



**International and domestic  
criminal justice responses to  
the alleged war crimes committed  
in Ukraine since February 2022**





Photo of Forensic workers carrying the corpse of a civilian killed during war against Russia after collecting it from a mass grave in Kyiv, Ukraine, Friday, April 8, 2022. ( AP Photo/Rodrigo Abd) by manlhui on flickr.com.

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## Introduction

“Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity. Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes. Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain 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.” (Preamble of the Rome Statute)

Among many others, in the preamble of the Rome Statute, these are the reasons for the existence of the International Criminal Court (ICC) as the universal and international mechanism in the fight against impunity for international crimes.

“Evil will be punished”, concluded Volodymyr Zelensky, President of Ukraine, in his April 3, 2022, speech to the United States Congress about the ongoing Russian invasion (Discours of Volodymyr Zelensky on 3 April 2022).

First and foremost, since February 24, 2022, the Ukrainian territory has been undergoing an invasion by Russia. The latter is carrying out military operations in Ukraine and the two armies are fighting each other. In this respect, serious violations of international law, specifically war crimes, have been recorded in several areas of the country. These crimes are allegedly perpetrated by the Russian army, but the latter in turn is passing the quid to the Ukrainian army (Polityuk, 2022).

This article will not discuss the qualification of the crime of aggression under international law and in the Rome Statute, or whether such a crime has been committed on the part of Russia. Only the illegality of war crimes and their legislation before the courts will be addressed, as the judicial responses given at this stage only involve the said crimes.

Thus, what are the international and national criminal justice responses to these serious violations of jus in bellum? First, it is necessary to address the definition of war crimes and what they entail.

## The Prohibition of War Crimes in International Law as a Serious Violation of the Jus in Bellum

It is important to note that one cannot talk about war crimes in a context of peace, meaning that war crimes are those committed in the context of an armed conflict. This section will discuss the definition of international armed conflict under applicable international law, as the conflict in Ukraine involving two sovereign countries qualifies as such.

Conventional and customary humanitarian law does not provide a clear definition of the notion of armed conflict as such. The commentary to Article 2 common to the Geneva Conventions of 1949 states that any dispute arising between two State Parties which leads to the use of members of the armed forces is an international armed conflict within the meaning of the above-mentioned conventions. (Dictionnaire pratique du droit humanitaire, 2013)

Nevertheless, the duration of the conflict, the number of military forces involved and the number of deaths are not decisive for this qualification. Unlike non-international armed conflicts, international armed conflicts are not subject to a requirement of intensity of fighting. (les Grands arrêts de droit international pénal, 2021)

Hence, the crimes committed in this context are war crimes. International Courts affirm that criminal conduct must be related to the armed conflict in which it takes place. It is this requirement of connectedness that is often found in the jurisprudence of the International Criminal Tribunal for the former Yugoslavia in the following cases: Prosecutor v. Alecksovki, Kunarac et al, Mucic et al. (les Grands arrêts de droit international pénal, 2021). This requirement is also found in the jurisprudence of the International Criminal Court, specifically in the Prosecutor v. Germain Katanga Case. (les Grands arrêts de droit international pénal, 2021). In this decision, the Court reiterated the interpretation it had given in the case of The Prosecutor v. Thomas Lubanga : « The Chamber considers an armed conflict to be international in character 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 ». (ICC, Pre-Trial Chamber I, The Prosecutor v. Germain Katanga, 30/09/2008, § 238).

In the present context in Ukraine, war crimes are committed in the course of hostilities by armed forces directly involved and participating in fighting. It is by using military function and means that war crimes are committed. Article 8 of the Rome Statute sets out the constitutive elements and underlying crimes constituting war crimes. For instance, article 8.2. a.i. qualifies the willful killing of civilians as a war crime. War crimes may also include the ill-treatment of prisoners of war and the denial of quarter. Thus, since the beginning of the war in Ukraine, there are several crimes that are recorded particularly on the

side of civilian victims who did not participate in the hostilities. The discovery of mass graves has moved the world, and some videos of executions have been shared on the Internet, showing the reality of war crimes committed in Ukraine. On 6 May 2022, Amnesty France published the findings of a 12-day extensive field investigation which concluded with the publication of a report entitled 'He's Not Coming Back': War Crimes in Northwest Areas of Kyiv Oblast. The report provides new evidence of war crimes committed by Russian forces in the area northwest of Kyiv, the capital of Ukraine. These include illegal air strikes, extrajudicial killings, indiscriminate and even disproportionate attacks on civilians. In total, Amnesty France reports that it has collected 45 testimonies from people about the unlawful killing of their relatives and neighbours by Russian forces, and 39 testimonies about air strikes on eight residential buildings. (Amnesty France, 2022).

So what is the international criminal justice system doing to punish these crimes?

## The International Criminal Court's commitment to justice for the victims of the Russian-Ukrainian conflict.

Since the beginning of the invasion of Ukraine, the International Criminal Court, through Prosecutor Karim Khan, has immediately reminded the belligerents to respect humanitarian law in several statements published on the Court's website. Subsequently, on behalf of the Court, the Prosecutor went down with his team to Ukraine in the framework of the investigations opened into the situation following the crimes identified. According to the Office of the High Commissioner for Human Rights, 10,308 civilian casualties have been recorded, including 4,597 deaths. The actual figure could be considerably higher as reported casualties are confirmed. (United Nations France, 2022). According to testimonies and investigations, these include: door-to-door executions of civilians, rape and sexual violence, torture, indiscriminate and disproportionate shelling and deliberate killings of civilians in the streets. (Amnesty France, 2022).

Karim Khan had also met with the general prosecutor of the country, Iryna Venediktov. (Statement of ICC Prosecutor, Karim A.A. Khan QC, on His Visits to Ukraine and Poland : "Engagement with All Actors Critical for Effective, Independent Investigations.", 2022)

Nevertheless, it should be recalled that the International Criminal Court, which is a permanent international criminal court with a universal jurisdiction, was created by the will of States, and thus it can only deal with the situations of States that have signed and ratified the Rome Statute, which is its constitutive act. (Rezagui, 2022)

The Court does not adjudicate on the responsibility of States, but rather individuals guilty of the crimes provided for in Article 5 of the Rome Statute: the crime of genocide, crimes against humanity, war crimes and crime of aggression. Thus, the Court applies individual criminal responsibility under Article 24 of the Statute.

However, neither Ukraine nor Russia have ratified the Rome Statute, making them third party states to the Court. In order to fight impunity for serious crimes under international law, Article 12(3) of the Rome Statute opens a loophole allowing third states to accept the jurisdiction of the Court by making a declaration to be filed with the Registry of the Court. This acceptance of the Court's jurisdiction is a consent by the third state to cooperate in the matter.

This is how, on 28 February 2022, Prosecutor Karim Khan announced the opening of an investigation into alleged international crimes committed in Ukraine since the beginning of the invasion. The Prosecutor bases his jurisdiction on two ad hoc declarations filed by Ukraine in 2014 and 2015 on the basis of Article 12(3) of the Statute. These declarations recognise the Court's jurisdiction over acts committed on Ukrainian soil since 21 November 2013. While these declarations were issued in the context of the war in Donbass and the annexation of Crimea by Russia, they now allow for a broader geographical scope to investigate the whole of Ukraine. (Rezagui, 2022).

According to Karim Khan, there is a reasonable basis to believe that the alleged war crimes were indeed committed, thus justifying the opening of an international criminal investigation (Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine : “I Have Decided to Proceed with Opening an Investigation.”, 2022).

As a result, an unexpected mobilisation of states has been observed: several states have referred the Ukrainian situation to the Court, which allows it to exercise jurisdiction over the crimes under Article 13(a) Rome Statute. For this reason, the Prosecutor was able to bypass the Pre-Trial Chamber's prior authorisation to investigate.

This is how Karim Khan officially started his investigation in Ukraine. Through his statements, personal visits to the field to meet with Ukrainian judicial authorities and Ukrainian civilians in camps, and sending Court investigators to collect evidence directly at the source, the International Criminal Court is demonstrating a high degree of pragmatism in the fight against international crimes in Ukraine.

Another point is that, in a statement on 25 April, the Prosecutor announced that “I am pleased to confirm that today my Office has become a participant in the joint investigation team (JIT) on alleged core international crimes committed in Ukraine, joining existing members Lithuania, Poland, and Ukraine.” (Statement by ICC Prosecutor, Karim A.A. Khan QC : Office of the Prosecutor joins national authorities in Joint Investigation Team on international crimes committed in Ukraine, 2022).

According to the European Union Agency for Criminal Justice Cooperation, a joint investigation team (JIT) is one of the most advanced tools used in international cooperation in criminal matters, comprising a legal agreement between competent authorities of two or more States for the purpose of carrying out criminal investigations. Made up of prosecutors and law enforcement authorities as well as judges, JITs are established for a fixed period, typically between 12 and 24 months, such as is necessary to reach successful conclusions to investigations. (Joint Investigation Teams, 2022).

All this demonstrates the contribution of the International Criminal Court in not leaving unpunished the alleged crimes committed in Ukraine since the beginning of the invasion.

Nevertheless, it should be noted that the International Criminal Court is bound by the principle of complementarity provided in Article 17 of the Rome Statute and tries those in high responsibility. This article states that the Court will only interfere when the state is unwilling or unable to provide justice.( Article 17.1.a of the Rome Statute)

Thus, there is a need for international criminal justice at the national level. This is what Ukraine is currently demonstrating with the last two trials of Russian soldiers.



### 3. The Ukrainian Justice system is moving 'quickly' to combat impunity for crimes committed.

Reuters reported that Kyiv has accused Russia of atrocities and brutality against civilians during the invasion and said it had identified more than 10,000 possible war crimes. Russia has denied targeting civilians or involvement in war crimes. At the same time, it carries out what it calls a "special military operation" in Ukraine (Polityuk, 2022).

The Ukrainian justice system has taken the lead since May in opening its first trial in relation to crimes committed during the current invasion.

While some non-governmental organisations are concerned that the justice system has moved too quickly, some consider that in this conflict, the judicial threat against the perpetrators of international crimes is an integral part of the political response of Ukraine and the West to Moscow, alongside the sanctions regime imposed by the European Union and its allies. (Maupas, 2022).

On Wednesday 18 May 2022, the first in a long series of war crimes trials since the beginning of the invasion began in the Ukrainian capital Kyiv. Indeed, Vadim Shishimarin, a 21-year-old Russian soldier, appeared in Court for killing an unarmed Ukrainian civilian by shooting him in the head in Sumy in north-eastern Ukraine on 28 February 2022. The victim was a 62-year-old civilian on his bicycle and the accused pleaded guilty. The statement from the Ukrainian Prosecutor's Office said there was evidence of the soldier's involvement, describing him as a responsible "in violation of the laws and customs of war combined with premeditated murder," and that the crime can carry a penalty of 10 to 15 years or life in prison. (Francis, Chapman and Parker, 2022)

Thereupon, on Monday, 23 May, the Kyiv court delivered its first verdict. JusticeInfo quoted the main points of the judgement as follows: "The court has found that Vadim Shishimarin is guilty and sentences him to life imprisonment" judge Sergiy Agafonov said on Monday 23 May. He was also found guilty of premeditated murder. "The murder was committed with direct intent," judge Agafonov said and "Shishimarin violated the laws and customs of war." (S. 2022, 23 may).

In addition, on 31 May 2022, the Ukrainian justice system has just pronounced its second conviction for war crimes. On 26 May, two Russian soldiers, Alexander Bobikin and Alexander Ivanov pleaded guilty in the trial for war crimes committed in Ukraine. They were tried for shelling civilians in eastern Ukraine. The Judge Evhen Bolybok stated that "the guilt of Bobikin and Ivanov has been proven in full," they are thus sentenced to 11 years and six months in jail. It should be noted that the prosecutors had requested 12 years in prison. However, the defence had suggested eight years because both defendants had pleaded guilty and expressed remorse, but they had been following superior orders when committing the crimes.

Subsequently, Bobikin and Ivanov acknowledged that the sentence of the Ukrainian Court was fair. (Polityuk, P. 2022).

For Emmanuel Daoud, lawyer at the Paris Bar and at the International Criminal Court, "An expeditious justice would make Ukraine lose much of its credibility. It is in Ukraine's interest to respect the standards of international justice in the various trials of Russian soldiers that are being opened". He added that the pressure of Ukrainian public opinion will weigh heavily in each of these cases. (Véronique, P. R. P. P. 2022).

This reactivity and expediency of the Ukrainian justice system will make it possible to render justice to the bereaved families and demonstrate a desire to fight against impunity for violations of the laws and customs of war.

## Conclusion

The invasion on Ukrainian territory has just passed the 100-day mark, which means that for 100 days, serious violations of the laws of war have been reported. Each side attributes war crimes to the other. The International Criminal Court has been contributing and deploying the necessary means to the fight against impunity for violations of the Rome Statute on Ukrainian territory. In this regard, it should be noted that the above-mentioned JTs aim to facilitate investigations and prosecutions in the States concerned as well as those that may be initiated before the International Criminal Court. With the first two trials, the Ukrainian justice system has laid the groundwork for a judicial response to the ongoing conflict.

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