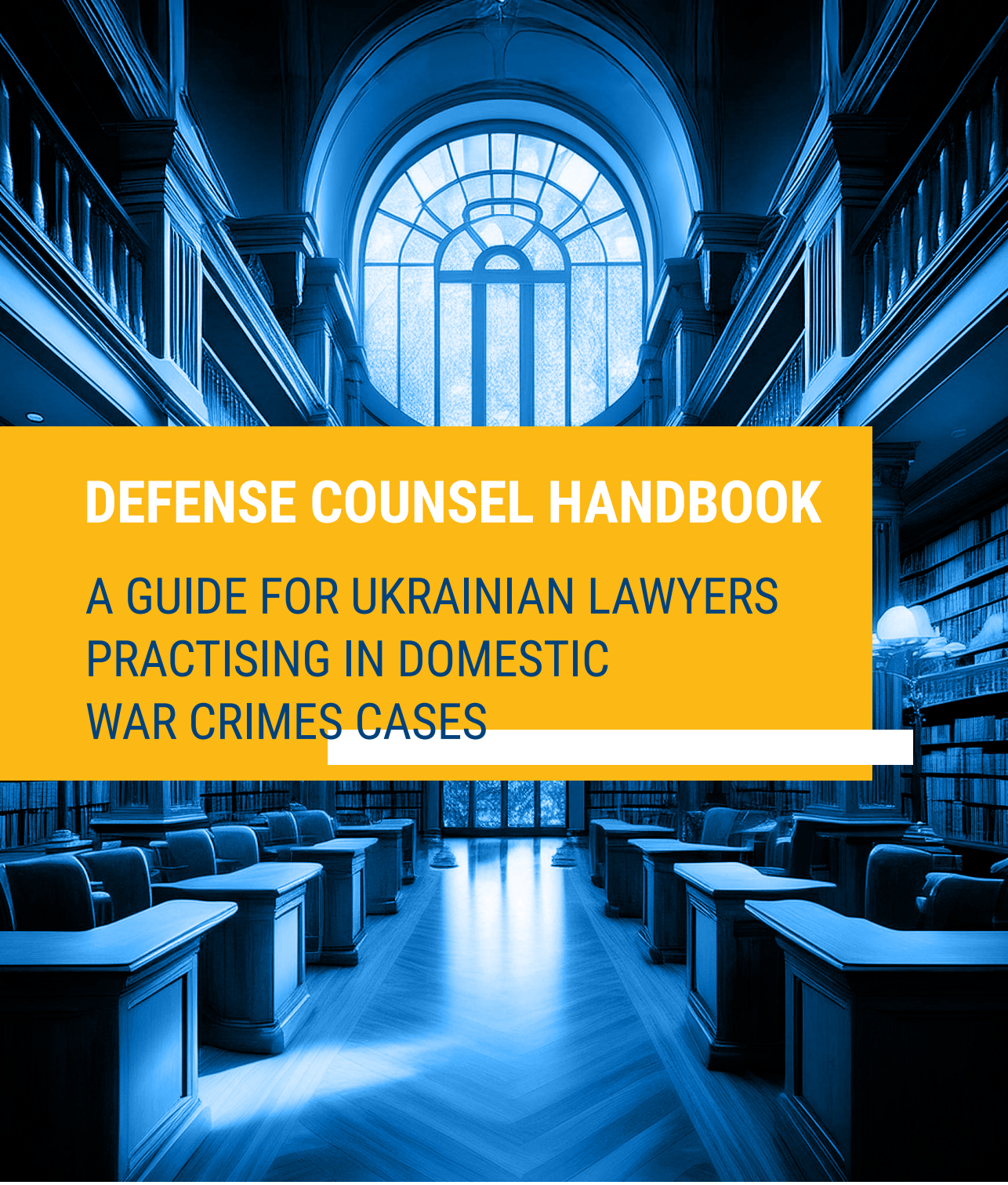

DEFENSE COUNSEL HANDBOOK

A GUIDE FOR UKRAINIAN LAWYERS PRACTISING IN DOMESTIC WAR CRIMES CASES

USAID
FROM THE AMERICAN PEOPLE

INTERNATIONAL BAR ASSOCIATION

FREE LEGAL AID

АСОЦІАЦІЯ ПРАВНИКІВ УКРАЇНИ
UKRAINIAN BAR ASSOCIATION

CONTENTS

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The methodology and content for this Handbook have been developed with guidance and support from the USAID Justice for All Activity in partnership with the Coordination Center for Legal Aid Provision, Ukrainian Bar Association and International Bar Association with contributions by *Judge Alphons Orie, Michael Kelly, Michael Scharf, Elsa Wyllie, Natalie von Wistinghausen, Sara Dill, Mylène Dimitri, and Sylvia de Bertodano.*

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*The views expressed herein are those of the author alone and do not reflect the views of the International Criminal Court and other entities with whom the authors are affiliated.

FOREWORD

DEAR DEFENSE LAWYERS,

Since the beginning of the full-scale invasion of Ukraine by the Russian Federation in February 2022, our country has been facing an unprecedented challenge: a need to ensure fair justice in over 130,000 war crime cases. This imposes not only a professional but also a moral obligation on us—to ensure that the rights of every individual before the court are protected, no matter the circumstances.

Defense lawyers who commit to defending individuals charged with war crimes face specific challenges. These include not only the complexity of cases from both legal and factual perspectives, but also public pressure, emotional stress, and risks related to fulfilling their professional duties during wartime. However, now, more than ever, it is crucial to demonstrate a commitment to the principles of the rule of law and fairness.

The content of this Handbook was developed based on conclusions and recommendations gathered following an assessment of the needs of defense lawyers for professional re-training to effectively defend war crime cases, conducted by the USAID Justice for All Activity in 2023. This Handbook is intended to provide practical advice to defense attorneys handling war crimes cases. The authors have compiled the latest information on national and international legislation, practical recommendations for defense strategy, and specific aspects of conducting investigations, working with witnesses, and preparing legal arguments. They have made every effort to ensure the Handbook is both useful and accessible to all defense lawyers.

I would like to extend my sincere thanks to all those involved in the creation of this Handbook: the authors, experts, editors, and representatives of the USAID Justice for All Activity. Your work is an invaluable contribution to the development of the Ukrainian legal system and the promotion of democratic values in society.

I hereby turn to you, dear defense lawyers, wishing you inspiration, courage, and professional growth. May this Handbook serve as a reliable guide in your work and in the continued promotion of fairness and the rule of law in our country.

Olexandr Baranov
Director Coordination Center for Free Legal Aid Provision

DEAR DEFENSE LAWYERS,

This Handbook builds on a needs assessment of defense lawyers completed by the USAID Justice for All Activity, which recommended preparing an on-demand educational and skill development tool focused on building the capacity of defense lawyers to effectively represent defendants in war crimes cases to ensure equality of arms and safeguard fair trial rights. Subsequently, it is designed to provide you with materials and guidelines related to preparing for and conducting trials in war crimes cases. This truly unique publication was developed by experienced Ukrainian and international defense lawyers in close cooperation with the Coordination Center for Free Legal Aid Provision to support you and your efforts in defending cases involving war crimes.

As international law provides that the bulk of war crimes cases must be handled at the domestic level in line with criteria set out by international humanitarian law, international criminal law, and international human rights law, it is vitally important to support defense lawyers at the national level, including strengthening their knowledge, skills, and abilities concerning war crimes. Accordingly, this Handbook forms part of a holistic approach to uphold international and European standards, while ensuring an effective defense in war crimes cases.

Since handling war crimes cases further requires specialized competencies, the introduction of this Handbook supports developing the necessary expertise to effectively defend cases, forming part of a set of demand-driven and tailored instructional materials. Moreover, it serves as a knowledge resource on the application of substantive international law within the Ukrainian context which will ultimately contribute to upholding fair trial rights through better representation of defendants in war crimes cases. In this regard, I would like to express my deep appreciation to the authors for their contributions in preparing this very timely and important publication.

David Vaughn
Chief of Party USAID Justice for All Activity

INTRODUCTION

Since the beginning of the Russian invasion of Ukraine in February 2022 more than 130,00 war crimes cases have been registered for investigation in the Ukrainian criminal courts. As the war continues, this number is only going to increase. This imposes new burdens on the Ukrainian system of criminal justice in terms of the time and resources that will be needed by the judges and prosecutors called upon to pursue those cases which will ultimately be brought in court. It also represents a formidable challenge to the community of defense counsel in Ukraine, not only regarding the resources which will be available to them to adequately defend the accused in such cases, but also regarding counsels' willingness to take on these cases at all given the circumstances. Those circumstances include representing individuals viewed as enemies of the state and enemies of Ukrainian citizens and doing so while the war itself is still ongoing just outside the courtroom.

War crimes cases are also, with rare exceptions, legally and factually complex. Counsel who undertake to defend the accused in such cases must not only be familiar with existing domestic law and procedure, but also with the international treaties and covenants which underly international criminal law and procedure, as well as the extent to which that body of law is already applicable, will be applicable or should be applicable in the domestic war crimes courts.

There are resources already available to defense counsel to prepare them for taking on these cases. A primary one is the "Benchbook on the Adjudication of International Crimes",[1] which was collaboratively produced by the National School of Judges of Ukraine, the Supreme Court of Ukraine, judges of appellate and first-instance courts, and international experts from UpRights, Global Rights Compliance (GRC) with the support of the USAID Justice for All Activity. The Benchbook "collects and analyses materials which are designed to assist judges in cases which involve war crimes, genocide and the crime of aggression." It sets out in detail the applicability of international crimes under Ukrainian national law.

The Benchbook is "designed to assist judges in the interpretation and application of the relevant domestic offences"; however, it is widely available to the Ukrainian legal community and is a significant resource on

[1] Benchbook on the Adjudication of International Crimes (Kyiv, 2023). ["Benchbook"]

these topics for all counsel appearing in the war crimes courts, including defense counsel.

Defense counsel also have access, to varying extents, to the databases containing the statutes, rules of procedure and evidence, and case law of the International Military Tribunal (IMT), International Criminal Court (ICC),[2] the International Criminal Tribunal for the Former Yugoslavia (ICTY),[3] the International Criminal Tribunal for Rwanda (ICTR),[4] the International Residual Mechanism for Criminal Tribunals (MICT), which is the international criminal court established in 2010 to perform the remaining functions of the ICTY and ICTR,[5] the Special Tribunal for Lebanon (STL),[6] the Special Court for Sierra Leona (SCSL),[7] the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Kosovo Specialist Chambers and the Special Panel for Serious Crimes (East Timor Tribunal).[8]

These resources can provide a solid basis for defense counsel to educate themselves on the intricacies of the law and procedures in international war crimes courts, to the extent that law and procedure is applicable in Ukrainian courts.[9] A separate issue, however, is how defense counsel can acquaint themselves with the practical skills required to investigate and defend war crimes cases.

The Association of Defense Counsel Practicing Before the International Courts and Tribunals (ADC-ICT, previously ADC-ICTY) addressed this same issue as part of its contribution to defense practice at the ICTY. It developed a practically oriented Manual aimed at providing counsel, who came from different countries and different legal backgrounds, many of which did not include training in the adversarial practices employed in the ICL trial courts, with specific advice and direction on the development and application of such skills in day-to-day courtroom practice.[10]

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2 https://www.legal-tools.org/cld

3 https://www.icty.org/en/about

4 https://unictr.irmct.org/

5 https://www.irmct.org/en

6 The STL closed in 2023 however information on the structure and functions of the tribunal as well as the judgment in *Prosecutor v Ayyash et al* (STL-11-01) can be found online.

7 https://rscsl.org

8 https://www.eccc.gov.kh/en/node/39457.

9 A significant unknown is the extent defense counsel can gain actual access without funds for translation as many of these databases and writings are available only in English and French.

10 *See* Manual on International Criminal Defense: ADC-ICT Developed Practices (2nd Edition, 2020), available at on the ADC-ICT homepage at https://www.adc-ict.org/ "Documents." The Manual

This Defense Manual, written by defense counsel practising at the ICTY, can also help defense counsel who will be taking on the representation of individuals accused of war crimes in the Ukrainian war crimes courts. The Manual includes a concise, easily referenced, discussion of the substantive law related to such cases including modes of liability and available legal and factual defenses, with links to relevant case law and other sources. It includes sections discussing the practical skills necessary to defend war crimes cases including practical advice regarding defense investigation, interview of witnesses, creating and presenting effective written and oral arguments, and direct and cross examination of witnesses at trial.

Defense counsel in Ukraine, however, will also be representing accused in trials *in absentia*, a difficult challenge which did not arise at the *ad hoc* tribunals (other than the STL) or in the ICC where such trials were not contemplated in the Statute or in the applicable rules of procedure and evidence. It is of paramount importance that the war crimes courts in Ukraine, in adjudicating these cases, adhere to the rule of law, apply the proper burden of proof and protect the rights of the accused in the war crimes cases which will be heard over the coming years. By upholding fidelity to these principles, such trials set an example for the country regarding Ukraine's commitment to the rule of law, even when prosecuting unpopular accused. As famously stated: "Justice must not only be done, but must also be seen to be done."[11]

Defense counsel contribute to this process by developing the skills necessary to effectively hold the courts to that task. They can do so by becoming thoroughly versed in the applicable law and procedures, and by being creative in advocating for the application of those aspects of the law which are not only favourable to the accused, but also consistent with the furtherance of open, fair and just war crimes courts. They can do so by being fearless in their commitment to challenging potentially unfair proceedings, by conducting independent investigations, when possible, to learn if there is exculpatory evidence which has been overlooked, by affirmatively questioning the credibility and/or reliability of prosecution evidence when appropriate, and by zealously representing the rights of

is available in English and Bosnian/Serbian/Croatian (BCS). It can be downloaded for free.

11 The admonition is attributed to Lord Hewart, Lord Chief Justice of England in the 1924 English case of *Rex v Justices of Sussex*: 1 KB 256. "It is not merely of some importance but is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done."

the accused; especially those accused who have already been convicted by popular opinion before any trial has even begun.

This Handbook was prepared prior to the adoption by the Verkhovna Rada of Ukraine of the Law on Amending Criminal and Criminal Procedure Codes of Ukraine in connection with the Ratification of the Rome Statute of the International Criminal Court and its Amendments (implementing law). With the entry into force of the above Law, the Law on the Ratification of the Rome Statute will enter into force, which means the final ratification of the Rome Statute of the ICC by Ukraine.

It is difficult to overestimate the importance of implementing the norms of the Rome Statute into Ukrainian criminal law.

Therefore, this Handbook references the law that will be used in the numerous cases brought before the implementing legislation and remains ever relevant in providing resource on the practice skills and issues faced by Ukrainian lawyers in conflict crime litigation.

HOW TO USE THE HANDBOOK

PART ONE outlines a brief overview of the law and where to find international cases/laws that are either binding or of instruction/ inspiration in your own litigation. In this Section, you will note boxes indicating the current Ukrainian Criminal Code provision, as well as any related provisions from international courts and tribunals, as well as international instruments. An asterisk (*) has been included where Ukraine has signed (and if necessary, ratified) on to such treaties and instruments making them binding in Ukrainian courts.

PART TWO will cover the practice of advocacy in international criminal law and some best practices adopted by lawyers representing accused in the international criminal courts. While many practising lawyers will already be well-versed in these subjects, the purpose of inclusion here is to discuss how some advocacy skills may be tailored to the specific kinds of challenges presented by war crimes cases.

PART THREE addresses "soft skills" a lawyer may wish to consider when dealing with war crimes cases in this complex area of law. This Section is the 'first stop' in navigating such cases. Dealing with cases of this gravity with the attendant social and political impact of such cases, can directly impact any lawyer and, in particular, lawyers living and practicing within active conflict areas. The section is an attempt to recognize and define the fortitude required of counsel and to enumerate some issues for counsels' reflection.

PART FOUR lists additional resources for counsels' research and information. It contains reprints of relevant codes, as well as references on where to best find these resources and a glossary of terms. Two example fact patterns of international cases that may provide reflection on the implementation of relevant laws and skills are also provided.

I.
THE LAW

1. BACKGROUND & SOURCES OF INTERNATIONAL CRIMINAL LAW

1.1. BACKGROUND

The practice of international criminal law has developed substantially since the time of the Nuremberg and Tokyo tribunals. The foundation for this dynamic area of law arises from a number of international treaties which affect international and domestic situations, and from "customary international law," which refers to the standard accepted practices of domestic jurisdictions over time. It also arises from the jurisprudence, both substantive and procedural, produced by the various international *ad hoc* courts and tribunals since their inception in the early 1990s. The body of law developed by these international courts rests, in turn, not only on the lessons of Nuremberg and Tokyo but relevant domestic law principles, humanitarian law and human rights law.

1.2. SOURCES OF APPLICABLE INTERNATIONAL LAW

Under international law the war of aggression begun by the Russian invasion of Ukraine constitutes an international armed conflict. Such conflicts are governed primarily by the four Geneva Conventions of 1949 and the first additional protocol of 1977 to those conventions as well as The Hague Conventions of 1899 and 1907[12]. Ukraine is also a signatory to a number of other international treaties, such as the European Convention on Human Rights (ECHR), the International Covenant on Civil and Political Rights (ICCPR), and the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT), International Convention for the Protection of All Persons from Enforced Disappearance, among others; treaties intended to define and guarantee fundamental human rights.[13] These treaties outline protections to be guaranteed to both combatants and civilians during a time of war. They also guarantee

12 GCI, GCII, GCIII, GCIV, API, APII.

13 Ukraine signed the Rome Statute of the ICC in 2000. Ukraine ratified the statute on 21 August 2024. It was signed into law by President Zelenskyy on 24 August 2024. The specifics of how and to what extent the implementation of the Statute will occur in Ukrainian war crimes courts has not yet been resolved as of the time of the preparation of this Handbook.

basic human rights to those accused of war crimes, including the right to counsel, due process of law and a fair trial.[14]

The most serious human rights violations have been codified in various statutes and treaties which established the international criminal courts, including the Rome Statute of the ICC, which describes the Court's jurisdiction over genocide, war crimes, crimes against humanity and, since 2010, aggression.[15] The Elements of Crimes, adopted by the ICC, defines the physical (*actus reus, objective element of a crime*), mental (*mens rea,* subjective element of a crime) elements and contextual elements of these crimes, which must be proved before an individual can be found guilty of such crimes.[16] Similarly the Statute of the ICTY, articles 2 through 5, adopts grave breaches of the Geneva Conventions, war crimes, crimes against humanity and genocide as crimes over which can exercise its jurisdiction[17] as does the Statute of the ICTR, Articles 1 through 4.[18] The ICTY and ICTR Statutes list the underlying conduct which must be established in order to prove these crimes.[19] They also list the grounds on which an individual may be found to be personally liable for such crimes, including the concept of superior or command responsibility.[20]

Specific elements of these crimes and theories of liability have been developed over time in the case law of the ICTY and ICTR, as well as other courts and tribunals of international character. This body of law is a rich source of detailed information regarding the evolution of the law at the *ad hoc* tribunals, some of which has informed the interpretation and application of the law in later cases prosecuted at the ICC.

The ICC framework also developed a document called the 'Elements of Crimes', adopted by consensus by the Preparatory Commission for the International Criminal Court, which defines the elements of crimes listed in the Statute that must be proved before an individual can be

14 It is strongly recommended that counsel in war crimes cases become familiar with all the relevant treaties to which Ukraine and Russia are signatories which may impact proceedings in Ukrainian courts trying war crimes cases.

15 Available in English at: https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf.

16 Available in English at: https://www.icc-cpi.int/sites/default/files/ElementsOfCrimesEng.pdf.

17 Available in English at: https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf. The ICTY did not define or prosecute the crime of aggression.

18 Available in English and French at: https://unictr.irmct.org/sites/unictr.org/files/legal-library/100131_Statute_en_fr_0.pdf.

19 See ICTY Statute; articles 2 to 5; ICTR Statute, articles 2 to 4.

20 See ICTY Statute, article 7, ICTR Statute, article 6.

found guilty.[21] This document, and databases of the case law of the ICC and aforementioned Tribunals has been compiled in databases which can be accessed through their websites and independently sourced digests.[22]

[21] Available in English at: https://www.icc-cpi.int/sites/default/files/ElementsOfCrimesEng.pdf. It is recommended that counsel review this publication.

[22] For a full listing of these resources, such as the ICC Case Law Database, Legal Tools, and the Unified Court Records, please see a section on *Additional Resources*.

2. INTERNATIONAL CRIMES

2.1. AGGRESSION23

"Article 437 contains two distinct offences:

(1) planning, preparation or initiation an aggressive war; and

(2) waging an aggressive war.

The Article 437 of the Criminal Code of Ukraine ("CCU") includes both aggression and conduct of an aggressive war but does not specify the precise elements of either of these crimes, and the practice in Ukraine relating to this crime has been of uneven and often contradictory application."[24].

Article 437.
Planning, preparation and waging of an aggressive war
Planning, preparation or waging of an aggressive war or armed conflict or conspiring for any such purposes shall be punishable by imprisonment for a term of seven to twelve years.
Conducting an aggressive war or aggressive military operations shall be punishable by imprisonment for a term of ten to fifteen years.
Related international provisions:

- UN Charter, Article 2(4) [*1945]
- Rome Statute, Article 8bis
- IMT Charter-N, Article 6(a)
- IMT Charter-T, Article 5(a)
- Nuremberg Principle VI(a)
- UNGA Resolution 3314, Article 5(2)

23 Upon entry into force of the Law on Amending Criminal and Criminal Procedure Codes of Ukraine in connection with the Ratification of the Rome Statute of the International Criminal Court and its Amendments (implementing law), dated October 9, 2024 No. 4012-IX, the title of Article 437 of the CC of Ukraine will be amended as follows: "Article 437. Crime of aggression" and the severity of the punishment will be increased in the second paragraph of the first part, the words "from seven to twelve" will be replaced by the words "from ten to fifteen", also in the second paragraph of the second part, "from ten to fifteen years" will be replaced by "from twelve to fifteen years or life imprisonment".

24 Benchbook, pp. 367-396.

In the list of international crimes of this chapter, the crime of aggression is 'new'. It does not feature in the statutes of the ICTY and ICTR and was not an operational crime within the jurisdiction of the ICC until the review conference amendment in 2010. Even now, the application of the Rome Statute only applies to those State territories who have specifically ratified this amendment. It is impossible to determine the jurisdiction of the ICC over the crime of aggression based on a declaration submitted under Article 12 of the Rome Statute, as Ukraine has done. Best practice is for Ukrainian counsel trying such crimes to turn to Article 8 *bis* of the ICC statute, which defines crimes of aggression, as a guide to achieve more consistency in the offence's application.

Article 8*bis* provides that the specific acts listed in the article each qualify as an act of aggression. Those acts include:

1. The perpetrator planned, prepared, initiated or executed an act of aggression.
2. The perpetrator is a person in a position to effectively exercise control over or to direct the political or military action of the State which committed the act of aggression.
3. The act of aggression—the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations—was committed.
4. The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations.
5. The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations.
6. The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.

In the ICC jurisdiction, there is no requirement to prove that the perpetrator made a legal evaluation as to whether the use of armed force was inconsistent with the U.N. Charter or a legal evaluation as to the "manifest" nature of the violation of the United Nations Charter.

Importantly, there are two specified defences. Conduct which would otherwise amount to the crime of aggression can be justified by either self-defense or UNSC authorisation.

The Grand Chamber of the Supreme Court in paragraph 18 of its decision of February 28, 2024 in case No. 415/2182/20 relied upon the definition found in Annex of UNGA Resolution 3314 (XXIX, 1974): "*Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition*". As may be seen, the definition largely resembles Article 2(4) of the UN Charter, but for a few notable differences. According to the Article 3 of the resolution, aggression is defined as:

a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation using force of the territory of another State or part thereof;

b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

c) The blockade of the ports or coasts of a State by the armed forces of another State;

d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

While it is generally agreed that aggression is prohibited in customary international law, its contours are unsettled and will develop only through further legislation or jurisprudence/case law.

Some Litigation Considerations:

- *Is the defendant a leader*?

- While Article 437 itself does not impose any category of restriction of individuals who may be held accountable for this crime, ICL has found that there is by definition a leadership requirement. "Leadership" requires effective control over the political or military action of the State which is said to have committed the act. This requirement has been recognised by the Ukrainian Supreme Court decision which contemplated categories of persons who can be prosecuted under Article 437 as, for example, heads of state and government; members of parliament; leaders of political parties; diplomats; heads of special services; de jure and *de facto* military commanders; other state officials; and those capable of influencing political-military processes.[25]

- *Did the defendant have effective control?*
  - As a part of the 'leadership requirement', the Ukrainian Supreme Court has held that a crime under Article 437 can be committed by persons who, by virtue of their official powers or actual social status, are capable of exercising effective control over political or military actions, or managing them, and/or significantly influencing political, military, economic, financial, informational, and other processes in their own country or abroad, and/or managing specific areas of political or military actions.[26]
  - *The Grand Chamber of the Supreme Court has identified the following persons with the relevant capabilities:*
    - *heads of state and government;*
    - *members of parliament;*
    - *leaders of political parties;*
    - *diplomats;*
    - *heads of special services;*
    - *commanders of armed forces subordinate to the state, as well as illegal paramilitary or armed groups;*
    - *other persons who actually act as military commanders;*
    - *heads of executive bodies that carry out functions of development and implementation of state policy and regulatory and legal regulation in the field of armed formations and arms trafficking;*

25 SC, Grand Chamber, No. 415/2182/20 (28 February 2024), para. 140
26 *Ibid.*

- *leaders whose legal status is not covered by the concept of a military commander and who exercise power or control over persons participating in an aggressive war or aggressive military actions;*
- *other persons who, although not holding formal positions, are able to have a real impact on military and political processes related to the planning, preparation, initiation of an aggressive war or military conflict and the conduct of an aggressive war or aggressive military actions.*

- *Does the defendant have the power to influence?*
  - Article 437 is construed as to require that individual subjects possess the appropriate powers and resources in the fields of international relations, domestic policy, defense, industry, economy, finance, or hold a social status that allows them to influence the decision-making of authorized persons.
  - Examples are provided in the Grand Chamber's decision of what could indicate appropriate powers (see above).[27]
- *How are the attacks defined?*
  - 'Attacks' have been further defined by the ICJ in the *Oil Platforms Case*, which discusses an exception for self-defense if essential to national security and the acts were necessary and proportional.[28]
- *Does ICL practice help?*
  - The ICC is the only ICL court with jurisdiction over aggression; however Article 8*bis* of the Rome Statue has not yet been used. Much academic discussion focuses on the limitations and scope defenses, particularly given the grey areas in the definition of this crime. Further, ICC Article 8*bis* is limited in its application, as it only applies where there has been a specific ratification by the subject matter jurisdiction.
- *Does the Defendant have Immunity?*
  - In the *Belgium Arrest Warrant Case*, the International Court of Justice held that Presidents, Prime Ministers, and Minsters of Foreign Affairs have absolute immunity in domestic courts for alleged international crimes while they remain in office.[29] This means that

27 *Ibid.*, para. 141.

28 ICJ, 'Oil Platforms', *Iran v United States*, Judgment, merits, ICJ GL No 90, [2003] ICJ Rep 161, ICGJ 74 (ICJ 2003), 6th November 2003.

29 ICJ, 'Arrest Warrant of 11 April 2000', *The Democratic Republic of the Congo v Belgium*, Judgment,

Ukraine Courts cannot issue indictments for such persons nor try them *in absentia* while the defendant is still in office.

MAIN CASES	
National Case Law	International Case Law
Judgment of the Supreme Court Grand Chamber, 28 February 2024, case No. 415/2182/20	IMT-N (1 October 1946) See the Benchbook for more international crimes cases.

2.2. WAR CRIMES30

"War crimes' refer to the criminalisation of specific prohibited conduct under IHL, such as murder, torture, inhumane treatment (underlying acts), when that conduct occurs in the context of an armed conflict, international or non-international in character (contextual element). The existence of an armed conflict and the link between the conflict and the conduct are referred to as the contextual elements of a war crime. The contextual elements are what differentiates war crimes from corresponding ordinary or domestic crimes. Not all IHL violations amount to a war crime. Rather, to amount to war crimes the specific violation: (1) needs to be serious; and (2) should be criminalised by an international treaty or under customary international law." [...]

Article 438.
Violation of rules of the warfare
1. Cruel treatment of prisoners of war or civilians, deportation of civilian population to engage them in forced labour, pillage of national treasures on occupied territories, use of methods of the warfare prohibited by international instruments, or any other violations of rules of the warfare stipulated by international treaties, ratified by the Verkhovna Rada of Ukraine, and also

Merits, Preliminary Objections, ICJ GL No 121, [2002] ICJ Rep 3, [2002] ICJ Rep 75, ICGJ 22 (ICJ 2002), 14th February 2002.

30 Upon entry into force of the Law on Amending Criminal and Criminal Procedure Codes of Ukraine in connection with the Ratification of the Rome Statute of the International Criminal Court and its Amendments (implementing law), dated October 9, 2024, No. 4012-IX, Article 438 of the CC of Ukraine will be titled "War crimes", and its second part will be worded as follows: "2. The same actions, if they caused the death of a person, are punishable by deprivation of liberty for a term of ten to fifteen years or life imprisonment".

issuing an order to commit any such actions shall be punishable by imprisonment for a term of eight to twelve years.
2. The same actions, where they are accompanied with premeditated murder shall be punishable by imprisonment for a term of ten to fifteen years or life imprisonment.
Related international provisions:

- Geneva Conventions I-IV [*1954]
- Additional Protocol I [*1990]
- Additional Protocol II [*1990]
- The Hague Regulations [*2015]
- Convention Protecting Cultural Property in Armed Conflict [*]
- Convention Prohibiting Biological Weapons [*]
- Convention Prohibiting Certain Conventional Weapons [*]
- Convention Prohibiting Chemical Weapons [*]
- Convention on Anti-Personnel Land Mines [*]
- Rome Statute, Article 8
- ICTY Statute, Articles 2-3
- ICTR Statute, Article 4
- ECCC Statute, Articles 7-8
- SCSL Statute, Articles 3-4
- IMT Charter-N, Article 6(b)
- IMT Charter-T, Article 5(a)
- Nuremberg Principle VI(b)

"Many provisions of the Law of Geneva and the Law of The Hague are technical in nature and their violation does not amount to a war crime. Rather, war crimes arise from violations of IHL that are sufficiently serious to warrant criminalisation."[31] Specifically, under the provision of Article 85, paragraph 5, of the Additional Protocol to the Geneva Conventions, grave breaches[32] of the Geneva Conventions (I-IV) and this Protocol are considered war crimes.

31 Benchbook, pp. 50, 52.

32 When qualifying violations of the laws and customs of war as war crimes, it is important to note that paragraph 5 of Article 85 of Additional Protocol I uses the term "grave breaches," whereas the Ukrainian translation uses the term "serious violations." It is crucial to consider that Article 50 of Geneva Convention I, Article 51 of Geneva Convention II, Article 130 of Geneva Convention III, Article 147 of Geneva Convention IV, and parts 4 of Article 11, Article 85 of Additional Protocol I also use the term "grave breaches."

Article 438 of the CCU names a limited number of war crimes for application in the Ukrainian legal system. By also referring to instruments of International Humanitarian Law (IHL) and International Criminal Law (ICL) approved by Parliament, however more than 100 specific war crimes are potentially prosecutable offenses in conflict.

The ICTY broke war crimes up into two separate sections of its Statute — Article 2 and 3. Grave breaches of the Geneva Conventions of 1949 were dealt with in Art. 2 and constitute war crimes when directed against persons or property protected under the provisions of the relevant Geneva Convention, such as (a) wilful killing; (b) torture or inhuman treatment, including biological experiments; (c) wilfully causing great suffering or serious injury to body or health; (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power; (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial; (g) unlawful deportation or transfer or unlawful confinement of a civilian; (h) taking civilians as hostages. Article 3 dealt with violations of the laws or customs of war, including: (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings or buildings; (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; (e) plunder of public or private property.

All war crimes are contained in one provision of the ICC Statute — Article 8. The ICC Statute provides that grave breaches of the Geneva Convention of 1949 are war crimes and that the ICC has jurisdiction in respect of such crimes "in particular' when committed as part of a plan or policy or as part of a large-scale commission of such crimes.[33] Those crimes identified as grave breaches of the Geneva Conventions of 1949 include all the war crimes specified in the ICTY and ICTR Statutes.[34]

However, the remaining provisions of Article 8 expand on that definition. Article 8(2)(b) of the Statute includes, as war crimes, other serious violations of the laws and customs of war applicable in international

33 ICC Statute, article 8(1) and (2).
34 ICC Statute, article 8 (2)(a)(i-viii).

armed conflict, within the established framework of international law. It lists 26 crimes, some of which are not specified in the ICTY and ICTR Statutes and some of which constitute more detailed descriptions of prohibited activity which is common to those statutes. Such acts include, for example:

- intentionally directing attacks against civilians not taking part in the hostilities and civilian objects which are not military objectives;[35]
- intentionally directing attacks against those involved in humanitarian assistance or peacekeeping;[36]
- killing or wounding an unarmed combatant or a combatant who has surrendered;[37]
- making improper use of a flag of truce or of the military insignia and uniform of the enemy or of the United Nations, resulting in death or serious personal injury;[38]
- employing weapons, materials or methods of warfare which are inherently indiscriminate in violation of the international law of armed conflict;[39]
- using civilians or other protected persons to render certain points, areas or military forces immune from military operations;[40]
- intentionally using starvation as a method of warfare including wilfully impeding relief supplies as provided for under the Geneva Conventions;[41]and
- conscripting children under 15 years into national armed forces or using them to participate in hostilities.[42]

Article 8(2)(c) provides that serious violations of the Geneva Convention of 1949 which take place during an armed conflict which is not international in character are war crimes when committed against people taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those no longer in combat due to sickness, wounds, detention or other causes. The crimes at issue include:

35 ICC Statute, article 8(2)(b)(i) and (ii).
36 ICC Statute, article 8(2)(b)(iii).
37 ICC Statute, article 8(2)(b)(vi).
38 ICC Statute, article 8(2)(b)(vii).
39 ICC Statute, article 8(2)(b)(xx).
40 ICC Statute, article 8(2)(b)(xxiii).
41 ICC Statute, article 8(2)(b)(xxv).
42 ICC Statute, article 8(2)(b)(xxvi).

(i) violence to life, in particular murder, mutilation, cruel treatment and torture;

(ii) outrages on personal dignity, in particular humiliating and degrading treatment;

(iii) taking hostages;

(iv) passing of sentences and carrying out of executions without previous judgement affording all judicial guarantees generally recognized as indispensable.[43]

Finally, Article 8(2)(e) and 8(2)(f) defines as war crimes serious violations of the laws and customs applicable in armed conflicts which are not international in nature, which take place on the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups. The prohibited conduct includes (but is not limited to):

(i) intentional attacks against civilians not taking part in the hostilities;

(iii) intentional attacks against those providing humanitarian aid or peacekeepers;

(v) pillaging;

(vi) rape and other forms of sexual violence;

(vii) conscripting children under the age of 15;

(viii) ordering displacement of the civilian population for reasons related to the conflict;

(xi) physical mutilation or medical or scientific experiments which cause death or serious injury.[44]

However, until the ratification of the ICC Rome Statute and the implementation of its qualifications of war crimes into the Criminal Code of Ukraine, Ukrainian legal practitioners need to apply the norms of the Hague and relevant Geneva Conventions and their protocols. This is because, under the current structure of Article 438 of the Criminal Code of Ukraine, the use of means of warfare prohibited by international law and the definition of violations of the laws and customs of war are

43 ICC Statute, article 8(2)(c)(i-iv). The Statute makes clear these provisions do not apply to internal, domestic or police disturbances such as riots, isolated and sporadic acts of violence or similar situations. ICC Statute, article 8(2)(d).

44 This is partial list of the conduct prohibited under Article 8(e)(i-xii).

governed by these conventions, which are international treaties to which the Verkhovna Rada of Ukraine has given its consent to be bound.

At the same time, the norms of these conventions do not specify the elements of crimes but only provide a series of prohibitions in international humanitarian law (IHL). Therefore, when applying the laws and customs of war and qualifying IHL violations that constitute war crimes, it is necessary to find a list of grave breaches in the text of a relevant convention and verify whether certain prohibited conduct falls under grave breaches. Only after confirming its seriousness can it be qualified as a crime.

However, while the list of grave breaches is provided in the Geneva Conventions and their protocols, the Hague Conventions do not contain such a list, which poses certain difficulties in determining which prohibitions on warfare constitute war crimes. At the same time, it should be noted that since Article 438 of the Criminal Code of Ukraine criminalizes all violations of international humanitarian law, the distinction between grave breaches and serious violations, as outlined in the Rome Statute, holds conditional significance.

2.2.1 ARTICLE 438 CCU — TORTURE AND INHUMANE TREATMENT

Torture and inhumane treatment is a common charge in international courts and tribunals and requires an understanding of the underlying instruments — both the Geneva Conventions and the later Convention Against Torture.

The Criminal Code of Ukraine in the military crimes section contains Article 434, which defines the mistreatment of prisoners of war, either associated with particular cruelty or directed against the sick and wounded, as well as the negligent performance of duties towards the sick and wounded by those responsible for their treatment and care, in the absence of signs of a more serious crime. On the one hand, it is stated that the article does not apply to serious crimes, while the definition of the norm mentions ill-treatment with particular cruelty.

With respect to sentencing, it is also important that for the ill-treatment of prisoners of war, which is a war crime, the minimum punishment under Part 1 of the Art. 438 of the Criminal Code of Ukraine (CCU) is 8 years, while under Article 434 of the CCU (maltreatment of prisoners of war, which constitutes a criminal offense against the established order of

military service by Ukrainian servicemen), carries a maximum penalty of 3 years of imprisonment. In practice, the application of Article 434 of the CCU may lead to discriminatory treatment. Furthermore, in cases analogous to Article 434 of the CCU, the defense of accused Russian servicemen may refer to Article 434 of the CCU as a basis defined by Article 82 of the Third Geneva Convention to limit the penalties under Article 438 of the Criminal Code of Ukraine.

Torture and Inhumane Treatment		
The Criminal Code of Ukraine	*The ICC Rome Statute*	*Sources of IHL*
Article 438 Violation of rules of the warfare ...Cruel treatment of prisoners of war or civilians, deportation of civilian population to engage them in forced labour	*RS, Article 8 (2) (c) (i)* Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture	*GC I-IV, Common Article 3 (1) (a)* The following acts are and shall remain prohibited [...]: Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture

2.2.2 ARTICLE 438 — EXPULSION OF CIVILIAN POPULATION FOR FORCED LABOUR (DEPORTATION FOR FORCED LABOUR

The provision regarding the expulsion of civilian populations for forced labor should be distinguished from deportation, as deportation does not imply expulsion for the purpose of forced labor. In contemporary conditions, there has been no recorded deportation of civilian populations for the purpose of forced labor. However, this does not mean that deportation is not criminalized under Article 438 of the Criminal Code of Ukraine, as the prohibition of deportation is enshrined in the laws and customs of war (international humanitarian law).

Violence, unlawful destruction of property, as well as unlawful seizure of property under the pretext of military necessity, committed against the population in the context of military operations, are violations of the laws and customs of war (Article 433 of the Criminal Code). Therefore, their application instead of Article 438 of the Criminal Code will raise issues of discriminatory treatment.

Discrimination will be evident if charges are brought for similar offenses, where the maximum penalty under Article 433 of the Criminal Code of Ukraine is limited to 8 years of imprisonment, while the penalty under Part One of Article 438 of the Criminal Code will be more severe, reaching up to 12 years.

Unlawful Deportation or Transfer		
The Criminal Code of Ukraine	*The ICC Rome Statute*	*Sources of IHL*
Article 438(1) *1. Cruel treatment of prisoners of war or civilians, deportation of civilian population to engage them in forced labour, pillage of national treasures on occupied territories, use of methods of the warfare prohibited by international instruments, or any other violations of rules of the warfare stipulated by international treaties, ratified by the Verkhovna Rada of Ukraine, and also issuing an order to commit any such actions shall be punishable by imprisonment for a term of eight to twelve years.*	*RS, Article 8(2) (a)(vii)* *Unlawful deportation or transfer or unlawful confinement* *RS, Article 8 (2) (b) (viii)* *The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory*	*Art. 147 GC IV* *Unlawful deportation or transfer or unlawful confinement* *Art. 85 (4) (a) of AP I* *[When committed wilfully and in violation of the Conventions or the Protocol]* *The transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention*

2.2.3 ARTICLE 438 CCU — PILLAGE OF NATIONAL TREASURES ON OCCUPIED TERRITORIES

See Annex No. 6 for the IHL norms.

2.2.4 ARTICLE 438 CCU – USE OF METHODS OF WARFARE PROHIBITED BY INTERNATIONAL INSTRUMENTS

See Annex No. 7 for the list of methods of warfare prohibited by the IHL.

2.2.5 ARTICLE 438 CCU – VIOLATIONS OF THE RULES OF WARFARE STIPULATED BY INTERNATIONAL TREATIES

See Appendix No. 8 for a list of violations of the rules and customs of war.

2.2.6 ARTICLE 438 CCU – ORDERING

A person who issues an order to commit a war crime is subject to criminal liability, as reflected in Article 25(3)(b) of the Rome Statute, which states that a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person orders, solicits, or induces the commission of such a crime, which in fact occurs or is attempted.

According to Article 33 of the Rome Statute, the fact that a crime has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

(a) The person was under a legal obligation to obey orders of the Government or the superior in question;

(b) The person did not know that the order was unlawful; and

(c) The order was not manifestly unlawful.

Part 2 of this article specifies that the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

As noted in commentary, issuing an order can be a form of instigation.[45] An order implies the existence of a relationship, typically of a military nature, of subordination between the person giving the order and the person receiving it. The executor uses their legal or factual authority to have another person commit the crime.

[45] Gerhard Werle, "Principles of International Criminal Law", Oxford University Press 2011, p.486,

"The mental element requires that the person giving the order has the intent for the crime to be committed in execution of that order, or at least is aware of the substantial likelihood that the crime will be committed"[46]. As with instigation, under the Rome Statute, there is no need for the person giving the order to have specific intent themselves. "It is sufficient if he is aware of the perpetrator's specific intent, but the person giving the order does not necessarily have to share it. This viewpoint adequately reflects the position of giving orders in the hierarchy of differentiated levels of participation."[47]

2.2.7 ARTICLE 438 CCU — WILFUL KILLING

Wilful killing encompasses cases of causing death in situations where the death resulted from violations of restrictions on the use of means and methods of warfare, attacks on persons protected by the International Humanitarian Law (IHL), and other instances of violations of the IHL norms. For more details on the war crime of the wilful killing, see the Benchbook (pgs. 76-83)

Main Cases	
National Case Law	International Case Law
Judgment of the Supreme Court, 28 February 2024, case No. 753/14148/21 Judgment of the Supreme Court, 28 February 2024, case No. 415/2182/20	*ICTY — Tadic* *ICTY — Kunarac* *ICTY — Blaskic Appeals Judgement* *ICTY — Boskoski & Tarculovski Appeals Judgement ICTR — Renzaho Appeals Judgement* *ICTR Nahimana et al. Appeals Judgement* *ICTR — 'Military I' Appeals Judgement* *ICC — Ntaganda Appeals Judgement* See the Benchbook to know about more international crimes cases.

46 Gerhard Werle, "Principles of International Criminal Law", Oxford University Press 2011, p.487.
47 Gerhard Werle, "Principles of International Criminal Law", Oxford University Press 2011, p.488.

2.3. CRIMES AGAINST HUMANITY

With the entry into force of the implementing law[48] adopted by the Verkhovna Rada of Ukraine in connection with the ratification of the Rome Statute of the International Criminal Court and its amendments, the Criminal Code of Ukraine will be supplemented by Article 442[1] of the following content:

"Article **442**[1]. Crimes against humanity

1. Intentional commitment as part of deliberate widespread or systematic attack against civilian population of:
   1) persecution against any group or community which can be identified, particularly the restriction of fundamental human rights on political, racial, national, ethnic, cultural, religious, sexual or other grounds (features) of discrimination, recognized as impermissible under international law;
   2) deportation of population, that is forcible, and without grounds permitted under international law, transfer (expulsion) **of relevant group of persons** from the area, in which they were lawfully present, to the territory of another state;
   3) enforced displacement of population, that is forcible, and without grounds permitted under international law, transfer (expulsion) of **relevant group of persons** from the area, in which they were lawfully present, to other area within one state;
   4) rape, sexual exploitation, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence;
   5) **enslavement** or human trafficking;
   6) enforced disappearance;
   7) illegal imprisonment;
   8) torture;
   9) other intentional inhumane acts of a similar character causing great suffering, **moderate** or severe bodily injury or serious harm to mental or physical health, —

shall be punishable by imprisonment for a term of seven to fifteen years.

[48] The Law on Amending Criminal and Criminal Procedure Codes of Ukraine in connection with the Ratification of the Rome Statute of the International Criminal Court and its Amendments (implementing law), dated October 9, 2024, No. 4012-IX.

2. Intentional commitment as part of deliberate widespread or systematic attack against civilian population of apartheid, extermination, murder —

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

Note 1. In this article, an attack directed against any civilian population shall be understood as the multiple **(two and more)** commission of acts referred to in this article, against any civilian population, in execution of or in furtherance of a policy of state or organization, directed on committing such attack.

2. In this article, enforced disappearance shall be understood as the arrest, detention, abduction or deprivation of freedom of person in any other form followed by a refusal to acknowledge the fact of such arrest, detention, abduction or deprivation of freedom in any other form or a concealment of data about the fate or whereabouts of that person, as well as a refusal to acknowledge the fact of the arrest, detention, abduction or deprivation of freedom of person in any other form or concealment of data about the fate or whereabouts of person.
3. In this Code, definition "apartheid" is used in the meaning given in the International Convention on the Suppression and Punishment of the Crime of Apartheid of 30 November 1973.
4. In this article, extermination shall be understood as deprivation of life of one or more persons by intentionally created living conditions directed on the destruction of part of a population, including by the deprivation of access to **water**, food or medicine.
5. In this article, torture shall be understood as intentional infliction of severe physical pain or moral suffering upon a person"

At the international level, crimes against humanity that may be committed during an armed conflict are governed only by the Rome Statute, as there is currently not no Convention for Crimes against Humanity.

Ukraine ratified the International Convention for the Protection of All Persons from Enforced Disappearance, Article 5 of which defines enforced disappearance as a crime against humanity. Article 2 of the Criminal Code of Ukraine does not allow criminalising crimes against humanity as set out in Article 5 of the International Convention for the Protection of All Persons from Enforced Disappearance without implementing it in the Criminal Code.

There is currently work being done to promulgate just such a text for signatories and potential, at any time, for these crimes to be incorporated into Ukrainian law. Even more importantly, the practice in this area is well developed at the international courts and tribunals and they often look at these charges alongside war crimes charges for the same acts and conduct of a defendant in the same crime.

Article 5 of the ICTY Statute provides the following acts may constitute crimes against humanity, "when committed in armed conflict, whether international or internal in character, and directed against a civilian population: (a) Murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; and (i) other inhumane acts.[49]

Article 3 of the ICTR Statute lists the same criminal acts. However, it does not specify that the acts must be committed during an armed conflict, instead stating the acts must be committed as "part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.[50]

The ICC definition of crimes against humanity also requires that the acts are committed as part of a widespread or systematic attack directed against a civilian population; this requirement is now recognized as settled law. There is no requirement that such acts occur during a national or international armed conflict. The attack need not constitute a military attack, although it is "understood" that any "policy to commit such an attack" requires the State or other organization to actively promote or encourage such an attack against a civilian population.[51]

Article 7 of the ICC Statute adds the requirement that the perpetrator "knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population."[52] This does not require proof the perpetrator knew all characteristics of the attack or the details of a plan or policy of the State or an organization. The mental element is satisfied if the perpetrator intended to further the attack.[53]

49 ICTY Statute, Article 5.
50 ICTR Statute, Article 3.
51 ICC Elements, Article 7, Introduction (3).
52 ICC Elements of Crime, Article 7(1)(a).
53 ICC Elements of Crime, Article 7, Introduction (2).

The acts which may constitute crimes against humanity under the ICC Statute include all the acts listed in the ICTY and ICTR statutes. The ICC Statute lists additional crimes, including: (g) sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, any other form of sexual violence of comparable gravity; (h) persecution, including, in addition to grounds listed in the ICTY and ICTR statutes; national, ethnic, cultural grounds or gender or other universally recognized impermissible grounds;[54] (i) enforced disappearance; (j) the crime of apartheid; (k) any other inhumane acts intentionally[55] causing great suffering or serious injury to body or to mental or physical health.[56]

The Elements of Crime, annex to the ICC statute, Article 7 also gives a specific definition for each crime.

Extermination requires proof of the killing of one or more persons, including by inflicting conditions of life calculated to bring about the destruction of a population. It includes conduct that constituted or was part of a mass killing of members of a civilian population.[57]

"Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

"Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law. Unlike deportation, which means transportation beyond the borders of the occupied territory to the occupying country or a third country, displacement refers to the movement within the occupied territories;

"Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the

54 ICC Statute, Article 7(3) explains that: "For the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above."

55 For example, the crime of 'forced marriage' was found to constitute 'other inhumane acts' through the *Ongwen* Trial Judgement findings. ICC, *Prosecutor v. Ongwen*, Trial Judgement, ICC-02/04-01/15-1762-Red, 4 February 2021, paras 2741-2753.

56 ICC Statute, article 7 (a-k).

57 ICC Elements, article 7(1)(b).

control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

"Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

"Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

"The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

"Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

Main Cases	
National Case Law	International Case Law
Prior to Ukraine's ratification of the Rome Statute, the provisions of the Criminal Code of Ukraine did not provide for criminal liability for Crimes against Humanity.	ICTY, *Tadic* Appeal Judgement, para. 288; ICTR, *Akayesu* Appeal Judgement, para. 464. For more court decisions in cases of international crimes, see in the Benchbook.

2.4. GENOCIDE58

Article 442.
Genocide
1. Genocide, that is a wilfully committed act for the purpose of total or partial destruction of any national, ethnic, racial, or religious group by extermination of members of any such group or inflicting grievous bodily injuries on them, creation of life conditions aimed at total or partial physical destruction of the group, decrease or prevention of childbearing in the group, or forceful transferring of children from one group to another shall be punishable by imprisonment for a term of ten to fifteen years or life imprisonment.
2. Public incitement to genocide, and also production of any materials inciting to genocide for the purpose of distribution, or distribution of such materials
shall be punishable by arrest for a term of up to six months, or imprisonment for a term of up to five years.
Related international provisions:

- Convention on the Prevention and Punishment of the Crime of Genocide of 1948 [*1954]
- Rome Statute, Article 6
- ICTY Statute, Article 4

58 With the entry into force of the implementing law adopted by the Verkhovna Rada of Ukraine in connection with the ratification of the Rome Statute of the International Criminal Court and its amendments, the Article 442 of the CC of Ukraine will be set forth in the following version:
"Article 442. Genocide
1. Genocide, means acts intentionally committed with to destroy, in whole or in part, a national, ethnical, racial or religious group, as such by:
(a) Deprivation of life of members of the group;
(b) Causing serious harm to members of the group;
(c) Creating conditions aimed at physical destruction of the group in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group, -
Shall be punishable by imprisonment for a term from ten to fifteen years or life imprisonment.
2. Direct and public calls for the commission of acts envisaged by part one of this Article, proclaimed with the aim of full or partial destruction of a national, ethnic, racial or religious group as such, as well as the production of materials calling for the commission of such acts with the aim of their distribution or distribution of such materials, shall be punishable by imprisonment for a term of three to seven years.
Note. For the purposes of this article, serious harm shall be understood as causing grievous or moderate severity bodily harm, committing rape or other forms of sexual violence, causing severe physical pain or physical or mental suffering."

- ICTR Statute, Article 2
- ECCC Statute, Article 4

"*The Genocide Convention was ratified by Ukraine on 15 November 1954, meaning that Ukraine has consented to be bound by its provisions. […] The ICTR/ICTR Statutes and the ICC Statute reproduce the definition contained in the Genocide Convention, and their practice further clarifies its scope […and] it is possible under Ukrainian law to rely upon the ICC and ICTY/ICTR legal frameworks and practice to interpret Article 442.*"[59]

Genocide is defined as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group:

(a) killing members of the group;

(b) causing serious bodily or mental harm to members of the group;

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) imposing measures intended to prevent births within the group;

(e) forcibly transferring children of the group to another group.

International criminal law, as developed at Courts and Tribunals, has found that conspiracy, incitement, attempt, and complicity in the crime are also criminal offences.

Some Litigation Considerations:

Are the legal elements met to establish the crime?

- 'Genocide' is a term that is used widely in a sense that is distinct from the requirements of a legal finding of 'genocide'. Each element must be proved for a conviction of an individual.

Does the defendant hold the requisite special intent (dolus specialis)?

- Genocide is not as often charged, as proving the special intent or *dolus specialis* is onerous There may be ample evidence of potentially genocidal acts, but the special intent distinguishes this crime from crimes against humanity. The Prosecution must show, through evidence, that the defendant held the special intention to destroy a protected group (in whole or in part) and that the protected group falls under the categories defined in the crime (national, ethnic, racial or religious). If this cannot be shown, genocide cannot be proved.

59 Benchbook, pp. 400-426.

The special intent (*dolus specialis*) is a defining characteristic of the crime of genocide. The intent of dolus specialis indicates that the purpose of the attack was to destroy a specific group or part of it. In other words, unlike the murder of certain individuals, the special intent indicates that the target of the killings was a specific group (or part of it). Such killings occur according to a general plan, with the perpetrator being aware that they are executing a special intent.

For genocide qualification, it is important that the perpetrator perceives the victim as belonging to a certain protected group, namely a national, ethnic, racial, or religious group.

What types of groups are 'protected groups'?

- As noted in the text of the Genocide Convention, and directly copied into the framework of law of domestic and international practice, the protected group must be either national, ethnic, racial or religious. This list is closed and does not include political or other groups, which hinders the qualification of genocide. However, since the disposition of the crime of genocide encompasses both the full and partial destruction of a group, theoretically, protection can extend to subgroups that exist within a certain protected group. In hearing cases with genocide charges, the *ad hoc* Tribunals have discussed how the protected group will be defined, finding that it will be done on a case-by-case basis considering — objectively and subjectively — the circumstances.

What is the size of the group targeted?

- Is should be noted that the size of the group need not be large; as found in the *ad hoc* Tribunals, a few persons targeted can be sufficient to meet the elements of the crime.
- In the context of genocide, the special intent to destroy a protected group (in whole or in part) means that the crime can be directed at a specific part of this group, not necessarily the entire group as a whole. This does not mean that the protected group can consist of only a few individuals, but rather that even if actions are directed only at part of the members of this group, they can still be qualified as genocide if there is a special intent to destroy that group or a portion of it.

What are the genocidal acts?

- While these crimes typically have murder or extermination as the underlying acts, other actions targeting life such as denying basic necessities to life or preventing births can also suffice.

MAIN CASES	
National Case Law	International Case Law
As of October 2024, the Unified state register of court decisions does not contain any Supreme Court judgements regarding the crime of genocide. At the same time, first-instance courts of Ukraine have issued verdicts regarding the genocide (part 2 of the Article 442 of the Criminal Code of Ukraine). These verdicts have not been appealed.	ICTY — *Karadzic* ICTY — *Mladic* ICTY — *Popovic et al* ICTY — *Tolimir* ICTY — *Krstic* ICTY — *Stakic* ICTY — *Jelesic* ICTR — *Nahimana et al* ICTR — *Rutaganda* ICTR — *Seromba* ICTR — *Simba* ICTR — *Semanza* ICTR — *Munyakazi* ICTR — *Muhimana* ICTR — *Kajelijeli* ICTR — *Niyitegeka* ICTR — *Akayesu* *ICTR — Kalimanzira* *ICTR — Butare* *ICTR — Ngirabatware* *ICTR — Ntagerura* ICC — *Al Bashir* Arrest Warrant ICJ — *Bosnia & Herzegovina v. Serbia & Montenegro*

3. OTHER APPLICABLE LEGAL CONCEPTS

3.1. COMMAND RESPONSIBILITY

"For a long time, only Article 426 of the Criminal Code of Ukraine provided for the criminal responsibility of the Ukrainian military authorities foromissions — i.e., "wilful failure to prevent a crime committed by a subordinate, or failure of a military inquiry authorities to institute criminal proceedings against a subordinate offender, and also wilful failure of a military officer to act in accordance with his/her duties" — this crime constitutes a military crime (a crime against the established procedure of military service) and, thus, only Ukrainian commanders may be held responsible under this provision.

However, With the entry into force of the implementing law adopted by the Verkhovna Rada of Ukraine in connection with the ratification of the Rome Statute of the International Criminal Court and its amendments, Chapter VI will be supplemented by Article 31[1] with the following content:

"Article 31[1]. Criminal responsibility of military commanders, other persons acting effectively as military commanders, and other superiors

1. A military commander or other person effectively acting as a military commander shall be criminally responsible for any crime envisaged in articles 437 – 439, 442, 4421 of this Code committed by subordinate who at the time of a crime was under his or her effective command and control, or effective authority and control as the case may be, as a result of his/her failure to exercise control properly over such subordinate, if a military commander or other person effectively acting as a military commander knew or, owing to the circumstances at the time, should and could have known that the subordinate was committing or had an intention to commit such crime, but failed to take actions he or she had to take and could take within his or her power to prevent or repress the commission of a crime or to notify the pre-trial investigation authority about such a crime.

2. A commander, whose legal status is not envisaged in paragraph 1 of this article, shall be criminally responsible for any crime envisaged in articles 437 – 439, 442, 4421 of this Code, if such a crime was related to the activity falling within his or her effective responsibility and control and was committed by subordinate who at the time of a crime was under his or her effective authority and control, as a result of failure of such a commander to exercise control properly over such subordinate, if he or she knew or should have known or

consciously disregarded information which clearly indicated, that subordinate was committing or had an intention to commit such crime, but failed to take actions he or she had to take and could take within his or her power to prevent or repress the commission of a crime or to notify the pre-trial investigation authority about such a crime.

3. A military commander or other person effectively acting as a military commander, other commander in the cases envisaged in paragraphs 1 and 2 of this article, shall be criminally responsible under relevant paragraph of this article and the article (paragraph of the article) of the Special Part of this Code establishing responsibility for a crime committed by subordinate.

Note. 1. In this article, a military commander shall be understood as a person who is legally authorized to exercise command and control over one or more subordinates participating in hostilities and belonging to the armed forces of a state.

2. In this article, other person effectively acting as a military commander shall be understood as a person exercising, in connection with conduct of hostilities, authority and control over one or more subordinates participating in hostilities and not belonging to the armed forces of a state.

3. In this article, a commander shall be understood as a person, not mentioned in paragraphs 1 and 2 of the Note to this article, that holds a position or is in a state providing him or her authority (power) and control over one or more subordinates."

Before the above changes, the Code did not explicitly contain articles regarding the responsibility of military commanders and civilian leaders in order to hold commanders accountable for their inaction in Ukraine concerning the prevention, cessation, or punishment of violations of IHL.

Nonetheless, Article 438 envisaged the possibility of criminal prosecution of military commanders on the grounds of Articles 86 and 87 of Additional Protocol I, as the failure to act by military commanders is itself a "violation of the rules of warfare recognised by international instruments consented to as binding by the Verkhovna Rada". Such an interpretation would overcome the disparity whereby Ukrainian commanders could be prosecuted for their omissions while Russian commanders could not."

The concept of command responsibility is an "original creation of international criminal law" that has no paradigm in national legal systems.

According to this concept, military commanders or civilian leaders can be held criminally responsible for international law crimes committed by their subordinates.

During armed conflict, a special principle of criminal liability applies, which is not characteristic of general criminal law. The necessity of such responsibility lies in the special role played by military commanders and/or civilian leaders in ensuring their subordinates' compliance with international humanitarian law (IHL).

Commanders and their subordinates, while having combatant privileges, must also adhere to the laws and customs of war. Since every duty corresponds to liability for its non-fulfillment, commanders' responsibility can motivate them not only to control their subordinates but also to be driven by criminal liability.

"The necessity for extending the scope of criminal liability of superiors arises from the hierarchical organizational structure, which typically characterizes the environment in which crimes under international law are committed. Firstly, this very environment significantly complicates the proof of direct participation in the commission of a crime, although the degree of responsibility often increases with the physical distance of the individual from the actual commission of the crime. In such situations, where direct evidence in favor of holding a superior criminally liable is absent, the concept of superior responsibility serves as an additional means. Secondly, behavior that does not reach the level of direct participation in the commission of a crime also poses a serious potential danger, especially when superiors with the authority to issue orders "turn a blind eye" or "look through their fingers" at the conduct of their subordinates. In this context, the concept of command responsibility encompasses behavior that would otherwise remain unpunished in its absence. This is particularly relevant when a superior fails to take measures to hold subordinates accountable for committing crimes under international law or to refer the situation to competent authorities".[60]

However, command responsibility is not absolute.

Rule 153 of customary international humanitarian law provides that commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing

60 Gerhard Werle "Principles of International Criminal Law", Oxford University Press, 2011, para. 499

such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.

According to the provisions of Article 86 of the Additional Protocol to the Geneva Conventions of 12 August 1949, which protects victims of international armed conflicts (Protocol I to the Geneva Conventions), it follows that parties involved in a conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so. The fact that a violation of the Conventions and this Protocol was committed by a subordinate does not absolve their superiors from criminal responsibility if they:

- received information that should have enabled them to conclude, given the circumstances at the time, that such a subordinate was committing or intended to commit such a violation;
- and if they did not take all feasible measures within their power to prevent or stop the violation.

Article 87 of Protocol I establishes the principle that a military commander is obliged to prevent violations of the Conventions and Protocol by subordinates and, if necessary, to stop such violations and report them to competent authorities.

The aforementioned norms of international humanitarian law define a list of duties for commanders/other superiors regarding the control of their subordinates. Their failure to fulfill these duties (through action or inaction) entails criminal responsibility under international law.

The concept of command responsibility has evolved in the law of tribunals, including the ICTY, and in modern international criminal law, it is represented by Article 28 of the Rome Statute of the ICC. This article provides that, in addition to other grounds for criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

> *A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:*

(a) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(b) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(a) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(b) (c) The crimes concerned activities that were within the effective responsibility and control of the superior; and The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

The provisions of Article 426 of the Criminal Code of Ukraine should be understood as applying to violations of the order of military service by Ukrainian servicemen. However, after the amendments to the Criminal Code of Ukraine enter into force, the responsibility of military commanders must be determined according to the standards of command responsibility provided for in Art. 28 of the Rome Statute and/or provisions of Article 31^1 of the Criminal Code of Ukraine. Otherwise, discriminatory treatment will be allowed in relation to military commanders of the opposing side.

Discrimination will occur in those situations where the principles of command responsibility impose a greater responsibility on a military commander for failure to exercise proper control over subordinates, which led to the commission by a subordinate of a serious war crime, than the responsibility provided for in Article 426 of the Criminal Code of Ukraine.

The norms of Article 426 of the Criminal Code of Ukraine limit liability to 10 years of imprisonment, while the commission of war crimes may entail significantly higher liability, including life imprisonment.

Furthermore, Article 426 of the Criminal Code of Ukraine establishes the liability of military commanders exclusively in cases of intentional failure to prevent an offense.

The issue of applying the institution of responsibility of commanders and other leaders in the national criminal law of Council of Europe member states was the subject of consideration by the European Court of Human Rights in the case of *Milanković v. Croatia*.[61] There, the applicant complained that his conviction for war crimes based on command responsibility lacked a legal basis in national or international law at the time of their commission. The European Court concluded that the state did not violate the European Convention, as the principle of superior responsibility for war crimes is a recognized customary norm of international law. In paragraph 57 of its decision, the European Court of Human Rights emphasized that the concept of "command responsibility" encompasses political leaders and other civilian authorities as well.

For Ukraine, this decision is an important source of experience. It means that the principle of *nullum crimen sine lege* enshrined in Article 7 of the Convention, as well as the standard of law quality (predictability, accessibility, and prevention of arbitrary application, in particular), will not be violated by the state if command responsibility is not explicitly stated in its national law.

When it comes to the responsibility of a commander or other superior, it is essential first to establish and prove the elements of the criminal act committed by the subordinate. This means determining whether a specific individual, subordinate to the commander or other superior, committed a war crime. In this regard, it is irrelevant whether the commander has been present in the actions of the subordinate. Neither is it required that that subordinate (as the direct perpetrator) is brought to justice. In national criminal law practice, situations may arise, for example, when an organizer or another accomplice of a crime is convicted while the perpetrator continues to evade justice, or the identity of the perpetrator is not disclosed.

The objective element of the commander's conduct will consist of the behavior related to the criminal outcome of the subordinate's actions.Additional materials related to the objective side that must be

61 No. 33351/20, dated January 20, 2020 (see paragraphs 55–57, 61).

established include, in particular, the hierarchical relationship between the commander and the perpetrator of the crime (the subordinate).

The subject of the crime is a person who de facto commands, implying the presence of a authoritative power to prevent or stop the crime or to hold one perpetrator accountable.

"As a rule, a superior's control over the conduct of subordinates is based on his legally justified authority; however, it is sufficient for a superior to exercise de facto control. Thus, military ranks or other forms of authority merely serve as indicators of effective control; the decisive factor is the factual circumstances. Consequently, the scope of a superior's legal (de jure) authority can be either expanded or narrowed by the limits of de facto control. The delegation of powers to exercise control and supervision over the conduct of subordinates can only narrow the limits of a superior's responsibility to the extent that it affects his de facto ability to exercise control."[62]

The subjective side of the commander's conduct can be established via either positive intent or negligence/omission liability.

The legal construction of command responsibility does not exclude guilt vis a vis negligence. Examples of positive intent or negligence include situations where a person:

- Anticipates the possibility of dangerous consequences of their action or inaction but recklessly relies on their prevention, or
- does not foresee the possibility of dangerous consequences of their action or inaction, although they should and could have foreseen them.

The assessment of the criminal negligence of superiors and commanders in national courts can contribute to the view on the practice set forth in the decisions of international courts. The attention of the courts was drawn to determining the conditions under which superiors should have known about the inevitable commission of a crime. According to the decision of the International Criminal Tribunal for the former Yugoslavia, modern customary international law allows for the presumption of the creation of so-called "informed negligence" of leaders if the superior has information that could draw their attention to the commission of offenses by a subordinate.

62 Gerhard Werle "Principles of International Criminal Law", Oxford University Press, 2011, para. 507

The concept of holding civilian superiors criminally responsible is more complex than that of military commanders, primarily due to the different systems of subordination in military and civilian management, and requires separate elaboration, which currently falls outside the scope of this Handbook.

Article 7 of the ICTY Statute and article 6 of the ICTR Statute list the modes of liability for crimes outlined in the statutes. Individual criminal responsibility may be found for a person who (1) planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime; (2) The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment; (3) The fact that any of the acts referred to in the Statute were committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof; (4) The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

In addition, both *ad hoc* tribunals came to recognize a theory of liability not specified in the statutes. The theory of joint criminal enterprise and its definition was first established in the Judgment returned in the *Tadic* case at the ICTY.[63] It held, in general terms, that each member of a group can be held liable for the criminal actions of other members of that group committed pursuant to a common plan or purpose (thereafter known as "JCE I"). The concept was thereafter broadened in later cases to include crimes which were not done to carry out the common plan or purpose of the group, but which were the natural or foreseeable consequence of pursuing that common plan or purpose (known as JCE III).[64] These concepts are related in theory to common-law modes of criminal liability rooted in conspiracy.

63 See *Prosecutor v Dusko Tadic*, ICTY Case No. IT-94-1, Judgment, 7 May 1997.

64 See *Prosecutor v Popovic* et al, ICTY Case No. IT-05-88-A; *Prosecutor v Milan Martic*, ICTY-IT-95-11A.

Article 25 sets forth the modes of individual criminal responsibility recognized at the ICC.[65] It provides that a person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with the Statute. The modes of liability include and expand on those adopted in the *ad hoc* statutes. They include:

(a) Committing a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Ordering, soliciting or inducing the commission of a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aiding, abetting or otherwise assisting in its commission or its attempted commission, including providing the means for its commission;

(d) In any other way contributing to the commission or attempted commission of a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

(e) In respect of the crime of genocide, directly and publicly inciting others to commit genocide;

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions.

A person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

Article 28 codifies criminal responsibility based upon command or superior responsibility. This is distinct from the ad hoc Tribunals that did not distinguish elements for each 'command' or 'superior' responsibility in their founding texts. The ICC also sets out the *mens rea* separately in

65 Article 26 provides that The Court shall have no jurisdiction, however, over any person who was under the age of 18 at the time of the alleged commission of a crime.

Article 30, identifying the mental element which must be found before an individual can be held criminally liable. It requires that a person will be found criminally liable for a crime only if the material elements are committed with intent or knowledge.[66] A person can be found to have intent when: (a) that person means to engage in the conduct; (b) that person means to cause the consequences of that conduct or is aware such consequences will occur in the ordinary course of events.[67] "Knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.[68]

Some Litigation Considerations:

- *What is the law being used?*
  - In the Ukrainian Code, until recently, there were no provisions regarding the responsibility of commanders and civilian superiors. Could, however, follow from international norms, which, according to the Ukrainian Constitution, are subject to direct application without the need for their implementation.
  - According to the first part of Article 15 of the Law of Ukraine "On International Treaties of Ukraine," Ukraine has confirmed the commitment proclaimed in Article 18 of the Constitution of Ukraine to strictly adhere to generally recognized principles and norms of international law. This was noted by the Higher Specialized Court of Ukraine for Civil and Criminal Cases, which explained that a generally recognized norm of international law should be understood by the courts as a rule of conduct accepted and recognized by the international community of states as a whole as legally binding.
  - The ECHR (*Milanković*) held that that the state did not violate the European Convention, as the principles of command responsibility for war crimes are a recognized customary norm of international law. In para. 75 of the judgment, the European Court of Human Rights emphasized that the concept of "command responsibility" also encompasses political leaders and other civilian superiors. However, *nullem crimen sine lege* will not be violated by the state if command responsibility is not explicitly stated in its national law.
- *Was there a superior-subordinate relationship?*

66 ICC Statute, article 30(1)
67 ICC Statute, article 30 (2) (a-b)
68 ICC Statute, article 30(3).

- The subject of the crime is a person who de facto commands, having the necessary command (authority) powers to prevent or stop the crime or to bring the direct perpetrator to justice.

- *What were the said actions of subordinates?*
  - A commander or superior has liability for the actions of his subordinates similar to convicting an organizer or other accomplice of a crime whose perpetrator continues to evade justice, or when the identity of the perpetrator is unknown.
  - In national criminal law practice, a concept close to the responsibility of superiors is the military crime provided for in Article 426 of the Criminal Code of Ukraine, which separately establishes the responsibility of military commanders for a criminal offense committed by a subordinate.
  - The objective side of the commander's act will consist of behavior described in the aforementioned norms of domestic and international law, related to the criminal result of the subordinate's act. Additional circumstances of the objective side that need to be established include, in particular, the subordinate relationship between the commander and the perpetrator of the crime (the subordinate).
- *Did the defendant have the requisite mens rea — knew or should have known?*
  - A violation of the International Humanitarian Law committed by a subordinate does not absolve their superiors from criminal responsibility if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that a subordinate was committing or was going to commit such a breach, and if they did not take all feasible measures within their power to prevent or repress the breach.
- *Are the allegations of intent or negligence?*
  - Act or failing to act with the intent of achieving a criminal result can fall under complicity responsibility of Article 438 CC Ukraine with reference to Article 27. This could be the case even if the commander / superior did not intend to assist the perpetrator in their unlawful behaviour but failed to fulfil their duties of control due to unlawful self-confidence or negligence.
  - Per ICTY cases, there can be a presumption of so-called "informed negligence' of superiors if it can be shown that there was infor-

mation that could have drawn their attention to the commission of crimes by their subordinates.

- Negligence can occur when the defendant:
  - Foresees the possibility of dangerous consequences of their act or omission but recklessly relies on their prevention, or
  - Does not foresee the possibility of dangerous consequences of their act or omission, although they should and could foresee them.
- Knowledge of the committed offenses must be proven in each specific case, considering criteria such as the number, type, and scale of offenses, the number of participants, the place and time of the offenses, etc. The use of indirect evidence is possible.

- *Could the crime have been prevented by the defendant?*
  - GC API Article 87 obliges military commanders to prevent violations of the GC and, if necessary, stop them and report to the competent authorities.

MAIN CASES	
National Case Law	International Case Law
At this time, national case law regarding the application of command responsibility has not been established.	*ICTY — Karadzic* *ICTY — Mladic* *ICTY — Popovic et al* *ICTY — Tolimir* *ICTY — Krstic* *ICTY — Stakic* *ICTY — Jelesic* *ICTY — Oric* *ICTY — Hadzihasanovic & Kubura* *ICTR — Nahimana et al* *ICTR — Rutaganda* *ICTR — Seromba* *ICTR — Simba* *ICTR — Semanza* *ICTR — Munyakazi* *ICTR — Muhimana* *ICTR — Kajelijeli* *ICTR — Niyitegeka* *ICTR — Akayesu* *ICC — Bemba* *Milanković v. Croatia No. 33351/20 dated 20.01.2020 (see paras. 55–57, 61).*

3.2. IN ABSENTIA PROCEEDINGS

"A special pre-trial investigation may not be initiated in all criminal proceedings, but with respect to crimes specified in part 2 of Article 297-1 of the CPC, can be initiated when the suspect, except for a minor, hides from pre-trial investigation bodies and court in the temporarily occupied territory of Ukraine and in the territory of the state recognised by the Verkhovna Rada of Ukraine as the aggressor state, to avoid criminal liability and/or is declared internationally wanted. In addition, a special pre-trial investigation may also be initiated in the criminal proceedings concerning a crime committed by a suspect, in respect of whom the authorised body has adopted a decision

to hand the suspect over for exchange as a prisoner of war and where such an exchange took place."[69]

Ukrainian legislation provides for the investigation and prosecution of war crimes in the framework of special criminal proceedings in the absence of a suspect or accused (*in absentia*). This procedure is implemented as:

1) a special pre-trial investigation, which is carried out with the consent of the court (see *Article 297-1 of the CPC*)
2) a trial in the absentia of the accused (see par. 3 *Article 323 of the CPC*).

A special pre-trial investigation on specific crimes is carried out based on the ruling of an investigating judges.[70] Special pre-trial investigation of other crimes is not allowed, except for cases when the crimes are committed by persons who:

- are hiding from the investigation authorities and the court in the temporarily occupied territory of Ukraine or on the territory of the Russian Federation, to evade criminal liability and/or have been put on the international wanted list, and
- are investigated in the same criminal proceedings with the crimes specified in this part, and the allocation of materials on them may adversely affect the completeness of the pre-trial investigation and trial.

To start applying the special investigation procedure, the suspect must be: 1) hiding from the investigation authorities and the court in the temporarily occupied territory of Ukraine, on the territory of the Russian Federation, in order to evade criminal liability, and/or 2) be on the international wanted list.

Subpoenas to summon a suspect are sent to the last known place of his/her residence or stay and must be published in the mass media of national distribution and on the official website of the Prosecutor General's Office. From the moment the summons is published in the national media and on the official website of the Prosecutor General's Office[71], the suspect is considered to be duly acquainted with its content.

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69 Benchbook, pp. 613-627

70 Articles 109, 110, 110-2, 111, 111-1, 111-2, 112, 113, 114, 114-1, 114-2, 115, 116, 118, Part 2 of Article 121, Part 2 of Article 127, Part 2. 2 and 3 Art. I146, Art. 146-1, 147, Parts 2 — 5 Art. 191 (in case of abuse of office by an official), Art. 209, 255-258-6, 348, 364, 364-1, 365, 3652, 368, 3682, 3683, 3684, 369, 3692, 370, 379, 400, 408, 436, 4361, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447 of the Criminal Code of Ukraine.

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The court hearing in criminal proceedings as to the crimes specified in part 2 of Article 297-1 of this Code (see a footnote 65) may be held *in absentia*, without the accused, except for a minor who hides from the investigation and judicial bodies with the view of avoiding criminal liability (special judicial proceedings) if the accused is announced in interstate or international wanted list (par. 3 Article 323 of the CPC).

The court receives the indictment, which has been prepared based on the results of the pre-trial investigation conducted under the special procedure. However, these charges usually concern a Russian military serviceman or another person located in the territory controlled by the Russian Federation. In such a situation, the court has no possibility to make a postal or other summons of the accused, as postal communication channels with the Russian Federation are absent. Therefore, Ukrainian legislation has taken the approach of establishing presumptions of notification by posting the notice of suspicion and summons in electronic form on the website of the Office of the Prosecutor General and publishing it in an official media outlet.

The procedure for publishing summonses, notices of suspicion, and information regarding suspects for whom permission has been granted to conduct a special pre-trial investigation is approved by the Order of the Prosecutor General dated May 30, 2023, No. 141[72].

Currently, the website of the Prosecutor General's Office does not have a summons search system, but notifications can be found using search tools. To do this, type the following in the browser: site: gp.gov.ua (space) search surname. On the website of the publication 'Government Courier,' summonses are placed in the 'Announcements Archive' section.

As mentioned above, in most situations, the problem of issuing a real summons to a suspect during pre-trial investigation and to an accused during court proceedings is related to objective reasons that neither investigators with prosecutors nor the court can overcome on their own.

Nevertheless, practical problems of notifying the accused cannot serve as a basis for refusing to take measures for a thorough search of the

72 Order of the Office of the Prosecutor General dated 30.05.2023 No. 141 "On the approval of the Procedure for organizing the publication in the mass media of the national sphere of distribution and on the official website of the Office of the Prosecutor General of subpoenas, notices of suspicion and information about suspects, in respect of which permission to carry out a special pre-trial investigation has been granted".

accused, including the use of social networks, Telegram channels, and other means of transmitting and receiving information. Examples include:

The verdict of the Darnytskyi District Court of Kyiv dated June 27, 2024, in case No. 753/13163/17. In this case, the judge was not satisfied with meeting formal requirements and used alternative means to notify the accused. In particular, it is stated that "... the court sent summons in PDF format to the social network account of PERSON_12, who is the daughter of PERSON_5, and according to the available report, the specified document was delivered on 28.08.2023, and to PERSON_13, who is the son-in-law of PERSON_5, and according to the available report, the specified document was received and read by the recipient on 29.08.2023".

The ruling of the Darnytskyi District Court of Kyiv dated November 16, 2023, in case No. 753/8141/18. In this case, the court reported on the measures taken, in particular, the court noted: "...the accused PERSON_5 was notified about the date and time of the preparatory court hearing through his personal email "INFORMATION_2".

Moreover, the court also established that PERSON_5 continues to carry out political activities in the temporarily occupied territory of the Autonomous Republic of Crimea, which is confirmed by data from open sources, in particular, information on the official website of the "Fair Russia" party. Therefore, the court sent summons in PDF format to the email addresses of the mentioned political force. Also, during the preparatory actions, the prosecution added to the case materials information about the phone number currently used by PERSON_5. In turn, the court duplicated summons to the accused about the court summons through Viber and Telegram applications. According to the available report, the icon that appeared in the Viber application is a sign — two checkmarks, which indicates a message that has already been sent and delivered to the recipient's application.

Compliance with only the formal procedures provided for by the CPC leads to a violation of the standards of procedural fairness. This includes problems of re-appeal and new consideration.

No trials have been held *in absentia* in the international courts and tribunals, save one notable exception. The Special Tribunal for Lebanon specifically permitted trials of defendants *in absentia* in the sole core crimes case tried there (*Ayyash et al*) heavily litigated all aspects that enter such novel proceedings. Their jurisprudence, not just on law,

but on deontology, shows how one institution dealt with the numerous international human rights and fair trial rights principles implicated are interpreted to be applied in such proceedings.[73]

The ICC, the ICTY, and the ICTR have all used *in absentia* proceedings for specific pre-trial processes; however, none have permitted the actual trials to be held *in absentia*. The ICC only recently decided to allow a confirmation of charges process *in absentia* where the defendant 'fled or cannot be found' (or otherwise waived his right to be present). However, any confirmed charges could not go to trial without the defendant, due to the express requirement of a defendant's personal presence at trial pursuant to Article 63(1). [74]

The ICTY and ICTR, in a handful of exceptional circumstances, permitted presentation of evidence in the absence of the defendant, during discrete pre-trial proceedings. These proceedings did not result in and were not intended to result in any factual findings which could subsequently be held against the accused. Full trials were provided after the accused were brought into custody. For example, In *Karadzic & Mladic*, the ICTY used Rule 61 of its Rules of Procedure and Evidence as a fact-finding measure when they could not be found and remained as fugitives. The proceedings did not constitute a 'trial'. Both defendants had full trials on the merits in their presence years later after they were apprehended. In *Kabuga*, the ICTR used Rule 71*bis* to preserve evidence in the defendant's "absence"; following his arrival at the Court and a finding that he was mentally unfit to stand trial. The Appeals Chamber, however, reversed that decision, finding the defendant's lack of mental fitness to stand trial did not permit a trial *in absentia*.

<u>Some Litigation Considerations:</u>

- *Is the notice of suspicion sufficient?*
  - ECHR dictates that certain measures must be taken to inform the defendants to suffice for the notice requirement.
- *Is the overall procedure in line with the Code?*

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73 Following the closure of the Special Tribunal for Lebanon, the archives are maintained by a project of Stanford University, see: https://exhibits.stanford.edu/virtual-tribunals/feature/special-tribunal-for-lebanon. Other sources for the filings themselves are CILRAP or RefWorld, see infra Annexes regarding resources.

74 See Prosecutor v Kony, ICC-02/04-01/05-481, Second Decision on the Prosecutor's Request to Hold Confirmation of Charges in the Kony case in the suspect's absence, 4 March 2024.

- If a suspect in respect of whom the investigating magistrate has issued a ruling to conduct a special pre-trial investigation has been detained or has voluntarily appeared before the pre-trial investigation body, further pre-trial investigation against him/her shall be carried out in accordance with the general rules envisaged by this Code.

- *What if a defendant has died or is suspected dead?*
  - One defendant was found to have died and, after litigation to support his death, the proceedings against him were terminated.
- *Is there a right to retrial?*
  - An option for a defendant to request a re-trial has been held as a fundamental fair trial component to holding *in absentia* proceedings.[75]
  - The STL has held a full trial and appeal procedure in absentia; the defendants who were convicted retain the right to retrial in the texts of that Statute should they reappear at a later date.[76]
- *Are there ethical limits to representing an in absentia defendant?*
  - The Special Tribunal for Lebanon is the only ICL institution specifically providing ethical guidance in its code of professional conduct specifically for in absentia proceedings. The Professional Ethical Rules that guide Ukrainian lawyers do not provide specific guidance as of yet, but a discussion of applicable considerations takes place below. Except for the order of the Ministry of Justice of Ukraine dated February 25, 2014, No. 386/5[77], which approved the Quality Standard for the provision of free secondary legal aid in criminal proceedings regarding in absentia proceedings. This provision stipulates that in Specific Standards for Providing Free Secondary Legal Aid in Special Pre-Trial Investigations (in absentia):
    - The attorney independently determines the defense position;
    - The attorney shall reasonably track notifications (summons) to the client at the last known place of residence or stay and their publications in mass media of nationwide distribution and on the official website of the Office of the Prosecutor General.

75 *See* ECtHR, *Shala v. Italy*, App. No(s). 71304/16, 31 August 2023.
76 *See Prosecutor v. Ayaash et al.*
77 See Annex.

- *What about the applicability of foreign court in absentia decisions in Ukraine?*
  - The *in absentia* trials in Ukraine may be aggravated by the fact that, according to Ukrainian legislation, judgments of foreign courts passed *in absentia* are not subject to execution in Ukraine. That is, without the participation of a person during criminal proceedings, except for cases when the convicted person was given a copy of the verdict and given the opportunity to appeal.[78]

MAIN CASES	
National Case Law	International Case Law
Judgment of the Supreme Court, 28 February 2024, Case No. 753/14148/21 Judgment of the Supreme Court, 19 July 2022, Case No. 727/13085/18 Judgment of the Supreme Court, 04 November 2021, Case No. 326/1385/18 Judgment of the Supreme Court, 01 April 2021, Case No. 759/2992/17 Judgment of the Supreme Court, 04 March 2020, Case No. 4910/16/19-к	STL — *Ayaash et al.* ICC — *Kony* (Confirmation of Charges proceedings) ICC — Banda (party submissions) See also ICTY — *Karadzic & Mladic* (Rule 61 hearing) ICTR — *Kabuga* (Rule 71*bis* procedure)

3.3. AFFIRMATIVE DEFENSES

"Under Ukrainian law, these defenses are primarily, but not exclusively, set out under Articles 36 to 43-1 of the Criminal Code of Ukraine (CCU), while defenses available under ICL are set out in the statutes and jurisprudence of the international courts and tribunals […]. Some of the defenses available under

78 Section IX Instructions, No. 2599/5 and Article 602: Judgments of foreign courts adopted in absentia, i.e. without the participation of a person in criminal proceedings, are not subject to execution in Ukraine, except for cases when the convicted person was given a copy of the verdict and given the opportunity to appeal against it. A request for execution of a judgment of a court of a foreign state may be refused if such execution contradicts Ukraine's obligations under international treaties of Ukraine.

ICL overlap with those available under the CCU, whereas others are unique to international law and specific to the circumstances of international crimes."[79]

There are several circumstances which require a finding that an individual accused is not criminally liable for crimes charged against him or her.

Article 31 (1) (a) of the ICC Statute provides that a person shall not be criminally responsible for charged conduct if at the time of the conduct the person suffered from diminished capacity; that is, from a mental disease or defect that destroyed their capacity to appreciate the unlawfulness or nature of the conduct or their capacity to control their conduct to conform to the law.[80]

Article 31(1)(b) recognizes the defense of involuntary intoxication; defined as intoxication that destroys the person's capacity to appreciate the unlawfulness or nature of their conduct or to control it so as to conform to the requirements of the law. The defense is not available to individuals who are voluntarily intoxicated.[81]

Individuals are also entitled to the defense of self-defense when they act reasonably to defend themselves or others or, in the case of war crimes, property, against an imminent and unlawful use of force. The reaction to such force must be proportionate to the degree of danger to the person or property. The fact a person was involved in a defensive operation conducted by military forces does not, in and of itself, entitle them to a claim of self-defense. Such claims will depend on the specific factual circumstances.[82]

Article 31(1)(d) provides for the defense of duress. When criminal conduct was caused by duress resulting from a threat of imminent death or continuing or imminent serious bodily harm against the person or a third party, and the person acts reasonably to avoid that threat, the defense may be available. The person must not, in reacting to the duress, intend to cause a greater harm than that sought to be avoided.

At trial a Court may also consider a ground for excluding criminal responsibility other than those specified in article 31(1) where the defense is derived from applicable law as set forth in article 21 of the ICC Statute.

79 Benchbook, pp. 574-610.
80 ICC Statute, article 31(1)(a).
81 ICC Statute, article 31(1)(b).
82 ICC Statute, article 31(1)(c).

The defenses of mistake of fact and mistake of law are also recognized by the ICC under article 32 of the ICC Statute. A mistake of fact will be grounds for excluding criminal responsibility only if it negates the applicable mental element of the crime charged.[83] A mistake of law regarding whether particular conduct constitutes a crime is not a ground for excluding criminal responsibility unless, given the circumstances, it also negates the mental element of the crime charged.[84]

The fact an individual committed the crime charged pursuant to an order or a government or a superior, be they military or civilian, will not exclude conviction for that crime. The exceptions to that general rule are when the person was under a legal obligation to obey orders from the government or the superior in question, *and* they did not know the order was unlawful, *and* the order was not manifestly unlawful.[85] Orders to commit genocide or to commit crimes against humanity are, by definition under the ICC Statute, manifestly unlawful.[86]

Some Litigation Considerations:

- *How is Ukraine's provision of "Combat Immunity" interpreted?*
  - International humanitarian law, in particular Article 43(2) of Additional Protocol I, grants combatants the right to participate in hostilities, which is referred to as the combatant's privilege. As long as a combatant adheres to the laws and customs of war, they are protected from criminal prosecution for participating in hostilities. From this provision, the term "combatant immunity" has become widely used.
  - Thus, combatant immunity is a legal institution that protects against criminal prosecution for lawful participation in hostilities, including protection from violation of the right to life of combatants of the opposing side in battle or as a result of military confrontation conducted according to the rules and laws of war. In this aspect, combatant immunity is one manifestation of how the norms of international human rights law (IHRL), including Article 2 of the European Convention, yield to the norms of international humanitarian law.

83 ICC Statute, article 32(1).
84 ICC Statute, article 32(2).
85 ICC Statute, article 33(1).
86 ICC Statute, article 33(2).

- The combatant's privilege entails rights in case of capture, as defined by the Third Geneva Convention on the Treatment of Prisoners of War of 1949 (GC III) and Additional Protocol I. Specifically, Article 44 of AP I stipulates that a combatant who falls into the hands of the adverse party is entitled to prisoner-of-war status.
- Article 87 of GC III prohibits prosecuting prisoners of war for participation in hostilities, and Article 99 of GC III prohibits convicting a prisoner of war for acts not prohibited by the national legislation of the detaining power or by international law applicable at the time they were committed.
- Therefore, the main aspects of this status include:
  - The right to directly participate in hostilities without being subject to criminal liability for merely participating in war.
  - The right to prisoner-of-war status if captured by the enemy.
  - Protection from legal prosecution for lawful military actions committed during conflict.
- Ukrainian legislation, specifically Article 1 of the Law of Ukraine dated December 6, 1991 "On Defense of Ukraine", contains a definition of "combatant immunity," which includes exemption from liability, including criminal liability, for military command, servicemen, police officers of special purpose units of the National Police of Ukraine, volunteers from the Territorial Defense Forces of the Armed Forces of Ukraine, and law enforcement officers who participate in Ukraine's defense according to their powers. This includes persons defined by the Law of Ukraine "On Ensuring Civilian Participation in Ukraine's Defense," exempting them from liability for losses in personnel, military equipment or other military property, consequences from using armed and other force during repelling armed aggression against Ukraine or neutralizing an armed conflict, performing other defense tasks with any weapons (armament), which could not be foreseen with reasonable caution when planning and executing such actions (tasks) or which are covered by justified risk, except in cases violating laws and customs of war or using armed force as defined by international treaties ratified by the Verkhovna Rada of Ukraine.
- This definition coincides with the aforementioned definition of combatant's privilege since national law grants privileges to a combatant using weapons (armament) with reasonable caution,

except in cases violating laws and customs of war or using armed force as defined by international treaties ratified by the Verkhovna Rada of Ukraine.

- *What other affirmative defenses may apply in Ukrainian courts?*
  - There are other specific provisions that are directly applicable, such as 'Fulfillment of the Duty to Protect the Homeland, Independence, and Territorial Integrity of Ukraine". Further, while not specifically enumerated, certain affirmative defenses used in international criminal law may be applicable in practice for the court consideration as a part of the right to present a case.
- *Where may there be arguments of duress in these cases?*
  - The law of duress is especially relevant in the case of conscripts and, in Ukraine, maybe especially applicable to be argued by Russian conscripts who are not at war voluntarily and/or were imprisoned in Russia at the time of their conscription.

MAIN CASES	
National Case Law	International Case Law
National Case Law on these issues in war crimes cases is only being formed.	ICTY — *Erdemovic* (duress) ICTY — *Stakic* (self-defense) ICTY — *Mladic* (alibi) ICTY — *Lukic & Lukic* (alibi) ICTR — Ntagerura ICC — *Ongwen* (duress, diminished capacity, alibi) ICC — *Al Hassan* (duress, mistake of law/fact, superior orders/ prescription of the law) ECCC — Case 001 "*Duch*" (duress) SCSL — *Fofana* (necessity)

3.4. PROCEDURAL DEFENSES

3.4.1 PRESUMPTION OF INNOCENCE

"Presumption of Innocence — an ICL principle under which a person accused of committing a crime must be considered innocent until proven guilty."[87]

At the core of all fundamental fair trial rights is the presumption of innocence. It need not be held only by the Court, but also can find violation in statements of other Court actors. For this type of crime or case, the presumption of innocence can be a difficult concept for the public, but nonetheless, something that is the duty of the lawyer to safeguard. Where in-court challenge is appropriate, it should be made as a procedural defence; this is especially true with a view to preserving this challenge for higher levels of review, including the European Court of Human Rights.

For discussion on difficulties faced in this type of case outside of the Courtroom, please see infra 'Dealing with Risks of Being a Defence Counsel'.

3.4.2 FAIR TRIAL RIGHTS

"Wherever provisions of this Code contradict an international treaty, ratified by the Verkhovna Rada of Ukraine, provisions of the corresponding international treaty of Ukraine shall apply. […] The criminal procedural legislation of Ukraine shall be applied with due regard to the case law of the European Court for Human Rights."[88]

Fair trial rights, including a concept of equality of arms, are mandated not only in Ukrainian law, but central to international justice systems. The burden of providing fair trials is heightened in Ukrainian cases by virtue of direct scrutiny available via the European Court of Human Rights, which has ruled on a number of fair trial provisions under its Article 6(1) and 6(3).

Fair trials are also required during armed conflict via the Geneva Conventions. GC III, Article 84, as well as customary international humanitarian law,[89] each dictate that POWs must be guaranteed the right

87 Benchbook, Glossary, p. 712.
88 Code of Criminal Procedure of Ukraine, Article 9(4).
89 Rule 100.

to a fair trial. To not assure such rights could be a war crime in and of itself if sufficient nexus to an armed conflict.

What does a 'fair trial' mean? This is where it becomes less clear and the finer parameters of each right are fleshed out in the litigation of the human rights courts, as well as in front of international and domestic panels. Regardless, any violation of a fair trial right may constitute a challenge to the procedure and is something that should be considered and, if founded, raised by the lawyer. The same procedural irregularities and challenges that are faced in regular cases before the Court are the same that could arise in domestic war crimes cases. In fact, given the novelties and added challenges of war crimes cases, makes these potential violations an even higher risk. It does not matter the gravity of the crime, if there is a right being violated, it should be addressed to ensure fairness and, ultimately, justice.

II.
THE PRACTICE

4. DEFENSE CASE STRATEGY

Defense counsel has the duty to zealously represent the accused and to do so in a manner which is consistent with counsel's legal and ethical obligations to the trial court and to the client. This requires that defense counsel thoroughly understand, both factually and legally, the charges contained in the indictment. It requires that counsel take all necessary and reasonable steps to investigate the case and learn what evidence, if any, disputes the allegations in the indictment as a factual matter. In the process counsel will determine what legal and/or factual arguments are available to refute the charges and/or to establish an affirmative defense at trial, which will form the foundation for the defense "theory" as to how to present its case at trial.

In doing so counsel must always keep in mind that in criminal cases the Prosecution has the burden to prove the charges against the accused beyond a reasonable doubt.[90] Proof beyond a reasonable doubt does not require absolute certainty or proof beyond a shadow of doubt, but it is a very high standard. It has been defined as "proof that leaves the [factfinder] firmly convinced of the accused's guilt,"[91] and "that state of the case which, after the entire comparison and consideration of all the evidence, leaves the mind of the [factfinders] in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge."[92,93]

The requirement of proof beyond a reasonable doubt applies to each element of each of the charged crimes and to each element of the forms of liability charged in the Indictment.[94] It also applies to all facts which

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90 Code of Criminal Procedure, Art 7 (accused is presumed innocent); Art 17: No one shall be required to prove their innocence of having committed a criminal offence and shall be acquitted unless the prosecution proves their guilt beyond any reasonable doubt.

91 *Regina v Brydon,* 95 C.C.C. 3d 509, 514 (1995) (Canada) [finding the use of expressions "feel sure," "real doubt," "substantial doubt," "moral certainty," and "serious doubt" in jury instructions insufficiently conveys the level of certitude necessary to convict and may lessen the prosecutor's burden of proof].

92 *Victor v. Nebraska*, 511 U.S. 1, 7-8; 114 S. Ct. 1239, 1244; 127 L.Ed 2d 583,591-593 (1994) (United States Supreme Court); and see generally Thomas V. Mulrine, "Reasonable Doubt: How in the World Is It Defined?" 12 *Amean University Journal of International Law & Policy* 195 (1997) [discussing definitions of reasonable doubt standard in adversarial systems such as Canada, United States, England and Australia].

93 Code of Criminal Procedure, Art 17; and see *Prosecutor v. Limaj*, IT-03-66-T, Trial Judgement, 30 Nov 2005, ("*Limaj* Trial Judgement"), para. 10.

94 *Prosecutor v. Limaj*, IT-03-66-T, Trial Judgement, 30 Nov 2005, ("*Limaj* Trial Judgement"), para. 10.

are "indispensable for entering a conviction"[95] which include predicate facts from which presumptions or inferences are drawn.[96] It applies to all evidence regarding the visual identification of the Accused, for example. Like all elements of an offence, the identification of an Accused must be proved by the Prosecution beyond a reasonable doubt.[97] It is extremely important for defense counsel to also always remember that the accused does not have the burden to affirmatively "disprove" the Prosecution case. The burden of proof *never* shifts to the accused.[98]

4.1. TRIAL STRATEGY

The goal of a well-prepared, well-presented defense case is to raise a reasonable doubt as to the sufficiency of the evidence to satisfy the Prosecution's burden of proof. The potential strategies for how to go about this at trial are legion and depend on the individual facts and circumstances of each case. It may be that the prosecution witnesses are not credible or reliable or that the chains of command or military structures assumed in the Prosecution charges are incorrect or that the accused has an alibi.

Whatever the theory, counsel can then pursue it through focused cross-examination of Prosecution witnesses, presentation of defense witnesses to testify to aspects of that defense theory, and challenges to other Prosecution evidence such as expert reports. The creation of a well-thought through trial strategy for presenting that theory from the very beginning of the trial is essential to convince the court to view the case as defense counsel does and find the Prosecution has not met its burden of proof.

Exercise standard trial preparation:

- Read and understand all charges in the indictment.
- Meet with your client to discuss it all; obtain information from the defendant.

95 *Prosecutor v. Ntagerura*, ICTR-99-46-A, Appeal Judgement, 7 July 2006, ("*Ntagerura* Appeal Judgement"), para. 174.

96 *Prosecutor v. Halilović*, IT-01-48-A, Appeal Judgement, 16 Oct 2007, ("*Halilović* Appeal Judgement"), paras 111-112.

97 *Limaj* Trial Judgement, para. 20; *Prosecutor v. Limaj,* IT-03-66-A, Appeal Judgement, 27 Sep 2007, ("*Limaj* Appeal Judgement"), para. 24.

98 Code of Criminal Procedure, Art 17; and see *Prosecutor v. Limaj,* IT-03-66-T, Trial Judgement, 30 Nov 2005, ("*Limaj* Trial Judgement"), para. 10.

- Obtain all possible disclosure of prosecution evidence including witness statements, expert reports, digital and video evidence. Review it all.
- Conduct independent factual and legal research of the charges, the prosecution evidence and information obtained from your client.
- Identify weaknesses in the prosecution case and means for revealing such weaknesses at trial.
- Identify any affirmative defenses such as alibi, duress, diminished capacity.
- Investigate and gather all evidence in support of those defenses.

4.1.1 ANALYZE THE INDICTMENT

The prosecution theory of its case will usually be apparent from the wording of the indictment. The indictment will set out the nature of the crime charged and all the elements that must be proved to establish commission of that crime. In general, this will include, in addition to the legal elements of the crime, the facts that constitute commission of the crime, the accused's role in it, the names and roles of any co-accused, and the mode(s) of liability alleged against the accused.[99]

It is good practice for defense counsel to evaluate the strength of the indictment by reading it initially in the light most favorable to the prosecution case. Then counsel can begin the process of identifying those allegations which require a defense response, as necessary. Counsel should never just assume the indictment is correct, factually or legally. It is counsel's duty to challenge allegations which are damaging to the accused or the accused's theory of the case. Counsel should also determine which allegations, if any, are not necessarily damaging to the accused's case and/or are likely provably true. Depending on the case it may be reasonable to concede such allegations and to instead focus on other issues, so long as conceding allegations will not cause harm or prejudice to the defendant or the overall defense.

If the accused, for example, is charged under a command responsibility theory for the criminal conduct of others, one potential theory of the defense case may be to not challenge proof of the underlying criminal

99 *See, e.g.* Code of Criminal Procedure, Art 291(5), Art 337 (parts 1 and 3), Art 368 (part 3).

conduct (often called the "crime base") and to instead focus on the circumstances which show that regardless of that conduct, the accused was not in a command position at the time of the offenses and therefore is not liable for them.

Analysing the charges:

- Did the event charged actually happen? Does the court have jurisdiction over it? Is the indictment defective in some way?
- If it did happen, is it a recognized criminal offense under international or domestic law?
- If it is a crime and the event did take place, is the accused arguably criminally responsible for it under a recognized theory of liability?
- What, if any, defenses to the charges (factual and/or legal) are suggested by the facts (either those charged in the indictment or those known to defense counsel due to defense investigation)? Are relevant defenses available under international and/or domestic law?
- What modes of liability are charged as to the accused? Are there factual or legal defenses to those allegations?
- What allegations, if any, have no impact on the accused's case or may even be conceded so as to focus on those issues which are relevant to the accused's case (which helps establish defense credibility)?

In the international criminal courts there are procedures which permit the defense to challenge the indictment before trial. If a challenge to the indictment is going to be raised it must be brought immediately at the opening of the case or it may be deemed to have been waived.[100] Such challenges are *not* written responses to the substance of the charges. They are limited, when the information is available, to arguing the court has no jurisdiction over the accused. They also may point out defects in the *form* of the indictment, such as a failure to properly define the relevant law given the alleged facts or other purely legalistic or procedural matters. They also include, when applicable, arguments that counts in the indictment have been improperly joined or individual accused have

[100] *See e.g.* ICTY Rules of Procedure and Evidence, rule 72, Preliminary Motions. Such motions include challenging jurisdiction, alleging defects in the form of the indictment, and seeking severance of counts and/or accused charged in the same case.

been improperly joined in the same proceedings when preservation of their rights require separate trials.

If the defense has a solid basis for arguing there is no jurisdiction over the accused, that argument should be made immediately before the proceedings go any further. The same is true for issues concerning the improper joinder of counts and/or accused in one trial. In some cases the basis for arguing improper joinder of accused in one trial or improper joinder of counts may only come to light later in the proceedings, perhaps as the result of receipt of prosecution disclosure or other evidence. In that case a motion to challenge joinder should be brought as soon as the basis for such a motion becomes apparent. If the motion is not timely brought any argument on appeal on this issue will be waived.

Challenges to defects in the *form* of the indictment are not automatically a good case strategy. As with everything, that depends on the specific case. Counsel should very carefully consider, for example, if a defect in the indictment may ultimately prove beneficial to the defense case at trial. If so, it is not counsel's obligation to point out mistakes made by the prosecution in formulating and defining its case as set out in the indictment. If the defect is fundamental, such as misstating or misapplying basic legal principles and if such mistakes may be prejudicial to the accused at trial or result in needless confusion or waste of time, then counsel may wish to address that problem. Except for jurisdiction and joinder issues it is generally good practice to leave the prosecution to recognize and repair its own mistakes. As with everything, counsel must never lose sight of the fact that the prosecution has the burden of proof at trial.

4.1.2 MEET WITH THE ACCUSED

It is counsel's duty to meet with the accused to learn whatever information the accused has including the accused's knowledge of the facts of the case, the potential witnesses, possible defenses and whatever other information may be of use to the defense.[101] In addition, counsel has an ethical duty to keep the accused informed of what is going on in the case, and consult with the accused on potential case theories.[102] It

[101] Code of Professional Conduct in Ukraine, Article 18. "Informing the client of taking conduct of the case"; Article 26." Informing the client of the progress in the performance of the assignment."

[102] Code of Professional Conduct in Ukraine, Art 26. In cases tried *in absentia*, of course, it is

is also important for counsel to develop a relationship with the accused of mutual trust and honesty when at all possible so the accused has confidence in counsel's strategy and decisions and will remain willing to speak openly with counsel. Among other things, the accused is often the best source of information for developing an independent defense investigation of the facts.

Meet with and interview the accused at the earliest possible opportunity.

- Provide the accused with all information relevant to the case including copies of the indictment and other relevant information; give the accused time to review that information; provide the accused with any explanations needed to assure he or she understands the information.
- Answer any questions the accused has regarding the law, the facts, defense strategy, future activities in the case or other matters.
- Try to develop from the outset a relationship with the accused of mutual respect, honesty and trust,
- Obtain whatever information you can from the accused regarding the case, including his or her knowledge of the facts, the charges, the individuals named in the indictment, any potential witness for or against the accused, or any other relevant matter; if the case includes audio visual materials, social media posts, information and contacts from telephones, review that material with the accused.
- Learn as much as you can about the accused's background and his or her role in the case, if any, including the names and means of contacting any potentially relevant witnesses or sources of needed information.
- Encourage the accused to speak with you and explain that his or her statements are privileged; if the accused is comfortable speaking, let him or her talk without needless limits; they are usually a valuable source of information.

not possible for counsel to meet with the accused. The issues raised by that circumstance are discussed *infra*.

4.1.3 ENFORCE PROSECUTION DISCLOSURE REQUIREMENTS

Counsel will also receive disclosure from the prosecution regarding the substance of its case which will usually include statements from witnesses interviewed by the prosecution in preparation for trial, the names of the witnesses to be presented at trial, expert reports, reports on forensic evidence such as DNA and identifications, press releases, film footage and, increasingly, evidence obtained from social media accounts. When possible, create a database of this material so that it is easily accessible and organized so as to enhance counsel's ability to understand the prosecution case as well as defense evidence which contradicts and/or undermines that case. It is counsel's responsibility to make sure all relevant evidence in the possession of the prosecution is properly disclosed to the defense and to take what steps are necessary if counsel learns evidence is being withheld for any reason.[103]

Based on the analysis of the indictment, information obtained from the accused, disclosure received from the prosecution, and any defense investigation, defense counsel should be in a position to develop a theory of the case which will guide the actions taken during the trial process and provide an effective and convincing basis for raising a reasonable doubt as to the guilt of the accused.

- Know all relevant rules of court regarding the Prosecution duty to disclose evidence, both inculpatory and exculpatory, and take all available steps to ensure those rules are followed;
- Develop, when possible, a reasonable, working relationship with prosecution counsel to facilitate obtaining disclosure as well as working on other aspects of the case;
- Review disclosure as soon as possible so that timely requests for additional disclosure or missing disclosure can be made without delaying defense investigation and/or trial proceedings;
- Investigate information obtained in disclosure whenever possible; never just assume it is credible and/or reliable.

103 Code of Criminal Procedure, Art. 24 "Everyone shall be guaranteed the right to challenge decisions, actions, or omission of a court, investigator, and public prosecutor as prescribed in the present Code". *See also* Art. 46, which provides that state authorities and local government bodies, as well as their officials, are obligated to comply with the legitimate requests of the defense attorney; Code of Criminal Procedure, Art. 290 regarding disclosure of materials to another party.

4.2. THE UNIQUE CHALLENGES FACED BY DEFENSE COUNSEL IN TRIALS IN ABSENTIA

Chapter 3 of this Handbook outlines the general provisions for trials *in absentia* in certain cases under certain circumstances.[104] The vast majority of war crimes cases heard in the Ukrainian war crimes courts are conducted *in absentia*. Counsel are appointed to represent the accused and they are given little-to-no defense resources.

With very rare exception, defense counsel is not in a position in such cases to conduct any meaningful defense investigation. Counsel will be reliant on the pre-trial investigation of the case done by an investigating judge. Counsel will have little and perhaps no contact with the accused and will probably receive no information at all much less directions about the case from that potential resource. There will be no basis for counsel to decide upon a case strategy based on the usual preparations.

This does not mean there can be no case strategy.

The legal authority to proceed with an *in absentia* case requires that certain conditions are met regarding the accused, including cause to find the accused is evading arrest by hiding from the relevant authorities or is on an international wanted list. Subpoenas for the accused to appear at planned criminal proceedings must be properly sent to the accused last known location and/or published in the mass media. Counsel's first strategy in such cases, when appropriate given the information available to counsel, may be to challenge the propriety of proceeding *in absentia* at all because some or all of these prior notice requirements have not been met. If they have not it is counsel's duty to immediately raise that issue and seek dismissal of the case.

Even if the notice and other requirements seem to have been met counsel may still wish to move to dismiss the case in order to preserve that issue for appeal, in consideration of the fact that new information might come to light after the *in absentia* trial has concluded. Counsel may also formally request a retrial once the case is concluded. The point here is not to raise frivolous issues but to protect the accused's rights as much as possible given the very limited ability to do so in the absence of the accused during *in absentia* proceedings.[105]

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104 *See also* Benchbook, Chapter 2, Part 1; discussing trials in absentia in Ukraine.

105 *See, e.g.* Supreme Court ruling of June 13, 2019, Case No. 607/9498/16-k, which was reviewed in absentia, finding the accused's right to a defense was violated by the inadequate performance of

Defense counsel should also raise any legal and/or factual challenges to motions, evidence or other matters presented at trial by the prosecution.[106] In some instances it may be that arguments presented by the prosecution are facially suspect on legal or factual grounds. The fact counsel has not met with the accused does not preclude counsel objecting to such matters and affirmatively arguing against them in written or oral submissions. As in all cases, it is counsel's duty to remain loyal to his or her client and to do what counsel can to protect the accused's rights. Counsel should do so at every reasonable opportunity in the course of *in absentia* proceedings.

It is extremely unlikely that counsel in an *absentia* trial will have any affirmative evidence to present at trial, however, it is not out of the question. It may be, for example, that questionable expert testimony is presented. If so, counsel is free to and must challenge such evidence; perhaps by calling experts as part of a defense case.

The primary focus for defense counsel is to continue to keep in mind that the prosecution has the burden of proof at trial. Even in the absence of the accused and/or the absence of any previous contact with the accused, any reasonable, ethical, well-founded arguments that may undermine a finding that this burden has been met can and should be raised

4.3. A SHORT COMMENT ON SOME ETHICAL CONSIDERATIONS DURING IN ABSENTIA PROCEEDINGS.

A final comment must be made about the unique ethical issues which counsel may face during *in absentia* proceedings. Some of these dilemmas have yet to be resolved in Ukraine war crimes courts as the law in this area is still developing. The Special Tribunal for Lebanon, the only international court to permit a full *in absentia* trial, has set forth some ethical rules. Those rules are briefly discussed here. They are not controlling in Ukraine but may be of assistance to counsel for avoiding some potential ethical pitfalls.

Article 8 of the STL Code of Conduct for Counsel, which discusses counsel's role in an *in absentia* proceeding appears to be consistent with

counsel who, among other deficiencies, did not object to the conduct of the special proceedings despite inadequate notice to the accused about the date and time of court sessions.

106 *Ibid.* In which defense counsel was also found in adequate for failing to answer prosecution motions and arguments and, ini doing so, essentially conceding the accused's guilt.

Ukrainian standards. It provides that counsel sets the scope of his or her representation of the absent accused and in that role shall undertake all necessary investigation to prepare a defense, make submissions on the law in the perceived best interest of the accused, should consider the effect of any action taken by counsel on the position of the accused in the current or potential future proceedings, and should take any other action in the best interest of the accused including drawing the court's attention to any defense available on the evidence as a matter of law, seeking such orders from the court counsel requires to carry out investigations, calling witnesses for the accused, and examining witness presented by the prosecution.[107]

Article 8 specifically forbids counsel from entering any plea on behalf of the accused.[108] Article 9 provides that counsel "shall" provide effective representation of his or her client and will be found to be ineffective "where one or several acts or omissions of counsel" materially compromise, or might irreparably compromise, the fundamental interests or rights of the client." [109]

A complicated dilemma can occur, however, if counsel by mistake or design or otherwise has contact with an accused who has been declared absent under the controlling standards for *in absentia* proceedings.

The STL rules were clear on this. Defense counsel who is assigned to an *in absentia* accused "shall not have contact with the accused."[110] If defense counsel is contacted, directly or indirectly by an *in absentia* accused, counsel "shall" "due to the risk such contact may pose to the accused's right to a retrial, and without this act amounting to acceptance of defense counsel by the absent accused" refuse to discuss any element of the case with the accused, and "refer the accused to the defense office of the STL for "independent legal advice."[111]

These admonitions, of course, presume the existence of "an independent defense office" and other matters inapplicable to the present realities in Ukraine. Some guidance can be taken, however. The most obvious is that

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107 Special Tribunal for Lebanon, Code of Conduct for Counsel, Article 8, Scope of Representation; and see Ukraine Supreme Court ruling of June 13, 2019, Case No. 607/9498/16-k.

108 STL Code of Conduct, Art 8(C)(i).

109 Ibid. Article 9 (A).

110 STL, Code of Conduct, Art 8(E).

111 "Indirect" contact with the accused can occur in any number of ways, for example, through the family or friends of the accused. As noted, indirect contact is treated the same as direct contact with the accused.

defense counsel cannot, as a legal or ethical matter, have ongoing contact with an *in absentia* accused. Among other things this clearly constitutes consciously misleading the court.

The more difficult ethical dilemmas may occur, however, if an *in absentia* accused contacts counsel, directly or indirectly, for some reason entirely unanticipated or requested by counsel. This raises a whole series of questions, ethical and legal. Among them; must counsel immediately reveal that contact to the court or the prosecutor? Would doing so violate the attorney-client confidentiality privilege? What if it happens only once? Should counsel refuse to discuss the case? If the counsel and the client met in pre-trial proceedings and then the client fled, is such contact more likely and, if so, should counsel have anticipated it? Is counsel required to reveal the content of any discussions?

None of these questions have been clearly resolved as yet. In a subsequent chapter of this Handbook it is proposed that defense counsel in war crimes cases could benefit from creating forums in which such issues can be addressed so that counsel, already faced with the challenges of defending unpopular clients in difficult *in absentia* proceedings, can get clear guidance on such issues so they can meet their professional and ethical obligations, consistent with their obligations to their clients.

5. DEFENSE INVESTIGATIONS

Defense counsel in war crimes cases brought in the Ukrainian courts will be provided with information obtained by the prosecution in support of its case. As with the indictment, defense counsel must become thoroughly familiar with this disclosure and investigate it, as a means of assessing the strength of the prosecution case. Counsel should not just assume this information is complete, credible and/or reliable. Technological advances, such as the proliferation of advanced tools to manipulate data and imagery and AI-generated producst, heighten the need for such scrutiny. It is counsel's duty to question it and to independently investigate it to the extent such investigation is possible.

The cases in the international criminal courts are replete with instances in which forensic tests and/or other procedures were conducted improperly and therefore their results were unreliable,[112] witnesses who recanted on pretrial statements to the prosecution and testified differently at trial, witness statements which were improperly or misleadingly translated, exculpatory evidence known to the prosecution which was not produced at trial, and many other matters which underline the importance of the defense conducting its own, independent investigations of prosecution evidence.[113]

Although investigation of prosecution evidence will be the basis for most defense investigation, counsel may also have received important information from the accused or other witnesses or individuals. That information must also be investigated for counsel to learn the identities of potential defense witnesses and to obtain statements from them or to determine if there is reason to obtain expert advice as an additional means to challenge prosecution evidence at trial.

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112 *Prosecutor v. Kupreškić et al.,* IT-95-16, Appeal Judgement, 23 Oct 2001, ("*Kupreškić et al.* Appeal Judgement") (internal citations omitted) para. 34-36 (regarding incorrect identification procedures used as to accused); *Prosecutor v. Milošević,* IT-02-54-AR73.2, Decision on Admissibility of Prosecution Investigator's Evidence, 30 Sep 2002, ("*Milošević* Decision on Admissibility of Investigator's Evidence"), para. 22.

113 *Prosecutor v. Orić,* IT-03-68-T, Decision on Ongoing Complaints about Prosecutorial Non-Compliance with Rule 68 of the Rules, 13 Dec 2005, ("*Orić* Decision on Ongoing Complaints about Prosecutorial Non-Compliance"), paras 34; 76-77; *Prosecutor v. Karemera*, ICTR-98-44-T, Decision on Joseph Nzirorera's Sixth, Seventh, and Eighth Notices of Disclosure Violations and Motions for Remedial, Punitive and Other Measures, 29 Nov 2007, ("*Karemera* Decision on Disclosure Violations"), para. 8.

5.1. IDENTIFY THE PURPOSES FOR THE INVESTIGATION

The first step in putting together an investigation is to know what the investigation is meant to accomplish. Will it be focused on seeking to undermine the credibility of prosecution witnesses and other evidence? Is it an effort to identify and interview potential defense witnesses known or unknown to the prosecution? Is there a need to obtain documents or other evidence from domestic or foreign authorities and, if so, what evidence and what is the process for obtaining them to ensure chain of custody and admissibility at trial? Must experts be consulted to retest prosecution evidence or reevaluate the significance of such evidence? Have attempts been made to influence or threaten witnesses and, if so, by whom and for what purpose? Do witnesses have ulterior motives or bias underlying their testimony? Are there prosecution trial witnesses who may have information exculpatory to the accused which has not otherwise been disclosed? Is there prosecution evidence which does not need to be challenged, factually or legally, because it is not critical to the outcome of the case? Will the investigation, as is sometimes the case, involve all of these lines of inquiry?

5.2. CREATE AN INVESTIGATIVE PLAN

Once counsel has determined the various areas to be investigated it's important to put together a workable plan. Except for privately retained cases, resources are usually very limited for defense counsel so it is important to prioritize the focus of the investigation and identify what the goals are. When the circumstances of the case and the information known to defense counsel indicate that a defense investigation is required to preserve the rights of the accused to a fair trial and/or to present a defense, counsel should ask the court for funding. Having an organized plan for investigation should enhance counsel's ability to demonstrate that such a request is reasonable and to obtain a favorable result[114]. If such a request is refused, that refusal may form the basis for a future appeal, particularly if the absence of needed investigation prejudicially effected counsel's ability to provide the accused with the effective assistance of counsel at trial.

Everyone involved in the investigation must be clear from the start as to its purpose. They must know the nature of the charges, including the

[114] Such requests should be made under seal to preserve confidentiality.

factual and legal allegations in the indictment, and, when appropriate,the potential factual or legal defenses at play. This is of vital importance as it is the only way for an investigator or other team member to recognize the significance of information discovered in the course of the investigation, including whether it should be followed up on or disregarded and how to memorialize it for future use at trial if need be. Communications between defense counsel and investigators are privileged, as is the information the investigator provides to counsel in the course of the investigation. Nonetheless it is good practice to remind investigators of their duty to preserve that confidentiality. Counsel should also consider what information to share with an investigator in order for that individual to effectively carry out his or her assignment.

Investigators, when it is possible to have one, should be informed as to which witnesses are to be approached and interviewed, and the information to be sought from those witnesses. There must be an agreed protocol for memorializing witness interviews. Investigators should also be given a list of documents to be obtained and where to get them as well as the names of any contacts in the region of the investigation who may be of assistance. This protocol should ensure that any evidence or statements obtained are admissible in court pursuant to evidentiary rules for the jurisdiction.

Counsel should prepare a workable timeline for the investigation with appropriate deadlines for the receipt of information developed in the course of the investigation and for obtaining reports from investigators if they are needed.

When it is possible to do so counsel should go to the place where the events underlying the indictment are alleged to have taken place. Visiting the place where an alleged crime occurred can be invaluable to counsel's understanding of the facts of the case, prosecution version of those facts and, at times, may entirely undermine the prosecution case or call it into serious doubt. Site visits sometimes reveal that witnesses could not have seen what they claimed to have seen because buildings or other obstructions were in the way or the distance between the witness and what they claimed to have seen was just too great. A visit may reveal that a witness's statement is likely false in whole or part because it overlooks critical information about the layout of a street or other location. At minimum a site visit will give counsel a realistic understanding of the site which can be of huge assistance in challenging witness testimony on cross

examination. In conflict zones a site visit is not always feasible. When it is possible counsel should always avail themselves of that opportunity.

5.3. CONSIDERATIONS REGARDING THE USE OF RESOURCES

The extent of the investigation done in any particular case will depend on the resources available to counsel in terms of both time and cost. If counsel has the resources, an investigator can be hired to conduct the investigation, under the supervision of counsel.[115] In some jurisdictions it is required that investigators be licensed. In others it may not be. It is counsel's responsibility to know these requirements and to abide by them. Counsel should attempt to employ the most qualified investigators available to counsel and to obtain ongoing, regular reports from them so that the focus or extent of the investigation can be modified, as needed, based on information produced as a result of the investigation. This final point is important.

Counsel may begin an investigation with any number of suppositions or assumptions based on information available to counsel at that point. If the ongoing investigation refutes those assumptions or results in discovery of an entirely unanticipated avenue of inquiry, effective counsel will be open to those developments and alter the defense investigation or perhaps the defense theory of its case, based on those developments.

In the international courts, where defense counsel's resources were often extremely limited, individuals already located in the region where the charged events took place were sometimes used to assist with investigations. There were practical reasons for this. Individuals in the region were familiar with the local culture, language and the community. They could advise counsel on how to approach potential witnesses so witnesses would feel it is safe to speak to counsel and that their rights would be protected. They could sometimes also be a source for learning the identities of additional witnesses, location of useful documents or other evidence or potential experts.

The reality in the Ukrainian courts, at least as of the time this Handbook is being produced, is that most war crimes cases which go to trial are

115 Counsel is responsible for the actions of individuals working on the defense team, including investigators. Thus counsel must be aware of the activities of investigators to make sure they comply with all relevant legal and ethical standards.

tried *in absentia*. Lawyers are appointed to represent the accused in these cases and are not given resources to hire a defense team or even a second counsel. When resources are limited counsel will have to conduct aspects of the investigation him or herself. In such cases counsel, like any investigator, must be well prepared for any witness interviews ahead of time as it is often the case that the chance to interview a witness will only happen once. It is also imperative that counsel never interviews a witness alone. Always have a third-party present. If counsel is lucky enough to have a defense team this issue is easily addressed. If not, counsel may have to request the assistance of a trusted colleague or find some other creative solution. It may also be the case that counsel could ask the court to provide the needed resources to accomplish such interviews.

There are two reasons for this. First, counsel must never put him or herself in the position of becoming a witness at trial.[116] That could occur and has occurred when a witness testifies at trial contrary to the statement the witness gave counsel pre-trial. If a third party was present when the statement was given, that third party can be called at trial to impeach the witness. If not, counsel has no means to impeach the witness which is arguably a serious violation of the accused's right to a fair trial. Second, if a third party is present this will usually obviate concerns that the witness will claim later that counsel threatened or intimidated the witness or engaged in other improper conduct; a situation which has also frequently occurred in the international courts. Obtaining recordings of witness statements or written statements may help to avoid this problem, although not all witnesses are amenable to being recorded. Even when they are, witnesses have been known to claim that written or recorded statements were taken under duress or some kind of unrecorded threat. The presence of a third party will usually protect counsel from these kinds of future concerns.

5.4. INTERVIEWING WITNESSES AND OBTAINING STATEMENTS

The topic of how to approach and interview a witness in a criminal case is a very large one. There are many different ways to do it and different people use different techniques. Certain general observations can be

116 Code of Professional Conduct, Art 9: Impermissibility of the conflict of interest.

made, however, as to how to go about it in cases involving war crimes and crimes against humanity.

There are many different interview techniques that can be used. The techniques vary from person to person and different techniques may be employed depending on the witness. A witness who is a victim of crime, for example, will usually be approached differently, given the sensitivity of their situation, than a person who is a disinterested eyewitness.

There are some general observations than can be made about interview techniques:

1. The interviewer should always introduce themselves to the witness and advise the witness who they represent and why they are seeking the interview: this applies to lawyers, investigators or any other person interviewing a potential witness.
2. Nothing should be done or said by the interviewer to influence the witness's statement; questions asked should be non-leading and open ended.
3. Allow the witness to speak without interruption as much as possible while guiding the interview to stay on relevant topics if need be; if the witness volunteers previously unanticipated information, let the witness talk.
4. Always treat witnesses with respect.
5. Pay attention to non-verbal clues and body language during the interview and memorialize any relevant observations later.
6. If the interview is to be recorded via audio or video, ask for permission to do so prior to the interview and abide by the witness's requests.
7. If the interview is to result in a written statement, make sure the statement is in a language the witness understands; always read the written statement to the witness when it is completed or have the witness read it; always ask the witness to initial each page in addition to providing their signature at the end of the statement. If a transcript is made of a video or audio recorded statement, provide the witness the opportunity to review the transcript as well.

8. If the witness is a protected witness and/or a prosecution witness, ask permission to interview the witness from the relevant authority; never approach them without prior permission; you may also need to secure additional permissions or personnel if dealing with vulnerable witnesses or where there are language issues.
9. Learn as much as you can about the witness prior to approaching the witness and be clear on the information you are seeking to obtain from them.
10. Create a template for a written statement and/or the structure and means of memorializing a recorded statement and follow that protocol for all witnesses; however, be flexible when the situation calls for flexibility.
11. Find out if the witness has given previous statements and obtain those statements if possible; thoroughly review them before the interview.
12. Decide on the place where the interview will occur and take the location into account in the approach to the witness (i.e., who else will be present, is it reasonable to conduct the interview in a public place where it can be observed by others, will the fact of the meeting be detrimental to the witness's security, does the interview involve sensitive topics that private settings are appropriate (e.g. sexual assault cases, etc.).
13. Determine ahead of time, when possible, if the witness is likely to be friendly or hostile or neither.
14. Determine ahead of time what you want from the witness and make a list of questions to assure those topics are covered; also identify and have available any documents or other evidence (photographs, etc.) to be shown to the witness.

5.5. INVESTIGATIONS ARE ONGOING

In general, defense investigation of a case will begin as soon as the case starts and counsel is in possession of the indictment and the Prosecution disclosure. Investigation will be ongoing throughout the pre-trial and trial proceedings as factual and/or legal issues arise, and during the sentencing

process. In some instances, investigation may become necessary as part of the appeal process. The goal for defense counsel is to have a focused investigative plan which can result in discovery of credible witnesses, reliable challenges to the prosecution evidence or legal theory, relevant documents or other matters which will support the defense theory of the case.

6. STRUCTURING A LEGAL ARGUMENT

Most domestic and international criminal courts will require that counsel at times submit legal arguments on various issues in written form. Counsel may also be called upon to address the court with oral arguments during trial, at the close of trial and in any subsequent appeal. It is imperative that counsel learn and develop the skills required to create clear, concise, persuasive arguments in written and oral form so as to effectively represent the accused, including a clear preservation of issues in the record for appeal.

There are many different ways to structure and present legal arguments and individual counsel will have different ideas about how to do so, consistent with their particular style of advocacy. There are certain basic principles though which apply to any legal argument, which will be outlined here, along with a suggested structure. However arguments are presented, the overriding goal is to persuade the court to adopt counsel's view of the facts and the law, and therefore to rule in counsel's favour.

6.1. DEVELOPING EFFECTIVE LEGAL ARGUMENTS

There are certain basic principles which apply to all legal arguments regardless of the specific structure counsel may employ in presenting them.

1. thorough legal research regarding the issues raised in argument;
2. thorough knowledge of the factual record related to those issues;
3. thorough knowledge of the trial record both factual and procedural, to demonstrate why defense arguments should prevail;
4. know who the judges are;
5. determine which issues are the strongest; which are most likely to prevail and start with the strongest issues first.

As with everything related to representing an accused in a criminal trial, the first step in preparing an oral or written legal argument is thorough research of the applicable law and thorough knowledge of the underlying facts of the particular case. Once that is completed counsel can make informed decisions as to what legal and/or factual arguments are available in a particular case and how to go about presenting those

arguments in the most persuasive way. Decisions can also be made as to which arguments are the strongest and/or which arguments are most likely to prevail given the particular circumstances of the case. As to this latter point, counsel should find out who the judges are and whether or not any particular judge or judges already hold strong views on issues related to counsel's case, including prior decisions on the same issues. Counsel can then take those views into consideration when determining which issues to raise and how to raise them.

6.2. WRITTEN LEGAL ARGUMENTS

One common and highly recommended structure for legal arguments is known as "IRAC;" which stands for Issue, Rule, Analysis, Conclusion. There are of course many ways to present legal arguments, but this is a very effective one and, for those who are new to legal writing, a good place to start.

1. state the legal and/or factual issue (I)
2. define the legal standards which govern (R)
3. analyze the issues raised in light of the facts of the case, applying the law to those facts in a clear and concise manner (A)

State the legal and/or factual conclusion which is the result of the analysis with a specific description of the relief being requested (C)

6.2.1 STATING THE ISSUE

The goal of all arguments is to persuade the court to rule in the accused's favour on whatever issues are at hand. It is good practice therefore for counsel to define the issue which is being raised in a clear way at the *outset* of any written argument so that the Court knows exactly what the issue is and how counsel is asking the Court to resolve or decide the issue.

A common, but ineffective example is for counsel to begin an argument by stating: "The accused is not guilty of ordering the charged murders." That statement defines the issue but only in a general manner. A judge reading that statement has no idea as to what the legal or factual basis

for the claim will be and will most likely have to read a fair portion of the written argument to follow before that will be made clear.

A more effective statement, which not only defines the legal issues but directs the Court's attention, from the start, as to the basis for the argument to follow, is to state the issue itself in an argumentative, conclusory way: "The Court must find the accused not guilty of ordering the commission of the charged murders, even though he was commander of the forces at the time, as he had no contact with the troops and was not in a position to otherwise convey an order." This statement focuses the Court's attention from the beginning on the specific legal and/or factual matters at issue and the reasons why the court should rule in favour of the accused.

The overriding idea in structuring an effective legal argument is to get the attention of the Court from the outset and to lead the Court, step by step, through the arguments which follow so that when the conclusion is reached the Court agrees it is the only reasonable conclusion available based on the facts and the law.

6.2.2 DEFINING THE GOVERNING LEGAL STANDARDS

Written legal arguments must always include a clear statement regarding the law which is applicable to the stated issue. In general, it is a good idea to discuss such rules at the beginning of the argument so that the Court already has them in mind as it gets to the specific facts and circumstances raised in the argument.

It is recommended, when the law can be quoted *concisely*, to use the exact wording of the legal rule in question by quoting from the applicable statute or case authority and not to paraphrase case law holdings. This will avoid getting into controversy as to whether the case law holding was properly represented. A direct quote obviates that kind of digression. Of course, this depends on the particulars of the law in question. Effective legal writing will be limited to the precise law at issue. Long quotations from lengthy statutes are usually not required and are not effective writing. When the governing legal principles are not new or in dispute in a particular case, paraphrasing those standards may be more interesting, less time consuming, and therefore more effective.

At times there is no clearly controlling law, which can certainly happen when international legal rules and/or jurisprudence regarding war crimes and crimes against humanity are to be applied in domestic courts. In

that case Counsel must define the law Counsel believes to be applicable and state why it should be applicable. Counsel may also want to discuss potential laws or rules that the prosecution may raise in counterarguments and explain why they are not relevant or applicable in the particular case before the Court.

It is also a good idea, when dealing with nuances of the law, to start with any general legal standards and then, when applicable, go into detail by describing the "particularities of the law based on sub-sections of the relevant statute or jurisprudential nuances."[117]

6.2.3 EFFECTIVE ANALYSIS OF THE LAW AND FACTS

After stating the issue and describing the applicable law, the argument will focus on applying those legal standards to the facts of the accused's case and the issues at hand. This is the place where counsel's advocacy skills are potentially the most crucial. When done well an effective factual and legal analysis will support the conclusion counsel wants the Court to reach in finding in favour of the accused.

If your argument requires summarizing the facts of the case as a background for the legal issues, it is usually best to present the facts in chronological order. This makes it easy for the court to understand and remember the relevant facts when evaluating the legal arguments that follow. Counsel is free, when summarizing facts, to use organization and language in such a way as to emphasize those facts which support the accused's case and undermine the prosecution's case. The summary of facts, in other words, can be a form of argument in and of itself and provides counsel with the opportunity to persuade the Court to see the case from the accused's point of view. Facts relevant to the case, but adverse to the accused, cannot be simply left out, however. Counsel has the ethical obligation not to mislead the court.[118] In addition, overlooking relevant adverse facts can backfire by being interpreted as the failure to explain them and therefore a concession they are somehow irrefutably damaging to the defense case. The most persuasive arguments will recognize the existence of adverse evidence but diminish its importance to the outcome of the case.

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117 Manual on International Criminal Defense, ADC-ICTY Developed Practices (2011), p 67.

118 Code of Professional Conduct, Art 44: Observance by the advocate of the principles of honesty and decency during his or her professional activity in the court

As with everything, there is more than one way to present legal arguments. One potentially persuasive approach is to analyze, compare, and contrast similar cases, when possible, to do so, as illustrations of the proper outcome in the accused's case. Counsel is also free to argue the provisions of relevant treaties, case law from international courts and customary international law when those sources are applicable and supportive of counsel's position. If such sources are not directly applicable counsel is free to argue them by analogy.

However counsel approaches the analysis, Counsel has an ethical duty not to exaggerate or overstate the law or to mislead the court regarding the law or the manner in which the law may apply to the accused's case. It is also good practice to address any adverse legal holdings or conflicts between international tribunals or jurisdictions, rather than ignoring them, so as to explain any differences with the accused's case and/or to point out the reasons why such holdings should not be decisive or applicable to the accused's case.

When the outcome of an argument depends not only on a finding whether there was a legal or factual error, but also a determination of how that error adversely affected (was prejudicial) to the accused's case, make sure to include that analysis and argument. Include similar cases where an adverse effect was found or explain why the present case is different from cases where prior Courts found no adverse effect. Never assume a Court or other factfinder will automatically reach such a finding.

6.2.4 CONCLUSION

The final section, the Conclusion, is just that. It is a clear, concise statement of the legal and or factual conclusions the accused is asking the court to reach and a statement of the specific relief the accused is requesting.

6.3. ORAL ARGUMENTS

Oral arguments presented during trial and on appeal can also benefit from applying the IRAC organizational structure. As with written submissions, thorough preparation and knowledge of the law is essential. If documents or references to the trial record are important to presentation of oral arguments, counsel should have those matters organized and ready

at hand during presentation of arguments. Counsel should practice oral arguments with questioning from colleagues, if possible, to be prepared for the presentation in Court.

The advice to present the strongest arguments first is particularly important regarding oral presentations. Oral arguments are routinely interrupted by the Court with questioning from the judges. The questioning can often go off on matters counsel did not necessarily raise or intend to address; including matters which are directly contrary to what counsel intended to argue.

When this occurs Counsel must answer such questions at the time they are asked even though this will disrupt the plan counsel had in mind for presenting argument. Never fail to answer a question from the Court at the time it is asked. The questions usually reflect the issues that are of concern to the Court, so counsel is wise to address those issues immediately. If an answer is put off, it may get overlooked or lost in the arguments by the time they are concluded; a serious error on the part of counsel when the question at issue was of importance to the court's view of the case.

The same may occur with arguments counsel intended to present. They can also sometimes get lost in the new direction an argument may take once there has been court intervention. Raising the strongest issue for the accused first will usually assure that at least that issue, perhaps the most meritorious one in the case, will be addressed.

Counsel should *never* simply read an argument. It is important for counsel to maintain eye contact with the Court as much as possible during arguments both to enhance counsel's persuasiveness and for counsel to maintain a sense of how the Court is reacting to counsel's presentation. That cannot occur if counsel is continuously looking at a piece of paper or a computer screen. If counsel feels she or she must read, then practice the argument so that counsel continues to make ongoing contact with the court without interrupting the flow of the argument. A better practice is to write an outline of the argument, with needed case citations or other potential references noted. That way counsel can keep eye contact with the court as counsel argues and refer to the outline, if need be, as argument progresses, to make sure counsel is not forgetting or overlooking important points.

Finally, if counsel is sidetracked by questions from the Court or needs to retrieve a document or reference, it is always acceptable to simply ask the Court for a moment to get reorganized. So long as this can be done quickly and not overly delay proceedings most Courts will be willing to grant such a request.

6.4. CONCLUSION

Effective written and oral legal arguments command the interest of the Court from the outset and lead the Court, step by step, to the factual and/or legal conclusion the accused is asking the Court to reach. In presenting such arguments, counsel must be flexible; willing to answer questions from the Court as they arise and able to alter the focus of the argument when the Court indicates the issues which are of interest to the Court. A thoroughly prepared, well-organized argument will also reflect counsel's own belief in the credibility of the accused's case, itself a strong indicator of the effectiveness of counsel's presentation.[119]

[119] This section, which addresses suggestions for structuring and presenting written and oral arguments in general, does not specifically discuss the timing or content of opening speeches and closing arguments of the prosecution and defense at trial; all of which are already fully discussed in Code of Criminal Procedure, Art 364.

7. EXAMINATION OF WITNESSES AT TRIAL

The Ukrainian criminal courts, like the ICL criminal courts, conduct trials based on the adversarial system of presentation of evidence.[120] As described in the Code of Criminal Procedure:

> *"Criminal proceedings shall be conducted on the basis of adversarial approach envisaging independent assertion by the side of accusation and the side of legal protection of their legal positions, rights, freedoms and legitimate interests by means set forth the present Code."*[121]

The Code also specifically provides that counsel for the accused shall have the right to examine prosecution witnesses at trial.

> *"The prosecution shall be required to ensure the presence of witnesses for the prosecution during trial so that the defense can enjoy their right to examine them before independent and impartial court."*[122]

In accordance with the accused's right to a fair trial, the accused also have the right to present witnesses on behalf of the defense.

> *". . . to participate, during trial, in the examination of witnesses for the prosecution or request that they should be examined, as well as request that witnesses for the defense be summoned and examined at the same conditions as witnesses for the prosecution;"*[123]

The Prosecution has the burden of proof at trial and presents its case first. Thereafter the defense is entitled to call its own witnesses if it chooses to do so. Whether the defense calls witnesses or not, the burden of proof always remains with the prosecution, which must prove the case beyond a reasonable doubt.

When a party calls a witness as part of its case, it conducts an examination-in-chief or direct examination of that witness. A successful direct examination will result in the party who called the witness eliciting all the relevant information in support of the party's case that that witness can provide.

Thereafter the opposing party can cross-examine that witness. An effective cross-examination will contradict or undermine the evidence

120 Code of Criminal Procedure, Art 22. Adversariality of parties and their freedom to present their evidence to the court and to convincingly prove this evidence
121 Code of Criminal Procedure, Art 22, sec 1.
122 Code of Criminal Procedure, Art 23. Direct examination of testimonies, objects and documents
123 Code of Criminal Procedure, Art 42, sec 4(1)

given by that witness, call into question their recollection, veracity, bias, or credibility on direct or may include eliciting additional information favorable to the cross-examining party. Once cross-examination is complete the party who called the witness may, with permission of the Court, conduct a re-examination if it deems that necessary.[124] Any re-direct examination is usually limited to correcting matters raised on cross or to dealing with new evidence raised on cross. A witness may also be recalled, with the court's permission, at the same or a future trial session to provide additional evidence regarding circumstances they were not questioned about.[125]

7.1. DIRECT EXAMINATION

There is always a reason for calling a particular person to testify at trial; they are an eyewitness, they are a victim, they are an expert on an issue in dispute, among many other possible reasons. Whatever the reason, counsel must determine as to each witness what information that witness can provide, in support of counsel's case and have a plan for eliciting that information.

7.1.1 CONSIDERATIONS AS TO EACH WITNESS ON DIRECT EXAMINATION

1. Why is this witness being called to testify; what information can they provide in support of the accused's theory of the case;
2. How will the witness be approached? Have a plan and structure for the direct examination;
3. What specific points can the witness make; structure the examination to elicit them all;
4. Are any exhibits or other demonstrative evidence going to be used with the witness;
5. Does the witness have any specific issues or biases that might impact on his or her credibility or reliability; how will they be addressed;

124 *See e.g.* Code of Criminal Procedure, Art 352, part 14.
125 *Ibid.*

6. Can counsel anticipate objections from the opposing counsel; if so what responses will there be.

7.1.2 LEADING QUESTIONS ARE NOT ALLOWED

There are many different ways to structure a direct examination but one rule is mandatory. The examiner in a direct examination may not ask leading questions. A leading question is one which suggests the answer to the witness and/or assumes, as part of the question, the existence of a fact which has not yet been proven or which is subject to dispute, often questions which call for a simple "yes" or "no" answer. For example, if the examiner wants evidence of the description of a perpetrator it is not permissible to ask the witness on direct examination: "You testified that a man entered the store with a gun. Was he wearing a dark suit and sunglasses?" That question suggests the answer the examiner is seeking. Instead, the examiner must frame the question so as not to influence the answer: "You testified that a man entered the store with a gun. Can you tell us what he was wearing?"

The reason for the rule is that evidence elicited by use of leading questions is usually deemed to have little to no probative value since the witness has, essentially, been told what to say.[126]

One exception to this rule is that leading questions may be allowed on issues that are not in dispute.[127] In fact, permitting leading questions on non-contentious issues can save time and allow the examiner to focus on the issues that matter. For example, when a witness's role in a particular event is not in dispute, the examiner can ask leading questions to efficiently present that underlying, undisputed evidence.

"Q: I would like to focus your attention on 4 July of this year. At that time you were working in the Best Diamonds Jewelry Store, is that right?"

"A: Yes."

"Q: And about 12:00 on that day a man entered the store with a gun."

"A: Yes."

126 See e.g. *Prosecutor v Prlic et al*, ICTY Case IT-04-74-T, Decision on Prosecution Motion Concerning Use of Leading Questions (4 July 2008) paras 17-19; *Prosecutor v Bagosora*, ICTR Case ICTR-98-41-T, Decision on Modalities for Examination of Defense Witnesses (16 April 2005), para. 5.

127 *Prosecutor v Gotovina et al,* ICTY Case IT-06-90-T (16 April 2008)

"Q: And two or three customers reacted to him by running out the front door of the store, correct?"

"A: Yes."

The extent to which posing leading questions on non-contentious issues may occur in any given examination depends on the case. It is good practice, if counsel anticipates questioning in this manner, to alert opposing counsel and the Court so that all parties are aware of what will be taking place and have the opportunity to object to it if they deem that appropriate.

It is important to prepare for any witness examination ahead of time, by meeting with the witness when possible and/or being familiar with any pre-trial statements given by the witness. The witness should be subjected to both direct and cross-examination and advised about the rules of evidence, potential objections to testimony, as well as the procedures within the courtroom itself. There should be a reason for asking each question and a well-prepared counsel should know ahead of time what answer will be given. Of course, sometimes a witness will make unanticipated statements at trial regardless of counsel's investigation and preparation. When that occurs it is usually a mistake to ask open-ended questions, as occurs during direct examination, when counsel does not have a very good sense of what the answer will be. Doing so risks eliciting unanticipated testimony damaging to the examiner's own case. The best counsel can do, when faced with this situation at trial, is to make a reasoned judgement as to whether pursuing the subject is beneficial to counsel's case or not and to proceed from there.

Counsel should determine, as to each witness, whether it is "better to permit the witness to tell his own story in his own way, guided minimally by counsel, or for counsel to take him through his account by means of a set of structured questions." Often minimal intervention by counsel is the most effective. In other situations, a witness may require guidance from counsel in the form of concise questions to ensure the evidence given is both relevant and comprehensive.[128]

Whatever approach is adopted, in a well-done direct examination the examiner will be in control of the process and focused on the issues relevant to the examiner's case.

[128] Manual on International Criminal Defense: ADC-ICTY Developed Practices, Chapter VIII: Direct, Cross-Examination and Re-Examination (2011)

7.2. CROSS EXAMINATION

Cross-examination is intended to test the credibility or reliability of testimony elicited on direct and/or serves to otherwise undermine the opposing party's case. Cross-examination is usually limited to the subject matter of the direct examination and matters affecting the witness's credibility or reliability. Cross-examination may sometimes also be used to elicit evidence, not presented on direct, which is relevant to the cross-examiner's case.[129]

Counsel who is cross-examining a witness is questioning someone who has just testified against the accused. It is very important for counsel to keep that fact in mind as it directly impacts the nature of any cross-examination and the manner in which counsel approaches the witness.

7.2.1 CONSIDERATIONS REGARDING THE STRUCTURE AND NATURE OF CROSS-EXAMINATION

1. Spend only so much time as is required to get the needed information and then sit down ("arrive late; leave early");
2. As much as is possible use only leading questions which call for "yes" or "no" answers;
3. Maintain control of the witness; never permit the witness to explain or clarify or expand on testimony unless you ask them to;
4. Never ask a question when you don't know the answer to it; if you must ask such a question, consider whether the inquiry justifies the risk;
5. Listen to the witness's answers on both direct and cross examination, paying attention to inconsistencies with prior statements or reports or testimony; follow up on them when needed even if that will require flexibility in your planned examination;
6. Do not argue with the witness; do not respond to verbal attacks from the witness

[129] When this occurs the general rule is that the examination eliciting that particular evidence may not be done using leading questions.

7. Use the examination only to elicit information which is useful for the defense case; save factual conclusions and legal points for arguments to the Court;[130]
8. If the witness refuses to answer a question or offers unsolicited statements ask the Court to direct the witness to only answer the question asked; ask the court to strike any unsolicited answers or gratuitous statements from the witness
9. Always assess the need to cross-examine the witness at all; not every witness needs to be cross-examined

Leading questions are permitted on cross-examination. In fact, the best cross-examination is comprised only of leading questions which can be answered with a "yes" or "no" response. A witness subject to cross-examination has been called by the opposing party and, although there are exceptions, that witness is usually hostile in some respect to the cross-examiner's case. It is important to control the extent to which such a witness can offer unsolicited or unanticipated information. The use of leading questions, with the relatively closed response called for by such questions, is the most effective way to do that.

One exception is when the cross-examining party wants to elicit new evidence from the witness, not produced on direct examination, which supports the cross-examiner's case. As to those questions, the cross-examiner may not use leading questions which suggest the answer or influence the witness's answer, the same as with direct examination. In some courts this can be done during the course of cross-examination. In other courts the questioning party will be directed to call the witness as its own witness later in the proceedings.

As to each witness, counsel should consider whether there is a need to cross-examine the witness at all. In war crimes cases and in cases involving crimes against humanity it is often the case that the fact the crimes occurred is not really in dispute. The issue is whether the accused is liable for those crimes. Although there are exceptions, there is oftentimes no need to cross-examine the victim of a crime or an eyewitness to a crime when the fact the crimes took place is not in dispute. This is particularly true when the witness is a reliable, credible witness. A better strategy is

130 *See* The Art of Cross-Examination by Irving Younger. The Section of Litigation Monograph Series, No. 1, published by the American Bar Association Section on Litigation.

to ask no questions and let the witness go, to avoid the possibility that cross-examination will elicit more damaging evidence.

The cross-examination of a truly hostile witness, which is often an issue in tense, emotionally charged war crimes cases, should never devolve into a battle between the examiner and the witness. Likewise, even more seemingly neutral witnesses may react poorly when their credibility and/or reliability is challenged during an effective cross. The rule of thumb is to keep examinations of such witnesses short and limited in scope. Once you have the information you need or the best information you are likely to get from such a witness, stop the examination. This is the source of the maxim: "Arrive late and leave early."

It is counsel's duty to treat all witnesses with dignity and respect, regardless of the behavior of the witness. There are no exceptions to this rule. Counsel is not prevented from showing his or her own, honest emotions during court proceedings and it is at times very effective for counsel to express such frustrations. That said, counsel should never do so in a way which is disrespectful to the Court or the witness.

7.3. RE-DIRECT EXAMINATION

In some trial courts a party's ability to pursue re-direct examination at the close of cross is not always automatic. It is good practice for counsel to ask if re-direct will be permitted or to alert the court that re-direct is required. A request to do so will usually be granted. Re-direct is limited to rehabilitating a witness whose credibility has been challenged on cross, addressing issues raised on cross so as to correct such issues when necessary, and responding to new evidence elicited on cross. As with direct, leading questions are not allowed.

7.4. TESTIMONY PRESENTED BY REMOTE VIDEO

In the ICL courts as well as the Ukrainian courts it is permissible, under certain circumstances, for a witness not to appear personally at trial but to instead testify from a remote location by video link.

Article 336 of the Ukrainian Code of Criminal Procedure provides that:

"Court proceedings may be conducted through video conference with transmission from another premises, including such as is located beyond the bounds of the court premises" under certain circumstances.

1) it is impossible for a participant of criminal proceedings to participate directly in the court proceedings for reason of health or for other valid reasons;

2) it is necessary to ensure the persons' security;

3) a minor or underage person is to be interrogated as a witness or victim;

4) such measures are necessary to ensure speedy court proceedings;

41) introduction of martial law or during quarantine established by the Cabinet of Ministers of Ukraine;

5) there exist other grounds recognised sufficient by the court." [131]

Depending on the circumstances at hand, examining a witness by remote video link may or may not impact on the rights of the accused. This will vary from case to case. The point for counsel is to be aware of the circumstances in counsel's case and raise objections to them when appropriate.

In general, examinations conducted via remote video will follow the same rules as those done in open court. The difference, of course, is that the witness is not physically present. This can potentially impact the receipt of the testimony. Most remote video will show only the upper portion of the witness's body; sometimes only the face. With protected witnesses the voice of the witness may be substituted by another's voice. This can also occur if there is simultaneous translation for the witness. In some instances the face of the witness may be obscured. Body language, facial expressions and voice intonation play a significant role in determining witness credibility. Those subtleties, again depending on the specific circumstances, can be completely lost with video link testimony. Counsel must take all of this into consideration when piecing together what will hopefully be an effective examination even given these restraints.

Counsel should also inquire as to the place where such testimony will be held. It is important to know who, if anyone, will be in the room with the witness during testimony and perhaps who, if anyone, accompanied the witness to the remote location. Courts require that witnesses are insulated

131 Code of Criminal Procedure, Art 336.

from any form of potential influence while they are testifying. Depending on the situation counsel may wish to ascertain if those protections are in place.

Most video link, remote testimony will occur under reasonably appropriate circumstances and most Courts will ensure the proper protections are in place. It is counsel's duty to nevertheless inquire, if need be, on these issues and object when it is necessary to protect the rights of the accused to a fair trial and the opportunity to confront and cross-examine the witnesses against the accused.

7.5. USE OF EVIDENCE DURING EXAMINATION OF WITNESSES

The use of evidence, such as witness statements, expert reports or other matters, to confront a witness during direct or cross examination, is governed by the specific rules of evidence applicable in the relevant jurisdiction. Counsel may introduce evidence favourable to counsel's case during direct examination when a witness can identify the evidence at issue and explain its importance, for example, by verifying an expert report and the manner in which it was produced. Similarly, counsel may use items of evidence to challenge a witness during cross examination by, for example, confronting the witness with a prior inconsistent statement of the witness. There are many different ways in which items of evidence can be used during witness examination. It is counsel's duty to be thoroughly familiar with the relevant evidentiary rules so that counsel can effectively use and gain admission of evidence favourable to counsel's case as part of the examination of witnesses at trial.

In addition, the source and nature of potential evidence has evolved over the years. Criminal cases throughout the world have recognized books, reports, telephone intercepts and video evidence, for example, when appropriately identified, as admissible evidence. Now there is an ever-growing range of modern-day technical evidence that can be used in cases and which sometimes requires special expertise to obtain and interpret; for example, call-data records, social media platforms, and dark site materials. The rules of evidence regarding how such sources of information can be reliably verified and therefore be deemed admissible in a court of law are also ever growing and evolving. As with everything, it is counsel's duty to become familiar with these changing evidentiary

sources and standards when such evidence is potentially relevant to counsel's case.

Open-source evidence and the internet, more generally, have also given rise to new investigation techniques and opportunities. Drawing upon resources available, a lawyer can find effective tools to manage his or her case and conduct in-depth investigations without ever leaving the office.

The Benchbook provides excellent guidance on international standards of digital evidence and open-source material,[132] as well as other resources that can be found here in the Additional Materials Section.

[132] Benchbook, pp. 638-654.

III.
THE SOFT SKILLS

8. DEALING WITH THE RISKS OF WORKING AS DEFENSE COUNSEL

It is important for everyone involved in the criminal justice system to be aware of and to acknowledge the challenges and risks which can exist for lawyers who agree to represent individuals accused of war crimes, crimes against humanity and genocide. These criminal acts during a time of war are universally seen as the most serious forms of violence against innocent civilians. Persons accused of such crimes are often identified and vilified in the popular press well before their arrest or trial; their guilt simply assumed. The need to provide everyone, including individuals charged with war crimes, with a fair trial, gets lost in the understandable response that the accused were never concerned about being fair to their victims.

Lawyers assigned to defend accused in war crimes courts in Ukraine, unlike counsel at the *ad hoc* tribunals, the ICC and other international courts, are also functioning within a war zone. The conflict in Ukraine is ongoing. Defense counsel must operate within a volatile, emotionally charged, and ever-changing situation of profound violence and social upheaval. Their clients are individuals who are charged with creating that social upheaval by attacking Ukrainian towns and citizens. They are in every sense of the term "enemies of the people." These are circumstances which necessarily create significant psychological and emotional pressure on defense counsel asked to represent accused in the war crime courts, in addition to the ugliness and horrors attendant to the facts of all war crimes cases.

Defense counsel will necessarily benefit from having some guidance as to how to deal with these realities consistent with their legal and ethical obligations to their clients.

There are no easy answers, but there are a number of factors which counsel may wish to take into consideration *before* agreeing to represent an individual accused of war crimes, as a means of determining if counsel is able and willing to meet these unusual challenges. Once counsel has agreed to take on such a case, the ongoing assessment of the impact of these factors, if any, may also help counsel to maintain focus and a steady hand in carrying out the difficult and, at times, courageous task of defending the accused, during a time of war, in the war crimes courts.

8.1. CONSIDERATIONS BEFORE AGREEING TO DEFEND A WAR CRIMES CASE

One obvious factor counsel might consider before agreeing to act as defense counsel in a war crimes case is counsel's own view of his or her potential clients.

> *Consideration (1): The accused is an individual who has attacked counsel's own country as part of an effort by a foreign power to seize control of counsel's country. Is counsel able to recognize and adapt to that reality consistent with counsel's duty to be "independent of his or her client" and "act on the basis of the priority of his or her clients' interests."*[133] *Can counsel "consistently adhere to the principle of dominance of the client's interests over all other interests and considerations related to the relations of counsel with the court.*[134]

There has been a negative reaction in Ukrainian society to the very fact of defending accused in war crimes cases. An individual counsel's agreement to represent such an accused is seen by some as reflecting counsel's lack of basic morals, ethics and perhaps loyalty to counsel's country. This is a common phenomenon in society in cases involving terrorism, war crimes and crimes against humanity.

> *Consideration (2): Can counsel function as an advocate for the accused with the "maximum independence" in the performance of counsel's duties to the client free from "any external influence, pressure or interference in his or her activity related to the provision" of legal assistance . . . in particular, on the part of public authorities, political parties, other advocates, etc., as well as the influence of his or her own interests."*[135]

Some counsel personally know or are in some other way connected to victims of the war. All counsel are presumably sympathetic to victims of the war regardless of any affirmative personal connection. Will this fact influence counsel's conduct in a war crimes case and/or counsel's ability to zealously represent his or her client?

> *Consideration (3): Does that fact affect counsel's "objectivity or impartiality in the performance . . . of his or her professional duties and commissioning or non-commissioning . . . of acts in the course of carrying out" counsel's*

133 Rules of Professional Conduct, with amendments approved by the Congress of Advocates of Ukraine on February 15, 2019 (hereinafter "Code"), Article 8.
134 Code, Article 43
135 Code, Article 6

duties.[136] *This may include investigation of and/or cross-examination of victims at trial.*

It can be the case that prosecutors and judges in war crimes courts are biased against the defense, in particular in cases involving notorious accused or notorious crimes. Given that circumstance:

Consideration (4): Can counsel, consistent with the principle of legality, "be persistent and principled in asserting the client's interests in the court; never compromise his or her independence in the defense and representation of the client's rights and interests in order to not worsen the relations with judges; (and) in the case of court pressure on the advocate, . . . not allow compromises which are contrary to the client's legally protected interests."[137]

In absentia proceedings are allowed in Ukrainian courts in war crimes cases. This is a divergence from the practice in the international courts which did not allow such trials. To the contrary the Rome Statute of the ICC makes clear that all accused have the right to be physically present at trial.[138]

The sole exception, the Special Tribunal for Lebanon, conducted all its trial proceedings in the one case tried at that tribunal, *in absentia*.[139]

Consideration (5): Is counsel willing to represent an accused in absentia given the limitations imposed on defense counsel in such proceedings and is counsel willing and qualified to undertake all necessary investigations to prepare the defense of the accused[140] *under such circumstances?*

Cases tried in Ukrainian war crimes courts will, by definition, require counsel to have a thorough knowledge not only of applicable Ukrainian law in such cases, but also of applicable international law principles. Counsel must be versed in international humanitarian law, international human rights law, international criminal law, public international law and

136 Code, Article 9

137 Code, Article 43

138 Rome Statute, Article 63. The ICC has for the first time recently permitted an *in absentia* confirmation hearing in the Kony case where the accused has not been apprehended for over 20 years. Prosecutor v Joseph Kony, ICC-02/04-01/05, Decision on Prosecution Request to hold confirmation of charges hearing in the Kony case in the suspect's absence, 23 November 2023; and see Second Decision on the Prosecution Request to hold confirmation of charges hearing in the Kony case in the suspect's absence, 4 March 2024. The rulings rely on Article 61 of the Rome Statute which permits such hearings if the suspect waived an appearance, fled or cannot be found.

139 *See* Prosecutor v Salim Jamil Ayyashi et. al, STL-11-01/T/TC.

140 *See* Special Tribunal for Lebanon Code of Conduct for Counsel.

the law of armed conflict. Proceedings *in absentia* also present their own challenges to counsel's ability to effectively represent the accused since counsel is, by definition, unable to consult or take instructions from his or her client and likely unable to conduct any independent investigation on behalf of the defense.

Consideration (6): Is counsel able and willing to undertake needed training to become proficient in the areas of law which may impact a war crimes case? Is counsel able to work within the confines of whatever resources are made available to counsel by the court?

8.2. POTENTIAL APPROACHES TO CHALLENGES FOR DEFENSE COUNSEL IN WAR CRIMES CASES

There are a number of ways in which defense counsel can gain needed support, both practical and personal, to enable them to meet the difficult challenges associated with defending individuals accused of war crimes. As mentioned earlier, these challenges are all the more daunting when the trials are taking place in the midst of an ongoing conflict, as is occurring in Ukraine.

It goes without saying that none of these following suggestions can occur without financial and other support being provided by the relevant authorities and/or organizations, including legal and judicial associations in Ukraine as well as local and perhaps national political assistance. Doing so also requires the motivation and commitment of the individual defense counsel working in the war crimes courts.

8.2.1 TRAINING PROGRAMS FOR DEFENSE COUNSEL

The first and easiest suggestion, and one now employed in all the current international criminal courts, is to provide comprehensive training programs for counsel in both the substantive and procedural law applicable to such cases. This will be of particular importance in Ukraine where the law is changing and will continue to change, including the specifics of the implementation of international legal principles in the domestic courts.

The training must also include the development of needed practical courtroom skills and guidance for the conduct of investigations. These programs can and should be organized by the relevant legal groups; individuals already versed in Ukrainian law and practice, as an obvious starting point.

The international criminal law community also has an extensive collection of training materials which have been used over the past decades to train defense lawyers for practice in the ICL courts. The ADC-ICT has been conducting mock trials (to train lawyers on practical courtroom skills) since 2012 all of which were filmed and are available on the ADC-ICT website.[141] It has also been providing in person and online lectures on both substantive and procedural law on a yearly basis over the past several years. All of these lectures are available for free online at the ADC-ICT website and should be a treasure trove of easily accessible information on the discrete topics which arise in war crimes cases.

The ICC Bar Association also conducts trainings, often as webinar to ensure access from all parts of the world. These resources are available now as a starting point to assist and augment whatever training can be organized now in Ukraine for local defense counsel.

It should be emphasized that no matter how experienced defense counsel may be, war crimes cases involve unique areas of the law and facts. Everyone will benefit from training in this context.

8.2.2 ORGANIZE THOSE LAWYERS WHO ARE INVOLVED IN WAR CRIMES CASES NOW, OR WHO ARE PLANNING AND WILLING TO BE ASSIGNED TO THEM, INTO A WORKING SUPPORT GROUP

A major lesson learned when the ADC-ICT was first organized in 2002 at the ICTY was the clear need for defense counsel to get organized instead of each individual defense team working in isolation without the benefit of the insights and experiences of those working around them. Unlike prosecutors who worked together in organized offices with staff and other logistical support, defense counsel maintained individual offices which did not have these resources. With the exception of the rare privately retained counsel, defense counsel also operated on limited and sometimes inadequate funding.

An organization of counsel working in war crimes cases within the bar can overcome these deficits in various ways that can be of fundamental importance. Counsel, first and foremost, can share knowledge and experience from their own cases with others, to the benefit of the war

141 *See* adc-ict.org. As with most of the international court websites these trainings are available in English and French.

crimes defense community. This can include sharing information on cases, judges, prosecutors, legal pleadings, research and other resources which can perhaps assist the defense in any number of cases. It can lead to the group development of effective legal strategies and creative thinking in what is, by definition, a complex area of the law. It can also serve as a means for counsel, when seeking needed, lacking resources, to approach the relevant authorities, as a group; a far stronger position then individual counsel attempting to gain needed resources without knowledge of the extent to which other counsel may also be doing the same.

Given the fact that war crimes cases are being tried in Ukraine in the midst of the ongoing conflict, defense counsel may also benefit from such a group to seek personal, psychological and other support from colleagues, as cases are discussed and individuals' concerns and experiences are shared. This does not necessarily require any formalistic structure. The mere meeting of counsel in an environment where counsel can speak candidly to each other is a valuable resource. The ADC-ICT and ICCBA, for example, hold yearly conferences where counsel can meet to discuss such matters. The mere existence of these groups also encouraged counsel to meet more often, in less organized fashion, as issues arose and created a community of reasonable trust and shared understanding that would not have occurred had these organizations never come into existence.

Such focus can also provide an avenue for developing formal or informal mentoring programmes within the bar.

8.2.3 CONNECT DOMESTIC LAWYERS TO INTERNATIONAL COUNTERPARTS

A second more ambitious suggestion is for a network of counsel to be organized within the Ukrainian bar for those practicing in these cases. These lawyers can be connected in peer-to-peer fashion with defense counsel practicing before international courts and tribunals. Bar-to-bar relationships can also be fostered with a larger network of the IBA practice groups, ADC-ICT and ICCBA. This will provide a second resource for local counsel who may need or desire specific guidance on issues arising in their cases from individuals who have faced similar issues in their ICL practice.

8.2.4 SEEK SUPPORT FROM THE RELEVANT COURTS AND OTHER AUTHORITIES REGARDING PHYSICAL AND OTHER THREATS OF VIOLENCE

There have been, and in the future there will likely, and unfortunately, continue to be, real threats to individuals defending accused in war crimes courts. No defense counsel should be left on their own to confront and attempt to deal with such threats. Defense counsel are officers of the court just as the prosecutors, judges and other court officials. Their presence is fundamental to the provision of fair trials and due process of law, regardless of who the accused may be. When needed, physical protection for counsel is mandatory, as may be cyber or electronic protections for counsel's evidence, work product, and confidential communications.

Given these concerns defense counsel must approach the courts or other relevant authorities and work with them to put together some form of system for assessing such threats and providing reasonable responses to them. Again, approaching the courts as an organized group with clear and reasonable requests, tailored to the realities of day-to-day practice in court during an ongoing conflict, is more likely to have a positive result than individual counsel having to do so on an individual basis.

8.2.5 INFORMATIONAL PROGRAMS IN THE MEDIA TO EDUCATE THE AVERAGE CITIZEN ON WHAT PROCEEDINGS IN WAR CRIMES COURTS ARE INTENDED TO ACCOMPLISH, THE ROLE OF DEFENSE COUNSEL IN THAT PROCESS AND THE NEED TO PROTECT THE RULE OF LAW IN UKRAINE

A final, and also ambitious, suggestion is for the relevant Ukrainian bar associations, including judges and prosecutors, to use their position and influence to convince the media to provide coverage when appropriate of the war crimes courts as a means to provide the public with basic information as to why the courts are operating as they are, the need for defense counsel and the role of defense counsel, and the importance of these processes to assuring the rule of law in Ukraine now—when possible—and in the future. Any media coverage should take care to not prejudice either the prosecution or the accused or improperly interfere with the judicial process or witnesses. [142]

[142] One source discussing how the U.S. encounters these issues is ABA Standards on Fair Trials and Public Discourse.

9. PUBLIC COMMUNICATION AND ADMISSIBLE ADVOCACY

There are several ethical, professional standards which govern and guide the practice of law in Ukraine and are relevant to the defense in the war crimes courts. Counsel is, of course, presumed to be aware of and well-versed in the content and application of these standards to their own practice.[143] War crimes cases attract publicity and notoriety, resulting in counsel and/or witnesses being approached for comments on the case. What follows is some guidance on how counsel can participate in such discussions without violating professional rules while still maintaining counsel's right to comment on matters of public interest.

9.1. UKRAINIAN STANDARDS

The Ukrainian legislation on the Bar and Practice of Law regulates the specifics of the advocate's activities, including defence against criminal charges, at the level of principles and professional standards. In particular, the rules of professional ethics regulate in detail the behaviour of an advocate in the public sphere, both when providing legal aid and outside the practice of law.

In many instances the public sphere becomes an inseparable part of an attorney's practice, not only when defense counsel needs to communicate with the mass media or provide comments to journalists, but also during the performance of activities that in former times were strictly confined to the sphere of courtroom proceedings.

The advancement of information technologies and the necessity to conduct court hearings via videoconference are accompanied by the recording of court sessions and their online streaming on the internet, resulting in a more public exposure of defense counsel. In such hearings, the attorney, on one hand, participates in the court session, addressing the court, prosecutor, or other parties to the proceedings, while on the other hand, due to the public online broadcast, cannot but realize that their legal performance is simultaneously far more accessible to the public then trials done without such coverage.

143 The relevant codes and rules of professional conduct are available to counsel and can be reviewed as cases go on and potential issues arise.

These circumstances may or may not facilitate the defense. In all cases, however, the attorney has the obligation to act in the best interests of his or her client.

To determine the boundaries and conditions for the defender's use of advocacy opportunities in public communication, the following sections of the Rules of Professional Ethics are important:

1. Priority of the client's interests (Article 8. Rules of professional conduct).
2. Respect for legality (Article 7. Rules of professional conduct).
3. Confidentiality (Article 10. Rules of professional conduct)
4. Honesty and good reputation (Article 12-1. Rules of professional conduct)
5. Observance by the advocate of the principle of legality in relations with the court and other participants of the court proceedings (Article 42. Rules of professional conduct).
6. Observance of the principle of advocate's independence and dominance of client's interests in relations of the advocate with the court (Article 43. Rules of professional conduct).
7. Ethical aspects of advocate's relations with other persons (Article 49. Rules of professional conduct).
8. Correlation between advocate's professional duties and his or her public, academic and other interests (Article 54 Rules of professional conduct).
9. Principles of advocates' behaviour on social networks (Article 57 Rules of professional conduct).
10. Observance of the principles of independence, professionalism and responsibility by advocate when using social networks, online forums and other forms of communication on the Internet (Article 58 Rules of professional conduct).
11. Observance of the principles of honesty, prudence, correctness and dignity by advocate when using social networks, online forums and other forms of communication on the Internet (Article 59 Rules of professional conduct).
12. Observance of the principles of tolerance and patience, corporate identity and preservation of trust on the part of society, confidentiality

and prevention of any demonstrations of discrimination (Article 60 Rules of professional conduct).

These ethical standards delineate the principles of legal practice in general. Additional rules address counsel's contact and communication with the public media.

The Ethical Guidelines for Legal Practitioners in Media and Public Communications in the course of conducting legal practice, provide that defense counsel shall:

- Adhere to ethical principles pertaining to the strategic utilization of media and public communications in client advocacy.
- Select appropriate parameters for interaction between legal practitioners and press outlets, as well as social media platforms, when discussing ongoing cases.
- Maintain a balance between advocacy activities and the preservation of public trust in the legal community and the judicial system as a whole.
- Obtain written consent from the client for any public statements related to their case.
- Avoid potential conflicts between the attorney's duty of confidentiality and the strategic use of publicity in client representation.
- Refrain from making public comments that may impede the administration of justice or compromise a fair trial.
- Distinguish between permissible public advocacy and impermissible attempts to influence potential witnesses or other participants in judicial proceedings.
- Respond judiciously, in accordance with ethical standards, to negative publicity or correct misinformation in the public domain regarding their clients' cases.
- Consider the application of ethical standards when participating in documentaries, interviews, or other media products related to current or concluded cases.
- Differentiate professional obligations when utilizing social media platforms for case-related communications or client defense.

While adhering to ethical requirements is crucial, the cornerstone for defining the limits of a lawyer's permissible public communication

lies in obtaining the client's written consent. This consent encompasses two critical aspects:

- firstly, approval for any publicity measures, and
- secondly, informed consent authorizing the lawyer to disclose the client's personal data and information otherwise protected by attorney-client privilege. This principle is enshrined in Article 10 of the Rules of Professional Conduct.

The Law of Ukraine 'On the Bar and Legal Practice' defines the principles and foundations for the exercise of advocacy. Article 2 of this law states that advocacy is carried out on the principles of the rule of law, legality, independence, confidentiality, and avoidance of conflicts of interest. These are basic ethical and legal principles guiding the practice of criminal defense in Ukraine.[144]

In any contact with the press or in presentations in academic or other forums, counsel must keep these principles in mind when discussing pending cases or current clients. An easy rule of thumb is that the client's interests, and certainly any applicable court orders, are paramount. All other considerations follow from that and may include those listed above as well as this: *Ensure that the client and any witnesses or interested parties (i.e. family or friends of the accused) are aware of the risks that may arise from speaking to the media, posting on social media, or otherwise discussing the case in public forums.*

9.2. INTERNATIONAL RULES OF PUBLIC COMMENT ON COURTS AND PENDING CASES

In the international criminal court participants in past and pending cases have been routinely contacted by media and other outlets eager to obtain information about cases, both for laudable and sometimes hostile purposes. Counsel's first obligation, then, is to know who you are talking to and why they want to speak to you. As we all know, particularly in the current universe of social media, not all media or other entities are trustworthy. Some are not. Counsel is wise to conduct, when at all possible,

144 See, e.g. Rules of Professional Conduct, Art. 7 "Respect for Legality," Art. 10 Confidentiality; Art. 12[1] Independent, honesty and good reputation; Art. 42, observance of principle of legality in relation to court and other participants in court proceedings; Art. 43, principle of advocate's independence and priority of client's interests; Art. 54, correlation between professional duties and public, academic or other interests.

at least a minimal inquiry as to who it is who is seeking information and the purpose for their contact, which may include reading social media feeds or previous media accounts, interviews, or articles to learn of any biases or motives of the media personnel or outlet.

Counsel should also be well informed of any ethical rules which may or may not limit their ability to discuss pending cases. This issue arose on a number of occasions in the international criminal courts, although with only one exception, did not result in any sanctions.

In the *Haradinaj et al* case at the ICTY, the then prosecutor, Carla del Ponte, gave an interview to *Der Spiegel* magazine in which she commented on the merits and strength of the prosecution's then pending case against Haradinaj and his two co-accused at the ICTY. The defense brought a motion for misconduct on the basis that her comments, which were widely publicized, could influence the trial court, which had yet to hear any evidence. The motion was denied, primarily on the grounds that the professional judges sitting on the case would not be influenced by her comments even though she was lead prosecutor. Therefore, there was no prejudicial effect on the pending trial.

The underlying concern, however, is worthy of attention. While general comments on pending cases may be appropriate--for example, a defense lawyer stating they believe their client is innocent and will be acquitted-specific comments on the details of upcoming evidence, witnesses or references to matters that may never be revealed at trial may border on potential ethical violations, including confidentiality issues, arguments the comments are meant to improperly influence the court and other matters. This is particularly true for defense counsel who rarely enjoy the status or deference afforded to lead prosecutors. It is perfectly permissible to speak to the press, to give lectures, to write articles and to participate in conferences in which cases are discussed publicly. The point is to be fully aware of proper comment when speaking about current, pending cases.

A similar issue arose in the *Karadzic* case at the ICTY when the accused alleged Ms. Del Ponte was in contempt of court for sharing a defense witness list with individuals at the US embassy.[145] The case was ultimately resolved on the basis that there was no specific court order

[145] *Prosecutor v Karadizic v Milosevic*, ICTY Case No.13-55-R90.1; 13-58-R90.1, Decision on Karadizic Request to Appoint an Amicus Curiae Prosecutor to Investigate Contempt Allegations Against Former ICTY Prosecutor Carla del Ponte, 27 November 2003.

which precluded Ms. Del Ponte from acting as she did. However, the lesson is clear for counsel. The revelation of names of witnesses or other potentially case sensitive information should never occur absent a very clear understanding that such revelations are proper.

Counsel must also be careful about comments made to the public and the press about the courts themselves and the trials which occur there as a general matter. In one case at the ICTY, a defense counsel was disciplined by the ICTY Disciplinary Council for statements he made to radio and television in the Republic of Srpska and to Vesti newspaper. It was alleged the statements violated Article 35(i) of the ICTY Code of Conduct for Counsel when he opined, regarding the conduct of the ICTY in general, that "*the main object has been achieved; (Serbia) has been demonized*."[146]

The majority of the Disciplinary Board found that this statement violated Article 3(v) of the Code of Conduct and therefore constituted misconduct under Article 35(i) of the Code. Article 3(v) provides that counsel: "shall take all necessary steps to ensure that their actions do not bring proceedings before the tribunal into disrepute." The majority of the Disciplinary Panel interpreted this article as imposing on counsel the affirmative obligation to protect the reputation of the tribunal and that this obligation extended to counsel's conduct outside of the tribunal. In fact, when the statement was made the Counsel was no longer representing at the tribunal, had no clients there and no pending cases there.

The argument that counsel had the right, as a matter of free speech under Article 19 of the ICCPR and Article 10 of the ECtHR, to express this opinion, was rejected by the majority. Also rejected by the majority was the contention that the statement in question was an honestly held, personal opinion, which is also entitled to protection.[147]

Counsel is entitled to free speech under any number of international conventions. But counsel must be aware of the particular rules governing public comments on cases in Ukraine, particularly cases currently pending

146 *In the Matter of Mr. Toma Fila*, Public Decision on Appeal to the Disciplinary Board, IT-13-93-Misc-1, 8 July 2013.

147 *See In the Matter of Mr. Boris Aleksic*, Case No. DP-2-11, Decision on Appeal of the Registrar to the Disciplinary Board, 16 December 2011, made public 17 February 2012, para. 44: "Respondent is entitled to an opinion on the matter and should not be censured by the Tribunal for his own opinions."

in the courts. International law is not consistent on whether and to what extent such comments are protected speech.

9.3. PRINCIPLES OF COUNSEL'S BEHAVIOUR ON SOCIAL NETWORKS

The advocate's use of social networks such as Facebook, Twitter, LinkedIn, MySpace and numerous other online forums as well as other forms of Internet communication are perfectly acceptable and have been recognized as such by the Supreme Court.[148] However, counsel must be careful, as with other forms of speech, to adhere to all applicable professional duties, as already mentioned here.[149] When communicating in such forums counsel should always take into account the consequences of such communications for counsel, counsel's clients and the courts at present and in the future. Communications on social media are just as consequential as any other form of communication, perhaps more so given the wide access to such communications.

Counsel may also seriously consider whether communications on social networks about counsel's cases, opinions about cases or clients, or other work-related subjects are appropriate at all given what it is that counsel is trying to accomplish by use of such networks. Always take into account the content of the communication, the likely audience and, without exception, the accuracy of whatever it is that is said.[150] Further, keep in mind that your Chamber or Judges will also have access to any messaging you create about the case.[151]

While lawyers are of course free to diligently pursue the legitimate interests of their clients without undue inhibition from any source be it authorities or the public at large. In the often volatile, emotionally charged atmosphere that can surround war crimes prosecutions; however, it is

148 *See* Judgement of the Supreme Court, sitting as judges of the Administrative Court of Cassation, Case No 815/1830/18, June 24, 2020, Art 57, Rules of Professional Ethics for Attorneys; however attorneys may only post or comment on information, the use of which does not prejudice the reputation of attorneys and the legal profession as a whole.

149 *See* Rules of Professional Conduct, Article 57: independence, professional behavior, responsibility, honesty, prudence and correctness, dignity, prevention of any demonstrations of discrimination, tolerance and patience, confidentiality.

150 *See* generally Rules of Conduct, Art 59 on counsel behaving with respect, avoid abusive language, the need to be responsible, reliable and not misleading.

151 *See, e.g.,* Prosecutor v. Al Hassan

especially important to consider carefully what is being said, the reason for saying it and to maintain respect for the rule of law and the courts which are there to enforce it.

Finally, it is highly recommended that counsel does not engage in public discussion of a client's case without the client's prior consent, when at all possible. While this may not always be necessary or practical it is a subject which can be raised with the client as part of ongoing discussions of the case, and when and if the subject comes up, so that counsel is aware of the client's preferences and can abide by them.[152]

[152] *See generally* Rules of Conduct, Art 60. And see Art 8: Priority of Client's Interests, and Art 7: Respect for Legality

IV. ADDITIONAL RESOURCES

10. GLOSSARY OF TERMS

1. **1949 Geneva Conventions** — four Geneva Conventions were adopted in 1949. Geneva Convention I through III primarily address the treatment of members of the armed forces in various scenarios: wounded and sick in the field (Geneva Convention I), wounded, sick and shipwrecked at sea (Geneva Convention II), and prisoners of war (Geneva Convention III). Geneva Convention IV addresses the protection of civilians during armed conflict. All four Geneva Conventions are universally ratified and uncontentious.
2. **1977 Additional Protocols** — the Geneva Conventions are supplemented by two additional protocols relating to the protection of victims of international armed conflict (1977 Additional Protocol I) and non-international armed conflict (1977 Additional Protocol II). In 2005, another Additional Protocol (2005 Additional Protocol III) was concluded adopting the additional red crystal ICRC emblem which is free from any religious and cultural connotation as compared to the red cross and red crescent.
3. **Accessory liability** — a form of criminal responsibility an accused can incur for the criminal actions of another person if the accused has a sufficient connection to, or participation in, the crime.
4. **Accountability** — refers to the processes, norms, and structures that bring perpetrators to justice by holding them accountable for their actions and violations of the law.
5. **Accused** — person(s) who stand accused of having committed crimes, and/or of having engaged in or contributed to criminal conduct. See also 'Perpetrator', below.
6. **Admissibility of Evidence** — in court proceedings, all information must be ruled 'admissible' to be used as evidence at trial. This requires the material to be relevant and reliable, and that its probative value is not outweighed by any prejudice if the material were to be admitted.
7. **Armed Conflict:** is the use of armed force between States or an protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.
   a) **International Armed Conflict (IAC)** (also known as Armed conflict of an international character) — any use of armed force between states,

regardless of a declaration of war or recognition of a state of war, as well as the partial or total occupation of a part of the territory of a state, even if the said occupation meets with no armed resistance. The main sources of treaty-based international humanitarian law applicable to international armed conflicts are the four Geneva Conventions relative to the protection of war victims of August 12, 1949, and Additional Protocol I, relating to the Protection of Victims of International Armed Conflicts of June 8, 1977.

b) **Non-International Armed Conflict (NIAC)** (also known as Armed conflict of a non-international character; Internal Armed Conflict) — protracted armed violence (use of armed force) within a State between an organised non-state armed group and a State, or between such groups. For a NIAC to exist, the hostilities must have reached a minimum level of intensity and the non-state groups involved must be organised. The main sources of treaty-based international humanitarian law applicable to non-international armed conflicts are Article 3 common to the four Geneva Conventions relative to the protection of war victims of August 12, 1949, and Additional Protocol II, relating to the Protection of Victims of Non-International Armed Conflicts of June 8, 1977.

8. **Armed Forces** — refers to the organised personnel and units operating under a command responsible to a belligerent State (e.g., army, navy, air force, national guards, etc.).

9. **Armed Groups** (or Non-State Armed Groups) — refers to organised non-state entities that are party to an armed conflict. The term refers exclusively to the armed or military wing of such entities, excluding, in particular, their political wing and other segments of the civilian population that are supportive of such entities.

10. **Civilians** — individuals who are not members of the armed forces. The civilian population consists of all persons who are civilians.

11. **Coercion** — acts designed to deprive or impair the ability of a person to exercise free will and autonomy.

12. **Combatants** — individuals with a right to participate in hostilities during IACs and can be targeted, such as members of the armed forces (excluding medical and religious personnel) and members of militias or volunteer corps forming part of such armed forces, members of other militias and volunteer corps (including those of organised resistance

movements) belonging to a party to the armed conflict which fulfil specific requirements, members of the regular armed forces who profess allegiance to a government or authority not recognised by the other Party to the armed conflict, and inhabitants of a non-occupied territory who on the approach of the enemy spontaneously take up arms to resist the invading forces.

13. **Command (or Superior) Responsibility** — refers to the responsibility of military commanders or civilian superiors for crimes committed by forces or subordinates acting under their command, authority and control, which occurred because of their failure to exercise proper control over those forces/ subordinates.

14. **Common Article 3** — refers to the third article common to the four Geneva Conventions. It is applicable to non-international armed conflicts and protects persons taking no active part in hostilities against any violence to life or person, taking of hostages, outrages upon dignity, arbitrary sentence of execution, and denial of care.

15. **Conflict-related sexual violence (CRSV)** — refers to the acts of rape, sexual slavery, forced prostitution, forced pregnancy, forced abortion, enforced sterilization, forced marriage and any other form of sexual violence perpetrated against women, men, girls or boys that is directly or indirectly linked to an armed conflict.

16. **Crime of Aggression** — prohibits the planning, preparation, initiation, and execution by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity, and scale, constitutes a manifest violation of the Charter of the United Nations. This crime is a leadership crime, which means it is necessary that the perpetrator was in a leadership position in the State that committed the act of aggression. It is enshrined in Article 8bis of the ICC Statute.

17. **Crimes Against Humanity** — a specific set of prohibited acts under international criminal law that occur in the context of a widespread or systematic attack directed against any civilian population. The existence of a widespread or systematic attack and the link between that attack and the conduct in question differentiates crimes against humanity from ordinary or domestic crimes. The prohibited acts are: a. murder;

b. extermination; c. enslavement; d. deportation or forcible transfer of population; e. imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; f. torture; g. rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; h. persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; i. enforced disappearance of persons; j. the crime of apartheid; k. other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. They are enshrined in Article 7 of the ICC Statute. They can be committed both in peacetime and during armed conflict.

18. **Customary International Law** — a set of rules arising from established international practices, as opposed to treaties. It derives from consistent conduct of States (State practice) acting out of the genuine belief that the law — as opposed to, e.g., courtesy or political advantages — requires them to act that way (opinio juris). A rule with customary law status is binding on all States regardless of whether they have a treaty obligation to the same effect.

19. **Detaining Power** — when a State holds/detains persons protected under the Geneva Conventions belonging to the adverse party.

20. **Digital Evidence** — information transmitted or stored in a digital format that a party to a case may use in criminal proceedings.

21. **Direct Participation in Hostilities** — refers to any acts, which aim to support one party to the armed conflict by directly causing harm to another party, either directly inflicting death, injury or destruction, or by directly harming the enemy's military operations or capacity, as opposed to indirect participation by providing general contribution to the war effort. When carried out by a civilian, a conduct qualifying as direct participation in hostilities would suspend their protection against the dangers arising from military operations. For the duration of their

conduct, the civilian in question may be directly attacked as if they were a combatant.

22. **Elements of Crimes** — a set of objective, subjective and contextual elements which, when taken as a whole, lead to the offending consequence and are altogether required to be proven to establish guilt. See also 'ICC Elements of Crimes', below.
    a) **Objective Elements (Actus Reus)** — the conduct, consequence and circumstances that materialize a crime. Objective elements are also known as 'material elements', 'physical elements' and 'actus reus'.
    b) **Subjective Elements (Mens Rea)** — the state of mind that is required to establish a crime. Under the law of the International Criminal Court, unless otherwise provided in the ICC Statute, each objective element of the crime must be carried out with intent and knowledge.
    c) **Contextual Elements** — War crimes and, crimes against humanity must occur in specific contexts. The requisite contextual elements distinguish them from domestic crimes with the same underlying conduct. See the definitions of War Crimes, Crimes against Humanity for specific definitions of their contextual elements.
23. **European Convention on Human Rights (ECHR)** — A convention opened for signature on 4 November 1950 to protect human rights and political freedoms within the framework of the Council of Europe. Since its adoption in 1950 the ECHR has been amended a number of times.
24. **European Court of Human Rights (ECtHR)** — A court established in 1959 under the framework of the Council of Europe. It rules on individual or State applications alleging violations of the rights set out in the ECHR.
25. **Factors relevant to an accused's culpability:**
    a) **Aggravating factors** — circumstances that might lead to an increased sentence and magnify the accused's culpability.
    b) **Mitigating factors** — circumstances that might lead to a reduced sentence and lessen the accused's culpability.
26. **Genocide** — a specific set of prohibited acts under international criminal law that must be committed with an intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such. The existence of a specific intent on the part of the perpetrator "to destroy, in whole or in part, a national, ethnical, racial, or religious group" differentiates

genocide from ordinary or domestic crimes and from crimes against humanity and war crimes. The prohibited acts are:

a) killing members of the group;
b) causing serious bodily or mental harm to members of the group;
c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
d) d. imposing measures intended to prevent births within the group;
e) forcibly transferring children of the group to another group.
f) It is enshrined in particular in Article 6 of the ICC Statute and Article II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. It can be committed both in peacetime and during armed conflict.

27. **ICC Statute** — The Rome Statute of the International Criminal Court is the treaty that established the ICC. Adopted on 17 July 1998, it sets out, inter alia, the crimes the Court can address and the mechanisms for State cooperation.

28. **ICC Elements of Crimes** — the instrument adopted by the Assembly of States Parties that assists the International Criminal Court in interpreting the crimes set out in the ICC Statute.

29. **Internal disturbances and tensions** — situations that do not qualify as a NIAC because they do not reach the requisite level of intensity or do not involve sufficiently organised non-state armed groups. Internal disturbances and tensions involve cases of the violation of internal order and situations of internal unrest, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature. See also 'Armed Conflict', above.

30. **International Crime** — a crime that undermines the foundations of the international legal order and is a matter of concern to the entire international community (e.g., genocide, crimes against humanity, war crimes, and the crime of aggression). One of the key features of an international crime is the existence of a contextual element or of a special intent. An individual may be held criminally liable for the commission of an international crime in both a domestic court according to domestic criminal law, and in international criminal courts and tribunals pursuant to their statutes.

31. **International Criminal Court** (ICC) — the world's first permanent international criminal court. It operates based on its founding international treaty — the Rome Statuteof the International Criminal Court. It is based in the Netherlands and is designed to investigate, prosecute and try individuals accused of committing the most serious crimes of concern to the international community as a whole, namely crimes against humanity, war crimes, genocide, and aggression. It is a complementary (additional) mechanism to national courts.

32. **International Criminal Law (ICL)** — a specialist branch of international law. It is a set of principles and norms of international law that establish and regulate individual criminal liability for international crimes (genocide, crimes against humanity, war crimes, and the crime of aggression). Since its birth in Nuremburg after the Second World War, ICL is shaped by the statutory instruments and jurisprudence of international(ized) courts and tribunals, as well as domestic case law on international crimes.

33. **International Criminal Tribunal for Rwanda (ICTR)** — was an ad hoc tribunal established by the United Nations Security Council to prosecute persons responsible for genocide and serious violations of international humanitarian law committed in Rwanda and neighbouring States, between 1 January and 31 December 1994.

34. **International Criminal Tribunal for the former Yugoslavia (ICTY)** — was an ad hoc tribunal established by the United Nations Security Council to bring to justice those responsible for serious violations of international humanitarian law committed in the former Yugoslavia since 1991.

35. **International Human Rights Law (IHRL)** — the body of international law that safeguards individual's fundamental freedoms (e.g., the right to life; freedom from torture; the right to liberty and security of the person; etc.) and protects individuals from the power of the State.

36. **International Humanitarian Law (IHL)** (also known as the Law of Armed Conflict; Laws and Customs of War; Jus in bello; Law of War) — is a branch of international law; a set of principles and norms of international law that establish and regulate the protection of victims of war and the use of means and methods of warfare. IHL consists of sub-branches: Geneva Law (protection of war victims), and the Hague Law (use of means and methods of warfare). The main purpose of IHL is to prevent human

suffering in times of armed conflict. The four Geneva Conventions and their Additional Protocols are the main treaties forming part of IHL.

37. **Military Crime** — a crime committed by military personnel and enshrined in domestic criminal law which constitutes a violation of the established procedure for military service. Military crimes are enshrined in Chapter XIX of the CCU.

38. **Military Necessity** — a principle of IHL whereby certain conduct during an armed conflict may be justified if it is necessary to attain a legitimate military advantage, provided that the conduct is not otherwise prohibited by IHL.

39. **Military Objective** — objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction,capture or neutralization in the circumstances ruling at the time, offers a party to the armed conflict a definite military advantage.

40. **Modes of Liability** — refer to the way in which a person was involved in the crime and, as a result, can be held criminally liable. They are the 'linking principles' used to connect a perpetrator with a particular crime, with other criminals, and with past decisions and consequences. See 'Accessory Liability', 'Command (or Superior) Responsibility', and 'Principal Liability' for examples of specific modes.

41. **Nulla poena sine lege** ('no penalty without law') — a fundamental component of criminal justice and the rule of law, it ensures that an accused cannot be punished for conduct that was not prohibited by law at the time it was committed.

42. **Nullum crimen sine lege** ('no crime without law') — a fundamental component of criminal justice and the rule of law, it ensures that an accused cannot be held criminally responsible for conduct that was not prohibited by law at the time it was committed.

43. **Occupation** — occurs when the territory of a State or part thereof is placed under the effective control of the armed forces of another State. The occupation extends only to the territory where such control has been established and can be exercised. Provided effective control is exercised, the situation will be qualified as an occupation even if it was met with no armed resistance.

44. **Perpetrator** — refers to the individual who has committed the crime or at least carried out the criminal conduct. See also 'Accused', above.
45. **Presumption of Innocence** — an ICL principle under which a person accused of committing a crime must be considered innocent until proven guilty.
46. **Principal Liability** — a form of criminal responsibility an accused can incur for their direct perpetration of a crime.
47. **Principle of Assimilation** — requires that prisoners of war be treated in the same way as members of the Detaining Power's own forces, in relation to a given issue.
48. **Principle of Distinction** — an IHL principle recognizing that civilians and civilian objects must be distinguished from combatants and military objectives. Only the latter can be attacked.
49. **Principle of Legality** — an ICL principle which protects prisoners of war from being tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by the international law in force at the time said act was committed.
50. **Principle of Precautions in attack** — an IHL principle that requires participants in an armed conflict to take all feasible precautionary measures to spare civilians and civilian objects in the course of military operations.
51. **Principle of Proportionality** — an IHL principle that prohibits launching an attack against a lawful military target if that attack may be expected to cause harm that would be excessive in relation to the concrete and direct military advantage anticipated.
52. **Prisoners of War (POWs)** — combatants who have fallen into the hands of the enemy. See also 'Combatants', above.
53. **Right to a Fair Trial** — a legal principle which ensures that the accused of any crime is guaranteed various rights and stipulates various obligations that a court must abide by to ensure that a final judgment is concluded fairly.
    a) **Right of Appeal** — a legal principle attached to the right to a fair trial. The accused can ask for a review of a judgment pronounced upon them.

54. **Right to Defense** — a fundamental legal principle that the accused cannot be convicted without having had the opportunity to present their defense.

55. Sanctions:
    a) **Disciplinary sanctions** — applied where appropriate instead of penal sanctions. They are applied to repress breaches of law or internal regulations.
    b) **Penal sanctions** — imposed when a rule of national or international law is violated. They are imposed through various methods such as compensation or reparation. Penal sanctions have varying goals, e.g., one is to punish the guilty.

56. **Trial in absentia** — a criminal proceeding in which the accused is not physically present at trial.

57. **Victim** — an individual that has suffered physical or emotional harm, property damage, or economic loss due to the commission of a crime.

58. **War Crimes** (violations of the laws and customs of war) — are serious violations of international humanitarian law that entail individual criminal responsibility. A specific set of prohibited acts under ICL that must be committed in the context of and associated with an armed conflict. According to Article 8 of the ICC Statute, there are four categories of war crimes:
    a) Grave breaches of the Geneva Conventions of 12 August 1949;
    b) Other serious violations of the laws and customs applicable in international armed conflicts;
    c) Serious violations of Common Article 3 of four Geneva Conventions of 12 August 1949, in the case of non-international armed conflict;
    d) Other serious violations of the laws and customs applicable in non-international armed conflicts.

59. **Witness** — a person who provides evidence to a court based on what they know, have seen or experienced.

SELECTED RESOURCES

Benchbook on the Adjudication of International Crimes, Kyiv, 2023

Manual on International Criminal Defence: ADC-ICT Developed Practices, 2nd Edition, 2020, ADC-ICT.

Practitioner's Handbook on Defence Investigations in International Criminal Trials, 2017, Defence Office of the Special Tribunal for Lebanon

Case Law Guides on the European Convention on Human Rights, ECtHR Registry.

Elements of Crimes, International Criminal Court, 2013

CASE LAW DATABASES

International Criminal Court Database

ICC Case Matrix Network

Case Law of the ICTR, ICTY, and IRMCT Appeals Chambers Database

Unified Court Records Database (International Criminal Tribunals for the former Yugoslavia and Rwanda)

Peter Robinson's Summaries of Decisions

V.
ANNEXES

ANNEX 1. TEST FOR SIGNS OF WAR CRIMES (ATTACKS ON CIVILIAN OBJECTS)

Test for signs of war crimes (attacks on civilian objects)

Stage 1. Check compliance with the following principles:

Distinguishing between military objectives and civilian objects.

1) Only military objectives may be attacked.
2) Civilian objects are all objects that are not military objectives. Military objectives are combatants, as well as objects that, by virtue of their nature, location, purpose or use, can be used in military operations and whose complete or partial destruction, capture or neutralization, under the circumstances, provides a certain military advantage.
3) A military objective remains so even if civilians are present (e.g., warehouses where weapons are stored).

Stage 2: Military necessity of the attack

It obliges to evaluate each attack in terms of:

1) Weakening of the enemy's military capabilities as a result of the attack, as well as its
2) Impact on civilians, the environment and other protected objects.

Stage 3. Proportionality between the attack, weakening of the enemy's military potential and damage to protected objects

1) It is necessary to check whether:
   a) Any weakening of the enemy's military potential is achieved. If it is, then
   b) Check the possibility of achieving the objectives by less intrusive measures (for example, instead of attacking a civilian settlement with hailstones, strike with a precision missile).
2) The military advantage resulting from a military attack must outweigh the damage that may be caused to civilians and objects in the course of the attack.
   a) Measures must be taken to avoid/minimize harm.
   b) Refrain from attacks that could cause excessive harm to the civilian population.

ANNEX 2. ARTICLE 8. ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

Article 8 [153, 154]

War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, "war crimes" means:

   (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

   (i) Wilful killing;

   (ii) Torture or inhuman treatment, including biological experiments;

   (iii) Wilfully causing great suffering, or serious injury to body or health;

   (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

   (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

   (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

   (vii) Unlawful deportation or transfer or unlawful confinement;

   (viii) Taking of hostages.

153 Paragraphs 2 (e) (xiii) to 2 (e) (xv) were inserted by resolution RC/Res.5 of 11 June 2010. See depositary notification C.N.533.2010.TREATIES-6 of 29 November 2010. The UN Treaty Section website detailing the status of the amendment.

154 Paragraphs (2) (b) (xxvii) to (xxix) and 2 (e) (xvi) to (xviii) were inserted by resolution ICC-ASP/16/Res.4 of 14 December 2017. For the amendment regarding "weapons which use microbial or other biological agents, or toxins", see depositary notification C.N.116.2018.TREATIES-XVIII-10 of 8 March 2018; the UN Treaty Section website detailing the status of the amendment. For the amendment regarding "weapons the primary effect of which is to injure by fragments undetectable by x-rays in the human body", see depositary notification C.N.125.2018.TREATIES-XVIII-10 of 8 March 2018; the UN Treaty Section website detailing the status of the amendment. For the amendment regarding "blinding laser weapons", see depositary notification C.N.126.2018.TREATIES-XVIII-10 of 8 March 2018; the UN Treaty Section website detailing the status of the amendment.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defense, has surrendered at discretion;

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments,

hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any

kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;

(xii) Declaring that no quarter will be given;

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvi) Pillaging a town or place, even when taken by assault;

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities;

(xxvii) Employing weapons, which use microbial or other biological agents, or toxins, whatever their origin or method of production.

(xxviii) Employing weapons the primary effect of which is to injure by fragments which in the human body escape detection by X-rays.

(xxix) Employing laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices.

c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted

court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) Pillaging a town or place, even when taken by assault;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(xiii) Employing poison or poisoned weapons;

(xiv) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xv) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xvi) Employing weapons, which use microbial or other biological agents, or toxins, whatever their origin or method of production.

(xvii) Employing weapons the primary effect of which is to injure by fragments which in the human body escape detection by X-rays.

(xviii) Employing laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices.

(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

ANNEX 3. COUNCIL OF EUROPE RESOLUTION (75) 11 ON THE CRITERIA GOVERNING PROCEEDINGS HELD IN THE ABSENCE OF THE ACCUSED

CoE Committee of Ministers Resolution (75) 11

On the Criteria Governing Proceedings Held in the Absence of the Accused

(Adopted by the Committee of Ministers on 21 May 1975 at the 245th meeting of the Ministers' Deputies)

The Committee of Ministers,

1. Recalling that one of the aims of the Council of Europe is to achieve greater unity among its Members;
2. Whereas the presence of the accused at his trial is of vital importance, from the point of view both of his right to be heard and of the need to establish the facts and, if need be, pass the appropriate sentence; and whereas exemptions should be granted only in exceptional cases;
3. Whereas ways and means should be found of securing the accused's right to a hearing as laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, and his right to be present at his trial as recognised in the International Covenant on Civil and Political Rights signed in New York on 19 December 1966;
4. Whereas the possibility of simplified proceedings without a hearing for certain minor offences should nevertheless not be excluded;
5. Whereas the systems adopted by several member states to avoid judgements in the absence of the accused and their consequences do not always appear to be effective when, for example, the accused is resident abroad;
6. Whereas, during the preparation of the European Convention on the International Validity of Criminal Judgments, the question of judgements in absentia raised difficulties and it proved necessary to grant Contracting States the right to formulate reservations with regard to the enforcement of such judgements;
7. Believing that such reservations could be avoided if the procedures for trial in the absence of the accused as currently applied satisfied the requirements of the proper administration of justice;

8. Convinced that the growing mobility of the population has the effect of increasing the number of judgements rendered in the absence of the accused in those states where this procedure is used,

I. Recommends that the governments of the member states apply the following minimum rules:

1. No one may be tried without having first been effectively served with a summons in time to enable him to appear and to prepare his defense, unless it is established that he has deliberately sought to evade justice.
2. The summons must state the consequences of any failure by the accused to appear at the trial.
3. Where the court finds that an accused person who fails to appear at the trial has been served with a summons, it must order an adjournment if it considers personal appearance of the accused to be indispensable or if there is reason to believe that he has been prevented from appearing.
4. The accused must not be tried in his absence, if it is possible and desirable to transfer the proceedings to another state or to apply for extradition.
5. Where the accused is tried in his absence, evidence must be taken in the usual manner and the defense must have the right to intervene.
6. A judgement passed in the absence of the accused must be notified to him according to the rules governing the service of the summons to appear and the time-limit for lodging an appeal must not begin to run until the convicted person has had effective knowledge of the judgement so notified, unless it is established that he has deliberately sought to evade justice.
7. Any person tried in his absence must be able to appeal against the judgement by whatever means of recourse would have been open to him, had he been present.
8. A person tried in his absence on whom a summons has not been served in due and proper form shall have a remedy enabling him to have the judgement annulled.
9. A person tried in his absence, but on whom a summons has been properly served is entitled to a retrial, in the ordinary way, if that person can prove that his absence and the fact that he could not inform the judge thereof were due to reasons beyond his control.

II. Invites the governments of member states to report to the Secretary General of the Council of Europe every five years on the action taken by them in pursuance of the recommendations contained in this resolution.

ANNEX 4. QUALITY STANDARD FOR THE PROVISION OF FREE SECONDARY LEGAL AID IN CRIMINAL PROCEEDINGS IN PART OF PROCEEDINGS IN ABSENTIA (EXTRACT)

Quality Standards for Providing Free Secondary Legal Aid in Criminal Proceedings, approved by the Ministry of Justice of Ukraine on February 25, 2014, No. 386/5.

The document was adopted with the aim of defining the main characteristics of the model of state-guaranteed defense in criminal proceedings.

№	Standard	The main sources of law on which the standard is based	Main sources of information for verifying compliance with the standard
5. Specific Standards for Providing Free Secondary Legal Aid in Special Pre-Trial Investigations (in absentia)			
1)	In the case of appointing a defense attorney in a special pre-trial investigation, the attorney shall familiarize themselves with the materials of the criminal proceedings within a reasonable time and ensure that the client has left and/or is located in the temporarily occupied territory of Ukraine, in the territory of a state recognized by the Verkhovna Rada of Ukraine as an aggressor state, and/or has been declared internationally wanted. **The attorney independently determines the defense position.**	Article 6 of the Convention; Articles 54, 297-1, 297-2, 297-3 of the Criminal Procedure Code; Decision of the European Court of Human Rights in the case of "Van Geisigem v. Belgium" dated January 21, 1999.	Statement of the attorney, protocol of familiarisation, data from visitor registration logs of the bodies conducting the pre-trial investigation

2)	Upon receiving notification from the prosecution about the completion of the pre-trial investigation and the opening of its materials for familiarisation, the attorney shall confirm in writing the fact of access to the materials of the pre-trial investigation, exercise their right, and verify the prosecution's provision of the client's rights. The attorney shall reasonably track notifications (summons) to the client at the last known place of residence or stay and their publications in mass media of nationwide distribution and on the official website of the Office of the Prosecutor General.	Articles 290, 297-5 of the Criminal Procedure Code.	Protocol of familiarisation, technical recording of the court session, data from the court session log, motions or objections of the attorney, printouts from internet resources, media
3)	Taking into account the independently chosen defense position, upon the prosecutor's request, the attorney provides access to available physical evidence or parts thereof, documents or their copies, and the opportunity to copy or otherwise reproduce them, as well as access to housing or other property, if they are in the possession or under the control of the defense party and if the defense party intends to use the information contained therein as evidence in court, except for any materials that may be used by the prosecutor to prove the defendant's guilt in committing a criminal offense.	Articles 290, 297-5 of the Criminal Procedure Code.	The attorney verifies the sending of copies of procedural documents to the client.

ANNEX 5. CODE OF PROFESSIONAL CONDUCT FOR DEFENSE COUNSEL AND LEGAL REPRESENTATIVES OF VICTIMS APPEARING BEFORE THE SPECIAL TRIBUNAL FOR LEBANON (EXTRACT)

Article 8

Scope of representation

C. Defense Counsel who is assigned to an in absentia accused pursuant to Article 22(2)(c) of the Statute and Rule 57(D)(viii) of the Rules shall set the scope of this representation, subject to the limitations that Defense Counsel:

(i) shall not enter any plea on behalf of the accused;

(ii) shall undertake all necessary investigations to prepare for the defense of the accused; and

(iii) shall make all submissions on the law in the perceived best interest of the accused.

D. Defense Counsel who is assigned to an in absentia accused shall consider the effect of any action he takes on the position of the accused in the current or future proceedings and may undertake any other action in the perceived best interests of the accused, including, but not limited to:

(i) drawing the Trial Chamber's attention to any defense available upon the evidence as a matter of law in the relevant factual circumstances;

(ii) seeking from the Trial Chamber any such orders as he considers necessary to enable him to properly carry out the obligations in paragraphs (C)(ii) and (iii) of this Article;

(iii) calling any witnesses who he considers to be in favour of the accused; and,

(iv) examining witnesses against the accused.

E. Defense Counsel who is assigned to an in absentia accused shall not have contact with the accused. If Defense Counsel is contacted, directly or indirectly, by the in absentia accused he shall, due to his awareness of the risk such contact may pose to the accused's right to a retrial, and without this act amounting to acceptance of Defense Counsel by the in absentia accused:

(i) refuse to discuss any element of the case with the in absentia accused; and,

(ii) refer the accused to the Head of the Defense Office to receive independent legal advice.

ANNEX 6. ARTICLE 438 CCU — PILLAGE OF NATIONAL TREASURES ON OCCUPIED TERRITORIES

Relevant Provisions		
Article 438	[ICL]	[IHL]
	Art. 8 (2) (b) (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives	Art. 85 (4) (d) of AP I Making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, sub-paragraph (b) [of API], and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives
Art/ 438 (1) Violation of rules of the warfare ...		Art. 53 (a) and (c) of AP I [... It is prohibited]: (a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples (c) to make such objects the object of reprisals

pillage of national treasures on occupied territories		Art. 27 (1) of HR IV In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes
		Art. 56 of HR IV The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings
		Art. 4 (1) of 1954 CCP The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility directed against such property

		Art. 15 of the 1999 CCP OP 1. Any person commits an offence within the meaning of this Protocol if that person intentionally and in violation of the Convention or this Protocol commits any of the following acts: a. making cultural property under enhanced protection the object of attack b. using cultural property under enhanced protection or its immediate surroundings in support of military action c. extensive destruction or appropriation of cultural property protected under the Convention and this Protocol d. making cultural property protected under the Convention and this Protocol the object of attack e. theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention 2. Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article and to make such offences punishable by appropriate penalties. When doing so, Parties shall comply with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act

ANNEX 7. ARTICLE 438 CCU — USE OF METHODS OF WARFARE PROHIBITED BY INTERNATIONAL INSTRUMENTS

Relevant Provisions		
Article 438	[ICL]	[IHL]
Art/ 438 (1) Violation of rules of the warfare ... use of methods of the warfare prohibited by international instruments	Art. 8 (2) (b) (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities	Art. 85 (3) (a), plus art. 51(2) AP I When committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health] Making the civilian population or individual civilians the object of attack
	Art. 8 (2) (b) (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives	Art. 52 (1) AP I Civilian objects shall not be the object of attack or of reprisals
	Ст.8 (2) (b)(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated	Art. 85 (3) (b) of AP I [Indiscriminate attacks:] [When committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health] Launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii) [of API]

		Art. 35 (3) of AP I [Damage to the natural environment:] It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment Art. 55 (1) of AP I [...] and thereby to prejudice the health or survival of the population
		Art. 55 (2) of AP I Attacks against the natural environment by way of reprisals are prohibited
	Art. 8 (2) (b) (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives	Art. 85 (3) (d) of AP I [When committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health] Making non-defended localities and demilitarized zones the object of attack Art. 25 of HR IV The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited

	Art. 8 (2) (b) (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion	Art. 85 (3) (e) of AP I [When committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health] Making a person the object of attack in the knowledge that he is 'hors de combat '
		Art. 23 (c) of HR IV [It is especially forbidden:] (c) To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion;
	Art. 8 (2) (b) (vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury	Art. 85 (3) (f) of AP I [When committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health] The perfidious use, in violation of Article 37 [of API], of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or this Protocol
		Art. 23 (f) of HR IV It is especially forbidden: [...] To make improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention

	Art. 8 (2) (b) (xvii) Employing poison or poisoned weapons	Art. 23 (a) of HR IV It is especially forbidden: [...] To employ poison or poisoned weapons
	Art. 8 (2) (b) (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices	1925 Geneva Protocol, summary The High Contracting Parties accept the prohibition of the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, and agree to extend this prohibition to the use of bacteriological methods of warfare
	Art. 8 (2) (b) (xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions	1899 Hague Declaration (IV, 3) The contracting Parties agree to abstain from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions

	Art. 8 (2) (b) (xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123	Art. 35 (2) of AP I It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering Art. 23 (1) (e) of HR IV It is especially forbidden: [...] to employ arms, projectiles, or material calculated to cause unnecessary suffering
	Art. 8 (2) (b) (xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations	Art. 23 (1) of GC III [...] Nor may [the presence of a POW] be used to render certain points or areas immune from military operations Art. 28 of GC IV The presence of a protected person may not be used to render certain points or areas immune from military operations

		Art. 51 (7) AP I The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular attempts to shield military objectives from attacks or to shield, favour or impede military operations Art. 58 (a) of AP I The Parties to the conflict shall [...] endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives
	Art. 8 (2) (b) (xxiv Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law	Art. 19 (1) of GC I [Military and civilian medical units, including medical and religious personnel:]
		Fixed establishments and mobile medical units of the Medical Service may in no circumstances be attacked

		Art. 24 of GC I Medical personnel exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, [...] staff exclusively engaged in the administration of medical units and establishments, as well as chaplains attached to the armed forces, shall be respected and protected in all circumstances
		Art. 23 of GC II Establishments ashore entitled to the protection of [GC I] shall be protected from bombardment or attack from the sea
		Art. 36 of GC II The religious, medical and hospital personnel of hospital ships and their crews shall be respected and protected
		Art. 18 (1) and (3) of GC IV Civilian hospitals [...] may in no circumstances be the object of attack. [...] Civilian hospitals shall be marked by means of the emblem provided for in Article 38 of GC I

		Art. 20 (1) and (2) of GC IV Persons regularly and solely engaged in the operation and administration of civilian hospitals [...] shall be respected and protected. [...]The above personnel shall be recognizable [...] by means of a stamped, water-resistant armlet [...] issued by the State and shall wear the emblem provided for in Article 38 of GC I
		Art. 12 (1) and (2) of AP I 1. Medical units shall be respected and protected at all times and shall not be the object of attack 2. Para. 1 shall apply to civilian medical units, provided that they: (a) belong to one of the Parties to the conflict (b) are recognized and authorized by the competent authority of one of the Parties to the conflict; (c) are authorized in conformity with Article 9 (2) of this Protocol or Article 27 of the First Convention
		Art. 15 (1) and (5) of AP I Civilian medical personnel shall be respected and protected ... Civilian religious personnel shall be respected and protected ...

		Art. 20 of GC I [Hospital ships and other craft:] Hospital ships entitled to the protection [of GC II] shall not be attacked from the land
		Art. 22 (1) of GC II Military hospital ships [...] may in no circumstances be attacked or captured
		Art. 24 (1) of GC II Hospital ships utilized by National Red Cross Societies [...] shall have the same protection as military hospital ships
		Art. 27 (1) of GC II Small craft [...] for coastal rescue operations shall also be respected and protected, so far as operational requirements permit
		Art. 23 (1) of AP I Medical ships and craft other than those referred to in Article 22 of this Protocol and Article 38 of GC II shall, whether at sea or in other waters, be respected and protected in the same way as mobile medical units under the Conventions and this Protocol

		Art. 35 (1) of GC I [Medical transports:] Transports of wounded and sick or of medical equipment shall be respected and protected in the same way as mobile medical units
		Art. 21 of GC IV Convoys of vehicles or hospital trains on land or specially provided vessels on sea, [...] shall be respected and protected
		Art. 21 of AP I Medical vehicles shall be respected and protected in the same way as mobile medical units under the Conventions and this Protocol
		Art. 36 (1) of GC I [Medical aircraft:] Medical aircraft [...] shall not be attacked. [...] They shall bear, clearly marked, the distinctive emblem prescribed in Article 38 [...]
		Art. 22 (1) and (2) of GC IV Aircraft exclusively employed for the removal of wounded and sick civilians [...] shall not be attacked [...] They may be marked with the distinctive emblem provided for in Article 38 of GC

		Art. 24 of AP I Medical aircraft shall be respected and protected subject to the provisions in this Part

ANNEX 8. ARTICLE 438 CCU — VIOLATIONS OF THE RULES OF WARFARE STIPULATED BY INTERNATIONAL TREATIES

Relevant provisions		
Article 438	[ICL]	[IHL]
Art/ 438 (1)	Art. 8 (2) (b) (xii)	Art. 40 of AP I It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis
Violation of rules of the warfare	Declaring that no quarter will be given	
…		Art. 23 (d) of HR IV It is especially forbidden: […] To declare that no quarter will be given
any other violations of rules of the warfare stipulated by international treaties, ratified by the Verkhovna Rada of Ukraine		
		Art. 23 (g) of HR IV It is especially forbidden: […] To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war

		Art. 23 (1) (h) of HR IV It is especially forbidden: [...] To declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party
	Ст. 8(2) (b)(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war	Art. 23 (2) of HR IV A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war
		Art.28ofHRIV The pillage of a town or place, even when taken by assault, is prohibited
	Art. 8 (2) (b) (xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party	Art. 23 (a) of HR IV It is especially forbidden: [...] To employ poison or poisoned weapons

	Art. 8 (2) (b) (xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war	Art. 75 (2) (b) of AP I The following acts are and shall remain prohibited [...]: [...] outrages upon personal dignity, in particular humiliating and degrading treatment [...]
	Art. 8 (2) (b) (xvi) Pillaging a town or place, even when taken by assault	Art. 85 (4) (c) of AP I [When committed wilfully and in violation of the Conventions or the Protocol] Practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination
	Art. 8 (2) (b) (xvii) Employing poison or poisoned weapons	Art. 75 (2) (b) of AP I The following acts are and shall remain prohibited [...]: [...] outrages upon personal dignity, in particular [...] enforced prostitution and any form of indecent assault

	Art. 8 (2) (b) (xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment	Art. 27 (2) of GC IV Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution or any form of indecent assault
		Art. 76 (1) of AP Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault
		Art. 23 (1) of GC III [...] Nor may [the presence of a POW] be used to render certain points or areas immune from military operations
		Art. 28 of GC IV The presence of a protected person may not be used to render certain points or areas immune from military operations

		Art. 51 (7) AP I The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular attempts to shield military objectives from attacks or to shield, favour or impede military operations
		Art. 58 (a) of AP The Parties to the conflict shall [...] endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives
		Art. 19 (1) of GC I [Military and civilian medical units, including medical and religious personnel:]
		Fixed establishments and mobile medical units of the Medical Service may in no circumstances be attacked

		Art. 24 of GC I Medical personnel exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, [...] staff exclusively engaged in the administration of medical units and establishments, as well as chaplains attached to the armed forces, shall be respected and protected in all circumstances
	Art. 8 (2) (b) (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions	Ст. 23 GC II Establishments ashore entitled to the protection of [GC I] shall be protected from bombardment or attack from the sea
	Art. 8 (2) (b) (xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations	Art. 36 of GC II The religious, medical and hospital personnel of hospital ships and their crews shall be respected and protected

	Art. 8 (2) (b) (xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law	