to test the truthfulness and reliability of their evidence, by having them orally examined in his presence, either at the time the witness was making the statement or at some later stage of the proceedings.”

1885. This right is not without limits.³³⁷³

³³⁷¹ See e.g., ECtHR, *Doorson v. The Netherlands* [Judgement](#), para. 67.

³³⁷² ECtHR, *Al-Khawaja and Tahery v. The United Kingdom* [Grand Chamber Judgement](#), paras 118, 127.

³³⁷³ ECtHR, *Doorson v. The Netherlands* [Judgement](#), para. 70.

ECTHR, *DOORSON V. THE NETHERLANDS*, JUDGEMENT, 26 MARCH 1996, PARA. 70.

“It is true that Article 6 (art. 6) does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consider. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 (art. 8) of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperiled. Against this background, principles of a fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify”.

1886. It follows from these principles that: (1) there should be a good reason for the absence of a witness; and (2) where a conviction is based solely or to a decisive degree on the evidence of an unexamined witness, this may violate the accused’s fair trial rights.³³⁷⁴
1887. The death of a witness has been clearly established to qualify as a good reason for their non-attendance and the admission of their witness statement.³³⁷⁵
1888. Where the absence is due to fear, the issue is whether there are objective grounds supported by evidence for the witness’s fear.³³⁷⁶ When a witness has not been examined at a prior stage of the proceedings, admission of a witness statement in lieu of live testimony must be a last resort. Before excusing a witness from testifying on grounds of fear, the court must be satisfied that “all available alternatives, such as witness anonymity and other special measures, would be inappropriate or impracticable”.³³⁷⁷

³³⁷⁴ ECtHR, *Al-Khawaja and Tahery v. The United Kingdom Grand Chamber Judgement*, para. 119.

³³⁷⁵ ECtHR, *Al-Khawaja and Tahery v. The United Kingdom Grand Chamber Judgement*, para. 121.

³³⁷⁶ ECtHR, *Al-Khawaja and Tahery v. The United Kingdom Grand Chamber Judgement*, para. 124.

³³⁷⁷ ECtHR, *Al-Khawaja and Tahery v. The United Kingdom Grand Chamber Judgement*, para. 125.

ECTHR, *AL-KHAWAJA AND TAHERY V. THE UNITED KINGDOM*, GRAND CHAMBER JUDGEMENT, PARAS 123-124:

“When a witness’s fear is attributable to the defendant or those acting on his behalf, it is appropriate to allow the evidence of that witness to be introduced at trial without the need for the witness to give live evidence or be examined by the defendant or his representatives — even if such evidence was the sole or decisive evidence against the defendant. To allow the defendant to benefit from the fear he has engendered in witnesses would be incompatible with the rights of victims and witnesses. No court could be expected to allow the integrity of the proceedings to be subverted in this way. Consequently, a defendant who has acted in this manner must be taken to have waived his rights to question such witnesses under Article 6 § 3 (d). The same conclusion must apply when the threats or actions which lead to the witness being afraid to testify come from those who act on behalf of the defendant or with his knowledge and approval.”

[...]

“There is [...] no requirement that a witness’s fear be attributable directly to threats made by the defendant in order for that witness to be excused from giving evidence at trial. Moreover, fear of death or injury of another person or of financial loss are all relevant considerations in determining whether a witness should not be required to give oral evidence. This does not mean, however, that any subjective fear of the witness will suffice.”

1889. With regard to the sole or decisive rule enumerated above, sole evidence should be understood as “the only evidence against an accused”. The “word ‘decisive’ should be narrowly understood as indicating evidence of such significance or importance as is likely to be determinative of the outcome of the case. Where the untested evidence of a witness is supported by other corroborative evidence, the assessment of whether it is decisive will depend on the strength of the supportive evidence; the stronger the corroborative evidence, the less likely that the evidence of the absent witness will be treated as decisive.”³³⁷⁸
1890. The sole and decisive rule should be considered in the overall context of the fairness of proceedings; therefore, even where a conviction is based solely or decisively on the evidence of absent witnesses, this does not automatically mean there has been a violation of the right to a fair trial. But the “question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place.”³³⁷⁹
1891. These principles were developed further in the case of *Schatschaschwili v. Germany*, where the court considered the implications of these considerations in detail.³³⁸⁰ Just as with the sole and decisive test, “the absence of good reasons for the non-attendance of a witness cannot of itself be conclusive of the unfairness of a trial”, though it may be a “very important factor” in reaching such a conclusion.³³⁸¹ Whether there was

³³⁷⁸ ECtHR, *Al-Khawaja and Tahery v. The United Kingdom* Grand Chamber Judgement, para. 131.

³³⁷⁹ ECtHR, *Al-Khawaja and Tahery v. The United Kingdom* Grand Chamber Judgement, paras 146-147.

³³⁸⁰ ECtHR, *Schatschaschwili v. Germany* Grand Chamber Judgement. Although this involved claimed PTSD on behalf of the absent witnesses, the German Regional Court did not accept this as justification (see para. 133). Accordingly, this case does not assess whether this sort of vulnerability could qualify as good reasons for non-attendance.

³³⁸¹ ECtHR, *Schatschaschwili v. Germany* Grand Chamber Judgement, para. 113.

good reason for the absence of a witness is to be determined from the trial court’s perspective.³³⁸²

1892. Where a witness is absent due to unreachability, the state has an obligation to make “all reasonable efforts” to secure their attendance, including actively searching for the witness, resort to international legal assistance where a witness is abroad, and careful scrutiny of the reasons for absence by the trial court.³³⁸³
1893. The court addressed counterbalancing factors in detail:
- a. “Counterbalancing factors must permit a fair and proper assessment of the reliability of that evidence”;³³⁸⁴
 - b. The extent of necessary counterbalancing factors depends on the weight of an absent witness’s evidence; the more important the evidence, the more “weight the counterbalancing factors will have to carry in order for the proceedings as a whole to be considered fair”;³³⁸⁵
 - c. Approaching untested evidence with caution is an important safeguard, including showing that the statements of absent witnesses carry less weight, providing detailed reasoning as to why such evidence may be reliable, and, where applicable, giving appropriate jury instructions regarding an absent witness’s evidence;³³⁸⁶
 - d. Showing a video-recording of an absent witness’s questioning to enable assessment of demeanour and reliability by those in the court is an additional safeguard;³³⁸⁷
 - e. The availability of corroborative evidence or similar fact evidence are further considerable safeguards;³³⁸⁸
 - f. Another safeguard is offering the defence the opportunity to put questions to an absent witness whether during the investigation stage or indirectly “for instance in writing” during the trial;³³⁸⁹ and
 - g. The defendant must have an opportunity to give his version of events and cast doubt on the credibility and reliability of an absent witness.³³⁹⁰
1894. The same principles discussed above in regard to witness absence apply to other instances where the defendant was not in a position to challenge the probity, credibility, truthfulness and reliability of witness evidence by having the witnesses orally examined in his or her presence at some stage of proceedings, including where statements of anonymous witnesses are admitted or where there are “special examination arrangements”.³³⁹¹

³³⁸² ECtHR, *Schatschaschwili v. Germany* [Grand Chamber Judgement](#), para. 119.

³³⁸³ ECtHR, *Schatschaschwili v. Germany* [Grand Chamber Judgement](#), para. 120-122.

³³⁸⁴ ECtHR, *Schatschaschwili v. Germany* [Grand Chamber Judgement](#), para. 125.

³³⁸⁵ ECtHR, *Schatschaschwili v. Germany* [Grand Chamber Judgement](#), para. 116.

³³⁸⁶ ECtHR, *Schatschaschwili v. Germany* [Grand Chamber Judgement](#), para. 126.

³³⁸⁷ ECtHR, *Schatschaschwili v. Germany* [Grand Chamber Judgement](#), para. 127.

³³⁸⁸ ECtHR, *Schatschaschwili v. Germany* [Grand Chamber Judgement](#), para. 128.

³³⁸⁹ ECtHR, *Schatschaschwili v. Germany* [Grand Chamber Judgement](#), paras 129-130.

³³⁹⁰ ECtHR, *Schatschaschwili v. Germany*, [Grand Chamber Judgement](#), para. 131.

³³⁹¹ See e.g. ECtHR, [Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial \(criminal limb\), paras 521-522.](#)

1895. While the ECtHR has considered these principles in the context of criminal proceedings concerning sexual offences, including in cases involving minors,³³⁹² the court has not ruled more broadly on whether the risk of trauma or revictimisation through criminal proceedings for adult victims of crimes not involving sexual violence may be a good reason for absence, anonymity, or other special measures.

ECTHR, *S.N. V. SWEDEN*, JUDGEMENT, PARA. 47:

“The Court has had regard to the special features of criminal proceedings concerning sexual offences. Such proceedings are often conceived of as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant. These features are even more prominent in a case involving a minor. In the assessment of the question whether or not in such proceedings an accused received a fair trial, account must be taken of the right to respect for the private life of the perceived victim. Therefore, the Court accepts that in criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence [...]. In securing the rights of the defence, the judicial authorities may be required to take measures which counterbalance the handicaps under which the defence labours [...].”

1896. Even with these cases involving vulnerable victims, the ECtHR’s approach depends on the domestic court’s efforts to protect the accused’s right to examine witnesses against him.³³⁹³

CASE STUDY: ECTHR, *BOCOS-CUESTA V. THE NETHERLANDS*, JUDGEMENT:

In a trial involving offences against minors, the domestic court denied an accused’s request to hear the minor victims’ evidence on the basis that the defendant’s interest in hearing them was outweighed by their interests “in not being forced to relive a possibly very traumatic experience”. The ECtHR “found no indication in the case file that this reason was based on any concrete evidence such as, for instance, an expert opinion. The Court appreciates that organising criminal proceedings in such a way as to protect the interests of very young witnesses, in particular in trial proceedings involving sexual offences, is a relevant consideration, to be taken into account for the purposes of Article 6. However, the reason given by the trial courts for refusing the applicant’s request to hear the four victims cannot but be regarded as insufficiently substantiated and thus, to a certain extent, speculative.” (para. 72)

1897. At the same time, the court has found that a sexual violence victim’s rights were violated when she was subjected to an extensive cross-examination involving inappropriate questioning by the defendant.³³⁹⁴

³³⁹² See e.g., ECtHR, *S.N. v. Sweden* [Judgement](#), para. 47; ECtHR, *Aigner v. Austria* [Judgement](#), para. 37; ECtHR, *B v. Finland* [Judgement](#), para. 43.

³³⁹³ ECtHR, *Bocos-Cuesta v. The Netherlands* [Judgement](#), para. 72

³³⁹⁴ ECtHR, *Y. v. Slovenia* [Judgement](#), paras 103, 106-109, 114-115.

CASE STUDY: AT LEAST IN THE CONTEXT OF CASES INVOLVING SEXUAL VIOLENCE, IT IS THE DOMESTIC COURT'S OBLIGATION TO ENSURE THE RIGHTS OF VICTIMS ECTHR, *Y. V. SLOVENIA*, JUDGEMENT:

In *Y v. Slovenia*, the applicant, who had alleged being a victim of a crime involving sexual violence, claimed that her rights under Article 8 of the ECHR had been violated as a result of how she was treated as a witness in the criminal proceedings against her alleged abuser. In addressing her claim, the Court recognised the difficult balance required of domestic courts in ensuring the accused's right to defend themselves while also noting that this "does not provide for an unlimited right to use any defence arguments" (para. 106). The Court stressed that the applicant was questioned over the course of four hearings held over a seven month period, involving cross-examination by the accused himself where he posed personal questions, leading questions, repeated the same questions, and attacked her truthfulness (paras 107-108)

"Of course, the defence had to be allowed a certain leeway to challenge the reliability and credibility of the applicant and to reveal possible inconsistencies in her statement. However, the Court considers that cross-examination should not be used as a means of intimidating or humiliating witnesses. In this connection, the Court is of the view that some of X's questions and remarks suggesting, without any evidentiary basis, that the applicant could cry on cue in order to manipulate people, that her distress might be eased by having dinner with him, or that she had confided in him her desire to dominate men, were not aimed only at attacking the applicant's credibility, but were also meant to denigrate her character." (para. 108)

"The Court considers that it was first and foremost the responsibility of the presiding judge to ensure that respect for the applicant's personal integrity was adequately protected at the trial. In its opinion, the sensitivity of the situation in which the applicant was questioned directly, in detail and at length by the man she accused of sexually assaulting her, required the presiding judge to oversee the form and content of X's questions and comments and, if necessary, to intervene. Indeed, the record of the hearing indicates that the presiding judge prohibited X from asking certain questions which were of no relevance to the case. However, the Court takes the view that X's offensive insinuations about the applicant also exceeded the limits of what could be tolerated for the purpose of enabling him to mount an effective defence, and called for a similar reaction. Considering the otherwise wide scope of cross-examination afforded to X, in the Court's opinion curtailing his personal remarks would not have unduly restricted his defence rights. Yet such an intervention would have mitigated what was clearly a distressing experience for the applicant [...]." (para. 109)

The ECtHR was mindful that the presiding judge's task in balancing the competing interests was a delicate one, and it also noted that there were measures taken to prevent further traumatization of the applicant, including: allowing her initial statement before the investigative judge to be taken in the defendant's and his counsel's absence, excluding the public from the trial, and removing the defendant from the courtroom when she gave her testimony, adjourning when the applicant became stressed, and warning the defendant against repeat questions and prohibiting some questions posed by the defendant. (para. 114)

“Nevertheless, in the Court’s opinion, the pre-existing relationship between the applicant and the defendant and the intimate nature of the subject matter, as well as the applicant’s young age — she was a minor when the alleged sexual assaults took place — were points of particular sensitivity which called for a correspondingly sensitive approach on the part of the authorities to the conduct of the criminal proceedings in issue. Taking into account the cumulative effect of the factors analysed above, which adversely affected the applicant’s personal integrity [...], the Court considers that they substantially exceeded the level of discomfort inherent in giving evidence as a victim of alleged sexual assaults, and accordingly cannot be justified by the requirements of a fair trial.” (para. 114)

“Therefore, the Court is of the view that the manner in which the criminal proceedings were conducted in the present case failed to afford the applicant the necessary protection so as to strike an appropriate balance between her rights and interests protected by Article 8 and X’s defence rights protected by Article 6 of the Convention.” (para. 115)

2. Other international guidelines

1898. International guidelines concerning justice for victims of crimes also contain relevant principles concerning the prevention of revictimisation. Specifically, the Handbook on Justice for Victims has a chapter concerning the role of the judiciary in promoting justice for victims. The Handbook and its guidelines were adopted to promote the United Nations General Assembly’s Declaration of Basic Principles for Victims of Crime and Abuse of Power.³³⁹⁵ While these guidelines do not constitute binding legal authority, they may provide persuasive guidance to judges when considering victims and victim witnesses in cases before them. Many of the proposed guidelines for judges involve what may be described as more assistive or supportive measures that may help avoid or alleviate revictimisation even where more formal protective measures are not available.
1899. The Handbook notes that judges have a leadership role in ensuring that victims and witnesses are treated with courtesy, respect and fairness. This may be achieved in part by ensuring that victims and witnesses are provided with information regarding their rights and prerogatives, as well as on the physical layout of the courthouse, witness fees, compensation funds, and other available financial assistance. Judges may also ensure that court administrators establish areas for receiving victims and witnesses, and provide them with information about public and community services.³³⁹⁶
1900. Judges may also ensure that victims are fully informed of the proceedings, including by making sure that victims are able to obtain information concerning their cases from court personnel. Judges may also consider, to the extent possible, that, at least where requested, victims are informed of the release of a defendant from custody.³³⁹⁷

³³⁹⁵ [Handbook on Justice for Victims](#), Foreword, p. iv. See also [Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power](#), Adopted by General Assembly resolution 40/34 of 29 November 1985.

³³⁹⁶ [Handbook on Justice for Victims](#), p. 69.

³³⁹⁷ [Handbook on Justice for Victims](#), p. 70.

1901. Judges may encourage or even arrange for special services and support for victims in their jurisdictions, including: (1) “Separate waiting areas for the defence and witnesses for the prosecution, including victims;” (2) “Interpreter and translation services for victims and witnesses in the courthouse;” (3) “An ‘on-call’ system to minimize unnecessary trips to the courtroom;” (4) “The expeditious return of evidence;” (5) “The availability of special transportation and protection to and from the courthouse when the safety of witnesses is a consideration;” (6) “Informing the public of the importance of supporting the participation of victims and witnesses in court proceedings;” (7) “Child-care services for victims and witnesses;” (8) “Crisis-intervention, counselling and other support services for victims;” (9) “Ensuring that the victim is not charged for rape examination or other costs of collecting and preserving evidence;” and (10) “Establishing fair and appropriate witness fees.”³³⁹⁸
1902. Judges should order restitution of victims wherever possible. Judges should facilitate victim participation to the extent possible under the law.³³⁹⁹
1903. Judges should authorise, to the extent possible, that victims be accompanied in the courtroom by a supportive person. Victim impact statements prior to sentencing should be encouraged and considered, and victims or the victim’s family should be allowed to remain in the courtroom.³⁴⁰⁰
1904. The Handbook also suggests that judges “should use their judicial authority to protect victims and witnesses from harassment, threats, intimidation and harm by: (1) “Limiting access to the addresses of victims and witnesses;” (2) “Ensuring that victims and witnesses are informed that if they agree to be interviewed prior to trial by opposing counsel or investigators, they may insist that the interviews be conducted at neutral locations;” and (3) “Encouraging legislation or rules requiring parole boards to advise the judge, the prosecutor, the public and the victim, where appropriate, prior to any hearing on the release of an offender convicted of a serious offence.”³⁴⁰¹
1905. With respect to “particularly vulnerable victims”, judges should consider the following measures: (1) “Expediting trials;” (2) “Encouraging specially designed or equipped courtrooms to protect vulnerable victims;” (3) “Permitting the use of videotaped depositions in cases involving vulnerable victims;” (4) “Allowing vulnerable victims to have an individual of their choice accompany them in closed juvenile proceedings;” and (5) “If a defendant is conducting his or her own defence, preventing the defendant from directly questioning the victim.”³⁴⁰²
1906. The Handbook also encourages that judges engage in sensitivity training for victim-related issues.³⁴⁰³

³³⁹⁸ [Handbook on Justice for Victims](#), p. 70.

³³⁹⁹ [Handbook on Justice for Victims](#), p. 70.

³⁴⁰⁰ [Handbook on Justice for Victims](#), p. 71.

³⁴⁰¹ [Handbook on Justice for Victims](#), p. 71.

³⁴⁰² [Handbook on Justice for Victims](#), p. 71.

³⁴⁰³ [Handbook on Justice for Victims](#), p. 72.

3. International Criminal Tribunals and Revictimisation

1907. International criminal tribunals have established mechanisms to guarantee the protection of witnesses and victims rights, including measures to address revictimisation. While these measures may provide some guidance to the judges, it is important to recall that these processes arise using the specific procedural rules applicable before these courts. Ukrainian judges will have to apply their own procedural law to the cases before them.

a) Witnesses and Victims before the ICTY

1908. The ICTY adopted several measures in its Statute and Rules aimed at witness and victim protection that were adopted at other internationalised and hybrid tribunals and, in the case of the ICC, expanded upon.

1909. Article 20(1) of the ICTY Statute denotes a trial chamber's duty to have "due regard for the protection of victims and witnesses" as part of its obligation to ensure a fair and expeditious trial. Article 22 of the ICTY Statute mandates that the rules of procedure and evidence shall provide for the protection of witnesses and victims, including but not limited to, the conduct of in camera proceedings and protecting victim's identities.³⁴⁰⁴

1910. In accordance with Article 22, the Rules of Procedure and Evidence provide for protective measures and adopt other measures that facilitate witness assistance as well. Rule 34 of the ICTY Rules of Procedure and Evidence establishes a victims and witnesses section under the authority of the Registrar. They are qualified to recommend protective measures for victims and witnesses and to provide counselling and support for them, particularly in cases of rape and sexual assault.³⁴⁰⁵

1911. Rules 69 and 75 of the ICTY Rules of Procedure and Evidence provide for protection of victims and witnesses. Rule 69 allows, in exceptional circumstances, for a judge or trial chamber to order pre-trial non-disclosure of the identity of a victim or witness who may be at risk.³⁴⁰⁶ Rule 75 provides for a number of protective measures during trial that may be ordered by a judge or chamber whether at their own initiative or at the request of a party or the victims and witnesses section, including: (1) a number of measures to protect their identities or whereabouts or that of their relatives or associates; (2) closed sessions; and (3) "appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television".³⁴⁰⁷

1912. Rule 75(D) requires that chambers shall "control the manner of questioning to avoid any harassment or intimidation. Rule 75(C) also requires that the Victims and Witnesses Section ensures that, before they give evidence, witnesses are informed that their identities may be disclosed in other proceedings."³⁴⁰⁸ As a general rule, protec-

³⁴⁰⁴ [ICTY Statute](#), Articles 20(1) and 22.

³⁴⁰⁵ [ICTY Rules of Procedure and Evidence](#), Rule 34.

³⁴⁰⁶ [ICTY Rules of Procedure and Evidence](#), Rule 69.

³⁴⁰⁷ [ICTY Rules of Procedure and Evidence](#), Rule 75(A), (B).

³⁴⁰⁸ [ICTY Rules of Procedure and Evidence](#), Rule 75(C), (D).

tive measures continue in subsequent proceedings unless rescinded or modified by judicial order.³⁴⁰⁹

1913. Rule 79 of the of the ICTY Rules of Procedure and Evidence authorises closed sessions for reasons of “public order or morality”, for the “safety, security, or non-disclosure of the identity of a victim or witness”, or “the protection of the interests of justice”.³⁴¹⁰ Rule 81 *bis* authorises a judge or chamber to order proceedings to be conducted by video-link if consistent with the interests of justice.³⁴¹¹
1914. Rule 96 of the ICTY Rules of Procedure and Evidence adopted special procedures for evidence in cases of sexual assault, including in camera proceedings before any evidence of consent of the victim is allowed, additional limitations on evidence of consent, and a rule against admission of evidence of the victim’s prior sexual conduct and a rule that no corroboration shall be required for the victim’s evidence.³⁴¹²
1915. In addition, while it is not a protective measure *per se*, Rule 92 *bis* allows for the admission of written statements in lieu of oral testimony from a witness if certain requirements are met. As a general matter, the possibility for revictimisation was not a factor for the admission of a statement, although if the evidence concerns the impact of crimes upon victims, this is a factor in favour of admitting the evidence in written form.³⁴¹³ Rule 92 *quinquies* was subsequently adopted and allows for the admission of statements of witnesses who do not appear as a result of having been “materially influenced by improper interference, including threats, intimidation, injury, bribery, or coercion”.³⁴¹⁴
1916. Generally, before the ICTY, the party requesting protective measures was required to “demonstrate the existence of an objectively grounded risk to the security or welfare of the witness or the witness’s family, should it become publicly known that he or she testified before the Tribunal”.³⁴¹⁵ So, with the exception of the specific procedures for victims of sexual violence and “appropriate measures to facilitate the testimony of vulnerable victims and witnesses” under Rule 75(B)(iii), the risk of trauma would generally not qualify for judicially ordered protective measures before the ICTY.
1917. While formal protective measures were not generally available to avoid revictimisation under the ICTY’s scheme, the ICTY’s support services undertaken by the victims and witnesses section, including the provision of social and psychological counselling and assistance to witnesses, exemplify measures other than judicially-ordered protection that may assist in avoiding or easing potential victim trauma.³⁴¹⁶

³⁴⁰⁹ [ICTY Rules of Procedure and Evidence](#), Rule 75(F)-(K).

³⁴¹⁰ [ICTY Rules of Procedure and Evidence](#), Rule 79.

³⁴¹¹ [ICTY Rules of Procedure and Evidence](#), Rule 81 *bis*.

³⁴¹² [ICTY Rules of Procedure and Evidence](#), Rule 96.

³⁴¹³ [ICTY Rules of Procedure and Evidence](#), Rule 92 *bis*.

³⁴¹⁴ [ICTY Rules of Procedure and Evidence](#), Rule 92 *quinquies*.

³⁴¹⁵ See e.g. ICTY, [Karadzic Protective Measures Decision of 9 July 2013](#), para. 6.

³⁴¹⁶ See generally, ICTY Witnesses FAQs, [What is the Victims and Witnesses Section](#) (VWS)?

b) Witnesses and victims before the ICC

1918. The ICC has similar provisions for witnesses and victims in its Statute and Rules of Procedure and Evidence to the ICTY, as well as a number of innovations regarding witness and victim protection, including provisions aimed at vulnerable witnesses and victims.
1919. Article 43(6) of the ICC Statute establishes a Victims and Witnesses Unit (“VWU”) within the Registry, which “shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.”³⁴¹⁷
1920. Article 68 of the ICC Statute provides for protective measures for victims and witnesses. It mandates “appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses”. In doing so, the court is to consider factors including age, gender, and health of the witness or victim as well as the nature of the crime, including particular but not exclusive regard for “crimes involving sexual or gender violence or violence against children”.³⁴¹⁸
1921. Article 68(2) allows for in camera proceedings, the presentation of evidence by electronic or other special means as an exception to the principle of public hearings, and states that “such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness”.³⁴¹⁹ Article 68(4) authorises the ICC Victims and Witnesses Unit to “advise the Prosecutor and the Court on protective measures, security arrangements, counselling and assistance”.³⁴²⁰ Article 68(5) allows for non-disclosure of evidence and information where disclosure may lead to “grave endangerment of the security of a witness or his or her family”.³⁴²¹
1922. Rules 16 through 19 of the Rules of Procedure and Evidence outline the responsibilities of the ICC Registry, generally, and the VWU, specifically, towards victims and witnesses. These rules oblige the Registry and the VWU to undertake a number of measures to facilitate the participation and ensure the protection of witnesses and victims, including, but not limited to, informing them of their rights, the work of the VWU, the implications of testimony, assisting them in relation to formal protective measures, and also “in obtaining medical, psychological and other appropriate assistance”.³⁴²²
1923. Rule 86 requires ICC chambers in making orders and other organs of the court in performing their functions, to “take into account the needs of all victims and witnesses

³⁴¹⁷ [ICC Statute](#), Article 43(6).

³⁴¹⁸ [ICC Statute](#), Article 68(1).

³⁴¹⁹ [ICC Statute](#), Article 68(2).

³⁴²⁰ [ICC Statute](#), Article 68(4).

³⁴²¹ [ICC Statute](#), Article 68(5).

³⁴²² [ICC Rules of Procedure and Evidence](#), Rules 16-19.

in accordance with article 68, in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence”.³⁴²³

1924. Rule 87 provides procedures for protective measures for witnesses and victims, including specific measures such as expunging the name or identifying information of at risk persons from the records, non-disclosure of such information to third parties, technical measures to prevent the disclosure of the identity or location, use of pseudonyms, or in camera proceedings.³⁴²⁴
1925. Rule 88 allows for chambers to order “special measures” to facilitate the testimony of a traumatised victim or witness, a child, an elderly person, or a victim of sexual violence, pursuant to article 68, paragraphs 1 and 2”.³⁴²⁵ It also provides for an order that “a counsel, a legal representative, a psychologist or a family member be permitted to attend during the testimony of the victim or witness”.³⁴²⁶ Finally, “[t]aking into consideration that violations of the privacy of a witness or victim may create risk to his or her security, a Chamber shall be vigilant in controlling the manner of questioning a witness or victim so as to avoid any harassment or intimidation, paying particular attention to attacks on victims of crimes of sexual violence”.³⁴²⁷
1926. Similar to the ICTY, protective measures before the ICC are granted “only on an exceptional basis, following a case-by-case assessment of whether they are necessary in light of an objectively justifiable risk and are proportionate to the rights of the accused” with “such case-by-case evaluation will involve a particularised analysis of the risk with respect to each witness”.³⁴²⁸
1927. However, there have been a number of decisions that have considered the risk of witness traumatising as being a sufficient basis for authorising protective or special measures.³⁴²⁹ In the *Gbagbo and Ble Goude* Decision of 3 November 2017, for example, the Prosecutor sought in camera testimony for witnesses who were victims of sexual violence. The trial chamber authorised this request, recognising that “due to the traumatic events they suffered, they are vulnerable and may indeed be exposed to retraumatisations if they were to testify publicly”.³⁴³⁰ The trial chamber also ordered that another witness should testify in camera because of that witness’s association with one of the sexual violence victims and the risk of undermining the first in camera order if this associated witness testified in public.³⁴³¹ The Prosecutor also sought special measures for certain witnesses, including “reading assistance, regular breaks in their testimonies, adapted questioning, and the presence of a psychologist during their testimonies”.³⁴³² The trial chamber granted this request as well, noting that

³⁴²³ [ICC Rules of Procedure and Evidence](#), Rule 86.

³⁴²⁴ [ICC Rules of Procedure and Evidence](#), Rule 87.

³⁴²⁵ [ICC Rules of Procedure and Evidence](#), Rule 88(1).

³⁴²⁶ [ICC Rules of Procedure and Evidence](#), Rule 88(2).

³⁴²⁷ [ICC Rules of Procedure and Evidence](#), Rule 88(5).

³⁴²⁸ ICC, *Ntaganda Protective Measures Decision*, para. 6.

³⁴²⁹ See e.g., ICC, *Gbagbo and Ble Goude Decision of 3 November 2017*, paras 6-14, 15-21, 22-29, 30-36. See also ICC, *Gbagbo and Ble Goude Decision of 27 November 2017*, paras 8-10, 15-16.

³⁴³⁰ ICC, *Gbagbo and Ble Goude Decision of 3 November 2017*, para. 11.

³⁴³¹ ICC, *Gbagbo and Ble Goude Decision of 3 November 2017*, paras 15-21.

³⁴³² ICC, *Gbagbo and Ble Goude Decision of 3 November 2017*, para. 22.

such measures may benefit witnesses without any adverse impact on the rights of the accused.³⁴³³ Finally, the trial chamber authorised video-link based on the health and travel anxiety of one witness and the brevity of another’s proposed testimony.³⁴³⁴

1928. In the *Ongwen* case, a single judge took the innovative step of authorising the taking of testimony prior to confirmation of the indictment on the basis of a unique investigative opportunity under circumstances that did not involve the witnesses being physically unable to attend future trial proceedings. In these decisions, the single judge rejected the notion that authorising the taking of evidence as a unique investigative opportunity under Article 57 of the ICC Statute was limited to circumstances where witnesses were physically incapable of attending trial. The single judge authorised the taking of testimony because of risk that they may become unavailable because of pressure on the witnesses that may result in them becoming unavailable. The single judge also authorised the request “with a view to making it possible for the eventual Trial Chamber to consider not calling the six witnesses to testify in person” because “there may be benefit in completing their involvement with the Court as soon as possible, so as not to force them to keep reliving their victimisation for a long period of time”.³⁴³⁵
1929. In the *Al Hassan* proceedings, however, a pre-trial chamber rejected this approach on the grounds that security concerns do not justify or warrant the deposition for a unique investigative opportunity under Article 56(2) of the ICC Statute and, for the same reasons, it did not authorise considerations of witness vulnerability as justifying the Article 56 process.³⁴³⁶
1930. In addition to such measures, the ICC has generally adopted protocols for witness familiarisation and for assessing witness vulnerability to determine whether special measures may be necessary and, if so, what measures. Familiarisation protocols and vulnerability protocols comprehensively detail the VWU’s role in assisting witnesses and assessing their risk throughout the proceedings.³⁴³⁷
1931. The familiarisation process covers all phases of the proceedings, beginning with an initial phase as soon as VWU is made aware that a party or participant will call a particular witness and continuing through to a witness feedback program after the witness’s involvement of the proceedings. It involves walking the witnesses through all aspects of their interaction with the ICC, including, among other measures: (1) the scheduling of their evidence; (2) an early needs and vulnerability assessment and then a subsequent vulnerability assessment to determine whether special measures under Rule 88 are necessary; (3) managing their travel to the location of their testimony; (4) familiarising them with the process of giving testimony and with the court’s facilities; (v) limiting witness contact with the parties and other witnesses; and (vi) assessing the

³⁴³³ ICC, *Gbagbo and Ble Goude* [Decision of 3 November 2017](#), paras 27-29.

³⁴³⁴ ICC, *Gbagbo and Ble Goude* [Decision of 3 November 2017](#), paras 30-36.

³⁴³⁵ ICC, *Ongwen* [Decision of 27 July 2015](#), paras 5-12; ICC, *Ongwen* [Decision of 12 October 2015](#), paras 4-12, 15-16.

³⁴³⁶ ICC, *Al Hassan* [Decision of 13 December 2018](#), paras 44-46, 50-56; ICC, *Al Hassan*, [Decision of 30 January 2019](#), para. 24.

³⁴³⁷ See generally, the ICC’s [Witnesses](#) page on its website.

need for protective measures. Throughout this process, the VWU maintains contact with the pre-trial and trial chambers and the parties as necessary.³⁴³⁸

1932. Similarly, protocols on vulnerability assessment entails the VWU's process for identifying vulnerable witnesses. These comprehensive protocols involve assessment and support prior to the trial, and continue until after the witness's testimony. It entails professional psychological evaluation of the witness's needs, if any.³⁴³⁹

D. Conclusion

1933. As demonstrated by the discussion of international standards above, judges have a variety of tools at their disposal to address revictimisation. While some measures, like admitting witness statements or permitting witness anonymity may only be authorised where consistent with the fair trial rights of the accused, other measures such as closed sessions, video-link testimony, and closed-circuit testimony may protect the rights and dignity of witnesses and victims with little or no impact on the accused. Still other supportive measures such as ensuring that witnesses are notified of and made familiar with the processes throughout, providing them with counselling and other practical assistance, even allowing them to have familiar persons in the courtroom when they testify may also assist witnesses without any impact on the accused's rights at all. It will be important for judges to make sure that any measures taken are consistent with Ukrainian law.

³⁴³⁸ See e.g., ICC, *Ntaganda*, [Annex A](#) to the Decision on the protocol on witness familiarization, 17 June 2015.

³⁴³⁹ See e.g., ICC, *Ntaganda*, [Annex 1](#) to the Victims and Witnesses Unit's submission of the Protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses pursuant to Order no ICC-01/04-02/06-416, 5 February 2015.

■ CHAPTER III – JUDGEMENT DRAFTING IN INTERNATIONAL CRIMES CASES

PART 1: THE NATURE AND CONTENT OF JUDGEMENTS

1934. This section sets out the general requirements for written judgements and considers these requirements in the context of cases concerning international crimes. It makes reference to the Criminal Procedural Code of Ukraine (CPC) including specific provisions concerning the nature and content of written judgements in criminal proceedings. These provisions are applicable to all criminal proceedings including those related to the adjudication of international crimes.
1935. Article 110(2) of the CPC, under the heading “Procedural decisions”, provides a definition of a court decision in criminal proceedings. It states: “[a] court decision shall be delivered in the form of a decision, judgment or verdict which should meet requirements provided for by Articles 369, 371-374 of this Code”.
1936. Article 369(1) of the CPC states that “a court decision in which the court decides on the substance of litigation is formulated in the form of a judgment”.
1937. Article 370 of the CPC states that the main requirements for a court decision in criminal proceedings are its legality, validity and reasonableness.

ARTICLE 370 OF THE CPC

1. Court decision shall be legal, valid and reasonable.
2. A decision **is legal** when it is made by a competent court in accordance with rules of substantive law and in observance of the requirements for criminal proceedings specified in the present Code.
3. A decision **is valid** when it is made by [a] court based on objectively ascertained circumstances which are supported with evidence examined during trial and assessed by the court as prescribed in Article 94 of the present Code.
4. A decision **is reasonable** when it sets forth appropriate and sufficient motives and grounds for passing thereof.

1938. Article 370(3) of the CPC requires the court to assess the evidence examined during trial as prescribed in article 94 of the CPC. Article 94 of the CPC requires the court to evaluate “evidence based on [its] own moral certainty grounded in comprehensive, complete, and impartial examination of all circumstances in criminal proceedings”.
1939. Article 371(6) of the CPC provides that the judgement “shall be set out in writing in paper and electronic forms.”³³⁴⁰
1940. Articles 371 and 376 of the CPC require that the judgement be rendered at the end of the trial immediately after the court has left the deliberation room. The presiding judge is required to explain the contents of the decision, procedure and the time limit

³³⁴⁰ Judgement in electronic form shall be executed in accordance with the requirements of the legislation in the field of electronic documents and electronic document flow, as well as electronic digital signature. See Article 371(6) of the CPC referring to Law No 835-VIII of 26.12.2015.

to challenge the decision. According to Article 376(2) of the CPC, if the drafting of the judgement requires considerable time, the court shall have the right to limit itself to drawing up and pronouncing its operative part, which shall be signed by all judges. In such cases, “the full text of the judgement should be drawn up not later than five days from the date of pronouncement of the operative part and pronounced to the participants in the proceedings” and “the time of pronouncement of the full text of the ruling (judgment) should be indicated in the previously drawn up operative part.”

1941. Article 376(6) of the CPC adds that “participants in judicial proceedings shall have the right to receive a copy of the verdict or ruling (judgments) of the court in court. A copy of the verdict shall be handed to the accused, a representative of the legal entity in whose respect proceedings are conducted as well as a prosecutor immediately after its pronouncement.”
1942. Article 373 of the CPC list two types of judgements: (1) judgement of conviction (the defendant is found guilty of a criminal offence beyond reasonable doubt); and (2) judgement of acquittal (the guilt of the defendant was not proven beyond reasonable doubt).
1943. Article 374 of the CPC specifies the content of a judgement. It is comprised of three parts: (1) introduction; (2) reasoning section; and (3) operative section. Each of these parts are addressed in detail below.

PART 2: THE INTRODUCTORY SECTION OF THE JUDGEMENT (ARTICLE 374(2) OF THE CPC)

1944. According to Article 374(2) of the CPC, the introduction of the judgement must contain:

- Date(s) and place of the delivery of the judgement;
- Name and composition of the court (names of judges and which one of them is presiding). In case of criminal proceedings conducted with a jury³³⁴¹, the name and initials of each juror shall be indicated;
- The name of the secretary of the court session;
- The name and number of the criminal proceedings;
- Information about the defendant including: last name, name and patronymic of the defendant; year, month and date of his birth; place of birth and place of residence, occupation, education, and family status.
- This list is not exhaustive and can also include any other information on the defendant's person that is important for the case. For example, it can include details such as the dependents, the health status of the defendant, and information that may affect the nature of the punishment, like the fact that the offense was committed during a period of parole or while on probation.

For the adjudication of international crimes, other relevant information on the defendant are also likely to include the defendant's citizenship, the name of his/her military unit, his/her rank and his/her service number.

- Reference to the Ukrainian law on criminal liability which provides for the criminal offense in the commission of which the person concerned is accused. At a minimum, reference shall be made to the criminal offense itself and as listed in the CCU. In relation to the adjudication of international crimes, if the criminal offense is:
 - 1) war crime(s), reference needs to be made to article 438 of the CCU;
 - 2) the crime of aggression, reference needs to be made to article 437 of the CCU;
 - 3) genocide, reference needs to be made to article 442 of the CCU.

The introductory part of the judgement can also set out any other legal provisions to which the court considers necessary to have regard in arriving at its conclusions in the case. For instance, it can incorporate reference to the modes of liability relied upon by the court (articles 26-31 of the CCU) or defenses raised by the defendant during the proceedings (articles 36-43 of the CCU).

³³⁴¹ See Articles 31(3), 383-391 of the CPC.

PART 3: THE REASONING SECTION OF THE JUDGEMENT

I. Requirements of Article 374(3) of the CPC

1945. The reasoning section is an essential part of the judgement. It sets forth in detail a judges' reason for their decisions. The requirement that the judgement of a court should adequately state and with sufficient clarity the reasons on which decisions are based is reflected in article 370 of the CPC. It is also an obligation stemming from the jurisprudence of the European Court of Human Rights as enumerated in article 6 of the European Convention of Human Rights³³⁴² which is directly applicable in Ukraine.
1946. Providing a reasoned opinion for criminal judgement is related to the proper administration of justice and Article 374(3) of the CPC requires specific details which must be incorporated in the reasoning part of the judgement in criminal proceedings. These requirements vary depending on the outcome of the criminal proceeding and whether the defendant is found guilty or not of the charges brought against him.
1947. **Where the defendant is found not guilty of one or several of the charges brought against him/her.** An acquittal must be pronounced where the court finds that:
- No event constituting a criminal offence has occurred;
 - In relation to a particular criminal offense a necessary element of that offence has not been proved beyond any reasonable doubt;
 - In relation to a particular criminal offence the guilt of the defendant has not been proved beyond any reasonable doubt;
1948. Article 374(3)(1) of the CPC provides that if a person has been acquitted, the reasoning section of the judgement must provide:
- A statement of charges brought against the person and found by court to not be proved;
 - Grounds for acquittal of the defendant including the reasons for rejecting or finding insufficient the evidence presented by the Prosecutor;
 - Motives for taking other decisions in respect of issues disposed by court when rendering a judgment, and
 - The provisions of the law that the court was guided by.
1949. **Where the defendant is found guilty of one or several of the charges brought against him/her.** When the court finds that the Prosecution has proved beyond any reasonable doubt (article 17 of the CPC) that the accused committed the offense charged a guilty verdict is pronounced.
1950. Article 374(3)2) of the CPC provides that if a person has been found guilty, the reasoning part of the judgement must provide:
- A statement of the charges found by court to be proved, with indication of:
 - (1) Place;

³³⁴² See e.g., ECtHR *Moreira Ferreira v. Portugal* (N°2), [Judgement](#), para 84.

- (2) Time;
- (3) The way of commission and implications of the criminal offense.
The court shall also specify the consequences that occurred as a result of the commission of the criminal offense of which the defendant has been found guilty.
- (4) Form of guilt.
If several persons are accused the court must set out the entire scope of the joint criminal activity which has been found to be proved, together with the role that each accused has been found to have played in the commission of the crime and the circumstances that determine their relative degree of guilt. If a person is found guilty of an attempt to commit the criminal offense, the court indicate the reasons why the crime was not completed.
- (5) Motives of the defendant for committing the criminal offense;
 - Articles of Law of Ukraine on criminal liability which establishes liability for the criminal offense guilty of committing which the defendant is found;
 - Presentation of the assessment of evidence in support of the circumstances considered proven by the court, as well as reasons for not taking into account particular evidence.
 - Reasons for changing charges if applicable;
 - Grounds for finding a part of the charges unsubstantiated, if such decisions have been taken by the court;
 - Circumstances which aggravate or mitigate punishment;
 - Reasons as relevant for :
 - (1) the imposition of punishment;
 - (2) releasing the defendant from service of punishment;
 - (3) the imposition of compulsory medical measures where a state of limited criminal capacity of the defendant has been established;
 - (4) the imposition of compulsory medical treatment as specified in Article 96 of the CCU; and
 - (5) the appointment of a public tutor for the underage person;
 - The punishment imposed by the court on the accused must be explained, and the circumstances which the court has found either to aggravate or mitigate the punishment must be specified according to the list set out in articles 66 and 67 of the Criminal Code of Ukraine.
 - Grounds for granting, dismissing or leaving undecided the civil action;
 - Reasons for taking other decisions in respect of issues disposed by court when rendering a judgment, and statutory provisions the court was guided by.

1951. While the court is not entitled in the judgement to go beyond the scope of the indictment, the CPC does not require to reproduce the text of the indictment even in cases where the indictment is not amended in court in the judgement.

II. Specific aspects regarding the assessment of the evidence

1952. In relation to the evidence presented at trial, Article 94 of the CPC requires the court to evaluate evidence “based on his own moral certainty grounded in comprehensive, complete, and impartial examination of all circumstances in criminal proceedings”. The article also states expressly that no evidence shall have any predetermined probative value.
1953. Article 374(3)(2) of the CPC states that the reasoning section of the judgement must contain a presentation of the assessment of evidence in support of circumstances considered proven by the court, as well as reasons for not taking into account particular evidence. All evidence which the court considered should be set out. It shall include the evidence from the Prosecution but also evidence of the defendant and any defence witnesses.
1954. Rules regarding the admission and assessment of evidence are set out in Chapter IV of the CPC. Reasoning of judges with respect to the admission and assessment of evidence on the basis of this Chapter of the CPC shall be explained by judges in the reasoning section of the judgement. On the basis of the evidence found to be authentic, admissible, relevant and reliable, the court must consider whether that evidence is adequate to prove beyond reasonable doubt that the defendant committed the crime under consideration.
1955. Individual pieces of evidence should not be viewed in isolation. Separate pieces of evidence, inconclusive in themselves, may interconnect with each other to amount to grounds on which a particular issue within a trial can be considered proved beyond reasonable doubt. If the court comes to such a conclusion it must explain its chain of reasoning in respect of such evidence.
1956. The section of the Benchbook entitled [Part 2: The Assessment of Digital Evidence](#), provides an overview of the provisions under Ukrainian law on the admissibility and assessment of digital evidence, as well as the international legal standards for the admission and assessment of digital evidence.

III. Specific aspects of the reasoning relevant for the adjudication of war crimes

1957. This section addresses specificities in judgement drafting for the adjudication of war crimes. Two relevant aspects are covered: (1) the drafting of the applicability of a particular crime under article 438; and (2) the identification and the drafting of the legal elements of war crimes. The Benchbook provides all information necessary to adjudicate and assist in the drafting of a judgement dealing with a charge involving a war crime. A yellow box at the end of the section [Introduction – Content](#), explains in detail how the Benchbook addresses criminal proceedings involving war crimes.

A. War crimes subsumed in Article 438 of the CCU

1958. In relation to the drafting of the reasoning of the judgement for war crime(s) charges, an express reference needs to be made to article 438 of the CCU in the judgement.
1959. However, Article 438 of the CCU is not explicit in its scope and content. While Article 438 explicitly lists a limited number of specific offences³³⁴³ it also contains two general references to the “Use of methods of the warfare prohibited by international instruments” and “Other violations of the laws or customs of war recognised by international treaties the binding nature of which has been approved by the Verkhovna Rada (Parliament) of Ukraine”. These two references do not explicitly set out the specific conduct prohibited by article 438 of the CCU.
1960. As a result, referring solely to article 438 in the judgement does not appear to be sufficient in itself to specify which war crime(s) the defendant is accused of. It is suggested that the judgement shall also expressly refer in its reasoning to:
- 1) The relevant international provisions encompassing the violations of the rules and customs of war recognised by international treaties ratified by Ukraine (for instance reference to specific provisions on violations of international humanitarian law in the Geneva Conventions or Additional protocol 1, etc.).
 - 2) The relevant instruments or other sources in international law recognising a violation of international humanitarian law as a war crime (for instance the specific provisions of the four Geneva Conventions or Additional Protocol I that refers to grave breaches, Article 8 of the ICC Statute and/or Articles 2 and 3 of the ICTY statute that codify international customary law, etc.).
1961. While setting out the specific international provisions or instruments, it is necessary to further note that the offences listed under Article 438 are not always identical to the underlying acts of war crimes codified under international criminal law. In some cases, Article 438 offences may cover one or more underlying acts of war crimes, in others the underlying acts of war crimes may be subsumed under the different prongs of Article 438 at the same time. The synoptic table in [Chapter I, Part I, Section I.C.3.](#) Underlying acts of war crimes applicable under article 438 of the CCU summarises this relationship.
1962. In light of the need to expressly refer to the specific charges against the defendant, and the lack of explicit reference in Article 438 of the CPC, the Benchbook assists judges by identifying the relevant provisions from international instruments ratified by Ukraine for judges to explain in the judgement how each existing war crimes under international criminal law is criminalized under article 438 of the CCU.
1963. In order to assist judges to determine the specific provisions to be inserted into a judgement, the Benchbook has been drafted to identify the relevant criminal conduct that qualifies as a war crime under [Chapter I, Part I, Section I.C.3.](#) Underlying acts of war crimes applicable under article 438 of the CCU. This section presents the most

³³⁴³ The specific offences listed under article 438 of the CCU are Cruel treatment of prisoners of war or civilians”, “Deportation of civilian population for forced labor”, “Pillage of national treasures on occupied territories” and “Murder”.

up to date list of the generally accepted war crimes under international criminal law and is primarily based on Article 8 of the ICC Statute. It also includes the Statute and practice of the ICTY, as it is particularly relevant in the context of an international armed conflict. Judges can on this basis identify the relevant sub-sections that addresses the war crime(s) they are seized to adjudicate.

1964. In a sub-section of the Benchbook existing under each war crime entitled “applicability under article 438 of the CCU”, judges can find an explanation that can be used in the reasoning section of the judgement on how a particular war crime can be considered criminalised under Article 438. In particular, it addresses how specific criminal conduct may be: (1) a violation of the rules and customs of war recognised by international treaties ratified by Ukraine; and (2) recognised under international law as a war crime.

EXAMPLE

Elements of language for the drafting of the applicability under article 438 of the CCU of the War Crime of Attacking Civilians.

This box sets out an example of language and the references to international instruments ratified by Ukraine that can be relied upon by judges to draft the reasoning section of the judgement in relation to the applicability of a particular war crime under article 438 of the CCU. A more detailed version can be found in the Benchbook under [Chapter I, Part I, Section I.C.3.d.i](#). Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities (ICC Statute, Article 8(2)(b)(i); ICTY Statute, Article 3).

Although not explicitly mentioned in Article 438 of the CCU, intentionally directing attacks against civilians or the civilian population (“attacking civilians”) may be subsumed under “any other violations of rules of warfare recognized by international instruments consented to be binding by the Verkhovna Rada of Ukraine” to which Article 438(1) refers.

Attacking civilians is a violation of the laws of warfare recognised in an international instrument accepted as binding by the Ukrainian Parliament. The prohibition of direct attacks against civilians stems from the IHL principle of distinction is codified in Articles 48 and 51 of [Additional Protocol I ratified by Ukraine](#).³³⁴⁴

Moreover, violation of this prohibition has been recognised as a war crime. When committed wilfully and causing death or serious injury to body or health, attacking civilians constitutes a grave breach of [Additional Protocol I](#) as stated in Article 85(3)(a) and therefore a war crime.³³⁴⁵ Moreover, “intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities” is expressly codified as a war crime in Article 8(2)(b)(i) of the [ICC Statute](#) applicable to international armed conflict. While not explicitly mentioned under the [ICTY Statute](#), the ICTY jurisprudence has determined that attacking civilians constitute violations of the laws and customs of war under Article 3 of the [ICTY Statute](#).³³⁴⁶

³³⁴⁴ Ukraine ratified Additional Protocol I on 25 January 1990. See ICRC, Treaties and States Parties, [Ukraine](#).

³³⁴⁵ [Additional Protocol I](#), Article 85(3)(a); ICRC, Advisory Service on International Humanitarian Law, [Obligations in terms of penal repression](#), p. 1.

³³⁴⁶ See e.g., ICTY, [Galic Trial Judgement](#) para. 596 (“The Trial Chamber is satisfied beyond reasonable doubt that the crime of attack on civilians within the meaning of Article 3 of the Statute was committed against the civilian population of Sarajevo during the Indictment Period. In relation to the *actus reus* of that crime, the Trial Chamber finds that attacks by sniping and shelling on the civilian population and individual civilians not taking part in hostilities

B. Legal elements of war crimes

1965. The reasoning section of the judgement shall also mention the legal elements of war crimes as well as a legal analysis on how each of the elements are met in the particular case. War crimes are composed of the following legal elements:
- 1) Objective elements or *actus reus*
 - 2) Subjective elements or *mens rea*
 - 3) Contextual elements
1966. The relevant international humanitarian instruments mentioned in Article 438 of the CCU do not identify the legal elements of the war crimes that are subsumed in article 438 of the CCU. This Benchbook, however, sets out in [Chapter I, Part I, Section I.B.1.b](#). Identification and classification of war crimes in international law, how the identification of their legal elements have been elaborated through the framework and practice of international criminal tribunals, including the ICC and ICTY.
1967. The ICTY in particular played a major role in identifying and defining existing war crimes and is considered reflective of customary international law. While not entirely reflective of customary law, Article 8 of the [ICC Statute](#) is the first international instrument providing an exhaustive and consolidated list of war crimes. It is complemented by the ICC [Elements of Crimes](#) that outlines the definition of each war crimes. The ICTY and ICC legal framework and practice can assist judges in identifying the legal element of war crimes and their legal elements.
1968. There is further elaboration in the Benchbook on why judges can rely on the law and practice of international criminal tribunals and in particular the ICC framework in the reasoning of the judgement. This can be found under [Chapter I, Part I, Section I.B.2.b. Applicability of international criminal law instruments: whether Article 438 of the CCU can be read in conjunction with the ICTY and ICC Statutes and practice.](#)
1969. **Objective elements of a war crime.** For each war crime, judges will find a section in the Benchbook that will assist them in identifying the objective elements of the specific offense according to the framework and practice of relevant international criminal tribunals, in particular the ICTY and the ICC, that can be incorporated in the reasoning of the judgement together with a legal analysis on how each elements are met in a particular case.
1970. **Subjective elements of a war crime.** The general part of the CCU identifies subjective elements that apply to crimes (Articles 23, 24 and 25 of the CCU). In drafting the reasoning section of the judgement, judges shall consider the relevance of the subjective elements listed in the general part of the CCU when considering the ele-

constitute acts of violence. These acts of violence resulted in death or serious injury to civilians. The Trial Chamber further finds that these acts were wilfully directed against civilians, that is, either deliberately against civilians or through recklessness.”); ICTY, *Blaskic Trial Judgement*, p. 267 (“[...] General Blaskic committed: — a violation of the laws or customs of war under Article 3 of the Statute and recognised by Article 51(2) of Additional Protocol I: unlawful attacks on civilians (count 3).”); ICTY, *Kordic and Cerkez Trial Judgement, para. 834* (“[...] [The Trial Chamber finds the accused Dario Kordić liable under Article 7\(1\) on the following counts: \(a\) Count 3 \(unlawful attacks on civilians\) \[...\]](#)”).

ments of the war crime. The Benchbook further provides guidance on the *mens rea* of each particular war crime according to the framework and practice of the relevant international criminal tribunal, in particular under international customary law and Article 30 the ICC Statute.

1971. **Contextual elements of war crimes.** A common requirement for all war crimes is the establishment of the contextual elements. This additional element needs to be included in the reasoning of the Judgement. The contextual elements of war crimes in international armed conflict are:

- 1) The existence of an international armed conflict;
- 2) The conduct of the perpetrator took place in the context and was associated with an international armed conflict;
- 3) The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.

For each of these requirements, judges shall define them in the judgement and explain if and how each requirement is proven in the particular case. Further analysis on each of them can then be found in the Benchbook under [Chapter I, Part I, Section I.C.2.](#), Contextual elements of war crimes.

PART 4: THE OPERATIVE PART OF THE JUDGEMENT (ARTICLE 374(4) OF THE CPC)

1972. According to Article 374(4) of the CPC, the operative part of a judgement must contain a number of details that differ depending on whether the defendant is found guilty or not guilty.
1973. **Where the defendant is found guilty** of one or more charges brought against him/her the operative part of the judgement must state:
- 1) *Identification of the defendant* – Article 374(4) of the CPC specifies that it must include the last name, first name and patronymic of the defendant.
 - 2) *Decision on finding the defendant guilty of charges brought against him/her* – The operative part must include “the relevant Article (paragraph of Article) of the Law of Ukraine on criminal liability”. If several charges were brought against the defendants and some of them have not been proven, the operative part must indicate which charges the defendant is acquitted of and of which charges he/she is convicted of.
 - 3) *The punishment* – The operative part of the judgement must include the punishment imposed on each of the charges found proven by the court and the final sentence imposed by the court. It must also state the beginning date of the sentence imposed. If the defendant is found guilty but is released from serving punishment, the court shall also state this in the operative part of the judgment.
 - 4) In case of release from serving a sentence on probation in accordance with Articles 75-79, 104 of the CCU, the operative part of the judgement shall indicate: (1) the length of the probation period; (2) duties imposed on the convict; and (3) the person to whom the court assigns the duty to supervise the convict and conduct educational work with him.
 - 5) When a milder punishment than provided by law is imposed, reference must be made to Article 69 of the CCU when specifying the punishment ultimately chosen by the court. Also, the imposition of punishment for a combination of crimes or sentences are taken into account with reference to Articles 70 to 72 of the CCU.
 - 6) *Other relevant aspects for the operative part* – As relevant, the operative part of the judgement must also state:
 - Decision to apply compulsory medical treatment or compulsory medical measures in respect of a defendant with limited criminal capacity;
 - Decision to appoint public tutor for the underage person;
 - Decision to apply criminal measures to a legal person;
 - If relevant, decision to apply criminal measures to a legal person;
 - The decision as to the civil action;
 - Decisions on other property penalties and grounds for these decisions;
 - Decisions regarding exhibits and documents and special confiscation;
 - Decisions on reimbursement of procedural expenses;
 - Decision on remuneration to a whistleblower;

- Decisions on measures to protect criminal proceedings;
- Decisions on the credit for detention pending trial;
- Time limit and procedure for the judgment to take legal effect and to be appealed against;
- The procedure for obtaining copies of the judgement and other information.
- Decision to enter information on the accused of committing a crime against sexual freedom and sexual inviolability of a minor into the Unified Register of Persons Convicted of Crimes against Sexual Freedom and Sexual Inviolability of a Minor.

1974. **Where the accused is found Not Guilty** of one or more crimes the operative part of the judgement must state:

- 1) *Identification of the defendant* – Article 374(4) of the CPC specifies that it must include the last name, first name and patronymic of the defendant.
- 2) *Decision on finding the defendant not guilty of charges brought against him/her*. As relevant, it may also include a decision to close proceedings in respect of a legal person.
- 3) *Other relevant aspects for the operative part*– As relevant, the operative part of the judgement must also state:
 - The decision to restore rights restricted during criminal proceedings;
 - A decision regarding measures to ensure criminal proceedings including decision on a restraint measure prior to taking legal effect by the judgment;
 - A decision regarding exhibits and documents;
 - A decisions on procedural expenses;
 - Time limit and procedure for the judgment to take legal effect and to be appealed against;
 - Procedure for obtaining copies of the judgment and other information.

1975. In addition, pursuant to Article 129 of the CPC, where the accused is found not guilty of any of the crimes charged the resolute part of the judgement must pronounce a decision on the civil claim and clearly set out the reasons for this decision, taking into account that this decision may be different depending on the reasons for the not guilty conclusion. Thus:

- The civil claim may be dismissed if no event constituting a criminal offence has occurred;
- The civil claim may be left without consideration if the accused is found not guilty for other reasons.

PART 5: TRIAL IN ABSTENTIA (ARTICLE 374(5) OF THE CPC)

1976. Finally, Article 374(5) of the CPC provides in relation to the content of a judgement that “in the case of a sentence based on the consequences of criminal proceedings in which a special pre-trial investigation or special court proceedings (in absentia) were carried out, the court shall separately substantiate whether the prosecution has taken all possible measures provided by law to respect the rights of the suspect or accused to protection and access to justice, taking into account the specifics of such proceedings established by law.”
1977. Article 323 of the CPC provides specificities on the proceedings to be followed in case of non-appearance of an accused. In addition, the section of the Benchbook entitled **Part I: Trials in Absentia – Fair Trial Standards**, considers relevant elements of Ukrainian law and procedures for trials in absentia.

PART 6: SEPARATE OPINION OF A JUDGE (ARTICLE 375 OF THE CPC)

1978. In criminal cases heard by a panel of judges, Article 375 (1) of the CPC states that the judgement is passed by a majority of judges comprising the court.
1979. The decision is passed in the deliberation room based on the results of deliberations by poll in which none of the judges have the right to abstain. The presiding judge votes last. The judgement is signed by all the judges on the panel. According to Article 375(3) of the CPC, each judge of the panel of judges may state his/her own separate opinion in writing. This separate opinion is not pronounced in court session but is attached to the materials of the proceedings and is accessible for perusal. The separate opinion of a judge is delivered by the judge on his/her own behalf and reflects his/her personal position in some or all aspects of the case.
1980. A separate opinion may express general agreement with the court's decision, but provide a different reasoning or legal argumentation; alternatively, it may express partial agreement/disagreement with the court's decisions; finally it may express disagreement with all of the court's conclusions. As a matter of principle, separate opinions shall not disclose the discussions between judges during deliberations.

 **ANNEXES**

ANNEX 1: GLOSSARY OF TERMS AND DEFINITIONS APPLICABLE TO CRIMINAL PROCEEDINGS CONCERNING INTERNATIONAL CRIMES

1. **1949 Geneva Conventions** — four Geneva Conventions were adopted in 1949. Geneva Convention I through III primarily address the treatment of members of the armed forces in various scenarios: wounded and sick in the field (Geneva Convention I), wounded, sick and shipwrecked at sea (Geneva Convention II), and prisoners of war (Geneva Convention III). Geneva Convention IV addresses the protection of civilians during armed conflict. All four Geneva Conventions are universally ratified and un-contentious.
2. **1977 Additional Protocols** — the Geneva Conventions are supplemented by two additional protocols relating to the protection of victims of international armed conflict (1977 Additional Protocol I) and non-international armed conflict (1977 Additional Protocol II). In 2005, another Additional Protocol (2005 Additional Protocol III) was concluded adopting the additional red crystal ICRC emblem which is free from any religious and cultural connotation as compared to the red cross and red crescent.
3. **Accessory liability** — a form of criminal responsibility an accused can incur for the criminal actions of another person if the accused has a sufficient connection to, or participation in, the crime.
4. **Accountability** — refers to the processes, norms, and structures that bring perpetrators to justice by holding them accountable for their actions and violations of the law.
5. **Accused** — person(s) who stand accused of having committed crimes, and/or of having engaged in or contributed to criminal conduct. See also ‘Perpetrator’, below.
6. **Admissibility of Evidence** — in court proceedings, all information must be ruled ‘admissible’ to be used as evidence at trial. This requires the material to be relevant and reliable, and that its probative value is not outweighed by any prejudice if the material were to be admitted.
7. **Armed Conflict:** is the use of armed force between States or an protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.
 - a. **International Armed Conflict (IAC) (also known as Armed conflict of an international character)** — any use of armed force between states, regardless of a declaration of war or recognition of a state of war, as well as the partial or total occupation of a part of the territory of a state, even if the said occupation meets with no armed resistance.
The main sources of treaty-based international humanitarian law applicable to international armed conflicts are the four Geneva Conventions relative to the protection of war victims of August 12, 1949, and Additional Protocol I, relating to the Protection of Victims of International Armed Conflicts of June 8, 1977.
 - b. **Non-International Armed Conflict (NIAC) (also known as Armed conflict of a non-international character; Internal Armed Conflict)** — protracted armed vio-

lence (use of armed force) within a State between an organised non-state armed group and a State, or between such groups. For a NIAC to exist, the hostilities must have reached a minimum level of intensity and the non-state groups involved must be organised.

The main sources of treaty-based international humanitarian law applicable to non-international armed conflicts are Article 3 common to the four Geneva Conventions relative to the protection of war victims of August 12, 1949, and Additional Protocol II, relating to the Protection of Victims of Non-International Armed Conflicts of June 8, 1977.

8. **Armed Forces** — refers to the organised personnel and units operating under a command responsible to a belligerent State (e.g., army, navy, air force, national guards, etc.).
9. **Armed Groups (or Non-State Armed Groups)** — refers to organised non-state entities that are party to an armed conflict. The term refers exclusively to the armed or military wing of such entities, excluding, in particular, their political wing and other segments of the civilian population that are supportive of such entities.
10. **Civilians** — individuals who are not members of the armed forces. The civilian population consists of all persons who are civilians.
11. **Coercion** — acts designed to deprive or impair the ability of a person to exercise free will and autonomy.
12. **Combatants** — individuals with a right to participate in hostilities during IACs and can be targeted, such as members of the armed forces (excluding medical and religious personnel) and members of militias or volunteer corps forming part of such armed forces, members of other militias and volunteer corps (including those of organised resistance movements) belonging to a party to the armed conflict which fulfil specific requirements, members of the regular armed forces who profess allegiance to a government or authority not recognised by the other Party to the armed conflict, and inhabitants of a non-occupied territory who on the approach of the enemy spontaneously take up arms to resist the invading forces.
13. **Command (or Superior) Responsibility** — refers to the responsibility of military commanders or civilian superiors for crimes committed by forces or subordinates acting under their command, authority and control, which occurred because of their failure to exercise proper control over those forces/ subordinates.
14. **Common Article 3** — refers to the third article common to the four Geneva Conventions. It is applicable to non-international armed conflicts and protects persons taking no active part in hostilities against any violence to life or person, taking of hostages, outrages upon dignity, arbitrary sentence of execution, and denial of care.
15. **Conflict-related sexual violence (CRSV)** — refers to the acts of rape, sexual slavery, forced prostitution, forced pregnancy, forced abortion, enforced sterilization, forced

marriage and any other form of sexual violence perpetrated against women, men, girls or boys that is directly or indirectly linked to an armed conflict.

16. **Crime of Aggression** — prohibits the planning, preparation, initiation, and execution by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity, and scale, constitutes a manifest violation of the Charter of the United Nations. This crime is a leadership crime, which means it is necessary that the perpetrator was in a leadership position in the State that committed the act of aggression. It is enshrined in Article 8*bis* of the ICC Statute.
17. **Crimes Against Humanity** — a specific set of prohibited acts under international criminal law that occur in the context of a widespread or systematic attack directed against any civilian population. The existence of a widespread or systematic attack and the link between that attack and the conduct in question differentiates crimes against humanity from ordinary or domestic crimes. The prohibited acts are:
 - a. murder;
 - b. extermination;
 - c. enslavement;
 - d. deportation or forcible transfer of population;
 - e. imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
 - f. torture;
 - g. rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
 - h. persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
 - i. enforced disappearance of persons;
 - j. the crime of apartheid;
 - k. other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

They are enshrined in Article 7 of the ICC Statute. They can be committed both in peacetime and during armed conflict.

18. **Customary International Law** — a set of rules arising from established international practices, as opposed to treaties. It derives from consistent conduct of States (State practice) acting out of the genuine belief that the law — as opposed to, e.g., courtesy or political advantages — requires them to act that way (*opinio juris*). A rule with customary law status is binding on all States regardless of whether they have a treaty obligation to the same effect.

19. **Detaining Power** — when a State holds/detains persons protected under the Geneva Conventions belonging to the adverse party.
20. **Digital Evidence** — information transmitted or stored in a digital format that a party to a case may use in criminal proceedings.
21. **Direct Participation in Hostilities** — refers to any acts, which aim to support one party to the armed conflict by directly causing harm to another party, either directly inflicting death, injury or destruction, or by directly harming the enemy's military operations or capacity, as opposed to indirect participation by providing general contribution to the war effort. When carried out by a civilian, a conduct qualifying as direct participation in hostilities would suspend their protection against the dangers arising from military operations. For the duration of their conduct, the civilian in question may be directly attacked as if they were a combatant.
22. **Draft Bill 7290** — Draft Law No. 7290 “On Amendments to the Criminal Code of Ukraine and the Criminal Procedure Code of Ukraine” of Ukraine’s Cabinet of Ministers, aimed at bringing the provisions of the CCU in line with international law in order to facilitate the prosecution of international crimes. At the time of drafting, this draft law/bill has not been adopted into law.
23. **Elements of Crimes** — a set of objective, subjective and contextual elements which, when taken as a whole, lead to the offending consequence and are altogether required to be proven to establish guilt. See also ‘ICC Elements of Crimes’, below.
 - a. **Objective Elements** (*Actus Reus*) — the conduct, consequence and circumstances that materialize a crime. Objective elements are also known as ‘material elements’, ‘physical elements’ and ‘*actus reus*’.
 - b. **Subjective Elements** (*Mens Rea*) — the state of mind that is required to establish a crime. Under the law of the International Criminal Court, unless otherwise provided in the ICC Statute, each objective element of the crime must be carried out with intent and knowledge.
 - c. **Contextual Elements** — War crimes and, crimes against humanity must occur in specific contexts. The requisite contextual elements distinguish them from domestic crimes with the same underlying conduct. See the definitions of War Crimes, Crimes against Humanity for specific definitions of their contextual elements.
24. **European Convention on Human Rights (ECHR)** — A convention opened for signature on 4 November 1950 to protect human rights and political freedoms within the framework of the Council of Europe. Since its adoption in 1950 the ECHR has been amended a number of times.
25. **European Court of Human Rights (ECtHR)** — A court established in 1959 under the framework of the Council of Europe. It rules on individual or State applications alleging violations of the rights set out in the ECHR.
26. **Factors relevant to an accused’s culpability:**

- a. **Aggravating factors** — circumstances that might lead to an increased sentence and magnify the accused's culpability.
 - b. **Mitigating factors** — circumstances that might lead to a reduced sentence and lessen the accused's culpability.
27. **Genocide** — a specific set of prohibited acts under international criminal law that must be committed with an intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such. The existence of a specific intent on the part of the perpetrator “to destroy, in whole or in part, a national, ethnical, racial, or religious group” differentiates genocide from ordinary or domestic crimes and from crimes against humanity and war crimes. The prohibited acts are:
- a. killing members of the group;
 - b. causing serious bodily or mental harm to members of the group;
 - c. deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
 - d. imposing measures intended to prevent births within the group;
 - e. forcibly transferring children of the group to another group.
 - f. It is enshrined in particular in Article 6 of the ICC Statute and Article II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. It can be committed both in peacetime and during armed conflict.
28. **ICC Statute** — The Rome Statute of the International Criminal Court is the treaty that established the ICC. Adopted on 17 July 1998, it sets out, *inter alia*, the crimes the Court can address and the mechanisms for State cooperation.
29. **ICC Elements of Crimes** — the instrument adopted by the Assembly of States Parties that assists the International Criminal Court in interpreting the crimes set out in the ICC Statute.
30. **Internal disturbances and tensions** — situations that do not qualify as a NIAC because they do not reach the requisite level of intensity or do not involve sufficiently organised non-state armed groups. Internal disturbances and tensions involve cases of the violation of internal order and situations of internal unrest, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature. See also ‘Armed Conflict’, above.
31. **International Crime** — a crime that undermines the foundations of the international legal order and is a matter of concern to the entire international community (e.g., genocide, crimes against humanity, war crimes, and the crime of aggression). One of the key feature of an international crime is the existence of a contextual element or of a special intent. An individual may be held criminally liable for the commission of an international crime in both a domestic court according to domestic criminal law, and in international criminal courts and tribunals pursuant to their statutes.
32. **International Criminal Court (ICC)** — the world's first permanent international criminal court. It operates based on its founding international treaty — *the Rome Statute*

- of the International Criminal Court.* It is based in the Netherlands and is designed to investigate, prosecute and try individuals accused of committing the most serious crimes of concern to the international community as a whole, namely crimes against humanity, war crimes, genocide, and aggression. It is a complementary (additional) mechanism to national courts.
33. **International Criminal Law (ICL)** — a specialist branch of international law. It is a set of principles and norms of international law that establish and regulate individual criminal liability for international crimes (genocide, crimes against humanity, war crimes, and the crime of aggression). Since its birth in Nuremburg after the Second World War, ICL is shaped by the statutory instruments and jurisprudence of international(ized) courts and tribunals, as well as domestic case law on international crimes.
 34. **International Criminal Tribunal for Rwanda (ICTR)** — was an *ad hoc* tribunal established by the United Nations Security Council to prosecute persons responsible for genocide and serious violations of international humanitarian law committed in Rwanda and neighboring States, between 1 January and 31 December 1994.
 35. **International Criminal Tribunal for the former Yugoslavia (ICTY)** — was an *ad hoc* tribunal established by the United Nations Security Council to bring to justice those responsible for serious violations of international humanitarian law committed in the former Yugoslavia since 1991.
 36. **International Human Rights Law (IHRL)** — the body of international law that safeguards individual's fundamental freedoms (e.g., the right to life; freedom from torture; the right to liberty and security of the person; etc.) and protects individuals from the power of the State.
 37. **International Humanitarian Law (IHL) (also known as the Law of Armed Conflict; Laws and Customs of War; Jus in bello; Law of War)** — is a branch of international law; a set of principles and norms of international law that establish and regulate the protection of victims of war and the use of means and methods of warfare. IHL consists of sub-branches: Geneva Law (protection of war victims), and the Hague Law (use of means and methods of warfare). The main purpose of IHL is to prevent human suffering in times of armed conflict. The four Geneva Conventions and their Additional Protocols are the main treaties forming part of IHL.
 38. **Military Crime** — a crime committed by military personnel and enshrined in domestic criminal law which constitutes a violation of the established procedure for military service. Military crimes are enshrined in Chapter XIX of the CCU.
 39. **Military Necessity** — a principle of IHL whereby certain conduct during an armed conflict may be justified if it is necessary to attain a legitimate military advantage, provided that the conduct is not otherwise prohibited by IHL.
 40. **Military Objective** — objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction,

capture or neutralization in the circumstances ruling at the time, offers a party to the armed conflict a definite military advantage.

41. **Modes of Liability** — refer to the way in which a person was involved in the crime and, as a result, can be held criminally liable. They are the ‘linking principles’ used to connect a perpetrator with a particular crime, with other criminals, and with past decisions and consequences. See ‘Accessory Liability’, ‘Command (or Superior) Responsibility’, and ‘Principal Liability’ for examples of specific modes.
42. ***Nulla poena sine lege*** (‘no penalty without law’) — a fundamental component of criminal justice and the rule of law, it ensures that an accused cannot be punished for conduct that was not prohibited by law at the time it was committed.
43. ***Nullum crimen sine lege*** (‘no crime without law’) — a fundamental component of criminal justice and the rule of law, it ensures that an accused cannot be held criminally responsible for conduct that was not prohibited by law at the time it was committed.
44. **Occupation** — occurs when the territory of a State or part thereof is placed under the effective control of the armed forces of another State. The occupation extends only to the territory where such control has been established and can be exercised. Provided effective control is exercised, the situation will be qualified as an occupation even if it was met with no armed resistance.
45. **Perpetrator** — refers to the individual who has committed the crime or at least carried out the criminal conduct. See also ‘Accused’, above.
46. **Presumption of Innocence** — an ICL principle under which a person accused of committing a crime must be considered innocent until proven guilty.
47. **Principal Liability** — a form of criminal responsibility an accused can incur for their direct perpetration of a crime.
48. **Principle of Assimilation** — requires that prisoners of war be treated in the same way as members of the Detaining Power’s own forces, in relation to a given issue.
49. **Principle of Distinction** — an IHL principle recognizing that civilians and civilian objects must be distinguished from combatants and military objectives. Only the latter can be attacked.
50. **Principle of Legality** — an ICL principle which protects prisoners of war from being tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by the international law in force at the time said act was committed.
51. **Principle of Precautions in attack** — an IHL principle that requires participants in an armed conflict to take all feasible precautionary measures to spare civilians and civilian objects in the course of military operations.

52. **Principle of Proportionality** — an IHL principle that prohibits launching an attack against a lawful military target if that attack may be expected to cause harm that would be excessive in relation to the concrete and direct military advantage anticipated.
53. **Prisoners of War (POWs)** — combatants who have fallen into the hands of the enemy. See also ‘Combatants’, above.
54. **Right to a Fair Trial** — a legal principle which ensures that the accused of any crime is guaranteed various rights and stipulates various obligations that a court must abide by to ensure that a final judgment is concluded fairly.
 - a. **Right of Appeal** — a legal principle attached to the right to a fair trial. The accused can ask for a review of a judgment pronounced upon them.
55. **Right to Defense** — a fundamental legal principle that the accused cannot be convicted without having had the opportunity to present their defense.
56. **Sanctions:**
 - a. **Disciplinary sanctions** — applied where appropriate instead of penal sanctions. They are applied to repress breaches of law or internal regulations.
 - b. **Penal sanctions** — imposed when a rule of national or international law is violated. They are imposed through various methods such as compensation or reparation. Penal sanctions have varying goals, e.g., one is to punish the guilty.
57. **Trial *in absentia*** — a criminal proceeding in which the accused is not physically present at trial.
58. **Victim** — an individual that has suffered physical or emotional harm, property damage, or economic loss due to the commission of a crime.
59. **War Crimes (violations of the laws and customs of war)** — are serious violations of international humanitarian law that entail individual criminal responsibility. A specific set of prohibited acts under ICL that must be committed in the context of and associated with an armed conflict. According to Article 8 of the ICC Statute, there are four categories of war crimes:
 - a. Grave breaches of the Geneva Conventions of 12 August 1949;
 - b. Other serious violations of the laws and customs applicable in international armed conflicts;
 - c. Serious violations of Common Article 3 of four Geneva Conventions of 12 August 1949, in the case of non-international armed conflict;
 - d. Other serious violations of the laws and customs applicable in non-international armed conflicts.
60. **Witness** — a person who provides evidence to a court based on what they know, have seen or experienced.

ANNEX 2: GLOSSARY OF CASE LAW DATABASES AND OTHER ONLINE RESOURCES

This Annex 2 contains a list and short description of existing resources containing the practice of international criminal tribunals as well as other online resources relating to international criminal law, international humanitarian law and international human rights law relevant in the context of the Benchbook.

With respect to the public records contained in online database, each database is unique to the respective institution and therefore requires individual users to gain an understanding of the specific search parameters and tools. In general questions may be asked directly to each institution should additional assistance be required.

I. Practice of International Criminal Tribunals and Other Courts

- **United Court Records Database (International Criminal Tribunals for the former Yugoslavia and Rwanda)**

Website: ucr.irmct.org

The Unified Court Records database provides access to public court records of the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the former Yugoslavia and the International Residual Mechanism for Criminal Tribunals (the successor to the Rwanda and Yugoslavia Tribunals). Registration is required.

See also the websites for the International Criminal Tribunal for the former Yugoslavia at www.icty.org including the case-specific database at www.icty.org and the International Criminal Tribunal for Rwanda at unictr.irmct.org and list of cases at unictr.irmct.org. These tools may help to research jurisprudence in the context of specific cases.

- **International Criminal Court Legal Tools Database**

Website: www.legal-tools.org

The ICC Legal Tools Database provides access to public court records of the International Criminal Court. The full legal tools comprise the ICC Legal Tools Database (including the ICC Case Law Database), together with legal research and reference tools developed by lawyers with expertise in international criminal law and justice including: the ICC Case Matrix, the Elements Digest, and the Means of Proof Digest.

Tutorial films are available to assist in using the database at www.legal-tools.org

ICC decisions organised by specific chamber, case and other functions are available at www.icc-cpi.int

- **European Court of Human Rights HUDOC**

Website: www.echr.coe.int

The database contains all of the European Court of Human Rights' judgements and a large selection of decisions, information on communicated cases, advisory opinions, press releases, legal summaries and Commission decisions and reports.

Tutorial films and manuals are available to assist in using the database at www.echr.coe.int

The European Court of Human Rights recently established the Court's Knowledge Sharing platform (ECHR-KS) at ks.echr.coe.int. The role of ECHR-KS is to share Convention case-law knowledge, complementing HUDOC. The database is organised by articles of the European Convention for Human Rights and by transversal themes.

- **Special Court for Sierra Leone Database**

Website: www.scsldocs.org

Court records for the Special Court for Sierra Leone, contained in the above link, are hosted on the website of the Residual Special Court for Sierra Leone. The website of the RSCSL contains additional information concerning the court and is available at www.rscsl.org

- **Extraordinary Chambers in the Courts of Cambodia**

Website: www.eccc.gov

The website for the Extraordinary Chambers in the Courts of Cambodia contains links to relevant decisions. Documents can be sorted by date, defendants and organs of the Court. There is also a basic court records search function.

- **Special Tribunal for Lebanon**

Website: www.stl-tsl.org

The Special Tribunal for Lebanon website contains a basic court records search function.

II. Other Online Resources Concerning International Criminal Law and International Humanitarian Law

- **International Committee of the Red Cross Customary International Humanitarian Law Database**

Website: ihl-databases.icrc.org

The International Committee of the Red Cross (ICRC) Customary International Humanitarian Law Database consists of a searchable summary of rules concerning IHL that come from "a general practice accepted as law" and exist independent of treaty law. The study began in 1996 and identifies customary law in order to clarify legal protections offered to victims of war. 161 rules of customary IHL are referenced and the study is organised into two sections: Volume 1 concerning rules provides a comprehensive analysis of the customary rules of IHL; Volume 2 concerning practices contains for each aspect of IHL a summary

of relevant of state practice including legislation, military manuals, case-law and official statements, as well as the practice of international organisations and other bodies.

- **International Committee of the Red Cross Treaties, State Parties and Commentaries Database**

Website: ihl-databases.icrc.org

The ICRC Treaties, States Parties and Commentaries database includes the text of IHL treaties and related documents and lists the States that have signed and/or ratified or acceded to the treaties, with any reservations or declarations. It also contains the ICRC Commentaries to the four 1949 Geneva Conventions and their Additional Protocols, including the updated Commentaries as they become available. For example, the Geneva Conventions and commentaries are available at www.icrc.org

- **WorldCourts**

Website: www.worldcourts.com

WorldCourts provides a searchable database of case decisions from the United Nations, African, and Inter-American human rights bodies' complaint mechanisms, as well as judgments of internationalized criminal tribunals. The database is not always up to date and likely does not include decisions issued within the previous 6 to 12 months.

- **WorldLII**

Website: www.worldlii.org

The World Legal Information Institute collects smaller databases containing case law, legislation, treaties, reports and articles from international courts and the domestic courts of over 20 countries. The international law library contains international documents. There are also region and country specific databases.

ANNEX 3: TABLE OF AUTHORITIES

I. Conventions and Instruments (chronological)

Short citation	Full citation
Hague Regulations 1899.	1899 Hague Convention (II) with respect to the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, 26 Martens Nouveau Recueil (Series 2), 949; 187 Consolidated Treaty Series 429.
Hague Regulations 1907 , or Hague Regulations.	1907 Hague Convention (IV) with respect to the Laws and Customs of War on Land and its Annexed Regulations concerning the Laws and Customs of War on Land, 3 Martens Nouveau Recueil (Series 3), 461; 187 Consolidated Treaty Series 227.
Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.	1925 Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 94 LNTS 65.
Convention to Suppress the Slave Trade and Slavery.	1926 Slavery Convention, 60 LNTS 253.
UN Charter.	1945 Charter of the United Nations, 892 UNTS 119.
Statute of the International Court of Justice.	1945 Statute of the International Court of Justice, 15 UNCIO 355.
IMT Charter , or Nuremburg Charter.	1945 Charter of the International Military Tribunal, Nuremberg, Annexed to the 1945 London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 82 UNTS 279.
IMTFE Charter , or Tokyo Charter.	1946 Charter of the International Military Tribunal for the Far East, Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo.
Genocide Convention.	1948 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277.
Universal Declaration of Human Rights , or UDHR.	1948 Universal Declaration of Human Rights, UNGA Res 217A (III).
Geneva Convention I.	1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31.
Geneva Convention II.	1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85.
Geneva Convention III.	1949 Geneva Convention Relative to the Treatment of Prisoners of War, 75 UNTS 135.
Geneva Convention IV.	1949 Convention Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287.
European Convention on Human Rights , or ECHR.	1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 221.

Protocols Amending the Text of the European Convention on Human Rights.	1952 First Protocol, ETS No. 9; 1963 Fourth Protocol, ETS No. 46; 1983 Sixth Protocol, ETS No. 114; 1984 Seventh Protocol, ETS No. 117; 2000 Twelfth Protocol, CETS No. 177; 2002 Thirteenth Protocol, CETS No. 187; 2013 Fifteenth Protocol, CETS No. 213; 2013 Sixteenth Protocol, CETS No. 214.
Convention for the Protection of Cultural Property in the Event of an Armed Conflict.	1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 UNTS 240.
Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.	1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 226 UNTS 3.
Vienna Convention on Diplomatic Relations.	1961 Vienna Convention on Diplomatic Relations, 500 UNTS 95.
International Convention on the Elimination of All Forms of Racial Discrimination.	1966 International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195.
International Covenant on Civil and Political Rights, or ICCPR.	1966 International Covenant on Civil and Political Rights, 999 UNTS 171.
International Covenant on Economic, Social and Cultural Rights, or ICESCR.	1966 International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3.
Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.	1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 754 UNTS 73.
Vienna Convention on the Law of Treaties.	1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331.
American Convention on Human Rights.	1969 American Convention on Human Rights "Pact of San José, Costa Rica", 1144 UNTS 123.
Convention on the Prohibition of Biological Weapons.	1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 1015 UNTS 163.
Convention on the Suppression and Punishment of the Crime of Apartheid.	1973 International Convention on the Suppression and Punishment of the Crime of Apartheid, 1015 UNTS 243.
European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes Strasbourg.	1974 European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, ETS No. 82.
Additional Protocol I.	1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3.
Additional Protocol II.	1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS 609.
International Convention Against the Taking of Hostages.	1979 International Convention against the Taking of Hostages, 1316 UNTS 205.

Convention prohibiting Certain Conventional Weapons.	1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, 1342 UNTS 7.
Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.	1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85.
Convention prohibiting Chemical Weapons.	1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 1015 UNTS 163.
ICTY Statute.	1993 Statute of the International Criminal Tribunal for the Former Yugoslavia, UNSC Res. 827 (1993)-1877 (2009).
ICTY Rules of Procedure and Evidence.	International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, IT/32/Rev.50, 2015.
ICTR Statute.	1994 Statute of the International Criminal Tribunal for Rwanda, UNSC Res. 955 (1994)-1901 (2009).
ICTR Rules of Procedure and Evidence.	International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, 2015.
Convention on the Safety of United Nations and Associated Personnel.	1994 Convention on the Safety of United Nations and Associated Personnel, 2051 UNTS 363.
Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction.	1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 2056 UNTS 577.
ICC Statute.	1998 Rome Statute of the International Criminal Court, 2187 UNTS 3.
ICC Elements of Crimes.	International Criminal Court Elements of Crimes, ICC-PIOS-LT-03-002/15_Eng, 2013.
ICC Rules of Procedure and Evidence.	International Criminal Court, Rules of Procedure and Evidence, ICC-PIDS-LT-02-002/13_Eng, 2013.
SCSL Statute.	2000 Statute of the Special Court for Sierra Leone, UNSC Res. 1315 (2000).
ECCC Law.	2001 Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, NS/RKM/0801/12, NS/RKM/1004/006.
Additional Protocol III.	2005 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III).
International Convention for the Protection of All Persons from Enforced Disappearance.	2006 International Convention for the Protection of All Persons from Enforced Disappearance , 2716 UNTS 3.
Treaty of Lisbon amending the Treaty on the European Union and the Treaty establishing the European Community.	2007 Treaty of Lisbon amending the Treaty on the European Union and the Treaty establishing the European Community , 2007/C 306/01.

STL Statute.	2007 Statute of the Special Tribunal for Lebanon, UNSC Res. 1757 (2007).
STL RPE.	Special Tribunal for Lebanon, Rules of Procedure and Evidence, STL-BD-2009-01-Rev.11.
Istanbul Convention.	2011 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, ETS No. 210.
KSC and SPO Statute.	2015 Law on Specialist Chambers and Specialist Prosecutor's Office, No. 05/L-053.
CCU	Criminal Code of the Republic of Ukraine.
CPC	Ukrainian Criminal Procedure Code.

II. Jurisprudence (alphabetical: tribunal name, case name)

A. International Criminal Court

Short citation	Full citation
ICC, <i>Abd-Al-Rahman</i> Judgement on the appeal of Mr Abd-Al-Rahman against Pre-Trial Chamber II's "Decision on the Defence 'Exception d'incompétence' (ICC-02/05-01/20-302)".	ICC, <i>Prosecutor v Ali Muhammed Ali Abd-Al-Rahman</i> , ICC-02/05-01/20-503, Judgement on the appeal of Mr Abd-Al-Rahman against Pre-Trial Chamber II's "Decision on the Defence 'Exception d'incompétence' (ICC-02/05-01/20-302)", 1 November 2021.
ICC, <i>Abu Garda</i> Decision on the Confirmation of Charges.	ICC, <i>Prosecutor v Bahr Idriss Abu Garda</i> , ICC-02/05-02/09-243-Red, Decision on the Confirmation of Charges, 8 February 2010.
ICC, <i>Al Bashir</i> Appeal Judgement.	ICC, <i>Prosecutor v Omar Hassan Ahmad al Bashir</i> , ICC-02/05-01/09-397-Corr, Judgment in the Jordan Referral re Al-Bashir Appeal, 6 May 2019.
ICC, <i>Al Bashir</i> Decision on the Prosecution's Application for a Warrant of Arrest.	ICC, <i>Prosecutor v Omar Hassan Ahmad al Bashir</i> , ICC-02/05-01/09-3, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009.
ICC, <i>Al Bashir</i> Second Decision on the Prosecution's Application for a Warrant of Arrest.	ICC, <i>Prosecutor v Omar Hassan Ahmad al Bashir</i> , ICC-02/05-01/09-94, Second Decision on the Prosecution's Application for a Warrant of Arrest, 12 July 2010.
ICC, <i>Al Hassan</i> Arrest Warrant Decision.	ICC, <i>Prosecutor v Al Hassan ag Abdoul Aziz ag Mohamed ag Mahmoud</i> , ICC-01/12-01/18-35-Red2-tENG, Decision on the Prosecutor's Application for the Issuance of a Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 22 May 2018.

ICC, Al Hassan Decision of 13 December 2018 .	ICC, <i>Prosecutor v Al Hassan ag Abdoul Aziz ag Mohamed ag Mahmoud</i> , ICC-01/12-01/18-204-Red, Décision relative aux requêtes du Procureur aux fins de prendre des mesures nécessaires en application de l'article 56-2 du Statut pour les témoins MLI-OTP P0066, MLI-OTP-P-0004, MLI-OTP-P-0605, MLI OTP-P-0582 et MLI-OTP-P-0537, 13 December 2018.
ICC, Al Hassan Decision of 30 January 2019	ICC, <i>Prosecutor v Al Hassan ag Abdoul Aziz ag Mohamed ag Mahmoud</i> , ICC-01/12-01/18-232-Red, Décision relative à la requête du Procureur aux fins de prendre des mesures nécessaires en application de l'article 56-2 du Statut pour le témoin MLI-OTP-P-0065, 30 January 2019.
ICC, Al Hassan Decision on Confirmation of charges ,	ICC, <i>Prosecutor v Al Hassan ag Abdoul Aziz ag Mohamed ag Mahmoud</i> , ICC-01/12-01/18-461-Corr-Red, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, original 30 September 2019.
ICC, Al Mahdi Decision on Confirmation of Charges	ICC, <i>Prosecutor v Ahmad Al Faqi Al Mahdi</i> , ICC-01/12-01/15-84-Red, Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi, 24 March 2016.
ICC, Al Mahdi Trial Judgement .	ICC, <i>Prosecutor v Ahmad Al Faqi Al Mahdi</i> , ICC-01/12-01/15-171, Trial Judgment and Sentence, 27 September 2016.
ICC, Al-Werfalli First Warrant of Arrest	ICC, <i>Prosecutor v Mahmoud Mustafa Busayf AL-WERFALLI</i> , ICC-01/11-01/17-2, Warrant of Arrest, 15 August 2017.
ICC, Al-Werfalli Second Warrant of Arrest	ICC, <i>Prosecutor v Mahmoud Mustafa Busayf AL-WERFALLI</i> , ICC-01/11-01/17-13, Second Warrant of Arrest, 4 July 2018.
ICC, Bemba Appeal Judgement	ICC, <i>Prosecutor v Jean-Pierre Bemba Gombo</i> , ICC-01/05-01/08-3636-Red, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", 8 June 2018.
ICC, Bemba Arrest Warrant Decision	ICC, <i>Prosecutor v Jean-Pierre Bemba Gombo</i> , ICC-01/05-01/08-1-tENG, Urgent Warrant of Arrest for Jean-Pierre Bemba Gombo, 23 May 2008.
ICC, Bemba Decision on Admission of Materials into Evidence	ICC, <i>Prosecutor v Jean-Pierre Bemba Gombo</i> , ICC-01/05-01/08-2299-Red, "Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute" of 6 September 2012, 8 October 2012.
ICC, Bemba Decision on the Confirmation of Charges	ICC, <i>Prosecutor v Jean-Pierre Bemba Gombo</i> , ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009.
ICC, Bemba Trial Judgement .	ICC, <i>Prosecutor v Jean-Pierre Bemba Gombo</i> , ICC-01/05-01/08-3343, Judgment pursuant to Article 74 of the Statute, 21 March 2016.

ICC, <i>Bemba et al.</i> Appeal Contempt Judgement	ICC, <i>Prosecutor v Jean-Pierre Bemba Gombo, Aime Kilolo Mussamba, Jean-Jacques Mangenda Kabongo, Fidele Babala Wandu, and Narcisse Arido</i> , ICC-01/05-01/13-2275-Red, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, 8 March 2018.
ICC, <i>Bemba et al.</i> Contempt Judgement ,	ICC, <i>Prosecutor v Jean-Pierre Bemba Gombo, Aime Kilolo Mussamba, Jean-Jacques Mangenda Kabongo, Fidele Babala Wandu, and Narcisse Arido</i> , ICC-01/05-01/13-1989-Red, Judgment pursuant to Article 74 of the Statute, 19 October 2016.
ICC, <i>Ble Goude</i> Decision on the Confirmation of Charges	ICC, <i>Prosecutor v Charles Ble Goude</i> , ICC-02/11-02/11, Decision on the confirmation of charges against Charles Blé Goudé, 11 December 2014.
ICC, <i>Chui</i> Judgement pursuant to Article 74 of the Statute, Concurring Opinion of Judge Christine Van den Wyngaert	ICC, <i>Prosecutor v. Ngudjolo Chui</i> , ICC-01/04-02/12-4, Judgement pursuant to Article 74 of the Statute, Concurring Opinion of Judge Christine Van den Wyngaert, 18 December 2012.
ICC, Decision on the ‘Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute’ (Myanmar/Bangladesh).	ICC, ICC-RoC46(3)-01/18-37 Decision on the ‘Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute’ (Myanmar/Bangladesh), 6 September 2018.
ICC, <i>Gbagbo and Ble Goude</i> Decision of 3 November 2017	ICC, <i>Prosecutor v Laurent Gbagbo and Charles Ble Goude</i> , ICC-02/11-01/15-1060, Decision on protective and special measures, mode of testimony and the order of appearance of certain upcoming witnesses, 3 November 2017.
ICC, <i>Gbagbo and Ble Goude</i> Decision of 27 November 2017	ICC, <i>Prosecutor v Laurent Gbagbo and Charles Ble Goude</i> , ICC-02/11-01/15-1079, Decision on the Prosecutor’s urgent application for testimony by means of videolink technology and for additional special measures with respect to Witness P-0554, 27 November 2017.
ICC, <i>Gbagbo</i> Decision on Confirmation of Charges .	ICC, <i>Prosecutor v Laurent Gbagbo</i> , ICC-02/11-01/11-656-Red, Decision on the confirmation of charges against Laurent Gbagbo, 12 June 2014.
ICC, <i>Guchmazov</i> Arrest Warrant	ICC, <i>Situation in Georgia</i> , ICC-01/15-41-Red, Public redacted version of ‘Arrest warrant for Gamlet Guchmazov’, original 24 June 2022.
ICC, <i>Harun and Kushayb</i> Decision on the Prosecution Application under Article 58(7) of the Statute	ICC, <i>Prosecutor v Ahmad Harun and Ali Kushayb</i> , ICC-02/05-01/07-1-Corr, Decision on the Prosecution Application under Article 58(7) of the Statute, 27 April 2007.
ICC, <i>Katanga and Ngudjolo Chui</i> Decision on the Confirmation of Charges	ICC, <i>Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui</i> , ICC-01/04-01/07-717, Decision on the confirmation of charges, 30 September 2008.

ICC, <i>Katanga and Ngudjolo Chui</i> Decision on the "Prosecution's Application Concerning Disclosure by the Defence Pursuant to Rules 78 and 79(4)"	ICC, <i>Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui</i> , ICC-01/04-01/07-2388, Decision on the "Prosecution's Application Concerning Disclosure Pursuant to Rules 78 and 79(4)", 14 September 2010.
ICC, <i>Katanga</i> Decision transmitting additional legal and factual material	ICC, <i>Prosecutor v Germain Katanga</i> , ICC-01/04-01/07-3371-tENG, Decision transmitting additional legal and factual material (regulation 55(2) and 55(3) of the Regulations of the Court), 15 May 2013.
ICC, <i>Katanga</i> Trial Judgement .	ICC, <i>Prosecutor v Germain Katanga</i> , ICC-01/04-01/07-3436-tENG, Judgment pursuant to article 74 of the Statute, 7 March 2014.
ICC, <i>Lubanga</i> Appeal Judgement	ICC, <i>Prosecutor v Thomas Lubanga Dyilo</i> , ICC-01/04-01/06-3121-Red, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014.
ICC, <i>Lubanga</i> Decision on the Confirmation of Charges .	ICC, <i>Prosecutor v Thomas Lubanga Dyilo</i> , ICC-01/04-01/06-803-tEN, Decision on the confirmation of charges, 29 January 2007.
ICC, <i>Lubanga</i> Decision concerning Pre-Trial Chamber I's Decision	ICC, <i>Prosecutor v Thomas Lubanga Dyilo</i> , ICC-01/04-01/06-8-US-Corr, Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo , 24 February 2006.
ICC, <i>Lubanga</i> Trial Judgement .	ICC, <i>Prosecutor v Thomas Lubanga Dyilo</i> , ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, 14 March 2012.
ICC, <i>Mudacumura</i> Decision on the Prosecutor's Application under Article 58	ICC, <i>Prosecutor v Sylvestre Mudacumura</i> , ICC-01/04-01/12-1-Red, Decision on the Prosecutor's Application under Article 58, 13 July 2012.
ICC, <i>Mbarushimana</i> Arrest Warrant Decision	ICC, <i>Prosecutor v Callixte Mbarushimana</i> , ICC-01/04-01/10-1, Decision on the Prosecutor's Application for a Warrant of Arrest Mbarushimana, 28 September 2010.
ICC, <i>Mbarushimana</i> Confirmation of Charges	ICC, <i>Prosecutor v Callixte Mbarushimana</i> , ICC-01/04-01/10-465-Red, Decision on the confirmation of charges, 16 December 2011.
ICC, <i>Mindzaev</i> Arrest Warrant	ICC, <i>Situation in Georgia</i> , ICC-01/15-40-Red, Public redacted version of "Corrected version of the "Arrest warrant for Mikhail Mayramovich Mindzaev"", 30 June 2022.
ICC, <i>Muhammad Hussein</i> Public Redacted Version of "Decision on the Prosecutor's Application under Article 58 relating to Abdel Raheem Muhammad Hussein" .	ICC, <i>Prosecutor v Abdel Raheem Muhammad Hussein</i> , ICC-02/05-01/12-1-Red, Public Redacted Version of "Decision on the Prosecutor's Application under Article 58 relating to Abdel Raheem Muhammad Hussein", 1 March 2012 .
ICC, <i>Muthaura et al.</i> Decision on the Confirmation of Charges	ICC, <i>Prosecutor v Francis Kirimi Muthaura, Uhuru Kenyatta, and Mohammed Hussein Ali</i> , ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012.

ICC, <i>Muthaura et al.</i> Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali	ICC, <i>Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali</i> , ICC-01/09-02/11-1, Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011.
ICC, <i>Nourain and Jerbo Jamus</i> Decision on the Confirmation of Charges	ICC, <i>Prosecutor v Nourain and Jerbo Jamus</i> , ICC-02/05-03/09-121-Corr-Red, Corrigendum of the "Decision on the Confirmation of Charges", 7 March 2011.
ICC, <i>Ntaganda</i> Appeal Judgement	ICC, <i>Prosecutor v Bosco Ntaganda</i> , ICC-01/04-02/06-2666-Red, Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment', 30 March 2021.
ICC, <i>Ntaganda</i> Appeal Judgement , Annex 1: Separate Opinion of Judge Howard Morrison and Judge Piotr Hofmański on the Prosecutor's Appeal	ICC, <i>Prosecutor v Bosco Ntaganda</i> , ICC-01/04-02/06-2666-Anx1, Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment', Annex 1: Separate opinion of Judge Howard Morrison and Judge Piotr Hofmański on the Prosecutor's appeal, 30 March 2021.
ICC, <i>Ntaganda</i> Appeal Judgement , Annex 4: Separate Opinion of Judge Solomy Balungi Bossa on the Prosecutor's Appeal	ICC, <i>Prosecutor v Bosco Ntaganda</i> , ICC-01/04-02/06-2666-Anx4, Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment', ANNEX 4: Separate opinion of Judge Solomy Balungi Bossa on the Prosecutor's appeal, 30 March 2021.
ICC, <i>Ntaganda</i> Decision on Confirmation of Charges	ICC, <i>Prosecutor v Bosco Ntaganda</i> , ICC-01/04-02/06-309, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014.
ICC, <i>Ntaganda</i> , Annex A to the Decision on the Protocol on Witness Familiarization	ICC, <i>Prosecutor v Bosco Ntaganda</i> , ICC-01/04-02/06-656-AnxA, Decision on the Protocol on Witness Familiarization, ANNEX A: Protocol on the practices to be used to familiarise witnesses for giving testimony at trial, 17 June 2015.
ICC, <i>Ntaganda</i> Prosecution request for notice to be given of a possible recharacterisation pursuant to regulation 55(2)	ICC, <i>Prosecutor v Bosco Ntaganda</i> , ICC-01/04-02/06-501, Prosecution request for notice to be given of a possible recharacterisation pursuant to regulation 55(2), 9 March 2015.
ICC, <i>Ntaganda</i> Protective Measures Decision	ICC, <i>Prosecutor v Bosco Ntaganda</i> , ICC-01/04-02/06-824-Red, Decision on request for in-court protective measures relating to the first Prosecution witness, 15 September 2015.
ICC, <i>Ntaganda</i> Trial Judgement .	ICC, <i>Prosecutor v Bosco Ntaganda</i> , ICC-01/04-02/06-2359, Trial Judgment, 8 July 2019.

ICC, <i>Ntaganda</i> Annex 1 to the Victims and Witnesses Unit's submission of the Protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses pursuant to Order no ICC-01/04-02/06-416, 5 February 2015	ICC, <i>Prosecutor v Bosco Ntaganda</i> , ICC-01/04-02/06-445-Anx1, Victims and Witnesses Unit's submission of the Protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses pursuant to Order no ICC-01/04-02/06-416, ANNEX 1, 17 June 2015.
ICC, <i>Ongwen</i> Amici Curiae Observations on Sexual- and Gender-Based Crimes	ICC, <i>Prosecutor v Dominic Ongwen</i> , ICC-02/04-01/15-1934, Amici Curiae Observations on Sexual and Gender-Based Crimes, Particularly Sexual Slavery, and on Cumulative Convictions Pursuant to Rule 103 of the Rules of Procedure and Evidence, 23 December 2021.
ICC, <i>Ongwen</i> Appeal Judgement	ICC, <i>Prosecutor v Dominic Ongwen</i> , ICC-02/04-01/15-2022-Red, Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled "Trial Judgment", 15 December 2022.
ICC, <i>Ongwen</i> Decision of 27 July 2015	ICC, <i>Prosecutor v Dominic Ongwen</i> , ICC-02/04-01/15-277-Red, Decision on the "Prosecution application for the Pre-Trial Chamber to preserve evidence and take measures under article 56 of the Rome Statute", original 27 July 2015.
ICC, <i>Ongwen</i> Decision of 12 October 2015	ICC, <i>Prosecutor v Dominic Ongwen</i> , ICC-02/04-01/15-316-Red, Decision on the "Second Prosecution application to the Pre-Trial Chamber to preserve evidence and take measures under article 56 of the Rome Statute", original 12 October 2015.
ICC, <i>Ongwen</i> Decision on the Confirmation of the Charges	ICC, <i>Prosecutor v Dominic Ongwen</i> , ICC-02/04-01/15-422-Red, Decision on the confirmation of charges against Dominic Ongwen, 23 March 2016.
ICC, <i>Ongwen</i> Sentencing Decision	ICC, <i>Prosecutor v Dominic Ongwen</i> , ICC-02/04-01/15-1819-Red, Sentence, 6 May 2021.
ICC, <i>Ongwen</i> Trial Judgement	ICC, <i>Prosecutor v Dominic Ongwen</i> , ICC-02/04-01/15-1762-Red, Trial Judgment, 4 February 2021.
ICC, <i>Ruto et al.</i> Decision on the confirmation of charges	ICC, <i>Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey, and Joshua Arap Sang</i> , ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012.
ICC <i>Sanakoev</i> Arrest Warrant	ICC, <i>Situation in Georgia</i> , ICC-01/15-42-Red, Public redacted version of 'Arrest warrant for David Georgiyevich Sanakoev', original 24 June 2022.
ICC, <i>Simone Gbagbo</i> Decision on Arrest Warrant	ICC, <i>Prosecutor v Simone Gbagbo</i> , ICC-02/11-01/12-2-Red, Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Simone Gbagbo, 2 March 2012.
ICC, <i>Situation in Bangladesh/Myanmar</i> Authorisation Decision	ICC, <i>Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar</i> , ICC-01/19-27, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, 14 November 2019.

ICC, <i>Situation in Burundi</i> Authorisation Decision .	ICC, <i>Situation in the Republic of Burundi</i> , ICC-01/17-9-Red, Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi", ICC-01/17-X-9-US Exp, 25 October 2017.
ICC, <i>Situation in Côte d'Ivoire</i> Corrigendum to Decision Pursuant to Article 15 of the ICC Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire	ICC, <i>Situation in the Republic of Côte d'Ivoire</i> , ICC-02/11-14-Corr, Corrigendum to "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, 15 November 2011.
ICC, <i>Situation in the Democratic Republic of Congo</i> Judgement on the Prosecutor's Appeal against the Decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58"	ICC, <i>Situation in the Democratic Republic of Congo</i> , ICC-01/04-169, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", 13 July 2006.
ICC, <i>Situation in the Islamic Republic of Afghanistan</i> Investigation Decision	ICC, <i>Situation in the Islamic Republic of Afghanistan</i> , ICC-02/17-33, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, 12 April 2019.
ICC, <i>Situation in the Islamic Republic of Afghanistan</i> Judgement on the Appeal against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, 5 March 2020	ICC, <i>Situation in the Islamic Republic of Afghanistan</i> , ICC-02/17-138, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, 5 March 2020.
ICC, <i>Situation in the Republic of Kenya</i> Investigation Authorisation Decision	ICC, <i>Situation in the Republic of Kenya</i> , ICC-01/09-19-Corr, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010.
ICC, <i>Yekatom</i> Decision on the Confirmation of Charges	ICC, <i>Prosecutor v Alfred Yekatom and Patrice-Edouard Ngaïssona</i> , ICC-01/14-01/18-403-Red, Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona, original 11 December 2019.

B. Other International Criminal Tribunals

Short citation	Full citation
ECCC, <i>Kaing Guek Eav (alias Duch)</i> Appeal Judgement	ECCC, <i>Co-Prosecutors v. Kaing Guek Eav (alias Duch)</i> , Case No. 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012.
ECCC, <i>Kaing Guek Eav (alias Duch)</i> Trial Judgement	ECCC, <i>Co-Prosecutors v. Kaing Guek Eav (alias Duch)</i> , Case No. 001/18-07-2007/ECCC/TC, Trial Judgement, 26 July 2010.
ECCC, <i>Nuon Chea and Khieu Samphan</i> Trial Judgement	ECCC, <i>Co-Prosecutors v. Nuon Chea and Khieu Samphan</i> , Case No. 002/19-09-2007/ECCC/TC, Case 002/02 Trial Judgement, 16 November 2018.

ICTR, <i>Akayesu</i> Appeal Judgement	ICTR, <i>Prosecutor v. Akayesu</i> , Case No. ICTR-96-4-A, Judgement, 1 June 2001.
ICTR, <i>Akayesu</i> Trial Judgement	ICTR, <i>Prosecutor v. Akayesu</i> , Case No. ICTR-96-4-T, Judgement, 2 September 1998.
ICTR, <i>Bagilishema</i> Appeal Judgement	ICTR, <i>The Prosecutor v. Ignace Bagilishema</i> , Case No. ICTR-95-1A-A, 3 July 2002.
ICTR, <i>Bagilishema</i> Trial Judgement	ICTR, <i>The Prosecutor v. Ignace Bagilishema</i> , Case No. ICTR-95-1A-T, Judgement, 7 June 2001.
ICTR, <i>Bagosora et al.</i> Appeal Judgement	ICTR, <i>Prosecutor v. Bagosora and Nsengiyumva</i> , Case No. ICTR-98-41-A, Judgement, 14 December 2011.
ICTR, <i>Bagosora et al.</i> Decision on Motions for Judgement of Acquittal	ICTR, <i>Prosecutor v. Bagosora et al.</i> , Case No. ICTR-98-41-T, Decision on Motions for Judgement of Acquittal, 2 February 2005.
ICTR, <i>Bagosora et al.</i> Trial Judgement	ICTR, <i>Prosecutor v. Bagosora et al.</i> , Case No. ICTR-98-41-T, Trial Judgement and Sentence, 18 December 2008.
ICTR, <i>Bizimungu</i> Appeal Judgement	ICTR, <i>Augustin Bizimungu v. The Prosecutor</i> , Case No. ICTR-00-56B-A, Judgement, 30 June 2014.
ICTR, <i>Bizimungu et al.</i> Trial Judgement	ICTR, <i>The Prosecutor v. Bizimungu et al.</i> Case No. ICTR-99-50-T, Trial Judgement and Sentence, 30 September 2011.
ICTR, <i>Gacumbitsi</i> Appeal Judgement	ICTR, <i>Sylvestre Gacumbitsi v. The Prosecutor</i> , Case No. ICTR-2001-64-A, "Judgement", 7 July 2006.
ICTR, <i>Gacumbitsi</i> Trial Judgement	ICTR, <i>The Prosecutor v. Sylvestre Gacumbitsi</i> , Case No. ICTR-2001-64-T, Trial Judgement, 17 June 2004.
ICTR, <i>Gatete</i> Trial Judgement	ICTR, <i>The Prosecutor v. Jean-Baptiste Gatete</i> , Case No. ICTR-2000-61-T, Trial Judgement and Sentence, 31 March 2011.
ICTR, <i>Hategekimana</i> Appeal Judgement	ICTR, <i>Ildephonse Hategekimana v. The Prosecutor</i> , Case No. ICTR-00-55B-A, Judgement, 8 May 2012.
ICTR, <i>Hategekimana</i> Trial Judgement	ICTR, <i>The Prosecutor v. Ildephonse Hategekimana</i> , Case No. ICTR-00-55B-T, Trial Judgement and Sentence, 6 December 2010.
ICTR, <i>Kajelijeli</i> Appeal Judgement	ICTR, <i>Juvénal Kajelijeli v. The Prosecutor</i> , Case No. ICTR-98-44A-A, 23 May 2005.
ICTR, <i>Kajelijeli</i> Trial Judgement	ICTR, <i>The Prosecutor v. Juvénal Kajelijeli</i> , Case No. ICTR-98-44A-T, Trial Judgement and Sentence, 1 December 2003.
ICTR, <i>Kalimanzira</i> Appeal Judgement	ICTR, <i>Callixte Kalimanzira v. The Prosecutor</i> , Case No. ICTR-05-88-A, Judgement, 20 October 2010.
ICTR, <i>Kalimanzira</i> Trial Judgement	ICTR, <i>The Prosecutor v. Callixte Kalimanzira</i> , Case No. ICTR-05-88-T, Trial Judgement, 22 June 2009.
ICTR, <i>Kambanda</i> Trial Judgement	ICTR, <i>The Prosecutor v. Jean Kambanda</i> , Case No. ICTR 97-23-S, Trial Judgement and Sentence, 4 September 1998.
ICTR, <i>Kamuhanda</i> Appeal Judgement	ICTR, <i>Kamuhanda v. Prosecutor</i> , Case No. ICTR-99-54A-A, Judgement, 19 September 2005.

ICTR, <i>Kamuhanda</i> Trial Judgement	ICTR, <i>The Prosecutor v. Jean de Dieu Kamuhanda</i> , Case No. ICTR-99-54A-T, Judgement and Sentence.
ICTR, <i>Kanyarukiga</i> Appeal Judgement	ICTR, <i>Gaspard Kanyarukiga v. The Prosecutor</i> , Case No. ICTR-02-78-A, Judgement, 8 May 2012.
ICTR, <i>Karemera and Ngirumpatse</i> Appeal Judgement	ICTR, <i>Karemera and Ngirumpatse v. Prosecutor</i> , Case No. ICTR-98-44-A, Judgement, 29 September 2014.
ICTR, <i>Karemera et al.</i> Decision on Jurisdictional Appeals: Joint Criminal Enterprise	ICTR, <i>Karemera et al. v. Prosecutor</i> , Case Nos. ICTR-98-44-AR72.5, ICTR-98-44-AR72.6, Decision on Jurisdictional Appeals: Joint Criminal Enterprise, 12 April 2006.
ICTR, <i>Karamera et al.</i> Decision on Motions for Judgement of Acquittal	ICTR, <i>Prosecutor v. Karemera et al.</i> , Case No. ICTR-98-44-T, Decision on Motions for Judgement of Acquittal , 19 March 2008.
ICTR, <i>Karemera and Ngirumpatse</i> Trial Judgement	ICTR, <i>Prosecutor v. Karemera and Ngirumpatse</i> , Case No. ICTR-98-44-T, Trial Judgement and Sentence, 2 February 2012.
ICTR, <i>Kayishema and Ruzindana</i> Appeal Judgement	ICTR, <i>Prosecutor v. Kayishema and Ruzidana</i> , Case No. ICTR-95-1-A, Judgement (Reasons), 1 June 2001.
ICTR, <i>Kayishema and Ruzindana</i> Trial Judgement	ICTR, <i>Prosecutor v. Kayishema and Ruzidana</i> , Case No. ICTR-95-1-T, Sentence, 21 May 1999.
ICTR, <i>Mpambara</i> Trial Judgement	ICTR, <i>The Prosecutor v. Jean Mpambara</i> , Case No. ICTR-01-65-T, Trial Judgement, 11 September 2006.
ICTR, <i>Muhimana</i> Appeal Judgement	ICTR, <i>Mikaeli Muhimana v. The Prosecutor</i> , Case No. ICTR-95-1B-A, Judgement, 21 May 2007.
ICTR, <i>Muhimana</i> Trial Judgement	ICTR, <i>The Prosecutor v. Mikaeli Muhimana</i> , Case No. ICTR-95-1B-T, Trial Judgement and Sentence, 28 April 2005.
ICTR, <i>Muvunyi</i> Trial Judgement	ICTR, <i>The Prosecutor v. Tharcisse Muvunyi</i> , Case No. ICTR-2000-55A-T, Judgement and Sentence, 12 September 2006.
ICTR, <i>Muvunyi</i> Decision on Muvunyi's Motion for Judgement of Acquittal	ICTR, <i>The Prosecutor v. Tharcisse Muvunyi</i> , Case No. ICTR-2000-55A-T, Decision on Muvunyi's Motion for Judgement of Acquittal pursuant to Rule 98 bis , 13 October 2005.
ICTR, <i>Musema</i> Trial Judgement	ICTR, <i>The Prosecutor v. Alfred Musema</i> , Case No. ICTR-96-13-T, Trial Judgement and Sentence, 27 January 2000.
ICTR, <i>Nahimana et al.</i> Appeal Judgement	ICTR, <i>Prosecutor v. Nahimana, Barayagwiza, and Ngeze</i> , Case No. ICTR-99-52-A, Judgement, 28 November 2007.
ICTR, <i>Nahimana et al.</i> Trial Judgement	ICTR, <i>Prosecutor v. Nahimana, Barayagwiza, and Ngeze</i> , Case No. ICTR-99-52-T, Trial Judgement and Sentence, 3 December 2003.
ICTR, <i>Ndahimana</i> Trial Judgement	ICTR, <i>Prosecutor v. Ndahimana</i> , Case No. ICTR-01-68-T, Trial Judgement and Sentence, 30 December 2011.
ICTR, <i>Ndindabahizi</i> Trial Judgement	ICTR, <i>Prosecutor v. Ndindabahizi</i> , Case No. ICTR-01-71-T, Trial Judgement and Sentence, 15 July 2004.
ICTR, <i>Ndindiliyimana et al.</i> Trial Judgement	ICTR, <i>Prosecutor v. Ndindiliyimana et al.</i> , Case No. ICTR-00-56-T, Trial Judgement and Sentence, 17 May 2011.

ICTR, <i>Niyitegeka</i> Appeal Judgement	ICTR, <i>Eliézer Niyitegeka v. The Prosecutor</i> , Case No. ICTR-96-14-A, Judgement, 9 July 2004.
ICTR, <i>Ntagerura et al.</i> Trial Judgement	ICTR, <i>The Prosecutor v. Ntagerura et al.</i> , Case No. ICTR-99-46-T, Trial Judgement and Sentence, 25 February 2004.
ICTR, <i>Ntakirutimana et al.</i> Appeal Judgement	ICTR, <i>Prosecutor v. Ntakirutimana and Ntakirutimana</i> , Cases Nos. ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004.
ICTR, <i>Ntakirutimana et al.</i> Trial Judgement	ICTR, <i>Prosecutor v. Ntakirutimana and Ntakirutimana</i> , Cases Nos. ICTR-96-10-T and ICTR-96-17-T, Trial Judgement and Sentence, 21 February 2003.
ICTR, <i>Nyiramasuhuko et al.</i> Appeal Judgement	ICTR, <i>The Prosecutor v. Nyiramasuhuko et al.</i> , Case No. ICTR-98-42-A, Appeals Judgement, 14 December 2015.
ICTR, <i>Nyiramasuhuko et al.</i> Decision on Defence Motions for Acquittal Under Rule 98bis	ICTR, <i>The Prosecutor v. Nyiramasuhuko et al.</i> , Case No. ICTR-98-42-T, Decision on Defence Motions for Acquittal Under Rule 98 bis , 16 December 2004.
ICTR, <i>Nyiramasuhuko et al.</i> Trial Judgement	ICTR, <i>The Prosecutor v. Pauline Nyiramasuhuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi and Élie Ndayambaje</i> , Case No. ICTR-98-42-T, Judgement and Sentence, 24 June 2011.
ICTR, <i>Nzabonimana</i> Trial Judgement	ICTR, <i>The Prosecutor v. Callixte Nzabonimana</i> , Case No. ICTR-98-44D-T, Trial Judgement and Sentence, 31 May 2012.
ICTR, <i>Rukundo</i> Trial Judgement	ICTR, <i>The Prosecutor v. Emmanuel Rukundo</i> , Case No. ICTR-01-70-T, Trial Judgement, 27 February 2009.
ICTR, <i>Rutaganda</i> Appeal Judgement	ICTR, <i>Georges Anderson Nderubumwe Rutaganda v. The Prosecutor</i> , Case No. ICTR-96-3-A, Judgement, 26 May 2003.
ICTR, <i>Rutaganda</i> Trial Judgement	ICTR, <i>Prosecutor v. Rutaganda</i> , Case No. ICTR-96-3-T, Judgement, 6 December 1999.
ICTR, <i>Rwamakuba</i> Decision on Interlocutory Appeal regarding Application of Joint Criminal Enterprise to the Crime of Genocide	ICTR, <i>André Rwamakuba v. Prosecutor</i> , Case No. ICTR-98-44-AR72.4, Decision on Interlocutory Appeal regarding Application of Joint Criminal Enterprise to the Crime of Genocide , 22 October 2004.
ICTR, <i>Semanza</i> Appeal Judgement	ICTR, <i>Semanza v. Prosecutor</i> , Case No. ICTR-97-20-A, Judgement, 20 May 2005.
ICTR, <i>Semanza</i> Trial Judgement	ICTR, <i>Prosecutor v. Semanza</i> , Case No. ICTR-97-20-T, Trial Judgement and Sentence, 15 May 2003.
ICTR, <i>Seromba</i> Appeal Judgement	ICTR, <i>Prosecutor v. Seromba</i> , Case No. ICTR-01-66-A, Judgement, 12 March 2008.
ICTR, <i>Setako</i> Trial Judgement	ICTR, <i>Prosecutor v. Setako</i> , Case No. ICTR-04-81-T, Trial Judgement and Sentence, 25 February 2010.
ICTR, <i>Simba</i> Trial Judgement	ICTR, <i>Prosecutor v. Aloys Simba</i> , Case No. ICTR-01-76-T, Trial Judgement and Sentence, 13 December 2005.
ICTY, <i>Aleksovski</i> Appeal Judgement	ICTY, <i>Prosecutor v. Aleksovski</i> , Case No. IT-95-14/1-A, Judgement, 24 March 2000.

ICTY, <i>Aleksovski</i> Trial Judgement	ICTY, <i>The Prosecutor v. Zlatko Aleksovski</i> , Case No. IT-95-14/1-T, "Judgement", 25 June 1999.
ICTY, <i>Blagojevic and Jokic</i> Appeal Judgement	ICTY, <i>Prosecutor v. Blagojević and Jokić</i> , Case No. IT-02-60-A, Judgement, 9 May 2007.
ICTY, <i>Blagojevic and Jokic</i> Decision on Admissibility of Intercept-related Materials	ICTY, <i>Prosecutor v. Blagojević and Jokić</i> , Case No. IT-02-60-T, Decision on the admission into evidence of intercept-related materials, 18 December 2003.
ICTY, <i>Blagojevic et Jokic</i> Trial Judgement	ICTY, <i>Prosecutor v. Blagojević and Jokić</i> , Case No. IT-02-60-T, Judgement, 17 January 2005.
ICTY, <i>Blaskic</i> Appeal Judgement	ICTY, <i>Prosecutor v. Blaškić</i> , Case No. IT-95-14-A, Judgement, 29 July 2004.
ICTY, <i>Blaskic</i> Trial Judgement	ICTY, <i>Prosecutor v. Blaškić</i> , Case No. IT-95-14-T, Judgement, 3 March 2000.
ICTY, <i>Boskoski and Tarculovski</i> Appeal Judgement .	ICTY, <i>Prosecutor v. Boškoski and Tarčulovski</i> , IT-04-82-A, Judgement, 19 May 2010.
ICTY, <i>Boskoski and Tarculovski</i> Trial Judgement .	ICTY, <i>The Prosecutor v. Ljube Boškoski and Johan Tarčulovski</i> , Case No. IT-04-82-T, "Judgement", public, 10 July 2008.
ICTY, <i>Brđanin</i> Appeal Judgement	ICTY, <i>Prosecutor v. Brđanin</i> , Case No. IT-99-36-A, Judgement, 3 April 2007.
ICTY, <i>Brđanin</i> Trial Judgement	ICTY, <i>Prosecutor v. Brđanin</i> , Case No. IT-99-36-T, Judgement, 1 September 2004.
ICTY, <i>Celebici</i> Appeal Judgement	ICTY, <i>Prosecutor v. Delalić, Mucić, Delić, and Landžo</i> , Case No. IT-96-21-A, Judgement, 20 February 2001.
ICTY, <i>Celebici</i> Trial Judgement	ICTY, <i>Prosecutor v. Delalić, Mucić, Delić, and Landžo</i> , Case No. IT-96-21-T, Judgement, 16 November 1998.
ICTY, <i>Cesic</i> Trial Sentencing Judgement	ICTY, <i>Prosecutor v. Češić</i> , Case No. IT-95-10/1-S, Sentencing Judgement, 11 March 2004.
ICTY, <i>Dordevic</i> Appeal Judgement	ICTY, <i>Prosecutor v. Đorđević</i> , Case No. IT-05-87/1-A, Judgement, 27 January 2014.
ICTY, <i>Dordevic</i> Trial Judgement	ICTY, <i>Prosecutor v. Đorđević</i> , Case No. IT-05-87/1-T, Judgement, 23 February 2011.
ICTY, <i>Erdemovic</i> Appeal Judgement	ICTY, <i>Prosecutor v. Erdemović</i> , Case No. IT-96-22-A, Appeal Judgement, 7 October 1997.
ICTY, <i>Furundzija</i> Appeal Judgement	ICTY, <i>Prosecutor v. Furundžija</i> , Case No. IT-95-17/1-A, Judgement, 21 July 2000.
ICTY, <i>Furundzija</i> Trial Judgement	ICTY, <i>The Prosecutor v. Anto Furundžija</i> , Case No. IT-95-17/1-T, "Judgement", 10 December 1998.
ICTY, <i>Galic</i> Appeal Judgement	ICTY, <i>Prosecutor v. Galić</i> , Case No. IT-98-29-A, Judgement, 30 November 2006.
ICTY, <i>Galic</i> Trial Judgement	ICTY, <i>Prosecutor v. Galić</i> , Case No. IT-98-29-T, Judgement and Opinion, 5 December 2003.
ICTY, <i>Gotovina et al.</i> Appeal Judgement	ICTY, <i>Prosecutor v. Gotovina and Markač</i> , Case No. IT-06-90-A, Judgement, 16 November 2012.

ICTY, <i>Gotovina et al.</i> Trial Judgement	ICTY, <i>Prosecutor v. Gotovina, Čermak, and Markač</i> , Case No. IT-06-90-T, Judgement, 15 April 2011.
ICTY, <i>Hadzihasanovic and Kubura</i> Appeal Judgement	ICTY, <i>Prosecutor v. Hadžihasanović and Kubura</i> , Case No. IT-01-47-A, Judgement, 22 April 2008.
ICTY, <i>Hadzihasanovic et al.</i> Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility	ICTY, <i>Prosecutor v. Hadžihasanović et al.</i> , Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003.
ICTY, <i>Hadzihasanovic and Kubura</i> Decision on Motions for Acquittal	ICTY, <i>Prosecutor v. Hadžihasanović and Kubura</i> , Case No. IT-01-47-AR73.3, Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98 bis Motions for Acquittal, 11 March 2005.
ICTY, <i>Hadzihasanovic and Kubura</i> Trial Judgement	ICTY, <i>The Prosecutor v. Enver Hadžihasanović and Amir Kubura</i> , Case No. IT-01-47-T, "Judgement", 15 March 2006.
ICTY, <i>Halilovic</i> Appeal Judgement	ICTY, <i>Prosecutor v. Halilović</i> , Case No. IT-01-48-A, Judgement, 16 October 2007.
ICTY, <i>Halilovic</i> Trial Judgement	ICTY, <i>Prosecutor v. Halilović</i> , Case No. IT-01-48-T, Judgement, 16 November 2005.
ICTY, <i>Haradinaj et al.</i> Trial Judgement	ICTY, <i>Prosecutor v. Haradinaj, Balaj, and Brahimaj</i> , Case No. IT-04-84-T, Judgement, 3 April 2008.
ICTY, <i>Jelasic</i> Appeal Judgement	ICTY, <i>Prosecutor v. Jelisić</i> , Case No. IT-95-10-A, Judgement, 5 July 2001.
ICTY, <i>Jelasic</i> Trial Judgement	ICTY, <i>Prosecutor v. Jelisić</i> , Case No. IT-95-10-T, Judgement, 14 December 1999.
ICTY, <i>Jokic</i> Trial Judgement	ICTY, <i>Prosecutor v. Jokić</i> , Case No. IT-01-42/1-S, Sentencing Judgement, 18 March 2004.
ICTY, <i>Karadzic</i> Appeal Decision on Hostage-Taking	ICTY, <i>Prosecutor v. Karadžić</i> , Case No. IT-95-5/18-AR73.9, Decision on Appeal from Denial of Judgement of Acquittal for Hostage-Taking, 11 December 2012.
ICTY, <i>Karadzic</i> Protective Measures Decision of 9 July 2013	ICTY, <i>Prosecutor v. Karadžić</i> , Case No. IT-95-5/18-T, Decision on Accused's Motion for Protective Measures for Witness KW428, 9 July 2013.
ICTY, <i>Karadzic</i> Rule 98 Judgement	ICTY, <i>Prosecutor v. Karadžić</i> , Case No. IT-95-5/18-AR98bis.I, Judgement, 11 July 2013.
ICTY, <i>Karadzic</i> Trial Judgement	ICTY, <i>Prosecutor v. Karadžić</i> , Case No. IT-95-5/18-T, Public Redacted Version of Judgement Issues on 24 March 2016, 24 March 2016.
ICTY, <i>Karadzic and Mladic</i> Indictment	ICTY, <i>Prosecutor v. Karadžić and Mladić</i> , Case No. IT-95-5-I, Indictment, July 1995.
ICTY, <i>Kordic and Cerkez</i> Appeal Judgement	ICTY, <i>Prosecutor v. Kordić and Čerkez</i> , Case No. IT-95-14/2-A, Judgement, 17 December 2004.
ICTY, <i>Kordic and Cerkez</i> Trial Judgement	ICTY, <i>Prosecutor v. Kordić and Čerkez</i> , Case No. IT-95-14/2-T, Judgement, 26 February 2001.
ICTY, <i>Krajisnik</i> Appeal Judgement	ICTY, <i>Prosecutor v. Krajišnik</i> , Case No. IT-00-39-A, Judgement, 17 March 2009.

ICTY, <i>Krajinšnik</i> Trial Judgement	ICTY, <i>Prosecutor v. Krajišnik</i> , Case No. IT-00-39-T, Judgement, 27 September 2006.
ICTY, <i>Krnojelac</i> Appeal Judgement	ICTY, <i>Prosecutor v. Krnojelac</i> , Case No. IT-97-25-A, Judgement, 17 September 2003.
ICTY, <i>Krnojelac</i> Trial Judgement	ICTY, <i>Prosecutor v. Krnojelac</i> , Case No. IT-97-25-T, Judgement, 15 March 2002.
ICTY, <i>Krstić</i> Appeal Judgement	ICTY, <i>Prosecutor v. Krstić</i> , Case No. 98-33-A, Judgement, 19 April 2004.
ICTY, <i>Krstić</i> Trial Judgement	ICTY, <i>Prosecutor v. Krstić</i> , Case No. 98-33-T, Judgement, 2 August 2001.
ICTY, <i>Kunarac et al.</i> Appeal Judgement	ICTY, <i>Prosecutor v. Kunarac, Kovač, and Vuković</i> , Case No. IT-96-23 and IT-96-23/1-A, Judgement, 12 June 2002.
ICTY, <i>Kunarac et al.</i> Trial Judgement	ICTY, <i>Prosecutor v. Kunarac, Kovač, and Vuković</i> , Case No. IT-96-23-T and IT-96-23/1-T, Judgement, 22 February 2001.
ICTY, <i>Kupreskic et al.</i> Trial Judgement	ICTY, <i>Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Josipović, Papić, and Šantić</i> , Case No. IT-95-16-T, Judgement, 14 January 2000.
ICTY, <i>Kvočka et al.</i> Appeal Judgement	ICTY, <i>Prosecutor v. Kvočka, Radić, Žigić, Prcać</i> , Case No. IT-98-30/1-A, Judgement, 28 February 2005.
ICTY, <i>Kvočka et al.</i> Trial Judgement	ICTY, <i>Prosecutor v. Kvočka, Kos, Radić, Žigić, Prcać</i> , Case No. IT-98-30/1-T, Judgement, 2 November 2001.
ICTY, <i>Limaj et al.</i> Appeal Judgement	ICTY, <i>Prosecutor v. Limaj, Bala, and Musliu</i> , Case No. IT-03-66-A, Judgement, 27 September 2007.
ICTY, <i>Limaj et al.</i> Trial Judgement	ICTY, <i>Prosecutor v. Limaj, Bala, and Musliu</i> , Case No. IT-03-66-T, Judgement, 30 November 2005.
ICTY, <i>Lukić and Lukić</i> Appeal Judgement	ICTY, <i>Prosecutor v. Lukić and Lukić</i> , Case No. IT-98-32/1-A, Judgement, 4 December 2012.
ICTY, <i>Lukić and Lukić</i> Decision on Milan Lukić's Notice of Verification of Alleged Victim Survivors and Application for Stay of Proceedings	ICTY, <i>Prosecutor v. Lukić and Lukić</i> , Case No. IT-98-32/1-T, Decision on Milan Lukić's Notice of Verification of Alleged Victim Survivors and Application for Stay of Proceedings with Exhibits A through H, 12 March 2009.
ICTY, <i>Lukić and Lukić</i> Trial Judgement	ICTY, <i>Prosecutor v. Lukić and Lukić</i> , Case No. IT-98-32/1-T, Judgement, 20 July 2009.
ICTY, <i>Martić</i> Appeal Judgement	ICTY, <i>Prosecutor v. Martić</i> , Case No. IT-95-11-A, Judgement, 8 October 2008.
ICTY, <i>Martić</i> Trial Judgement	ICTY, <i>Prosecutor v. Martić</i> , Case No. IT-95-11-T, Judgement, 12 June 2007.
ICTY, <i>Milosevic</i> Appeal Judgement	ICTY, <i>Prosecutor v. Dragomir Milošević</i> , Case No. IT-98-29/1-A, Judgement, 12 November 2009.
ICTY, <i>Milosevic</i> Trial Judgement	ICTY, <i>Prosecutor v. Dragomir Milošević</i> , Case No. IT-98-29/1-T, Judgement, 12 December 2007.
ICTY, <i>Milutinovic et al.</i> Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise	ICTY, <i>Prosecutor v. Milutinović, Šainović, and Ojdanić</i> , Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003.

ICTY, <i>Milutinovic et al.</i> Trial Judgement	ICTY, <i>Prosecutor v. Milutinović, Šainović, Ojdanić, Pavković, Lazarević, and Lukić</i> , Case No. IT-05-87-T, Judgement, 26 February 2009.
ICTY, <i>Mladic</i> Trial Judgement	ICTY, <i>Prosecutor v. Mladić</i> , Case No. IT-09-92-T, Trial Judgement, 22 November 2017.
ICTY, <i>Mrksic et al.</i> Appeal Judgement	ICTY, <i>Prosecutor v. Mrkšić and Šljivančanin</i> , Case No. IT-95-13/1-A, Judgement, 5 May 2009.
ICTY, <i>Mrksic et al.</i> Trial Judgement	ICTY, <i>Prosecutor v. Mrkšić, Radić, and Šljivančanin</i> , Case No. IT-95-13/1-T, Judgement, 27 September 2007.
ICTY, <i>Naletilic and Martinovic</i> Appeal Judgement	ICTY, <i>Prosecutor v. Naletilić and Martinović</i> , Case No. IT-98-34-A, Judgement, 3 May 2006.
ICTY, <i>Naletilic and Martinovic</i> Second Amended Indictment	ICTY, <i>Prosecutor v. Naletilić and Martinović</i> , Case No. IT-98-34-PT, Second Amended Indictment, September 2001.
ICTY, <i>Naletilic and Martinovic</i> Trial Judgement	ICTY, <i>Prosecutor v. Naletilić and Martinović</i> , Case No. IT-98-34-T, Judgement, 31 March 2003.
ICTY, <i>Oric</i> Appeal Judgement	ICTY, <i>Prosecutor v. Orić</i> , Case No. IT-03-68-A, Judgement, 3 July 2008.
ICTY, <i>Oric</i> Trial Judgement	ICTY, <i>Prosecutor v. Orić</i> , Case No. IT-03-68-T, Judgement, 30 June 2006.
ICTY, <i>Perisic</i> Trial Judgement	ICTY, <i>Prosecutor v. Perišić</i> , Case No. IT-04-81-T, Trial Judgement, 6 September 2011.
ICTY, <i>Popovic et al.</i> Appeal Judgement	ICTY, <i>Prosecutor v. Popović, Beara, Nikolić, Miletić, and Pandurević</i> , Case No. IT-05-88-A, Judgement, 30 January 2015.
ICTY, <i>Popovic et al.</i> Decision on Admissibility of Intercepted Communications	ICTY, <i>Prosecutor v. Popović, Beara, Nikolić, Borovčanin, Miletić, Gvero, and Pandurević</i> , Case No. IT-05-88, Decision on admissibility of intercepted communications, 7 December 2007.
ICTY, <i>Popovic et al.</i> Trial Judgement	ICTY, <i>Prosecutor v. Popović, Beara, Nikolić, Borovčanin, Miletić, Gvero, and Pandurević</i> , Case No. IT-05-88-T, Judgement, 10 June 2010.
ICTY, <i>Prlic et al.</i> Appeal Judgement	ICTY, <i>Prosecutor v. Prlić et al.</i> , Case No. IT-04-74-A, Appeal Judgement, 29 November 2017.
ICTY, <i>Prlic et al.</i> Decision to Dismiss the Preliminary Objections Against the Tribunal's Jurisdiction	ICTY, <i>Prosecutor v. Prlić et al.</i> , Case No. IT-04-74-PT, Decision to Dismiss the Preliminary Objections Against the Tribunal's Jurisdiction, 26 September 2005.
ICTY, <i>Prlic et al.</i> Trial Judgement	ICTY, <i>Prosecutor v. Prlić et al.</i> , Case No. IT-04-74-T, Trial Judgement, 29 May 2013.
ICTY, <i>Rasevic et al.</i> Prosecutor's Final Progress Report	ICTY, <i>Prosecutor v. Rašević and Todović</i> , Case No. IT-97-25/1-PT, Prosecutor's Final Progress Report, 20 April 2009.
ICTY, <i>Sainovic et al.</i> Appeal Judgement	ICTY, <i>Prosecutor v. Šainović, Pavković, Lazarević, and Lukić</i> , Case No. IT-05-87-A, Judgement, 23 January 2014.
ICTY, <i>Sikirica et al.</i> Judgement on Defence Motions to Acquit	ICTY, <i>Prosecutor v. Sikirica et al.</i> , Case No. IT-95-8-T, Judgement on Defence Motions to Acquit, 3 September 2001.

ICTY, <i>Simic</i> Appeal Judgement	ICTY, <i>Prosecutor v. Simić</i> , Case No. IT-95-9-A, Judgement, 28 November 2006.
ICTY, <i>Simic</i> Trial Judgement	ICTY, <i>Prosecutor v. Simić, Tadić, and Zarić</i> , Case No. IT-95-9-T, Judgement, 17 October 2003.
ICTY, <i>Stanisic and Simatovic</i> Trial Judgement	ICTY, <i>Prosecutor v. Stanisic and Simatovic</i> , Case No. IT-03-69-T, Trial Judgement, 30 May 2013.
ICTY, <i>Stakic</i> Appeal Judgement	ICTY, <i>Prosecutor v. Stakić</i> , Case No. IT-97-24-A, Judgement, 22 March 2006.
ICTY, <i>Stakic</i> Trial Judgement	ICTY, <i>Prosecutor v. Stakić</i> , Case No. IT-97-24-T, Judgement, 31 July 2003.
ICTY, <i>Stanisic & Simatovic</i> Appeal Judgement	ICTY, <i>Prosecutor v. Jovica Stanišić and Simatović</i> , Case No. IT-03-69-A, Appeal Judgement, 9 December 2015.
ICTY, <i>Stanisic & Simatovic</i> Trial Judgement	ICTY, <i>Prosecutor v. Jovica Stanišić and Simatović</i> , Case No. IT-03-69-T, Judgement, 30 May 2013.
ICTY, <i>Stanisic & Zupljanin</i> Appeal Judgement	ICTY, <i>Prosecutor v. Stanišić and Župljanin</i> , Case No. IT-08-91-A, Appeal Judgement, 30 June 2016.
ICTY <i>Strugar</i> Appeal Judgement	ICTY, <i>Prosecutor v. Strugar</i> , Case No. IT-01-42-A, Judgement, 17 July 2008.
ICTY, <i>Strugar</i> Rule 98 bis Decision	ICTY, <i>Prosecutor v. Strugar</i> , Case No. IT-01-42-T, Decision on Defence Motion Requesting Judgement of Acquittal pursuant to Rule 98 bis, 21 June 2004.
ICTY, <i>Strugar</i> Trial Judgement	ICTY, <i>Prosecutor v. Strugar</i> , Case No. IT-01-42-T, Judgement, 31 January 2005.
ICTY, <i>Tadic</i> Appeal Judgement	ICTY, <i>Prosecutor v. Tadić</i> , Case No. IT-94-1-A, Judgement, 15 July 1999.
ICTY, <i>Tadic</i> Decision on Interlocutory Appeal on Jurisdiction	ICTY, <i>Prosecutor v. Tadić</i> , Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.
ICTY, <i>Tadic</i> Trial Judgement	ICTY, <i>Prosecutor v. Tadić</i> , Case No. IT-94-1-T, Opinion and Judgement, 7 May 1997.
ICTY, <i>Todorovic</i> Sentencing Judgement	ICTY, <i>Prosecutor v. Todorović</i> , Case No. IT-95-9/1-S, Sentencing Judgement, 31 July 2001.
ICTY, <i>Tolimir</i> Appeal Judgement	ICTY, <i>Prosecutor v. Tolimir</i> , Case No. IT-05-88/2-A, Judgement, 8 April 2015.
ICTY, <i>Tolimir</i> Decision on Admissibility of Intercepts	ICTY, <i>Prosecutor v. Tolimir</i> , Case No. IT-05-88/2-T, Decision on Prosecution's Motion for Admission of 28 Intercepts from the Bar Table, 20 January 2012.
ICTY, <i>Tolimir</i> Decision on Prosecution Motion for Order Requiring Particulars of Accused's Alibi Defence	ICTY, <i>Prosecutor v. Tolimir</i> , Case No. IT-05-88/2-T, Decision on Prosecution Motion for Order Requiring Particulars of Accused's Alibi Defence, 1 December 2010.
ICTY, <i>Tolimir</i> Trial Judgement	ICTY, <i>Prosecutor v. Tolimir</i> , Case No. IT-05-88/2-T, Judgement, 12 December 2012.
ICTY, <i>Vasiljevic</i> Appeal Judgement	ICTY, <i>Prosecutor v. Vasiljević</i> , Case No. IT-98-32-A, Judgement, 25 February 2004.
ICTY, <i>Vasiljevic</i> Trial Judgement	ICTY, <i>Prosecutor v. Vasiljević</i> , Case No. IT-98-32-T, Judgement, 29 November 2002.

MICT, <i>Karadzic</i> Appeal Judgement	MICT, <i>Prosecutor v. Karadžić</i> , Case No. MICT-13-55-A, Appeal Judgement, 20 March 2019.
MICT, <i>Mladic</i> Appeal Judgement	MICT, <i>Prosecutor v. Mladić</i> , Case No. MICT-13-56-A, Appeal Judgement, 8 June 2021.
MICT, <i>Ngirabatware</i> Appeal Judgement	MICT, <i>Ngirabatware v. Prosecutor</i> , Case No. MICT-12-29-A, Appeal Judgement, 18 December 2014.
MICT, <i>Seselj</i> Appeal Judgement	MICT, <i>Prosecutor v. Šešelj</i> , Case No. MICT -16-99-A, Appeal Judgement, 11 April 2018.
SCSL, <i>Brima et al.</i> Appeal Judgement	SCSL, <i>Prosecutor v. Brima et al.</i> , Case No. SCSL-04-16-A, Appeal Judgment, 22 February 2008.
SCSL, <i>Brima et al.</i> Decision and Order on Defence Preliminary Motion for Defect in the Form of the Indictment	SCSL, <i>Prosecutor v. Brima et al.</i> , Case No. SCSL-04-16-PT, Decision and Order on Defence Preliminary Motion on Defects in the Form of the Indictment , 1 April 2004.
SCSL, <i>Brima et al.</i> Trial Judgement	SCSL, <i>Prosecutor v. Brima et al.</i> , Case No. SCSL-04-16-T, Trial Judgement, 20 June 2007.
SCSL, <i>Fofana and Kondewa</i> Appeal Judgement	SCSL, <i>Prosecutor v. Fofana and Kondewa</i> , Case No. SCSL-04-14-A, Appeal Judgement, 28 May 2008.
SCSL, <i>Fofana and Kondewa</i> Sentencing Judgement	SCSL, <i>Prosecutor v. Fofana and Kondewa</i> , Case No. SCSL-04-14-T, Judgement on the Sentencing of Moinina Fofana and Allieu Kondewa, 9 October 2007.
SCSL, <i>Fofana and Kondewa</i> Trial Judgement	SCSL, <i>Prosecutor v. Fofana and Kondewa</i> , Case No. SCSL-04-14-T, Trial Judgement, 2 August 2007.
SCSL, <i>Kondewa</i> Decision and Order on the Defence Preliminary Motion for Defects in the Form of the Indictment	SCSL, <i>Prosecutor v. Kondewa</i> , Case No. SCSL-2003-12-PT, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 27 November 2003.
SCSL, <i>Sesay et al.</i> Appeal Judgement	SCSL, <i>Prosecutor v. Sesay, Kallon and Gbao</i> , Case No. SCSL-04-15-A, Appeal Judgment, 26 October 2009.
SCSL, <i>Sesay et al.</i> Trial Judgement	SCSL, <i>Prosecutor v. Sesay, Kallon and Gbao</i> , Case No. SCSL-04-15-T, Trial Judgment, 2 March 2009.
SCSL, <i>Taylor</i> Trial Judgement	SCSL, <i>Prosecutor v. Taylor</i> , Case No. SCSL-03-01-T, Trial Judgment, 18 May 2012.
STL, <i>Ayyash</i> Decision to Hold Trial In Absentia	STL, <i>Prosecutor v. Salim Jamil Ayyash</i> , STL-18-10/I/TC F0090, Decision to Hold Trial In Absentia , 5 February 2020.
STL, <i>Ayyash et al.</i> Corrected Version of Decision on Defence Appeals Against Trial Chamber's Decision on Reconsideration of the Trial in Absentia Decision	STL, <i>Prosecutor v. Ayyash et al.</i> , STL-11-01/PT/AC F0012-AR126.1, Corrected Version of Decision on Defence Appeals Against Trial Chamber's Decision on Reconsideration of the Trial in Absentia Decision , 1 November 2012.
STL, <i>Ayyash et al.</i> Decision on Admissibility of "Notice of Appeal on Behalf of Mr Ayyash Against Conviction and Sentence"	STL, <i>Prosecutor v. Ayyash et al.</i> , STL-11-01/A-1/AC F0026, Decision on Admissibility of "Notice of Appeal on Behalf of Mr Ayyash Against Conviction and Sentence" , 29 March 2021.
STL, <i>Ayyash et al.</i> Decision to Hold Trial In Absentia	STL, <i>Prosecutor v. Ayyash et al.</i> , STL-11-01/I/TC F0112, Decision to Hold Trial In Absentia , 1 February 2012.

STL, <i>Ayyash et al.</i> Trial Judgement	STL, <i>Prosecutor v. Ayyash et al.</i> , STL-11-01/T/TC F3839, Trial Judgement, 18 August 2020.
STL, <i>Ayyash et al.</i> WikiLeaks Decision	STL, <i>Prosecutor v. Ayyash et al.</i> , STL-11-01/T/TC F1955, Decision on the Admissibility of Documents Published on the Wikileaks Website, 21 May 2015.
STL, <i>Merhi</i> , Decision to Hold Trial In Absentia	STL, <i>Prosecutor v. Hassan Habib Merhi</i> , STL-13-04/I/TC F0037, Decision to Hold Trial In Absentia , 20 December 2013.

C. Other International and Regional Jurisdictions

Short citation	Full citation
ECtHR, <i>Bankovic v. Belgium</i> Decision on Admissibility .	ECtHR, <i>Bankovic et al. v. Belgium et al.</i> , App. No. 52207/99, Grand Chamber Decision on Admissibility, 12 December 2001 .
ECtHR, Advisory Opinion concerning the use of the “blanket reference” or “legislation by reference” technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law.	ECtHR, Request No. P16-2019-00, Grand Chamber Advisory Opinion concerning the use of the “blanket reference” or “legislation by reference” technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law, 29 May 2020 .
ECtHR, <i>Aigner v. Austria</i> Judgement	ECtHR, <i>Aigner v. Austria</i> , App. No. 28328/03, Judgment, 10 May 2012 .
ECtHR, <i>Al-Khawaja and Tahery v. The United Kingdom</i> Grand Chamber Judgement	ECtHR, <i>Al-Khawaja and Tahery v. The United Kingdom</i> , App. Nos. 26766/05 and 22228/06, Grand Chamber Judgment, 15 December 2011 .
ECtHR, <i>B. v. Finland</i> Judgement	ECtHR, <i>B. v. Finland</i> , App. No. 17122/02, Judgement, 24 April 2007 .
ECtHR, <i>Boldea v. Romania</i> Judgement	ECtHR, <i>Boldea v. Romania</i> , App. No. 19997/02, Judgement, 15 February 2007 .
ECtHR, <i>Bocos-Cuesta v. The Netherlands</i> Judgement	ECtHR, <i>Bocos-Cuesta v. The Netherlands</i> , App. No. 54789/00, Judgement, 10 November 2005 .
ECtHR, <i>Bykov v. Russia</i> Judgement	ECtHR, <i>Bykov v. Russia</i> , App. No. 4378/02, Grand Chamber Judgement, 10 March 2009 .
ECtHR, <i>Cakici v. Turkey</i> Judgement	ECtHR, <i>Cakici v. Turkey</i> , App. No. 23657/94, Grand Chamber Judgement, 8 July 1999 .
ECtHR, <i>Catan and others v. Moldova and Russia</i> Judgement	ECtHR, <i>Catan and others v. Moldova and Russia</i> , App. Nos. 43370/04, 8252/05 and 18454/06, Grand Chamber Judgement, 19 October 2012 .
ECtHR, <i>Colozza v. Italy</i> Judgement	ECtHR, <i>Colozza v. Italy</i> , App. No. 9024/80, Judgement, 12 February 1985 .
ECtHR, <i>Coniac v. Romania</i> Judgement	ECtHR, <i>Coniac v. Romania</i> , App. No. 4941/07, Judgement, 6 October 2015 .
ECtHR, <i>Cyprus v. Turkey</i> Judgement	ECtHR, <i>Cyprus v. Turkey</i> , App. No. 25781/94, Grand Chamber Judgement, 12 May 2014 .

ECtHR, <i>Doorson v. The Netherlands</i> Judgement	ECtHR, <i>Doorson v. The Netherlands</i> , App. No. 20524/92, Judgement, 26 March 1996.
ECtHR, <i>El-Masri v. The Former Yugoslav Republic of Macedonia</i> Judgement	ECtHR, <i>El-Masri v. The Former Yugoslav Republic of Macedonia</i> , App. No. 39630/09, Grand Chamber Judgement, 13 December 2012.
ECtHR, <i>Findlay v. United Kingdom</i> Judgement	ECtHR, <i>Findlay v. United Kingdom</i> , App. No. 22107/93, Judgement, 25 February 1997.
ECtHR, <i>Garcia Ruiz v. Spain</i> Grand Chamber Judgement	ECtHR, <i>Garcia Ruiz v. Spain</i> , App. No. 30544/96, Grand Chamber Judgement, 21 January 1999.
ECtHR, <i>Hassan v. The United Kingdom</i> Judgement	ECtHR, <i>Hassan v. The United Kingdom</i> , App. No. 29750/09, Grand Chamber Judgement, 16 September 2014.
ECtHR, <i>Ilascu and others v. Moldova and Russia</i> Judgement	ECtHR, <i>Ilascu and others v. Moldova and Russia</i> , App. No. 48787/99, Grand Chamber Judgement, 8 July 2004.
ECtHR <i>Issa and others v. Turkey</i> Judgement.	ECtHR <i>Issa and others v. Turkey</i> , App. No. 31821/96, Judgement, 16 November 2004.
ECtHR, <i>Jaloud v. the Netherlands</i> Judgement	ECtHR, <i>Jaloud v. the Netherlands</i> , App. No. 47708/08, Grand Chamber Judgement, 20 November 2014.
ECtHR, <i>Jorgic v. Germany</i> Judgement	ECtHR, <i>Jorgic v. Germany</i> , App. No. 74613/01, Judgement, 12 July 2007.
ECtHR, <i>K.-H.W. v. Germany</i> Judgement	ECtHR, <i>K.-H.W. v. Germany</i> , App. No. 37201/97, Grand Chamber Judgement, 22 March 2001.
ECtHR, <i>Kari-pekka Pietilainen v. Finland</i> Judgement	ECtHR, <i>Kari-pekka Pietilainen v. Finland</i> , App. No. 13566/06, Judgement, 22 September 2009.
ECtHR, <i>Korbely v. Hungary</i> Grand Chamber Judgement	ECtHR, <i>Korbely v. Hungary</i> , App. No. 9174/02, Grand Chamber Judgement, 19 September 2008.
ECtHR, <i>Kononov v. Latvia</i> Grand Chamber Judgement	ECtHR, <i>Kononov v. Latvia</i> , App. No. 36376/04, Grand Chamber Judgement, 17 May 2010.
ECtHR, <i>Durmus Kurt et al. v. Turkey</i> Court (Second Section) Judgement	ECtHR, <i>Durmus Kurt et al. v. Turkey</i> , App. No. 12101/03, Court (Second Section) Judgement, 31 May 2007.
ECtHR, <i>Lobzhanidze and Peradze v. Georgia</i> Judgement	ECtHR, <i>Lobzhanidze and Peradze v. Georgia</i> , App. Nos. 21447/11 35839/11, Judgement, 27 February 2020.
ECtHR, <i>Loizidou v. Turkey</i> Preliminary Objections Judgement	ECtHR, <i>Loizidou v. Turkey</i> , App. No. 15318/89, Grand Chamber Judgement on Preliminary Objections, 23 March 1995.
ECtHR, <i>Loizidou v. Turkey</i> Judgement	ECtHR, <i>Loizidou v. Turkey</i> , App. No. 15318/89, (Article 50) (40/1993/435/514), Grand Chamber Judgement, 28 July 1998.
ECtHR, <i>Menesheva v. Russia</i> Judgement	ECtHR, <i>Menesheva v. Russia</i> , App. No. 59261/00, Judgement, 9 March 2006.
ECtHR, <i>Milankovic v. Croatia</i> Judgement	ECtHR, <i>Milankovic v. Croatia</i> , App. No. 33351/20, Judgement, 20 January 2022.
ECtHR, <i>M.T.B. v. Turkey</i> Judgement	ECtHR, <i>M.T.B. v. Turkey</i> , App. No. 47081/06, Judgement, 12 June 2018.
ECtHR, <i>M.C. v. Bulgaria</i> Judgement	ECtHR, <i>M.C. v. Bulgaria</i> , App. No. 39272/98, Judgement, 4 December 2003.

ECtHR, <i>Moreira Ferreira v. Portugal (No. 2)</i> Judgement	ECtHR, <i>Moreira Ferreira v. Portugal (No. 2)</i> , App. No. 19867/12, Grand Chamber Judgement , 11 July 2017 .
ECtHR, <i>Murtazaliyeva v. Russia</i> Judgement	ECtHR, <i>Murtazaliyeva v. Russia</i> , App. No. 36658/05, Grand Chamber Judgement , 18 December 2018 .
ECtHR, <i>Ocalan v. Turkey</i> Judgement	ECtHR, <i>Ocalan v. Turkey</i> , App. No. 46221/99, Grand Chamber Judgement , 12 May 2005 .
ECtHR, <i>Ould Dah v. France</i> , Decision	ECtHR, <i>Ould Dah v. France</i> , App. No. 13113/03, Decision , 17 March 2009 .
ECtHR, <i>Salmanoglu and Polattas v. Turkey</i> Judgement	ECtHR, <i>Salmanoglu and Polattas v. Turkey</i> , App. No. 15828/03, Judgement , 17 March 2009 .
ECtHR, <i>Sanader v. Croatia</i> Judgement	ECtHR, <i>Sanader v. Croatia</i> , App. No. 66408/12, Judgement , 12 February 2015 .
ECtHR, <i>Saunders v. the United Kingdom</i> Judgement	ECtHR, <i>Saunders v. the United Kingdom</i> , App. No. 19187/91, Grand Chamber Judgement , 17 December 1996 .
ECtHR, <i>Schatschaschwili v. Germany</i> Grand Chamber Judgement	ECtHR, <i>Schatschaschwili v. Germany</i> , App. No. 9154/10, Grand Chamber Judgement , 15 December 2015 .
ECtHR, <i>Schenk v. Switzerland</i> Judgement	ECtHR, <i>Schenk v. Switzerland</i> , App. No. 10862/84, Judgement , 12 July 1988 .
ECtHR, <i>Sejdovic v. Italy</i> Grand Chamber Judgement	ECtHR, <i>Sejdovic v. Italy</i> , App. No. 56581/00, Grand Chamber Judgement , 1 March 2006 .
ECtHR, <i>Shkalla v. Albania</i> Judgement	ECtHR, <i>Shkalla v. Albania</i> , App. No. 26866/05, Judgement , 10 May 2011 .
ECtHR, <i>Simsic v. Bosnia and Herzegovina</i> Decision	ECtHR, <i>Simsic v. Bosnia and Herzegovina</i> , App. No. 51552/10, Decision , 10 April 2012 .
ECtHR, <i>Simic v. Bosnia and Herzegovina</i> Judgement	ECtHR, <i>Simic v. Bosnia and Herzegovina</i> , App. No. 39764/20, Judgement , 17 May 2022 .
ECtHR, <i>S.N. v. Sweden</i> Judgement	ECtHR, <i>S.N. v. Sweden</i> , App. No. 34209/96, Judgement , 2 July 2002 .
ECtHR, <i>Tolmachev v. Estonia</i> Judgement	ECtHR, <i>Tolmachev v. Estonia</i> , App. No. 73748/13, Judgement , 9 July 2015 .
ECtHR, <i>Ukraine and the Netherlands v. Russia</i> Grand Chamber Decision	ECtHR, <i>Ukraine and the Netherlands v. Russia</i> , App. Nos. 8019/16, 43800/14 and 28525/20), Grand Chamber Decision, 30 November 2022 .
ECtHR, <i>Ukraine v. Russia</i> Decision	ECtHR, <i>Ukraine v. Russia</i> , App. No. 49537/14, Decision, 1 September 2015 .
ECtHR, <i>Ukraine v. Russia (re Crimea)</i> Judgement	ECtHR, <i>Ukraine v. Russia (re Crimea)</i> , App. Nos. 20958/14 and 38334/18, Grand Chamber Decision 16 December 2020 .
ECtHR, <i>Van Geyseghem v. Belgium</i> , Judgement	ECtHR, <i>Van Geyseghem v. Belgium</i> , App. No. 26103/95, Grand Chamber Judgement , 21 January 1999 .
ECtHR, <i>Vasiliauskas v. Lithuania</i> Grand Chamber Judgement	ECtHR, <i>Vasiliauskas v. Lithuania</i> , App. No. 35343/05, Grand Chamber Judgement , 20 October 2015 .

ECtHR, <i>Varnava and Others v. Turkey</i> Judgement	ECtHR, <i>Varnava and Others v. Turkey</i> , App. Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Grand Chamber Judgement , 18 September 2009.
ECtHR, <i>Vyacheslav Korchagin v. Russia</i> Judgement	ECtHR, <i>Vyacheslav Korchagin v. Russia</i> , App. No. 12307/16, Judgement , 28 August 2018.
ECtHR, <i>Y. v. Slovenia</i> Judgement	ECtHR, <i>Y. v. Slovenia</i> , App. No. 41107/10, Judgement , 28 May 2015.
ECtHR, <i>Yeger v. Turkey</i> Judgement	ECtHR, <i>Yeger v. Turkey</i> , App. No. 4099/12, Judgement , 7 June 2022.
IACtHR, <i>Fernandez Ortega et al. v. Mexico</i> Judgement	IACtHR, <i>Fernández Ortega et al. v. Mexico</i> , Series C No. 215, Judgement: Preliminary Objection, Merits, Reparations, and Costs, 30 August 2010.
IACtHR, <i>Godínez-Cruz v. Honduras</i> Judgement	IACtHR, <i>Godínez Cruz v. Honduras</i> , Series C No. 5, Judgement: Merits, 20 January 1989.
IACtHR, <i>Goiburú et al. v. Paraguay</i> Judgement	IACtHR, <i>Goiburú et al. v. Paraguay</i> , Series C No. 153, Judgement: Merits, Reparations and Costs, 22 September 2006.
IACtHR, <i>Heliodoro Portugal v. Panama</i> Judgement	IACtHR, <i>Heliodoro Portugal v. Panama</i> , Series C No. 186, Judgement: Preliminary Objections, Merits, Reparations, and Costs, 12 August 2008.
IACtHR, <i>Lopez Soto v. Venezuela</i> Judgement ,	IACtHR, <i>López Soto et al. v. Venezuela</i> , Series C No. 362, Judgement: Merits, Reparations and Costs, 26 September 2018.
IACtHR, <i>Velasquez-Rodriguez v. Honduras</i> Judgement	IACtHR, <i>Velásquez Rodríguez v. Honduras</i> , Series C No. 4, Judgement: Merits, 29 July 1988.
ICJ, <i>Armed Activities</i> Judgement .	ICJ, <i>Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)</i> , 2005 ICJ Rep. 168, Judgment, 19 December 2005.
ICJ, <i>Bosnia v. Serbia, Application of the Genocide Convention</i> Judgement	ICJ, <i>Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)</i> , 2007 ICJ Rep. 43, Judgment, 26 February 2007.
ICJ, <i>Certain Expenses of the United Nations</i> Advisory Opinion	ICJ, <i>Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)</i> , 1962 ICJ Rep. 151, Advisory Opinion, 20 July 1962.
ICJ, <i>Construction of a Wall</i> Advisory Opinion	ICJ, <i>Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory</i> , 2004 ICJ Rep. 136, Advisory Opinion, 9 July 2004.
ICJ, <i>Croatia v. Serbia, Application of the Genocide Convention</i> Judgement	ICJ, <i>Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)</i> , 2015 ICJ Rep. 3, Judgment, 3 February 2015.
ICJ, <i>Democratic Republic of Congo v. Belgium</i> Judgement	ICJ, <i>Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)</i> , 2002 ICJ Rep. 3, Judgment, 14 February 2002.

ICJ, <i>Military and Paramilitary Activities in and against Nicaragua</i> , Judgement	ICJ, <i>Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)</i> , 1986 ICJ Rep. 14, Merits, Judgment, 27 June 1986.
ICJ, Nuclear Weapons Advisory Opinion .	ICJ, <i>Legality of the Threat or Use of Nuclear Weapons</i> , 1996 ICJ Rep. 226, Advisory Opinion, 8 July 1996.
ICJ, <i>North Sea Continental Shelf</i> Judgement .	ICJ, <i>North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)</i> , 1969 ICJ Rep. 3, Judgment, 20 February 1969.
ICJ, <i>Oil Platforms</i> Judgement	ICJ, <i>Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America)</i> , 2003 ICJ Rep. 161, Merits, Judgment, 6 November 2003.
ICJ, <i>Oil Platforms</i> Dissenting Opinion of Judge Elaraby	ICJ, <i>Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America)</i> , 2003 ICJ Rep. 290, Merits, Judgment, Dissenting Opinion of Judge Elaraby , 6 November 2003.
ICJ, <i>Oil Platforms</i> Separate Opinion of Judge Simma	ICJ, <i>Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America)</i> , 2003 ICJ Rep. 324, Merits, Judgment, Separate Opinion of Judge Simma , 6 November 2003.
ICJ, <i>Tehran Hostages</i> Judgement	ICJ, <i>Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)</i> , 1980 ICJ Rep. 3, Judgment, 24 May 1980.
IMT for the Far East Judgement	IMT for the Far East, Judgement of 4 November 1948, in Pritchard and Zaide (Eds.), vol. 22 The Tokyo War Crimes Trial.
IMT Nuremberg Judgement	IMT Nuremberg, Judgement of 1 October 1946 , in vol. 22 <i>The Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg, Germany.</i>

D. Domestic Cases, including WWII Cases

Short citation	Full citation
Bangladesh International Crimes Tribunal-1, <i>Chief Prosecutor vs. Md. Abdul Aziz alias Habul and 2 Others</i> , Judgement	Bangladesh International Crimes Tribunal-1, <i>Chief Prosecutor vs. Md. Abdul Aziz alias Habul and 2 Others</i> , ICT-BD [ICT-1] Case No.04 of 2017, Judgement , 19 May 2022.
British Military Court for the Trial of War Criminals, Essen, Case No. 8 The Essen Lynching Case: Trial of Erich Heyer and Six Others	British Military Court for the Trial of War Criminals, Essen, Case No. 8 The Essen Lynching Case: Trial of Erich Heyer and Six Others , 18-19, 21-22 December, 1945.
Canadian Military Court at Aurich, Germany, The Abbaye Ardenne Case: Trial of S.S. Brigadeführer Kurt Meyer .	Canadian Military Court at Aurich, Germany, The Abbaye Ardenne Case: Trial of S.S. Brigadeführer Kurt Meyer , 10-28 December 1945; in United Nations War Crimes Commission, Vol. IV ed. <i>Law Reports of Trials of War Criminals</i> 97, 1948.
District Court of The Hague, MH 17 Trial, Verdict .	District Court of The Hague, MH 17 Trial , Verdict, 17 November 2022.

District Court of Jerusalem, <i>Attorney-General of Israel v. Eichmann</i> Judgement	District Court of Jerusalem, <i>Attorney-General of Israel v. Eichmann</i> , Criminal Case No. 40/61, Judgement
Dutch Case No. 3271, Note I/66 by Dr. Litawski, Legal Officer	Dutch Case No. 3271, Note I/66 by Dr. Litawski, Legal Officer; in United Nations War Crimes Commission, <i>History of the United Nations War Crimes Commission and the Development of the Laws of War</i> , 1948, pp 490-491.
General Military Government Court of the United States Zone, Dachau, Germany, Case No. 60 (The Dachau Concentration Camp Trial: Trial of Martin Gottfried Weiss and Thirty-Nine Others)	General Military Government Court of the United States Zone, Dachau, Germany, Case No. 60 (The Dachau Concentration Camp Trial: Trial of Martin Gottfried Weiss and Thirty-Nine Others) , 15 November–13 December 1945; in United Nations War Crimes Commission, ed. <i>Law Reports of Trials of War Criminals</i> .
General Military Government Court of the United States Zone of Germany, <i>Skorzeny et al.</i> Trial .	General Military Government Court of the United States Zone of Germany, <i>Skorzeny et al.</i> Trial , 18 August–9 September 1947; in United Nations War Crimes Commission, Vol. IX ed. <i>Law Reports of Trials of War Criminals</i> 90, 1949.
Israel Supreme Court, Beit Sourik Village Council Judgement .	Israel Supreme Court, Beit Sourik Village Council v. The Government of Israel, HCJ 2056/04, Judgement, 30 May 2004 .
Supreme Court of Israel, <i>The Public Committee against Torture in Israel et al. v. The Government of Israel et al.</i> Judgement .	Supreme Court of Israel, <i>The Public Committee against Torture in Israel et al. v. The Government of Israel et al.</i> , Judgement .
UKHL, <i>R v Jones et al.</i> Opinions of the Lords of Appeal for Judgment .	United Kingdom House of Lords, <i>R v Jones et al.</i> , [2006] UKHL 16, Opinions of the Lords of Appeal for Judgment, 29 March 2006.
UN War Crimes Commission, <i>Hostages Trial</i> .	UN War Crimes Commission, <i>Hostages Trial</i> , in Vol. III <i>Law Reports of Trial of War Criminals</i> , 1949, London.
United States Deputy Judge Advocate's Office, War Crimes Group, European Command, <i>Skorzeny et al.</i> Review .	United States Deputy Judge Advocate's Office, War Crimes Group, European Command, <i>Skorzeny et al.</i> Review , 14 April 1948.
United States Intermediate Military Government Court at Dachau, Germany, Trial of Heinz Hagedorf .	United States Intermediate Military Government Court at Dachau, Germany, Trial of Heinz Hagedorf ; in United Nations War Crimes Commission, Vol. XIII ed. <i>Law Reports of Trials of War Criminals</i> 146.
United States, Military Tribunal at Nuremberg, Von Leeb Case (The German High Command Trial), Judgement .	United States, Military Tribunal at Nuremberg, Von Leeb Case (The German High Command Trial) , Judgement, 28 October 1948.
US Military Tribunal No. 1 at Nuremberg, <i>Brandt et al.</i> Judgement .	US Military Tribunal No. 1 at Nuremberg, <i>Brandt et al.</i> Judgement; in Vol. 2 <i>Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 p. 171</i> .
US Military Tribunal Nuremberg, United States v. Carl Krauch, et al. Judgement .	US Military Tribunal Nuremberg, United States v. Carl Krauch, et al. (THE IG Farben Trial) Judgement, 30 July 1948.
US National Military Tribunal, <i>Justice Case</i> Judgement .	US National Military Tribunal, <i>Justice Case</i> Judgement , 4 December 1947.
US Supreme Court, In re Yamashita Opinion .	US Supreme Court, In re Yamashita, 327 U.S. 1 (1946) Opinion , 4 February 1946.

III. Other Key Sources and Publications (alphabetical)

Short citation	Full citation
ICRC Commentary on Geneva Convention I (2016)	Spoerri, Dörmann, Lijnzaad and Sassòli (Eds.), <i>Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field</i> , ICRC, Cambridge University Press, 2016.
ICRC Commentary on Geneva Convention II (2017)	Dörmann, Spoerri, Lijnzaad and Sassòli (Eds.), <i>Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea</i> , ICRC, Cambridge University Press, 2017.
ICRC Commentary on Geneva Convention III (1960)	De Preux <i>et al.</i> (Eds.), <i>Commentary on Geneva Convention III Relative to the Treatment of Prisoners of War</i> , ICRC, 1960.
ICRC Commentary on Geneva Convention III (2020)	Dörmann, Droege, Durham, Spoerri, Lijnzaad, Sassòli, Watkin (Eds.), <i>Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War</i> , ICRC, Cambridge University Press, 2020.
ICRC Commentary on Geneva Convention IV (1958)	Pictet <i>et al.</i> (Eds.) <i>Commentary on Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War</i> , ICRC, 1958.
ICRC Commentary on Additional Protocol I (1987)	Sandoz, Swinarski and Zimmermann (Eds.), <i>Commentary on the Additional Protocols of 8 June 1977 to the Geneva Convention of 12 August 1949</i> , ICRC, 1987.
ICRC, IHL Database, Customary IHL.	Henckaerts and Doswald-Beck (Eds.), <i>Customary International Humanitarian Law, Vol. 1: Rules</i> , Cambridge University Press, Cambridge, 2005; International Committee of the Red Cross, <i>Databases on International Humanitarian Law: Customary IHL Database</i> .
ICRC, IHL Database, Treaties, States Parties and Commentaries.	International Committee of the Red Cross, <i>Databases on International Humanitarian Law: Treaties, States Parties and Commentaries Database</i> .
International Law Commission, ' Draft Articles on the Responsibility of States for Internationally Wrongful Acts '.	International Law Commission, ' Draft Articles on the Responsibility of States for Internationally Wrongful Acts ', vol. II (Part Two) <i>Yearbook of the International Law Commission</i> , 2001.
International Law Commission, ' Principles of International Law Recognised in the Charter of the Nurnberg Tribunal and in the Judgement of the Tribunal '.	International Law Commission, ' Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal ', vol. II <i>Yearbook of the International Law Commission</i> , 1950.
San Remo Manual on International Law Applicable to Armed Conflicts at Sea	<i>San Remo Manual on International Law Applicable to Armed Conflicts at Sea</i> , 1994, published as Doswald-Beck (Ed.), no. 309 <i>International Review of the Red Cross</i> , Cambridge University Press, November-December 1995, pp 583-594.