

Between Genocide and War Crime – Legal-Cultural Analysis of the Russian Aggression in Ukraine

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Abstract: The cultural context, where two neighboring Slavic nations are in a state of war and the Russian imperialistic approach has never gone away for good, must be taken seriously into consideration. The international legal analysis of the Russo-Ukrainian war is not enough to truly understand the essence – rationale – of this armed conflict and then to find a solution to how to solve it and punish the perpetrator – the Russian Federation. The arguments gathered here by the author come from her own experience during trips to Russia and Ukraine, as well as military courses facilitation where students are taught that in modern warfighting it becomes more and more valid to change the (Western) lens and begin thinking as the perpetrator does. Only then we are objectively able to see and understand if the atrocities committed by Russian troops in Ukraine bear the hallmarks of a war crime or an act of genocide.

1. Introduction

This article's aim is to shed light upon a deeply troubling and complex issue that demands our regional and global attention: the Russian aggression in Ukraine. The war *de iure* started in February 2022 when Russian troops illegally entered the sovereign territory of another state – Ukraine, yet *de facto* we must emphasize that Russian aggressive and unprovoked actions began already in March 2014 after the annexation of Crimea, an integral part of

the Ukrainian territory¹. Public opinion, mass media, and social media gave their opinions on such affairs, although for the Central-Eastern European countries, the situation looks far more complex and cannot be analyzed in isolation from the historical, socio-cultural context. While for nations such as Poland, the Baltic states, and other former Soviet republics, Russian rhetoric – both political and military – is predictable and well-thought-out, for some Western allies it remains a geostrategic riddle.

Here, the best example could be the quote by the U.S. Secretary of Defense Lloyd Austin during the Asia-Pacific Security Forum (International Institute for Strategic Studies (IISS) Shangri-La Dialogue). The 2023 event took place in Singapore on 2–4 June and gathered, as every year, the heads of ministries of defense/national security from the Indo-Pacific region, as well as a few key players from Europe. Secretary Austin reiterated the generally accepted and acknowledged theme in the West, namely, that the Russian act of aggression against Ukrainians was “shocking.”² Yet, for the states that suffered under communism during the times of the Second World War and afterward, after the so-called “liberation” by the Red Army, the act of aggression against Ukraine was completely predictable.

Consequently, the cultural context, where two neighboring Slavic nations are in a state of war and the Russian imperialistic approach has never gone away for good, must be taken seriously into consideration. The international legal analysis of the Russo-Ukrainian war is therefore not enough to truly understand the essence – rationale – of this armed conflict and thus

¹ One of the major methods of warfare used by the Russian Federation is influencing or forcing false election. Compare: П. УЦБС, *Falsifications and Intimidation: How Russia Held Illegitimate Election in the Occupied Luhansk and Donetsk Regions*, September 21, 2021, “Ukrainian Security & Cooperation Center,” accessed June 20, 2023, <https://uscc.org.ua/en/falsifications-and-intimidation-how-russia-held-illegitimate-election-in-the-occupied-luhansk-and-donetsk-regions/>.

² Andrew Jeong, Ellen Francis, and Justine McDaniel, “Ukraine Live Briefing: Austin Says War is a Warning for Asia; Kyiv Promises to Keep Shelters Open,” *The Washington Post*, June 3, 2023, accessed June 20, 2023, <https://www.washingtonpost.com/world/2023/06/03/russia-ukraine-war-news-austin/>; “Opening Remarks by Secretary of Defense Lloyd J. Austin III at the 12th Ukraine Defense Contact Group (As Delivered),” U.S. Department of Defense, May 25, 2023, accessed June 20, 2023, <https://www.defense.gov/News/Speeches/Speech/Article/3407082/opening-remarks-by-secretary-of-defense-lloyd-j-austin-iii-at-the-12th-ukraine/>.

to find a solution on how to resolve it and punish the perpetrator – the Russian Federation.

Lastly, after a legal-cultural analysis of the Russian aggression in Ukraine, we will be able to determine whether crimes committed by the Russian troops against the Ukrainian nation, its civilians, and civilian infrastructure are to be legally classified as war crimes or genocide. To a layman, the targeted killing of the civilian population, as well as combatants defending their land, combined with torture and rape appear as a clear act of genocide. Yet, we must take into consideration the reasons behind those crimes and what the Russian government is trying to achieve through its armed forces. Additionally, what appears important and relevant, but is not sufficiently understood or deployed by journalists and the public, is the rationale of the perpetrator – in its eyes, not our own. This article is therefore an attempt to present the war in Ukraine how it is, not how we, the West, want to see and read it. The arguments gathered here by the author come from her own experience³ during trips to Russia and Ukraine, long and very emotional conversations with academics, lawyers, and ordinary Russians and Ukrainians. Finally, the author's personal and professional mission is to spread the truth, no matter how bitter it is, as only by using pure facts are we able to make a change.

2. Legal Culture

We often encounter a lack of understanding of how and why the International Humanitarian Law of Armed Conflict (the proper and formal name of this branch of public international law according to the International Committee of the Red Cross, ICRC⁴) does not work. Well, it does, but the lack

³ Yet, some analysts point to a cold calculation of business benefits of maintaining relations with Russia in the face of aggression in Ukraine, thus a well-thought-out strategy by some countries rather than a pure lack of understanding of the cultural context. The author is of the opinion that those attitudes are not mutually exclusive, nonetheless, this article is not about the economic profits in international relations, so this topic will not be addressed here.

⁴ Commonly, lawyers differentiate between two sub-branches of International Humanitarian Law of Armed Conflict: International Humanitarian Law and Law of Armed Conflict. The former focuses on the protection of civilians and civilian infrastructure during the armed conflict, while the latter – on means and methods of warfighting accepted by law. Yet, according to many scholars and partitioners, including the author herself, we should

of legal awareness is immense. Therefore, at the beginning of this article it appears necessary to establish a common understanding of the definitions of both legal culture and legal awareness (sometimes also called legal consciousness,⁵ which the author tends to use more in her research and thus in this article), terms we shall encounter throughout this paper.

The legal-cultural analysis of armed conflict explores the intricate relationship between legal culture and legal consciousness in the context of international law. Recognizing the diverse nature of legal systems across the globe, we delve into the multifaceted dimensions that shape legal cultures and influence individuals' legal consciousness. At the end of this academic delving, we will ultimately develop a deeper understanding of the complexities of international law and shed light on the challenges and opportunities presented by its diversity⁶ for the benefit of ourselves, mainly those in need – the populace at war.

In general terms, not going into detail, in social science methodology, social scientists make cultural arguments about the law in three ways. They either make their observations by viewing culture as an independent variable to explain variations in law, by regarding law as an independent variable to explain culture, or lastly by considering law as culture itself⁷.

As the world becomes increasingly interconnected, the significance of international law has grown exponentially. International law encompasses a vast array of legal systems, written norms, and customary principles that govern the interactions between states, still remaining the primal and main standard setters under the Westphalian system, as well as to some extent international organizations, and other non-state actors (NSAs) gaining more

not separate those two related branches of international law as they simply must be considered together.

⁵ Susan S. Silbey, "Legal Culture and Legal Consciousness," in *International Encyclopedia of the Social & Behavioral Sciences*, ed. James D. Wright, 2nd ed. (Cambridge, MA: Elsevier, 2015), 726–33, <https://doi.org/10.1016/B978-0-08-097086-8.86067-5>.

⁶ Cruz Reynoso and Cory Amron, "Diversity in Legal Education: A Broader View, a Deeper Commitment," *Journal of Legal Education* 52, no. 4 (2002): 491–505, <http://www.jstor.org/stable/42898300>; Paula J. Schauwecker, "Building Ecosystems of Legal Diversity," *Natural Resources & Environment* 28, no. 3 (2014): 56–8, <http://www.jstor.org/stable/24426146>.

⁷ Abigail C. Saguy and Forrest Stuart, "Culture and Law: Beyond a Paradigm of Cause and Effect," *The Annals of the American Academy of Political and Social Science* 619, (2008): 149–64, <http://www.jstor.org/stable/40375800>.

and more influence, and finally us – the individuals. Legal culture can be described as the lens through which we perceive. It constitutes a fundamental aspect of any legal system, serving as a lens through which individuals observe and interpret the law. We must therefore explore the concept of legal culture, highlighting its varied dimensions, including historical, social, economic, and political factors. By acknowledging the diversity of legal cultures around the world, we gain a deeper appreciation for the multifaceted nature of international law and its impact on different societies.⁸

Hence, legal culture refers to the shared beliefs, values, written norms and oral customs and practices that shape the legal system which influences the behavior and perceptions of individuals within a particular legal community. Those can be entire states or intrastate regions, like a region in France, a voivodship in Poland, a state in the USA, a canton in Switzerland, and so on. In 1975, Lawrence Friedman, an American law professor and historian of American legal history, introduced the concept of “legal culture” as a means of emphasizing the fact that law can be best understood and thus described as both a product of social forces and a conduit for those same forces. Here are five additional definitions of legal culture provided by scholars the author wishes to quote:

Legal culture encompasses the fundamental assumptions, values, and practices that constitute a society’s legal system. It includes the way the law is created, interpreted, enforced, and perceived by the members of that society.⁹

Legal culture refers to the socially shared understandings and expectations that shape the attitudes, behavior, and actions of legal actors within a given legal system. It encompasses not only the formal legal rules but also the informal norms and practices that influence the operation of the legal system.¹⁰

By legal culture, I mean professional sensibilities, habits of mind, and intellectual reflexes: What are the characteristic rhetorical strategies deployed by

⁸ Sally E. Merry, “Legal Pluralism,” *Law & Society Review* 22, no. 5 (1988): 869–96, <https://doi.org/10.2307/3053638>.

⁹ Michael J. Broyde, “Editorial,” *Journal of Law and Religion* 32, no. 1 (2017): 1–3, <https://doi.org/10.1017/jlr.2017.24>.

¹⁰ Susan S. Silbey, “Legal Culture and Cultures of Legality,” in *Routledge Handbook of Cultural Sociology*, eds. John R. Hall, Laura Grindstaff, and Ming-Cheng M. Lo (New York: Routledge, 1997), 470–9, <https://doi.org/10.4324/9781315267784>.

participants in a given legal setting? What is their repertoire of recurring argumentative moves? What counts as a persuasive legal argument? What types of arguments, possibly valid in other types of discourse (...) are deemed outside the professional discourse of lawyers?¹¹

The legal clarifications (...) may increase the level of stability of the application of law (its uniformity in the territory of Poland), transparency of administrative activities and legal certainty of entrepreneurs, thus increasing the degree of legal awareness and legal culture of entrepreneurs as a social group.¹²

Legal culture refers to an aggregate level (macro or group) phenomenon; legal consciousness usually refers to micro-level social action, especially the ways in which individuals interpret and mobilize legal meanings and signs.¹³

These definitions highlight the complex nature of legal culture and its influence on legal systems, legal actors, and the wider society. Yet, legal culture is not limited to formal legal rules, but encompasses broader societal values and norms that shape the understanding and application of the law. The most controversial example here would be the slightly different legal approach to same-sex marriage. In some countries, homosexual couples are allowed to marry, in some they can also adopt a child, while in others it is codified in the penal code, even with capital punishment.¹⁴

¹¹ Murray Hunt, "The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession," *Journal of Law and Society* 26, no. 1 (1999): 86–102, <http://www.jstor.org/stable/1410580>.

¹² Anna Piszcz and Halina Sierocka, "The Role of Culture in Legal Languages, Legal Interpretation and Legal Translation," *International Journal for the Semiotics of Law – Revue internationale de Sémiotique juridique*, no. 33 (2020): 533–42, <https://doi.org/10.1007/s11196-020-09760-3>.

¹³ Susan S. Silbey, "Legal Culture and Legal Consciousness," in *International Encyclopedia of the Social & Behavioral Sciences* (Elsevier Science Ltd., 2011).

¹⁴ The author wrote a few legal analyses on this topic for the Polish Ministry of Justice. The works are available in Polish at: Joanna Siekiera, "Depenalizacja zachowań homoseksualnych – ujęcie porównawcze," Fundacja Instytut Prawa Ustrojowego, accessed June 20, 2023, <https://efektywne-prawo.org.pl/depnalizacja-zachowan-homoseksualnych-ujecie-porownawcze-dr-joanna-siekiera>; Siekiera, "Międzynarodowe standardy tzw. praw LGBT," Fundacja Instytut Prawa Ustrojowego, accessed June 20, 2023, <https://efektywne-prawo.org.pl/miedzynarodowe-standardy-tzw-praw-lgbt-dr-joanna-siekiera>; Siekiera, "Pojęcie gender w prawie międzynarodowym," Fundacja Instytut Prawa Ustrojowego, accessed June 20, 2023, <https://efektywne-prawo.org.pl/pojecie-gender-w-prawie-miedzynarodowym-dr-joanna-siekiera>;

Legal consciousness in turn refers to the awareness, beliefs, and attitudes individuals hold toward the law. The formation and development of legal consciousness is about how personal experiences, education, media, and social norms shape individuals' perceptions of international (global or regional) and national (internal – whole state or local – territorial) law. By understanding the intricacies of legal consciousness, we can better comprehend how international law works/or does not work in various legal cultures¹⁵.

Legal consciousness encompasses how individuals perceive and interpret the law, their attitudes towards legal authorities (although not only judges and lawyers, but also democratically elected representatives), and their sense of rights and obligations within a legal system (“Should I?”, “Could I?”, “What can I do for the state?” versus “What can my state do for me?”). Here, three definitions of legal consciousness will be provided to present this complex phenomenon, still neglected in (far too) many legal and military analyses:

Legal consciousness refers to the ways in which people think and act in relation to law, including situations in which they view the law as relevant and useful and those in which they reject law or never consider it at all.¹⁶

Legal consciousness refers to the ways in which people experience, understand, and act in relation to law. It comprises both cognition and behavior, both the ideologies and the practices of people as they navigate their way through situations in which law could play a role. Legal consciousness does not simply refer to legal awareness, nor is it meant to measure knowledge – or ignorance – of the law.¹⁷

Siekiera, “Regulacje zmiany płci w państwach skandynawskich,” Fundacja Instytut Prawa Ustrojowego, accessed June 20, 2023, <https://efektywne-prawo.org.pl/regulacje-zmiany-płci-w-państwach-skandynawskich-dr-joanna-siekiera>.

¹⁵ Joseph W. Singer, “The Player and the Cards: Nihilism and Legal Theory,” *The Yale Law Journal* 94, no. 1 (1984): 1–70, <https://doi.org/10.2307/796315>.

¹⁶ Lynette J. Chua, David M. Engel, and Sida Liu, “Legal Consciousness,” in *The Asian Law and Society Reader* (Cambridge: Cambridge University Press, 2023), 139–82, <https://doi.org/10.1017/9781108864824.005>.

¹⁷ Lynette J. Chua and David M. Engel, “Legal Consciousness Reconsidered,” *Annual Review of Law and Social Science*, no. 15 (2019): 335–53, <https://doi.org/10.1146/annurev-lawsocsci-101518-042717>.

Legal theoreticians viewed legal consciousness as a part of the law, in the broadest sense of the word (jurisprudence), which reflected the elements of jurisprudence. According to this definition, law could ‘materialize’ (e.g. legislation) and these ‘materialized’ forms of legal consciousness would reflect legal consciousness. Legal psychologists defined consciousness as a general term and viewed legal consciousness as a subfield of consciousness.¹⁸

The challenges of legal-cultural (or socio-legal) studies on the legal consciousness approach open up a whole spectrum of subjective experiences of the law, which are unfortunately still overlooked by scholars, decision-makers, and military commanders. The true insight into legal consciousness is that law is experienced in everyday life – during peacetime and war. It is indeed a real social phenomenon¹⁹ that provides actual reasons behind human behaviors, whether legal and accepted or illegal, dehumanizing, and wrong.

The definitions provided in this part of the article emphasize the individual’s subjective (!) understanding of and experiences with the law (“I always collect <<unnecessary>> parking fines” versus “social responsibility of business through high taxes”). Legal consciousness goes beyond mere knowledge of legal rules and incorporates individuals’ perceptions of justice, fairness, and the role of law in society. It acknowledges the social, cultural, and personal (thus, of each and every one of us) factors that shape how individuals engage with and make sense of the legal system.

Certainly, the diversity of legal systems presents both challenges and opportunities in the field of international law. There are challenges arising from conflicting legal cultures, such as differences in legal terminology, interpretation, and enforcement (these differences have been exploited for political advantage throughout history up to the present day, because for one legal culture, even within one state or country, phenomenon “x” may be sacred, but for another it might be cursed, unwanted or even illegal). Yet, there are potential benefits that diversity brings, including the enrichment

¹⁸ Silvia Kaugia, “Structure of Legal Consciousness,” *Juridica International. Law Review. University of Tartu*, no. 1 (1996): 16–20, https://www.juridicainternational.eu/article_full.php?url=1996_I_16_structure-of-legal-consciousness.

¹⁹ Dave Cowan, “Legal Consciousness: Some Observations,” *The Modern Law Review* 67, no. 6 (2004): 928–58, <http://www.jstor.org/stable/3698990>.

of legal principles, cross-cultural dialogue, and the fostering of intercultural understanding.

Prof. Piotr Gliški, the Polish Minister of National Heritage and Culture, in an interview with the Polish Radio on June 2, 2023, said: “This war is a war for culture,”²⁰ referring to the Russian aggression on the territory of Ukraine. What the author usually builds upon when teaching military and civilian students is that “culture eats strategy for breakfast.” In many geopolitical analyses in the first weeks of the war, but also even months after its outbreak, many Western analysts focused on the lack of military justification, any profitable rationale of war against Ukraine, or, finally, no large territorial gains from this act of aggression. But they forgot about the cultural mindset of the perpetrator – the mindset of Russian imperialism, so well-known to the nations in Central Eastern Europe. The remainder of this article will therefore be presented taking into account this mindset.

3. War Crimes

Since the beginning of the war – though we must count the beginning of the actual armed attack by the Russian Federation on the Ukrainian territorial integrity in February and March 2014 – there have been many examples of legal culture clashes. As the author’s mission is to raise awareness of the different legal-cultural mindsets represented by us – the Western world, the “West” – and the perpetrator(s), we must stop expecting the war criminal(s) to follow international humanitarian law principles. Human rights will not be respected, they must be enforced, while compliance with international law during war by the aggressor must be put aside. The aggressor has already invaded a territory of another state and is killing and torturing a vulnerable population, which is *nomen omen* legally protected by a whole range of international conventions. Yet, our naïve – a strong but needed expression – expectation of the other side in the conflict to follow the Geneva Convention only leads to more casualties. Here are two of the most disgraceful examples.

²⁰ “Zrabowany z Polski obraz odzyskany w Japonii. Gliški: zaakceptowali fakt, że to strata wojenna,” Trójka Polskie Radio, June 2, 2023, accessed June 20, 2023, <https://trojka.polskieradio.pl/artykul/3181189,Zrabowany-z-Polski-obraz-odzyskany-w-Japonii-Glinski-zaakceptowali-fakt-ze-to-strata-wojenna>.

The perpetrators intentionally fail to comply with their legal obligation to protect vulnerable groups, such as children, women, the disabled. Exactly contrary to that, Russian troops used one of the fundamental principles in international law and international relations – goodwill – to humiliate our civilization’s sacred values. States enter into international relations through treaties or other formal or soft law mechanisms expecting all parties to comply with all the requirements and observe the agreed terms with due diligence. Probably the closest notion at the local level here would be the social contract as a trustworthy agreement between entities. The Ukrainian side, according to the International Humanitarian Law of Armed Conflict, was allowed to protect its own citizens who were not taking part in the hostilities and exclude these vulnerable groups of civilians from the potential armed attack of the adversary. In order to provide special, and thus efficient, protection for the minors hidden in urban areas, Ukrainians wrote large inscriptions with the Russian word Дети (Eng. children) on rooftops where the population was hiding from Russian bombardment or in front of such premises. What happened next? Clearly, for Russian troops, it was a well-defined target instead of a specially marked area under strict protection. They did not hesitate to take advantage of this, striking the targets marked in an act of goodwill and killing innocent people.²¹

A similar warfighting method was used sometime after. The Ukrainian side asked the International Committee of the Red Cross and other humanitarian organizations for help and aid. To do so, to get to the population most in need, the so-called humanitarian corridors had to be established. In order to protect the cargo, according to the norms of International Humanitarian Law, these “white truck” routes were notified in order to prevent illegal acts of sabotage, hijacking, or bombing. Again here, the expectation of one side – the one who has been suffering illegal and unprovoked

²¹ This is then a severe example of perfidy. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), Article 37 states: “Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy.”

attacks – was trying to follow the international law rules and customs.²² But what did Russian troops do with such an excellent case of complying with the law? They mined those humanitarian corridors. Only a small portion of the international aid was delivered at that time.

“War crimes” is a combined term for the acts – most serious ones – taken within the international community against the general paradigm of international law established by the United Nations Charter in its very first article: “To maintain international peace and security.”²³ Yet, war crimes, various ones among which genocide and crimes against humanity seem to be the most terrifying, are “a burgeoning field of study for a crime as old as humanity.”²⁴ According to the Rome Statute of the International Criminal Court (ICC) based in the Hague, the Netherlands, international crimes are divided into 4 main categories (which are also the objective scope of the ruling by the Court): the crime of genocide, crimes against humanity, war crimes and the crime of aggression.²⁵

The crime of genocide was first codified by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, also called the Genocide Convention. According to Article 2:

Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (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.²⁶

²² Joanna Siekiera, “Legal Culture in Protection of Civilians,” *The Center of Excellence for Stability Police Units Magazine*, no. 3 (2022): 9–13.

²³ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Art. 1.

²⁴ Emily Sample, “Genocide and Crimes Against Humanity,” in *Encyclopedia of Violence, Peace, and Conflict*, ed. Lester R. Kurtz, 3rd ed. (Academic Press, 2022), 707–17, <https://doi.org/10.1016/B978-0-12-820195-4.00093-5>.

²⁵ UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, Art. 5.

²⁶ UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, Treaty Series, vol. 78.

The Rome Statute's Article 6 uses the exact same wording yet does not quote or refer to the Genocide Convention, but states "for the purpose of this Statute." We must remember here that while the United Nations Convention on the Prevention and Punishment of the Crime of Genocide was established for all its member states (now summed up to 193 states), among which 153²⁷ have ratified the Convention, officially accepting international criminal responsibilities into their national legal orders, the ICC functions outside of the UN family. The International Criminal Court includes 123²⁸ states parties, however, initially 137 states signed the Rome Statute, which is the treaty establishing this tribunal. Among the states who are not (any-more) parties to the ICC are both the Russian Federation and Ukraine – the first withdrew after the unflattering ruling against Russia to stop its illegal aggression against Ukraine in 2014 and to immediately withdraw its troops from Crimea (which never happened as it was not executed due to the lack of international legal tools and political will of the entire international community), while the latter signed but never ratified the Statute. The most probable explanation for why the government in Kyiv²⁹ never finalized its membership in the ICC was that Ukrainian politicians and decision-makers did not wish to upset the Russian neighbor and cause any tension. Also, Russian own interest was to keep Ukraine outside of the "Western" international tribunal system. Yet, such international acts of subordination cannot take place, as Ukraine is a sovereign country and thus is allowed to enter into any international arrangements it desires.

"War crimes" is a much more capacious term than an act of genocide, a crime(s) against humanity, or a crime of aggression. Its definition can be found in the Rome Statute, which, according to the international law doctrine, is perceived as the primary source of definitions, clarifications,

²⁷ See the United Nations Treaty Collection, Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948, accessed June 20, 2023, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=_en.

²⁸ United Nations Treaty Collection, Rome Statute of the International Criminal Court, Rome, 17 July 1998, accessed June 20, 2023, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en.

²⁹ Please mind the Ukrainian spelling of the country's own capital *Kyiv* as opposed to *Kiev*, which is the Russian spelling transcription. This mistake appeared in many English analyses and in media, which, given the Russian aggression and territorial claims, is unacceptable.

and methodology regarding war crimes despite its non-universal scope of membership. The list of war crimes is extremely long: more than 50 norms (Article 8, paragraph 2, letter a, letter (i) – (viii); letter b, letter (i) – (xxvi), letter c, letter (i) – (iv); letter d–e, letter (i) – (xv); letter f, finishing with paragraph 3 emphasizing the sovereign rights of each state to establish its own laws, which must be understood that this enumeration is not a closed list.³⁰

The war crimes given as the main examples are willful killing; torture or inhuman treatment, including biological experiments; willfully causing great suffering, or serious injury to body or health; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or other protected person to serve in the forces of a hostile Power; willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; unlawful deportation or transfer or unlawful confinement; taking of hostages,³¹ as well as other serious violations of the laws and customs applicable in international armed conflict: intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; intentionally directing attacks against civilian objects, that is, objects which are not military objectives; attacking or bombarding, by any means, towns, villages, dwellings or buildings which are undefended and are not military objectives; 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; 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 gathered, provided they are not military objectives.³²

³⁰ The exact wording of paragraph 3: “Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or reestablish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.”

³¹ Rome Statute of the International Criminal Court, Article 8, paragraph 2, letter a, letter (i) – (viii).

³² Rome Statute of the International Criminal Court, Article 8, paragraph 2, letter b, letter (i) – (ii); (v); (viii); (ix).

As one can see, when comparing the list of crimes understood as an act of genocide and this long list of acts of war crimes, much more acts can be put under the latter definition. The main distinction, therefore, will be made on the basis of the intention of the perpetrator to destroy, in whole or in part, a national, ethnical, racial or religious group.

4. War in Ukraine

So, is what we are observing in Ukraine, done by the Russian troops under the order of the President of the Russian Federation Vladimir V. Putin and decision-makers around him, supported by the vast majority of the Russian population in Russia and abroad, an act of genocide or a war crime?

The war in Ukraine has resulted in tragic acts of war, yet not unprecedented when we compare this conflict to other international and non-international conflicts, especially in Africa. The bombing of civilians in hospitals, schools, and train stations, the sieges of cities like Mariupol and the bombardment of its Azovstal steel plant, the kamikaze drone attacks on critical (water and electricity) infrastructures, the torture and rape of civilians, including minors, in Bucha, the mass graves discovered in reclaimed towns like Izyum, and finally the forced deportation of thousands (especially children) in the Donbas are the most dreadful and stark atrocities³³ under a UN investigation and a separate ICC investigation. Both these proceedings are “in the case” while not “against,” so the first (initial, so perhaps not final) stage is to investigate the charges while not mentioning the possible guilt of the perpetrator – the Russian Federation.

As it was pointed out earlier in this article, Ukraine is not a party to the Rome Statute and is therefore not bound by its norms nor can it put forward a motion to the ICC, especially when the accused party is also a non-member of the Court, thus outside of the scope of the ICC jurisdiction. Yet, there is a practical exception to this rule, as Ukraine has accepted the ICC’s power to settle disputes by adopting the jurisdiction “on an unlimited basis,” so the ICC can *ex officio* file a case for the crimes committed

³³ Cynthia M. Horne, “Accountability for Atrocity Crimes in Ukraine: Gendering Transitional Justice,” *Women’s Studies International Forum* 96, (2023), <https://doi.org/10.1016/j.wsif.2022.102666>.

on the Ukrainian territory.³⁴ On March 17, 2023, Pre-Trial Chamber II of the International Criminal Court issued warrants of arrest for two individuals in the context of the situation in Ukraine: Vladimir V. Putin and Maria A. Lvova-Belova, Commissioner for Children's Rights in the Office of the President of the Russian Federation.³⁵ They were both allegedly responsible for the war crime of unlawful deportation of the population (minors) and that of unlawful transfer of population (again minors) from the occupied areas of Ukraine to the Russian Federation, under Article 8, paragraph 2, letter (a), letter (vii) and Articles 8, paragraph 2, letter (b), letter (viii) of the Rome Statute quoted above.

Again, Russia, and so its citizens, is not a party to the Court and therefore it is not bound by its norms or rulings. In this legal scenario, the ICC hoped to exert international pressure, certainly to elevate Ukrainians' morale during the war, as well as, perhaps, to open a future proceeding before an *ad hoc* tribunal.

Another legal option could be the UN International Court of Justice (ICJ), which is an integral organ within the UN, one of its main bodies, responsible for upholding the UN Charter. The ICJ is notoriously confused with the ICC, whereas its origins, scope of jurisdiction, and membership are far different. Also, there is a Russian judge in the ICJ representing the interests of his own country, so we cannot expect his vote to go against his own motherland. That was exactly what happened in the case on March 16, 2022. The ICJ declared that the Russian attack on Ukraine was illegal and ordered an immediate halt to the invasion. Nonetheless, due to the greatest weakness of international law, such a judgment had no elements of a sanction (as sanction is an element of a national norm, not an international one³⁶). As it was observed since the outbreak of the war, Russia, support-

³⁴ Joanna Siekiera, "The War in Ukraine and International Law – What Causes Its Ineffectiveness?" Institute of New Europe, April 25, 2022, accessed June 20, 2023, <https://ine.org.pl/en/the-war-in-ukraine-and-international-law-what-causes-its-ineffectiveness>.

³⁵ "Situation in Ukraine: ICC Judges Issue Arrest Warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova," ICC, March 17, 2023, accessed June 20, 2023, <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>.

³⁶ An international norm is composed of a hypothesis and a disposition, while a national norm has all three elements: a hypothesis, a disposition, and a sanction. This demonstrates

ed by China, has been blocking any resolution against Russia demanding from it the final withdrawal from Ukraine. With such an old, one might say colonial, Security Council system, effective perseverance in preventing war crimes, enforcing human rights, and judging the perpetrators of any acts of aggression remains a (legal) mirage.

As the subtitle of this article is “Legal-cultural analysis of the Russian aggression in Ukraine,” we must not avoid discussing the cultural perception of Ukrainians and Russians in the eyes of Russians themselves. The political propaganda used first by the Russian tsars, then communist dictators Vladimir I. Ulyanov (better known as Vladimir Lenin) and Joseph V. Stalin has always emphasized the “civilizational” dominance³⁷ and thus the vital role of Russia – Orthodox³⁸ and “white,” in contrast to the Asian parts of this large country. There were two main reasons for this – to polarize Russians against the rotten West along with other regions, such as the unbaptized Asians, but also to radicalize their own population, which would be deeply subordinate to the rulers, obey the order (undemocratic, of course) imposed on them, and never question the good intentions of those in power, who know better how to protect their own people against the external and internal threats to their heritage, religion, and statehood.

Thus, it is not, as is commonly claimed in the vast majority of Western analyses and media, “Putin’s war” – this is the Russian imperialistic appetite towards a former Soviet nation, which is placed by them very low on the “civilizational ladder,” just like other Slavic nations, including Poles. The author herself, during her travels to Russia, engaging in conversation with Russian professors, judges, academics, but also ordinary people, heard

the very essence of international law placing the principle of sovereignty of states above others, with international judiciary being obligatory and establishing and maintenance of international relations voluntary. Yes, one can argue that the war criminals can still be brought, against their will, before the international courts. But to do so, we would need a political consensus. Yet, since the beginning of the war, not 100% of states have supported Ukraine or claimed that Russia is guilty.

³⁷ Isabelle Mandraud, “Russia’s War in Ukraine is also a Culture War,” *Le Monde*, June 3, 2023, accessed June 20, 2023, https://www.lemonde.fr/en/opinion/article/2023/06/03/russia-s-war-in-ukraine-is-also-a-culture-war_6028932_23.html.

³⁸ Maria Domańska, “Putin’s Article: ‘On the Historical Unity of Russians and Ukrainians,’” Center for Eastern Studies, July 13, 2021, accessed June 20, 2023, <https://www.osw.waw.pl/en/publikacje/analyses/2021-07-13/putins-article-historical-unity-russians-and-ukrainians>.

and witnessed many times the argumentation based on such civilizational superiority towards Ukrainians.³⁹ Such presumed superiority only mirrors the mindset of Russian soldiers, brought up with such propaganda of their nation's superiority and therefore a total and unlimited legal, religious, and cultural justification of treating Ukrainian civilians and military in a dehumanizing way. The military and political target is not to destroy the nation, as for Russians Ukrainians are nobodies, very low on the "civilizational ladder." Why? Because as was stated earlier in this article, the Russian goal in this war is not to destroy the nation that they do not see as a threat or enemy to their own civilization, but to simply regain power by reclaiming the territory. The Russian President wrote his (in)famous article "On the Historical Unity of Russians and Ukrainians,"⁴⁰ where he simply follows the same old propaganda, claiming that Ukraine must come back to "a single whole." The war crimes committed by the Russian troops in this war were carried out in order to rebuild the spheres of influence known and much-loved as "Balszaja Rossija," to control the larger territory with its resources – human, raw material, infrastructure – not to destroy a national group. The Russian side does not need to kill Ukrainians to achieve their military goal. Yes, they deliberately target civilians and break the law of armed conflict through torturing and killing the prisoners of war, but this is "just" a method of warfighting – not a factor that has a decisive impact on the nature or outcome of the war.

5. Conclusion

This war as never before has shown us, the international community of analysts, geostrategists, military leaders, politicians, and lawyers, that we must not forget about the cultural aspects of the fighting parties. In order to understand the true reasons behind an armed conflict, an unprovoked act of aggression of one country against another, we should always incorporate the social – human! – aspects of warfighting. Yes, military and strictly

³⁹ The most common sentences used by the interlocutors were: "Ukrainians are like cattle," "Crimea has always been Russian," "we must take back what is ours." The more dreadful presumptions will not be quoted.

⁴⁰ Vladimir Putin, "On the Historical Unity of Russians and Ukrainians," Kremlin, July 12, 2021, accessed June 20, 2023, <http://www.en.kremlin.ru/events/president/news/66181>.

logistical, economic (what is worth, at what cost) assessments are vital. Yet, the Russian war in the territory of Ukraine proves that (unfortunately, at the moment of writing this article, nothing indicates the war is about to an end) the cultural dimension must not be overlooked, as it influences the perception and understanding of these events. Cultural factors, including the historical context, national identity, and political narratives, can shape how these actions are perceived both within and outside Ukraine. The lens through which the international community views these events can influence the level of condemnation of the perpetrator, the pursuit of justice, and the commitment to preventing future atrocities.

The slow procedures of international criminal courts which usually take place decades after the atrocities have been committed must also be noted. So far, not a single political leader of the country (head of state) has been held criminally responsible in a trial before any international court for war crimes (regardless of the accusation of 4 of the war crimes enumerated in the Rome Statute). Also, it is institutionally difficult to link the head of state with crimes committed by the armed forces of his (or her) country. However, it should not be forgotten that war crimes are not subject to a statute of limitations. Yet, the memory of the act fades with the passage of time among other international affairs. One only needs to recall the absolute lack of international reaction (no *ad hoc* tribunal, no economic or political sanction on Russia) after other Russian acts of terrorism: internal actions against their own citizens, political opponents, journalists through abduction, torture, rape, defamation, deportation to a penal colony; killing 300,000 Chechnya civilians by Russians in the late 1990s; the 2008 war in Georgia – while to date 20% of its territory is occupied by Russian troops, just as Transnistria is *de iure* part of the Republic of Moldova, yet *de facto* a fully militarized Russian sphere since the Russian “peacekeeping operation”⁴¹ after the 1990–92 Transnistria war; the 2014 Crimea annexation; the 2019 cyberattack on the government in Tallinn and the 2019 detonation of the Czech weapons depot by two Russian agents.

⁴¹ The author’s visit to Transnistria in fall 2021 proved how Russians are perceived there by the population – as friends, allies, liberators, economic providers (cheap natural resources and other products).

This list can be extended, but the reason for writing this article was to present the commonly neglected legal-cultural standpoint in which the Russian atrocities committed in Ukraine are deeply embedded in the Russian people's mentality, national pride, and massive propaganda supported by the centralized organs in Moscow (not only the president, as he can easily be replaced with another useful person prepared for this cause by the intelligence services), the Orthodox Church (which of course has nothing to do with Christian faith), and local communities, families, and friends. Of course, saying that every Russian thinks the same and accepts the official politics of the Kremlin would be untrue. Similarly, saying that every Russian is preoccupied with the war in Ukraine would also be untrue, as an incomparably large part of the Russian Federation has been struggling with the lack of access to basic infrastructure – sanitation, roads, access to basic education or clinics.

Therefore, when analyzing the war in Ukraine, we must stop thinking as we do, as the Western democratic states, but indeed change the lens and begin thinking like the perpetrator does. We are missing the point when we argue that Russia will abide by the international legal order, as it has proven so many times that it will not. We are missing the point if we assume that the war crimes committed by the soldiers, private contractors, released prisoners and whoever else is deployed in the territory of Ukraine are based on a nationalistic need of vanishing the other nation. No, the perpetrator does not need to do that, as its military goal is to regain power over the territory. This war is not over, and we might witness even more atrocities. What we need are better, more complex and comprehensive, analyses that extend beyond legal and military arguments. We must strive to see the entire picture, not only the part that we, the West, are capable of understanding. What is at stake is not the legal terminology of the allegations made, but the lives of innocent people.

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