



War Crimes Trials Before Domestic Courts in Ukraine – Making the Case for a Differentiated Approach to International Law

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Russia's full-scale invasion of Ukraine on February 24th, 2022 has involved and still causes large-scale atrocities, primarily for Ukraine's civilian population. The office of the Ukrainian Prosecutor General has registered 165 4787 crimes related to Russia's aggression whereof 160 733 are registered as war crimes.² They have identified 660 persons as suspects and 126 persons are serving sentences.³ This article sets out to describe and analyze domestic war crimes prosecutions in Ukraine with emphasis on aspects of the general interest to investigate and prosecute war crimes beyond the Russia-Ukraine war.

As preliminary matter, states have a legal responsibility to provide effective penal sanctions at the domestic level for persons responsible for international crimes. This entails an obligation to bring such persons to their own domestic courts or extradite such persons to other states that are able and willing to conduct trials. International criminal tribunals and courts are to be a last resort when states fail to meet these obligations. Even with the existence and availability of criminal proceedings at international level, the assumption is, and the practical circumstances require, that most cases will need to be adjudicated at domestic level. Although the emphasis on domestic investigation and prosecution clearly follows from international treaties, this is not properly reflected in legal scholarship.

While this article focuses on cases relating to crimes committed after the full-scale invasion 2022, one must acknowledge that the war between Russia and Ukraine started already in 2014 with Russia's illegal annexation of Crimea and interventions in Donbas and Luhansk.⁴ Fairly few, only 397 crimes

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² As of 29 April 2025, Website of the Ukrainian Prosecutor General's Office, available at <https://www.gp.gov.ua/>.

³ Генпрокурор розповів, скільки випадків воєнних злочинів зареєстрували в Україні (The Prosecutor General revealed how many cases of war crimes were registered in Ukraine), Hormadske, 27 August 2024, available at <https://hromadske.ua/viyina/230217-henprokuror-rozpoviv-skilky-vypadkiv-voyennykh-zlochyniv-zareyestruvaly-v-ukrayini>, accessed 9 April 2025.

⁴ In 2017, the ICC OTP found evidence of "direct military engagement between the respective armed forces of the Russian Federation and Ukraine suggesting the existence of an international armed conflict in eastern

were registered under Article 438 of the Criminal Code of Ukraine (CCU) prior to the 2022 full-scale invasion.⁵ Iryna Marchuk explains the low number of registered criminal proceedings and verdicts under Article 438 of the CCU by the incorrect qualification of conflict-related crimes in eastern Ukraine (Donbas) under the umbrella of terrorist offences rather than as violations of the laws and customs of war under Article 438 of the CCU.⁶ The number of registered crimes and convictions under Article 438 after the 2022 full-scale invasion soon outnumbered those for the period 2014-2022 which may have several explanations. First, the crimes are now clearly committed in the context of a single international armed conflict with no need to discuss the qualification of the conflict. One could have argued that there was some uncertainty how to qualify the conflict in Donbas prior to the 2022 full-scale invasion, whether it was non-international armed conflict (NIAC), international armed conflict (IAC) or mixed. However, the occupation of Crimea from 2014 and the conflict after 2022 clearly falls within the law governing IAC. Second, Ukrainian authorities, including prosecution and police have become more educated and trained in relation to war-related crimes. Third, the atrocities have become much graver, both in terms of quantity and brutality.⁷ In other words, the current cases are different cases than those relating to events prior to the 2022 invasion.

This article analyzes how Ukrainian courts have addressed key legal issues and suggests areas of improvement. Section 1 reviews the jurisdictional conditions for Ukrainian domestic courts. Section 2 investigates the scope of Ukraine's war crimes statutes. Section 3 considers whether Ukraine's general criminal law principles extend to international crimes or if the principles used by international criminal courts ought to be adopted. Section 4 examines the process for conducting trials in absentia. These themes will be illustrated by some of the early war crimes cases before Ukrainian courts where the defendants have been present at trial: the *Shyshymarin* case which related to a Russian soldier shooting and killing a civilian in the belief that the civilian was in contact with Ukrainian armed forces (a defence rejected by the court),⁸ the *Kharkiv* case concerned bombing with cruise and ballistic

Ukraine from 14 July 2014 at the latest.", ICC OTP Report on Preliminary Examination Activities, 4 December 2017, para. 94.

⁵ Svyrydova, Darya and Pavliuk, Alina, 'The Problems of the Correct Legal Qualification of War Crimes available online at <https://azones.law/analytics/problemni-pytannya-naleznoyi-kvalifikatsiyi-voyennyh-zlochyniv/>' *Azones Analytics*, 15 September 2022; commented by Marchuk, Iryna, 'Domestic Accountability Efforts in Response to the Russia–Ukraine War: An Appraisal of the First War Crimes Trials in Ukraine' *Journal of International Criminal Justice*, 2022, p. 789.

⁶ *Ibid.*.

⁷ *Ibid.*.

⁸ *Prosecutor v. Shyshymarin*, case No. 760/5257/22, Solomianskyi District Court of Kyiv, available at <https://reyestr.court.gov.ua/Review/104432094>, 23 May 2022; *Prosecutor v. Shyshymarin*, case No. 760/5257/22, Kyiv Court of Appeal, available at <https://reyestr.court.gov.ua/Review/105669005>, 29 July 2022.

missiles of civilian objects,⁹ the *Kharkiv* shelling case concerning the shelling of Ukrainian settlements in the Kharkiv region with the “Grad” Multiple Launch Rocket System (MLRS), with the knowledge that “this type of weapons under the given circumstances was indiscriminate and that civilian infrastructure objects, residential buildings, civilians would for sure be impacted under such circumstances”.¹⁰ Some trials in absentia will also be considered, for example the *Fasova* case where the defendant attacked a civilian farm facility in the village of Fasova, illegally detained and deprived liberty of civilians at the facility, the *Andriyivka* case where the defendant was held responsible for cruel treatment of the civilian population, and the *Chernihiv* case where the defendant, a tank commander, ordered the firing of a high-explosive fragmentation shell at a residential multi-story building.¹¹

How do Ukrainian courts deal with the questions on general principles of criminal law and trial in absentia compared to other domestic jurisdictions? What can countries who have never conducted domestic war crimes trials in modern times learn from the Ukrainian experience? The answers to these questions are of both practical and scholarly relevance. Practical in the sense that these matters relate to the most serious crimes, where the interest in combatting impunity is high. From a scholarly perspective, we may acquire a better understanding of norms, external or from above, that may influence the laws of a domestic legal system. How do domestic rules and case law relate to international law; are they part of the same system (monism), separate systems (dualism) or a mix thereof?¹²

Based on the Ukrainian example, this article will argue for a differentiated approach in Ukraine and other domestic jurisdictions, meaning that international humanitarian law (IHL) has and should have a decisive role in defining the scope of the specific war crimes while general principles of criminal law should be governed by domestic law. As indicated, this argument goes beyond Ukraine which here serves as an example to prove a general point and recommendation.

1. Applying Territorial Jurisdiction

Articles 6-8 of the CCU regulate jurisdiction in criminal cases. Domestic war crimes trials are often associated with universal jurisdiction. However, considering that the crimes committed in the context

⁹ *Kharkiv* missile case, case No. 638/1343/23, Dzerzhynsky District Court of Kharkiv, 2 March 2023, available at <https://reyestr.court.gov.ua/Review/109334224>.

¹⁰ *Kharkiv shelling*, case No. 535/244/22, Kotelevskyi District Court of Poltava region, 31 May 2022, available at <https://reyestr.court.gov.ua/Review/104531363>.

¹¹ *Fasova* case, Makarivskyi District Court of Kyiv Oblast, Case No. 370/179/23, 20 April 2023, available at <https://reyestr.court.gov.ua/Review/110354341>; *Andriyivka* case, Chernihivskyi District Court of Chernihiv Oblast, Case No. 748/855/23, 14 September 2023, available at <https://reyestr.court.gov.ua/Review/113458684>; *Chernihiv* case, Desnianskyi District Court of Chernihiv Oblast, Case No. 750/6470/2 of 11 April 2023, available at <https://reyestr.court.gov.ua/Review/110135338>.

¹² Klamberg, Mark, ‘Foreword’, 66 *Scandinavian Studies in Law*, 2020, 5-8, p. 6.

of the Russia-Ukraine war have been committed entirely or in essential parts on Ukrainian territory the question of jurisdiction for Ukrainian courts is more straightforward as explained next.

Ukrainian courts can rely on the territorial principle which is anchored in article 6. This provision applies the sub-principle of ubiquity, i.e. that the crime is considered to have occurred in the place of the action of the perpetrator or in the place where the harm occurred.¹³ More specifically, article 6(2) provides that “[a]n offense shall be deemed to have been committed on the territory of Ukraine if it has been initiated, continued, completed or discontinued on the territory of Ukraine.”. In relation to the Russia-Ukraine war the territorial principle provides the jurisdictional basis in most, if not all, cases. The sub-principle of ubiquity becomes relevant in the same conflict in relation to the armed attacks where the actor is in Russia but the harm occurs in Ukraine, which includes air attacks and missile strikes originating from Russian territory. The *Kharkiv shelling* case is an application of this principle where the defendants were involved in firing Grad rockets from Russian territory “aimed at the territory of Ukraine”.¹⁴

Article 7 provides for jurisdiction based on the active nationality principle,¹⁵ i.e. Ukrainian courts can exercise jurisdiction over crimes committed outside of Ukraine by Ukrainians citizens or stateless persons residing in Ukraine.

Article 8 provides for jurisdiction over foreign nationals or stateless persons not residing permanently in Ukraine, who have committed criminal offenses outside Ukraine when provided for by the international treaties, i.e. universal jurisdiction.¹⁶ Universal jurisdiction is certainly an important principle of the context of prosecuting war crimes, but in the context of the Russia-Ukraine war it appears less relevant since most, if not all, crimes may be prosecuted in a more straightforward manner under the territorial principle. Article 8 also provides for jurisdiction the same category of person who have committed any of the special grave offenses against rights and freedoms of Ukrainian citizens or Ukraine as prescribed by the CCU, i.e. the passive personality principle¹⁷ and the protective principle.¹⁸

¹³ Om the principle of ubiquity, see Gallant, Kenneth S., *International Criminal Jurisdiction: Whose Law Must We Obey?* (Oxford: Oxford University Press, 2022), pp. 203-206; Cameron, Iain, ‘Straffrättslig jurisdiktion i Norden’, 80(3) *Nordisk Tidsskrift for Kriminalret*, 1993, 221-234, pp. 223-224.

¹⁴ *Kharkiv shelling* case, Case No. 535/244/22, Kotelva District Court of Poltava region, 31 May 2022, available at <https://reyestr.court.gov.ua/Review/104531363>, p. 9

¹⁵ Gallant, 2022, pp. 345-407

¹⁶ *Ibid*, pp. 461-528.

¹⁷ *Ibid*, pp. 441-460.

¹⁸ *Ibid*, pp. 409-440.

There is no explicit discussion in the Ukrainian court cases on jurisdiction, however it is clear from the cases that the courts are dealing with crimes committed on Ukrainian soil and thus have applied territorial jurisdiction.¹⁹

2. Dynamic Approach v. Static Approach in Domestic Implementation of War Crimes

The key provision for prosecuting war crimes is Article 438 of the CCU on violation of rules of the warfare. The provision is placed in Chapter XX of the CCU which applies to any person as opposed to Chapter XIX on military offences which only applies to the Armed Forces of Ukraine and other Ukrainian services.²⁰ Thus, for war crimes committed by Russians as well as other persons (if they commit crimes) Article 438 is applicable and it provides the following

Article 438. War Crimes (heading before 2024: “Violation of rules of the warfare”)

Cruel treatment of prisoners of war or civilians, deportation of civilian population for forced labor, pillage of national treasures on occupied territories, use of methods of the warfare prohibited by international instruments, or any other violations of rules of the warfare recognized by international instruments consented to by binding by the Verkhovna Rada (Parliament) of Ukraine, and also giving an order to commit any such actions,

- shall be punishable by imprisonment for a term of eight to twelve years.

The same acts that have led to the death of a person,

- shall be punishable by imprisonment for a term of ten to fifteen years, or life imprisonment.

The provision does provide a list of certain criminalized acts, however the list is short and the provision is open-ended in the sense that it contains references to “use of methods of the warfare prohibited by international instruments” and “any other violations of rules of the warfare recognized by international instruments”.²¹ A key question relates to the scope of the provision, does it cover all violations of IHL or is it restricted to grave breaches or serious violations? For example, article 38 of Geneva Convention III from 1949 (GC III) provides that the Detaining Power shall ensure that prisoners of war can exercise sports and games. Would an omission in this regard amount to a war crime under Ukrainian law?

¹⁹ *Prosecutor v. Shyshymarin*, case No. 760/5257/22, Solomianskyi District Court of Kyiv, available at <https://reyestr.court.gov.ua/Review/104432094>, 23 May 2022, p. 6.

²⁰ CCU, article 401(2).

²¹ Nuridzhanian, Gaiane, ‘Ensuring Fairness of War Crime Trials in Ukraine’ SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4565541> , p. 7.

The incorporation of parts of IHL and international criminal law (ICL) by reference (*renvoi*) is not unique for Ukraine.²² Other examples includes the US, Sweden (as the law was before 1 July 2014) and the Netherlands (as the law was before 1 October 2003). It was also something considered by Denmark when they were considering different options of implementing international criminal law into domestic law.²³ The scope of the US War Crimes Act is given by reference to grave breaches regime of the four Geneva Conventions from 1949 (GC I-IV), certain provisions in the Annex to the Hague Convention IV, common Article 3 of GC I-IV and the Protocol on Mines, Booby-Traps and Other Devices as amended 1996.²⁴ The Swedish provision on crime against international law (war crimes) differs from its equivalents in Ukrainian and US law by not only containing a reference to treaty law, prosecutions can also be based on violations of customary international law. However, the provision is limited to serious violations of IHL.²⁵ Similarly, the Dutch legislation until 2003 criminalized violations of the laws and customs of war in a blanket manner without providing a list of the concrete criminal acts.²⁶ The Dutch legislation has been amended to include a list of specific war crimes,²⁷ but still has a clause that makes it open-ended through the reference “violation of the laws and customs of war”.²⁸ This legislative technique adopted by Ukraine, Sweden (prior to 1 July 2014) and the Netherlands (both prior to and after 1 October 2003) makes the law dynamic in the sense that whenever any of these states joins a new treaty (or in the case of Sweden and the Netherlands: when customary international law evolves) the scope of the criminal provision changes without a need of legislative amendment of the provision itself. Thus, this approach could be described as the “open-ended dynamic approach”. The US provision is closed and static since it exhaustively specifies certain treaties and provisions as the basis for criminal prosecution. However, this is not the only version of the “closed static approach”. While the US law relies on “*renvoi*”, other static approaches do not. Article 8 of the Rome Statute of the International Criminal Court (ICC),²⁹ articles 8-12 in the German Code of Crimes against

²² Klamberg, Mark, ‘International Criminal Law in Swedish Courts: The Principle of Legality in the Arklöv Case’, 9 *International Criminal Law Review*, 2009 395–409, p. 397; Ferdinandusse, Ward N., *Direct Application of International Criminal Law in National Courts* (The Hague: T • M • C Asser Press, 2006), p. 2

²³ Betænkning om visse internationale forbrydelser (Preparatory works on international crimes, Denmark), Betænkning (Consideration) nr. 1583(2024), p. 58 which mentions *henvisningsbestemmelser* (reference provisions) as a potential legislative technique.

²⁴ 18 U.S.C. § 2441 (US War Crimes Act).

²⁵ Chapter 22, section 6 of the Swedish Penal Code (BrB), prior to 1 July 2014.

²⁶ The Wartime Offences Act of 1952 [Wet Oorlogsstrafrech] (Netherlands) available at <https://wetten.overheid.nl/BWBR0002099/2013-10-01>, see comment by Lachezar Yanev, *The Netherlands*, in Lachezar Yanev & Harmen van der Wilt (eds.) *Universality without Uniformity: States' Exercise of Universal Jurisdiction over Core International Crimes*, Edward Elgar Publishers p. 10 (forthcoming)

²⁷ Articles 5-6, International Crimes Act [Wet internationale misdrijven] (The Netherlands).

²⁸ Article 7, International Crimes Act [Wet internationale misdrijven] (The Netherlands).

²⁹ Article 8, Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 90.

International Law,³⁰ chapter 13(a), sections 118(e)-(i) of the Danish penal code,³¹ and sections 3-11 of the Swedish act on international crimes³² all contain each of an exhaustive list on what may constitute a war crime. There are ongoing discussions in Ukraine about the need for a more comprehensive reform of domestic legislation, particularly because the 2024 implementing legislation lacks a detailed legal framework on atrocity crimes, especially war crimes.³³ There is a proposal on legislation which would have a detailed list of underlying war crimes,³⁴ pursuant to the static approach. However, experts in Ukraine have criticized the bill based on arguing there is an overlap with the implementing legislation and that subject to poor legal drafting.³⁵ Thus, article 438 will remain the relevant criminalization of war crimes at least for the near future.³⁶

The static-dynamic terminology may appear value-laden, where “dynamic” is better than “static”, no such effect is sought, both approaches have their pros and cons as explained next. There is some guidance in the 2017 order of the Ukrainian Ministry of Defence which appears to limit criminal responsibility to “serious violations of IHL” and also lists which acts fall within this category.³⁷ Moreover, this understanding of the article 438 as limited to serious violations of IHL is arguably conformed by the change in 2024 of the provision’s from “violations of the laws and customs of war” to “war crimes”.³⁸ Other violations of IHL not amounting to “serious” are to be subjected to disciplinary responsibility.³⁹ Figure 1 shows a typology of approaches on how to criminalize war crimes.

³⁰ Articles 8-12, Code of Crimes against International Law (CCAIL) of 26 June 2002 (Federal Law Gazette I, p. 2254), as last amended by Article 1 of the Act of 22 December 2016 (Federal Law Gazette I, p. 3150).

³¹ Chapter 13(a), sections 118(e)-(i), Penal Code (Denmark).

³² Section 3-11, International Crimes Act (2014:406 (Sweden).

³³ Marchuk, Iryna, ‘Rough Waters or Smooth Sailing? Taking Stock of War Crimes Judgments by Ukrainian Courts’ *Journal of International Criminal Justice*, (Forthcoming), p. 4 footnote 10.

³⁴ Draft Law on Criminal Liability for International Crimes, Verkhovna Rada of Ukraine, number 11538, 2 September 2024 available at <https://itd.rada.gov.ua/billInfo/Bills/Card/44789>.

³⁵ Pavliuk, Alina, ‘Implementation of International Law in National Legislation: What Lessons Should Ukraine Learn from its Own Experience’, Just Talk, available online at <https://justtalk.com.ua/post/implementatsiya-mizhnarodnogo-prava-v-natsionalne-zakonodavstvo-yaki-uroki-varto-zasvoiti-ukraini-z-vlasnogo-dosvidu> *Just Talk*, 12 February 2025.

³⁶ Marchuk, forthcoming, p. 4.

³⁷ Ukrainian Ministry of Defence, Order No. 164 of 23 March 2017, available at <https://zakon.rada.gov.ua/laws/main/l468770>, chapter 8, sections 4 and 5.

³⁸ Marchuk, forthcoming, at 3.

³⁹ Ukrainian Ministry of Defence, Order No. 164 of 23 March 2017, available at <https://zakon.rada.gov.ua/laws/main/l468770>, chapter 8, section 8.

Typology of approaches on how to criminalize war crimes

		Modes of implementation	
		Static (exhaustive list of crimes)	Dynamic (scope defined by reference to international law)
Scope	Only treaty violations	US War Crimes Act The Rome Statute of the ICC	Criminal Code of Ukraine, article 438
	Treaty violations and customary international law	Sweden, Act on International Crimes (after 2014) Germany, Code of Crimes against International Law (after 2002)	Sweden, Swedish Penal Code 22:6 (prior to 2014) Netherlands, The Wartime Offences Act of 1952 (prior to 2003) Netherlands, International Crimes Act (after 2003)

The dynamic approach ensures that the domestic war crimes provision has the same scope as the relevant rules at the international level,⁴⁰ potentially treaty law as well as customary international law. It lessens the risk of an impunity gap and accommodates ongoing evolution of international rules. The potential danger is that exact scope of the war crimes provision may appear indeterminate detriment to legal certainty which is particularly negative from a defendant's perspective, a risk of "overcriminalization". In order to completely appreciate what is permitted and criminalized, an individual, for example a soldier, needs to master the complete body of IHL, both treaty law and customary international.

In contrast, the static approach creates predictability and arguably makes the law more accessible for a lay-person.⁴¹ The risk is that static nature of may create a discrepancy between national law and international law if the latter body of law develops new rules without the legislative body making corresponding changes in the national law. There is also a risk that legislator by mistake (or intentionally) omits certain crimes when creating a list of criminalized acts, a risk of "undercriminalization". In other words, there is a potential trade-off between the interests of closing the impunity gap with the dynamic approach and creating legal predictability with the static approach.

Regardless if a particular system follows the open-ended dynamic or closed static approach, IHL has and should have a decisive role in defining the scope of the specific crimes, however there is a difference how that influence takes place. Under the open-ended dynamic approach, the legislator

⁴⁰ Betænkning om visse internationale forbrydelser (Preparatory works on international crimes, Denmark), Betænkning (Consideration) nr. 1583(2024), p. 58

⁴¹ Betænkning om visse internationale forbrydelser (Preparatory works on international crimes, Denmark), Betænkning (Consideration) nr. 1583(2024), pp. 58-59.

introduces a blanket reference to IHL where the judge needs to do a full inquiry into the scope and content of the relevant IHL rules.⁴² Under the closed static approach, the legislator has to some extent decided and specified which IHL rules are relevant by codifying them in an exhaustive list under domestic legislation, arguably leaving less need for the judge to identify the relevant international rules beyond domestic law.

One way of dealing with the risks of the dynamic approach is - for prosecutors when charging and courts when issuing judgement - to be transparent on how they concluded that a certain act is criminalized and the elements required to reach conviction. Relying on the case law of the ECtHR the prosecutor could argue that the alleged act is “flagrant[ly] unlawful”⁴³ and also point to how the conduct is criminalized in the territory where it was committed.⁴⁴

Moreover, the monist nature set by the Constitution of Ukraine is noted, which provides that “International treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine”.⁴⁵ The monist approach also supports reliance on case law from international courts, at least affording them persuasive authority.⁴⁶

However, one should arguably distinguish between treaties and customary international law in the field of the IHL on the one hand from the Rome Statute on the other hand. While the GC I-IV requires states to criminalize certain acts, the Rome Statute does not.⁴⁷ The Rome Statute addresses primarily, and provides the applicable law for, the ICC. This follows from Article 1 which provides that “The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.” Moreover, Article 21 provides that it is for the ICC to apply the listed sources of law: there is nothing

⁴² The ECtHR has ruled that such blanket references are permissible, *Milanković v. Croatia*, (Application no. 33351/20), ECtHR, Judgment, 20 January 2022, paras. 13, 50, 63 and 64, see especially para. 63: “the accused must be able to appreciate that his conduct is criminal in the sense generally understood, without reference to any specific provision, and that accessibility does not exclude reliance being placed on a law which is based on custom”. In the case at hand the court that the conviction has a sufficient legal basis considering the “flagrant unlawful nature of the war crimes committed” (paras. 64 and 66).

⁴³ Ibid, para. 64.

⁴⁴ Klamberg, Mark, ‘International Criminal Law in Swedish Courts: The Principle of Legality in the *Arklöv* Case’, 9 *International Criminal Law Review*, 2009, 395–409, p. 408.

⁴⁵ Constitution of Ukraine, article 9.

⁴⁶ Compare with *Prosecutor v. Kanyabashi*, (Case No. ICTR-96-15), ICTR T. Ch., Decision on the Defence Motion on Jurisdiction, 18 June 1997, para. 8; *Prosecutor v. Thomas Lubanga Dyilo*, (Case No. ICC-01/04-01/06), ICC T. Ch. I, Prosecution's Submission on the Admissibility of Four Documents, 1 April 2008, para. 26; *Prosecutor v. Thomas Lubanga Dyilo*, (Case No. ICC-01/04-01/06), ICC T. Ch. I, Decision on the admissibility of four documents, 13 June 2008; paras. 25-32; Klamberg, Mark, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events* (Leiden: Martinus Nijhoff Publishers, 2013), pp. 42, 348 and 434.

⁴⁷ Lee, Roy S., ‘States’ Responses: Issues and Solutions’ Lee, Roy S. (ed), *States’ Responses to Issues Arising from the ICC Statute, Constitutional, Sovereignty, Judicial Cooperation and Criminal Law*, 1-46 (Ardsey: Transnational Publishers, 2005), p. 22; Friman, Håkan, ‘Political and Legal Considerations in Sweden Relating to the Rome Statute for the International Criminal Court’ Lee, Roy S. (ed), *States’ Responses to Issues Arising from the ICC Statute, Constitutional, Sovereignty, Judicial Cooperation and Criminal Law*, 121-145 (Ardsey: Transnational Publishers, 2005), pp. 139-140.

in the provision which obliges domestic courts to apply these sources of law. The legal obligation to criminalize international crimes follows from other treaties, for example the 1949 Geneva Conventions which provide that “The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article ...”.⁴⁸ The UN Genocide Convention contains a corresponding obligation.⁴⁹ States certainly have an interest that cases that potentially can be prosecuted in their domestic courts may in fact come under those courts’ jurisdiction so as to avoid their coming before the ICC pursuant to the principle of complementarity.⁵⁰ However, that is something different from a legal obligation to incorporate the Rome Statute in domestic law.⁵¹

When scrutinizing the early cases before Ukrainian courts the following observations can be made. The district court ruled in *Shyshymarin* that the defendant had violated laws and customs of warfare as set out by Article 51(2) of additional protocol I to GC I-IV (AP I) with reference to Article 85(3)(a) setting out that making the civilian population or individual civilians the object of attack is a grave breach of the protocol.⁵² However, the court did not specify the elements required or potentially relevant case law from the ICTY or ICTR.⁵³ Moreover, article 51(2) relates to “[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited” something that courts picks up on.⁵⁴ However, this has to be primary intent of the perpetrator,⁵⁵ which makes the *Shyshymarin* case a bad fit, the defendant’s intent was arguably to only kill the victim rather than terrorizing the civilian population.⁵⁶

The judgment in the *Kharkiv* case is very sparse which may be explained by the proceedings being conducted *in camera*. The judgement initially provides references to AP I, article 52, information on

⁴⁸ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, article 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, article 50; Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, article 129; Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, article 146.

⁴⁹ Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948, 78 UNTS 277, Article 5.

⁵⁰ Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 90, article 17; Triffterer, Otto, ‘Legal and Political Implications of Domestic Ratification and Implementation Processes’ Kreß, Claus and Lattanzi, Flavia (eds), *The Rome Statute and Domestic Legal orders, volume I: General Aspects and Constitutional Issues* (Baden-Baden: Nomos Verlagsgesellschaft, 2000) 1-28, p. 16.

⁵¹ The same argument has been made in Klamberg, Mark, ‘The Evolution of Swedish Legislation on International Crimes’, 66 *Scandinavian Studies in Law*, 2020, 205-215, pp. 211-212.

⁵² *Prosecutor v. Shyshymarin*, Solomianskyi District Court of Kyiv, Case No. 760/5257/22, 23 May 2022, available at <https://reyestr.court.gov.ua/Review/104432094>, p. 18 (see also reference to articles 50-51 on p. 7).

⁵³ *Prosecutor v. Martić*, (Case No. IT-95-11) “RSK”, ICTY T. Ch. I, Judgment, 12 June 2007, paras. 67-72; *Prosecutor v. Dragomir Milošević*, (Case No. IT-98-29/1-A), ICTY A. Ch., Judgment 12 November 2009, paras. 53-54.

⁵⁴ *Shyshymarin*, 23 May 2022, p. 17

⁵⁵ *Prosecutor v. Galić*, (Case No. IT-98-29-A), ICTY A. Ch., Judgment 30 November 2006, para. 104; see comment by Marchuk, 2022, p. 800.

⁵⁶ *Ibid*, p. 800.

the criminal conduct of the Russian forces in the area, but no specifics of the criminal contribution of the defendant himself.⁵⁷ The Kotelevsky district court referred to violations of AP I, Articles 51 and 52 in *Kharkiv shelling* case when it qualified the defendants' acts as indiscriminate attacks.⁵⁸ The Makarivskyi district court convicted in the *Fasova* case the defendant for violations of GC IV, article 51(1-3) and AP I, article 75(1-2).⁵⁹ However, the later courts similarly fails to articulate the constitutive elements of the charged crimes.⁶⁰ Moreover, the *Desnianskyi* district court referencing the Rome Statute even if Ukraine neither ratified the treaty at the time of commission of the crimes nor at time of the actual trial.⁶¹ In contrast, the Irpin district court found it inappropriate to examine whether the accused committed international crimes under Articles 7 and 8 of the Rome Statute since Ukraine is not a party to the Rome Statute.⁶² Whether Ukraine has ratified the Rome Statute or not may appear on this matter appear less relevant since the Rome Statute in itself does not require a country to criminalize certain acts, as explained above. Thus, there are some deficiencies that should be avoided in future cases. Even though a correct application of IHL to qualify the defendants' acts in the abovementioned cases would have led to the same outcome,⁶³ the Ukrainian courts expose themselves and Ukraine as a state to the scrutiny of the ECtHR. It may lead to potential findings of fault under article 6 of the ECHR, among them the right of the defendant to be informed of the charge against him or her.

3. General Principles of Criminal Law - Questioning the Primacy of International Law

A key question is whether the general principles of Ukrainian criminal law or general principles as applied by international criminal courts should be applied when international crimes are adjudicated before a domestic Ukrainian court. In other words, does Part III of the Rome Statute of the International Criminal Court have any relevance in domestic criminal trials when one is confronted with issues such as mode of liability, *mens rea* and grounds for excluding criminal responsibility? Alternatively, should rules of customary international law – which may be codified in Part III of the

⁵⁷ *Kharkiv missile case*, Dzerzhynsky District Court of Kharkiv, Case No. 638/1044/23, 2 March 2023, available at <https://reyestr.court.gov.ua/Review/109334224>, p. 2

⁵⁸ *Kharkiv shelling case*, No. 535/244/22, Kotelva District Court of Poltava region, 31 May 2022, available at <https://reyestr.court.gov.ua/Review/104531363>, pp. 5, 7, 9 and 11.

⁵⁹ *Fasova case*, Makarivskyi District Court of Kyiv Oblast, Case No. 370/179/23, 20 April 2023, available at <https://reyestr.court.gov.ua/Review/110354341>.

⁶⁰ See comment by Marchuk, 2022 on the cases available at that time, p. 800 and Marchuk, Iryna, 'Rough Waters or Smooth Sailing? Taking Stock of War Crimes Judgments by Ukrainian Courts' *Journal of International Criminal Justice*, forthcoming, at 5-6 and 16.

⁶¹ *Chernihiv case*, Desnianskyi District Court of Chernihiv, Case No. 750/6470/2, 11 April 2023, available at <https://reyestr.court.gov.ua/Review/110135338>.

⁶² Irpin City Court of Kyiv Region in case No. 367/3477/22, 12 May 2023 available at <https://reyestr.court.gov.ua/Review/110824305>.

⁶³ Marchuk, 2022, p. 801.

Rome Statute – be binding or provide guidance in general principles of criminal law in domestic criminal proceedings?

The significance of this choice may be illustrated by the following two cases. The Southern District of New York undertook in the *Talisman Energy* case (a civil dispute concerning commission of war crimes and crimes against humanity in southern Sudan) to define the elements of liability for aiding and abetting under the Alien Torts Statute, concluding that they must be derived from international law.⁶⁴ The U.S. Court of Appeals for the Second Circuit affirmed, holding that “to establish accessorial liability for violations of the international norms prohibiting genocide, war crimes, and crimes against humanity, plaintiffs were required to prove, *inter alia*, that Talisman provided substantial assistance to the Government of the Sudan with the purpose of aiding its unlawful conduct.”⁶⁵ This may be compared with the ongoing *Lundin* case, where the Swedish prosecution relies on the comparatively lower Swedish requirement on intent (reckless intent) while one of the defendants has argued — submitting that the prosecutor should face a higher threshold (indirect or direct intent), as required by the Rome Statute and relevant case law from the ICC.⁶⁶ Thus in *Lundin*, the defendants make an argument that aligns with the holding of the U.S. Court of Appeals for the Second Circuit in the *Talisman Energy* case. The determination of the court on this matter may prove highly determinative for the outcome of the case (where the trial is ongoing). In this context, I have argued that Swedish courts should apply the general principles of criminal law of the Swedish domestic law,⁶⁷ and courts have in subsequent case law come to the same conclusion.⁶⁸

In this context one may note that the travaux préparatoires to the 1949 Geneva Conventions reveals that there was no agreement among states during the negotiations on accomplice liability,

⁶⁴ *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633 (S.D.N.Y. 2006) at 668.

⁶⁵ *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 247–48 (2d Cir. 2009) at 244, 253.

⁶⁶ Compare Indictment, Case No. B 11304-14, Stockholms Tingsrätt [Stockholm District Court], 11 Nov. 2021, para. 9(a) (“I.L. arrived at the decision intentionally. . .”) and paras. 9(b)–(k) (using similar language for both defendants) with Swedish Prosecution Authority Press Release, Prosecution for Complicity in Grave War Crimes in Sudan, (Nov. 11, 2021), <https://www.aklagare.se/en/media/press-releases/2021/november/prosecution-for-complicity-in-grave-war-crimes-in-sudan/>: “The company then requested from the Sudanese government that the military should now be made responsible for the security, knowing that this meant that the military would then need to take control of Block 5A via military force. What constitutes complicity in a criminal sense is that they made these demands despite understanding or, in any case being indifferent to the military and the militia carrying out the war in a way that was forbidden according to international humanitarian law.”. See Motion from Alexandre Schneider to the Ministry of Justice, Motion from Alexandre Schneider to Ministry of Justice, Justitiedepartementet BIRS [Ministry of Justice, Criminal Matters and International Judicial Cooperation Unit], 9 Feb. 2017, JuBC2018/00136/BRIS, at 3 (challenging the legal standards relied on by the prosecutor); see also Ove Bring & Per Ole Träskman, Expert Opinion (Dec. 19, 2014), at 2–3 (noting that the interpretation of intent has evolved in international case law to reflect a higher threshold).

⁶⁷ Klamberg, 2020 at 208.

⁶⁸ In relation to acts committed before the legislative amendment 2014, see *Prosecutor v. M.H.*, Stockholm District Court, B 5459-23, Judgment 20 June 2024 at 58 footnote 44 and for acts committed after the 2014 amendment, see *Prosecutor v. Saeed*, Supreme Court, B 5595-19, Judgment 5 May 2021 at 13.

attempt to commit a crime, duress, grounds for excluding criminal responsibility, or the obligation to obey orders. Instead, the records explicitly state that these issues were left for judges applying domestic law to address.⁶⁹ The next sections will examine key general principles of criminal law and how Ukrainian courts have dealt with them.

In analyzing Ukrainian case law, we are assisted by the fact that article 91 of the Criminal Procedural Code of Ukraine (CPCU) provides that among other things the following shall be proved in criminal proceedings: “[the] degree of guilt of the accused in the commission of criminal offence, form of guilt, motive and purpose of the criminal offense”, having the consequence that the courts explicitly account for these matters in their written judgements.

3.1 Mens rea

War crimes have to be committed with intent, which includes direct intent, indirect intent and in some jurisdictions recklessness or *dolus eventualis*.⁷⁰ Recklessness and the closely related concept *dolus eventualis* are at the *ad hoc* tribunals⁷¹ and some domestic jurisdictions⁷² is perceived as the form of intent with the lowest threshold where the defendant can still be held accountable for war crimes.⁷³ The ICC has rejected recklessness as well as *dolus eventualis* as a basis for convicting a defendant for core international crimes,⁷⁴ which highlights why the choice of applicable law may determine the outcome of a case.

Turning to Ukrainian law, article 24 of the CCU provides that intent may be direct or indirect. Article 25 provides for criminal responsibility based on negligence which is subdivided into advertent

⁶⁹ Fourth Report Drawn up by the Special Committee of the Joint Committee, in 2 Final Record of the Diplomatic Conference of Geneva of 1949, Section B, at 114–15 (1949).

⁷⁰ *Prosecutor v. Jean-Pierre Bemba Gombo*, (Case No. ICC-01/05-01/08), ICC PT. Ch. II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, paras. 358-360; Mohamed Badar, *Article 30*, in Klamberg et al, “Commentary on the Law of the Criminal Court”, vol I., 2nd edition, 2023, p. 862.

⁷¹ *Prosecutor v. Tadić*, (Case No. IT-94-1), ICTY A. Ch., Judgment 15 July 1999, para. 228: “In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk.”; *Prosecutor v. Zejnil Delalić et al. (Čelebići)*, (Case No. IT-96-21), ICTY T. Ch., Judgment, 16 November 1998, para. 439: “the Trial Chamber is in no doubt that the necessary intent, meaning K, required to establish the crimes of wilful killing and murder, as recognised in the Geneva Conventions, is present where there is demonstrated an intention on the part of the accused to kill, or inflict serious injury in reckless disregard of human life.”

⁷² Lekvall, Ebba and Martinsson, Dennis, ‘The *Mens Rea* Element of Intent in the Context of International Criminal Trials in Sweden’, 66 *Scandinavian Studies in Law*, 2020, 100-129, p. 101; Plum, Lars, ‘Investigation and Prosecution in Denmark of International Crimes’, 66 *Scandinavian Studies in Law*, 2020, 435-455, p. 445.

⁷³ Cox, Brian L., ‘Recklessness, Intent, and War Crimes: Refining the Legal Standard and Clarifying the Role of International Criminal Tribunals as a Source of Customary International Law’, 52(1) *Georgetown Journal of International Law*, 2020, 1-75, pp. 28-32

⁷⁴ *Bemba*, ICC PT. Ch. II, Decision 15 June 2009, para. 360: “With respect to *dolus eventualis* as the third form of *dolus*, recklessness or any lower form of culpability, the Chamber is of the view that such concepts are not captured by article 30 of the Statute.”

and inadvertent negligence. Thus, the distinction between criminal intent on the one hand and criminal negligence on the other hand is important since war crimes cannot be committed merely by negligence as explained above. In *Shyshymarin* the district court explained the following:

According to cl. 22 of Resolution No. 2 of the Plenum of the Supreme Court of Ukraine “On Case Law under Cases on Crimes against Human Life and Health” as of 07.02.2003, the issue of intent shall be decided based on the totality of all circumstances of the committed act, in particular, taking into consideration means, weapon of crime, number, character and location of injuries and other bodily harm, causes for termination of criminal actions, conduct of the guilty person and victim preceding the event.

The defendant’s conduct proves circumstances given in the indictment bill, namely, that, while making shots at the victim, V. Ye. Shyshymarin was aware of the socially dangerous nature of his actions, forecast their socially dangerous consequences in the form of the victim’s death and desired them. Hence, based on Article 24(2) of the Criminal Code of Ukraine, the defendant acted with direct intent. This circumstance was proved in the court and the court has no doubts about that.⁷⁵

Thus, it is clear that the *Shyshymarin* the district court applied general principles of Ukrainian criminal law on the issues of intent.

3.2 Modes of liability

Crimes may be committed both by action and omission.⁷⁶ Article 18 sets out that criminal offenders can be held accountable. Articles 26-31 of the CCU deals with various forms of criminal liability, including for the principal or co-principal (i.e. perpetrators and co-perpetrators), accomplice, organizers, abettor, accessory, concealment of a criminal offender, tools or means of a criminal offense, traces of crime or criminally obtained things. These modes of liability encompass commanders require their direct involvement, either as perpetrators or as an accomplice. The concept of command responsibility - failure of a commander to prevent or punish crimes (i.e. by omission) - was only introduced as late as 2024. This begs the question how to deal with such omissions that occurred before 2024, they did, did not in themselves constitute criminal conduct, as further discussed in section 3.3. In addition to criminalizing the commission of genocide, Article 442(2) criminalizes public calls to genocide. Article 426 provides for modes of liability familiar in the ICL discourse such as command

⁷⁵ *Prosecutor v. Shyshymarin*, Solomianskyi District Court of Kyiv, Case No. 760/5257/22, 23 May 2022, available at <https://reyestr.court.gov.ua/Review/104432094>, pp. 16-17.

⁷⁶ CCU, article 11.

responsibility. However, this provision only applies to military offences committed by Ukrainian armed forces,⁷⁷ as explained below. On 9 October 2024 a legal amendment came into force which introduced the new provision – article 31(1) - expanding command responsibility beyond persons belonging to the Ukrainian armed forces.

The Ukrainian courts have used the same mode of liability in several of the surveyed war crimes cases referencing article 28 of the CCU. The district court in *Shyshymarin* explained that “the crime was committed ... by a group of persons in collusion (Article 28(2) of the Criminal Code of Ukraine) since actions of defendant V. Ye. Shyshymarin and Person 1 were united by the common shared intent and were aimed at violating the laws and customs of warfare combined with intentional murder.”⁷⁸ The Dzerzhynsky Raion Court of Kharkiv convicted the defendant in the *Kharkiv* case based in article 28(2) of the CCU, i.e. co-perpetration.⁷⁹ The district court in relied on the same provision classifying the defendants as co-perpetrators.⁸⁰ In the *Andriyivka* case the court explained that the defendant committed the act by prior conspiracy by a group of persons and referenced CCU article 28.⁸¹ There are also cases where the court convicts the defendant without giving explicit reference to a specific provision on liability, yet it is clear that it is based on the CCU.⁸² In other words, the courts applied Ukrainian principles of criminal law, as codified in the CCU, when dealing with modes of liability.

3.3 Command responsibility

Many of the alleged crimes in the Russia-Ukraine war have been committed by enlisted soldiers and junior officers. While it sometimes may be possible to prove that commanders have ordered their subordinates to commit crimes, there are several real or conceivable situations where that is difficult and one would need to resort to command responsibility, i.e. failure of commanders to prevent and sanction their subordinates for crimes. One of the key challenges in prosecuting the higher echelons of the Russian armed forces for war crimes has been the absence – until the legislative amendment of 9 October 2024 – of an explicit provision on command responsibility in Ukrainian law.

Already before the conflict, article 426 criminalized willful failure of a Ukrainian commander to prevent a crime committed by a subordinate, or failure of a military inquiry authorities to institute a

⁷⁷ CCU, article 401(2).

⁷⁸ *Shyshymarin*, 23 May 2022, p. 19.

⁷⁹ *Kharkiv* missile case, Dzerzhynsky District Court of Kharkiv, Case No. 638/1044/23, 2 March 2023, available at <https://reyestr.court.gov.ua/Review/109334224>, pp. 7 and 9.

⁸⁰ *Kharkiv shelling* case, Case No. 535/244/22, Kotelva District Court of Poltava region, 31 May 2022, available at <https://reyestr.court.gov.ua/Review/104531363>, pp. 11 and 14.

⁸¹ *Andriyivka* case, Chernihivskyi District Court of Chernihiv Oblast, Case No. 748/855/23, 14 September 2023, available at <https://reyestr.court.gov.ua/Review/113458684>

⁸² See for example *Fasova* case, Makarivskyi District Court of Kyiv Oblast, Case No. 370/179/23, 20 April 2023, available at <https://reyestr.court.gov.ua/Review/110354341> which uses the term “committing” in relation to the crimes.

criminal case against a subordinate offender, and also willful failure of a military official to act in accordance with his/her official duties.⁸³ However, by having article 426 in chapter XIX of the CCU it is clear that article 426 only applies to military offences committed by Ukrainian armed forces,⁸⁴ not by its Russian counterpart even if the crime is committed on Ukrainian territory. Article 426 states the following.

Willful failure to prevent a crime committed by a subordinate, or failure of a military inquiry authorities to institute a criminal case against a subordinate offender, and also willful failure of a military official to act in accordance with his/her official duties, if it caused any significant damage, shall be punishable ...

As indicated above, on 9 October 2024 article 31(1) came into force which expands command responsibility beyond persons belonging to the Ukrainian armed forces. It provides the following.

1. A military commander or other person actually acting as a military commander shall be criminally liable for any of the crimes provided for in Articles 437-439 , 442 and 442-1 of this Code committed by a subordinate who was, at the time of the commission of the crime , under his actual command and control or, depending on the circumstances, under his actual authority and control, as a result of his failure to exercise proper control over such person, if at the same time the military commander or other person actually acting as a military commander knew or, taking into account the circumstances existing at that time, should have known and could have known that the said subordinate had committed or intended to commit such a crime, but failed to take actions that he should have taken and could have taken within the limits of his powers to prevent or stop the commission of the crime or to report such a crime to the competent authority.

The dilemma is that the new article 31(1) may not apply retroactively,⁸⁵ which is a problem in the sense that many alleged crime were committed before 9 October 2024. For that time period, there are arguably two ways of establishing command responsibility for Russian military commanders for conduct in Ukraine.

The first alternative is to interpret article 438 to also incorporate command responsibility since the provision criminalizes “any other violations of rules of the warfare recognized by international

⁸³ CCU, article 426.

⁸⁴ CCU, article 401(2).

⁸⁵ CCU, article 15(2).

instruments". The argument would be that reference to "international instruments" in article 438 would include AP I, Article 86(2) which provides the following.

The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

With this alternative, article 438 would also criminalize what one would sometimes describe as a mode of liability. Some might argue that this is inconsistent with the CCU where perpetration and modes of liability are regulated in article 18 and articles 26-31.

A second alternative would be to argue that even though command responsibility is not explicitly provided for, it exists as it is a general principle of Ukrainian criminal law. In some continental European countries command responsibility is described as a principle based on the doctrine of supervisory responsibility, German: *erfolgsabwendungspflicht* and *Garantenpflichten*;⁸⁶ Swedish: *garantlärar*,⁸⁷. The doctrine of supervisory responsibility and the principle of command responsibility are similar in the sense that they both 1) are limited to a certain groups of persons such as military commanders, corporate managers, pool guards, mountain guide, parents; 2) requirement on knowledge; 3) the commander/supervisor has a duty to prevent crime or danger; and 4) there has to be causal link between the inaction of the commander/supervisor and occurrence of the crime/injury/damage.⁸⁸ Does Ukrainian law embrace the same doctrine?

There are several provisions in the CCU which provide for supervisory responsibility in cases of omission, including for failure to provide help to a person who is in a condition dangerous to life,⁸⁹ failure to perform professional or official duty with regard to life safety and health care of minors,⁹⁰

⁸⁶ For German doctrine, see Kaufmann, Armin, *Die Dogmatik der Unterlassungsdelikte* (Göttingen: Schwartz, 1959), pp. 14, 49, 51–54 and 306 et seq.; Beulke, Werner and Wessels, Johannes, *Strafrecht Allgemeiner Teil — Die Straftat und ihr Aufbau* (42nd, C.F. Müller, 2012), pp. 288–289; Brammsen, Joerg, *Die Entstehungsvoraussetzungen der Garantenpflichten, Die Entstehungsvoraussetzungen der Garantenpflichten* (Berlin: Duncker & Humblot, 1986), pp. 116 et seq.; Köndgen, Johannes, *Selbstbindung ohne Vertrag* (Tübingen: 1981), pp. 163 et seq.; Gründewald, Anette, *Zivilrechtlich begründete Garantenpflichten im Strafrecht?* (Berlin: Duncker & Humblot, 2000), p. 46; commented by Sjögren, Anders, 'Högsta domstolen prövar garantlärar' *Svensk Juristtidning*, 2014, 170-184, pp. 170–184.

⁸⁷ Asp, Petter, Jareborg, Nils and Ulväng, Magnus, *Kriminalrättens grunder* (2nd edition, Uppsala: Iustus, 2013), pp. 106–116; Larsson, Frida, 'Styvföräldrars garantansvar'(3) *Juridisk Tidskrift*, 2013/14, 651-662.

⁸⁸ Klamberg, Mark, 'Regulatory Choices at the Advent of Gig Warfare' *Journal of International Humanitarian Legal Studies*, 2023.

⁸⁹ CCU, article 136.

⁹⁰ CCU, article 137.

failure of a member of medical profession to provide help to a patient,⁹¹ failure to perform professional duty by a member of medical or pharmaceutical profession due to neglect of careless discharge of this duty,⁹² failure of parents, guardians or custodians to perform their duties established by law and related to the care of a child or a person under guardianship or in the custody,⁹³ failure to comply with duties or improper performance of duties by a person to whom somebody else's property was entrusted or in whose custody it was placed,⁹⁴ failure of a person responsible for the operation of technological installations or other sources of risk in a safety zone to take measures for the protection of sea life against hazardous effect of waste or radiation and energy,⁹⁵ failure of a captain of a vessel to provide assistance to the crew and passengers of another vessel in case of collision with it, and also to any other wrecked persons encountered at sea or any other waterway⁹⁶ and as mentioned above: willful failure of a Ukrainian commander to prevent a crime committed by a subordinate, or failure of a military inquiry authorities to institute a criminal case against a subordinate offender, and also willful failure of a military official to act in accordance with his/her official duties.⁹⁷ This wealth of provisions providing supervisory responsibility under Ukrainian law could either be interpreted as proving the existence of a more general doctrine which also includes command responsibility or in the explicit absence provision on command responsibility the non-existence of that principle. Based on the legalistic approach in Ukrainian law requiring an explicit provision it appears as command responsibility cannot be established by this line of arguing.⁹⁸

To summarize, the most viable way to establishing command responsibility for Russian military commanders for conduct in Ukraine appears to be by interpreting article 438 to also incorporate command responsibility. It remains to be seen if Ukrainian prosecutors attempts to pursue this alternative and whether Ukrainian courts accepts it.

3.4 Grounds for excluding criminal responsibility

In the context of grounds for excluding criminal responsibility, complete substantive defences are of particular interest, they entail circumstances that may completely negate criminal liability despite the

⁹¹ CCU, article 139.

⁹² CCU, article 140.

⁹³ CCU, article 166.

⁹⁴ CCU, article 197.

⁹⁵ CCU, article 244.

⁹⁶ CCU, article 284.

⁹⁷ CCU, article 426.

⁹⁸ I have reached this conclusion when suggesting this approach during conversation with Professor Yurii Ponomarenko, USAID conference "Justice in the Domestic Adjudication of War Crimes Cases", Lviv, 21 October 2023. Ponomarenko did not perceive it as a viable alternative.

presence of *actus reus* and *mens rea*.⁹⁹ An act that would normally be criminal may be *justified* by the need to protect an opposing interest, e.g. in cases of self-defence, defence of other, defence of property and necessity.¹⁰⁰ Even if the act is not justified, the person may be *excused* because he or she could not be expected to act lawfully, eg. in cases of insanity, mental disorder and duress.¹⁰¹

Articles 36-43 of the CCU provide for circumstances excluding criminality of an act, include inter alia defence (article 36), necessity (article 39), physical or mental coercion, i.e. duress (article 40) and obeying an order or command, as long as it is not a patently criminal (article 41) which is relevant in the context of war crimes.

The district court in *Shyshymarin* referenced Article 41(4) of the CCU when it stated that “a person, who obeyed an obviously criminal order or command, shall be criminally liable on general grounds for the acts committed in pursuance of such order or command.”¹⁰² Similar to the approach to other general principles of criminal law, the *Shyshymarin* the district court applied those of Ukrainian criminal law on the issue of obeying orders and concluded that the defence of superior orders wasn’t applicable .

3.5 Preliminary conclusions

The case law on war crimes from Ukrainian courts indicates that they apply the general principles of Ukrainian criminal law, rather than adhering to principles derived from the *ad hoc* tribunals or the Rome Statute of the ICC. The Ukrainian approach is consistent with the travaux préparatoires to the 1949 Geneva Conventions which stated state that these issues were left for judges who were to apply domestic law, as indicated above.¹⁰³ For the sake of argument, let us consider the alternative of applying international rules. This naturally leads to a second critical question: Which international rules should be applied? The rules on modes of liability, intent and grounds for excluding criminal responsibility differ between the ICTY and ICTR on one hand and the ICC on the other, which one should we choose?

It should also be emphasized that the Rome Statute of the ICC is not a treaty containing legally obligating state parties to change or adapt domestic rules to protect certain rights in an analogous

⁹⁹ Norée, Annika and Andreev, Dennis, ‘Grounds for Excluding Criminal Responsibility for International Crimes under Domestic Swedish Law’, 66 *Scandinavian Studies in Law*, 2020, 131-155, p. 132.

¹⁰⁰ Ibid; Klamberg, Mark, ‘Article 31’ Klamberg, Mark, Nilsson, Jonas and Angotti, Antonio (eds), *Commentary on the Law of the International Criminal Court – The Rome Statute, vol I* (2nd edition, Brussels: TOEAP, 2023), p. 881.

¹⁰¹ Norée and Andreev, 2020, p. 132.

¹⁰² *Prosecutor v. Shyshymarin*, Solomianskyi District Court of Kyiv, Case No. 760/5257/22, 23 May 2022, available at <https://reyestr.court.gov.ua/Review/104432094>, p. 18.

¹⁰³ Fourth Report Drawn up by the Special Committee of the Joint Committee, in 2 Final Record of the Diplomatic Conference of Geneva of 1949, Section B, at 114–15 (1949).

manner.¹⁰⁴ Instead, it is a document regulating the work of the ICC.¹⁰⁵ Even if one were to conclude that the open-ended character of the international crimes provision directs domestic courts to apply customary international law, the content of that law would be difficult to discern, especially in instances where the common law and continental European legal traditions may differ. Articles 25, 30, and 31 of the Rome Statute do not by necessity reflect customary international law.¹⁰⁶

There is a potential problem with domestic courts applying the general principles of criminal law as derived from their own domestic law, which warrants some caution. Take the example of combatant immunity (not to be conflated with immunity with diplomats or the troika of state leaders). Posit that a state has general principles of criminal law that go beyond those proscribed by IHL and those of the opposing belligerent party. That would criminalize conduct that soldiers from the opposing side would believe would be protected against prosecution, relying on combatant immunity. However, this would arguably be a misunderstanding of purpose of combatant immunity. The purpose is to protect against prosecution for “normal” crimes such as homicide,¹⁰⁷ not against allegations of war crimes.

Thus, for reasons of consistency within domestic systems, the understanding at the time when the 1949 Geneva Conventions were adopted, the non-existence of a complete and universal international framework binding vis-à-vis states, domestic courts should apply the general principles of criminal law as derived from their own domestic law.

4. Upholding Justice Amid War

The general assumption is that war crimes proceedings before domestic courts are to be conducted pursuant to criminal procedure of that state, in this context as set out in the Criminal Procedural Code (CPC) of Ukraine. However, even if the CPC is applicable, trials involving international crimes may raise special challenges that warrant a discussion. The main challenge is that many of the alleged criminals reside outside Ukraine, namely in Russia, and this makes investigation more complicated and difficult. This in turn may have consequences for the trial and the assessment of whether the defendant is guilty. In times of peace states could rely on international legal assistance and cooperation, which is

¹⁰⁴ Klamberg, 2020, p. 213; Lekvall and Martinsson, 2020, p. 126; see also Cassese, Antonio and Gaeta, Paola, *International Criminal Law* (Third Edition, Oxford: Oxford University Press, 2013), p. 10 (check): “[T]he ICC Statute, far from constituting an ‘international criminal code’, only lays down the rules that the Court must apply when it exercises its jurisdiction over the crimes it is called to adjudicate.”

¹⁰⁵ See Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, article 1: “The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.”; see also Rome Statute, article 10: “Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.”

¹⁰⁶ The same argument is made in Klamberg, Mark, ‘Prosecuting Corporate Executives for War Crimes in Sudan’, 54(3) *New York University Journal of International Law and Politics*, 2022, 887-939, p. 935.

¹⁰⁷ Stahn, Carsten, *A Critical Introduction to International Criminal Law* (Cambridge: Cambridge University Press, 2019), p. 78.

unavailable between Ukraine and Russia. Moreover, the huge case load presents unique challenges. In addition to questions about international legal assistance and cooperation there are several procedural issues that press for discussion, for example victims' right, conduct of investigations, prosecutorial discretion (or absence of such) and how to deal with evidence in terms of admissibility, disclosure and evaluation. In this context, only two specific procedural matters will be considered: conducting trials in absentia and the use of special courts.

4.1 Trials in Absentia - Expediency at the Expense of Due Process?

Most of the trials relating to the Russia-Ukraine war have been conducted in the absence of the defendant, i.e. trials *in absentia*. Considering non-cooperation from Russia and ensuing difficulties to bring accused person to trial in person before Ukrainian courts one may understand why such proceedings are needed. The CPCU was amended to allow for trials *in absentia* following the 2013-14 Maidan protests to make the prosecution of senior Ukrainian officials possible, including bringing charges against former President Yanukovich, who fled Ukraine to Russia.¹⁰⁸ However, there are at least two serious concerns in relation to these proceedings: the notification process vis-à-vis the suspect and the mode and availability of retrial in case a person convicted *in absentia* becomes available for trial in person.¹⁰⁹ Both of these concerns involves a tension between the interest of ending impunity and expediting proceedings on the one hand and the due process rights of the defendant on the other hand.

The default rule is that criminal trials in Ukraine should be conducted in the presence of the accused. However, article 297(1) of the Criminal Procedure Code (CPC) of Ukraine permits special pre-trial investigation *in absentia*. The procedure is available when the suspect is hiding from the investigation and judicial bodies in the temporarily occupied territory of Ukraine (includes Donetsk and Luhansk), in the territory of a state recognized by the Verkhovna Rada of Ukraine as an aggressor state (Russia), for the purpose of evading criminal responsibility.¹¹⁰

The proceedings are limited to serious crimes including war crimes and other criminal offenses against peace, security of mankind and international legal order.¹¹¹ The motion is filed by an investigator or prosecutor. The investigative judge shall consider a motion requesting to conduct special pre-trial investigation *in absentia* within ten days from the moment of its submission to the court with the participation of the person who submitted the motion (investigator or prosecutor) and a defence counsel of the suspect.¹¹² In case of conducting special pre-trial investigation the summons

¹⁰⁸ Marchuk, 2022, pp. 792-793.

¹⁰⁹ Ibid, p. 793.

¹¹⁰ CPC, article 297-1(2), not updated in the English translation of the code, see original version in Ukrainian at the Verkhovna Rada of Ukraine: <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.

¹¹¹ Ibid.

¹¹² CPC, article 297-3(1).

shall be sent to the last known address of residence or staying of the suspect and shall be published in national mass media and official websites of the agencies conducting pre-trial investigation.¹¹³

When it comes to notification, the Supreme Court has explained that a person is considered to be properly acquainted with the content of court summonses, and therefore, aware of the criminal proceedings being conducted by the court against him in accordance with Part 3 of Article 323 of the Criminal Procedure Code (in absentia), if the local court notified him of the court hearings (including the court hearing at which the verdict was pronounced) by placing an announcement on the web portal "Judicial Authority of Ukraine" and in the publication "Government Courier". Coming to the trial *in absentia*, the court must verify whether the pre-trial investigation body has taken all appropriate measures to serve the suspect with a notice of suspicion of committing a criminal offense, the completion of the pre-trial investigation and the provision of access to the pre-trial investigation materials.¹¹⁴ In this context the Supreme Court has explained that sending a notice of suspicion and summons to a suspect who is in the temporarily occupied territory of Ukraine using the Viber messenger app to the phone number used by the suspect, and confirming that he has viewed these messages, complies with the provisions of the CPC and is an additional measure to the main methods of informing the suspect provided for in the CPC.¹¹⁵

While considering the motion for proceedings *in absentia* the investigative judge shall be entitled, on the basis of a motion of the parties to the proceedings or on own initiative, take testimony from any witness or examine any materials which are of relevance to address the issue on special pre-trial investigation.¹¹⁶ The investigative judge shall at the end of the special pre-trial investigation *in absentia*-proceeding issue a decision specifying the reasons for upholding or dismissing the motion to conduct proceedings in absentia.¹¹⁷ In essence, it is a trial *in absentia*.¹¹⁸ When a verdict is passed as a result of special pre-trial investigation *in absentia*, the court must specify whether the prosecution has taken all possible measures provided for by law to respect the rights of the suspect or the accused to defense and access to justice, taking into account the legally requirements of such proceedings.¹¹⁹ If

¹¹³ CPC, article 297-5(1).

¹¹⁴ Supreme Court of Ukraine, Case law of the Criminal Court of Cassation regarding the implementation of a special procedure of criminal proceedings (pretrial investigation and trial) in the absence of the accused (in absentia) in the Supreme Court- Review (current practice), from 2018 to August 2022, p. 2.

¹¹⁵ Supreme Court of Ukraine, Case law of the Criminal Court of Cassation regarding the implementation of a special procedure of criminal proceedings (pretrial investigation and trial) in the absence of the accused (in absentia) in the Supreme Court- Review (current practice), from 2018 to August 2022, p. 2.

¹¹⁶ CPC, article 297-3(3). See for example *Andriyivka* case, Chernihivskyi District Court of Chernihiv Oblast, Case No. 748/855/23, 14 September 2023, available at <https://reyestr.court.gov.ua/Review/113458684> where the court emphasizes the right of the accused to be duly informed of the date of the hearing and of his right to legal or other representation in court.

¹¹⁷ CPC, article 297-4(3).

¹¹⁸ CPC, article 434(3) uses the term « trial » when it makes reference to article 297-1.

¹¹⁹ CPC, article 374(5), not updated in the English translation of the code, see original version in Ukrainian at the Verkhovna Rada of Ukraine: <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.

the accused appears or is brought to court after the decision on special pre-trial investigation *in absentia* was issued, the trial continues in accordance with the general rules provided for by CPC.¹²⁰ Turning to the situation when a trial *in absentia* has been completed, the CPC does not explicitly guarantee the right to re-trial. Instead, the rules on appeal trials applies.¹²¹ In effect this means that the defendant gets his first trial in before an appeal court.

The European Court of Human Rights has ruled that a trial in absentia is not in itself incompatible with the fair trial requirements that follow from Article 6 of the European Convention on Human Rights (ECHR) provided that the convicted person once he or she becomes aware of the trial *in absentia* proceedings, is granted a retrial.¹²² A case that appears relevant for the Ukrainian context is *Sanader v Croatia* in which the applicant was 1992 living in the then occupied parts of Croatia, he was charged by the Croatian prosecuting authorities with war crimes against prisoners of war. He was tried *in absentia*, convicted as charged and sentenced to 20 years' imprisonment. Croatia offered two remedies 1) that the applicant had to go into custody to get the right to a retrial or 2) the general legal avenue for seeking a retrial after a judgment had become final and enforceable. This second remedy was restricted category of cases tried *in absentia* and was not available for the applicant. The European Court of Human Rights (ECtHR) found that the two remedies disproportionate and rules that Croatia had violated the fair-trial requirements of article 6 of the ECHR.¹²³

The first trial in absentia proceedings in the context of the 2022 war involved the rape of a civilian by a Russian soldier, Mikhail Romanov.¹²⁴ The Solomyanskyy district court heard the case in early December 2022,¹²⁵ the outcome of the case is unknown. Several in absentia trials relate to pillaging. The Solomyanskyy District Court of Kyiv convicted Russian soldier Sergey Steiner for damaging civilian property and pillaging the amount of 150,000 UAH (around 5400 USD) and sentenced him to nine years of imprisonment¹²⁶ Marchuk has found the sentencing in these trial *in absentia* cases

¹²⁰ CPC, article 323(4), not updated in the English translation of the code, see original version in Ukrainian at the Verkhovna Rada of Ukraine: <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.

¹²¹ CPC, article 400(3); Supreme Court of Ukraine, case No. 753/14148/21, decision, 28 February 2024, pp. 7-8.

¹²² *Sejdovic v. Italy*, (Application No. Application no. 56581/00), ECtHR, Judgement of 1 March 2006; *Sanader v Croatia*, (Application No. Application no. 66408/12), ECtHR, Judgement of 12 February 2015.

¹²³ *Sanader v Croatia*, Judgement of 12 February 2015.

¹²⁴ Pjotr Sauer, "Ukraine begins first trial of Russian soldier charged with rape", The Guardian, 23 June 2022, available at <https://www.theguardian.com/world/2022/jun/23/ukraine-to-begin-first-trial-of-russian-soldier-charged-with-rape-mikhail-romanov>

¹²⁵ US State Department, Ukraine 2022 Human Rights Report, p. 40.

¹²⁶ Lukyanivka village, case No. 760/6123/22: Solomyanskiy District Court of Kyiv, 26 September 2022, available at <https://reyestr.court.gov.ua/Review/106808179>; I. Domashchenko, 'First in absentia Verdict for Russian War Crimes: How Lieutenant Steiner was Tried for Pillage', 26 September 2022, available online at <https://sudreporter.org/pershyjzaochnyj-vyrok-za-rosijski-voyenni-zlochyny-yak-lejtenanta-shtajnera-sudyly-za-grabuvannya-cyvilnyh> (visited 30 January 2024 (in Ukrainian)); commented by Marchuk, 2022, p. 794.

and relating to pillage as harsh, the sentence being disproportionate to the monetary value of the pillaged goods.¹²⁷

To conclude, the ECHR places some limits the use of trials in absentia. There is room to have such trials in the interest of ending impunity and expediting proceedings, however there appears to be a need to reign in this possibility before Ukrainian courts in order to respect the requirements of the ECHR.

4.2 Use of Digital Evidence

When prosecuting international crimes, digital evidence – which includes wire-tapping and surveillance of communication, photos and smartphone videos, open sources and social media sometimes stored on USB flash drives, SD cards, CD, DVD or tape – has become increasingly relevant. For example, in the *Shyshymarin* case the court relied upon on examination of mobile phone Samsung belonging to victim.¹²⁸ In the *Fasova* case, the court relied on evidence derived from the defendant's use of a mobile phone, transcripts of phone conversations, photos taken and images posted at the social media network "Vkontakte" to establish that he was a Russian who was in Fasova, Ukraine at the time when the crimes were committed.¹²⁹ For prosecution of more senior commanders it is likely that even more digital evidence is needed, not least in form of intercepted communication.¹³⁰

Ukrainian criminal proceedings are governed by free admissibility of evidence. The principle of free admissibility of evidence follows from article 84 of the CPC which does not set up any limits beyond stating that evidence may consist of testimonies, objects, documents, expert findings.¹³¹ From this follows that information from open sources and social media may be used as evidence if deemed relevant to the indictment. The Supreme Court of Ukraine has also ruled that information from websites of (open sources) are admissible as evidence.¹³² Ukrainian courts have also relied on evidence obtained by the conduct of counterintelligence and operational-search measures.¹³³

Although evidence from open sources and social media is useful, it is not always the best evidence, especially where there is uncertainty as to how the evidence has been handled and stored.

¹²⁷ Ibid.

¹²⁸ *Prosecutor v. Shyshymarin*, Solomianskyi District Court of Kyiv, Case No. 760/5257/22, available at <https://reyestr.court.gov.ua/Review/104432094>, 23 May 2022, p. 14.

¹²⁹ *Fasova* case, Makarivskyi District Court of Kyiv Oblast, Case No. 370/179/23, 20 April 2023, available at <https://reyestr.court.gov.ua/Review/110354341>

¹³⁰ Marchuk, 2022, p. 799. On the treatment of intercepted communication at the ICTY, see Klamberg, Mark, 'Evidentiary Matters in the Context of Investigating and Prosecuting International Crimes in Sweden: Admissibility, Digital Evidence and Judicial Notice', 66 *Scandinavian Studies in Law*, 2020, 367-383, pp. 372-373.

¹³¹ Some scholars and experts have suggested that this provisoon should be amended in order to clarify that electronic evidence is admissible, see for example Ponomarenko, Alla Vasylivna and others, 'Inadmissibility of Evidence in Criminal Proceedings in Ukraine', 9(29) *Amazonia Investiga*, 2020, p. 152.

¹³² Supreme Court of Ukraine, case No. 753/14148/21, decision, 28 February 2024, p. 7.

¹³³ Supreme Court of Ukraine, case No. 753/14148/21, decision, 28 February 2024, p. 6.

Nevertheless, photographs and especially film/video may constitute important evidence that may capture courses of events, facilitate identification of specific persons and establish how they have acted; and their presence at certain geographic locations.¹³⁴

The use of digital evidence raises important questions regarding fair trial rights, equality of arms, and a balance in resources between the prosecution and the defence. As indicated earlier issues relating to how evidence has been collected and handled (chain of custody) may become paramount for determining a case. Amann and Dillon argue that the following needs to be documented:¹³⁵

- Where, when and by whom was the evidence discovered and collected?
- Where, when and by whom was the evidence handled or examined?
- Who had custody of the evidence and during what period?
- How was it stored?
- When the evidence changed custody, when and how did the transfer occur?

One challenge with digital evidence is that it is volatile and manipulable. Law enforcement agencies can take protective measures and implement procedures to guarantee that the material has been handled in a correct manner. This can be done by running an algorithm over the binary content of the file and creating a unique “hash value”. This unique value may be registered on the chain-of-custody form.¹³⁶ The Criminal Court of Cassation within the Supreme Court of Ukraine appears to have approved this approach.¹³⁷ Digital forensics also offers tools and procedure to collect and examine evidence that has been stored on digital media. This requires a proactive approach, training, standardization of practice, and the right hardware and software.¹³⁸

5. Conclusions

War crimes trials in Ukraine are different from those in other European countries, they are conducted in a country in the midst of ongoing war. These proceedings present practical challenges in relation to safety of trial participants and the possibilities to bring defendants to justice while other issues are more straightforward. An example of the latter is jurisdiction, since the alleged crimes have been committed on Ukrainian soil, territorial jurisdiction of Ukrainian courts is apparent. The Ukrainian war crimes legislation and trials confront similar issues as other domestic jurisdiction, where the common

¹³⁴ Ekfeldt, Jonas, *Om informationstekniskt bevis* (Stockholms universitet, 2016), p. 329.

¹³⁵ Amann, Philipp and Dillon, Mark P., ‘Electronic Evidence Management at the ICC: Legal, Technical, Investigative and Organizational Considerations’ Babington-Ashaye, Adejoké, Comrie, Aimée and Adeniran, Akingbolahan (eds), *International Criminal Investigations: Law and Practice* (The Hague: Eleven International Publishing, 2018) 231-252, p. 237.

¹³⁶ Ibid, 237-243 and 252. Same comment as in Klamberg, *Evidentiary Matters*, 2020, p. 380.

¹³⁷ Check The Resolution of the joint chamber of the Criminal Court of Cassation within the Supreme Court of Ukraine, 29 March 2021 in case No. 554/5090/16-к (proceedings No. 51–1878кмо20).

¹³⁸ Amann and Dillon, 2018, 237-243 and 252. Same comment as in Klamberg, *Evidentiary Matters*, 2020, p. 380.

trend is to go from open-ended provisions on war crimes pursuant to the dynamic approach to a closed and exhaustive list pursuant to the static approach. Ukrainian courts have, similar to domestic courts in other countries, accepted and relied upon digital evidence and open source evidence. Even though Ukraine is not the only country that conducts trial in absentia the current conflict has brought such proceedings to a rarely precedented scale.

Based on the Ukrainian example, this article has argued for a differentiated approach in Ukraine and other domestic jurisdictions, meaning that IHL has and should have a decisive role in defining the scope of the specific war crimes while general principles of criminal law should be governed by domestic law. The quest for ending impunity while upholding fair trial rights of the defendant is not required and not always best served by transplanting the entire corpuses of IHL and ICL into domestic law.

Other countries than Ukraine have already, or will, meet similar challenges which highlights the need to exchange experience and scrutinize one's own assumptions. The Ukrainian war crimes trials are not only important in themselves, they also make a significant contribution to the corpus of international criminal justice.

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