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Reflections on Victim-Centered Accountability in Ukraine

We must change our approach to war crime justice. The war turned people into numbers . . . the scale of war crimes grew so large that it has become impossible to recognize all stories . . . We need justice for all victims of war crimes because we must return people their names. Because the life of each person matters.

— Oleksandra Matviichuk, Center for Civil Liberties, 2022 Nobel Prize Laureate

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Armed conflict in Ukraine has been ongoing since 2014, when Russia unlawfully annexed the Ukrainian peninsula of Crimea.¹ The previous year, then-President of Ukraine Viktor Yanukovich rejected an agreement that provided for “greater economic integration” within the European Union (EU), a move that sparked extensive protests across the country.² As tensions escalated between protesters and state forces, Yanukovich fled the country.³ Russian President Vladimir Putin referred to the events in Ukraine as “a Western-backed fascist coup that endangered the ethnic Russian minority in Crimea.”⁴ Arguing for the need to protect Russian speakers and citizens in the region, Putin sent troops to Crimea, and after orchestrating a largely controversial referendum, he illegally annexed the peninsula to the Russian Federation.⁵ Two months later, as tensions and divisions continued to intensify, Russian-installed authorities in the Ukrainian regions of Donetsk and Luhansk proceeded to hold similarly contested referendums on independence as well, and fighting erupted between Ukrainian and Russian-supported forces.⁶ A few months later, in early 2015, a number of countries, including France, Germany, Russia, and Ukraine, took steps to begin peace negotiations as part of the so-called Minsk Accords. The agreements provided for an immediate ceasefire, the removal of all heavy weapons, and a “constitutional reform recognizing the special status of

1 The authors would like to acknowledge the contribution of their program intern, Claudia Gonzalez Garcia. Her assistance with the research, fact-checking, and report coordination was invaluable.

2 Center for Preventive Action, Council on Foreign Relations (CFR), “Global Conflict Tracker: Conflict in Ukraine” (October 2022), www.cfr.org/global-conflict-tracker/conflict/conflict-ukraine

3 Ibid.

4 Jonathan Masters, Council on Foreign Relations, “Ukraine: Conflict at the Crossroads of Europe and Russia” (October 2022), www.cfr.org/background/ukraine-conflict-crossroads-europe-and-russia#chapter-title-o-4

5 Center for Preventive Action, CFR, “Global Conflict Tracker: Conflict in Ukraine.”

6 Ibid.

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Donestk and Luhansk.⁷ Despite such efforts, however, the conflict continued.⁸ No side made significant territorial gains.

Toward the end of 2021, tensions began escalating significantly once again. In November, Russia increased its military presence along the Ukrainian border, and the following month tensions intensified further as intelligence from the United States (US) government found that Russia could be potentially preparing to invade and occupy Ukraine.⁹ US President Joe Biden declared that if it happened the US and other allied countries would impose further sanctions on Russia. Meanwhile, Russia requested that North Atlantic Treaty Organization (NATO) and Western countries stop all military operations near Ukraine, arguing that the country could not be a member of NATO.¹⁰ All attempts to reduce tensions at the start of 2022 failed.¹¹ On February 21, Putin recognized the independence of the self-proclaimed Donetsk and Luhansk People's Republics, sent forces to the Ukrainian border, and ordered the deployment of "peacekeeping" troops in the two regions.¹² Putin then announced on February 24 the start of a military operation in Ukraine "to demilitarize" and "de-Nazify Ukraine and end the alleged genocide of Russians in Ukrainian territory."¹³ Ukraine, in turn, declared a state of emergency and mobilized its own troops.¹⁴

Numerous countries and international bodies immediately condemned Russia's invasion of Ukraine.¹⁵ Various states imposed sanctions against Russia, and many countries started providing support to Ukraine in the form of military and humanitarian assistance.¹⁶ From February 24, Russian forces sought to claim control of some of the main cities in Ukraine, including Kyiv,¹⁷ affecting thousands of people and essential infrastructure. As its attempts to capture the capital failed, Russia retreated from Kyiv and reinforced its operations in the eastern part of the country. Russia was able to take control of the strategic city of Mariupol, where civilians were targeted and indiscriminately attacked and essential buildings, including a maternity hospital, were hit.¹⁸ During the summer of 2022, hostilities concentrated mainly in the eastern and southern regions of the country, where Russia took control of various ports, thereby disrupting essential food supply chains.¹⁹ In September, Ukrainian forces managed to reclaim some territory. Nevertheless, near the end of the month, Russia announced the annexation of four regions in eastern Ukraine after holding largely disputed independence referendums. A few days later, on October 10, Russia began a new military operation across various regions of the country.²⁰

7 Nigel Walker, House of Commons Library, "Ukraine Crisis: A Timeline (2014 - Present)" (April 2022), 4, <https://researchbriefings.files.parliament.uk/documents/CBP-9476/CBP-9476.pdf>

8 Center for Preventive Action, CFR "Global Conflict Tracker: Conflict in Ukraine."

9 Nigel Walker, "Ukraine Crisis: A Timeline (2014 - Present)," 4-5.

10 Rule of Law and Armed Conflict Project, Geneva Academy of International Humanitarian Law and Human Rights, "International Armed Conflict in Ukraine" (October 2022), <https://www.rulac.org/browse/conflicts/international-armed-conflict-in-ukraine#collapse2accord>

11 Ibid.

12 Nigel Walker, House of Commons Library, "Ukraine Crisis: A Timeline (2014 - Present)," 5.

13 Center for Preventive Action, CFR, "Global Conflict Tracker: Conflict in Ukraine."

14 UN Independent International Commission of Inquiry on Ukraine, *Report of the Independent International Commission of Inquiry on Ukraine*, (New York: Official Record A/77/533 October 2022), 26, www.ohchr.org/en/documents/reports/a77533-independent-international-commission-inquiry-ukraine-note-secretary

15 In this paper, the terms "conflict" and "war" in Ukraine refer to Russia's war against Ukraine.

16 Nigel Walker, "Ukraine Crisis: A Timeline (2014 - Present)."

17 Rule of Law and Armed Conflict project, Geneva Academy of International Humanitarian Law and Human Rights, "International Armed Conflict in Ukraine" (October 2022), www.rulac.org/browse/conflicts/international-armed-conflict-in-ukraine#collapse2accord

18 Center for Preventive Action, CFR "Global Conflict Tracker: Conflict in Ukraine."

19 Ibid.

20 Ibid.

According to the Office of the High Commissioner of Human Rights, over 6,000 civilians have lost their lives since the invasion began in February 2022, and over 9,000 have been wounded.²¹ The numbers, however, are thought to be dramatically higher. Essential infrastructure has been severely damaged, and millions have been forced to flee Ukraine or relocate to other parts of the country. As noted in the most recent report of the Independent International Commission of Inquiry on Ukraine (IICIU), which was established by the UN Human Rights Council in March 2022, Russian forces have committed serious violations of international humanitarian and human rights law. In particular, the commission reported indiscriminate attacks against civilians and people on the move, summary executions, torture and ill-treatment, sexual and gender-based violence (SGBV), unlawful detentions, and forced deportations.²² Against this backdrop, demands for truth and justice continue to grow among victims, victims' relatives, and international actors.

The war in Ukraine presents a new scenario for the application of transitional justice and raises some questions related to the implementation of such a process. Firstly, the situation in Ukraine constitutes an *international* armed conflict between two states. This has implications for the design and implementation of transitional justice measures and policies, mainly because practitioners so far have only pursued such measures and policies in contexts of *internal* conflicts.²³

Another factor that must be considered is that the conflict in Ukraine is still underway. Traditionally, transitional justice has been applied in societies emerging from conflict or repression, but increasingly it is seen as relevant to other types of contexts as well.²⁴ Transitional justice mechanisms can have an important peacebuilding value even when violence and conflict are ongoing. According to human rights expert Ron Dudai, these mechanisms can play a significant role “in the facilitating of successful negotiations, complementing the agreements with broader societal involvement and strengthening the long-term viability of the signed agreements.”²⁵ Some issues relevant to the conflict, notes Dudai, “can be addressed in earlier stages while others would be fruitful in later stages.” Therefore, persistent conflict and transitional justice need not be mutually exclusive. Instead, a model of gradual transitional justice, in which the number and extent of measures increase as the process of reaching a political settlement progresses, could be suitable in such contexts including Ukraine.

Despite the challenges that the interstate character of the war in Ukraine presents for transitional justice, valuable lessons drawn from other contexts on issues related to the

21 UN Independent International Commission of Inquiry, “Report of the Independent International Commission of Inquiry on Ukraine,” 33.

22 Ibid.

23 This issue has been addressed by authors such as Ron Dudai, who notes in his analysis of the situation in Israel and Palestine that the international nature of the conflict raises doubts about the applicability of transitional justice mechanisms. As he points out, that situation is not one of a new regime taking account of and dealing with the crimes committed in the past within its own borders, which has been the traditional scenario for the application of transitional justice. Instead, the situation is one of “continuity of leadership,” which, he argues, is one of the greatest obstacles to establishing of transitional justice mechanisms in contexts of inter-state wars. However, this does not mean that the implementation of such mechanisms is to be completely ruled out in these contexts. Rather, “creativity and openness” will be required “in finding suitable mechanisms.” See Ron Dudai, “A Model for Dealing with the Past in the Israeli-Palestinian Context,” *International Journal of Transitional Justice* 1, 7 (2007): 252. See also Berghof Foundation, “Collecting Testimony and Transitional Justice in Ukraine” (October 2022) <https://berghof-foundation.org/news/collecting-testimony-and-transitional-justice-in-ukraine>

24 Virginie Ladisch and Anna Myriam Roccatello, ICTJ, “The Color of Justice: Transitional Justice and the Legacy of Slavery and Racism in the United States” (April 2021), 2.

25 Ron Dudai, “A Model for Dealing with the Past in the Israeli-Palestinian Context,” *International Journal of Transitional Justice*: 253, 262.

pursuit of criminal justice, the use of existing documentation for truth seeking, provision of urgent victim assistance, and the potential synergies between reparation programs and development plans are still applicable in Ukraine. Transitional justice mechanisms and policies can be creatively used to help redress the horrific harms of the war and build sustainable peace by strengthening democratic institutions, encouraging civic engagement, and promoting a pluralistic and rights-based culture.

Multilateralism in the Pursuit of Criminal Accountability

The international community has responded to the conflict in Ukraine with a surge of prompt multilateral actions the likes of which have been seldom seen since the Syrian conflict. On February 27, 2022, the UN Security Council called for an Emergency Special Session of the General Assembly to consider and recommend collective action on the situation after the council's permanent members had reached a deadlock.²⁶ It marked the first time in four decades that such a session was held. Since the start of the conflict, countries have worked together to provide Ukraine with military support and humanitarian aid, as well as to implement sanctions against Russia.

International Efforts

Both traditional and social media have speculated that the conflict in Ukraine will be the most well documented of the 21st century.²⁷ The international community has also made an enormous effort to document conflict-related violence. The UN mandated the IICIU to “investigate alleged violations . . . of human rights and . . . international humanitarian law.”²⁸ Bodies such as this one have become an increasingly common response of the international community to situations where serious violations of international law have occurred. However, unique to the conflict in Ukraine is the myriad of documentation initiatives that different actors are undertaking for the sole purpose of criminal accountability.

Investigations into crimes committed during the conflict are being carried out in different jurisdictions. On March 2, the International Criminal Court (ICC) opened an investigation in response to a referral by 43 state parties. The scope of the investigation encompasses alleged war crimes, crimes against humanity, and genocide. While Ukraine is not a party to the Rome Statute, it has officially accepted the court's jurisdiction for crimes committed on its territory since November 21, 2013, which is the date marking the beginning of demonstrations and civil unrest that preceded Russia's invasion of Crimea.²⁹ In June, the European Union announced a 7.25 million euro program to enhance the ICC's investigative capacities, in part to ensure that the ICC could meet the

26 UN Security Council, *Resolutions and Declarations of the Security Council*, (New York: Official Record S/RES/2623, February 27, 2022), www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2623.pdf

27 Lauren Bailie, United States Institute of Peace, “How to Achieve Accountability for Atrocities in Ukraine” (April 21, 2022), www.usip.org/publications/2022/04/how-achieve-accountability-atrocities-ukraine

28 Human Rights Council, “Situation of human rights in Ukraine Stemming from the Russian Aggression,” (UN Doc. A/HRC/RES/49/1, March 4, 2022), 11(a), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/277/44/PDF/G2227744.pdf?OpenElement>

29 The government of Ukraine exercised its prerogative under Article 12(3) of the Rome Statute twice. In the first declaration, it set the time period for between November 21, 2013 and February 22, 2014; in the second, it extended the time period from February 20, 2014 onward on an open-ended basis. See ICC, “Situation in Ukraine,” www.icc-cpi.int/ukraine.

scope of its investigation in Ukraine.³⁰ The European Union is also exploring establishing a special prosecutor's office to investigate war crimes committed by Russia in Ukraine.³¹

On March 25, a Joint Investigation Team (JIT) was established to gather evidence on possible war crimes, crimes against humanity, and other international crimes. Supported by Eurojust, the JIT was originally formed with the governments of Lithuania, Poland, and Ukraine. As of October, Estonia, Latvia, Slovakia, Romania, and the ICC's Office of the Prosecutor have also become members.³² And at least 21 countries have initiated investigations under the principle of universal jurisdiction.³³

Since the occupation of its territory in 2014, Ukraine has filed a number of cases in different international and regional mechanisms. On February 26, 2022, Ukraine filed a new case at the International Court of Justice (ICJ) under the Convention on the Prevention and Punishment of the Crime of Genocide.³⁴ Since filing the case, an unprecedented number of countries (33) have intervened in the ICJ proceedings.³⁵

In addition, many in the international legal community have been exploring ways to prosecute the crime of aggression. This crime has never been prosecuted, which many legal scholars believe exposes "a gaping hole in the enforcement of international criminal law."³⁶ Unlike other atrocity crimes defined in the Rome Statute, the ICC cannot prosecute nationals of non-state parties for this crime. The discussion on how to prosecute the invasion of Ukraine, in the face of the ICC's jurisdictional limitation, has generated different ideas, including the following:

- A **special tribunal** (international or hybrid) with jurisdiction over this one category of crime, respecting the ICC's jurisdiction over all other atrocity crimes. Promoters of a special tribunal have proposed different options.³⁷

30 UN Office for the Coordination of Humanitarian Affairs, "Russian War Crimes in Ukraine: EU Supports the International Criminal Court Investigation with €7.25 Million," (June 8, 2022), <https://reliefweb.int/report/ukraine/russian-war-crimes-ukraine-eu-supports-international-criminal-court-investigation-eu725-million>

31 Stephanie Bodoni and Jorge Valero, "EU Weighs Prosecution Office to Help Probe Russian War Crimes," *Bloomberg*, January 27, 2023, www.bloomberg.com/news/articles/2023-01-27/eu-weighs-setting-up-prosecution-office-to-probe-russian-crimes.

32 Eurojust, "Romania Becomes Seventh Member of Joint Investigation Team on Alleged Core International Crimes Committed in Ukraine" (October 13, 2022), www.eurojust.europa.eu/news/romania-becomes-seventh-member-joint-investigation-team-alleged-core-international-crimes

33 Elisenda Calvet-Martínez, University of Cambridge, "Ukraine Options Paper: Transitional Justice in a Settlement to End the Conflict between Ukraine and Russia" (August 18, 2022), www.lcil.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.lcil.cam.ac.uk/ukraine/calvet-martinez_transitional_justice_in_a_settlement_to_end_the_conflict_between_ukraine_and_russia.pdf

34 Ukraine v. Russian Federation, Case No. 182/2022, International Court of Justice, Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide, Application Instituting Proceedings, (February 26, 2022), www.icj-cij.org/public/files/case-related/182/182-20220227-APP-01-00-EN.pdf

35 Countries that have intervened in the proceedings include Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, the Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Spain, Slovenia, Slovakia, Sweden, the United Kingdom, and the United States. Ukraine v. Russian Federation, Case No. 182/2022, International Court of Justice, Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide, Intervention, www.icj-cij.org/en/case/182/intervention

36 Astrid Reisinger Coracini, Just Security, "The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression in Ukraine - Part II" (September 23, 2022), www.justsecurity.org/83201/tribunal-crime-of-aggression-part-two/

37 One proposal originated from the "Yale Club Roundtable: a Special Tribunal for the Crime of Aggression Recommended by the UN General Assembly?" that was organized by the Permanent Missions of Latvia and Liechtenstein to the United Nations in June 2022. See www.justsecurity.org/wp-content/uploads/2022/09/UNSC-Letter-12-August-2022.pdf. Another proposal was made by the Ukraine Task Force of the Global Accountability Network. See <https://uba.ua/eng/news/9360/>. A third was made by UK Prime Minister Gordon Brown and Ukraine Minister of Foreign Affairs Dmytro Kuleba. See <https://gordonandsarahbrown.com/2022/03/calling-for-the-creation-of-a-special-tribunal-for-the-punishment-of-the-crime-of-aggression-against-ukraine/>

- A **Ukrainian high war crimes court** sitting within the domestic legal system. Its jurisdiction would be over all atrocity crimes committed since November 2013.³⁸
- A **hybrid tribunal under the auspices of the Council of Europe**. This would be an extraordinary chamber for aggression that is part of Ukraine's judicial system.³⁹
- A **model indictment for the crime of aggression committed against Ukraine**. This indictment could be used in any number of fora.⁴⁰
- An **amendment to the Rome Statute** to empower the ICC to prosecute the crime of aggression by authorizing the UN General Assembly to refer the situation to the ICC. This proposal seems to have the least support due to the fact it will take at least a year to secure the required consensus and complete the amendment.⁴¹

There are pros and cons to each of these proposals, but the creativity and drive to find an appropriate mechanism underscore the significance of prosecuting this crime as a means to strengthen the international legal framework and enforce relevant norms.

Domestic Efforts

Ukraine's General Prosecutor's Office (GPO) has taken a strong, proactive role in investigating crimes committed during the conflict.⁴² The office has focused on violations of the laws and customs of war; planning, preparing, or unleashing and waging an aggressive war; and incitement to war. The GPO has a dedicated war crimes office and an online portal through which it can receive information about alleged violations.⁴³ As of September 14, its war crimes office had opened over 30,000 cases.⁴⁴

38 The Public International Law and Policy Group (PILPG) produced a draft law to create the domestic mechanism. The law references a definition of the crime of aggression found in Article 437 of Ukraine's criminal code and states that the law's definition is based on Article 8 of the Rome Statute. According to the law, the court would complement efforts of existing domestic courts, the ICC, and any future international tribunal established. While the law states that the court would pursue those "most responsible," it also acknowledges that such is the need for it to focus on those who fall below that level. See PILPG, "Draft Law for a Ukrainian High War Crimes Court" (2022),

<https://static1.squarespace.com/static/5900b58e1b631bffa367167e/t/62d6c27baae10b6ca51cadb71658241661209/DRAFT+Ukraine+High+War+Crimes+Court.pdf>

39 This idea poses constitutional concerns as Article 125 of Ukraine's Constitution prohibits the establishment of extraordinary or special tribunals. See Alexander Komarov and Oona A. Hathaway, "Ukraine's Constitutional Court: How to Achieve Accountability for the Crime of Aggression" (April 5, 2022), www.justsecurity.org/80958/ukraines-constitutional-constraints-how-to-achieve-accountability-for-the-crime-of-aggression/, and Kevin Jon Heller, *OpinioJuris*, "The Best Option: An Extraordinary Ukrainian Chamber for Aggression" (March 16, 2022), <https://opiniojuris.org/2022/03/16/the-best-option-an-extraordinary-ukrainian-chamber-for-aggression/>.

40 Open Society Justice Initiative, "Model Indictment for the Crime of Aggression Committed Against Ukraine" (May 9, 2022), www.justiceinitiative.org/publications/model-indictment-for-the-crime-of-aggression-committed-against-ukraine

41 Shane Darcy, Just Security, "Aggression by P5 Security Council Members: Time for ICC Referrals by the General Assembly" (March 16, 2022), www.justsecurity.org/80686/aggression-by-p5-security-council-members-time-for-icc-referrals-by-the-general-assembly/.

42 The GPO receives support from the Atrocity Crimes Advisory Group set up by the European Union, United Kingdom, and United States, as well as from other sources. See Elisenda Calvet-Martinez, "Ukraine Options Paper: Transitional Justice in a Settlement to End the Conflict between Ukraine and Russia."

43 Sergey Vasiliev, "The Future of Justice for Ukraine IS Domestic," *JusticeInfo.net*, March 29, 2022, www.justiceinfo.net/en/89434-future-justice-for-ukraine-domestic.html#:~:text=Europe%20and%20beyond-The%20prosecution%20services%20in%20at%20least%20eleven%20other%20European%20states,the%20principle%20of%20universal%20jurisdiction

44 "Closed-Door Peer Exchange for Practitioners" (2022), Panel discussion at Berghof Foundation Symposium on Collecting Testimony and Transitional Justice in Ukraine, Berlin, September 14. As of February 6, 2023, over 66,000 alleged war crimes have been reported to the GPO. Liz Sly, "66,000 War Crimes Have Been Reported in Ukraine. It Vows to Prosecute them All," *Washington Post*, February 6, 2023, www.washingtonpost.com/world/2023/01/29/war-crimes-ukraine-prosecution

Unlike in many contexts where criminal accountability for conflict-related sexual violence (CRSV) is not prioritized, the GPO demonstrated its commitment to it early on. Cases of sexual violence have been documented against women, men, children, and the elderly.⁴⁵ On May 3, Ukraine signed a cooperation agreement with the United Nations that included provisions for investigations, legal reforms, and services for victims.⁴⁶ Together, they have been working to develop a strategy that is victim centered.⁴⁷ The GPO has also established a special unit dedicated to CRSV. Of course, challenges remain, including building the capacity of the police and judiciary to handle such crimes; however, the determination and wisdom of some of the prosecutors involved have already ensured that best practices are applied in even the direst circumstances.⁴⁸ Enhancing this capacity is a priority, but support should be provided to ongoing cases in parallel.⁴⁹

Challenges to Criminal Justice

ICTJ has identified several challenges facing these initiatives. While coordination among national and international actors involved in these efforts is often officially hailed as a success,⁵⁰ concerns have been raised over a dearth of information sharing and cooperation.⁵¹ At a UN side event in September, the president of Eurojust noted the need to centralize the currently fragmented ongoing investigations through the use of an international database, which would allow for a common codification of violations based on evidence that the various stakeholders have gathered.⁵²

ICTJ is concerned by the insufficient communication among the ICC, JIT, and the GPO. It is also concerned by the apparent absence of a prosecutorial strategy at the level of the Ukrainian authorities, though not exclusively. At a closed-door symposium that ICTJ attended on September 14, the GPO reported that its main challenge was the lack of transparency as neither JIT nor the ICC had been sharing information with local authorities. At the same event, an international member of an investigative team insisted that the national authorities must be involved, but then glided past the issue of a prosecutorial strategy. When pressed, he insisted a strategy existed, but that a theory of crime did not.⁵³ ICTJ would argue that a theory of the crime is the basis for a prosecutorial strategy, the latter cannot exist without the former.

45 UN Independent International Commission of Inquiry, "Report of the Independent International Commission of Inquiry on Ukraine" 88.

46 UN News, "Ukraine War: UN Signs Framework to Assist survivors of Sexual Violence," *UN News*, May 3, 2022, <https://news.un.org/en/story/2022/05/1117442>

47 Iryna Didenko, presentation at the side event "A Sustainable Model for Responding to Conflict-Related Sexual Violence in Ukraine" at the twenty-first session of Assembly of States Parties to the Rome Statute, The Hague, Netherlands, December 5 to 10, 2022.

48 Ibid.

49 Chloe Marnay-Baszanger, Office of SRSO on Sexual Violence in Conflict, "Accountability" (2022), panel presentation at the UN General Assembly side event "Protection and Justice for Victims of Conflict-Related Sexual Violence in Ukraine," New York, September 23.

50 Media reports and those involved in these efforts highlight successful coordination among national and international actors. ICTJ has attended closed door and public events, including those referenced in this paper, in which various official representatives raised the lack of coordination among investigative efforts or the limited communication between competent international and national authorities or agencies.

51 Valerie Hopkins, "Investigators of War Crimes in Ukraine Face Formidable Challenges," *The New York Times*, July 3, 2022, World section.

52 Ladislav Hamran, Eurojust, "Accountability" (2022), Panel presentation at UN General Assembly side event on Protection and Justice for Victims of Conflict-Related Sexual Violence in Ukraine, New York, September 23.

53 "Closed-Door Peer Exchange for Practitioners" (2022), Panel discussion at Berghof Foundation Symposium on Collecting Testimony and Transitional Justice in Ukraine, Berlin, September 14.

ICTJ recognizes that the prosecution of crimes committed during this conflict must happen in different venues. Ukraine has not ratified the Rome Statute, and hence it has not integrated the statute's provisions into its applicable criminal code. Therefore, prosecuting violations of international humanitarian and human rights law at the ICC and in other countries using the principle of universal jurisdiction will have more solid legal ground. However, even the combined efforts in various fora will only be able to handle a small fraction of the cases. There are numerous technical challenges facing the GPO, including the massive number cases it has opened and its lack of a prosecutorial strategy.⁵⁴ Moreover, Ukraine can hardly be deemed to be in a position to conduct fair and transparent trials. Even if the international community were to provide the GPO with all the capacity building and technical support it requires, the accused would hardly perceive a Ukrainian tribunal as independent, fair, and safe.⁵⁵

The Necessity of Rebuilding a Better Ukraine

The tremendous effort and resources that national and international actors have invested in the various criminal justice-related investigations are laudable and demonstrate an unprecedented global commitment that has not been seen for any conflict in the past several decades. However, ICTJ has noticed that very few conversations are taking place about the victims and the consequences of the violations they endured. ICTJ has also observed that discussions about Ukraine's reconstruction rarely, if ever, include building a pluralistic, rights-based society as a goal of these efforts. According to the Ukrainian Recovery Plan, presented in Lugano, Switzerland on July 4-5, 2022, the cost of reconstruction amounts to \$750 billion.⁵⁶ At a conference on October 25, 2022, the European Commission and G7 Presidency called for "nothing less than the creation of a new Marshall plan for the 21st century" to rebuild the country's "homes, schools, roads, bridges, and infrastructure."⁵⁷

Prior to Russia's full-scale invasion of Ukraine on February 24, 2022, Ukraine had been facing a protracted conflict with Russia marked by the Russian occupation of Crimea and an armed struggle with, and initiated by, Russian-supported separatist militias in the Donbas region. Some believe that at the root of the conflict are tensions among Ukraine's culturally and linguistically diverse demographic groups, who largely reside in different regions that were historically occupied by various foreign powers.⁵⁸ The current war has created a sense of unity among the population and an unwavering support for the Ukrainian government. However, experiences in other contexts have shown that

54 In 2021, ICTJ undertook some programming in Ukraine. In a private conversation with ICTJ Senior Expert Cristián Correa, a prosecutor admitted not knowing what a prosecutorial strategy was. However, ICTJ understands that recently the prosecutor's office has recently begun the process of developing a prosecutorial strategy. No further information is available at the moment. Anna Mykytenko, presentation on prosecutorial strategy at a side event "Ukraine: Justice in Times of War" organized by the Fondation Hirondelle at the twenty-first session of Assembly of States Parties to the Rome Statute, The Hague, Netherlands, December 5 to 10, 2022.

55 For example, punishments meted out by recent treason convictions have been perceived by some as disproportionately severe. See Kateryna Trokhymchuk, "High Treason in Crimea: 'I don't Understand Why I'm Punished So Severely,'" *JusticeInfo.net*, November 22, 2022, www.justiceinfo.net/en/109167-high-treason-crimea-i-dont-understand-why-punished-so-severely.html?mc_cid=ocaf538obd4&mc_eid=71c46c2e20

56 National Recovery Council, "Ukraine's National Recovery Plan" (July 2022), https://uploads-ssl.webflow.com/621f88db25fbf24758792dd8/62c166751fcf41105380a733_NRC%20Ukraine%27s%20Recovery%20Plan%20blueprint_ENG.pdf

57 European Commission, "A Marshall Plan for Ukraine: G7 Presidency and European Commission to Invite Experts to a Conference on the Reconstruction of the War Torn Country," *European Commission*, October 25, 2022, https://ec.europa.eu/commission/presscorner/detail/en/AC_22_6385

58 J.A. Kazlas, ICTJ, "Corruption, Impunity, and Current Reforms in Ukraine" (August 2014), 4-6

this unity often quickly dissipates after a conflict ends, and when political divisions re-emerge. Without efforts to reinforce democratic civic engagement, the country's legacy of fear, distrust, and resentment will continue to haunt the Ukrainian people and political volatility will ensue.

The Balkans provide a cautionary example of how a myopic focus on criminal accountability, without a concerted effort to promote social dialogue, can leave the needs of victims unmet and undermine the building of a tolerant and pluralistic society. In response to the brutality of the conflict that erupted after the breakup of the Socialist Federal Republic of Yugoslavia in the 1990s, the international community established one of the first international tribunals since the end of World War II. The International Criminal Tribunal for Yugoslavia (ICTY) produced groundbreaking jurisprudence on genocide, war crimes, and crimes against humanity that altered the international legal landscape.⁵⁹

At the end of its mandate, the ICTY needed to transfer cases to national jurisdictions, which led to the creation of the War Crimes Section in Bosnia and Herzegovina (BiH). Recognizing that the ICTY could only pursue a small fraction of perpetrators, national authorities tried cases for a decade; however, their limited capacity to prosecute complex war crimes cases led to concerns over the legitimacy of verdicts. The establishment of the BiH War Crimes Section and the prosecutor's office was meant to build the national judicial system to effectively handle cases of violations of international law.⁶⁰

While these types of measures have strengthened the justice systems of the countries that implemented them, other efforts in the Western Balkans to confront the past have been largely missing.⁶¹ Countries in the region have made relatively little effort at the national level to develop measures that examine the truth of what happened during the conflict to victims from all ethnic groups, not just those in the majority. ICTJ believes that the absence of a balanced historical record to challenge the dominant war narrative, which is often built upon a denial about who committed violations and the extent of those violations, has created an environment in which ethno-nationalist politics and authoritarian tactics flourish. For the most part, politicians across the Western Balkans manipulate victims' groups with identity-based rhetoric, while leveraging promises of much-needed assistance for votes.⁶²

The lesson for Ukraine is that even a significant commitment on the part of both the international community and national authorities to pursue criminal accountability will not be enough to keep a one-sided narrative of the conflict from dominating the political landscape and eroding stability. The actors engaged in the various documentation initiatives, as well as stakeholders in the reconstruction process, need to think broader than their current set of priorities and consider other ways to not only help Ukraine

59 ICTY, "About the ICTY," www.icty.org/en/about

60 The establishment of the BiH War Crimes Section and the prosecutor's office was meant to build the capacity of the national judicial system to effectively handle cases of violations of international law. Kosovo's "Regulation 64 Panels" were integrated into the national judicial system and operated with a mix of international and national judges, prosecutors, and staff. See Elena Naughton, ICTJ, "Committing to Justice for Serious Human Rights Violations: Lessons from Hybrid Tribunals" (December 2018), 26.

61 There was a regional coalition to support the establishment of the Regional Truth Commission in the Western Balkans (RECOM) and other longer-term documentation initiatives, but ultranationalist politics and widespread denial of war crimes eroded the coalition's effectiveness.

62 This finding is based on unpublished assessment studies on the situation and needs of victims in Kosovo, Northern Macedonia, and Serbia conducted as part of an EU project on "supporting grassroots civil society actors in transitional justice initiatives and confidence-building in the Western Balkans." ICTJ contributed to this project.

recover from the conflict, but also ensure it becomes a stronger pluralistic and rights-based society. Ukraine's "Marshall Plan" must be designed to create an environment in which Ukrainian society can continue building accountable, independent, and transparent public institutions and consolidate its democracy.

Amplifying the Use of Documentation

The various ongoing initiatives to investigate crimes committed in the war in Ukraine provide an opportunity. Given high standards for admissible evidence, a vast amount of the documentation that is being gathered will not be used. The Ukrainian authorities and the international community should adopt a broader perspective on how to use this information. Other transitional justice contexts have demonstrated that varying levels of documentation on conflict-related violations can be used to achieve different objectives. This section proposes a few ideas as starting points to a larger conversation on how the efforts underway should be used as extensively as possible to address the needs of victims and create a lasting peace in Ukraine.

Using Elements of Truth Seeking to Create an Impartial, Official Record of the Conflict

The concept of truth seeking first emerged when victims and society at large recognized the need to bring to light the experiences that characterized a period of violence, particularly those that had never been spoken about or had been openly denied. While truth seeking can take many forms, it generally provides a space for victims to tell their stories and establish a public record of the period in question. In many contexts, these processes have documented the perspectives of different sides of a conflict and have done so by prioritizing a victim-centered approach.

Information from the various investigation initiatives could be used to create a record of the conflict in Ukraine, including its causes and consequences, much in the same way that a truth-seeking process might. When the sense of unity within society begins to fade after a conflict ends, such a record can be used to counter any politicized narratives that surface.⁶³

To implement such a project, stakeholders would need to consider numerous issues. First, they would need to create an appropriate space to preserve the victim testimonies and other documentation that have been collected. They would also need to think through questions such as what would house this space, which entities would share their data and in what forms, what roles members in the project would assume, what form its findings would take, and how those would be made accessible to the public, to name just a few.

These many considerations are indicative of truth-seeking efforts and the different forms they can take; however, one element that must be central to any such initiative is ensuring the protection of victims. Transitional justice measures in other contexts have shown that for this sort of project to be successful, stakeholders must prioritize the creation of policies and procedures in the design phase. The process must also be flexible enough for its

⁶³ In order for this record to be impartial, violations committed by both sides would have to be documented and analyzed. Anecdotal evidence indicates that most, if not all, of the investigations taking place are focused solely on violations committed by Russian forces.

operations to adapt to unforeseen risks that may arise during implementation. To identify the risks to victims and ways to mitigate them, it is vital to consult with victims' groups and civil society organizations, including women's groups.⁶⁴

The involvement of civil society could go far beyond consultations. Ukrainian civil society is responsible for collecting the largest amount of documentation to date.⁶⁵ Increasingly in transitional justice contexts, civil society organizations are implementing their own truth-seeking initiatives. While these efforts may look different than official truth commissions, "there is a clear convergence around three main purposes: (1) to establish the facts about human rights violations that remain disputed or denied, aspiring to validate different degrees of interpretation and analysis of those facts; (2) to protect, acknowledge, and empower victims and survivors; and (3) to inform policy, promote change in groups and institutions, and contribute to social and political transformation."⁶⁶ In countries such as Colombia, Indonesia, Scotland, and the United States, civil society-led processes have examined issues that include violence against women, poverty, racial violence, and structural discrimination.⁶⁷

While some of these initiatives are entirely run by national civil society organizations, others have been conducted with international partners. Oasis de la Memoria, whose members consisted of local and international actors, investigated human rights violations committed during the 15-year conflict in the Western Sahara between Moroccan armed forces and Sahrawi nationalists. Based on semi-structured interviews with victims and secondary sources, the project's two-volume report dealt with the past violence, while also taking a forward-looking approach by identifying measures that would help the Saharawi people work toward a democratic society.⁶⁸

Several years ago, ICTJ led the collaborative project Save Syrian Schools in partnership with 10 Syrian organizations who had spent years documenting the Syrian conflict with the hope that the information could contribute to future criminal justice efforts. As years passed and the conflict continued to intensify, the organizations saw the need to use the documentation for other purposes. After extensive consultations with a wide range of civil society groups, the organizations decided to examine the issue of attacks on schools from multiple angles. Using a victim-centered approach, the organizations worked together to produce a report that explored these attacks and their legal implications, as well as their impact on children, families, educators, and society.⁶⁹ This project is noteworthy in part because of its process. It brought together a diverse set of organizations that each had a say in the design and implementation of the project regardless of its size or prominence. The role each organization played in pulling together different forms of data and analyzing them drew on the strengths of each organization. For 18 months, the organizations

64 Kelli Muddell and Sibley Hawkins, ICTJ, "Gender and Transitional Justice: A Training Module Series—An Overview" (October 2018), 51-52.

65 Elisenda Calvet-Martínez, University of Cambridge, "Ukraine Options Paper: Transitional Justice in a Settlement to End the Conflict between Ukraine and Russia."

66 Eduardo González Cueva, Jill Williams, and Félix Reátegui Carrillo, ICTJ, "Civil Society-Led Truth-Seeking Initiatives: Expanding Opportunities for Acknowledgment and Redress" (April 2022), 6, citing Eduardo González and Howard Varney (eds.), ICTJ, "Truth Seeking: Elements of Creating an Effective Truth Commission" (2013).

67 Ibid.

68 Kelli Muddell and Sibley Hawkins, ICTJ, "Gender and Transitional Justice: A Training Module Series—Truth-seeking" (October 2018), 12.

69 ICTJ, Badael, Center for Civil Society and Democracy, Lawyers and Doctors for Human Rights, Startpoint, Syrian Institute for Justice, Syrian Network for Human Rights, The Day After Association, Violations Documentation Center, and Women Now for Development, "'We Didn't Think It Would Hit Us:' Understanding the Impact of Attacks on Schools in Syria" (September 2018), 3-6.

collaborated closely and always sought consensus when differences of opinion arose, which fostered a collective sense of ownership of the project.

Urgent Assistance for Victims and Future Reparations

A large proportion of Ukraine's population requires immediate assistance. To date, policy discussions about reconstruction have centered around the rebuilding of infrastructure and have not adequately take into account the needs of individuals affected by the conflict. All those who are displaced, housed in refugee camps, or suffering trauma should receive support to help them rebuild their lives. Given the conflict's wide reach and the massive destruction it has caused, many Ukrainians fit into these categories. A smaller, but significant and sometimes overlapping, subset of the population is experiencing acute physical, psychological, and economic harms as result of violations such as torture, sexual and gender-based violence, unlawful confinement, and the summary executions of family members.

While the international community has made an effort to provide assistance, victims are often not being reached. At an event last September on conflict-related sexual violence (CRSV) in Ukraine, the founder of a nongovernmental network of CRSV victims sat on a panel with several international stakeholders who were speaking about the support their organizations were providing to victims. After they finished, she began her presentation by introducing herself as the "victim who has been talked about a lot today." In a very passionate and informative statement, she described the immediate needs of CRSV victims, such as being able to provide food for their families while living with intense emotional and physical trauma. She reported with frustration that none of members in her network had been able to access any of the assistance that the international actors had described and pleaded with them to support her network and its work.⁷⁰

Ukraine must play a leading role in creating and implementing a program to meet the urgent needs of those affected by the conflict. National ownership and public participation must be at the center of all recovery and reconstruction efforts for them to be successful.⁷¹ Additionally, Ukraine will require significant resources from the international community to provide the needed assistance. For example, the conflict has left many people disabled, but Ukraine's ability to care for these victims and similar segments of the population is doubtful. Even before the war began, Ukraine's laws to support the disabled were not consistently followed, and the conflict has only exacerbated the plight of this population.⁷² Social service programs for this population, as well as others affected by the conflict, would need to be significantly scaled up and/or better coordinated. To help ensure as broad of coverage as possible, psychosocial support could be provided through a network that includes both public and private providers. With funding from the government, certain civil society organizations could also provide different forms of assistance. Examples of different ways to get urgently needed support to

70 Iryna Dovgan, SEMA, "Assistance to Survivors of CRSV" (2022), panel presentation at the UN General Assembly side event "Protection and Justice for Victims of Conflict-Related Sexual Violence in Ukraine," New York, September 23.

71 Zoriana Mishchuk, Globsec, "Ukraine's Recovery after Lugano: First Blueprints Take Shape but Quandaries Lie Ahead" (July 18, 2022), www.globsec.org/publications/ukraines-recovery-after-lugano-first-blueprints-take-shape-but-quandaries-lie-ahead/

72 See Sam Mednick, Devex, "People with Disabilities Left Behind the War in Ukraine" (July 5, 2022), <https://www.devex.com/news/people-with-disabilities-left-behind-during-the-war-in-ukraine-103530> and Handicap International, "Ukraine, Where Sires Sound Day and Night: A Focus on Persons with Disabilities and Provision of Emergency Health Services" (October 2022).

victims in the face of limited resources and infrastructure challenges can be drawn from countries that have already undertaken a transitional justice process. Lessons learned from both recovery and reparations programs could be useful in the Ukrainian context.

In addition to helping establish a public record of the conflict, existing documentation could also inform the design of an urgent assistance program. Information that has been gathered could contribute to the development of a victim registry that identifies types of violations and the urgent assistance needed. A registry could also be useful for consolidating data that may be needed for other processes, such as the search for the missing. For instance, the forcible transfer of civilians, including children, under the guise of evacuation has been well documented.⁷³ Of particular concern is Russia's actions to start granting citizenship to Ukrainian children residing in Russia without parental care, which opens up an avenue for Russian families to adopt them.⁷⁴ While the Russian government's messaging on these points has been clear, it has kept silent about any plans it may have to meet their legal responsibility to try to reunite these children with their families.⁷⁵ For these children and others who boarded a bus under the false pretense that they were being evacuated from a besieged area, a victim registry could house data on when and where the person was last seen, what they were wearing, and any other information that might assist with any efforts to determine what happened to them, where they are located if alive, and where their bodies could be found if they are not.

Incorporating a gender dimension into the provision of urgent assistance and any future reparations program is essential to guaranteeing their effectiveness. How violations can affect people differently based upon their gender must be considered when both registering victims and other qualifying individuals and delivering assistance and services. Any assistance to victims must recognize that these gendered consequences are not limited to those abuses committed during periods and in locations of active fighting. Among the internally displaced, for instance, women and girls are particularly vulnerable to gender-based violence and human trafficking.⁷⁶ In addition, LGBTIQ individuals who are displaced also encounter discrimination and violence.⁷⁷

Urgent assistance and reparations processes must be designed to respond to the challenges that victims of SGBV may face related to shame and stigma. The transitional justice field offers ample examples of victim-centered and gender-sensitive registries that have ensured victims were not excluded because they lacked documentation (such as a doctor's report), faced safety concerns, or had difficulties telling their story because of pervasive societal silence around certain violations and the possibility of re-traumatization.

Victims, victims' groups, and civil society organizations must be consulted when designing policies for providing urgent assistance and reparations programs. Reparations programs, in particular, can face many different dilemmas. For such programs to address challenges transparently and effectively, it is essential that these stakeholders participate in

73 See Human Rights Watch, "'We Had No Choice' 'Filtration' and the Crime of Forcibly Transferring Ukrainian Civilians to Russia" (September 1, 2022).

74 According to the Press Service of the Ukrainian Parliament Commissioner for Human Rights, since the invasion began, 14,732 Ukrainian children were forcibly deported, 459 died, and 917 were wounded. Government of Ukraine, "All News," January 31, 2023, <https://war.ukraine.ua/news/31-01-2023/>

75 Ibid., 53.

76 OHCHR, "Ukraine: Millions of Displaced Traumatized and Urgently Need Help, Say Experts," OHCHR, May 5, 2022, www.ohchr.org/en/press-releases/2022/05/ukraine-millions-displaced-traumatized-and-urgently-need-help-say-experts

77 International Crisis Group, "Responding to Ukraine's Displacement Crisis: From Speed to Sustainability" (September 26, 2022), 12.

all stages of design and implementation, not just in one-off consultations at the beginning of a process.

While all those in need should receive urgent assistance, reparations are provided to victims of human rights violations. Urgent assistance cannot replace a reparations program. The long-term harms caused by human rights violations will still need to be addressed. Furthermore, an important distinction exists between their objectives. Reparation includes an acknowledgment that an individual's rights have been violated, and victims have a legal right to receive reparation.

It is essential that victims of the most serious violations receive reparations.⁷⁸ This may mean including only certain categories of victims to simplify the process and expedite the delivery of the reparations. Reparations for a large number of victims cannot be based on an individualized assessment of harms and losses, as this would make the program too cumbersome and costly. However, categories of benefits should take into account the differing impact of violations on marginalized and vulnerable groups. Reparations should also be designed to have a transformative effect on the lives of women by addressing gender inequalities and the additional harms that women may experience compared with their male counterparts.

Ideally, Russia should acknowledge the violations committed by its armed forces and fund a comprehensive reparations program; however, the likelihood it will do so in the nearby future is slim. In the absence of Russia meeting its legal obligation, Ukraine should take steps to provide reparation to victims of conflict-related violations.⁷⁹ There are very few examples of reparations implemented in contexts of international conflict, and those that exist are not necessarily consistent. Therefore, much exploration and discussion are needed to find ways to make a reparations program one day a reality. Some stakeholders have begun to have conversations about relevant legal and policy questions.⁸⁰ In the meantime, urgent assistance must be prioritized.

Restorative Justice

Experience has increasingly shown that traditional judicial procedures cannot respond to massive human rights violations and persistent violence given their limitations in terms of resources, capacity, and independence described earlier. Contexts where atrocities have been committed require a different approach.

Transitional justice processes are fundamentally based on the principles of restorative justice, and focus primarily on addressing and repairing the harm caused to individuals, communities, and wider society. In other words, a transitional justice process aims to re-

78 UN General Assembly, 60th Session, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 2006 (New York: Official Record A/RES/60/147).

79 Ibid., 15 and 16. A state is required to "provide reparations to victims for acts or omissions which can be attributed to the State" but "should endeavour to establish national programmes for reparations and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations."

80 See Luke Moffet, Lieber Institute West Point, "Ukraine Symposium – Reparations for War: What Options for Ukraine" (November 15, 2022), <https://lieber.westpoint.edu/reparations-for-war-what-options-for-ukraine/>; New Lines Institute for Strategy and Policy, "Multilateral Action Module: Model on Reparations" (October 2022), <https://newlinesinstitute.org/wp-content/uploads/20221031-MAMOR-Doc-w-toc-NLISP.pdf>; and PILPG, "Experts Roundtable: Reparations in Ukraine" (July 8, 2022), www.publicinternationallawandpolicygroup.org/expert-roundtable-ukraine-reparations

establish the foundations for peaceful coexistence.⁸¹ Restorative justice and transitional justice are closely and fundamentally related. Whereas restorative justice emerged in response to the limitations of retributive justice systems in the domestic prosecution of crime, transitional justice developed in those contexts where the conventional rule-of-law institutions proved to be inadequate and/or inappropriate for addressing massive and grave human rights violations.⁸²

As heinous as the violations reportedly committed in Ukraine are, prosecuting thousands of low- and even middle-ranking Russian soldiers and Ukrainian nationals in occupied territories who collaborated with the invaders only in order to save themselves and their families would result in little reparation for the victims. Criminal prosecution should be reserved for those individuals who had decision-making power in directing military forces to attack civilians as well as committed other related violations during the conflict. Similarly, it should target only those civilians in a position of power who supported and enabled the invasion.

ICTJ is particularly concerned about the amendment to the Ukrainian criminal code, which has redefined and expanded the crime of “collaborationism.”⁸³ It appears that, on the basis of the new provisions, several criminal charges were raised against a number of civilians residing in Ukrainian territories formerly occupied by Russian troops. The criminal proceedings were conducted very quickly and resulted in harsh sentences, even in cases that either should have been considered minor or should have not even risen to the attention of the prosecutorial authorities.⁸⁴ The extensive use of this legislation constitutes a serious danger to the country’s future. Charging individuals for acts or deeds that fall short of “treason” in a society that is fighting for its survival—and where many have been forced to live for extended periods of time under enemy control and abuse, and some have helped Russian soldiers out of human empathy, moral obligation, or constriction—may ultimately give credence to the allegations that Ukrainian nationalists discriminated against Russian-speaking and ethnic Russians living in Ukraine and may serve to justify Russian Federation’s intervention to “liberate” them.⁸⁵

Ukraine should instead consider amnesties and different processes with lenient sanctions for the many captured Russian soldiers held in custody. While their continued detention may be warranted for security reasons, they nonetheless should be provided an opportunity to acknowledge their crimes, confront their victims, understand the magnitude of the harm they caused, contribute to a narrative of the war based on undeniable facts, and provide reparation to victims.

81 Restorative justice refers to any process that enables those harmed by crime and those responsible for that harm, if they freely consent, to participate actively in the resolution of matters arising from the offense, with the help of a trained and impartial third party, or “facilitator.” Restorative justice often takes the form of a dialogue (whether direct or indirect) between the victim and the offender, and can involve, where appropriate, other persons directly or indirectly affected by a crime. This may include supporters of victims and offenders, relevant professionals, and members or representatives of affected communities. Council of Europe, Committee of Ministers, “Recommendation CM/Rec(2018)8 of the Committee of Ministers to member States concerning restorative justice in criminal matters” (adopted by the Committee of Ministers on October 3, 2018, at the 1,326th meeting of the Ministers’ Deputies), II.

82 ICTJ, “Restorative Justice and Transitional Justice” (provisional title), research report (forthcoming 2023).

83 Law No. 2108-IX of Ukraine on the Amendments to Certain Legislative Acts regarding the Establishment of Criminal Liability for Collaboration Activities (Criminal Liability for Collaboration Law), March 3, 2022.

84 Iryna Salii, presentation at a side event “Ukraine: Justice in Times of War” organized by the Fondation Hirondelle at the twenty-first session of the Assembly of States Parties to the Rome Statute, The Hague, Netherlands, December 5 to 10, 2022.

85 Ibid.

In addition to helping provide reparation to victims, a restorative justice process would be critical in eroding the pervasive propaganda of the Kremlin. Processes that include the experiences of Russian soldiers, collect them safely, and present them in a neutral manner are more likely to challenge the position and arguments of the Russian government, particularly as they are the only ones currently permitted in the Russian Federation

Amnesties have always been a part of peace negotiations. From a legal point of view, the use of this tool to help end a conflict is straightforward.⁸⁶ However, they bring enormous social and political challenges that must be understood and addressed. Any amnesty process must be designed with clarity and transparency, and with a special emphasis on victims and upholding their rights.⁸⁷

Recent experiences provide insight on how to design an accountability system that includes both criminal and alternative proceedings. For example, Colombia's Special Jurisdiction for Peace features components of both retributive and restorative justice. Such a system can offer options and leniency to perpetrators depending on their level of cooperation with and contribution to the overall truth, acknowledgment, and reparation process.⁸⁸

Conclusion

The international community responded swiftly to the conflict in Ukraine with various actions, including numerous investigative initiatives. Criminal accountability must be pursued but it requires certain pre-conditions. Excessive pressure to prosecute has risks. Ukraine is not in a position to conduct fair trials, and the international community's emphasis on these efforts does not necessarily help provide what victims most need at this stage. Criminal proceedings absorb a great deal of financial and human resources, which could be allocated to addressing the urgent situation in which victims find themselves.

As reconstruction plans are being discussed and prepared, it is imperative that they do not focus solely on infrastructure. Their design must include services and assistance to civilians who have experienced the brunt of the conflict's consequences.

While transitional justice is not usually applied in contexts of international armed conflict, it can provide lessons on how to help Ukrainian society recover from war. Past truth-seeking, victim assistance, and reparation initiatives offer insights on how to use documentation to help create an inclusive narrative of the conflict and address the harms suffered. Restorative justice models demonstrate how amnesties can be paired with requirements that a perpetrator contribute to the acknowledgment of victims' suffering and reparations. International and national efforts to address human rights violations and reconstruct the country must seek to consolidate a democratic, pluralistic, and inclusive society. Otherwise, Ukraine risks ultimately losing the war, regardless of its military gains.

86 Fernando Travesí and Henry Rivera, ICTJ, "Political Crime, Amnesties, and Pardons: Scope and Challenges" (March 2016), 2.

87 See Paul Seils, ICTJ, "Squaring Colombia's Circle: The Objectives of Punishment and the Pursuit of Peace" (June 2015).

88 See Anna Myriam Roccatello and Gabriel Rojas, ICTJ, "A Mixed Approach to International Crimes: The Retributive and Restorative Justice Proceedings of Colombia's Special Jurisdiction for Peace" (July 2020).

