

# RESEARCH BRIEF

## NAVIGATING PATHWAYS TOWARD TRANSITIONAL JUSTICE IN UKRAINE

### EXECUTIVE SUMMARY

Despite the ongoing hostilities, it is not too early to think about transitional justice in the context of the Russia-Ukraine conflict. From a normative perspective, it is broadly accepted that the constraints imposed by conflict do not invalidate or suspend the entitlement of victims and survivors to seek justice and obtain reparations for injustices suffered. Indeed, President Zelenskyy has been vocal about pursuing transitional justice both during and after the war. Moreover, experience demonstrates that the scope for and effectiveness of post-conflict transitional justice programs can be shaped by steps taken during hostilities, such as collecting and storing evidence. Most importantly, when transitional justice measures are implemented during a conflict, their nature can have a profound impact on peace-building – either positive or negative.

In the case of Russia-Ukraine, these questions are complicated because the conflict is intertwined with a fragile geopolitical situation, and thus exists with and participates in wider global trends, such as the resurgence of ‘great power’ politics, erosion of international norms, and proliferation of hybrid warfare. As a result, transitional justice – both what is being done and what is possible – is wound up in the interests of the different parties involved. Against these complexities, this paper examines the transitional justice measures currently being advanced and unpacks how such efforts might be tailored to promote the efficacy of future initiatives, avoid Russian provocation, and potentially contribute to a cessation of hostilities between the countries.

To enable this, it is important to understand the interests and perspectives of not only Russia and Ukraine, but also Europe and the broader multilateral community. As will be discussed, these latter parties are highly important insofar as they are promoting, funding and independently spearheading different forms of transitional justice. Part 1 discusses the origins of the conflict, key issues of contestation, as well as how different approaches to transitional justice are likely to be viewed by stakeholders. Part 2 provides a short introduction to transitional justice as an area of legal scholarship and explains that initiatives currently being actioned in Ukraine need to be understood both as standalone extant transitional justice measures, as well as steps laying the groundwork for a future project. Part 3 looks specifically at how Ukraine (and others) are approaching the five interconnected pillars upon which transitional justice is grounded – truth, justice, reparations, guarantees of non-recurrence, and memorialization. The concluding section provides a critique of efforts to date and recommendations on how approaches might be tailored to simultaneously deliver justice, promote peace and build a foundation for positive inter-state relations.

#### Summary of recommendations:

1. Criminal trial procedure should align with international justice standards: Ukraine's approach to criminal justice should promote due process and the rule of law, trust in the judiciary, and support future reintegration and reconciliation. In particular, Ukraine should bring rules on in absentia trials into conformity with international standards, and devise justice pathways through which collaborators can contribute positively to truth-seeking, reparations, and restorative efforts in de-occupied areas.
2. Lay the groundwork for holistic transitional justice in a post-conflict Ukraine: Evidence collection and preservation should be structured to facilitate a possible future truth process. This includes broadening the types of evidence gathered to account for a range of victimhood experiences. Narratives should be built around social dialogue, allowing for multiple, yet complementary, perspectives to coexist and evolve as new insights emerge.

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3. A proactive role by international actors and community: Donors and the Ukraine government should work together to ensure that the type and nature of technical and resources support provided shapes transitional justice efforts constructively. Chiefly, the current focus on individual criminal responsibility should be scrutinized for its potential long-term implications on peacebuilding and recovery. The international community should likewise contribute to peacebuilding by examining how fissures in the international security architecture and multilateralism have played a role in the conditions that led to the current conflict.
4. Transitional justice as both a driver and a by-product of the broader recovery efforts: Ukraine should channel recovery assistance into specific projects, such as interim or emergency reparation, to mitigate the impacts of rights abuses suffered during the conflict and lay the groundwork for future transitional justice. Ukraine could also recognize the right to reparation and begin to craft a strategy that is inclusive of all victims and survivors of the conflict, including those affected between 2014 and 2022.
5. A post-conflict peace centered around violence mitigation and economic recovery: The scope for violence in a post-war scenario must be carefully managed. This includes coordinated DDR (Disarmament, Demobilization, and Reintegration) and SSR (Security Sector Reform) efforts, community violence reduction programs, and initiatives to build trust in the security sector, such as investigating allegations of criminality against members of the security forces and volunteer battalions. These efforts should be complemented by programs that address potential conflict drivers, such as ensuring equal access to essential services, fostering community consultation and participation in recovery efforts, and creating jobs.

## PART 1. BACKGROUND TO THE CONFLICT, THE PARTIES AND THEIR INTERESTS

*'To catalyze transformation, transitional justice should anticipate that social conflict will play itself out in different ways in the future and that violence and conflict that may appear new are often both historically informed and rooted in ongoing experiences of social marginalization, political exclusion, and economic exploitation. This implies that transformation will require new framings of how violence is perceived and tackled.'*<sup>1</sup>

**Paul Gready and Simon Robins**

It is important to understand the Russia-Ukraine conflict in its broader context, with the invasion on 24 February 2022 marking the latest in a series of escalations rooted in intra-regional power recalibrations. Since 1991, Russia's sphere of influence has been on the decline, something it has dealt with by engaging in a pattern of attempted control over former Soviet bloc states. More recently, the gradual yet consistent eastward expansion of NATO<sup>2</sup> has worked to reinforce the Kremlin's narrative on existential threats. The Kremlin has embraced the narrative that Ukraine's accelerated plans to join the military alliance after the ouster of Viktor Yanukovich during the 2014 Maidan uprising was the reason for Russia's annexation of Crimea (rationalizing that it would be used to host a NATO naval base).<sup>3</sup> Russia also views its situation through an economic lens. Importantly, the EU had been in negotiations with Ukraine since 2009 regarding trade and energy cooperation, which would have had damaging consequences for Russia, especially its agriculture, aviation, and automobile manufacturing sectors.

From Ukraine's perspective, there is a strong desire within society to align more closely with Europe and progress along a modern, opportunity-rich and democratic trajectory. This sentiment peaked in the run-up to Maidan, as citizens — particularly in the western regions — were deeply frustrated by the Kremlin's pressure on Yanukovich's government to abandon trade talks with the EU.<sup>4</sup> Russia's repeated violations of its territorial sovereignty, the damage caused and lives lost, has undoubtedly strengthened such resolve.

It would be wrong, however, to assume that this is the perspective of all Ukrainians. Certainly, some elements within society would like to see a return to Soviet-era

politics. This was amplified by political developments following the Maidan protests, including the ousting of President Yanukovich and the repeal of laws that previously granted the Russian language official status alongside Ukrainian.<sup>5</sup> Indeed, the socio-political marginalization felt by groups in predominantly Russophone areas, already disillusioned with the post-Maidan landscape, was consolidated by the snap presidential elections leading to a pro-Western government.<sup>6</sup> Others regard potential EU membership as a threat; membership would require significant reforms, particularly addressing corruption, which would bode badly for some powerholders. It is noteworthy that these social tensions are deeply intertwined with issues of corruption and the manipulation of state institutions by factions seeking expedient economic gains.<sup>7</sup> Since its independence, Ukraine's political landscape has nurtured a symbiotic relationship between business elites and political figures. The former leverage their economic power to exert political influence, while the latter benefit from financial support, administrative favors, and kickbacks.<sup>8</sup> Competition among these patron-client networks has given rise to a multi-pyramid patronal system. This competitive struggle has facilitated a dynamic political environment that sustains electoral pluralism,<sup>9</sup> yet reinforces structural corruption within a complex interplay of formal and informal institutions. With the war passing the 30-month mark, Ukraine's transitional justice dilemma is two-fold. The first challenge exists in a tension between peace and justice — or, more specifically, between an 'unjust' peace and a 'just' peace. A just peace connotes a victory, including a complete Russian retreat from territories occupied since 2014 and the reintegration of these territories with international security guarantees. An unjust peace, by contrast, might involve territorial concessions as a means of ending armed hostilities. In either case, the rights of victims and survivors of the conflict to truth, justice and reparation would need to be addressed. The second challenge is to balance immediate security needs, human rights norms, and the rights of victims and survivors while the war is ongoing, without undermining the longer-term objectives of post-war stability, the rule of law, and societal reconciliation.

How these challenges might be addressed needs to take into account Russia's likely framing of transitional justice

## PART 2. TRANSITIONAL JUSTICE AND UKRAINE

initiatives and possible counter-measures. Indeed, any efforts taken by Ukraine to promote or initiate transitional justice are likely to be viewed as an affront. Domestically, they will be presented as evidence of Western domination, and used to justify Russia's war efforts as imperative to safeguarding its territorial integrity. Insofar that transitional justice implies a potential for criminal accountability, the risk is that President Putin doubles-down and becomes more mercurial.

For its part, the EU should be viewed as having both a strong role and interest in the conflict. Russia, once an unscrupulous yet predictable player, is now anything but. As a nuclear power that has already issued latent threats, Europe is aware that an expansion of the conflict would have catastrophic consequences for global security, trade and multilateralism generally. Yet, because Russia has directly targeted the essence of the EU 'project — something interpreted by many as an assault on European values — a response is imperative.

The broader Western community adopts a similar frame, though with fewer immediate stakes. Russia is not only a UN Member State but also a permanent member of the Security Council which has breached international law in the most fundamental sense. Not responding threatens the integrity of the multilateral system, yet any response is risk-imbued and may culminate in the system's collapse anyway. Moreover, how the situation is (or is not) handled will have spillover impacts for other authoritarian and would-be authoritarian states. Many will be closely watching to see if China becomes more aggressive towards Taiwan, for example, and in turn whether the international response will deter or embolden such actions.

This is the lens through which transitional justice in Ukraine needs to be viewed. Actions currently undertaken may impact not only the efficacy of future programs, but also how the war is being played out and prospects for peace. Specifically, depending on how it is crafted, transitional justice can be used as a tool to encourage more IHL-compliant behavior, lay the groundwork for future inter-state relations, or to punish. But ultimately, the end prize all parties should be seeking is peace, and how transitional justice is both framed and actioned will impact this. All of these perspectives should inform Ukraine's (and the international community's) crafting of transitional justice both now and into the future.

Pablo de Greiff describes transitional justice as 'the set of measures that can be implemented to redress the legacies of massive human rights abuses, where 'redressing the legacies' means primarily giving force to human rights norms that were systematically violated. A non-exhaustive list of these measures includes criminal prosecutions, truth-telling, reparations, and institutional reform. Far from being elements of a random list, these measures are part of transitional justice in virtue of sharing two mediate goals, providing recognition to victims and fostering civic trust, and two final goals, contributing to reconciliation and democratization.<sup>10</sup>

Emerging in the 1980s, transitional justice encompasses a range of practices and measures employed by societies grappling with past injustices, particularly those in the process of transitioning from authoritarian rule to liberal democracy.<sup>11</sup> Measures include criminal trials, truth commissions, reparation, amnesties, lustration and memorialization. Over time, as the concept gained prominence, its theoretical lens extended beyond political transitions, to include post-conflict societies moving forward in the wake of gross violations of human rights and international humanitarian law.<sup>12</sup>

There are two basic frames through which transitional justice can be understood. The first ('normative'/'thick') frame views transitional justice as a holistic framework for dealing with mass atrocities rooted in international law, and applicable in situations with a base level of political commitment to confronting a violent past. Initiatives are characteristically victim-centered and developed through processes that engage all stakeholder groups. The alternate ('descriptive'/'thin') frame is more pragmatic. Proponents of this approach argue that how countries respond to mass atrocity events is context-specific, meaning that there is no single approach that is most likely to be successful. This 'actual practice' of transitional justice, which is 'diverse and organic,' can be distinguished from normative approaches which are more 'aspirational ... and directive'.<sup>13</sup>

The notion of a 'transitional' phase, during which policies addressing mass violence and injustice are developed and implemented, implies the existence of a rupture point. This can be the ousting of an authoritarian leader, conclusion of an armed conflict, or (at minimum) a significant decrease

in hostilities. Such a rupture between the past and present does not exist in Ukraine today, and indeed a resolution to the conflict with Russia seems far from imminent. Nevertheless, it is clear that transitional justice measures are being implemented. A first set of measures (including documentation and preservation of evidence) can be seen as precursors to a future transitional justice process.<sup>14</sup> A second set of measures (including domestic trials and ICC arrest warrants) can be classified as a de facto transitional justice process being implemented while the conflict is ongoing.<sup>15</sup>

The simultaneous framing of transitional justice as both an ongoing process and a future project has attracted criticism. In particular, it has been argued that the disproportionate emphasis on criminal accountability has crowded out a more holistic, victim-centered approach. This may be correct. However, the reality in which Ukrainian politics and society operates — defending itself against an aggressor State — likely does not permit the fulfillment of the conditions required for the establishment of a comprehensive transitional justice process. Principally, effective programming assumes that state institutions are willing and have the capacity to acknowledge past wrongdoing by all actors in a conflict. This, in turn, requires both political conditions that can enable extensive self-scrutiny, as well as a space for open dialogue within society. With its state apparatus primarily focused on defense and maintaining order, meaningful transitional justice could be seen as undermining national unity or military efforts. Pursuing transitional justice, for example, would require comprehensive investigations into all individuals accused of war crimes, including those within the Ukrainian forces or state-affiliated volunteer battalions operative since 2014. It is also important to appreciate that Ukraine is not the only actor undertaking and enabling transitional justice. UN-mandated bodies, civil society entities and open-source investigation organizations are engaged in a range of functions that could feed into a future transitional justice process, albeit with Ukraine's acquiescence. Processes to attribute criminal accountability outside of the Ukrainian justice system, are likewise taking shape.

## **PART 3. TRANSITIONAL JUSTICE MECHANISMS**

Whether they are established during hostilities, or after the conflict ends, the implementation of transitional justice mechanisms will face issues and challenges specific to the Ukraine context. This section unpacks these by examining the five interconnected pillars upon which transitional justice is grounded — truth, justice, reparations, guarantees of non-recurrence and memorialization.

### **3.1 TRUTH**

Truth-seeking mechanisms, often referred to as Truth Commissions (TCs), are official, yet non-judicial bodies that aim to establish the facts and circumstances of past violations, and identify their root causes and consequences within a certain period. TCs provide a platform for victims and perpetrators to share their experiences through public hearings, testimonies or submissions, and frequently produce policy recommendations based on the findings. Seen as a form of restorative justice, TCs can play a crucial role in rebuilding civic trust, restoring the dignity of victims and survivors, and reaffirming the specific moral fabric of a society. Processes can also contribute to societal reconciliation, with some TCs explicitly focusing on reconciling different societal groups, as exemplified by South Africa's Truth and Reconciliation Commission.

The scope and volume of violence seen during the Russia-Ukraine conflict, coupled with the obstacles to international criminal justice (discussed in part 3.2), suggest that a truth process may play an important role in any future transitional justice framework. This relates particularly to the high number of enforced disappearances reportedly committed in Russian-occupied Ukrainian territories.<sup>16</sup> However, experience demonstrates that in inter-state conflicts, even where a peace agreement has been reached, success is largely contingent on the cooperation and participation of both parties. Indeed, States that have unilaterally established TCs (e.g. South Korea and Timor Leste's investigation of crimes committed during the Japanese and Indonesian occupations respectively) — while serving as platforms for recognizing harms suffered by victims and shedding light on atrocities committed — typically have had less success in bridging national narratives across state boundaries on the same historical events.<sup>17</sup> Regional truth-seeking initiatives, such as the Regional Commission for Establishing Facts

about War Crimes and Other Gross Violations of Human Rights Committed on the Territory of the Former Socialist Federal Republic of Yugoslavia (RECOM), have attempted to overcome such limits, but faced bottlenecks around state collaboration and cooperation.<sup>18</sup> The upshot is that in the absence of a substantial shift in Russia's internal politics, a shared understanding of the conflict across borders is unlikely. This should not however quash the value that a Ukraine-centric truth mechanism might produce.

To this end, important groundwork is being undertaken that could support a TC, should this become desirable and politically viable. In March 2022, the United Nations Independent International Commission of Inquiry on Ukraine (CoI) was established to investigate human rights violations and breaches of international humanitarian law in the context of Russia's aggression against Ukraine.<sup>19</sup> It is mandated to establish the facts, circumstances, and root causes of such violations, their gender dimensions, as well as to make recommendations on accountability measures, including individual criminal responsibility and access to justice for victims.<sup>20</sup> This work is complemented by the UN Human Rights Monitoring Mission in Ukraine (HRMMU), which was established in 2014 but has since pivoted its efforts to also document international human rights and humanitarian law violations since the 2022 invasion.<sup>21</sup> The Netherlands-based investigative journalism group Bellingcat has been using open-source information (OSIN) and decentralized networks to identify and verify war crimes in Ukraine, building on its experience in Syria. Similarly, local civil society organizations, like Truth Hounds,<sup>22</sup> are using OSIN methods to monitor and register incidents that could amount to war crimes. Various civil society organizations are also playing important documentation roles by gathering personal testimonies from survivors and witnesses, and conducting fieldwork aimed at capturing video and photo footage.<sup>23</sup>

Importantly, over the past decade UN-mandated investigatory mechanisms have increasingly moved beyond fact-finding, to applying criminal law standards and methodologies. Indeed, the CoI is mandated to collect, analyze, and preserve evidence, with a view towards future legal proceedings,<sup>24</sup> and to identify responsible individuals and entities. Scholars such as Engle criticize this 'criminal turn' insofar as it risks oversimplifying what are often complex socio-political realities.<sup>25</sup> Moreover, when mandates or budgets prioritize collecting material

that will be applicable in criminal trials, other important evidence relevant to broader historical narratives may be neglected. These risks need to be weighed against the potential for positive spillovers. Chiefly, fact-finding processes confer a message that, at some point in the future, perpetrators of international humanitarian or human rights law may be brought to account. This can disincentivize the willingness of parties to resort to illegal forms of violence.

#### **GOOD PRACTICE:**

##### **SECURING INFORMATION ON DISAPPEARED PERSONS.**

Waiting for justice until the end of a conflict is particularly problematic for the families of those forcibly disappeared.<sup>26</sup> These acts constitute continuous human rights violations for as long as the fate and whereabouts of the disappeared are concealed.<sup>27</sup> A good practice example in this regard concerns the work of the International Commission on Missing Persons (ICMP). In 2011, at the request of the governments of Bosnia and Herzegovina (BiH), Serbia, Croatia, Montenegro, and Kosovo, ICMP created a unified regional list of persons missing during the 1990s conflicts.<sup>28</sup> ICMP and ICRC have since facilitated a coordinated search effort, including creating a joint database of active missing persons, facilitating information sharing between states, and organizing exhumations and victim repatriations. This process has underscored the importance of inter-state cooperation.<sup>29</sup> As noted by ICMP, the likelihood of finding victims increases significantly when search efforts extend into the territories controlled by opposing sides.

### **3.2 JUSTICE**

The situation in Ukraine presents a multifaceted approach to pursuing criminal justice,<sup>30</sup> encompassing domestic trials, international investigations at the ICC and institutions like the ICPA, as well as cases pursued by third states exercising universal jurisdiction.

#### **Domestic criminal trials**

As of November 2023, Ukraine's Prosecutor General had registered 112,904 allegations of war crimes and acts of aggression.<sup>31</sup> As of May 2024, more than 100 individuals had been convicted of war crimes, the majority in absentia. Further, more than 8,000 criminal cases have been opened against 'collaborators' — individuals accused by the government of aiding and abetting the Russian occupation.<sup>32</sup> It is noteworthy that substantial resources and expertise are being directed towards documenting and prosecuting war crimes, with earmarked funding from individual donor states and through multi-donor

platforms.<sup>33</sup> A key initiative in this regard is the Ukraine Atrocity Crimes Advisory Group (ACA).<sup>34</sup> Established in May 2022 by the US, EU and UK, the ACA provides strategic and operational support to Ukraine's Prosecutor General and enhances coordination in documenting and prosecuting war crimes.<sup>35</sup> Ukraine's hyper-focus on Russian-perpetrated crimes can be contrasted to its persistent lack of investigation and prosecution of Ukrainian armed forces and state-affiliated volunteer battalions.<sup>36</sup> Importantly, this policy stance is consistent with the draft law 'On the Principles of the State policy of the Transition Period' (enacted prior to the full-scale invasion but withdrawn not long after its introduction),<sup>37</sup> and the Law on Cooperation with the International Criminal Court (2022), which overlooked Ukrainian violations entirely.

While in absentia trials are not prohibited under international law (and have been part of Ukraine's domestic criminal procedure since 2014), they must be held under specific circumstances, such as when the defendant is removed from the court due to disruptive behavior or has waived their right to be present.<sup>38</sup> The European Court of Human Rights (ECHR) requires that this waiver be a 'knowing and intelligent waiver'.<sup>39</sup> Moreover, if there is reasonable doubt concerning their awareness, the defendant must be guaranteed the right to a retrial upon their apprehension. Practice in Ukraine thus raises some concerns from a perspective of procedural good practice. With all official communication channels between Ukraine and Russia severed, the ability to notify accused persons in Russian-controlled territories and guarantee their informed absence is severely obstructed.<sup>40</sup> Further, under Ukrainian law, a retrial after in absentia proceedings is only allowed if the defendant is located before the court issues its verdict. Once the verdict is rendered, the defendant can only appeal, not request a retrial. As observed by the Office of the High Commissioner for Human Rights (OHCHR), failure to observe international standards might result in third party states refusing extradition requests concerning individuals convicted in absentia, thus hindering the enforcement of these verdicts.<sup>41</sup>

Another set of criticisms from a fair trial perspective concerns the practice of prisoner exchanges. On the one hand, several in absentia trials have taken place after the accused were released from detention as part of a prisoner

exchange with the Russian Federation.<sup>42</sup> On the other, at least three individuals convicted of war crimes have been returned to Russia in exchange for Ukrainian Prisoners of War (POWs). Not only do such deals contribute to the de facto impunity of perpetrators, but it has also been argued that prosecutors and Security Service of Ukraine (SBU) officers violated due process rights by pressuring these POWs to plead guilty, suggesting that an exchange was their only pathway to release (which itself could be considered a war crime).<sup>43</sup>

A third area of concern is the rapid pace and indiscriminate nature of prosecuting collaboration in liberated areas. With most high-ranking collaborators now in Russia, the remaining pool of suspects comprises mainly low- and mid-level individuals whose involvement in the conflict is complex and subject to interpretation.<sup>44</sup> Adding to this uncertainty, Ukraine's laws on collaboration<sup>45</sup> lack clarity on whether and how factors such as coercion, misinformation, and individual circumstance should be considered by the courts.<sup>46</sup> Although Ukrainian officials have stated that non-collaborators will be regarded as victims of the invasion, and their rights safeguarded,<sup>47</sup> without clear definitions that acknowledge the context of the occupation, unfair outcomes may result; risking an erosion of civic trust and social cohesion in a post-war context.<sup>48</sup>

#### **GOOD PRACTICE:**

##### **JUSTICE PATHWAYS FOR COLLABORATORS.**

To promote reintegration and reconciliation in de-occupied areas, Ukraine might consider justice pathways through which collaborators can contribute positively to truth-seeking, reparations, and restorative justice. Transitional justice processes in the past have used carrot and stick tactics, wherein prosecution is twinned with incentives such as lenient sentencing, contingent on disarmament and cooperation in truth-seeking. The sanctions regime of the Special Jurisdiction for Peace (JEP) in Colombia, for example, adopted differentiated accountability pathways for perpetrators based on levels of responsibility, with the possibility of special non-custodial sanctions tied to their contribution to truth-telling.<sup>49</sup>

## International criminal accountability mechanisms

In March 2023, the International Criminal Court (ICC) launched an investigation into the situation in Ukraine, tasked with probing alleged crimes dating back to the onset of the Maidan protests on 21 November 2013.<sup>50</sup> Thus far, the court has issued warrants for the arrest of six Russian individuals on charges of war crimes, including President Vladimir Putin.<sup>51</sup> While these warrants carry significant weight in the normative sustenance of international criminal law, their practical impact has been limited, as seen in Putin's recent visit to Mongolia, a state party to the Rome Statute, which refused to arrest and hand him over to the ICC.<sup>52</sup>

Further, the ICC's jurisdiction over the crime of aggression in Ukraine<sup>53</sup> is contingent upon both the victim and the aggressor state either ratifying the court's jurisdiction, or the UN Security Council (UNSC) referring the situation to the court.<sup>54</sup> Despite Ukraine's declaration in 2015 accepting the ICC's jurisdiction over genocide, crimes against humanity and war crimes since 20 February 2014, the court has clarified that this does not extend to the crime of aggression. This has sparked discussion around a possible amendment of the Rome Statute,<sup>55</sup> or the creation of a special (hybrid/internationalized) tribunal to prosecute such a case.<sup>56</sup> The complications are many,<sup>57</sup> including legal questions (defining jurisdiction and addressing the diplomatic immunity of the Russian leadership) and political considerations (securing adequate funding and addressing concerns regarding the selective application of justice for the crime of aggression).

In response to these challenges, some member states are pursuing alternate accountability pathways. At least 11 investigations have been launched across Europe and Canada under the principle of universal jurisdiction.<sup>58</sup> Such cases have benefited from assistance, especially with respect to evidence, from the CoI and civil society organizations. Another source of support is the multi-state Joint Investigation Team (JIT), which was formed to enable the exchange of information and facilitate investigations into international crimes either by concerned states, or that might be taken up by the ICC. Launched on 25 March 2022, the JIT is composed of Ukraine, Lithuania, Poland, Estonia, Latvia, Slovakia and Romania, with participation by the Office of the Prosecutor (OTP) of the ICC, Europol and the USA (through a Memorandum of Understanding).<sup>59</sup>

A specific initiative of the JIT is the International Center for the Prosecution of the Crime of Aggression Against Ukraine (ICPA).<sup>60</sup> This center, hosted by the European Union Agency for Criminal Justice Cooperation (Eurojust), is tasked with preserving evidence and preparing cases for future trials, whether conducted through national, international or hybrid mechanisms. It is important to note in this regard that international core crimes are not subject to statutes of limitations,<sup>61</sup> allowing for the prosecution of perpetrators as long as they are alive.

### PROSECUTING THE CRIME OF AGGRESSION

While the perpetration of mass crimes usually involves state complicity, cases of aggression imply an interdependent relationship between individual and state responsibility. According to the Kampala amendment, the crime of aggression involves committing an 'act of aggression' that 'by its character, gravity, and scale constitutes a manifest violation of the Charter of the United Nations.'<sup>62</sup> At the same time, as Akande and Tzanakopoulos explain, establishing a state's responsibility for such a manifest breach is necessary for convicting individuals of the crime of aggression.<sup>63</sup> The upshot is that any future mechanism addressing individual responsibility for aggression must first, or simultaneously, determine state responsibility for breaching the prohibition on the use of force under international law. As discussed, the main impediment here is the absence of an international court with jurisdiction over Russia's violations, and the impediments faced by the UNSC in exercising its Chapter VII powers.

Another perspective is that individual criminal responsibility for the crime of aggression is insufficient to capture the nature of the crime. Frédéric Mégret argues that individuals who engage in aggression are not automatically responsible for war crimes committed during the conflict, as these crimes are distinct from the act of aggression itself. They are also not criminally liable for the lawful deaths of enemy combatants or collateral civilian casualties, which are legal under the *jus in bello*. Additionally, aggressors are not accountable for casualties resulting from the defending state's self-defense actions, nor the deaths of their own troops, despite these deaths stemming from their initial aggression. This raises questions about the scope of individual responsibility for aggression and suggests that state responsibility might encompass a broader range of consequences, including war crimes committed by their own forces and potentially those committed by the opposing side, depending on the legal context.

These coordinated multi-state efforts provide a potential means to bridge impunity gaps by targeting perpetrators who might otherwise escape prosecution at domestic courts or the ICC.<sup>64</sup> They may also enable more efficient international criminal justice through proactive complementarity,<sup>65</sup> reducing task duplication and mitigating tensions between national and international judicial processes. However, some deficits will remain, particularly regarding the duration of trials and associated



costs, which can drive selectivity in prosecutions. These issues are compounded by Russia's lack of cooperation in executing arrest warrants, accessing evidence and conducting investigations.

### 3.3 REPARATIONS

Under international law, victims and survivors have a right to adequate, effective and prompt reparation for gross violations of IHRL and serious violations of IHL, irrespective of whether responsibility can be established by courts (which usually employ high evidentiary thresholds).<sup>66</sup> Reparations can be realized as monetary compensation for harms suffered, restitution of the status quo ante, satisfaction measures to address moral or psychological harm, rehabilitation measures to aid reintegration and/or rebuilding, or guarantees of non-recurrence.<sup>67</sup>

Reparations can be facilitated through judicial or administrative processes, and may be awarded to states or to individuals. Inter-state reparations, i.e. those owed by an offending state for internationally wrongful acts, generally take the form of compensation to address the loss of production, disrupted trade and other systemic harms resulting from an armed conflict.<sup>68</sup> These reparations tend to focus on rebuilding state infrastructure and institutions rather than fulfilling the entitlements of victims and survivors to an effective remedy.

Individual reparations can be granted by judicial or administrative processes. Indeed, the Supreme Court of Ukraine has issued rulings awarding compensation to victims, with costs to be borne by the Russian Federation. However, without Russian acquiescence, the realization of such judgments is unlikely, and the use of Russian frozen assets remains contentious. The ICC and ECHR can also order reparation packages; however, the latter only has jurisdiction over violations that took place prior to 16 March 2022, the date Russia ceased to be a member of the Council of Europe (CoE).<sup>69</sup>

In light of the limitations associated with judicial processes, States often facilitate reparation via administrative mechanisms.<sup>70</sup> These mechanisms enable quicker access to reparation and involve a lower evidentiary burden compared to court-ordered awards. Efforts in this direction were kickstarted following the

UNGA's calls for a remedy and reparation in the context of the Russian aggression on 15 November 2022.<sup>71</sup> In response, the CoE established 'The Register of Damage Caused by the Aggression of the Russian Federation Against Ukraine'.<sup>72</sup> The Register compiles claims and evidence documenting damage, loss or injury resulting from illegal acts by Russia in or against Ukraine dating from February 2022, and accepts submissions from individuals, businesses and governmental entities. The aim is to establish a factual and evidential foundation for Ukraine to seek reparation from Russia in a future international compensation mechanism.<sup>73</sup> Although the register is creating an important body of documentation, it has been criticized for workability. Indeed, any mechanism would need a bilateral agreement between Russia and Ukraine, or operate under an authority comparable to the United Nations Security Council.<sup>74</sup> Moreover, despite the Register's commitment to a victim-centered approach<sup>75</sup>, its temporal limitation effectively excludes victims and survivors of the conflict between 2014 and 2022.<sup>76</sup> This risks divisions within the broader victim and survivor community in Ukraine, and thus competing claims of victimhood, which may prove detrimental to future societal cohesion.

#### GOOD PRACTICE:

##### STAGGERED/GRADUAL REALIZATION OF REPARATION

Even in the absence of a classic transition, states can recognize a right to reparation based on gradual realization. A good practice example is Colombia's 2011 Victims and Land Restitution Law (*Ley de Víctimas y Restitución de Tierras*).<sup>77</sup> The law recognizes victims' entitlement to full reparation for harms suffered and, based on the principle of graduality, the state's responsibility to 'design operational tools within a defined scope in time, space and budgetary resources that allow for the staggered implementation of care, assistance, and reparation programmes, plans and projects, without ignoring the obligation to implement them throughout the country within a given period of time, respecting the constitutional principle of equality.' Another good practice involves tackling societal barriers that hinder access to reparation for victims of conflict-related sexual violence. In Kosovo, community-based interventions were launched to address the stigma surrounding sexual violence and empower survivors to seek redress in addition to legal recognition of victimhood by the state. These interventions included the construction of memorials, art activism, and other grassroots initiatives aimed at transforming public narratives about sexual violence during the war.<sup>78</sup>

The only active reparation facility in Ukraine concerns survivors of conflict-related sexual violence (CRSV).<sup>79</sup> In May 2022, Ukraine entered into a cooperation framework with the UN aimed at preventing and responding to

conflict-related sexual violence (CRSV).<sup>80</sup> Two draft laws have since been presented to Ukraine's parliament; the first establishing a victims' registry, and the second defining the status of survivors and enabling urgent interim reparation.<sup>81</sup> As a pilot project, the Global Survivors Fund (GSF), in partnership with survivor groups, the Mukwege Foundation, and the International Organization for Migration (IOM), has started to deliver such reparation,<sup>82</sup> including compensation, livelihood support, medical care and psychological counseling.

### 3.4 GUARANTEES OF NON-RECURRENCE

Guarantees of non-recurrence (GNR) are measures designed to prevent the repetition of human rights violations<sup>83</sup> and to avert any resurgence of violence linked to the circumstances of post-mass atrocity environments.<sup>84</sup> Such measures may include institutional reform, lustrations and vetting processes within the judiciary and security sector, as well as disarmament, demobilization and reintegration (DDR) programs. In Ukraine's case, inter-state assurances of non-recurrence may be considered essential for deterring future aggression, as well as addressing the international structural conditions that contributed to Russia's actions. Under the framework of state responsibility for internationally wrongful acts, offending states are obliged to provide assurances and guarantees of non-repetition to the aggrieved state 'if circumstances so require'.<sup>85</sup> As discussed in part 3.2, the main impediment here is the absence of an international court with jurisdiction over Russia's violations, and the obstacles faced by the UNSC in exercising its Chapter VII powers. Should Russia be held responsible, however, GNR would require security assurances to Ukraine to avert future acts of aggression, as well as guarantees that perpetrators will not be shielded from criminal accountability.

Conceptualizing what GNR measures might look like is complicated by the layered and cumulative events that have taken place in Ukraine since 2014 — from the Maidan protests to civil unrest in Donbas, the annexation of Crimea, the armed conflict in Donbas, and now the full-scale invasion. These events have complicated Ukraine's efforts to deal with the immediate past, resulting in a fragmented landscape of reforms and measures. Indeed, in 2014, Ukraine began pursuing a reform agenda focused on combating corruption, restructuring courts, and decentralization. These reforms were complemented by

measures to address the crimes of the ancien regime, such as lustrations targeting those who held public office during Yanukovich's presidential term, and criminal prosecutions against officers of the Berkut special police force (riot police) responsible for the Maidan shootings.<sup>86</sup> Further institutional reforms were spurred by the 2014 Association Agreement and Deep and Comprehensive Free Trade Areas (DCFTA) with the EU, chiefly an ecosystem of four anti-corruption bodies.<sup>87</sup> This was followed in 2016 by a Public Council of Integrity (mandated to strengthen justice sector employee vetting),<sup>88</sup> the High Anti-Corruption Court of Ukraine (HACC) in 2018,<sup>89</sup> and an Ethics Council in 2021.<sup>90</sup>

It is difficult to evaluate the effectiveness of these reforms. Some posit that Zelenskyy's anti-corruption measures, coupled with strict media controls and other conditions of war that allow for a centralized power hierarchy, are steadily dismantling multi-pyramidal patronal politics.<sup>91</sup> However, this must be balanced against the risk that the governance structures established under martial law become entrenched, inadvertently fostering an autocratic single-pyramid patronal system.<sup>92</sup> Ukraine must also reach a resolution on the decentralization reforms brokered during the post-Maidan period that redistribute power from the national to municipal levels.<sup>93</sup> Full implementation of these reforms requires a constitutional amendment, an agreement on which had reached a stalemate prior to the 2022 invasion, and is now obstructed by nationwide martial law.<sup>94</sup> These internal conflicts may resurface in a post-war setting.

Controlling violence in a post-war scenario presents another challenge. In Ukraine's case, the waning effect of the 'rally around the flag' phenomenon coupled with a normalization of violence, may breed further conflict if an external enemy ceases to exist.<sup>95</sup> To this end, Security Sector Reform (SSR) and DDR will prove crucial. These processes aim to reduce the risks of violence recurrence in transitional settings by enhancing the integrity of a state's security system and cultivating public trust in its institutions and actors. SSR can include national security strategies, civilian oversight mechanisms, and lustration and vetting. DDR involves disarming combatants of non-state armed groups, demobilizing members — including those in non-combat roles — and assisting their reintegration into society as civilians.

In Ukraine, SSR initiatives began in the wake of the Maidan protests with the disbanding of the Berkut special police agency. Such efforts were interrupted by the 2014 annexation of Crimea and the Donbas conflict that followed, which triggered a bolstering of the security architecture and enhancement of combat capabilities.<sup>96</sup> As a result, Ukraine's primary internal security agency, the SBU, has largely evaded scrutiny, with its hierarchy citing the ongoing conflict as a barrier to necessary restructuring and reform.<sup>97</sup> Indeed, the hard-won 2021 SBU-reform bill<sup>98</sup> was withdrawn with the onset of the full-scale invasion.<sup>99</sup>

A further issue is the volunteer battalions — privately funded armed groups mobilized en masse for anti-terror operations during the early years of the Donbas conflict. Recognizing the risks of these groups operating independently, since 2015, Ukraine has been integrating units into the Armed Forces of Ukraine (ZSU) and the Ukrainian National Guard. Yet, with investigations into war crimes perpetrated by these groups (and state-affiliated armed forces) being virtually non-existent, their integration has proceeded without thorough vetting, risking the inclusion of individuals implicated in serious offenses. Effective reintegration will rely heavily on Ukraine's willingness and ability to address these abuses, especially in terms of fostering civic trust in the security sector and preparing communities to absorb the demobilized members of armed groups. Ultimately, however, a DDR program in Ukraine is unlikely to begin in earnest in the absence of guarantees against future aggression.<sup>100</sup>

### 3.5 MEMORIALIZATION

Memorialization, often referred to as the fifth pillar of transitional justice<sup>101</sup>, comprises processes and forms of remembrance. These include establishing monuments, holding annual commemoration ceremonies, enacting memory legislation, renaming public spaces, curating history textbooks, and creating or preserving archives. The aim is to recognize the harms suffered by victims, survivors and the wider community, and protect the memory of the violence endured to prevent its repetition.<sup>102</sup> Such processes also play an important role in constructing collective narrative(s) that allow societies to engage meaningfully with their shared history at both individual and communal levels.<sup>103</sup>

Ukraine's memorialization efforts to date signal an attempt to create a national meta-narrative reflective of the current war, as well as its Soviet history. Following the Maidan protests, Soviet-era monuments were removed and exhibitions on the Russo-Ukrainian conflict were created at the National Museum of the History of Ukraine. Memory laws were also enacted. Such moves aim to both distance Ukraine from the totalitarian practices and human rights violations of prior regimes and to unite opinion against Russia as a means of bolstering national security. Special attention, for example, has been paid to preventing Ukrainians from forgetting steps taken to suppress the Ukrainian language, promote Russian culture over Ukrainian, and the Holodomor — a Stalinist-engineered famine that killed millions of Ukrainians.

The construction of national meta-narratives through memorialization, however, is fraught with challenges. This is mainly due to the inter-subjective nature of memory; different mnemonic groups shaped by ethnic, linguistic, and familial backgrounds bring varied experiences and interpretations to historical events. The risk is that a sanctified institutional memory pushing an overarching narrative works to marginalize dissenting voices with different post-Soviet experiences, thus alienating segments of the population. The upshot is that while memory laws can be valuable tools in combating denialism, approaches that promote social dialogue on the causes and consequences of past violence, permit multiple (yet complementary) narratives to coexist and evolve.<sup>104</sup>

It is equally important to consider the contingent nature of different transitional justice measures. For example, any peace agreement should take into account the importance of (or at least leave space for) crafting a shared narrative that can serve as a basis for future interstate relations. The Minsk Agreements, which focused on a ceasefire without addressing the broader causes (thus further polarizing the memory landscape), provide a cautionary tale in this regard.<sup>105</sup> Indeed, there is already a sharp disconnect between Ukraine's historical memory (which emphasizes its victimhood under Soviet rule and valorizes its nationalist independence struggle during World War II), and Russia's (which glorifies its Soviet heritage and portrays itself as a defender against fascism during World War II).

## THE DUTY TO REMEMBER THE PAST

Memorialisation is linked to the international policy framework on transitional justice via the right to know the truth. The Joinet/Orentlicher Principles codify the 'Duty to Preserve Memory' under the 'Right to Know', acknowledging a people's knowledge of their history of oppression as part of their heritage.<sup>106</sup> As such, states must take appropriate measures to maintain archives and evidence of human rights and humanitarian law violations to ensure that the collective memory is preserved and protected from revision or denial.<sup>107</sup>

However, growing critiques have emerged around the standardization of moral remembrance in transitional justice processes.<sup>108</sup> Critics argue that such approaches can flatten complex historical narratives, reducing them to a singular, often state-sponsored version of events. This risks fueling competing victimhoods and a polarized politics of memory, where different mnemonic groups may vie to have their experiences validated and/or prioritized. Furthermore, state-centric approaches, such as constructing memorial museums or enacting memory laws, often aim to present a cohesive, linear story of the past, shaping a collective identity that may not reflect the nuanced, diverse experiences of those affected. In contrast, collective trauma unfolds in cycles and spans generations, influencing societies well beyond the initial event.<sup>109</sup> A fixed, linear view of memory often oversimplifies this ongoing process, neglecting its dynamic nature, especially in post-conflict societies where trauma continues to be re-experienced/lived/embodied and reinterpreted by future generations in manifold ways.<sup>110</sup>

Still, without memory, the core pillars of transitional justice—truth, justice, reparation and guarantees of non-recurrence — cannot be fully realized.<sup>111</sup> Ultimately, the duty to remember extends beyond the preservation of historical records; it implies an active responsibility of applying that knowledge to cultivate a more just and equitable future.

Finally, the narratives created and used by third-party states are also important to Ukraine's memorialisation endeavor, and the trajectory of the conflict generally. Indeed, the portrayal of Ukraine's internal dynamics as a simple dichotomy between a pro-European West and a pro-Russian East overlooks the country's complex hybrid identities and oversimplifies the underlying issues of social marginalization, political exclusion, and economic exploitation in its post-Soviet experience. This narrative also fails to capture the nuances of Ukraine's struggles, where economic entanglement with Russia and the country's informal integration with EU norms and systems — against a backdrop of deteriorating West-Russia relations — had transformed the situation into what Lavinia Stan calls a 'precarious and illusory middle ground',<sup>112</sup> if not a zero-sum game. In short, the international community is contributing to the narrative of the Russo-Ukraine war, but to do so

responsibly, it must grasp the unique local dynamics at play, as well as the broader international socio-political forces that underpin the conflict. Certainly, if properly leveraged, memory diplomacy is a key opportunity for the peacebuilding agenda. Discussions could home in on the interconnectedness between the victims and survivors of Russian violence both in Ukraine and Russia, and/or address the paradox of Russia's nationalist imperialism in its neighborhood versus its anti-colonial stance globally.

## PART 4. CONCLUSION AND RECOMMENDATIONS

Transitional justice in Ukraine comprises a multifaceted, dynamic and complex set of processes. These are occurring both inside and outside of Ukraine, are led by Ukrainian and non-Ukrainian actors, and contribute to both extant ends and potential future projects. Importantly, the lens of transitional justice relates, not only to the current conflict with Russia, but also the 2014 unrest, as well as more historical Soviet-era violations. Indeed, the country started to develop its transitional justice strategy back in 2019. Much has changed since then, particularly in terms of the scale and nature of the violence perpetrated, as well as the increased involvement and support of the broader international community. Still, the draft policy gives indications on how the government conceptualizes transitional justice and might serve as a foundation for developing a more bespoke and comprehensive package of measures.

Homing in on transitional justice actions undertaken since 2022, a key observation is Ukraine's hyper-focus on criminal accountability, with trials primarily targeting Russian perpetrators and Ukrainian collaborators. In many ways, this approach is understandable given that alternate pathways to prosecuting international crimes are almost completely blocked. It is also important to note that this focus has been supported and enabled by key donors, who have remained relatively silent about Ukraine's avoidance of investigating and prosecuting crimes committed by its own military. However, there is growing concern that a disproportionate emphasis on criminal trials risks marginalizing other facets of transitional justice and could impede reconciliation and recovery in a post-war Ukraine.<sup>113</sup> Focusing solely on individuals also risks abstraction from the cross-border systemic conditions that have played a role in

the conflict, such as the deeply polarized historical memory landscape between Russia and Ukraine, the unreconciled visions of a post-Cold War Europe between the EU and Russia, and the security dilemma between NATO and Russia.<sup>114</sup> Within such debates, it is important not to overlook that more holistically-oriented actions are being undertaken in support of transitional justice. For example, while wartime is rarely conducive to truth-seeking processes, foundational efforts are underway through documentation and evidence preservation by the CoI and other grassroots organizations. A program of emergency and interim reparation is also taking place, along with a comprehensive registrar of losses coordinated by a consortium of member states.

#### PREVIOUS STEPS IN UKRAINE'S TRANSITIONAL JUSTICE: THE TJ ROADMAP AND ITS CONTEXT

In 2019, President Zelenskyy established a Working Group on the Reintegration of the Temporarily Occupied Territories within the Law Reform Commission and tasked it with developing an interim transitional justice 'roadmap' to facilitate the de-occupation and reintegration of Crimea and Donbas. The draft roadmap references several potential entry points, including compensation, a truth-seeking initiative, a documentation authority, and a lustration policy. It also highlights specific principles, including that there should be no amnesties for perpetrators of gross violations of human rights and international crimes, the importance of addressing the gendered dimensions of the conflict, and elevating damage to Ukraine's natural environment and cultural heritage on par with physical assets. Parallel to discussions on the roadmap, Ukraine's Ministry for Reintegration of the Temporarily Occupied Territories presented Parliament with a Draft Law on the Principles of State Policy of the Transition Period. It was withdrawn from Parliament in January 2022, however, likely in an attempt to de-escalate Russia's build-up of military force along the border.<sup>115</sup>

Against this backdrop, the following recommendations can be made.

#### 1. Criminal trial procedure should align with international justice standards

*Ukraine's approach to criminal justice should promote due process and the rule of law, trust in the judiciary and future reintegration and reconciliation. Particularly, Ukraine should bring rules on in absentia trials into conformity with international standards, and devise justice pathways through which collaborators can contribute positively to truth-seeking, reparations, and restorative efforts in de-occupied areas.*

As noted, Ukraine is taking a comprehensive and consolidated approach to criminal justice that focuses on Russian perpetrators and Ukrainian collaborators. While it is beyond the scope of this paper to assess the efficacy of this strategy fully, it is prudent for Ukraine to ensure that its court rules and procedures adhere to international standards, especially regarding in absentia trials. These trials, if not conducted properly, risk unjust outcomes, fueling Russian hostility, disincentivizing judicial cooperation from other states, and complicating future reintegration and reconciliation efforts. How courts deal with collaborators is equally important; current approaches do not provide sufficient protection to individuals whose participation in the conflict defies a binary victim-perpetrator categorization. A more nuanced approach that considers the exigencies of occupation and offers clarity to judges on applying mitigating factors is needed.

Finally, while it may not be realistic at present, it is crucial that, in a post-conflict context, Ukraine examines its own legacy of criminality, particularly concerning its SBU and volunteer battalions. Without this, any transitional project aimed at delivering truth, justice and reparations to victims and survivors will remain incomplete. To this end, Ukraine might return to its draft transitional justice roadmap which made specific reference to lustration and the principle that amnesties would not be considered for perpetrators of serious crimes. In the meantime, the integration of volunteer battalions into the armed forces and national guard should include a robust screening and vetting process. Indeed, ensuring a state monopoly on force grounded in respect for human rights, enhancing human security, and upholding the rule of law during the

conflict, is one of the most powerful steps to fostering an environment conducive to the successful implementation of transitional justice measures in the future.

## **2. Lay the groundwork for holistic transitional justice in a post-conflict Ukraine**

*Evidence collection and preservation should be structured to facilitate a future truth process, including extending the types of evidence gathered to reflect diverse experiences of victimhood. Narratives should be built around social dialogue, allow multiple (yet complementary) perspectives to coexist, and evolve as new insights emerge.*

At some point, Ukraine will need to confront its history of conflict in a manner that allows society to recover and rebuild along a path that meets its people's aspirations. The groundwork for such a future process can be laid even as the war continues. Evidence collection, in particular, can be pivotal to the success of a truth commission. As the CoI and civil society initiatives proceed, it is important to preserve a range of evidence beyond that admissible in criminal trials. In addition to facilitating a multifaceted understanding of historical truth, attention should also be paid to illuminating the types of victimhood often marginalized in criminal proceedings, particularly those pertaining to economic, social and cultural rights violations.

Another transitional justice effort taking shape, whether deliberate or not, is memorialization. Since 2014, through memory laws, war propaganda, and specific reforms, the Ukrainian government has been building a single narrative centered around Russian aggression and illegality. While understandable (and perhaps justified) the approach risks marginalizing dissenting voices who had different post-Soviet experiences. Ukraine may need to develop a strategy for how to address multiple, yet interconnected, legacies of mass violence comprehensively. This will require a nuanced understanding of past grievances and tailored interventions centered around social dialogue about the causes and consequences of past violence. These interventions may take the form of, or be complemented by, art, literature, film, education, culture and social media interventions aimed at transforming attitudes toward violence and addressing socio-political fractures.<sup>116</sup>

## **3. A proactive role by international actors and the member state community**

*Donors and the Ukrainian government should work together to ensure that the type and nature of technical and resource support provided shapes transitional justice efforts constructively. Chiefly, the current focus on individual criminal responsibility should be scrutinized in terms of potential longer-term implications for peacebuilding and recovery. The international community should likewise contribute to peacebuilding by examining how fissures in the international security architecture and multilateralism have played roles in the conditions that led to the current conflict.*

Western donors have made substantial contributions in support of Ukraine's transitional justice efforts.<sup>117</sup> The nature and form of such assistance can shape the development and implementation of strategies, thus influencing the post-conflict trajectory in complex ways. As noted, through their technical and resource support, donors have enabled Ukraine's hyper-focus on criminal trials. Likewise, the 'criminal turn' in the mandates of UN Commissions of Inquiry and Fact-Finding Missions is something that member states have driven. Given that implementing these approaches today may affect future peacebuilding and reconciliation, the international community should reflect carefully.

The international community is also undertaking transitional justice, including via the ICC, the Council of Europe's damage register, and individual states exercising universal jurisdiction. While not strictly transitional justice, UN member states have also collectively condemned Russia's aggression. Examples include the UNSC's (Uniting for Peace) Resolution 2623,<sup>118</sup> the General Assembly's suspension of Russia's membership in the Human Rights Council,<sup>119</sup> and the Human Rights Council's appointment of a Special Rapporteur and creation of a Commission of Inquiry.<sup>120</sup> Additionally, at least 40 countries have imposed economic sanctions on the Russian Federation, individuals, and affiliated entities in reaction to the Ukrainian invasion.<sup>121</sup> These actions feed into a broader narrative about the war and Russian-Western relations. However, these narratives have been overly simplistic and overlook the nuanced interconnections between policy positioning, economic goals, and historical injustices. This is arguably a missed opportunity for peacebuilding, which could be rectified through more strategic and reflective policy dialogue.

Finally, the international community should take some level of ownership over the current state of affairs. The continuation of Russian aggression into a third year has exposed the deficiencies in the international peace and security architecture in responding effectively to breaches of the UN Charter on the use of force. Even if the veto was theoretically abolished, it is difficult to imagine the Security Council authorizing the use of force against a nuclear-armed state in the interests of peace.<sup>122</sup> Developing a transitional justice policy that neglects these transnational and international perspectives poses risks to its efficacy and may undermine the credibility of transitional justice in addressing the legacies of international conflicts more broadly.

#### **4. Transitional justice as both a driver and a by-product of the broader recovery efforts**

*Ukraine should channel recovery assistance into specific projects, such as interim or emergency reparation, to mitigate the impacts of rights abuses suffered during the conflict and lay the groundwork for future transitional justice. Ukraine could also recognize the right to reparation and begin crafting a strategy that addresses all victims and survivors of the conflict, including those who suffered violations between 2014 and 2022.*

Ukraine is receiving unprecedented amounts of humanitarian aid, some of which is earmarked for recovery. This recovery programming can be carefully framed to contribute to transitional justice, such as facilitating emergency reparation. Indeed, the importance of timely and effective reparation to victims of mass crime cannot be overstated — the conditions that follow an initial violation can ‘shape the traumatic outcome more profoundly than the original violation.’<sup>123</sup> However, given that reparations from frozen Russian assets or the ICC victim trust fund are by no means guaranteed, it is important to explore other options. The project led by GSF and IOM, benefiting victims of conflict-related sexual violence, is a prime example of a practice that could be scaled up.<sup>124</sup> It is important to underscore that such projects should be framed as reparation rather than aid or relief assistance, as the latter does not acknowledge the status of victims and survivors as equal rights-holders entitled to justice for the harms suffered.<sup>125</sup>

#### **5. A post-conflict peace centered around violence mitigation and just economic recovery**

*The scope for violence in a post-war scenario needs to be carefully managed including through carefully coordinated DDR and SSR, community violence reduction programs, and efforts to promote trust in the security sector (such as investigations into allegations of criminality against members of the security forces and volunteer battalions). This should be complemented by programs to mitigate potential conflict drivers such as ensuring equal access to essential services, community consultation and participation in recovery efforts, and jobs creation.*

It is not too soon to consider what challenges Ukraine might face following a cessation of hostilities. The potential for violence in a post-war scenario will need to be carefully managed, especially given the types of violence citizens were exposed to and the amount of weaponry distributed. At the forefront should be programs of DDR and SSR, including thorough investigations into allegations against members of the security forces and volunteer battalions. These measures should be complemented by trust-building and stabilization measures, such as community violence reduction programs<sup>126</sup> aimed at addressing local conflict drivers, reintegration needs, and access to essential services.<sup>127</sup> A parallel priority will be ensuring steady and just economic recovery and job creation. This is an area where carefully crafted donor assistance could prove indispensable. Such support should be calibrated to avoid inadvertently strengthening entrenched elites or exacerbating existing socio-economic disparities.<sup>128</sup> It should strengthen institutional checks and balances, promote the conditions conducive for foreign investment, and continue to implement anti-corruption reforms, while simultaneously safeguarding against corporate capture.<sup>129</sup>

Future research might focus on post-conflict states that have implemented transitional justice and received external development assistance over the past three to four decades, and provide updated (longer-term) comparative assessments on the role of foreign assistance in economic recovery and violence mitigation. Examining these cases through the lens of political economy and the protection of social and economic rights could provide important insights for shaping donor strategies and identifying further funding avenues for Ukraine.<sup>130</sup>

## END NOTES

1 Paul Greedy and Simon Robins (eds.), 'Theories and Contexts' in *From Transitional to Transformative Justice* (Cambridge University Press, 2019), 41.

2 Klaus Wiegrefe, 'NATO's Eastward Expansion: Is Vladimir Putin Right?' *Der Spiegel* (15 February 2022) <<https://www.spiegel.de/international/world/nato-s-eastward-expansion-is-vladimir-putin-right-a-bf318d2c-7aeb-4b59-8d5f-1d8c94e1964d>> accessed January 6, 2024; For example, in 1990 German Foreign Minister Hans-Dietrich Genscher stated that: "Whatever happens to the Warsaw Pact, there will be no expansion of NATO territory to the east and closer to the borders of the Soviet Union." His American counterpart James Baker offered "ironclad guarantees that NATO's jurisdiction or forces would not move eastward" in that same year.

3 John J Mearsheimer, 'Why the Ukraine Crisis Is the West's Fault: The Liberal Delusions That Provoked Putin' (2014) 93 *Foreign Affairs* 77, 77. See further, Team of the Official Website of the President of Russia, 'Address by President of the Russian Federation' (President of Russia, 24 March 2014) <<http://en.kremlin.ru/events/president/news/20603>> accessed January 9, 2024.

4 Ian Traynor and Oksana Grytsenko, 'Ukraine Suspends Talks on EU Trade Pact as Putin Wins Tug of War' *The Guardian* (21 November 2013) <<https://www.theguardian.com/world/2013/nov/21/ukraine-suspends-preparations-eu-trade-pact>> accessed 4 July 2024.

5 Hana Josticova, *Mariupol 2013-2022: Stories of Mobilization and Resistance* (Central European University Press 2024), 21-36. See also, Dominique Arel, 'Language, Status, and State Loyalty in Ukraine' (2017) 35 *Harvard Ukrainian Studies* 1/4, 233-63.

6 Erik Herron, Michael Thunberg and Nazar Boyko, 'Crisis Management and Adaptation in Wartime Elections: Ukraine's 2014 Snap Presidential and Parliamentary Elections' (2015) 40 *Electoral Studies*, 419-429.

7 "Financial-political groups (FPGs) united by personal relations and private interests constitute a vital element of Ukrainian political culture and are key players in political competition. Personal relations within the group usually span decades. The core group consists of a real leader, a public leader (this may be the same person), several business-owners, and CEOs of associated corporations. The core group usually controls several governmental agencies, local governments, a registered political party, a parliamentary faction, a group of influential judges, a media holding and several popular public figures." Mykhailo Minakov, 'Euromaidan, War, and the Development of Ukraine's Political System in 2014 -2015' in *Rimlands, Buffer Zones and Great Power Rivalry: Ukraine Conference Papers* (New York: Columbia University Press 2016), 78.

8 After gaining independence in 1991, Ukraine underwent parallel political and institutional changes alongside its economic transition, shifting from a party dictatorship to a democratic system and from a planned to a market economy. Millions of Ukrainians were left living in poverty in the absence of a robust monetary policy in the early 1990s, and the transfer of ownership to private hands and associated market reforms could not be efficiently regulated by the nascent political and legal institutions. This provided fertile ground for the oligarchic system to thrive, consolidating ownership in particular industries and creating regional dominance among business groups. These business networks pursued political representation to align the legislature with their interests and instrumentalise Ukraine's legal institutions.

9 This phenomenon is often termed "oligarchic pluralism." Mikhail Minakov and Matthew Rojansky, 'Democracy in Ukraine: Are We There Yet?' (2018) 30 *Kennan Cable*, 4. "(Oligarchic) pluralism did not make Ukraine democratic, but it kept it from becoming fully autocratic, and the oligarchs defended that pluralism whenever anyone sought to establish political-economic dominance in the country. That explains why powerful oligarchs supported both the Orange Revolution of 2004 and the "Revolution of Dignity" of 2013-2014." Paul D'Anieri, 'The Sources of Conflict over Ukraine' in *Ukraine and Russia: From Civilized Divorce to Uncivil War* (Cambridge University Press 2019), 1-28.

10 Pablo de Greiff, 'Theorizing Transitional Justice' in Melissa S Williams and Jon Elster (eds), *Transitional Justice* (New York University Press 2012), 31-77.

11 This phase is identified as the start of TJ as an autonomous discourse. While 'Transitional Justice' as a distinct terminology was being used in academic conferences since the 1980s, it did not appear in literature before 1995. As Marcus Zunino states, "the discourse of transitional justice appeared at a specific point in time with a particular political and intellectual baggage tied to this historical juncture." Marcus Zunino, 'Introduction: Two Dimensions of Transitional Justice' in Marcus Zunino (ed), *Justice Framed: A Genealogy of Transitional Justice*. (Cambridge University Press, 2019), 7. At the same time, responses to mass violence that predate the appearance of a distinct discourse can be designated as instances of transitional justice.

12 The key international instruments relevant to transitional justice are the Updated Set of Principles for the protection and promotion of human rights through action to combat impunity (Impunity Principles) and the 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 (Basic Principles). The Impunity Principles delineate the right to truth, justice, reparation, and guarantees of non-recurrence, with corollary State obligations to investigate, prosecute and redress human rights violations, as well as prevent their repeated occurrence. The Basic Principles, adopted by the UN General Assembly in 2005, represent the most comprehensive international guidelines on reparation. They specify that a victim's right to a remedy comprises equal access to adequate, effective and prompt justice and reparation, as well as to relevant information concerning violations and reparation mechanisms. These instruments have played an important role in anchoring the discourse of transitional justice in IHRL and international legal jurisprudence.

13 Mark A. Drumbl, 'Book Review, Marcos Zunino, *Justice Framed: A Genealogy of Transitional Justice* (2019)', 30 *Eur. J. Int'l L.* 1452 (2019).

14 Elisenda Calvet-Martinez, 'Transitional Justice in the Context of the War in Ukraine' <<https://geopolitique.eu/en/articles/transitional-justice-in-the-context-of-the-war-in-ukraine/>> accessed 11 September 2024.

15 "The TJ process in Ukraine had already started when the first international investigators set foot into the areas where (...) violations occurred." Anja Mihr, 'Transitional Justice in Ukraine' in Anja Mihr and Chiara Pierobon (eds), *Polarization, Shifting Borders and Liquid Governance*. (Springer 2024), 411.

16 Tetiana Fedorkova, 'Enforced Disappearance in Ukraine: Andrii's Mother's Tortured Path' (JusticeInfo.net, 24 June 2024) <<https://www.justiceinfo.net/en/133519-enforced-disappearance-in-ukraine-andrii-mother-way-tortured-path.html>> accessed 11 September 2024.

17 John Roosa, 'East Timor's Truth Commission: Introduction to Pacific Affairs Special Forum' (2007) 80 *Pacific Affairs* 563, 563-567. Daniel Snider, 'Different Wartime Memories Keep Japan and South Korea Apart' (United States Institute of Peace, August 2022) <<https://www.usip.org/publications/2022/08/different-wartime-memories-keep-japan-and-south-korea-apart>> accessed 11 September 2024.

18 Sven Milekic, 'Balkan Govts Dodge Signing Truth Commission Declaration' (Balkan Insight, 10 July 2018) <<https://balkaninsight.com/2018/07/10/west-balkans-states-not-singing-recom-declaration-07-09-2018/>> accessed 11 September 2024. "Past promises by some governments to commit to establishing RECOM have so far come to nothing." Serbeze Haxhijaj, 'Truth Commission Activists Plan Yugoslav 'Book of the Dead'' (Balkan Insight, 16 January 2020) <<https://balkaninsight.com/2020/01/16/truth-commission-activists-plan-yugoslav-book-of-the-dead/>> accessed 11 September 2024.

19 Situation of human rights in Ukraine stemming from the Russian aggression (4 March 2022) UN Doc A/HRC/RES/49/1.

20 *Ibid.*

21 'UN Human Rights in Ukraine' (OHCHR) <<https://www.ohchr.org/en/countries/ukraine/our-presence>> accessed 6 February 2024.

22 Truth Hounds <<https://truth-hounds.org/en/about/>>

23 The Reckoning Project <<https://www.thereckoningproject.com/>> Human Rights Center ZMINA <<https://zmina.ua/en/>>

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25 Karen Engle, 'A Genealogy of the Criminal Turn in Human Rights' in DM Davis, Karen Engle and Zinaida Miller (eds), *Anti-Impunity and the Human Rights Agenda* (Cambridge University Press 2016), 15-67.

26 Enforced disappearance involves the arrest, detention, or abduction of an individual by state agents or those acting with state approval, followed by a denial or concealment of their fate. This places the person outside legal protection. Article 2, International Convention for the Protection of All Persons from Enforced Disappearance (ICPED). In the absence of clear evidence of state involvement, most cases are initially categorized as general missing persons.

27 United Nations Commission on Human Rights (UNCHR), Declaration on the Protection of All Persons from Enforced Disappearance (28 February 1992) UN Doc E/CN.4/RES/1992/29.



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33 Ministerie van Buitenlandse Zaken, 'Restoring Justice for Ukraine Conference: press statement by Minister Bruins Slot' (2 April 2024) <<https://www.government.nl/documents/speeches/2024/04/02/restoring-justice-for-ukraine-conference-press-statement-by-minister-bruins-slot>> accessed 11 September 2024. See also, 'UK Announces Further Support for Ukraine's Efforts to Bring War Criminals to Justice' (GOV.UK) <<https://www.gov.uk/government/news/uk-announces-further-support-for-ukraines-efforts-to-bring-war-criminals-to-justice>> accessed 28 June 2024. See also, 'Croatia Wants to Assist Ukraine in Demining and Prosecuting War Crimes' (vlada.gov.hr) <<https://vlada.gov.hr/news/croatia-wants-to-assist-ukraine-in-demining-and-prosecuting-war-crimes/42040>> accessed 28 June 2024.

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39 *Dvorski v. Croatia* (2015) 25703/11, para. 101; *Pishchalnikov v. Russia* (2009) 7025/04, para. 77-79.

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67 The nature of mass crimes makes it clear that restitution of the status prior to the violations is practically impossible. While efforts such as land and property restitution may be viable in some cases, victim-centered reparation for mass crimes primarily involves compensation, satisfaction, rehabilitation, guarantees of non-recurrence, or a combination thereof, granted as individual and/or collective reparations.

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83 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff' (2015), UN Doc A/HRC/30/42, para. 24.

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85 International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts (November 2001), Art. 30.

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86 Anti-corruption measures were combined with lustration in the law of government cleansing. Lustrations applied to those who held public office for at least a year consecutively within the periods from February 25, 2010, to February 22, 2014, and from November 21, 2013 to February 22, 2014. See, Law on Government Cleansing (2014).

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87 The National Anti-Corruption Bureau (NABU), the Special Anti-corruption Prosecutor's Office (SAPO), the National Agency for Prevention of Corruption (NAPC) and the Asset Recovery and Management Agency (ARMA).

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88 An independent advisory body tasked with supporting the vetting process overseen by the High Qualification Commission of Judges (HCQJ).

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independence in prosecuting high-profile corruption cases The HACC included the involvement of the Public Council of International Experts (PICE) in the judicial selection process, granting the Council authority to veto candidates if doubts regarding their integrity arise; See Ivanna Y Kuz and Matthew C Stephenson, 'Ukraine's High Anti-Corruption Court. Innovation for Impartial Justice' (2020) 3 U4 Brief <<https://www.cmi.no/publications/7185-ukraines-high-anti-corruption-court-innovation-for-impartial-justice>> accessed 12 September 2024.

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91 Mikhail Minakov, 'War, De-Oligarchization, and the Possibility of Anti-Patronal Transformation in Ukraine' in Bálint Madlovics and Bálint Magyar (eds), *Ukraine's Patronal Democracy and the Russian Invasion* (Central European University Press 2023), 141-166.

92 Ibid.

93 Ministry for Communities, Territories and Infrastructure Development of Ukraine, 'Government of Ukraine Approves Decentralization Roadmap' (gov.ua, 26 May 2024) <<https://www.kmu.gov.ua/en/news/uriad-ukrainy-zatverdyl-dorozhniu-kartu-detsentralizatsii>> accessed 12 September 2024. The decentralization process entails the voluntary creation of self-sustaining "amalgamated territorial communities" (ATCs), which would gain significant autonomy in tax collection, self-governance, and public policy upon recognition by the central government. A second phase of decentralization began in 2019, involving administrative-territorial reforms at the district level and redefining regional and subregional authorities. Valentyna Romanova and Andreas Umland, 'Ukraine's Decentralization Reforms Since 2014: Initial Achievements and Future Challenges' (Chatham House, 2019).

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99 Julia Soldatiuk-Westerveld, Bob Deen and Ate Lucien van Steenberg, 'Work in Progress: Ukraine's State-Civil Partnership to Reform the Security Sector' (Clingendael, 2023), 2.

100 Prerequisites for beginning a DDR program generally include negotiated ceasefire or peace agreement outlining the DDR framework, trust in the peace process, commitment from all parties to participate in DDR, and basic security assurances for involved groups.

101 'Memorialization processes in the context of serious violations of human rights and international humanitarian law: the fifth pillar of transitional justice' Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (2020), UN Doc. A/HRC/45/45.

102 Ibid.

103 Ibid.

104 Fabian Salvioli supports the progressive development of memory while ensuring non-regression on the part of the recognition of harms suffered by victims. See UNHRC 'Memorialization processes in the context of serious violations of human rights and international humanitarian law: the fifth pillar of transitional justice - Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence' (2020), UN Doc. A/HRC/45/45. For a deeper reflection, read Michel-Rolph Trouillot, *Silencing the Past: Power and the Production of History*, 20th Anniversary Edition (2nd Revised edition, Beacon Press 2015).

105 As seen in other regions like Republika Srpska in Bosnia and Herzegovina (BiH) and Northern Kosovo in Kosovo.

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117 Major international donors in the TJ field include Western European and North American states, various UN agencies, and international financial institutions (IFIs) like the International Monetary Fund (IMF), the World Bank, and regional development banks.

118 On 25 February, the draft resolution submitted by Albania and the United States calling for an end to the Russian Federation's military offensive was vetoed by the Russian Federation. Two days later, UNSC RES/2623 (27 February 2022) a "Uniting for Peace" resolution calling for an "emergency special session" (ESS) of the General Assembly was adopted with 11 votes in favor, one against (Russia), and three abstentions (China, India, and the UAE).

119 Aggression against Ukraine (2 March 2022) UN Doc A/RES/ES-11/1. In November 2022, the UN General Assembly adopted the resolution on "Furtherance of remedy and reparation for aggression against Ukraine," calling for accountability from Russia for its internationally wrongful acts in and against Ukraine. Furtherance of remedy and reparation for aggression against Ukraine (2022), UN Doc A/RES/ES-11/5.

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121 Peter Piatetsky, 'What Are Countries Doing to Counter Russia's War?' (Castellum.AI) <<https://www.castellum.ai/insights/which-countries-are-taking-action-on-ukraine>> accessed 12 September 2024.

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122 This also highlights the systematic failures of arms control negotiation, both for weapons of mass destruction and conventional arms. "Because the Council's role in nonproliferation is often perceived as an extension of P5 policy to preserve their WMD monopoly, any improvement in acceptance by the wider international community of the Council's approach to non-proliferation seems likely to be linked to real evidence of willingness to make the multilateral disarmament framework effective." Cross-Cutting Report No. 2: The Security Council's Role in Disarmament and Arms Control: Nuclear Weapons, Non-Proliferation and Other Weapons of Mass Destruction' (Security Council Report) <<https://www.securitycouncilreport.org/research-reports/lookup-c-glkwlemtisg-b-5405331.php>> accessed 12 September 2024. See further, William E Lippert, 'How Conventional Arms Control Failures Caused the Russo-Ukraine War' (2024) 40 Defense & Security Analysis 138.

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123 The importance of timely and effective reparation is widely recognized in the literature. As Clancy and Hamber note, survivor experiences are significantly influenced by the aftermath of the events. Delayed reparations can worsen trauma, as they fail to close justice gaps and do not provide survivors with the necessary tools to rebuild their lives. Mary Alice Clancy and Brandon Hamber, 'Trauma, Peacebuilding, and Development: An Overview of Key Positions and Critical Questions: Trauma, Development and Peacebuilding Conference' (International Conflict Research Institute, 2009).

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124 The Partnership Fund for a Resilient Ukraine (PFRU), managed by the United Kingdom's Foreign, Commonwealth and Development Office (FCDO), for example, includes under its umbrella policy planning and analysis "in preparation for post-war transition," memory and memorialization and the reintegration of abducted children; 'Partnership Fund for a Resilient Ukraine' <<https://pfru.org.ua/>> accessed 8 September 2024.

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125 Reparation, by contrast, emphasizes the restoration and reaffirmation of societal norms and principles that have been violated by widespread atrocities.

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126 'Report of the Secretary-General: Disarmament, demobilization and reintegration' (2022) UN Doc A/77/610.

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127 United Nations Office of Rule of Law and Security Institutions (OROLSI), 'Community Violence Reduction: Creating Space for Peace' (2019).

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128 For instance, the ongoing land reform and concentration of arable land in the hands of large agribusinesses and international investors—driven by structural adjustment programs tied to financial support—have sparked concerns among small-scale farmers. Dominic Culverwell, 'Second Phase of Ukraine's Land Reform Underway, Critics Say Law Will Hurt Small Farmers' (The Kyiv Independent, 16 January 2024) <<https://kyivindependent.com/land-reform-second-stage-of-ukraines-land-reform-underway-sparking-concerns-among-small-scale-farmers/>> accessed 12 September 2024.

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129 Corporate capture refers to "the many ways that economic elites exert influence to shape domestic and international decision-making spaces in order to maximize profits - at the cost of human rights and environmental justice." International Network for Economic, Social & Cultural Rights, 'Manifestations of Corporate Capture' ESCR-Net <<https://www.escr-net.org/resources/manifestations-of-corporate-capture/>> See also, Jenny Lah, 'Trends in Funding to Anti-corporate Capture Scan' (Trust, Accountability and Inclusion Collaborative, December 2023) <<https://taicollaborative.org/funding-trends-to-anticorporate-capture-work>> accessed 15 September 2024.

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130 Daniela Lai proposes three shifts in how political economy is applied to transitional justice research in conflict-affected settings, focusing on corporate accountability. She suggests moving from examining the economic causes of conflict to analyzing the transformation of economies from pre-war to post-war, highlighting the persistent power structures and inequalities established during conflicts. Lai also calls for a shift from studying war economies to understanding the broader political economy of violence, offering a more nuanced view of how corporate actors evade accountability, as illustrated through case studies from the Bosnian War. Daniela Lai, 'Beyond Context: taking political economy seriously in the study of corporate accountability' 29 *New Political Economy* 3, 385-399.

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