

# **The Road to Justice**

## **Lessons for Ukraine From the USSR Invasion of Afghanistan**

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## Abstract

In February 1989, the Union of Socialist Republics' ('USSR') left Afghanistan following a ten-year invasion. Although an Action Plan for Peace, Reconciliation and Justice was drafted, in the quest for peace, justice for victims of the atrocities was never prioritised by authorities and the international community. Thirty-three years later, on 24 February 2022, President Putin of the Russian Federation announced the commencement of a 'special military operation' in Ukraine. Even as the invasion continues, questions remain as to how Ukraine will approach and implement transitional justice. Although there are clear differences between the invasions, if history is to be instructive, there is much to be learnt from the USSR invasion of Afghanistan, the response to it, and the Soviet legacy apparent in the Russian invasion of Ukraine which are of relevance to the transitional justice process in Ukraine and the international rule of law. Drawing on these historical perspectives, this paper aims to generate further discourse on peace, justice and accountability for victims, ensuring past mistakes are not repeated.

## Keywords

Afghanistan - Ukraine – Soviet legacy – transitional justice - accountability

## 1. Introduction

On 27 December 1979, the 40<sup>th</sup> Army of the former Union of Socialist Republics' ('USSR') Red Army launched an invasion of Afghanistan, which faced fierce opposition from the Afghan resistance forces (the 'Mojahedin').<sup>1</sup> Ten years later, in February 1989, under the United Nations ('UN')-mediated Agreements on the Settlement of the Situation Relating to Afghanistan ('Geneva Accords'), the final USSR soldier left the country. Described as 'the most consistent – and systematic – proponent of transitional justice' in Afghanistan, the Afghanistan Independent Human Rights Commission ('AIHRC') released a report in 2005 entitled 'A Call for Justice', which followed a national consultation on 'Afghans' experiences of the war and how they wanted to deal with the question of justice for past war crimes.<sup>2</sup> Based on this, the Action Plan for Peace, Reconciliation and Justice was drafted by the AIHRC and President's Office with support from the United Nations Assistance Mission in Afghanistan ('Action Plan').<sup>3</sup> However, in the quest for peace, the 'Call for Justice' on behalf of victims of the atrocities was left largely unmet by authorities and the international community.

Fast forward thirty-three years to 24 February 2022, when echoes of the USSR's invasion of Afghanistan could be heard in President Putin of the Russian Federation's ('Russia's') haunting announcement of the commencement of a 'special military operation' in Ukraine.<sup>4</sup> A Soviet legacy can be seen in a large part of Russia's approach to and conduct during the invasion of Ukraine thus far. The Working Group on the Reintegration of the Temporarily Occupied Territories, created in 2019 and tasked with developing Ukraine's transitional justice roadmap, 'continues to enhance the proposed transitional framework for Ukraine,

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1 M. Riepl, *Russian Contributions to International Humanitarian Law: A contrastive analysis of Russia's historical role and its current practice*, (Nomos, 2022), p. 133.

2 Afghanistan Independent Human Rights Commission, 'A Call for Justice: A National Consultation on past Human Rights Violations in Afghanistan', 2005, available at: <<https://www.refworld.org/pdfid/47fdfad50.pdf>>; P. Gossman and S. Kouvo, 'Tell us how this ends: Transitional Justice and Prospects for Peace in Afghanistan', Afghanistan Analysts Network, 2013, available at: <[https://www.afghanistan-analysts.org/wp-content/uploads/2013/06/2013-06\\_AAN\\_TransitionalJustice2.pdf](https://www.afghanistan-analysts.org/wp-content/uploads/2013/06/2013-06_AAN_TransitionalJustice2.pdf)>.

3 P. Gossman and S. Kouvo, 'Tell us how this ends: Transitional Justice and Prospects for Peace in Afghanistan', Afghanistan Analysts Network, 2013, available at: <[https://www.afghanistan-analysts.org/wp-content/uploads/2013/06/2013-06\\_AAN\\_TransitionalJustice2.pdf](https://www.afghanistan-analysts.org/wp-content/uploads/2013/06/2013-06_AAN_TransitionalJustice2.pdf)>.

4 'Full text: Putin's declaration of war on Ukraine', The Spectator, 24 February 2022, available at: <<https://www.spectator.co.uk/article/full-text-putin-s-declaration-of-war-on-ukraine>>.

including since Russia's full-scale invasion this year.<sup>5</sup> However, the criticisms of the parallel Draft Law on the Principles of State Policy of the Transition Period and the developments that the full-scale invasion have brought, mean that questions remain as to how Ukraine will approach and implement transitional justice.

The USSR invasion of Afghanistan and the Russian invasion of Ukraine should not be directly compared – they are both uniquely complex and can be distinguished *inter alia* in terms of legal classification, temporally, territorially, and in terms of the perpetrators and victims affected. Despite these divergences, if history is to be instructive, there is much to be learnt from the USSR invasion of Afghanistan, the response to it, and the Soviet legacy apparent in the Russian invasion of Ukraine which could shape the process for Ukraine, even as the invasion there continues. Drawing on these historical perspectives, this paper highlights key issues of relevance to transitional justice in Ukraine and the international rule of law, and provides selected conclusions and recommendations to the stakeholders involved. With the invasion of Ukraine ongoing, the authors aim to generate further discourse on peace, justice and accountability for victims, ensuring past mistakes are not repeated.

## 2. Historical Framing

Firstly, understanding the historical framing of the invasion of Ukraine by Russia is critical to the justice process. Putin sought to provide specific *ad bellum* legal justifications<sup>6</sup> for his so-called 'special military operation' in Ukraine: self-defence under Article 51(7) of the UN Charter in response to a security threat against Russia (and the Russian-recognised People's Republics of Donetsk and Luhansk); the people of Crimea and Sevastopol's right to self-determination under Article 1 of the UN Charter, and the 'genocide' occurring in Eastern Ukraine.<sup>7</sup> In fact, there was no armed attack or threat of an imminent armed attack against Russia, nor could there be a right to collective self-defence due to the lack of legal effect of the recognition by Russia of the independence of the Donetsk and Luhansk People's republics in the days prior to the invasion.<sup>8</sup> Furthermore, the International Court of Justice ordered provisional measures that it was 'not in possession of evidence substantiating the allegation of the Russian Federation that genocide has been committed on Ukrainian territory' and as a result 'that Ukraine has a plausible right not to be subjected to military operations by the Russian Federation for the purpose of preventing and punishing an alleged genocide in the territory of Ukraine'.<sup>9</sup>

Themes of imperialism and patriotism instead dominate the Russian rhetoric surrounding the invasion.<sup>10</sup>

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5 K. Busol, 'Mariupol and the Origins and Avenues of Ukraine's Transitional Justice Process', Just Security, 1 June 2022, available at: <<https://www.justsecurity.org/81680/mariupol-and-the-origins-and-avenues-of-ukraines-transitional-justice-process/>>.

6 J. A. Green, C. Henderson & T. Ruys, 'Russia's attack on Ukraine and the *jus ad bellum*' 2022 *Journal on the Use of Force and International Law* 9(1), pp. 4-30.

7 'Full text: Putin's declaration of war on Ukraine', The Spectator, 24 February 2022, available at: <<https://www.spectator.co.uk/article/full-text-putin-s-declaration-of-war-on-ukraine>>.

8 M. Milanovic, 'What is Russia's Legal Justification for Using Force against Ukraine?' EJIL: Talk! 24 February 2022, available at: <<https://www.ejiltalk.org/what-is-russias-legal-justification-for-using-force-against-ukraine/>>.

9 International Court of Justice, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Summary 2022/2, 16 March 2022, available at: <<https://www.icj-cij.org/public/files/case-related/182/182-20220316-SUM-01-00-EN.pdf>>.

10 T. Snyder, 'The War in Ukraine Is a Colonial War', The New Yorker, 28 April 2022, available at: <<https://www.newyorker.com/news/essay/the-war-in-ukraine-is-a-colonial-war>>; National WWII Museum, 'Remembrance of the Great Patriotic War and Russia's Invasion of Ukraine' (18 March 2022), available at: <<https://www.nationalww2museum.org/war/articles/great-patriotic-war-russia-invasion-ukraine>>.

Indeed, '[t]his technique of presenting contemporary events through a framework of a supposed historical equivalent [is] essential to government efforts to replay and make-present a heroic Russian past'.<sup>11</sup> Russia does so selectively, not only seeking to legitimise its policies, but also to create a 'revised understanding of patriotism' and Russian identity to garner support domestically.<sup>12</sup> The restoration of 'Soviet greatness' has been a narrative employed by Russia, along with the revival of 'Great Patriotic War' or 'de-Nazification' ideology.<sup>13</sup>

In Afghanistan, the USSR's invasion was justified under the Brezhnev Doctrine, a foreign policy promoted by USSR leader Brezhnev 'calling on the Soviet Union to intervene—including militarily—in countries where socialist rule was under threat'.<sup>14</sup> The USSR claimed that they had received a 'request from the Afghan Government for assistance against insurgent movements',<sup>15</sup> however historical records contradict this. Instead, a 'more conventional understanding [of the motivation for the invasion] was the desire by the Kremlin to prop up a fellow Communist state'.<sup>16</sup>

The Russian state employs memory of victories rather than losses, and thus due to the 'political embarrassment' of the invasion, Afghan veterans in Russia were, for many years after the invasion, denied heroic status.<sup>17</sup> Narratives of restoring Soviet greatness and revising Russian patriotism and identity have therefore engaged pro-Russian 'Afghantsy' to become fundamental supporters of the invasion in Ukraine. Considering the role of 'Combat Brotherhood' in drumming up domestic support in Russia for the invasion, a recent article has described the transformation of what began as collectives of 'disgruntled veterans' into 'the biggest ultranationalist cheerleader'.<sup>18</sup>

Deep consideration of the historical framing of the invasion of Ukraine and the role of the Soviet legacy in this regard is therefore critical to any transitional justice initiatives. As Busol and Hamilton argue, 'any understanding of the root causes of Russia's aggression, the policy element of Russia's crimes against humanity, and the Kremlin's potentially genocidal conduct now will be incomplete' without this.<sup>19</sup> This consideration is fundamental for criminal justice and case-building initiatives on the part of (inter)national investigatory and prosecutorial authorities and civil society organisations. Focusing on rhetoric as opposed to solely direct perpetration crimes will be essential in ensuring that the Russian leadership is held accountable.

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11 J. McGlynn, 'Reliving the Past: How the Russian Government and Media use History to Frame the Present' University of Oxford, 2020, available at: <<https://ora.ox.ac.uk/objects/uuid:2464a1de-88de-461d-a19d-a8f5dac6b828>>.

12 J. McGlynn, 'Reliving the Past: How the Russian Government and Media use History to Frame the Present' University of Oxford, 2020, p. 21, available at <<https://ora.ox.ac.uk/objects/uuid:2464a1de-88de-461d-a19d-a8f5dac6b828>>.

13 J. McGlynn, 'Reliving the Past: How the Russian Government and Media use History to Frame the Present' University of Oxford, 2020, pp. 142-3, available at <<https://ora.ox.ac.uk/objects/uuid:2464a1de-88de-461d-a19d-a8f5dac6b828>>.

14 See e.g. <<https://www.britannica.com/event/Brezhnev-Doctrine>>.

15 United Nations Good Offices Mission in Afghanistan and Pakistan (UNGOMAP), 'Background', available at: <<https://peacekeeping.un.org/mission/past/ungomap/background.html>>.

16 P. Baker, 'Why Did Soviets Invade Afghanistan? Documents Offer History Lesson for Trump', The New York Times, 29 January 2019, available at: <<https://www.nytimes.com/2019/01/29/us/politics/afghanistan-trump-soviet-union.html>>.

17 E. Hoge, 'The Legacy of the Soviet Afghan War and Its Role in the Ukrainian Invasion', *Lawfare*, 25 April 2022, available at: <<https://www.lawfareblog.com/legacy-soviet-afghan-war-and-its-role-ukrainian-invasion>>.

18 E. Hoge, 'The Legacy of the Soviet Afghan War and Its Role in the Ukrainian Invasion', *Lawfare*, 25 April 2022, available at: <<https://www.lawfareblog.com/legacy-soviet-afghan-war-and-its-role-ukrainian-invasion>>.

19 K. Busol and R. Hamilton, 'Transitional Justice in Ukraine: Guidance to Policymakers', Just Security, 2 June 2022, available at: <<https://www.justsecurity.org/81719/transitional-justice-in-ukraine-guidance-to-policymakers/>>.

In addition, given the conflict is still ongoing, further consideration of the Russian motives and rhetoric could also be beneficial in predicting how the invasion will continue and in determining the components of any peace agreement. It has been suggested that the invasion may become a war of attrition, or a ‘forever war’.<sup>20</sup> Concession of Ukrainian territory is not an issue on the table for Ukraine, and will only further feed into the Russian narratives outlined above.<sup>21</sup> Furthermore, one only has to consider the ‘forever war’ in Afghanistan to understand that such a situation may not only provide a breeding ground for insurgency and extremism (as well as a nuclear risk in the Ukrainian case), but most importantly it will heavily impact civilians in Ukraine.<sup>22</sup> The drive for peace should therefore be carefully navigated.

### 3. Institutional failures

Brutal tactics of warfare, from indiscriminate bombardments, to arbitrary arrests, mass killings and conflict-related sexual violence were not only employed in the USSR invasion of Afghanistan, but have characterised Russian involvement in conflicts since. From the earliest months of the USSR invasion of Afghanistan until the last USSR troops left in February 1989, no single tactic of war caused as much devastation nor killed as many Afghans as the relentless campaigns of aerial and artillery-fired bombardment of villages, including through the use of certain incendiary weapons.<sup>23</sup> The United Nations Special Rapporteur on the situation of human rights in Afghanistan at the time described ‘scenes of devastation... carefully constructed homes reduced to rubble, deserted towns, the charred remains of wheat fields, and trees cut down by immense firepower.’<sup>24</sup> For example, on 29 February 1980 USSR troops mounted an intensive air attack on Shigal, Asmar, Dangam and two other districts of Kunar Province, which resulted in the killing of hundreds of civilians and destruction of most of the villages. Furthermore, a bombing campaign which began in March 1987 and lasted for 40 days in the Jurm district of Badkhashan resulted in the death of at least 200 civilians and caused substantial damage to the majority of villages in the district, most of which needed to be evacuated.<sup>25</sup>

At the beginning of the Russian invasion of Ukraine, it was clear that Russia was adopting ‘a mass shelling campaign to instil fear, terror, destruction, chaos and to create conditions in which the civilian population flees en masse, then creating conditions in which eventually, even the largest urban territories will end up falling under their control.’<sup>26</sup> Human Rights Watch, for example, reported incidents such as the dropping of multiple unguided bombs on 3 March 2022 in a residential neighbourhood of Chernihiv,<sup>27</sup> and repeated airstrikes and shelling of densely populated areas in Kharkiv, which have ‘damaged civilian buildings, including apartment blocks, schools, places of worship, and shops, impeding access to food and medicines. They also damaged infrastruc-

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20 B. Marcetic, ‘Turning Ukraine Into Another Afghanistan Would Be a Disastrous Idea’, Jacobin, available at: <<https://jacobin.com/2022/03/ukraine-afghanistan-quagmire-far-right-global-economy-climate-disaster>>.

21 S. O’Rourke, ‘Territorial concessions by Kyiv would not bring peace, only ceasefire’, The Irish Times, 5 July 2022, available at: <<https://www.irishtimes.com/opinion/2022/07/05/territorial-concessions-by-kyiv-would-not-bring-peace-only-ceasefire/>>.

22 B. Marcetic, ‘Turning Ukraine Into Another Afghanistan Would Be a Disastrous Idea’, Jacobin, available at: <<https://jacobin.com/2022/03/ukraine-afghanistan-quagmire-far-right-global-economy-climate-disaster>>.

23 F. Ermacora, ‘Report on the Situation of Human Rights in Afghanistan Prepared in Accordance with Commission on Human Rights Resolution 1985/38 (UN Doc E/CN.4/1986/24), pp. 17-18.

24 Report of the Economic and Social Council, Situation of human rights in Afghanistan, Note by the Secretary-General, 5 November 1985 (A/40/843 (1985)), para 81.

25 This information was taken from notes for a AIHRC mapping of human rights report which was never officially published, but which author Nader Nadery led the documentation and writing of.

26 J. Keating, ‘What the horrors of Syria and Chechnya can tell us about Russia’s tactics in Ukraine’, GRID News, 29 March 2022, available at: <<https://www.grid.news/story/global/2022/03/29/terror-destruction-and-chaos-russian-tactics-in-ukraine-have-a-history/>>.

27 Human Rights Watch, ‘Ukraine: Russian Air-Dropped Bombs Hit Residential Area’, (10 March 2022), available at: <<https://www.hrw.org/news/2022/03/10/ukraine-russian-air-dropped-bombs-hit-residential-area>>.



ture in the city causing civilians to lose vital services such as electricity, heat, and water.’<sup>28</sup> A report by Amnesty International documented that 28 indiscriminate strikes were launched by Russian forces in the city of Kharkiv alone between 28 February and 30 April 2022.<sup>29</sup> Bellingcat has additionally conducted open-source investigations of ammunitions found in Ukraine and has verified the use of cluster munitions in urban areas.<sup>30</sup> Additionally, *Médecins Sans Frontières* reported that indiscriminate shelling has been utilised during the Ukrainian invasion with a lack of care to distinguish and protect citizens.<sup>31</sup> Recently, indiscriminate bombardment has been used in response to the strategic targeting by Ukrainian forces, for example of the Kerch bridge linking Crimea to Russia.<sup>32</sup> Ultimately, much like the USSR did in Afghanistan, and like that which has been seen in Syria and Chechnya, Russia continues to use bombardment as a key strategy in order to minimise its losses, but in doing so causing ‘indiscriminate carnage’ to civilians and civilian infrastructure.<sup>33</sup>

In Afghanistan, USSR forces massacred entire villages, using trained dogs to attack and kill civilians,<sup>34</sup> and ‘systematically entered all the houses executing the inhabitants including women and children often by shooting them in the head.’<sup>35</sup> As many as ten mass graves exist, where civilians were killed and buried by Soviet forces in the northern part of Herat city.<sup>36</sup> Persons detained by USSR forces accused of supporting the Mohajedin were deprived of all contact with their family, often held incommunicado. They would be interrogated by USSR ‘advisors’ continuously while different forms of torture techniques were used, including: electric shocks; pulling out nails, pulling out teeth; breaking back bones, burning with cigarettes; sleep deprivation; being forced to stand in snow bare foot; and being forced to sit on a bottle so that it penetrated the anus.<sup>37</sup> Throughout the USSR invasion, in the absence of due process and fair trial considerations, many of those accused of fighting against the USSR were summarily executed. Mass execution sites in Kerala of Kuner province and around Pul-e-Charkhi prison in Kabul are living evidence of these atrocities. In Ukraine, Russian forces have arrested civilians without procedure, subjecting them to ill-treatment and in some cases torture. Particularly well-documented cases include the ‘torture chamber network’ in Kharkiv,<sup>38</sup> and that of a Ukrainian interpreter and Radio France fixer who was held in captivity by Russian forces in freezing temperatures, beaten, tortured and deprived of food.<sup>39</sup> Amnesty International has documented extrajudicial and other unlawful killings in several villages and cities,

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28 Human Rights Watch, ‘Ukraine: Deadly Attacks Kill, Injure Civilians, Destroy Homes’, (18 March 2022), available at: <<https://www.hrw.org/news/2022/03/18/ukraine-deadly-attacks-kill-injure-civilians-destroy-homes>>.

29 Amnesty International, ‘“Anyone can die at any time”: Indiscriminate attacks by Russian forces in Kharkiv, Ukraine’ (13 June 2022), available at: <<https://www.amnesty.org/en/documents/eur50/5682/2022/en/>>.

30 Bellingcat, ‘These are the Cluster Munitions Documented by Ukrainian Civilians’ (11 March 2022), available at: <<https://www.bellingcat.com/news/rest-of-world/2022/03/11/these-are-the-cluster-munitions-documented-by-ukrainian-civilians/>>.

31 Medecins sans Frontieres, ‘No Mercy for Civilians – Troubling accounts from the MSF medical train in Ukraine’ (June 2022), available at: <<https://www.msf.org/data-and-patient-accounts-reveal-indiscriminate-attacks-against-civilians-ukraine-war>>.

32 M. Hunder and J. Landay, ‘Russia launches biggest air strikes since start of Ukraine war’, Reuters, 11 October 2022, available at: <<https://www.reuters.com/world/europe/russias-ria-state-agency-reports-fuel-tank-fire-kerch-bridge-crimea-2022-10-08/>>.

33 R. M. Cassidy Major, ‘Russia in Afghanistan and Chechnya: Military Strategic Culture and the Paradoxes of Asymmetric Conflict’, (2003) *US Army War College Press: Monographs, Books, and Publications*, p. 37.

34 F. Ermacora, ‘Report on the Situation of Human Rights in Afghanistan Prepared in Accordance with Commission on Human Rights Resolution 1985/38 (UN Doc E/CN.4/1986/24)’ (1986), p. 19.

35 M. Riepl, *Russian Contributions to International Humanitarian Law: A contrastive analysis of Russia’s historical role and its current practice*, (Nomos, 2022), p. 134, citing R. Reuveny and A. Prakash, ‘The Afghanistan War and the Breakdown of the Soviet Union’ (1999) *Review of International Studies* 25, p. 702.

36 Omar, ‘Mass grave in Ukraine revives Afghans’ memories of Soviet invasion’, Salaam Times, 27 April 2022, available at: <[https://afghanistan.asia-news.com/en\\_GB/articles/cnmi\\_st/features/2022/04/27/feature-01](https://afghanistan.asia-news.com/en_GB/articles/cnmi_st/features/2022/04/27/feature-01)>.

37 This information was taken from notes for a AIHRC mapping of human rights report which was never officially published, but which Nader Nadery led the documentation and writing of (see section 5).

38 A. Query, ‘How Russia organized its torture chamber network in Kharkiv Oblast’, The Kyiv Independent, 22 October 2022, available at: <<https://kyivindependent.com/national/how-russia-organized-its-torture-chamber-network-in-kharkiv-oblast>>.

39 OSCE, Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity committed in Ukraine since 24 February 2022, 12 April 2022, p. 18.

whereby ‘unarmed civilians in Ukraine are being killed in their homes and streets in acts of unspeakable cruelty and shocking brutality’.<sup>40</sup> Mass execution of civilians by Russian forces have been reported in Bucha, Mariupol and Iziium.<sup>41</sup>

Conflict-related sexual violence also occurred on a large scale in Afghanistan.<sup>42</sup> There were some reports of rape, torture, sexual violence and sexual bribes against male and female prisoners, and the family of prisoners held by USSR forces.<sup>43</sup> However, factors such as religion, collective shame and honour practices meant that much of the conflict-related sexual violence was hugely underreported. Although evident, it remained a specific form of violence that was very rarely spoken openly about or testified to. Harrowing accounts of the commission of conflict-related sexual violence in Ukraine by Russian forces on a scale which has been described as ‘difficult for many to comprehend’ are emerging.<sup>44</sup> As of 3 June 2022, the Human Rights Monitoring Team of the United Nations High Commissioner for Human Rights had received reports of 124 alleged acts of conflict-related sexual violence, occurring against women, girls, men and boys in Ukraine.<sup>45</sup> Furthermore, a national hotline has been set up, which has so far received reports of ‘rape, gang rape, pregnancy following rape, attempted rape, threats of rape, coercion to watch an act of sexual violence committed against a partner or a child, and forced nudity.’<sup>46</sup> Natalia Karbowska, Co-Founder and Director of Strategic Development of the Ukrainian Women’s Fund, stated that ‘the Russian Federation is using sexual violence and rape as terror to control civilians at the temporary occupied territories.’<sup>47</sup> Accounts have described Russian soldiers entering homes, raping women (including repeatedly<sup>48</sup>), sometimes killing the women, and also killing their husbands and burning down their homes.<sup>49</sup> One particular incident which was reported involved the systematic rape of twenty-five girls in a basement in Bucha

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40 Amnesty International, Ukraine: Russian forces extrajudicially executing civilians in apparent war crimes – new testimony’, 7 April 2022, available at: <<https://www.amnesty.org/en/latest/news/2022/04/ukraine-russian-forces-extrajudicially-executing-civilians-in-apparent-war-crimes-new-testimony/>>.

41 OSCE, Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity committed in Ukraine since 24 February 2022, 12 April 2022, p. 22; <https://www.theguardian.com/world/2022/sep/16/ukraine-mass-grave-with-440-bodies-discovered-in-recaptured-izium-says-police-chief>

42 E. Sciolino, ‘4 Soviet Deserters Tell of Cruel Afghanistan War’, The New York Times, 3 August 1984, available at: <<https://www.nytimes.com/1984/08/03/world/4-soviet-deserters-tell-of-cruel-afghanistan-war.html>>; L. Ahmad, ‘Sexual violence in War and Post-War Afghanistan’, Master Thesis at the Interuniversity Institute of Social and Peace Development, September 2013, p. 90, available at: <[http://repositori.uji.es/xmlui/bitstream/handle/10234/74347/TFM\\_Lida\\_Ahmad.pdf?sequence=1&isAllowed=y](http://repositori.uji.es/xmlui/bitstream/handle/10234/74347/TFM_Lida_Ahmad.pdf?sequence=1&isAllowed=y)>.

43 L. Ahmad, ‘Sexual violence in War and Post-War Afghanistan’, Master Thesis at the Interuniversity Institute of Social and Peace Development, September 2013, p. 90, available at: <[http://repositori.uji.es/xmlui/bitstream/handle/10234/74347/TFM\\_Lida\\_Ahmad.pdf?sequence=1&isAllowed=y](http://repositori.uji.es/xmlui/bitstream/handle/10234/74347/TFM_Lida_Ahmad.pdf?sequence=1&isAllowed=y)>.

44 B. MacKernan, ‘Rape as a weapon: huge scale of sexual violence inflicted in Ukraine emerges’, The Guardian, 4 April 2022, available at: <<https://www.theguardian.com/world/2022/apr/03/all-wars-are-like-this-used-as-a-weapon-of-war-in-ukraine>>; N. Paton Walsh, et al., ‘In Russian-Occupied Kherson, Allegations of Rape Emerge’, CNN, 28 April 2022, available at: <<https://edition.cnn.com/2022/04/27/europe/ukraine-kherson-russia-rape-intl/index.html>>; D. Sheridan, ‘Ukrainian Mother Raped by Russian Soldier as She Sheltered in School’, The Telegraph, 3 April 2022, available at: <<https://www.telegraph.co.uk/world-news/2022/04/03/young-ukrainian-mother-raped-russian-soldier-sheltered-school/>>; OSCE, Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity committed in Ukraine since 24 February 2022, 12 April 2022, p. 76; C. Engelbrecht, ‘Reports of sexual violence involving Russian soldiers are multiplying, Ukrainian officials say’ The New York Times, 29 March 2022, available at: <<https://www.nytimes.com/2022/03/29/world/europe/russian-soldiers-sexual-violence-ukraine.html>>.

45 UN, Sexual Violence ‘Most Hidden Crime’ Being Committed against Ukrainians, Civil Society Representative Tells Security Council’, SC/14926, 6 June 2022.

46 UN, Sexual Violence ‘Most Hidden Crime’ Being Committed against Ukrainians, Civil Society Representative Tells Security Council’, SC/14926, 6 June 2022.

47 UN, Sexual Violence ‘Most Hidden Crime’ Being Committed against Ukrainians, Civil Society Representative Tells Security Council’, SC/14926, 6 June 2022.

48 Human Rights Watch, ‘Ukraine: Apparent War Crimes in Russia-Controlled Areas’, 3 April 2022, available at: <<https://www.hrw.org/news/2022/04/03/ukraine-apparent-war-crimes-russia-controlled-areas?s=03>>.

49 Y. Limaye, ‘Ukraine conflict: ‘Russian soldiers raped me and killed my husband’’, BBC, 11 April 2022, available at: <<https://www.bbc.co.uk/news/world-europe-61071243>>.

by Russian forces, resulting in nine becoming pregnant.<sup>50</sup> Rape by the Russian forces of children, elderly women, and in front of family members has also been reported.<sup>51</sup>

The brutality in the Russian invasion of Ukraine and disregard for civilians is illustrative of continued Soviet influence within the Russian military. While broader ideology and rhetoric are at play, addressing institutional failings throughout military structures including a lack of education and training, combined with the patriarchal and hierarchal attitudes that are perpetuating such brutality will also be critical to ensuring sustainable peace. In terms of education and training, the Russian army is composed of conscripts and a contract-based professional force.<sup>52</sup> The military education system employed in Russia to date is largely inherited from that same system which existed in the USSR, with ongoing reforms aiming to preserve traditions of military education in the former USSR.<sup>53</sup> Under Russian law, all able-bodied men aged 18 to 27 years are subject to conscription for 1 year of military service in the Russian armed forces.<sup>54</sup> New conscripts supposedly obtain 1-2 months of basic training followed by 3-6 months of advanced training, and indeed current law in Russia only requires 4-months of training.<sup>55</sup> There is one basic training site: 'The Hatsavita Mountain Training Center' in Labinsk in South Russia.<sup>56</sup> When an individual signs a contract with the Russian army, the Russian Defence Ministry website states that an intensive four week combined armed training with a survival course is essential.<sup>57</sup> However, when Russia sent troops to Belarus in November 2021 for example, it was suggested that some who signed military contracts only received days of training and were wholly unprepared.<sup>58</sup> In the case of the Ukrainian invasion, the professional Russian army is limited,<sup>59</sup> with Putin even announcing on 21 September 2022 the mobilisation of 300,000 reservists, who may only have up to two weeks of training.<sup>60</sup>

In addition, there is a lack of transparent information as to the extent of international humanitarian law ('IHL')

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50 M. O'Brien and N. Quinevet, 'Sexual and Gender-Based Violence against Women in the Russia-Ukraine Conflict' *EJIL: Talk!*, 8 June 2022, available at: <<https://www.ejiltalk.org/sexual-and-gender-based-violence-against-women-in-the-russia-ukraine-conflict/>>; N. Vasilyeva, 'Nine Women and Girls in Bucha Pregnant After Being Raped by Russian Soldiers, Kyiv Says', *The Telegraph*, 12 April 2022, available at: <<https://www.telegraph.co.uk/world-news/2022/04/12/nine-women-girls-bucha-pregnant-raped-russian-soldiers-kyiv/>>; C. Gall, 'Bucha's Month of Terror', *NYT*, 11 April 2022, available at: <<https://www.nytimes.com/interactive/2022/04/11/world/europe/bucha-terror.html>>.

51 M. O'Brien and N. Quinevet, 'Sexual and Gender-Based Violence against Women in the Russia-Ukraine Conflict' *EJIL: Talk!*, 8 June 2022, available at: <<https://www.ejiltalk.org/sexual-and-gender-based-violence-against-women-in-the-russia-ukraine-conflict/>>.

52 K. Stepanenko, F. W. Kagan, B. Babcock-Lumish, 'Explainer on Russian Conscription, Reserve, and Mobilization' (*Institute for the Study of War*, 5 March 2022), available at: <<https://www.understandingwar.org/backgroundunder/explainer-russian-conscription-reserve-and-mobilization#:~:text=New%20conscripts%20undergo%20a%20one, arriving%20at%20their%20assigned%20units>>. Note that Russia also uses private military contractors such as the Wagner Group, and less formalised fighters such as those under the command of the head of the Chechen Republic, Kadyrov, however discussion of these are beyond the scope of this paper.

53 K. Kraj, 'The System of Military Higher Education in the Russian Federation' (2019) *Bezpieczeństwo* 3, available at: <https://btp.ka.edu.pl/pdf/2019-3/btip2019-3-kraj.pdf>

54 R. Novosti, "Призыв на военную службу в РФ" [*Call for military service in the Russian Federation*] (1 October 2021), available at: <<https://ria.ru/20211001/prizyv-1752351899.html>>.

55 K. Stepanenko, F. W. Kagan, B. Babcock-Lumish, 'Explainer on Russian Conscription, Reserve, and Mobilization' (*Institute for the Study of War*, 5 March 2022), available at: <<https://www.understandingwar.org/backgroundunder/explainer-russian-conscription-reserve-and-mobilization#:~:text=New%20conscripts%20undergo%20a%20one, arriving%20at%20their%20assigned%20units>>.

56 See <https://twitter.com/markhertling/status/1572571676524838915>.

57 A.Tenisheva, 'Russia Sends Army Recruits to Fight in Ukraine After Just Days of Training', *The Moscow Times*, 22 July 2022, available at: <<https://www.themoscowtimes.com/2022/07/20/russia-sends-army-recruits-to-fight-in-ukraine-after-just-days-of-training-a78314>>.

58 A.Tenisheva, 'Russia Sends Army Recruits to Fight in Ukraine After Just Days of Training', *The Moscow Times*, 22 July 2022, available at: <<https://www.themoscowtimes.com/2022/07/20/russia-sends-army-recruits-to-fight-in-ukraine-after-just-days-of-training-a78314>>.

59 S. B. Freeman and K. Kjellstrom Elgin, 'What the use of Russian conscripts tells us about the war in Ukraine' (*Politico*, 17 March 2022), available at: <<https://www.politico.eu/article/what-the-use-of-russia-conscripts-tells-us-about-the-war-in-ukraine/>>.

60 See <<https://www.aljazeera.com/news/2022/9/21/russias-putin-orders-partial-mobilisation-what-did-he-say>>; and <<https://www.csis.org/analysis/what-does-russias-partial-mobilization-mean>>.



training in the Russian military system and how far this feeds into the Rules of Engagement to be followed by their forces.<sup>61</sup> The Russian government has released public statements acknowledging its obligations under IHL and has proclaimed to provide training to the Russian Armed Forces on their IHL obligations.<sup>62</sup> Additionally, the ICRC has given training on IHL to Russian armed forces in the past. However, the content and recipients of the Russian government-provided training is not fully known, and it is unclear to what extent the ICRC has remained active in Russia in this regard. Overall, the lack of training, combined with harsh penalties imposed for voluntary surrender and desertification, lead to a pressure from within the system to fight irregardless of experience or the cost to civilians.<sup>63</sup>

Moreover, during the USSR invasion of Afghanistan, internal hierarchies contributed to difficulty in bonding amongst USSR soldiers and thus resulted in low morale.<sup>64</sup> Research has suggested that differences in rank as well as between those who had served longer and the newer recruits precluded positive experiences.<sup>65</sup> Notably, these pressures ‘were usually vented in senseless cruelty – not only towards Afghans but also towards [their fellow comrades]’.<sup>66</sup> Low morale and a culture of violence with impunity continues to permeate the Russian military. The ‘dedovshchina’ or ‘rule of grandfathers’, is a form of initiation or hazing involving brutality towards new young conscripts, including rape. This behaviour has been considered by the European Court of Human Rights to be a ‘gross abuse of human rights’.<sup>67</sup> This practice remains ongoing in the Russian military today with a 2019 report indicating that the situation is getting worse.<sup>68</sup> Additionally, there is a culture of ‘toxic masculinity’, in which competitiveness between male soldiers as to their masculinity is the norm.<sup>69</sup> The lack of an organisational structure, in which professional non-conscript commanders are accountable for the actions of their subordinates,<sup>70</sup> also contributes to the lack of discipline and a coercive environment with impunity. Combined, these factors all serve as a barrier to professionalism within the Russian armed forces.<sup>71</sup>

A further illustration of this point is that conflict-related sexual violence committed by Russian forces has been evident for over 70 years and appears to be a demonstration of a gendered view in keeping with ‘loyalty’ to comrades, power, and humiliation.<sup>72</sup> In Russia, domestic violence only attracts administrative penalties, and

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61 A. Demus and O. Younossi, ‘Reopening Old Wounds: Two Stories, One Lesson’, RAND Blog, 16 April 2022, available at: <<https://www.rand.org/blog/2022/04/reopening-old-wounds-two-stories-one-lesson.html>>.

62 Prikaz Ministra oborony Rossiiskoi Federatsii “O merakh po sobliudeniю norm mezhdunarodnogo prava v Vooruzhennykh Silakh Rossiiskoi Federatsii” No 360 ot 8 avgusta 2001 [Order by the Minister of Defence of the Russian Federation No 360, “On Measures to Ensure Respect for International Humanitarian Law by the Armed Forces of the Russian Federation”, August 8, 2001].

63 See e.g. <<https://www.rferl.org/a/russia-penalty-desertion-surrender/32049445.html>>.

64 M. Galeotti, *Afghanistan: The Soviet Union’s Last War* (1st edn, Routledge 1995), pp 34-35.

65 A. Heinamaa, M. Lapanen and Y. Yurchenko, *The Soldiers’ Story: Soviet Veterans Remember the Afghan War* (University of California at Berkeley, 1994) p. 11.

66 A. Heinamaa, M. Lapanen and Y. Yurchenko, *The Soldiers’ Story: Soviet Veterans Remember the Afghan War* (University of California at Berkeley, 1994) p. 11.

67 M. O’Brien and N. Quinevet, ‘Sexual and Gender-Based Violence against Women in the Russia-Ukraine Conflict’ *EJIL: Talk!*, 8 June 2022, available at: <<https://www.ejiltalk.org/sexual-and-gender-based-violence-against-women-in-the-russia-ukraine-conflict/>>; *Peredeventsey v Russia*, Judgement of the European Court of Human Rights, Application No 39583/05, para 99, available at: <[https://hudoc.echr.coe.int/eng#{"itemid":\["001-142516"\]}](https://hudoc.echr.coe.int/eng#{)>.

68 See <https://www.documentcloud.org/documents/21042968-dedovshchina-v-rossiiskoi-armii-2019>

69 M. O’Brien and N. Quinevet, ‘Sexual and Gender-Based Violence against Women in the Russia-Ukraine Conflict’ *EJIL: Talk!*, 8 June 2022, available at: <<https://www.ejiltalk.org/sexual-and-gender-based-violence-against-women-in-the-russia-ukraine-conflict/>>.

70 A. Exum, ‘The Russian Military Has Descended Into Inhumanity’, *The Atlantic*, 6 April 2022, available at: <<https://www.theatlantic.com/ideas/archive/2022/04/bucha-ukraine-bodies-russian-military-crimes/629485/>>.

71 M. N. Posard and K. Holynska, ‘Russia’s Problems with Military Professionalization’ (RAND Blog, 21 March 2022, available at: <<https://www.rand.org/blog/2022/03/russias-problems-with-military-professionalization.html>>.

72 M. O’Brien and N. Quinevet, ‘Sexual and Gender-Based Violence against Women in the Russia-Ukraine Conflict’ *EJIL: Talk!*, 8 June 2022, available at: <<https://www.ejiltalk.org/sexual-and-gender-based-violence-against-women-in-the-russia-ukraine-conflict/>>.

within the Russian military, female soldiers are subjected to beauty contests and ultimately, exclusion.<sup>73</sup> In the case of the USSR in World War II, ‘rapes were not only a display of masculine power over other women but also reinforced the bonds between Soviet soldiers, and sent a signal to German men, unable to protect women.’<sup>74</sup>

Ultimately, investing in education and training should be a key component in addressing the root causes of the crimes committed, including archaic patriarchal and hierarchal attitudes which have filtered through military structures, to ensure similar patterns are not repeated again.

#### 4. Peace or justice?<sup>75</sup>

Afghanistan has been plagued by sustained impunity with respect to the injustices that have occurred. The Afghan population’s and especially victim groups’ continued advocacy for justice have remained consistent since 1989. The consultation carried out by AIHRC and the subsequent report ‘A Call for Justice’ received overwhelming support. Although an accountability mechanism was envisaged in the Action Plan drawn up by representatives of the President’s Office, the AIHRC, and UNAMA and supported by the EU and the Netherlands, the drive for short-term security was prioritised, following the policy of ‘peace now, justice later’ promulgated by Afghan authorities and the international community.<sup>76</sup>

In Ukraine, the picture is radically different. Transitional justice initiatives in ongoing conflicts prompt a complex dual-facing approach between accounting for the past, but also looking to the future.<sup>77</sup> In 2021, 54 percent of Ukrainians supported discussions on transitional justice even amid ongoing conflict, with only 11.5 percent in favour of waiting until after the Russian occupation ended.<sup>78</sup> Often peace takes priority in such a case due to a lack of political resources to dedicate to justice processes, however, accountability has always been the highest priority for the Ukrainian people.<sup>79</sup> Since the beginning of the invasion, and as the conflict continues, the drive for accountability by the Ukrainian authorities and the international community has been unprecedented. Following the invasion, the International Criminal Court (‘ICC’) opened an investigation into the situation in Ukraine, on the basis of the December 2020 conclusions of the Office of the Prosecutor’s preliminary examination.<sup>80</sup> The investigation was opened on 2 March 2022, following the referral by 39 Member States, and covers any allegations of war crimes, crimes against humanity or genocide committed on any part of the territory of Ukraine by any person from 21 November 2013 onwards.<sup>81</sup> Several European countries have initiated universal jurisdiction investigations, including Poland, Germany, Spain, Estonia, Lithuania, Slovakia, France, Norway, Latvia, Sweden,

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73 M. O’Brien and N. Quinevet, ‘Sexual and Gender-Based Violence against Women in the Russia-Ukraine Conflict’ *EJIL: Talk!*, 8 June 2022, available at: <<https://www.ejiltalk.org/sexual-and-gender-based-violence-against-women-in-the-russia-ukraine-conflict/>>.

74 M. O’Brien and N. Quinevet, ‘Sexual and Gender-Based Violence against Women in the Russia-Ukraine Conflict’ *EJIL: Talk!*, 8 June 2022, available at: <<https://www.ejiltalk.org/sexual-and-gender-based-violence-against-women-in-the-russia-ukraine-conflict/>>.

75 A. N. Nadery, ‘Peace or Justice? Transitional Justice in Afghanistan’ 2007 *International Journal of Transitional Justice* 1(1) 173.

76 P. Gossman and S. Kouvo, ‘Tell us how this ends: Transitional Justice and Prospects for Peace in Afghanistan’, Afghanistan Analysts Network, 2013, available at: <[https://www.afghanistan-analysts.org/wp-content/uploads/2013/06/2013-06\\_AAN\\_TransitionalJustice2.pdf](https://www.afghanistan-analysts.org/wp-content/uploads/2013/06/2013-06_AAN_TransitionalJustice2.pdf)>.

77 Peacerep, ‘The Role of Transitional Justice in Ukraine’, 18 May 2022, available at: <<https://peacerep.org/2022/05/18/the-role-of-transitional-justice-in-ukraine/>>.

78 K. Busol, ‘Mariupol and the Origins and Avenues of Ukraine’s Transitional Justice Process’, Just Security, 1 June 2022, available at: <<https://www.justsecurity.org/81680/mariupol-and-the-origins-and-avenues-of-ukraines-transitional-justice-process/>>.

79 K. Busol, ‘Mariupol and the Origins and Avenues of Ukraine’s Transitional Justice Process’, Just Security, 1 June 2022, available at: <<https://www.justsecurity.org/81680/mariupol-and-the-origins-and-avenues-of-ukraines-transitional-justice-process/>>.

80 Ukraine accepted the jurisdiction of the ICC by declarations under Article 12 (3) of the Rome Statute giving the ICC jurisdiction over crimes perpetrated in the territory of Ukraine from November 2013 onward.

81 Note that further States have referred the situation, including Japan, since. *See* e.g. ‘Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine’, 11 March 2022, online at <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-additional-referrals-japan-and>

Switzerland and Romania.<sup>82</sup> A joint investigation team between Ukraine, Lithuania, Poland and the Office of the Prosecutor at the ICC has been set up with the support of Eurojust.<sup>83</sup> The Ukrainian Office of the Prosecutor General is also carrying out the majority of the work, with its War Crimes Department being supported by an Atrocity Crimes Advisory Unit, and Mobile Justice Teams consisting of international legal and investigatory experts.<sup>84</sup> Momentum is also building for the creation of a Special Tribunal for the Crime of Aggression against Ukraine.<sup>85</sup>

In the case of Afghanistan, while the Geneva Accords were pitched to Afghans as a peace agreement, ultimately, ignorance of criminal justice and the promotion of a state of impunity by authorities in favour of peace did not serve the interest of victims, and resulted in more violence and insecurity, demonstrating that this was not conducive to sustainable peace.<sup>86</sup> It also was not reflective of victims wishes – over 76% respondents to the ‘A Call for Justice’ consultations favoured prioritising criminal justice initiatives, demonstrative of the ‘perception is that war criminals are a source of instability, and that measures that seek to deal with them will enhance security’.<sup>87</sup> In the Ukrainian context, the motivation towards criminal accountability of Russian perpetrators is clear, however it is important that criminal justice initiatives are effective, do not become fragmented, that Ukraine maintains ownership of the process (while still ensuring the impartiality of it), and, as should have been the case in Afghanistan, that the accountability process is led by the victim’s interests.

In this sense, concerns that the introduction of a legal procedure in Ukraine in July 2022, which allows prisoners of war accused of international crimes to be released from detention and exchanged (while the criminal proceedings against them continue *in absentia*), amount to a *de facto* amnesty should be carefully considered.<sup>88</sup> Ukraine’s law on cooperation with the ICC of 3 May 2022 which allows for cooperation on the investigation and prosecution *only* of those who ‘were subject to and/or acted with the aim of carrying out armed aggression against Ukraine, and/or on the basis of decisions (orders, directives, etc.) of officials, military command, or public authorities of the Russian Federation or another State that carried out aggression or facilitated its implementation against Ukraine’ is also problematic in that it does not address victims of any crimes by the Ukrainian side.<sup>89</sup> An original criticism of the Draft Law on the Principles of State Policy of the Transition Period prior to the invasion was that it was ‘one-sided, because it focused exclusively on the consequences of Russia’s aggression and occupation (articles 1.1(4), 2.4, 13.1), and thus risked inaction in case of possible violations by Ukrainian actors, even if far less prevalent’.<sup>90</sup> While it is important to aim for the Russian leadership, symbolic trials *in absentia*

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82 Annegret Hartig, ‘Domestic Criminal Courts as Gap-Fillers? Avoiding Impunity for the Commission of the Crime of Aggression against Ukraine’, *Völkerrechtsblog*, 12 April 2022, online at <https://voelkerrechtsblog.org/domestic-criminal-courts-as-gap-fillers/> (accessed on 4 May 2022); <https://www.wsj.com/livecoverage/russia-ukraine-latest-news-2022-03-08/card/germany-opens-investigation-into-suspected-russian-war-crimes-in-ukraine-bNCphaIWE30f2REH8BCi>; <https://notesfrompoland.com/2022/03/17/icc-chief-prosecutor-thanks-poland-for-support-investigating-war-crimes-in-ukraine/>.

83 Eurojust, ‘ICC participates in joint investigation team supported by Eurojust on alleged core international crimes in Ukraine’, Press release, 22 April 2022, online at <https://www.eurojust.europa.eu/news/icc-participates-joint-investigation-team-supported-eurojust-alleged-core-international-crimes> (accessed 4 May 2022).

84 See e.g. <<https://www.gov.uk/government/news/joint-statement-eu-us-and-uk-establish-atrocity-crimes-advisory-group-aca-for-ukraine>>.

85 See e.g. European Parliament resolution of 19 May 2022 on the fight against impunity for war crimes in Ukraine (2022/2655(RSP)), and I. Koshiw, ‘Ukraine calls for international tribunal to bring Putin to justice more quickly’, *The Guardian*, 21 July 2022, available at: <<https://www.theguardian.com/world/2022/jul/21/ukraine-calls-for-international-tribunal-to-bring-putin-to-justice-more-quickly>>.

86 A. N. Nadery, ‘Peace or Justice? Transitional Justice in Afghanistan’ 2007 *International Journal of Transitional Justice* 1(1) 173.

87 Afghanistan Independent Human Rights Commission, ‘A Call for Justice: A National Consultation on past Human Rights Violations in Afghanistan’, 2005, available at: <<https://www.refworld.org/pdfid/47fdfad50.pdf>>, p. 17.

88 J. Crawford, ‘UN Points to Russian Crimes and Ukraine Justice Challenges’, *Justiceinfo.net*, 11 October 2022, available at: <<https://www.justiceinfo.net/en/107587-un-points-to-russian-crimes-and-ukraine-justice-challenges.html>>.

89 K. Ambos, ‘Ukrainian Prosecution of ICC Statute Crimes: Fair, Independent and Impartial?’, *EJIL:Talk!*, 10 June 2022, available at: <<https://www.ejiltalk.org/ukrainian-prosecution-of-icc-statute-crimes-fair-independent-and-impartial/#:~:text=Last%20but%20not%20least%2C%20concerns,been%20signed%20by%20President%20Zelenskyy.>>

90 K. Busol, ‘Mariupol and the Origins and Avenues of Ukraine’s Transitional Justice Process’, *Just Security*, 1 June 2022, available at: <<https://www.justsecurity.org/81680/mariupol-and-the-origins-and-avenues-of-ukraines-transitional-justice-process/>>.

or trials which are driven by a select number of Western states (who have not engaged themselves with existing international criminal justice initiatives in other contexts), with limited Ukrainian representation or components, or without global support, may raise issues of legitimacy or efficacy. It is also questionable whether such criminal justice processes would be truly victim-centric. For example, while targeting the leadership's rhetoric and ideologies is key, personification of the invasion through Putin and Lavrov may neglect crimes committed by lower-level perpetrators and victims of specific categories of crimes such as conflict-related sexual violence. Resources should therefore also be directed towards enhancing the capacity of the Ukrainian national criminal justice actors who will be tasked with investigating, prosecuting and adjudicating these cases. Victims should be consulted at the outset of designing the justice process as occurred in Afghanistan, and at all stages throughout.

## 5. Documentation

Documentation for truth-telling and the preservation of memory were both envisaged in the Action Plan in Afghanistan. The United Nations created a Special Rapporteur on the situation of human rights in Afghanistan in 1984, however he unfortunately was not able to travel in-country, meaning his reports were based on interviews from refugees and journalists. The United Nations Office of the High Commissioner for Human Rights decided to 'conduct a limited mapping exercise' which was never officially published but indirectly made its way into the public domain.<sup>91</sup> In 2006, the AIHRC began efforts to document major incidents and patterns of war crimes in Afghanistan from 1978 to 2001, including analysis of the chain of command of the parties involved, however its final report was never released.

Ultimately, despite documentation being available, it never fed into any official truth-seeking exercise or was recognised as important to the national reconciliation process.<sup>92</sup> Those involved in the conflict also did not commit to records they held being made available for scrutiny. For example, although Soviet officials most likely 'kept records of the many arrests and summary trials, the names and sentences of those imprisoned, and the military campaigns in the countryside that targeted mujahedin insurgents and the civilians who supported them' many of these records were likely removed following the Soviet departure or kept classified.<sup>93</sup> Although some efforts were made towards memorialisation – for example, the erection of the memorial in Dasht-e Shohada, and 'A Way from Darkness' (Rah-i az meyan tarik) in Herat, in the absence of comprehensive and publicly available documentation and preservation of memory, a coherent narrative of the past was never achieved.<sup>94</sup>

In contrast, in response to the Russian invasion of Ukraine, a vast number of actors have been involved in documentation, including national civil society organisations, international non-governmental organisations, and open-source investigators, together with national law enforcement agencies, international investigators, and the UN Commission of Inquiry. The sheer number of initiatives, however, makes the documentation process complex. Documentation is currently decentralised, and may therefore be duplicated, in some cases running the risk that victims could be re-traumatised due to repeated interviews, and also leading to fatigue on the part of victims and witnesses. There are also varying purposes of the documentation. For example, many involved in the documentation process have made clear that their efforts are being conducted with the aim of feeding evidence into criminal justice processes, however questions as to how this will be operationalised in practice, especially given the diversity of the processes and lack of cooperation protocols, remain. It is also important to

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91 P. Gossman and S. Kouvo, 'Tell us how this ends: Transitional Justice and Prospects for Peace in Afghanistan', Afghanistan Analysts Network, 2013, p. 22, available at: <[https://www.afghanistan-analysts.org/wp-content/uploads/2013/06/2013-06\\_AAN\\_TransitionalJustice2.pdf](https://www.afghanistan-analysts.org/wp-content/uploads/2013/06/2013-06_AAN_TransitionalJustice2.pdf)>.

92 P. Gossman and S. Kouvo, 'Tell us how this ends: Transitional Justice and Prospects for Peace in Afghanistan', Afghanistan Analysts Network, 2013, p. 24, available at: <[https://www.afghanistan-analysts.org/wp-content/uploads/2013/06/2013-06\\_AAN\\_TransitionalJustice2.pdf](https://www.afghanistan-analysts.org/wp-content/uploads/2013/06/2013-06_AAN_TransitionalJustice2.pdf)>.

93 P. Gossman and S. Kouvo, 'Tell us how this ends: Transitional Justice and Prospects for Peace in Afghanistan', Afghanistan Analysts Network, 2013, p. 19, available at: <[https://www.afghanistan-analysts.org/wp-content/uploads/2013/06/2013-06\\_AAN\\_TransitionalJustice2.pdf](https://www.afghanistan-analysts.org/wp-content/uploads/2013/06/2013-06_AAN_TransitionalJustice2.pdf)>.

94 P. Gossman and S. Kouvo, 'Tell us how this ends: Transitional Justice and Prospects for Peace in Afghanistan', Afghanistan Analysts Network, 2013, pp. 38-39, available at: <[https://www.afghanistan-analysts.org/wp-content/uploads/2013/06/2013-06\\_AAN\\_TransitionalJustice2.pdf](https://www.afghanistan-analysts.org/wp-content/uploads/2013/06/2013-06_AAN_TransitionalJustice2.pdf)>.



remember the truth-seeking and preservation of memory purposes of documentation.<sup>95</sup> Regardless of the exact purpose, a lesson that can be learnt from Afghanistan is that a *coherent* narrative of the invasion and the impact on victims should be built through documentation. In this sense, those involved in documentation should also consider the wider rhetoric (as described in Section 2), and further consideration should be made to military records held by the Ministry of Justice, among other institutions, which could be highly valuable. It is fundamental that documentation efforts are further coordinated in Ukraine towards this ultimate goal.<sup>96</sup>

## 6. The role of the international community

Justice for Ukraine should be unique to its context. However, just as the USSR invasion of Afghanistan ultimately preceded the breakup of the USSR, the invasion of Ukraine by Russia is also a pivotal moment in the ‘future world order’.<sup>97</sup> While ‘[t]he level of international protest, sanctions and media coverage diminished after the initial outcry over the large-scale Soviet intervention in December 1979’,<sup>98</sup> the wider role of the international community in terms of the maintenance of international peace and security following the Russian invasion of Ukraine should be considered. In its rhetoric surrounding the Ukrainian invasion, Russia has demonstrated legal nihilism,<sup>99</sup> in that it appears to view international law as an ‘instrument of power’,<sup>100</sup> ultimately resulting in its refusal to engage with international legal processes.

When Russian Foreign Minister Sergey Lavrov addressed the UN General Assembly in 2019, he stated:

In our view, the reason for the current state of affairs lies, first and foremost, in the unwillingness of the countries which declared themselves the winners in the Cold War to reckon with the legitimate interests of all other states, to accept the objective course of history.<sup>101</sup>

As a result, he stated that ‘[leading] Western countries’ are trying to ‘impose standards of conduct based on the narrow Western interpretation of liberalism on others’ in the name of the “rules-based order”, ultimately aiming:

to revise the norms of international law which no longer suit the West, to substitute it for the “rules” adjusted to its self-serving schemes which are elaborated depending on the political expediency, and to proclaim the West and only the West as an indisputable source of legitimacy.<sup>102</sup>

Much of the same language was used in Putin’s speech announcing his ‘special military operation’ in Ukraine.

However, Russia itself manipulates international law, as seen in Putin’s debunked *ad bellum* legal justifications<sup>103</sup> for his so-called ‘special military operation’ in Ukraine outlined in Section 2. Furthermore, Russia has denied the application of IHL or the facts which underpin allegations of breaches, an approach that has derived

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95 See, e.g. the work of organisations such as the Lemkin Centre, <<https://instytutpileckiego.pl/en/instytut/aktualnosci/centrum-dokumentowania-zbrodni-rosyjskich-w-ukrainie-im>>, or the Institute for Peace and Common Ground based in Kyiv.

96 K. Busol and R. Hamilton, ‘Transitional Justice in Ukraine: Guidance to Policymakers’, Just Security, 2 June 2022, available at: <<https://www.justsecurity.org/81719/transitional-justice-in-ukraine-guidance-to-policymakers/>>.

97 I. Brunk and M. Hakimi, ‘Russia, Ukraine, and the Future World Order’, 2022 *American Journal of International Law* 116(4) 687.

98 W.M. Riesman and J. Silk, ‘Which Law Applies to the Afghan Conflict?’, 1988 *The American Journal of International Law* 82(3), p. 459.

99 The Finnish Institute of International Affairs, Webinar: ‘Russian Approaches to International Law’, 21 April 2022, available at: <<https://www.youtube.com/watch?v=y4MFLWVFDDI>>.

100 C. von Gall, ‘Russia’s Approaches to International Humanitarian Law’, *Voelkerrechtsblog*, 13 April 2022, available at: <<https://voelkerrechtsblog.org/russias-approaches-to-international-humanitarian-law/>>.

101 Statement by H. E. Sergey Lavrov, Minister of Foreign Affairs of the Russian Federation at the 74<sup>th</sup> Session of the UN General Assembly, 27 September 2019, available at: <[http://statements.unmeetings.org/GA74/RU\\_EN.pdf](http://statements.unmeetings.org/GA74/RU_EN.pdf)>.

102 Statement by H. E. Sergey Lavrov, Minister of Foreign Affairs of the Russian Federation at the 74<sup>th</sup> Session of the UN General Assembly, 27 September 2019, available at: <[http://statements.unmeetings.org/GA74/RU\\_EN.pdf](http://statements.unmeetings.org/GA74/RU_EN.pdf)>.

103 J. A. Green, C. Henderson & T. Ruys, ‘Russia’s attack on Ukraine and the *jus ad bellum*’ 2022 *Journal on the Use of Force and International Law* 9(1), pp. 4-30.



from the Soviet era.<sup>104</sup> Indeed, Riepl has argued that Russia (following the USSR's approach) often uses 'the Paintbrush' approach to blur the lines around the characterisation of armed conflicts to impede the triggering of the applicability of IHL,<sup>105</sup> or 'the Sledgehammer' approach, in which Russia resorts to a denial of facts concerning IHL violations to stifle accusations of breaches.<sup>106</sup> For example, in line with the 'Paintbrush' approach, when reminded of their obligations under IHL during the invasion of Afghanistan, the Soviet government replied that such problems would be better directed towards the Afghan authorities, because the USSR does not participate in combat.<sup>107</sup> Similar statements have been made in the Ukraine context, with Russia categorising the conflict as a 'special military operation' and denying that they have invaded Ukraine.<sup>108</sup> In previous conflicts where evidence has emerged that Russia violated its obligations under IHL, Moscow has challenged the facts on which the criticisms have been founded in an attempt to deny any wrongdoing.<sup>109</sup> Moreover, in line with the 'Sledgehammer' approach, the Russian government has opted to deny accusations that they have been targeting civilians, with the Kremlin suggesting images and videos emerging from Bucha, Ukraine were 'faked'.<sup>110</sup> As the USSR did with the invasion of Afghanistan, Russia has been censoring details about the Ukrainian invasion and dispersing protestors opposed to the war.<sup>111</sup>

The UN Security Council was paralysed at the time of the USSR invasion of Afghanistan, and has been paralysed again in terms of Ukraine, resulting in emergency sessions of the UN General Assembly being called, and strikingly similar resolutions being adopted which 'deplor[ed]' the 'armed intervention' (in the case of Afghanistan), and 'aggression' (in the case of Ukraine), and called for the 'immediate' withdrawal of Soviet troops and cessation of Russia's unlawful use of force.<sup>112</sup> Russia had already withdrawn from the ICC and, since the invasion, from the Council of Europe, and cases before the European Court of Human Rights and the International Court of Justice in relation to the situation in Ukraine have so far been unenforceable against Russia.<sup>113</sup> However, it would be naïve to suggest that a lack of engagement with international law and international legal enforcement bodies is a Russian 'playbook'.<sup>114</sup> Questions have consistently been raised about the legal basis of the US-coalition invasion of Iraq in the early 2000s,<sup>115</sup> and many Western powers have been criticised for their repeated

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104 M. Kramer, 'Russia, Chechnya, and the Geneva Conventions, 1994–2006' in Matthew Evangelista and Nina Tannenwald (eds), *Do the Geneva Conventions Matter?* (Oxford University Press 2017), p. 183. The perestroika was a program led by Michael Gorbachev in the 1980s to restructure Soviet economic and political policy.

105 M. Riepl, *Russian Contributions to International Humanitarian Law: A contrastive analysis of Russia's historical role and its current practice*, (Nomos, 2022), p. 212

106 M. Riepl, *Russian Contributions to International Humanitarian Law: A contrastive analysis of Russia's historical role and its current practice*, (Nomos, 2022), p. 358

107 ICRC, 'Annual Report 1980' (1980), p. 45; see also ICRC, 'Annual Report 1981' (1981), p. 37.

108 See, e.g. <<https://tass.com/politics/1419745>>.

109 M. Riepl, *Russian Contributions to International Humanitarian Law: A contrastive analysis of Russia's historical role and its current practice*, (Nomos, 2022), p. 368

110 Aljazeera, 'Russia denies military forces killed Bucha civilians in Ukraine', 4 April 2022, available at: <<https://www.aljazeera.com/news/2022/4/4/kremlin-rejects-accusation-russian-forces-killed-bucha-civilians>>.

111 Amnesty International, 'Russia: Kremlin censors media and disperses protesters opposed to Ukraine invasion', 28 February 2022, available at: <<https://www.amnesty.org/en/latest/news/2022/02/russia-kremlin-censors-media-and-disperses-protesters-opposed-to-ukraine-invasion/>>.

112 United Nations Good Offices Mission in Afghanistan and Pakistan (UNGOMAP), 'Background', available at: <<https://peacekeeping.un.org/mission/past/ungomap/background.html>>; UN, 'General Assembly Overwhelmingly Adopts Resolution Demanding Russian Federation Immediately End Illegal Use of Force in Ukraine, Withdraw All Troops', GA/12407, 2 March 2022, available at: <<https://www.un.org/press/en/2022/ga12407.doc.htm>>.

113 V. Kerr, 'Debunking the Role of International Law in the Ukrainian Conflict' *Opinio Juris*, 8 March 2022, available at: <<https://opiniojuris.org/2022/03/08/de-bunking-the-role-of-international-law-in-the-ukrainian-conflict/>>.

114 N. J. Robinson, 'Is Russian Brutality Toward Civilians Actually Unique?', *Current Affairs*, 21 March 2022, available at: <<https://www.currentaffairs.org/2022/03/is-russian-brutality-toward-civilians-actually-unique>>.

115 E. MacAskill and J. Borger, 'Iraq war was illegal and breached UN charter, says Annan', *The Guardian*, 16 September 2004, available at: <<https://www.theguardian.com/world/2004/sep/16/iraq.iraq>>.

disregard for civilian lives and lack of transparency as to the suffering they have caused in Afghanistan and other conflicts they were involved.<sup>116</sup> An investigation has been recently opened in the United Kingdom, for example, into claims SAS soldiers killed Afghan civilians ‘in cold blood’ between 2010 and 2013.<sup>117</sup> While the United States is openly supportive of the ICC investigation in Ukraine, its moral authority in demanding justice in this respect could be questioned, as it is not a party to the ICC, and, in fact, has demonstrated an ‘an openly hostile attitude toward the Court and adopt[ed] adverse policy and legal actions during the Bush and the Trump administrations.’<sup>118</sup> Heller has also argued, in the context of creating a Special Tribunal for Aggression against Ukraine, that ‘[i]t would also be a travesty if the Special Tribunal was created by the same states that were responsible for neutering the crime of aggression at the ICC.’<sup>119</sup>

The lack of effective response from the international community to the atrocities of the USSR invasion of Afghanistan (and indeed to many other atrocities since) and the lack of commitment of states to the enforcement of international law demonstrates a certain selectivity and fragmentation which must be addressed. Vasiliev has described a ‘crisis of multilateralism’, an ‘erosion of international rule of law’ and ‘States’ commitment to accountability ha[ving] seemingly been worn out or becom[ing] markedly less steadfast’.<sup>120</sup> As Vasiliev argues, ‘[t]he ‘Ukraine moment’ could, and hopefully will, mark a paradigm shift in states’ attitude, that would contribute to restoring the international rule of law and to reconfiguring the multilateral cooperation in international justice’.<sup>121</sup> Rather than acting in a reactionary fashion, the international community must demonstrate a renewed commitment to sustainable peace and security, including through ensuring that no victims are left forgotten.

## 7. Conclusions and Recommendations

Despite the USSR invasion of Afghanistan and the Russian invasion of Ukraine being separated by three decades and distinguishable in a number of respects, there are nonetheless a number of lessons which can be drawn from a historical analysis of the two. In-depth consideration of the historical framing of the invasion of Ukraine through imperialism and the role of the Soviet legacy in driving patriotism will be critical to the transitional justice process in Ukraine. Rhetoric will not only be essential in ensuring that the Russian leadership is held accountable, it could also be beneficial in predicting how the invasion will continue and in determining the components of any peace agreement. While broader ideology and rhetoric are at play, addressing institutional failings throughout military structures illustrative of continued Soviet influence within the Russian military including a lack of education and training, as well as patriarchal and hierarchal attitudes that are perpetuating brutality will also be critical to ensuring sustainable peace. Criminal justice initiatives must be effective and coordinated, Ukraine must maintain ownership of the process, and the accountability process should be led by the victims’ interests. A coherent narrative of the invasion and the impact on victims should be built through coordinated and purposeful documentation.

While justice for Ukraine should be tailored to its specific context, in contrast to the response from the international community to the USSR invasion of Afghanistan, the Russian invasion of Ukraine should be seen

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116 S. Jager, ‘Lost Innocents: The US Military’s Shameful Failure to Protect Civilians’, Human Rights Watch, 28 January 2022, available at: <<https://www.hrw.org/news/2022/01/25/lost-innocents>>.

117 D. Sabbagh, ‘Inquiry launched into claims SAS soldiers killed Afghan civilians’, The Guardian, 15 December 2022, available at: <<https://www.theguardian.com/uk-news/2022/dec/15/inquiry-launched-into-claims-sas-soldiers-killed-afghan-civilians>>.

118 Y. Dutton and M. Sterio, ‘The War in Ukraine and the Legitimacy of the International Criminal Court’, Just Security, 30 August 2022, available at: <<https://www.justsecurity.org/82889/the-war-in-ukraine-and-the-legitimacy-of-the-international-criminal-court/>>.


119 <https://opiniojuris.org/2022/03/07/creating-a-special-tribunal-for-aggression-against-ukraine-is-a-bad-idea/>

120 S. Vasiliev, ‘Watershed Moment or Same Old? Ukraine and the Future of International Criminal Justice’, *Journal of International Criminal Justice* 2022, available at: <<https://academic.oup.com/jicj/advance-article/doi/10.1093/jicj/mqac044/6827886#381139094>>.

121 S. Vasiliev, ‘Watershed Moment or Same Old? Ukraine and the Future of International Criminal Justice’, *Journal of International Criminal Justice* 2022, available at: <<https://academic.oup.com/jicj/advance-article/doi/10.1093/jicj/mqac044/6827886#381139094>>.

as a pivotal moment for the international community to demonstrate a renewed commitment to sustainable peace and security, including through ensuring that no victims are left forgotten. Reactionary and selective action will not prevent future illegal invasions nor civilian suffering in Ukraine or elsewhere. Ultimately, the reflections given in this paper demonstrate that further discourse is needed on how to go forward. Only through decisive steps and sustainable and holistic action, nationally and internationally, will we achieve peace, justice and accountability for victims and ensure past mistakes are not repeated.





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