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The Russian Federation's aggression against Ukraine: ensuring accountability for serious violations of international humanitarian law and other international crimes

Report[1]
Committee on Legal Affairs and Human Rights
Rapporteur: Mr Aleksander POCIEJ, Poland, Group of the European People's Party

Summary

The Russian Federation's ongoing war of aggression against Ukraine is being conducted with a brutality that was unprecedented in Europe since the Second World War. The use of heavy weapons in densely populated areas has caused thousands of civilian casualties. New reports of atrocities against civilians, including executions and sexual violence, allegedly committed by Russian troops in areas under their control, continue to appear.

In the face of these allegations of serious violations of international humanitarian law, the Parliamentary Assembly urges the international community to send a clear message, namely that perpetrators of war crimes and crimes against humanity, and possible genocide, will be held to account. The same must apply to the crime of aggression allegedly committed by the leaders of the Russian Federation.

The Assembly therefore calls on all member and observer States of the Council of Europe to support the ongoing investigations, notably those launched by the International Criminal Court Prosecutor, the Ukrainian authorities and other national jurisdictions making use of their universal jurisdiction, while at the same time ensuring close co-ordination. They should also set up an *ad hoc* international criminal tribunal for the investigation and prosecution of the crime of aggression, on the basis of a multilateral treaty concluded by a group of States, which could be endorsed by the United Nations General Assembly and supported by the Council of Europe.

1. Reference to committee: Bureau decision of 21 April 2022, Reference 4635 of 25 April 2022.

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A. Draft resolution[2]

1. The Parliamentary Assembly is appalled by the ongoing war of aggression waged by the Russian Federation against Ukraine. This war is conducted with a brutality that was unprecedented in Europe since the Second World War. The use of heavy weapons in densely populated areas has caused thousands of civilian casualties, the almost complete destruction of the city of Mariupol and severe damage to civilian infrastructures such as hospitals, schools, kindergardens, water and electricity supply and residential buildings in Kharkiv and many other cities and towns throughout Ukraine.

2. The Assembly is horrified by reports of atrocities against civilians allegedly committed by Russian troops in towns and villages temporarily under their control, in particular in Bucha and other towns in the vicinity of Kyiv.

3. The Assembly is appalled by widespread reports of the use of rape and torture as weapons of war, both of which are recognised as war crimes in international criminal law.

4. The grant by the President of the Russian Federation on 18 April 2022 of an honorary title to the 64th motorised infantry brigade, which was posted in Bucha at the time of the reported atrocities, sends a devastating message to the victims' families and cynically encourages Russian troops to continue committing similar actions which may amount to war crimes and crimes against humanity with impunity.

5. The Assembly therefore urges the international community to send a clear message to the contrary, namely that perpetrators of war crimes and crimes against humanity, and possible genocide, will be held to account. The same must apply to the perpetrators of the crime of aggression, namely the political and military leadership of the Russian Federation who are responsible for launching the ongoing war.

6. The Assembly notes that relevant legal instruments already exist in order to prosecute war crimes and crimes against humanity, and possibly genocide, namely:

6.1. the International Criminal Court (ICC), which in 2014 was granted jurisdiction by Ukraine to investigate war crimes and crimes against humanity on its territory;

6.2. the criminal justice systems of Ukraine and any other States that have granted their courts universal jurisdiction for such crimes.

7. Leading politicians, academics and human rights lawyers have proposed the creation, by a group of States willing to take the lead, of an *ad hoc* international criminal tribunal to prosecute the crime of aggression. This cannot presently be covered by the ICC without a resolution by the United Nations Security Council, which the Russian Federation would probably block by using its veto.

8. In addition to criminal responsibility of individual perpetrators of international crimes, the European Court of Human Rights and the International Court of Justice (ICJ) can hold the Russian Federation accountable for human rights violations committed by Russian troops and, in the case of the ICJ other violations of international law for which the ICJ has jurisdiction.

9. The Assembly recalls the legal duty to prevent and punish genocide under the Convention on the Prevention and Punishment of the Crime of Genocide to which all 46 member States of the Council of Europe are Contracting Parties. As interpreted by the ICJ, this obligation and a corresponding duty to act arise at the instant that one has learnt of, or should normally have learned of, the existence of a risk that genocide would be committed.

10. The Assembly therefore calls on all member and observer States of the Council of Europe to:

10.1. support the ICC Prosecutor in his task of investigating and prosecuting suspected perpetrators of war crimes, crimes against humanity and, possibly, genocide, by providing political support, adequate human and financial resources and by making available any evidence in their possession, including open source intelligence, information and data, satellite imagery and intercepts of communications;

10.2. make use of their universal jurisdiction, to the extent foreseen in their legislation, to investigate and prosecute international crimes;

2. Draft resolution unanimously adopted by the committee on 26 April 2022.

10.3. join or otherwise support the Joint Investigation Team (JIT) already set up by Ukraine, Poland and Lithuania with the support of Eurojust, for the purpose of co-ordinating their investigations and pooling their results through direct co-operation between the competent authorities of the participating States;

10.4. closely co-ordinate their investigations with the ICC Prosecutor; those States participating in the JIT could include the ICC Prosecutor in the JIT;

10.5. fully co-operate with the ICC Prosecutor, the members of the JIT and any other States making use of their universal jurisdiction, including by handing over to them any persons on their territory against whom arrest warrants will be issued;

10.6. urgently set up an *ad hoc* international criminal tribunal, which should:

10.6.1. receive a mandate to investigate and prosecute the crime of aggression allegedly committed by the political and military leadership of the Russian Federation;

10.6.2. apply the definition of the crime of aggression as established in customary international law, which has also inspired the definition of the crime of aggression in Article 8 *bis* of the ICC Statute;

10.6.3. have the power to issue international arrest warrants and not be limited by State immunity or the immunity of heads of State and government and other State officials;

10.6.4. be set up notably by a group of like-minded States in the form of a multilateral treaty endorsed by the United Nations General Assembly and with support to be provided by the Council of Europe, the European Union and other international organisations;

10.6.5. have its headquarters in Strasbourg (France), in view of possible synergies with the European Court of Human Rights, which is dealing with numerous related individual and interstate applications;

10.7. sign and ratify the Rome Statute of the ICC and the Kampala amendments introducing Article 8 *bis* on the crime of aggression;

10.8. avail themselves of the opportunity under Article 33 of the European Convention on Human Rights (ETS No. 5) to refer to the European Court of Human Rights, individually or through joint legal action, any alleged breach of the Convention and its Protocols by the Russian Federation occurring until 16 September 2022, when the Russian Federation will cease to be a Party to the Convention.

11. The Assembly further invites:

11.1. the European Court of Human Rights to consider prioritising cases stemming from the Russian aggression against Ukraine and making use of the possibility to engage in fact-finding under Article 38 of the European Convention on Human Rights;

11.2. the Commissioner for Human Rights of the Council of Europe to closely follow the human rights situation in Ukraine and to identify and swiftly denounce, in her targeted reports or statements, any patterns of serious human rights violations or violations of international humanitarian law she detects;

11.3. the ICC and its Prosecutor to:

11.3.1. prioritise the investigation and prosecution of war crimes and crimes against humanity committed during the ongoing war of aggression launched by the Russian Federation against Ukraine;

11.3.2. swiftly conclude investigations in the most glaring cases and issue indictments and arrest warrants against the suspected perpetrators;

11.3.3. co-operate closely with the national prosecutorial authorities exercising their universal jurisdiction following the principle of complementarity and participate in the co-ordination of relevant investigations through the JIT set up by several States with the support of Eurojust;

11.4. the Independent International Commission of Inquiry set up by the UN Human Rights Council to investigate all alleged violations of human rights in the context of the Russian aggression against Ukraine and to co-operate and co-ordinate its activities closely with the Prosecutor of the ICC and the national prosecutorial authorities investigating international crimes under their universal jurisdiction;

11.5. the United Nations General Assembly to:

11.5.1. support setting up an *ad hoc* international criminal tribunal to prosecute the crime of aggression allegedly committed by the political leaders and military commanders of the Russian Federation against Ukraine and encourage United Nations member States to step up their efforts in providing full support to establishing such a tribunal;

11.5.2. request an Advisory Opinion from the International Court of Justice on possible limits to the veto rights of permanent members of the United Nations Security Council that could be based on the general legal principles of the prohibition of the abuse of rights and the duty of member States of international organisations to exercise their membership rights in good faith.

12. The Assembly finally calls on the Russian Federation to:

12.1. cease hostilities against Ukraine and immediately, completely and unconditionally withdraw its military forces from the territory of Ukraine within its internationally recognised borders, and comply strictly with its obligations under human rights and international humanitarian law;

12.2. ensure accountability for crimes committed by its forces and all entities for which it bears responsibility according to its obligations under international humanitarian law and human rights law, including the Geneva Conventions, the International Covenant on Civil and Political Rights and the European Convention on Human Rights, which is still binding on the Russian Federation until 16 September 2022, also bearing in mind the binding nature of the judgments of the European Court of Human Rights, those already pending supervision over execution and those still to be adopted.

B. Draft recommendation[3]

1. The Parliamentary Assembly refers to its Resolution... (2022), stressing the need to ensure accountability for war crimes, crimes against humanity and possible genocide as well as the crime of aggression in connection with the Russian war of aggression against Ukraine.

2. The Assembly invites the Committee of Ministers to:

2.1. strengthen the competent services of the Council of Europe in order to enable them to provide technical assistance and advice to Ukraine and those member States exercising their universal jurisdiction with investigating and documenting gross human rights violations, including those amounting to war crimes, crimes against humanity and possible genocide, on the scale required;

2.2. invite the expert bodies of the Council of Europe, notably the Consultative Council of European Judges and the Consultative Council of European Prosecutors, the European Commission for the Efficiency of Justice and the European Commission for Democracy through Law (Venice Commission), and other monitoring and standard-setting mechanisms of the Council of Europe concerned, to produce expert recommendations and guidelines relating to these issues within the ambit of their competence;

2.3. encourage all member States to participate in setting up an *ad hoc* international criminal tribunal to prosecute the crime of aggression allegedly committed by the political leaders and military commanders of the Russian Federation against Ukraine, by way of a multilateral treaty between like-minded States;

2.4. examine ways and means for the Council of Europe as a whole to play an active role in setting-up and operating such a tribunal, including by providing logistical or other technical assistance.

3. Draft recommendation unanimously adopted by the committee on 26 April 2022.

C. Explanatory memorandum by Aleksander Pociej, Rapporteur

1. Introduction

1. Following a request by the Committee on Legal Affairs and Human Rights of 4 April 2022, the Assembly decided, on 25 April 2022, to hold an urgent debate on the issue at stake in this report during its April 2022 part-session.

2. In its Opinion 300 (2022) of 15 March 2022, the Assembly unanimously considered that the Russian Federation could no longer be a member State of the Council of Europe, in the context of the procedure launched by the Committee of Ministers under Article 8 of its Statute. It considered, among other things, that the Russian Federation's armed attack on Ukraine was in breach of the Charter of the United Nations, qualified as a "crime against peace" under the Charter of the International Military Tribunal (Nuremberg Charter), and constituted an "aggression" under the terms of Resolution 3314 (XXIX) of the United Nations General Assembly adopted in 1974. It was also a serious breach of Article 3 of the Statute of the Council of Europe (ETS No. 1). The Assembly was deeply disturbed by evidence of serious violations of human rights and international humanitarian law by the Russian Federation, including attacks against civilian targets; indiscriminate use of artillery, missiles and bombs, including cluster bombs; attacks on humanitarian corridors intended to allow civilians to escape from besieged towns and cities; hostage-taking; and reckless attacks on nuclear facilities. In this regard, it expressed support to all efforts aimed at ensuring that those responsible are held accountable for their actions, including the decision by the Prosecutor of the International Criminal Court (ICC) to investigate the situation in Ukraine and the establishment of a special investigation commission by the United Nations Human Rights Council, and stated that it would evaluate the proposals to establish a special international criminal tribunal for war crimes committed during the war in Ukraine started by the Russian military aggression. The Assembly also welcomed other efforts to document possible crimes under international law committed in Ukraine, including through the publication of commercial satellite imagery, the analysis of this imagery and other forms of open-source intelligence by private actors.

3. In an extraordinary meeting on the following day, 16 March 2022, the Committee of Ministers, in the context of the procedure under Article 8 of the Statute of the Council of Europe and taking into consideration the Assembly's Opinion, decided that the Russian Federation ceased to be a member of the Council of Europe with immediate effect.[4]

4. Since then, and despite numerous calls by the international community on the Russian Federation to stop its war against Ukraine and withdraw all forces from its territory, the Russian Federation's aggression has continued to escalate, causing a humanitarian crisis unprecedented in Europe since the Second World War, with at least 5 381 civilian casualties and over 10 million people, almost a quarter of the Ukrainian population having been displaced either within Ukraine or having fled to neighbouring countries.[5]

2. Possible serious violations of international humanitarian law committed by Russian forces since 24 February 2022

5. Different Council of Europe bodies and other international organisations have reacted to allegations of serious violations of international humanitarian law and human rights law committed on the Ukrainian territory by the Russian armed forces.

6. On 3 April 2022, Tiny Kox, President of the Assembly, expressed shock and horror at reports of civilian killings by Russian forces discovered after their withdrawal from Bucha and other towns around Kyiv.[6] Following the first Council of Europe official visit to Ukraine since hostilities begun (6 April 2022), he strongly condemned "the atrocities against innocent civilians, including horrifying sexual violence, committed by the Russian army in the towns around Kyiv". Mr Kox assured that the Council of Europe would provide all possible assistance "to facilitate the investigation into these war crimes, and to ensure that those responsible for them are brought to justice".[7]

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4. CM/Res(2022)2.
5. UNHCR – UN High Commissioner for Refugees calls for immediate end to Ukraine war, which has uprooted over 10 million people; www.ohchr.org/en/news/2022/04/ukraine-civilian-casualty-update-22-april-2022: 2 435 killed and 2 946 injured. The OHCHR indicates that these are conservative figures, as the receipt of information from some locations where intense hostilities have been going on has been delayed and many reports are still pending corroboration.
6. PACE President reacts to reports of civilian killings by Russian forces around Kyiv (coe.int).

7. The Secretary General of the Council of Europe was also appalled "at horrific images of atrocities from the town of Bucha and other towns near Kyiv following the withdrawal of Russian forces". She called "for an urgent, full and independent investigation into these horrendous crimes" and assured the Ukrainian authorities that the Council of Europe remains ready to assist them.[8]

8. The Council of Europe Commissioner for Human Rights promptly reacted to allegations of human rights and international humanitarian law violations during the ongoing war, issuing a number of statements. To mention a few, on 6 April 2022, she expressed that the images of lifeless bodies of civilians in Bucha provide "a haunting illustration to shocking reports of violations of human rights and breaches of international humanitarian law, such as summary executions, abductions, torture, sexual violence, and attacks against the civilian infrastructures, committed in areas of Ukraine previously under the control of Russian troops". The Commissioner added that "the terrible acts committed against the civilian populations of Bucha, Borodianka, Trostianets, and many other hitherto peaceful Ukrainian cities and towns (…) may constitute war crimes and must not go unpunished".[9] On 8 April, she condemned the attack with missiles on a railway station in Kramatorsk, killing and injuring civilians who were waiting to be evacuated to safer regions, and stated that such attacks could also constitute war crimes.[10]

9. The European Court of Human Rights, on 1 and 4 March 2022, indicated a number of interim measures to the Government of the Russian Federation in relation to the military action commenced on 24 February 2022 in various parts of Ukraine, considering that "it gives rise to a real and continuing risk of serious violations of the Convention rights of the civilian population, in particular under Articles 2 (right to life), 3 (prohibition of torture and inhuman or degrading treatment or punishment) and 8 (right to respect for private and family life) of the European Convention on Human Rights".[11] On 1 April 2022, the Court, in response to additional requests made by Ukraine considered that the previous interim measures should apply to "any and all attacks against civilians, including with the use of any form of prohibited weapons, measures targeting particular civilians due to their status, as well as the destruction of civilian objects under the control of Russian forces". In addition, the Court expanded the measure concerning access of the civilian population to safe evacuation routes, and added that "the evacuation routes should allow civilians to seek refuge in safer regions of Ukraine" (therefore excluding the possible forced transfers of civilians to the Russian Federation).[12]

10. The President of the Congress of Local and Regional Authorities, on 6 April 2022, referred to the case of the mayor of the village of Motyzhyn, Olga Sukhenko, who was reportedly kidnapped on 23 March with her husband and their son, and later found in a grave. Similar crimes have been reported in Hostomel and other towns in the Kyiv oblast against mayors killed for having refused to co-operate with the Russian troops.[13]

11. The Human Rights Monitoring Mission in Ukraine (HRMMU) of the Office of the United Nations High Commissioner for Human Rights (UN OHCHR), in its update on the human rights situation in Ukraine (period 24 February-26 March 2022), observed that "the conduct of hostilities by the Russian armed forces has been characterized by the broad use of explosive weapons with wide area effects in populated areas, including shelling from heavy artillery and multiple launch rocket systems, missile, and air strikes". It found that "there are strong indications that serious violations of international humanitarian law and gross violations of

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7. Assembly delegation condemns atrocities and pledges help after first Ukraine visit – Newsroom (coe.int). On 6 April 2022, the PACE General Rapporteur on Violence against Women also denounced the horrifying sexual violence reportedly perpetrated by Russian military forces in Ukraine, referring to "testimonies of rape and sexual violence'" and to rape "being used as a weapon to break, demoralise and destroy people, home and families in Ukraine at this moment", see: PACE General Rapporteur denounces the horrifying sexual violence reportedly perpetrated by Russian military forces in Ukraine (coe.int).

8. Statement by Council of Europe Secretary General Marija Pejčinović Burić on the atrocities in Bucha – Newsroom (coe.int).

9. Justice needed for residents of Bucha and all other victims of the war in Ukraine (coe.int).

10. www.coe.int/en/web/commissioner/-/kramatorsk-those-responsible-for-the-terrible-loss-of-civilian-life-must-be-held-accountable. According to Ukrainian sources at least 300 were wounded in the strike and at least 50 killed, including at least 5 children.

11. https://hudoc.echr.coe.int/eng-press?i=003-7277548-9913621. The measures of 1 March were indicated in the context of a request from the Ukrainian Government (application n° 11055/22, *Ukraine v. Russia (X)*), but cover any individual request falling into the category of civilians who provide sufficient evidence showing that they face a serious and imminent risk of irreparable harm to their physical integrity and/or right to life.

12. https://hudoc.echr.coe.int/eng-press?i=003-7300828-9953996.

13. Congress President condemns the crimes against Ukrainian citizens and elected local leaders (coe.int).

international human rights law have occurred, in particular with regard to the principles of distinction and the prohibition of indiscriminate attacks".[14] The report refers to allegations of specific violations of human rights and international humanitarian law committed by Russian forces, such as:

– the explosion of cluster munition at a hospital in Vuhledar (Donetsk region) on 24 February, killing at least 4 civilians and injuring 10, and damaging ambulances and the hospital;

– the use of non-precision guided missiles bearing cluster munitions in several districts of Kharkiv on 25 February, killing at least 9 civilians and injuring 37;

– the damage to or destruction of 81 civilian objects in Kharkiv city, including 40 apartment buildings, as of 26 March;

– air strikes on hospitals in different cities, including the one on Mariupol hospital No. 3 on 9 March, injuring 17 civilians (including healthcare workers, children, and pregnant women, one of whom died at a very late stage of pregnancy);

– the attack on the area of the Zaporizhzhia nuclear power plant in Enerhodar city on 4 March;

– the air strike on the Drama Theatre in Mariupol on 16 March, where between 800 and 1 200 civilians were taking shelter, with possibly hundreds of civilian casualties;

– forcible evacuations of Mariupol residents to the territory controlled by Russian affiliated armed groups and further into the Russian Federation;

– killing of civilians in moving cars during evacuations or during peaceful assemblies;

– the arrests and detention of 24 public officials and civil servants of local authorities, including the mayor of Melitopol, who was taken away on 11 March and later exchanged against Russian prisoners of war;

– cases of conflict related sexual violence, including one in Kyiv region currently being investigated as a violation of the laws and customs of war;[15]

– arrests and possible enforced disappearances of 21 journalists and civil society activists who had been vocal against the Russian attack in Kyiv, Luhansk, Kherson, and Zaporizhzhia regions;

– targeted attacks against journalists;

– lack of access to basic goods and necessities for civilians in areas such as Chernihiv, Izium, Kharkiv, Mariupol, Okhtyrka and Volnovakha.[16]

12. Since the publication of the HRMMU report, new allegations of war crimes, such as those following the discovery of civilians lying dead with their hands tied in Bucha, have been brought to the attention of the UN High Commissioner for Human Rights.[17] In response to the recent reports, the UN General Assembly voted on 7 April 2022 to suspend the Russian Federation from the UN Human Rights Council, expressing grave concern at the ongoing human rights and humanitarian crisis in Ukraine, particularly at the reports of violations and abuses of human rights and violations of international humanitarian law by the Russian Federation.[18]

13. On 13 April 2022, a mission of experts from the Organization for Security and Co-operation in Europe (OSCE) published a report entitled "Report On Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity Committed in Ukraine Since 24 February 2022". The mission was composed of three experts selected by Ukraine.[19] It found clear patterns of international humanitarian law violations by the Russian forces in their conduct of hostilities, as well as in the occupied parts of Ukraine. Although some violations were also identified regarding Ukraine (notably on the treatment of prisoners of war),

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14. OHCHR, Update on the human rights situation in Ukraine, reporting period: 24 February-26 March, paragraphs 1-2.
15. See other testimonies of sexual violence in media reports: www.bbc.com/news/world-europe-61071243.
16. The HRMMU also reported on alleged violations of human rights and international humanitarian law by Ukrainian forces (for example launch of missile equipped with cluster sub-munitions intercepted in Donetsk on 14 March 2022, videos with interrogations and intimidation of prisoners of war in the power of Ukraine).
17. Comment by UN High Commissioner for Human Rights Michelle Bachelet on bodies in town of Bucha in Ukraine | OHCHR.
18. www.un.org/press/en/2022/ga12414.doc.htm.
19. Professor Wolfgang Benedek, Professor Veronika Bílková and Professor Marco Sassoli. The experts were selected after 45 OSCE participating States, following consultation with Ukraine, invoked the OSCE's Moscow Mechanism on 3 March "to address the human rights and humanitarian impacts of the Russian Federation's invasion and acts of war, supported by Belarus, on the people of Ukraine, within Ukraine's internationally recognized borders and territorial waters". The events investigated cover the period from 24 February until 1 April 2022. The experts could not visit Ukraine, and their main sources of information were Ukrainian authorities, international organisations, NGOs, and media reports. See

violations committed by the Russian Federation were by far more serious in nature and scale. The report refers, among others, to enforced disappearances, summary executions, pillage, deportations, use of indiscriminate weapons in densely populated areas, attacks against hospitals, schools and places of worship. It looks in more detail into the attacks on Mariupol Maternity House and Children's Hospital on 9 March, and on Mariupol theatre on 16 March, considering that they must have been deliberate. The mission also concluded that some patterns of violent acts in breach of international human rights law, such as targeted killing, enforced disappearance or abductions of civilians, including journalists and local officials, were likely to qualify as a "widespread or systematic attack directed against a civilian population" (under the definition of crimes against humanity). For instance, according to the experts, the alleged extrajudicial killing of all local men aged 16-60 in Bucha, if confirmed, would clearly constitute a crime against humanity. In relation to allegations of rapes, including gang rapes, committed by Russian soldiers, the experts recalled that rape or other forms of sexual violence may constitute or a crime against humanity or a war crime.

14. Leading international human rights non-governmental organisations such as Human Rights Watch (HRW) and Amnesty International (AI) have also documented possible war crimes and violations of international humanitarian law in Ukraine by Russian forces, including cases of rape, summary executions, indiscriminate attacks and civilians living under siege.[20] In relation to Bucha, AI Secretary General said: "These reports from Bucha are showing a wider pattern of war crimes including extrajudicial executions and torture in other occupied areas of Ukraine".[21]

15. According to the Russian official narrative, some of the alleged atrocities were "staged" by Ukrainian authorities after the Russian troops withdrew from the areas concerned. For instance, the Russian Foreign Ministry claimed that while Bucha was under Russian control "not a single local resident [had] suffered from any violent action" and President Putin said that the images showing bodies on the streets were "fake". However, satellite images of Bucha have shown bodies lying in the street nearly two weeks before the Russians left the town, exactly in the same locations where they were later found, directly contradicting the Russian version.[22] On 18 April 2022, President Putin granted an honorary title to the 64th motorised infantry brigade which was stationed in Bucha at the time of the reported atrocities.[23] I am outraged by the cruel message this sends to the victims' families and to Russian troops elsewhere in Ukraine, namely that such atrocities may be committed with impunity and may even be rewarded.

16. Although it is not part of my mandate to subsume the above allegations under the different articles of the Geneva Conventions of 1949 or other rules of customary international humanitarian law, it is important to stress already now that many of these acts could qualify as war crimes, giving rise to individual criminal responsibility of the perpetrators and their commanders. These would include grave breaches of the Geneva Conventions and/or the Additional Protocol I of 1977 (applicable to international armed conflicts), ratified by both the Russian Federation and Ukraine, such as: wilful killing, torture or inhuman treatment, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer, extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly,[24] wilfully making the civilian population or individual civilians the object of attack, wilfully 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.[25] Although sexual violence and rape are not explicitly included as a grave breach either in the Geneva Conventions or in the Additional Protocol I, they can be considered as inhuman treatment or wilfully causing great suffering or serious injury to body or

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"Report of the OSCE Moscow Mechanism's mission of experts entitled 'Report On Violations Of International Humanitarian And Human Rights Law, War Crimes And Crimes Against Humanity Committed In Ukraine Since 24 February 2022", OSCE.

20. Ukraine: Apparent War Crimes in Russia-Controlled Areas | Human Rights Watch (hrw.org); Ukraine: Russian forces extrajudicially executing civilians in apparent war crimes – new testimony – Amnesty International.

21. Ukraine: Apparent war crimes by Russian forces in Bucha must be investigated – Amnesty International.

22. www.bbc.com/news/60981238.

23. www.thetimes.co.uk/article/putin-honours-russian-brigade-accused-of-bucha-atrocities-vrxd3mtdm.

24. Article 147 of Convention IV relative to the Protection of Civilian Persons in Time of War. These acts are also war crimes under Article 8(2)(a) of the Rome Statute of the International Criminal Court. Article 8(1) states that the ICC shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

25. Article 85.3 (a) and (b) of Additional Protocol I of 1977. These acts are also war crimes under Article 8(2)(b) of the Rome Statute of the International Criminal Court (although the wording varies slightly). Other grave breaches of Additional Protocol I (for instance, making non-defended localities and demilitarized zones the object of attack, Article 85.3(d)) are not included as such in the ICC Statute.

health.[26] Other acts, such as preventing the delivery of humanitarian aid to encircled cities (for example Mariupol) could qualify as war crimes under the Statute of Rome of the International Criminal Court (ICC Statute).[27]

17. Some of these violations of international humanitarian law could at the same time constitute crimes against humanity under Article 7 of the ICC Statute or under international customary law, if there is evidence that they were committed as "part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".[28] Whether certain acts would additionally fulfil the definition of genocide under Article 6 of the ICC Statute (namely committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group") is an open issue that would require further consideration and legal analysis.[29] For this purpose, it is important to investigate and document patterns of destructive behaviour that would allow inferences as to the existence of genocidal intent.[30] In any event, although the Russian Federation is not a Party to the Rome Statute, the ICC has jurisdiction over crimes against humanity and genocide if committed on the territory of Ukraine since 21 November 2013 (see paragraphs 19 and 20 below).

18. Finally, it is important to stress that the possible violations of international humanitarian law committed by Russian officers and commanders engage the responsibility of their State under international human rights law, including the European Convention of Human Rights (of which the Russian Federation is still a Contracting Party until 16 September 2022, see paragraphs 41-44 below), the International Covenant on Civil and Political Rights[31] and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. According to the case law of the European Court of Human Rights and the International Court of Justice, human rights law treaties continue to apply in times of war, and both international humanitarian law and international human rights law should be interpreted in a complementary and coherent way.[32] For instance, killings of civilians, torching and looting of houses in occupied areas amount to violations of Articles 2, 3 and 8 of the Convention and Article 1 of Protocol No.1 by the State exercising jurisdiction over those areas.[33] Therefore, the Russian Federation should continue to be held accountable before the existing international human rights mechanisms, including for human rights violations committed by its forces during the ongoing war.

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26. They are explicitly listed as war crimes under Article 8(2)(b)(xxii) of the ICC Statute.
27. Article 8(2)(b)(xxv): intentionally using starvation of civilians as a method of warfare, including through wilfully impeding relief supplies.
28. For instance, Article 7(1)(g) of the ICC Statute criminalises "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity".
29. President Zelensky accused Russia of genocide. Mateusz Morawiecki, Prime Minister of Poland, has called for an international commission to investigate actions committed by Russian forces in Ukrainian towns such as Bucha as a possible genocide. President Biden has also referred to genocide.
30. The article by Timofey Sergeitsev published on 3 April 2022 by the Russian State news agency RIA NOVOSTI ("What Russia should do with Ukraine") is a chilling reminder that genocidal ideas such as those laid out in this article exist in Russia and are freely expressed in State media.(see https://ccl.org.ua/en/news/ria-novosti-has-clarified-russias-plans-vis-a-vis-ukraine-and-the-rest-of-the-free-world-in-a-program-like-article-what-russia-should-do-with-ukraine-2/).
31. The Russian Federation has ratified the International Covenant on Civil and Political Rights and its Optional Protocol (on individual complaints). See Statement of the Human Rights Committee (HRC) in relation to the consideration of the eighth periodic report of the Russian Federation scheduled to take place at its 134th session on 3 to 4 March 2022, where the HRC urges the Russian Federation to take all necessary measures to comply with its Covenant obligations, in particular with the right to life, the supreme right from which no derogation is permitted, even in situations of armed conflict.
32. European Court of Human Rights, *Hassan v. the United Kingdom,* Application No. 29750/09, judgment of 16 September 2014 (Grand Chamber), paragraph 104; ICJ, Advisory Opinion on "The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory", 9 July 2004, paragraph 106; see also Resolution 2407 (2021) "Celebrating the 70th anniversary of the Geneva Conventions: the contribution of the Council of Europe to the increasing synergy between international humanitarian law and international human rights law".
33. See, for instance, *Georgia v. Russia (II),* Application No. 38263/08, judgment of 21 January 2021 (Grand Chamber), paragraphs 198-199, 205-222, where the Court also referred to several provisions of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War.

3. Avenues for accountability for serious violations of international humanitarian law and other international crimes (including war crimes, crimes against humanity, genocide and crime of aggression)

3.1. Ongoing international investigations and proceedings

19. Neither Ukraine nor the Russian Federation is a Party to the International Criminal Court Statute.[34] But Ukraine has made two declarations under Article 12(3) of the Statute, which enables a State not Party to the Statute to accept the exercise of jurisdiction by the ICC. The first one explicitly covered alleged crimes committed between 21 November 2013 and 22 February 2014. The second declaration (8 September 2015) extended the acceptance of the ICC's jurisdiction indefinitely,[35] therefore covering acts committed in the territory of Ukraine in connection with the ongoing war, including war crimes, crimes against humanity and genocide. The only exception is the crime of aggression. If it is committed by nationals or on the territory of a State non-Party to the ICC Statute, it can only be submitted to the ICC's jurisdiction by a referral to the ICC Prosecutor by the UN Security Council acting under Chapter VII of the UN Charter.[36] This would likely be vetoed by the Russian Federation.

20. On 28 February 2022, the ICC Prosecutor, Karim Khan, confirmed that there was a reasonable basis to proceed with opening an investigation on alleged war crimes and crimes against humanity committed in Ukraine, in relation to the events already assessed during the preliminary examination launched in 2014. He indicated that the investigation shall also encompass "any new alleged crimes falling within the jurisdiction of [his] Office that are committed by any party to the conflict on any part of the territory of Ukraine".[37] On 1 March 2022, the Prosecutor informed the ICC judges of an upcoming request to obtain judicial authorisation under Article 15(3) of the Statute. In addition, on 2 March 2022, he announced that he had opened an investigation into the situation in Ukraine on the basis of referrals received from 39 ICC States Parties (including 34 Council of Europe member States), a possibility foreseen by Article 14 of the ICC Statute, which does not require judicial authorisation.[38] The scope of the situation being investigated encompasses any past and present allegations of war crimes, crimes against humanity or genocide committed on any part of the territory of Ukraine by any person from 21 November 2013 onwards.[39] For the time being, the ICC Prosecutor has deployed an investigative team to Ukraine, which has commenced evidence-collection activities, and established a dedicated portal for provision of information.[40] He has met with Ukrainian authorities on the ground, and transmitted a formal request to the Russian Federation to meet their competent authorities.[41]

21. In line with Assembly Opinion 300 (2022), I fully support the recent decisions by the ICC Prosecutor, as well as the joint action by Council of Europe member States which allowed the Prosecutor to expedite matters and delivered a strong message of support for the ICC. However, I find it problematic that the previous ICC Prosecutor had completed her preliminary examination on Ukraine in December 2020 (six years after launching it), and no authorisation for the investigation was requested from ICC judges in the course of 2021. In fact, the previous ICC Prosecutor, Fatou Bensouda, referred to significant operational challenges and capacity constraints because of lack of resources. I believe that in order to meet the challenges faced in the current investigation and fulfil its essential role in ensuring accountability, the ICC and its Prosecutor's Office should receive the necessary financial and political support from States Parties to the Rome Statute, particularly from Council of Europe member States, for instance through voluntary contributions and secondment of personnel. States must also be ready to provide the ICC with relevant data and evidence with a view to documenting potential crimes. Although prosecutions and trials against individuals before the ICC will take time, the immediate launch of a comprehensive investigation (possibly soon followed by the issuance of arrest warrants) sends an important message – namely that there is no impunity for international crimes.

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34. Other Council of Europe member and observer States, and States whose parliaments enjoy observer or partner for democracy status with the Assembly, which are not yet States Parties to the ICC Statute are: Armenia, Azerbaijan, Monaco, Turkey, the United States, Israel, Kyrgyzstan and Morocco.
35. ICC press release, 8 September 2015, "Ukraine accepts ICC jurisdiction over alleged crimes since 20 February 2014".
36. Article 15 *bis* (5) and *ter* of the ICC Statute. Some scholars argue that the ICC Statute should be amended to apply the ICC's ordinary jurisdiction regime set out in Article 12 to the crime of aggression.
37. www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening.
38. The Prosecutor has later confirmed that three additional States, Japan, North Macedonia, and the Republic of Chile, had also referred the situation in Ukraine, bringing the total number of referring States to 42.
39. www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states.
40. www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-additional-referrals-japan-and.
41. 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." | International Criminal Court (icc-cpi.int).

This will also contribute to the further international delegitimisation of the Russian political and military leadership. It must be hoped that the launch of the investigation also has some deterrent effect on Russian troops and commanders on the ground.[42]

22. The Russian Federation's aggression also led the UN Human Rights Council to adopt on 4 March 2022 a resolution establishing an Independent International Commission of Inquiry to investigate all alleged violations of human rights in the context of the aggression.[43] The Commission shall be constituted by three human rights experts, to be appointed by the President of the Human Rights Council for an initial duration of one year, with the mandate to, among other things, investigate all alleged violations and abuses of human rights and violations of international humanitarian law, and related crimes, in the context of the Russian Federation's aggression against Ukraine, and establish the facts, circumstances, and root causes of any such violations and abuses; collect, consolidate and analyse evidence of such violations and abuses, including their gender dimension, and systematically record and preserve all information, documentation and evidence, including interviews, witness testimony and forensic material, in view of any future legal proceedings; identify, where possible, those individuals and entities responsible, with a view to ensuring that they are held accountable; and make recommendations, in particular on accountability measures.

23. The President of the Human Rights Council has appointed Erik Møse, former Norwegian judge of the European Court of Human Rights, Jasminka Džumhur, Human Rights Ombudsperson of Bosnia and Herzegovina, and Pablo de Greiff, the first UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, as the three independent members of the Commission of Inquiry. Mr Møse will be the Chair person of the Commission. The Commissioners are requested to present an oral update on their work to the Human Rights Council in September 2022 and a comprehensive written report in March 2023.

24. In my view, this kind of investigative mechanism can play an important complementary role by gathering and preserving evidence that can be shared with the ICC and other jurisdictions. Member States of the Council of Europe, including Ukraine, should support this investigation, by providing it with relevant information they may possess or come to possess on potential abuses and crimes.

25. Finally, it is worth mentioning the ongoing proceedings before the International Court of Justice, instituted on 26 February 2022 by Ukraine against the Russian Federation concerning a dispute relating to the interpretation, application and fulfilment of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The application aims at showing that claims that Ukraine is responsible for genocide in the Luhansk and Donetsk regions are unfounded and establishing that the Russian Federation has therefore no lawful basis to take military action based on those false claims. On 16 March 2022, the ICJ indicated provisional measures to the Russian Federation to immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine, and to ensure that any military or irregular armed units which may be directed or supported by it, as well as any organisations and persons which may be subject to its control or direction, take no steps in furtherance of such operations. It further indicated that both parties should refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.[44] Although these proceedings are not aimed at establishing individual accountability for concrete human rights or international humanitarian law violations, they are useful insofar as they discredit one of the main arguments used by Russian leaders to justify the so-called "special military operation", to stop an alleged "genocide" of Russian-speaking population in Eastern Ukraine. In this respect, the ICJ, in its order of 16 March, without prejudging the merits of the dispute, already stated that it was not in possession of any evidence substantiating the allegation of the Russian Federation that genocide had been committed.

3.2. Alternative international mechanisms: proposal to set up a special tribunal on the crime of aggression

26. As I mentioned above, the crime of aggression (codified in Article 8 *bis* of the Rome Statute,[45] which entered into force on 17 July 2018) is not subject to the ICC's jurisdiction if committed by nationals or on the territory of a State not Party to the ICC Statute. Since neither Ukraine nor the Russian Federation are parties to the Rome Statute, the only possibility of exercising jurisdiction over this crime would be through a referral to

42. See Sergey Vasilev, "Aggression against Ukraine: Avenues for Accountability for Core Crimes", EJIL: Talk, 3 March 2022.
43. www.ohchr.org/en/press-releases/2022/03/human-rights-council-establishes-independent-international-commission?msclkid=037db3d9aeb811ec87251eb202d14a0f. Resolution A/HRC/49/1.
44. ICJ, "Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (*Ukraine v. Russian Federation*)", Order of 16 March 2022.

the ICC Prosecutor by the UN Security Council. In the likely case that the Russian Federation would exercise its veto in the Security Council against such a referral, the ICC would be prevented from investigating and prosecuting crimes of aggression against Ukraine. In order to fill this gap and complement the actions underway before the other international tribunals, a number of prominent figures from the legal and political spheres, including Sir Nicolas Bratza, former President of the European Court of Human Rights, Gordon Brown, former Prime Minister of the United Kingdom, Professors Philippe Sands and Philip Leach, Professors Egbert Myjer and Angelika Nussberger, former Judges of the European Court of Human Rights, have proposed the creation of a special tribunal with a limited focus on the crime of aggression. According to this proposal, the Special Tribunal should be constituted to investigate the acts of violence committed by the Russian Federation against Ukraine and to determine whether they constitute a crime of aggression. According to this proposal, States should agree to grant jurisdiction arising under national criminal codes and general international law, and confer on such a tribunal jurisdiction to investigate and prosecute both the perpetrators of the crime of aggression and those who have substantially contributed to or shaped the commission of that crime.[46]

27. The Assembly, in its Opinion 300 (2022), already considered that the Russian Federation's armed attack on Ukraine qualifies as a "crime against peace" under the Nuremberg Charter and constitutes an "aggression" under the terms of Resolution 3314 (XXIX) of the United Nations General Assembly adopted in 1974. The UN General Assembly has also considered with an overwhelming majority that the Russian Federation committed an aggression in violation of Article 2(4) of the UN Charter.[47] While the Russian Federation is not a party to the ICC Statute, which codifies the crime of aggression referring to the definition set out in UNGA Resolution 3314 (XXIX), customary international law also provides for individual criminal responsibility for those who plan, prepare, initiate or execute a war of aggression. During the Nuremberg trials, the crime against the peace (what we now call crime of aggression) was considered a leadership crime, a crime primarily committed by planners and designers, those occupying high-level positions in the Nazi party, government or military leaders.[48] The leadership nature of the crime is now reflected in the Article 8 *bis* of the ICC Statute, which limits its applicability to persons in a position effectively to "control or direct" the political or military action of a State. Some have argued that while war crimes are likely to be attributed to individual soldiers and commanders, it could be easier to identify and prosecute the leaders who planned and waged the war of aggression against Ukraine, holding them responsible for all the deaths and destruction resulting from the aggression, including of Ukrainian soldiers (who are in principle lawful targets under international humanitarian law).[49] This charge could apply not only to Russian leaders and high-ranking officials, but also to those from Belarus, a State whose involvement in the Russian Federation's aggression against Ukraine has been widely condemned by the international community.[50]

28. One of the main challenges for the operation and effectiveness of such a tribunal would be the presumable lack of co-operation by the aggressor State(s), which is still waging war. The Nuremberg and Tokyo Military Tribunals established after the Second World War were based on the consent of the vanquished Axis States. The Russian Federation would certainly veto the creation of an *ad hoc* tribunal by the UN Security Council acting under chapter VII of the UN Charter, such as those set up for the former Yugoslavia (ICTY) and Rwanda (ICTR) in the 90s. The other possibility would be to establish a special tribunal based on an agreement between the State in which the offences were committed and the United Nations, following the example of the Special Court for Sierra Leone, established in 2002.[51] In some post-conflict situations, "hybrid" judicial mechanisms, with both international and national judges, were created

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45. Article 8 *bis* (1) of the ICC Statute: "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations. Article 8 *bis* (2)*:* "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.

46. https://gordonandsarahbrown.com/wp-content/uploads/2022/03/Combined-Statement-and-Declaration.pdf; https://news7h.com/putins-use-of-military-force-is-a-crime-of-aggression/.

The Statement and Declaration were supported by the Ukrainian Foreign Minister in an event hosted by Chatham House on 4 March 2022. (www.chathamhouse.org/events/all/research-event/criminal-tribunal-aggression-ukraine). See also: www.justiceinfo.net/en/90566-ukraine-momentum-tribunal-aggression.html.

47. UNGA Resolution on Aggression against Ukraine of 1 March 2022, A/ES-11/L.1.

48. Charter of the International Military Tribunal (Nuremberg Charter), Article 6 (a); Opening Statement of Justice Robert H. Jackson, Chief of Counsel for the United States, to the IMT.

49. See also Andrew Clapham, "Ukraine Tribunal Could Try Russian Leaders for Aggression": https://balkaninsight.com/2022/04/07/ukraine-tribunal-could-try-russian-leaders-for-aggression-expert/.

50. Report for Opinion 300 (2022), paragraphs 17-21.

51. The European Parliament, in its resolution of 7 April 2022 on the conclusions of the European Council of 24-25 March 2022, called, among other things, for a special UN tribunal for the crimes in Ukraine to be set up (paragraph 3).

within the domestic legal system, for example the Extraordinary Chambers in the Courts of Cambodia, established in 2003, the War Crimes Chamber of the State Court of Bosnia-Herzegovina, established in 2005, or the Kosovo Specialist Chambers and Specialist Prosecutor's Office, established in 2015.[52] The establishment of such special or "hybrid" court should ideally be based on a recommendation by the UN General Assembly, which would give it wide international legitimacy.[53]

29. Some have recently argued that a "hybrid" tribunal within the Ukrainian judicial system could also be set up with the support of the Council of Europe. Ukraine could for instance ask the Committee of Ministers to recommend, pursuant to Article 15(a) of the Statute, that member States adopt a "common policy" with regard to supporting such a tribunal. This would give the Council of Europe express authority to conclude an agreement with Ukraine on the establishment of such a tribunal.[54] The competence of the Council of Europe to assist Ukraine in the establishment of a criminal accountability mechanism could be justified by the fact that the ongoing aggression amounts to a serious breach of the Statute of the Council of Europe and that in response to large-scale human rights violations committed on the territory of one of its members, member States have a collective responsibility to further the aims of the Organisation and safeguard its common ideals and principles, in line with Article 1 of the Statute. In addition, the Preamble of the Statute establishes a clear link between the pursuit of peace and justice, supporting the idea that justice and accountability for gross human rights violations are key to the restoration of peace.

30. However, given the scale of the current aggression and the international dimension of the conflict, I believe that the best option would be for a group of States to create a special international tribunal for the punishment of the crime of aggression against Ukraine (which could have its seat within or outside Ukraine) on the basis of a multilateral treaty, granting it jurisdiction over the crime of aggression as defined in customary international law.[55] Council of Europe member and observer States could take the lead in this process, by launching the negotiations, providing political and financial support to the tribunal, and possibly being involved in the appointment of its members according to the procedures established in the treaty. Once adopted, it could be supported by the United Nations General Assembly, the Council of Europe, the European Union or other regional organisations. Although the current Russian leadership would probably not co-operate, States parties to the agreement would have the obligation to arrest and surrender any Russian high-ranking official sought by the tribunal who might be present on their territory. Heads of State and other government officials (from non-parties to the treaty) could not rely on immunities *vis-à-vis* such an international tribunal, in line with the practice of the ICC and other international courts, an advantage that a strictly national or even a "hybrid" court might not have.[56]

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52. Composed of international members and having jurisdiction over crimes against humanity, war crimes and other crimes under Kosovo law in relation to allegations reported in the Assembly Report of 7 January 2011 "Inhuman treatment of people and illicit trafficking in human organs in Kosovo" (Doc.12462). (All reference to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.)

53. For instance, the Extraordinary Chambers in the Courts of Cambodia were endorsed by a resolution of the UNGA (resolution 57/228, 13 May 2003).

54. https://opiniojuris.org/2022/03/16/the-best-option-an-extraordinary-ukrainian-chamber-for-aggression/.
http://opiniojuris.org/2022/03/30/an-aggression-chamber-for-ukraine-supported-by-the-council-of-europe/?fbclid=IwAR2WOc3jgY6fJY5qJ3zJw9Hff0SGIC72sxldnEPyNLxzomrXmPGYrLCv8N8.
See conversely, on the advantages of creating a special international court through a treaty between Ukraine and the UN, rather than a "hybrid" court through a treaty between Ukraine and the Council of Europe: www.justsecurity.org/81063/the-best-path-for-accountability-for-the-crime-of-aggression-under ukrainian-and-international-law/.

55. Carrie McDougall proposes that the constitutive instrument of the *ad hoc* tribunal replicates the definition of the crime of aggression found in Article 8 *bis* of the Rome Statute. See https://opiniojuris.org/2022/03/15/why-creating-a-special-tribunal-for-aggression-against-ukraine-is-the-best-available-option-a-reply-to-kevin-jon-heller-and-other-critics/.

56. ICC, *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* judgment of 6 May 2019, paragraphs 113 and 115 (see also Article 27 of the ICC Statute); Special Court for Sierra Leone, The Prosecutor against Charles Ghankay Taylor, "Decision on immunity from jurisdiction", 31 May 2004, paragraphs 52-53. According to the ICJ, Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), judgment of 14 February 2002, paragraph 60, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction, such as the ICTY, the ICTR and the ICC. Although it has been argued that an *ad hoc* special or "hybrid" tribunal for the aggression against Ukraine would be sufficiently international to exclude the applicability of immunities for a prosecution, within the meaning of this case law, the question remains open.
(www.justsecurity.org/80395/united-nations-response-options-to-russias-aggression-opportunities-and-rabbit-holes/;https://opiniojuris.org/2022/03/15/why-creating-a-special-tribunal-for-aggression-against-ukraine-is-the-best-available-option-a-reply-to-kevin-jon-heller-and-other-critics/;
www.justsecurity.org/81063/the-best-path-for-accountability-for-the-crime-of-aggression-under-ukrainian-and-international-law/).

31. I am aware of the selectivity concerns raised against the creation of a special tribunal, based on the argument that past aggressions by other States went unpunished. However, I think that we should seize this moment of unprecedented political response by the international community in order to reinforce (not weaken) international criminal justice, including by creating novel and *ad hoc* mechanisms that could fill the gaps of the existing and somehow imperfect ones.

32. Should a change in the Russian leadership happen in the future leading to a possible request for re-accession to the Council of Europe, I believe that the Russian Federation should be requested to undertake to co-operate fully with all pending international criminal proceedings stemming from the aggression, including by surrendering (former) State officials who may be indicted by the ICC or the special tribunal.

33. In order to address the issue of the abuse by the Russian Federation of its veto rights as Permanent Member of the UN Security Council, in particular to stop a possible resolution by the Security Council to seize the ICC of its own crime of aggression under Article 8 *bis* of the Statute of Rome, the UN General Assembly could ask the International Court of Justice for an Advisory Opinion on whether the right to veto may be restricted in cases of obvious abuse of rights, when the sole purpose of the veto is to escape accountability for the veto power's own crime of aggression.

3.3. National investigations and prosecutions

34. According to its Statute, the ICC is complementary to national criminal jurisdictions.[57] The rule is that it should intervene when national jurisdictions are unwilling or unable genuinely to carry out an investigation or prosecution. The Ukrainian Criminal Code proscribes planning, preparing and waging an aggressive war (Article 437), violations of the rules of warfare (Article 438) and genocide (Article 442). Article 438 contains a provision prohibiting, among others, the cruel treatment of prisoners of war or civilians, and the "use of methods of warfare prohibited by international instruments, or any other violations of the rules of warfare recognised by international instruments consented to as by binding by the Parliament of Ukraine, and also giving an order to commit such actions". This allows Ukraine to prosecute an individual for violations of IHL treaties to which it is a party. As of 14 April 2022, the Office of the Prosecutor General has registered 6 305 alleged war crimes (under Article 438) and 43 alleged crimes of aggression (under Article 437) during the full-scale invasion.[58] It has identified 570 suspects, representatives of the military and political leadership of the Russian Federation. With regard to the ability of Ukrainian authorities to bring those responsible to justice, I note that the Code of Criminal Procedure (Article 262) allows trials *in absentia* in exceptional circumstances. In addition, a task force is being created in the Prosecutor's General Office for the search and confiscation of assets and property of suspected war criminals from the Russian Federation abroad.[59]

35. Although Russian legislation also criminalises aggressive war (Article 353 of the Criminal Code) and war crimes (Article 356), it is unlikely that prosecutions of Russian leaders and officers will take place before Russian courts, at least in the current circumstances. In line with the official narrative of denial, the Russian Investigative Committee opened an investigation on the "deliberately false information" about Russian armed forces in Bucha.[60] It also launched criminal proceedings on various alleged cases of Ukrainian shelling.

36. It is important to recall that the Geneva Conventions and their Additional Protocol I require States to enact legislation to punish "grave breaches" (war crimes), to search for persons who allegedly committed such crimes and to bring them before their courts or to extradite them to another State for prosecution (*aut dedere aut judicare*).[61] This obviously applies to each party's own soldiers and commanders. In this regard, the OSCE Mission of experts recommended that both Ukraine and Russia extend their investigations to suspects belonging to their own party.[62]

37. Proceedings in third countries may also be launched to investigate and prosecute some of the crimes committed in Ukraine. Many countries allow for the prosecution of war crimes and crimes against humanity under the principle of universal jurisdiction (for example Lithuania, the Netherlands, Germany, Spain, the

57. Preamble, Articles 1 and 17 (issues of admissibility).
58. www.gp.gov.ua. The Office of the Prosecutor General also charged at the beginning Russian prisoners of war with violating Ukraine's territorial integrity, killings and illegal crossings of the Ukrainian border, but it seems that this initial approach was caused by a misunderstanding of international humanitarian law, according to which combatants cannot be punished for the mere participation in hostilities (OSCE Moscow Mechanism's Mission of experts report, p. 12).
59. https://en.interfax.com.ua/news/general/806527.html.
60. www.reuters.com/world/russia-orders-probe-ukrainian-provocation-over-civilian-deaths-bucha-2022-04-04/.
61. First Geneva Convention, Article 49; Second Geneva Convention, Article 50; Third Geneva Convention, Article 129; Fourth Geneva Convention, Article 146; Additional Protocol I, Article 85(1).
62. OSCE Moscow Mechanism's Mission of experts report, p. 92.

Czech Republic), sometimes limiting its scope to cases where there is a particular link, for instance when the suspect is present or residing in their territory. The German Federal Prosecution office opened an investigation into suspected war crimes by Russian troops in Ukraine and began collecting evidence.[63] France opened three investigations into alleged war crimes committed against its nationals in Ukraine, on the basis of the principle of passive personality (nationality of the victims).[64]

38. As regards the crime of aggression, certain countries may also exercise universal jurisdiction (for example the Netherlands and Lithuania) or prosecute aggression on the basis of the protection of their interests (Poland). In this context, it has been reported that both Poland and Lithuania opened investigations covering the Russian aggression against Ukraine.[65] Although most of these proceedings will lead to trials and convictions only when and if the suspects come within their territory or are extradited, the steps taken by national jurisdictions deserve to be encouraged, as they can usefully complement the efforts of Ukrainian and international investigators.

39. Domestic prosecutions can also benefit from assistance and coordination in a regional context. For instance, Eurojust supported the setting up of a joint investigative team (JIT) into alleged core international crimes committed in Ukraine. The authorities of Lithuania, Poland and Ukraine signed a JIT agreement on 25 March 2022 to enable the exchange of information and facilitate investigations into these crimes. Participation in the JIT may be extended to other EU member States, third countries and other parties. The Office of the Prosecutor of the ICC has already been invited to join the JIT, with a view to ensuring co-ordination in the collection and analysis of evidence.[66]

4. Strengthening the Council of Europe's response and assistance to ensure accountability

40. To complement the (existing and novel) accountability mechanisms described above, the Council of Europe should continue its core work aimed at the protection of human rights, the rule of law and democracy in Ukraine. To the extent possible, this should continue and even be stepped up during the ongoing conflict, and in any case continue in the post-conflict scenario. In this context, the Council should revise its priorities and respond to the new challenges emerging from the Russian Federation's aggression, responding as much as possible to the needs expressed by the Ukrainian authorities and civil society. Some of the existing Council of Europe mechanisms, given their unique human rights expertise and mandate, could contribute in different ways to ensure accountability for human rights violations and violations of international humanitarian law. The Council of Europe could also contribute to the setting-up and operation of the future *ad hoc* tribunal to investigate and prosecute the crime of aggression, by making its expertise available in such fields as the negotiation of multilateral agreements in the legal field and the logistics involved in setting up international bodies. I should like to suggest that the headquarters of the new *ad hoc* tribunal shall be in Strasbourg so as to facilitate synergies with the Council of Europe and, in particular, with the European Court of Human Rights. As we will see, it is dealing with numerous cases of human rights violations related to the Russian aggression against Ukraine.

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63. www.aljazeera.com/news/2022/3/8/germany-launches-probe-into-suspected-war-crimes-in-ukraine.
64. https://blog.leclubdesjuristes.com/louverture-denquetes-en-france-pour-crimes-de-guerre-en-ukraine-quels-fondements-et-perspective/?utm_source=sendinblue&utm_campaign=Newsletter%20du%20Club%20des%20juristes%20-%20Spciale%20Ukraine%20-%20Dimanche%2010%20avril%202022&utm_medium=email.
65. https://opiniojuris.org/2022/03/15/why-creating-a-special-tribunal-for-aggression-against-ukraine-is-the-best-available-option-a-reply-to-kevin-jon-heller-and-other-critics/.
www.gov.pl/web/prokuratura-krajowa/mazowiecki-pion-pz-pk-wszczal-sledztwo-w-sprawie-napasci-rosji-na-ukraine.
66. www.eurojust.europa.eu/news/eurojust-supports-joint-investigation-team-alleged-core-international-crimes-ukraine ;
Statement of Eurojust President Mr Ladislav Hamran following visit of EU Ministers of Justice on Ukraine, European Union Agency for Criminal Justice Cooperation (europa.eu).
Statement from President Ursula von der Leyen following her phone call with President Zelenskyy on the Commission's reactions to the atrocities in Bucha (europa.eu): "A global response is necessary. There are ongoing talks between Eurojust and the International Criminal Court to join forces and for the Court to be part of the Joint Investigation Team. Such a co-ordinated approach from the Ukrainian authorities, the European Union, its member States and agencies, and the International Criminal Court will allow for the evidence to be collected, analysed and processed in the most complete and effective way possible".

4.1. Proceedings before the European Court of Human Rights (present and future interstate and individual cases)

41. The European Court of Human Rights has received interim measures requests from the Ukrainian Government and individuals concerning the current Russian military operations on the Ukrainian territory. The Court has granted some of these measures on 1 and 4 March and on 1 April 2022 (see paragraph 9 above).[67] New requests for interim measures, individual and interstate applications may still be lodged against the Russian Federation, provided they relate to acts or omissions which occurred before 16 September 2022 (date on which the Russian Federation will cease to be a High Contracting Party to the Convention). All these new cases concerning the ongoing war will be added to the number of interstate and individual cases pending before the Court concerning the previous stages of the conflict started in 2014, mainly in relation to Crimea and eastern Ukraine.[68]

42. There are two main challenges in the processing and adjudication of these cases. Firstly, it remains to be seen whether the Russian Federation will engage at all in these proceedings, following the cessation of its membership with the Council of Europe on 16 March 2022 and as State Party to the Convention as of 16 September 2022. For the time being, it seems that the Russian Federation has stopped responding to the Court. In the context of the last interim measures requests from the Ukrainian Government, on 24 March 2022, the Court invited the Government of Russia to provide their comments and to reply to specific requests, to no avail. Secondly, the Court will have to decide on complex jurisdictional issues, particularly in those cases where the alleged violations of the Convention occurred during military operations and active hostilities. For these cases, under the current state of the Court's case law (2021), a State does not exercise "jurisdiction" within the meaning of the Convention in respect of extra-territorial military operations during the "active phase of hostilities" of an international armed conflict, having regard to "the very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos".[69] Although this conclusion was reached in relation to the eight day war between Georgia and the Russian Federation in South Ossetia in August 2008 (involving bombing and artillery shelling), the Court will have to decide in cases concerning the current conflict whether particular military attacks against civilians and civilian objects or the alleged impeded access to safe evacuation routes (both issues being precisely covered by the interim measures), came within the "jurisdiction" of Russia and therefore triggered the application of the Convention *vis-à-vis* the Russian Federation.

43. Although this report is not the appropriate place to discuss whether the Court's current case law is fully satisfactory, one cannot exclude that the case law will evolve and/or distinguish the present conflict situation from the *Georgia v. Russia (II)* precedent. In any event, I believe that in the current unique circumstances the Court should give priority to interstate and individual cases arising out of the current conflict, and resources should be mobilised to that effect, including through voluntary contributions from member States to the Court's budget.[70] The risk of the Russian Federation not implementing the judgments of the Court (in violation of its international obligations under Articles 46.1 and 58.2 of the Convention), as is the case now with regard to the already granted interim measures, should not prevent the Court from establishing and documenting the aggressor State's responsibility for human rights violations and delivering justice (even symbolic) for the Ukrainian victims.

44. It is clear however that once the Convention will cease to apply in respect of the Russian Federation, the European Court will have no jurisdiction over possible violations committed by Russian authorities as of that date in the occupied territories, therefore creating a "grey zone" or "black hole" in the Convention legal space. This issue goes beyond the purposes of this report, but in my view the Council of Europe should

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67. The Ukrainian Government's request was registered under application number 11055/22, *Ukraine v. Russia (X),* although Ukraine has yet to submit a duly completed application.

68. The interstate applications lodged by Ukraine against the Russian Federation concerning the conflict and currently pending are: *Ukraine and the Netherlands v. Russia,* applications nos. 8019/16, 43800/14 and 28525/20 (Eastern Ukraine, including the crash of Malaysian Airlines flight MH17), *Ukraine v. Russia (re Crimea*), Applications nos. 20958/14 and 38334/18 (Crimea), *Ukraine v. Russia (VIII)*, Application no. 55855/18 (Kerch Strait incident of 2018). The Russian Federation has lodged an application against Ukraine, *Russia v. Ukraine,* Application no. 36958/21. I was informed by the Registry of the Court that there are also approximately 8 750 individual applications arising out of the previous conflicts: 6 730 against Ukraine only; 1 066 against the Russian Federation only; and 950 against both the Russian Federation and Ukraine.

69. *Georgia v. Russia (II),* Application No. 38263/08, judgment of 21 January 2021 (Grand Chamber), paragraphs 126 and 137. This restrictive approach to "jurisdiction" was also applied in respect of the territorial State, Georgia, in a follow-up inadmissibility decision (*Shavlokhova and Others v. Georgia* (dec.), Application no. 45431/08, 5 October 2021).

70. See also paragraph 15.3 of Opinion 300 (2022) on prioritising individual applications against the Russian Federation for acts committed in the temporarily occupied areas of Ukraine.

consider alternative mechanisms to fill the gap and maintain its ability to monitor the human rights situation in those territories, which are within Ukraine's internationally recognised borders. The same would apply to other territories of Council of Europe member States under the de facto control of Russia (for example in the Republic of Moldova and Georgia).[71]

4.2. Commissioner for Human Rights

45. The Commissioner for Human Rights, Dunja Mijatović, is working on addressing the impact of the war on human rights, both in Ukraine and in other Council of Europe member States which are receiving people in need of protection. As part of this work, the Commissioner interacts with human rights defenders and gathers information on patterns of violations of human rights, in accordance with her mandate.

46. However, the Commissioner is not mandated and, therefore, not equipped to work on securing evidence of violations of international humanitarian law. She has nevertheless stressed the importance of accountability for serious violations of human rights and grave breaches of international humanitarian law committed in Ukraine.[72] The Commissioner is also in contact with the office of the Prosecutor of the ICC to see how to support his work.

47. I believe that the Commissioner should continue to raise awareness about patterns of human rights violations committed in Ukraine during the ongoing war and to support initiatives aimed at documenting them, including through regular contact with the authorities, the institutions and her network of human rights defenders and civil society in Ukraine.

4.3. Co-operation activities

48. On 22 March 2022, Iryna Venediktova, Prosecutor General of Ukraine, and Christos Giakoumopoulos, Director General for Human Rights and the Rule of Law of the Council of Europe met at the Polish-Ukrainian border to discuss immediate assistance to Ukraine in the context of the human rights and rule of law consequences of the Russian Federation's aggression. Mr Giakoumopoulos highlighted that the Directorate General, within its mandate and expertise, would continue providing support to the Ukrainian authorities in their endeavours to uphold human rights and the rule of law in the context of the current challenges of the war. In this regard, the Director General and the Prosecutor General of Ukraine exchanged on priorities of action and immediate co-operation measures, *inter alia* with respect to gross human rights violations.[73]

49. On 5 April 2022, the Directorate General conducted expert consultations with the representatives of the Ministry of Justice of Ukraine. The goal of these consultations was to discuss the draft law 'On Support for Criminal Proceedings and Enforcement of Punishments, Which Are Precluded as a Result of Armed Aggression, Temporary Occupation of the Territory of Ukraine', prepared under the aegis of the Ministry. Deputy Minister of Justice Oleksandr Banchuk outlined the most urgent needs for the Ministry, including possible assistance of the Council of Europe in documenting gross human rights violations, to be performed in co-ordination with the Office of the Prosecutor General of Ukraine. These consultations are conducted within the framework of the Council of Europe Project "Human Rights Compliant Criminal Justice System in Ukraine", which is part of the Council of Europe Action Plan for Ukraine 2018-2022.[74]

50. The Council of Europe should mobilise its resources and co-operation programmes to assist the Ukrainian authorities, for instance by providing expertise and training on documenting human rights violations and giving advice on the different legislative and judicial reforms which may be needed for the effective and human-rights compliant investigation and prosecution of serious crimes committed during the war.[75]

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71. www.ejiltalk.org/europes-kairos-the-role-of-the-council-of-europe-under-a-negotiated-peace-in-ukraine/.
72. www.coe.int/en/web/commissioner/war-in-ukraine.
73. Immediate assistance to Ukraine: Prosecutor General of Ukraine meets Council of Europe Director General of Human Rights and Rule of Law – News & Events (coe.int).
74. Consultations with the Ministry of Justice of Ukraine: cooperation on challenges arising from the ongoing armed aggression of the Russian Federation – Council of Europe Human Rights National Implementation website (coe.int).
75. The Directorate General Human Rights and Rule of Law has recently set up an expert advisory group to support the Office of the Prosecutor General of Ukraine: www.coe.int/en/web/kyiv/-/council-of-europe-expert-advisory-group-starts-its-work-supporting-ukraine-s-prosecutor-general-office.

5. Conclusions

51. In sum, in light of all the reports and statements by international bodies and non-governmental observers, there is a growing body of evidence showing that Russian armed forces may have committed serious violations of international humanitarian law since the beginning of the 2022 aggression against Ukraine. These include attacks against civilians and civilian objects, indiscriminate shelling against residential areas and civilian infrastructure, such as hospitals, schools and shelters, use of cluster munitions, attacks on humanitarian corridors, and more recently, extrajudicial executions, rape and sexual violence in towns temporarily occupied by Russian troops. Many of these atrocities may amount to grave breaches of the Geneva Conventions and/or the Additional Protocol I of 1977, therefore qualifying as war crimes. They may also constitute violations of international human rights law, including of the European Convention of Human Rights, (still binding on Russia until 16 September 2022), and crimes against humanity, if there is evidence that they were committed as "part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack". All these possible violations of international law result from the use of force by the Russian Federation, which is in itself unlawful and could fulfil the definition of the crime of aggression under Article 8 *bis* of the ICC Statute or customary international law. It should be noted that the International Court of Justice, in its order indicating provisional measures concerning the dispute between Ukraine and the Russian Federation under the Genocide Convention, has not found any evidence for a "genocide" being committed by Ukraine against the Russian-speaking population in the Donbass region, which was one of the arguments used by the Russian Federation to justify its military intervention in Ukraine.

52. There must be no impunity for violations of international law, human rights and international humanitarian law, which shall be applied simultaneously and in a complementary way during an international armed conflict. Council of Europe member States individually and through the Organisation as a whole should support (including by providing human and financial resources) the ongoing investigations and proceedings arising out of the ongoing aggression before different international accountability mechanisms, including the International Criminal Court, the International Court of Justice, the European Court of Human Rights, and the special Independent International Commission of Inquiry set up by the UN Human Rights Council. They should also encourage and participate in the establishment of a special international tribunal with a view to prosecuting and punishing the crime of aggression allegedly committed by the political and military leaders of the Russian Federation against Ukraine, as proposed by different initiatives/experts on the basis of different models. This would open the possibility of bringing to justice high-ranking Russian as well as Belarusian government officials responsible for waging and participating in the war of aggression against Ukraine. This would supplement existing mechanisms which have no jurisdiction over this crime.

53. The Council of Europe and its member States should support all national proceedings initiated to investigate or prosecute the alleged crimes committed in Ukraine, including first and foremost by the competent Ukrainian authorities. The Council of Europe could also provide expertise and assistance in documenting gross human rights violations for the benefit of the competent Ukrainian authorities. Member States which have opened investigations into the crimes committed in Ukraine under the principle of universal jurisdiction or on other grounds should contribute to the collection and preservation of evidence, in co-ordination with international and other national jurisdictions. To prevent any overlaps and contradictions, the ICC Prosecutor should be given a strong co-ordinating role, along with the necessary human, technical and financial resources.

54. In the draft resolution and recommendation, I have formulated some specific recommendations to member and observer States, other relevant international actors and the Committee of Ministers, with a view to ensuring the highest possible degree of accountability for serious violations of international humanitarian law and other international crimes committed during the Russian Federation's aggression against Ukraine.