

Quick sheet: The Enforcement of International Humanitarian Law in Ukraine (updated)

Introduction

Serious violations of international humanitarian law (“IHL”) and other international crimes must be investigated and prosecuted (if appropriate) by the state with jurisdiction over them. Since 2013 / 2014, Ukraine has seen numerous alleged serious violations of IHL and other international crimes carried out on its territory. As such, Ukraine is obliged to domestically prosecute these crimes. In order to assess Ukraine’s legal obligations in this regard and assist in efforts to investigate and prosecute relevant individuals, Global Rights Compliance (“GRC”) produced the report, “The Enforcement of International Humanitarian Law” in 2016, which was [updated](#) in 2022 (prior to the Russian invasion). This “**quick sheet**” provides an accessible introduction and summary of the background, objectives, and structure of the updated Report and highlights several of its most important conclusions.

Objectives and Structure of the Report (pp. 16-17)¹

The Report aims to provide useful guidance and recommendations to the Government of Ukraine and its prosecuting authorities on how to approach their international legal obligations to investigate and prosecute serious violations of IHL and other international crimes, within the current framework of the [Criminal Code of Ukraine](#) (“CCU”).

The Report is divided into four main parts. Part I (**pp. 18-21**) provides a brief overview of the ongoing situation in Crimea and the armed conflict in the Donbas region of eastern Ukraine and, through publicly available information, highlights the range of international crimes allegedly committed. Part II (**pp. 22-42**) offers a complete overview of Ukraine’s treaty-based and customary law obligations to prosecute serious violations of IHL and other international crimes, as well as its obligations with regards to prospective prosecutions at the International Criminal Court (“ICC”). Part III (**pp. 43-64**) explores the steps Ukraine has taken towards meeting those obligations by analysing a representative sample of Ukraine’s current investigation and prosecution of international crimes. Part IV (**pp. 64-67**) concludes that Ukraine is failing to meet its international obligations to adequately investigate and prosecute serious IHL violations and other international crimes that have occurred on its territory and, more specifically, that prosecutions thus far do not adequately address conduct affecting civilians. Finally, the Report’s Conclusion (**pp. 68-99**) makes several recommendations to Ukrainian prosecutors. The Report also has three annexes, with Annex A providing summaries of conflict-related cases prosecuted in Ukraine between September 2016 and April 2021, Annex B outlining the precise questions that the ICC will be required to address in relation to specific war crimes and Annex C listing which violations of the methods of warfare fall under Article 438 CCU, Draft Bill 2689, and international sources.

¹ Corresponding page numbers in the Report are indicated throughout the **quick sheet**.

Background to the Ukrainian Conflict (pp. 18-21)

Since the events surrounding the late 2013 and early 2014 “Revolution of Dignity” – where over 100 protesters and security personnel were killed – Ukraine has been deeply affected by armed conflict. At the end of February 2014, the Crimean Peninsula was occupied by unidentified armed men ([since acknowledged](#) to have been Russian military) who gained control over the area – to widespread international condemnation. Shortly after, eastern Ukraine also began to destabilise. In the regions of Donetsk and Luhansk, conflict broke out between armed separatists and law enforcement agencies. Thereafter, protracted armed conflict ensued and continues to the present day along largely static frontlines. Although efforts by the international community had been partially successful in reducing the intensity of the fighting, there is no clear end to the conflict in sight. Indeed, late 2021 and early 2022 has seen a [heightening of tensions](#) in the region. On 21 February 2022, Russia ultimately [moved troops into eastern Ukraine](#) after officially recognising the People’s Republics of Donetsk and Luhansk as independent states that same day. What is certain, however, is that since the beginning of hostilities in Ukraine, the armed conflict has led to serious human suffering. The ICC’s Office of the Prosecutor (“ICC OTP”) and multiple civil society and human rights organisations have reported a large number of alleged (serious) violations of IHL and other international crimes.

Since the publication of the Report, Russia has launched a ‘special military operation’ in Ukraine which has been considered [an act of aggression](#) by international organisations and states around the globe.² The invasion has caused major suffering to the citizens of Ukraine, and allegations of serious violations of IHL and international crimes have increased exponentially.³ As of 27 June 2022, the OHCHR has [recorded 10,631 civilian casualties](#) in the country.

What is International Criminal Law? What is its relationship with IHL? (pp. 22-42)

While international law has traditionally regulated the rights and responsibilities of States, international criminal law (“ICL”) addresses the criminal responsibility of individuals for international crimes. The ‘core’ international crimes, which are believed to “shock the conscience of humanity” and “threaten the peace, security and well-being of the world,”⁴ are genocide, war crimes, crimes against humanity and the crime of aggression. They are all part of customary international law and are included in the [Rome Statute](#) – the founding treaty of the ICC.⁵ The ICC, as a complementary court, will only act in situations where States are “unwilling or unable” to genuinely prosecute international crimes within their own jurisdiction.

² On 1 March 2022, the UN General Assembly adopted a resolution deploring Russia’s actions as an act of aggression against Ukraine: UNGA, ‘Aggression against Ukraine’ (1 March 2022) A/ES-11/L.1 available:

<https://www.documentcloud.org/documents/21314169-unga-resolution>

³ See: Amnesty International, ‘Russian military commits indiscriminate attacks during the invasion of Ukraine’ (25 February 2022) <https://www.amnesty.org/en/latest/news/2022/02/russian-military-commits-indiscriminate-attacks-during-the-invasion-of-ukraine/> accessed 29 June 2022; Human Rights Watch, ‘Ukraine: Apparent War Crimes in Russia-Controlled Areas’ (3 April 2022) <https://www.hrw.org/news/2022/04/03/ukraine-apparent-war-crimes-russia-controlled-areas> accessed 29 June 2022; OHCHR, ‘Ukraine: civilian casualty update’ (27 June 2022) <https://www.ohchr.org/en/news/2022/06/ukraine-civilian-casualty-update-27-june-2022> accessed 29 June 2022.

⁴ [Rome Statute](#), Preamble.

⁵ [Rome Statute](#), Articles 5-8*bis*.

As the title suggests, the Report primarily focuses on Ukraine’s enforcement of IHL – more specifically Ukraine’s treaty-based and customary obligations to investigate and prosecute ‘serious’ violations of IHL allegedly committed by its nationals or on its territory.⁶ Serious violations of IHL, which include “grave breaches” of the 1949 Geneva Conventions and their Additional Protocol I and other serious violations of the laws and customs of war in international and non-international armed conflicts, constitute war crimes in the context of ICL.⁷ In the first place, States should investigate and prosecute war crimes within their own domestic legal systems and, in theory, are flexible to use ordinary criminal charges instead of charges constituting international crimes.⁸ However, it is essential that the prosecution is meaningful, that the charges correspond to the gravity of the crime, and that the charges entail “effective penal sanctions”.

Ukraine and ICL (pp. 43-67)

The Report reflects on the recent efforts by Ukraine to investigate and prosecute conflict-related crimes within the domestic framework of the CCU by reviewing a total of 1,230 conflict-related cases dated from September 2016 to April 2021.⁹ Since 2020, in particular, there has been a significant increase in investigations and prosecutions of conflict-related crimes in Ukraine, especially conduct that appears to amount to serious violations of IHL and/or war crimes under Article 438 of the CCU.¹⁰ So far, however, only two criminal proceedings under Article 438 have resulted in the accused being found guilty of war crimes, of which one is being reviewed by the Supreme Court of Ukraine. In addition, there appears to be a pattern of charging “separatists” (or those suspected of assisting the military effort of the separatists in the east of Ukraine) for participation in the conflict; a pattern of charging “separatists” who organised referenda and/ or undertook or continued public service on the territories outside Ukraine’s control with crimes against state security of Ukraine, a pattern of generally prosecuting or charging Ukrainian (government/military) officials for a range of domestic crimes against the established order of military service and the occasional prosecution of conduct that may amount to IHL violations or other serious violations of international law by both parties to the conflict as domestic crimes. However, the majority of these prosecutions fail to fulfil the main objectives of IHL: the protection of civilians and those *hors de combat*. The charges and prosecutions often fail to properly reflect the gravity or range of the alleged conduct, eschew any focus on the treatment of civilians by combatants and are rather tied to the perpetrator’s status as separatist or negligent Ukrainian soldier.

The report therefore asserts that Ukraine is currently not fulfilling its obligations under IHL and ICL to investigate and prosecute international crimes – raising the question on the possible complementary jurisdiction of the ICC. While Ukraine is not a party to the Rome Statute, it has filed two declarations giving the ICC jurisdiction over crimes that occurred between 21 November 2013 and 22 February 2014 during the aforementioned “Revolution of Dignity” and over international crimes committed since the beginning of hostilities on the territory of Ukraine from 20 February 2014 to the present.

⁶ ICRC, [Customary IHL Study](#), Rule 158; [Geneva Convention I](#), Article 49; [Geneva Convention II](#), Article 50; [Geneva Convention III](#), Article 129; [Geneva Convention IV](#), Article 146; [Rome Statute](#), Preamble, paras 4,6, and Article 1.

⁷ ICRC, [Customary IHL Study](#), Rule 156; [Rome Statute](#), Article 8(2).

⁸ For example, according to the ICTY, serious breaches of IHL do not necessarily have to be charged as war crimes. *See* p. 24 of the Report.

⁹ *See* Annex A of the Report for a representative sample of these cases.

¹⁰ While Article 438 CCU is the main provision on war crimes, there are several other provisions within the CCU that allow for the prosecution of more specific crimes that amount to war crimes.



Since prosecuting large numbers of IHL and other international crimes is a highly technical and complex task, the Report offers the following practical recommendations for Ukraine's prosecutors to immediately move towards ensuring effective penal sanctions for such conduct:

- Follow international fair trial principles in charging international crimes (pp. 69-72) to ensure that decisions concerning case selection, prioritisation and charging are in line with the law and IHL and human rights principles. The criminal charges chosen should also be representative of the committed crimes.

Acknowledge the existence of an armed conflict in practice (pp. 72-76) to switch the focus towards prosecuting conduct as war crimes, since prosecutors need to prove the existence of an armed conflict as a contextual element of war crimes.

- Prosecute with reliance upon international crimes (under Article 438) (pp. 76-96) and other relevant Articles of the CCU governing international crimes.
- Use domestic crimes only when appropriate or when the relevant international crime is not available (pp. 96-97), most importantly ensuring that it incurs an appropriate penal sanction reflecting the gravity of the corresponding international crime.

Current Developments

Since the publication of the Report, but prior to the full-scale invasion by Russia, there had been [three war crimes convictions](#) in Ukraine. In May 2022, the Prosecutor General Iryna Venediktova announced that Ukrainian prosecutors had collected evidence of [15,000 potential cases](#) relating to war crimes. On 31 May 2022, the Prosecutor General [announced that Ukraine had begun prosecuting](#) 80 cases. The first conviction since the start of the invasion was handed down on 23 May 2022 to a Russian soldier [found guilty of murdering an unarmed civilian](#). The following week, two Russian artillerymen were found guilty of indiscriminately shelling civilian objects in Kharkiv and were sentenced. The Ukrainian government has established a [website platform](#) for the collection of evidence relating to human rights or war crimes violations for use in future judicial proceedings. The website invites representatives of human rights organisations, experts, victims or witnesses of such violations to submit evidence along with registration forms.

For up-to-date information and resources about the situation in Ukraine regarding the prosecution of international crimes, see the MATRA-Ukraine Project website: www.asser.nl/MATRA-Ukraine/.