

Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity Committed in Ukraine since 24 February 2022: Summary of the Report by a Mission of Experts under the OSCE Moscow Mechanism

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On 13 April 2022, we presented the report of our mission on Ukraine to a special session of the Permanent Council of OSCE. Based on this presentation, the following contribution summarizes the establishment and mandate, methodology and findings of our 94 pages Report.



Establishment and mandate

On 3 March 2022, Ukraine, supported by 45 OSCE participating States, resorted to Paragraph 8 of the Moscow Mechanism (see for its rules here) of the human dimension of the OSCE providing for the invitation of a Mission of Experts to address a particular question on its territory relating to the human dimension of the OSCE. Different from the previous adversarial use as in the cases of Chechnya or Belarus (see here), when a group of participating States had initiated the mechanism against the will of the state investigated, this was theoretically a cooperative use of the mechanism because the state concerned itself had invited the mission (although in reality the report concerns largely violations by another state, the Russian Federation). On 14 March 2022 the mission of experts was appointed by Ukraine drawing from the roster of experts kept by OSCE for that purpose, consisting of Prof. Veronika Bílková from Faculty of Law, Charles University of Prague, Institute of International Relations and a member of the Venice Commission, Prof. Marco Sassòli from University of Geneva, who is also an associate professor at the University of Québec á Montreal and Prof. Wolfgang Benedek, Institute of International Law and International Relations as well as the European Training and Research Centre for Human Rights and Democracy of the University of Graz, who was elected as the chair of the Mission by his colleagues.

The comprehensive mandate of our Mission was defined as follows:

- Establish the facts and circumstances surrounding possible contraventions of OSCE commitments, and violations and abuses of international human rights law and international humanitarian law;

- Establish the facts and circumstances of possible cases of war crimes and crimes against humanity, including due to deliberate and indiscriminate attacks against civilians and civilian infrastructure; and to collect, consolidate, and analyze this information with a view to presenting it to relevant accountability mechanisms, as well as national, regional, or international courts or tribunals that have, or may in future have, jurisdiction.

As foreseen in Paragraph 6 of the Moscow Mechanism the Report was to be completed within three weeks, meaning by 5 April 2022.

Methodology

The events investigated by the Mission of Experts cover the period from 24 February until 1 April 2022, as then the Report had to be finalized, which means that at the moment of the completion of this Report, the war was unfortunately still ongoing and new developments unfolded as dynamically as the flow of information. In particular, the Mission noted allegations received after the formal end of its investigations of summary executions of a large number of civilians during the Russian occupation of villages in the proximity of Kyiv, in particular Bucha. There are photos and videos of civilians killed in the streets partly with their hands tied and reports about one or more mass graves. This evidence points to a major war crime and a crime against humanity committed by the Russian forces. Such an event deserves and requires a serious international enquiry, on the spot, with forensic experts, which the mission even if the time period at the disposal had been prolonged, could not have conducted.

During the period of our investigations, new reports of relevant incidents were published daily, and active hostilities occurred within the whole territory of Ukraine. OSCE/ODIHR, which provided much appreciated logistical and administrative support strongly advised not to visit Ukraine as safe access to the places of potential violations could not be provided.

In spite of these limitations, the Mission has been able to get access to a large variety of sources allowing to gain a good oversight of the situation in general and of particular issues under review. This has been partly possible due to the cooperation of Ukraine as the inviting state, which, however, because of the ongoing war, had of course to be limited. The Mission regretted, in particular, that it did not succeed in having any contact with the Ukrainian military, which would have been crucial to evaluate certain violations of International Humanitarian Law (IHL) on the conduct of hostilities, including by the Russian Federation. ODIHR opened a channel through which relevant information could be shared. In addition, the mission reached out to a large number of contacts within international organizations with knowledge about the situation like, in particular, the United Nations Human Rights Monitoring Mission in Ukraine. It also received valuable information from specialized non-governmental organizations like the Platform for the Investigation of War Crimes in Ukraine consisting of more than 20 NGOs, as well as from

several specialized international investigative NGOs and even from special university research and experienced individuals, journalists and victims possessing a particular knowledge on the matter.

The Mission also send a request to the Russian Permanent Representation to the OSCE asking for support by providing relevant information which, however, was declined. In spite of this lack of cooperation, the Mission of Experts did its best also to take Russian positions into account.

As sources of obligations the mission took the numerous relevant OSCE commitments as well as pertinent rules of International Humanitarian Law (IHL) and Human Rights Law (IHRL) into account. The applicable law is introduced in the respective parts of the Report. In addition to IHL and IHRL, the legal framework on war crimes and crimes against humanity also applies to situations of international armed conflict. The legal norms on these crimes provide for individual criminal accountability of persons who commit atrocities during armed conflict.

The assessment of the alleged violations of IHL and IHRL based on the facts investigated can be found in chapters IV and V of our Report.

International Humanitarian Law (IHL)

Difficulties to keep jus in bello distinct from jus ad bellum

In view of current public discussions on IHL in Ukraine and to correctly understand the findings of the Report, a remark is necessary on the constant mixing up of *jus ad bellum* (the law on when war may be conducted, prohibiting, *inter alia*, aggression) and *jus in bello* (the law on how war must be conducted). IHL is part of *jus in bello*. It has to be kept completely separate and distinct from *jus ad bellum*. IHL applies equally to both belligerents. This is particularly difficult to accept in Ukraine, where Russia is the aggressor and therefore responsible for all the human suffering in the conflict. It is nevertheless crucial for the effectivity of IHL, because in every armed conflict each party considers that it is in its right and the victims on both sides nevertheless deserve the same protection.

Overall conclusions of the Mission on IHL issues

The Mission's overall conclusion was that during the period under consideration, violations occurred on both the Ukrainian and Russian sides. In many instances, both sides also respected IHL and publicly expressed their commitment to comply with their obligations under IHL.

The violations committed by the Russian Federation, however, are by far larger in scale and nature. Due to the time limitation and means at the disposal of the Mission, the Mission was not able to conduct a detailed assessment of most allegations of IHL

violations concerning particular incidents. Nevertheless, the Mission found clear patterns of IHL violations by Russian forces on many of the issues investigated—and some violations committed by Ukraine.

Conduct of hostilities

Under IHL, the assessment of whether the rules regulating the conduct of hostilities were violated is based not on the results, e.g., what was *destroyed* or who was *killed* or *injured*, but on what and who was *targeted*. *Targeting* civilians or civilian objects is a violation of IHL and a war crime.

The Mission found evidence that civilians were *targeted* in only a limited number of instances, including instances when civilians were shot at individually, outside buildings, or summarily executed when in the control of Russian forces. Beyond that, it is inconceivable that so many civilians would have been killed and injured, and so many civilian objects—including houses, hospitals, cultural property, schools, multi-story residential buildings, administrative buildings, penitentiary institutions, police stations, water stations, and electricity systems—would have been damaged or destroyed if Russia had respected its IHL obligations in terms of distinction, proportionality, and precautions in conducting hostilities in Ukraine. This is particularly the case when destruction and deaths occurred far away from the actual fighting. Even in cases where fighting opposed both parties, such as the conduct of the siege of Mariupol, we found examples of clear violations, such as for the destruction of the Mariupol theatre and the Mariupol maternity hospital.

Use of explosive weapons with a wide area effect in urban warfare

Under IHL, even when a weapon is not *per se* prohibited (e.g. cluster munitions for Russia and Ukraine, which are not parties to the Oslo Convention banning them), its use must comply with the rules on distinction, proportionality, and precautions. The Mission determined that even if certain targets were, hypothetically, military objectives and combatants, it is highly implausible that the undisputed use of cluster munitions, munitions with a large blast radius—such as large bombs or missiles, unguided missiles, artillery and mortars, multiple launch rocket systems (MLRS), and dumb bombs released from aircrafts—and the alleged use of incendiary weapons, white phosphorus, and thermobaric or vacuum bombs, in densely populated areas, was in each case the only feasible choice for the Russian commander, especially considering the wide choice of weaponry Russia possesses. Therefore, the Mission concluded that Russia did not take all feasible precautionary measures, as it should have under IHL.

The ICRC leads a campaign aimed at a political commitment by States not to use explosive weapons in densely populated areas unless they take sufficient mitigation measures to limit their wide-area effects and the consequent risk of civilian harm. Many

States remained, at least before 24 February 2022, opposed to new legal obligations in this respect. We hope that their current reaction to Russian practices in Ukraine evidences a change in their attitude.

Hospitals and ambulances

The Mission dedicated particular attention to specially protected objects such as medical units and transport, nuclear power stations, cultural heritage, and arguable schools. To take the example of hospitals, according to different credible reports, between 52 and 74 hospitals and ambulances were destroyed or damaged during the first month of the conflict. Even assuming that some attacks were directed against facilities engaged in acts harmful to the enemy or were incidentally harmed by attacks against legitimate targets, this cannot explain the large number of affected facilities. In addition, in only one single case has Russia vaguely claimed that it gave the warning prescribed by IHL – but without a time-limit and without any indication what had to be done to preserve the special protection. Therefore, in none of the cases was the special protection lost. Intentionally directing attacks against hospitals and places where the sick and wounded are collected is a war crime, provided they are not military objectives.

The law of occupation

The applicability of IHL of military occupation during the invasion phase is controversial. The Mission applied a functional concept of occupation. Under this approach, certain rules of IHL of military occupation gradually started to apply as soon as Russia obtained control over the issues regulated by those rules. According to the degree of Russian control, negative obligations to abstain apply as soon as the conduct they prohibit is materially possible (such as when the person benefitting from the prohibition falls into the hands of the invading forces), while positive obligations to provide and to guarantee would apply only at a later stage when a greater level of control is gained. Such an approach captures the fluid and dynamic realities of modern warfare and the absence of defined frontlines. It allowed the Mission to apply IHL of military occupation to all abuses by Russian forces concerning civilians in Ukraine who were, even if only temporarily, in the power of Russian forces. The Mission concluded that much of the conduct of Russian forces in the parts of Ukraine it occupied both before and after 24 February 2022, including through its proxies—the self-proclaimed “republics” of Donetsk and Luhansk—violated certain rules of IHL of military occupation.

Prisoners of war

Very limited information was available to the Mission with regard to prisoners of war (POWs) held by both parties to the conflict. The Mission was astonished by the small number of POWs acknowledged by both parties and expressed its regrets that these POWs do not yet benefit from the ICRC visits prescribed by Geneva Convention III. Some violations and problems were also identified regarding practices of Ukraine on the

treatment of POWs. The Mission was particularly concerned by the fact that captured POWs were originally considered criminals and treated in ways that are incompatible with Geneva Convention III.

War crimes

Contrary to the impression given in current public discussions by the media, NGOs and State representatives, States cannot commit war crimes. They commit violations of IHL. Human beings commit war crimes. A war crime can only be found if an individual perpetrator can be determined and he or she acted with the necessary knowledge and intent or in case of command responsibility. For the latter, the fact that an individual was the commander of the perpetrators is not sufficient. The Mission was unable to determine such individual perpetrators or persons fulfilling the necessary conditions for command responsibility. Our Report contains findings on violations of IHL by Russia and Ukraine and simply mentions which violations would constitute war crimes, if the responsible individuals can be identified.

International Human Rights Law (IHRL)

Preliminary remarks on the approach and on the scope of application of IHRL

The Mission adopted a comprehensive, holistic approach to IHRL. The Report is thus not limited to any single category of human rights but, rather, covers a whole range of civil, political, economic, social, cultural, and other rights. The Mission believes that only such a comprehensive approach makes it truly possible to understand the full impact that the conflict in Ukraine has had on the enjoyment of human rights and on lives of people.

Concerning the scope of application of IHRL, it is now largely accepted that human rights continue to apply in times of armed conflict and that some of their basic guarantees may never be suspended. It is however also largely accepted that in times of armed conflict, human rights standards must be interpreted in light of the applicable *lex specialis*, i.e., international humanitarian law. Thus, acts of killing an enemy combatant or, even, acts of killing incidentally civilians when targeting a military objective, to the extent that those acts are lawful under IHL, would also in most instances be found compatible with IHRL. At the same time, the Mission shared the view expressed by the OHCHR that *“the more effective the control over persons or territory, the more human rights law would constitute the appropriate reference framework”*. The Mission also had to take note of the extensive derogation introduced by Ukraine in the early days of the conflict, suspending the application of most of the provisions of the ICCPR and ECHR, as well as of the limited jurisdiction exercised, in the non-occupied areas of Ukraine, by the Russian Federation.

Substantive conclusions on the alleged violations and abuses of IHRL

The Mission was not in the position to verify all the reported incidents which might involve violations (by States) or abuses (by non-state actors) of IHRL. Yet, based on a thorough analysis of these reported incidents, it was able to come to three main substantive

conclusions.

First, the Mission found credible evidence suggesting that violations of IHRL, including violations of some of the most fundamental human rights, took place during the first five weeks of the conflict. Most of these violations occurred in the areas under the effective control of Russia and especially in the areas which got under its control, for a shorter or longer period, in the current conflict (the Kherson region, Kyiv suburbs, etc.). The available evidence makes these violations largely attributable to Russia. The most serious of these violations include, but are not limited to: targeted killing of civilians, including journalists and human rights defenders (violation of the right to life); mistreatment of civilians, including rape of women and girls (violation of the prohibition of torture and other inhuman and degrading treatment); or abductions, enforced disappearance or deportation of large number of civilians (violation of the right to freedom and security). The seriousness of these violations is further compounded by their denial and the lack of any attempt to investigate them and bring those responsible for them to justice.

Secondly, the Mission concluded that the impact of the conflict on human rights had gone beyond the direct violations of these rights. By causing a high level of destruction and by interfering with the provision of vital services, such as healthcare or education, the conflict had made it very difficult for the Ukrainians to fully enjoy their human rights and it also had made it very difficult for Ukraine to effectively respect, protect and fulfil all the human rights of its inhabitants. The Mission warned that the number of persons who would suffer or even die in result of all these disruptions was likely to be as high as, if not higher than, the number of persons harmed by active hostilities.

Thirdly, the Mission established that while the conflict had affected all inhabitants of Ukraine, it had had a particularly strong effect on individuals belonging to vulnerable groups. These groups encompass, but again are not limited to: women, who experienced various forms of gender-based conflict-related violence including rape; children, who had their family links disrupted; or older persons and person with disabilities, who were often left behind or decided to stay behind, without care and means of subsistence. The Mission also confirmed that the conflict had produced new vulnerable groups, especially refugees and internally displaced persons. The needs and problems faced by individuals belonging to all these vulnerable groups deserve special attention.

Possible cases of crimes against humanity

The mandate of the Mission pertained not only to the alleged violations and abuses of IHRL but also to possible cases of crimes against humanity. Different from violations of IHRL which are, legally speaking, committed by states, crimes against humanity are committed by individuals. The former give rise to the responsibility of the state, the latter to the criminal responsibility of an individual. In line with the definition contained in Article 7 of the Rome Statute of the International Criminal Court, crimes against humanity are violent acts such as murder, torture or rape, which are committed as part of a widespread

or systematic attack directed against any civilian population, with knowledge of the attack. The categories of crimes against humanity and war crimes are not fully disjunctive. An individual may thus commit crimes of both categories by one single act.

The Mission was not able to conclude whether the Russian attacks on Ukraine *per se* could qualify as a widespread or systematic attack against a civilian population. Yet, it found credible evidence suggesting that at least some patterns of violent acts which had been repeatedly documented in the course of the conflict, such as targeted killing, rape, abductions or massive deportations of civilians, met this qualification. Violent acts of this type, committed as part of such an attack and with knowledge of it, constitute a crime against humanity. Similar as with war crimes, the Mission was not in the position to identify concrete individuals who could be held responsible for such crimes – as direct perpetrators or on account of command responsibility. This identification will be the task of other international or national bodies, such as national courts or the International Criminal Court.

Ensuring accountability for IHL and HR violations, war crimes and crimes against humanity

With regard to ensuring accountability for IHL and HR violations, war crimes and crimes against humanity the Report highlights the various relevant principles and obligations enshrined in accountability mechanisms at different levels including the pertinent courts, some of which are already at work, like the International Criminal Court or the Independent International Commission of Inquiry on Ukraine established by the UN Human Rights Council.

While the findings of this Report are – in part – necessarily preliminary due to the short period of investigation in the context of an ongoing armed conflict, in which constantly new evidence appears, they can inform other bodies' more in-depth investigations into legal accountability. The findings may also contribute to establish political accountability.

The Mission notes several ongoing initiatives on the collection and preservation of evidence on the global, regional and national levels by both public and private actors, like the "Global Platform to work for accountability following Russia's aggression against Ukraine" established by several states under the leadership of Denmark or the Platform for the Investigation of War Crimes in Ukraine by Ukrainian NGOs mentioned above. The main responsibility obviously is with the national authorities – in Ukraine and Russia and in every other State based upon the principle of universal jurisdiction. While it was able to contribute to a first collection and analysis of facts, more detailed investigations are necessary, in particular with regard to establishing individual criminal responsibility for war crimes. This is a task for the competent courts which can benefit from the collections of evidence by professional organizations and from the assessment of patterns and specific incidents by Missions of inquiry like our own.