

Application of Transitional Justice Mechanisms in Ukraine

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Master's Degrees by Examination and Dissertation

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Contents

Contents.....	3
Abstract.....	4
Introduction.....	5
Defining Transitional Justice in Ukraine.....	6
Application of Transitional Justice.....	14
Truth-seeking.....	14
Prosecutions.....	20
Reparations.....	24
Institutional reforms.....	26
Conclusions.....	30
Reference List.....	32

Abstract

This paper explores the application of transitional justice mechanisms in Ukraine, focusing on the restoration of human rights violated as a result of Russia's aggression against Ukraine. The Ukrainian case is distinctive in that transitional justice mechanisms can be developed and implemented during an ongoing conflict, differing from the more common practice of applying such mechanisms during the transitional period. Based on international experience, the paper analyses the possibilities of adapting transitional justice instruments to the Ukrainian context. Through a comparative analysis and assessment of national initiatives, the study suggests the forms that transitional justice mechanisms can take, taking into account the continuing conflict and the need to restore the rights of victims, both present and future.

Introduction

Transitional justice is a comprehensive approach used by societies after conflicts and massive human rights violations. The goal of transitional justice is to ensure justice, access to the truth, reform of state institutions, and reparations, i.e. it is a broad set of tools for society's reconstruction with victims in mind. Transitional justice strategies have been widely used since the second half of the last century in Argentina, Colombia, Rwanda, South Africa and other countries.

In Ukraine, the implementation of transitional justice is important for overcoming the consequences of Russian armed aggression, which began in 2014 and has been going on for more than a decade. In the last two years alone, more than 30,000 civilian casualties have been verified (Office of the High Commissioner for Human Rights, 2024). The ongoing conflict and the growing number of victims creates a need to develop and implement mechanisms to ensure justice and restore the rights of people who have been victims of Russian aggression

The complexity of developing and implementing such mechanisms lies in the fact that transitional justice is mostly applied after the active phases of massive human rights violations are ended, at times when nations can focus on recovery. However, in the Ukrainian case, the conflict is ongoing, making the implementation of such mechanisms more difficult. As the rights of some victims will be restored and protected, new victims will emerge, who will also subsequently need protection and support measures. This creates a cycle where, even when providing assistance to some victims, it is necessary to simultaneously prepare to protect the rights of those who are only suffering from the ongoing events of the international conflict. This aspect distinguishes the Ukrainian case from the classic examples of transitional justice, which were mainly based on internal conflicts and the period after their end.

The purpose of this paper is to propose, based on the study of international experience and analysis of the Ukrainian context, specific forms of transitional justice instruments that can be effectively applied in Ukraine. The paper focuses on the analysis of the perception of transitional justice in Ukraine and the adaptation of international practices to Ukrainian realities in order to ensure justice, restore victims' rights and institutional reforms to protect these rights.

The main approach is a comparative analysis of international experience of transitional justice, in particular in countries such as Argentina, Rwanda, Colombia and South Africa. This enabled the identification of the main aspects that facilitated or hindered the successful implementation of transitional justice.

In addition, the inductive approach allowed for the collection of data on the current state of transitional justice in Ukraine, with a particular focus on national initiatives and legislative drafts, which helped to assess Ukraine's efforts to implement transitional justice mechanisms.

The deductive analysis in this paper has enabled the identification of possible ways to adapt international experience to the Ukrainian context. Based on models from other countries that have gone through transitional justice processes, I explore tools that may be effective for Ukraine, particularly in view of the ongoing international conflict.

As mentioned above, this study mainly focuses on analysing the experience of transitional justice in countries such as Argentina, Rwanda, Colombia and South Africa, where the process took place in the context of internal conflicts or repressive regimes. However, the experience of other countries, such as Canada, Australia, Sierra Leone and others, where transitional justice mechanisms have also been introduced, is not considered in this paper.

It is worth noting that transitional justice mechanisms often involve interaction between victims and perpetrators in order to establish the truth or achieve reconciliation. In the Ukrainian context, it could involve interaction between Ukrainians who became victims of aggression and Russians who acted as perpetrators. However, this paper focuses not on reconciliation between the parties, but on the restoration of the rights of victims who are in the government-controlled territory of Ukraine.

Defining Transitional Justice in Ukraine

Transitional justice (TJ) may be as old as democracy, with roots in ancient Greece (Elster, 2004, pp. 1–23). However, as the concept of democracy has evolved, so has TJ. Having a definition of TJ is essential for understanding what the concept has developed into, what it is and what it includes in general and in different contexts, and particularly in the Ukrainian one that is the focus of this work.

The theory and practice of transitional justice began to gain new momentum in the second half of the 20th century and its development continues. Since then, many definitions have been proposed by various actors in the field. However, some of them have been limited to the borders of a single state, such as Teitel (2000, p. 5), Kritz, (1995) or Elster (2004, pp. 1–23). The limitations of these definitions can be traced back to the theorising that emerged from the practice of applying transitional justice primarily after internal human rights violations, as in South Africa, Rwanda, Argentina, and others. Nevertheless, the widely cited works of the above-mentioned scholars obviously make a significant contribution to the development of the concept. The impetus provided by Teitel being about roots of the transitional justice lying in the concepts of the rule of law, human rights and justice, as well as associations with the restoration towards democracy (Teitel, 2000, pp. 3-9) in times of political shift is at the basis of plenty of subsequent research.

Over time, the authors have begun to expand the concept of transitional justice, due to “globalisation” and “normalisation” of mechanisms (Teitel, 2014), as well as to a wider perception of this approach as being oriented towards victims of past human rights violations (Brett and Malagon, 2013), thus being adaptive to the specific context. Emerged broader definitions may include the United Nations' (2004) one, understanding TJ as

“the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof”

or that transitional justice can be broadly understood as a set of moral, legal and political dilemmas related to finding the best response to mass atrocities and other forms of profound injustice after periods of conflict and repression (Sharp, 2018).

Building on international definitions such as those proposed by Teitel (2000) and the United Nations (2004), transitional justice in Ukraine is defined in this paper as a set of legal, social and institutional mechanisms aimed at addressing injustices, including those resulting from Soviet totalitarian rule and the ongoing conflict with Russia.

While some studies focus on the use of transitional justice mechanisms in the transition from Soviet rule (as in Posner, E.A. and Vermeule, A. (2004) and Teitel, R.G. (2000)),

which could be relevant for Ukraine, most papers consider the application of these instruments to overcome the consequences of Russia's armed aggression against Ukraine. Notwithstanding the scarcity of research on transitional justice in Ukraine since independence in 1992 and before the start of Russian-Ukrainian war in 2014, it can be argued ex post facto that these mechanisms have been applied to overcome consequences of totalitarian governing (although not as a coordinated and explicit transitional justice policy).

Massive violations of human rights law by the Soviet authorities, such as deportations, persecution, the Famine of 1932 - 1933 – Holodomor of the Ukrainian people, etc., caused a huge number of victims. With the onset of Ukraine's independence, a chance has emerged to recognise and restore the rights of victims. Discussions about recognising the victims of the Soviet regime, such as the victims of the Holodomor or the Gulags, began long before the collapse of the USSR, albeit mainly in Western societies.

In the 1990s, certain steps were already taken by international and many national institutions. In 1996, the Parliamentary Assembly of the Council of Europe adopted Resolution 1096 (1996) on Measures to Dismantle the Heritage of Former Communist Totalitarian Systems. It was one of the first resolutions to emphasise the importance of dismantling the institutional and social legacy of the past regime in Ukraine. The resolution also welcomed 'the opening of secret service files for public examination' and stated 'material compensation should also be awarded to these victims of totalitarian justice' (Parliamentary Assembly, 1996). As subsequently noted by Myroslava Antonovych (2015), Ukraine fulfilled its obligations under this resolution and made public the materials of the State Archives of the Security Service of Ukraine on the Holodomor of 1932-1933.

While the studies on Soviet crimes did not focus on the concept of transitional justice, they covered its instruments, had a similar idea and became the basis for further considerations of the application of transitional justice mechanisms in Ukraine.

A number of such works by Ukrainian scholars began to appear in the 1990s and early 2000s, especially in the context of decommunisation, rehabilitation of victims of political repression and restoration of historical memory. For example, historian Yurii Shapoval (1993) examined in detail the repressions of the Soviet (Stalinist) regime and their impact on Ukrainian society. Ivan Dziuba, a cultural and literary critic, also addressed the issues of

repression and human rights. In his landmark work “Internationalism or Russification? A study in the Soviet nationalities problem” (1968), Dziuba analyses Soviet repression in terms of ideological control and its impact on Ukrainian culture. Although the book was published in London in 1968, Ukrainians gained free access to it only in 1991, when it appeared in a separate edition in Ukraine and was ‘safe’ to use due to the fall of the Soviet regime.

The list of scholars is long, and other scholars who have also studied the impact of the Soviet regime on Ukrainian society in terms of mass human rights violations are Volodymyr Serhiichuk (1996), Anatoliy Rusnachenko (1998), Yaroslav Hrytsak, and Myroslav Marynovych, who has given numerous lectures on human rights to students and young generation.

Transitional justice-related topics also found a place in the media space. In the 2000s, and following the pro-democracy Orange Revolution in 2004, there was a growing interest in Ukrainian society to understand the Soviet past, national identity and the search for truth. In 2009, Radio Liberty began a series of publications dedicated to the declassification of the archives of the Soviet special services under the title ‘From the KGB Archives. SEARCH FOR FREEDOM’. These publications primarily informed about the possibility of access to information that was previously classified and inaccessible to the public. But what is also important for a post-totalitarian society, they conveyed the thesis: ‘People have an inherent desire to establish the truth. People want to know the truth. It has been so and it will be so. Especially when it comes to recent and painful history. This was demonstrated by the poll conducted by Radio Liberty’ (Iryna Shtohryn, 2009).

Summarising the several paragraphs above, research and media publications before the Revolution of Dignity (the revolution against the dispersal of a peaceful protest by students and civil society activists, which resulted in the country's legally mandated EU course) in 2014 laid the foundations for the further development of the concept of transitional justice in Ukraine, even if the term itself was not yet widely used at the time. They contributed to the formation of a public discourse on the need to restore justice, rehabilitate victims, and form a collective memory - understanding the Soviet past as important steps in the process of democratisation.

After 2014, the number of academic papers on transitional justice and references in the public space and government increased. Based on the works of Ukrainian and foreign scholars, during and immediately after the Revolution of Dignity, the Ukrainian academy focused on the connection between transitional justice and the issue of collective memory, for example, Holubchuk (2014) and Volianiuk (2014).

Later, the framework of transitional justice theory in Ukraine has been expanded as a result of the Russian war against Ukraine, which has caused and continues to cause a significant number of victims, requiring a new analysis of the existing mechanisms in the world for their optimal application in Ukraine. Thus, the basis for research on the use of transitional justice mechanisms to address a wider range of issues has expanded from post-Soviet countries (i.e. the experience of the Baltic states, Poland) to the whole world - Africa, Latin America, etc.

Ukrainian scholars also considered transitional justice from a comprehensive perspective, taking into account not only legal but also social, institutional and cultural aspects. For instance, Korynevych and Korotkyi (2020) emphasised the importance of four main elements that make up the concept of transitional justice in the Ukrainian context: the right to truth, institutional reforms, compensation for victims and prosecution of perpetrators of the most serious crimes, such as genocide and war crimes. They emphasise the need to develop a national model of transitional justice - a strategy or roadmap - that would take into account the experience of other post-conflict countries, such as Germany, Bosnia and Herzegovina, and Rwanda, and at the same time be adapted to Ukrainian realities.

In addition to this, Chervyakova (2020) focuses on improving Ukrainian legislation, in particular on the criminalisation of war crimes and crimes against humanity, including the ratification of the Rome Statute of the International Criminal Court. Chervyakova also points to the importance of institutional reforms to ensure fair investigations and trials, and to improve the skills of law enforcement and judges.

In general, both articles analysed the application of transitional justice mechanisms, taking into account the limitations of the legislation, and therefore the authors emphasise the need for a comprehensive and systematic approach to transitional justice in Ukraine.

The topic of transitional justice has been actively covered not only in academic research but also in the media, which has played an important role in shaping public opinion. The results of the OPORA Civil Network study (2023) show that social media are the most popular source of information for Ukrainians - 77.9% choose them (Ukrainians use Telegram (71.3%), YouTube (66.2%) and Facebook (55%) most of all), followed by television (62.5%), and the Internet (excluding social media) (57.7%). Accordingly, the analysis of materials in the media, social media and the Internet in general can provide insight into how Ukrainians can develop an understanding of transitional justice based on the available information on the subject.

The articles on transitional justice in Ukraine mainly explain the concept and list the 4 components of transitional justice, and there is general agreement on its importance for restoring justice and preventing impunity after the conflict. The authors, as well as scholars, also agree on the adaptation of tools for the Ukrainian context in order to achieve the goals of transitional justice. Below are examples of publications on the Internet on the topic of transitional justice.

For example, Taras Tsymbriivskyi in an interview with Levantovych (2017), notes that this process is not a panacea, but should be a chance for the country, in particular through the adaptation of international experience, and also emphasises the risks of politicising this process, which could undermine trust in justice. Tsymbriivskyi's position raises the question: can Ukraine avoid these risks and use transitional justice for sustainable peace?

In an interview with Kulykov (2021), Anna Mykytenko approaches the topic from a social justice perspective, noting that transitional justice includes not only accountability, but also reconciliation, restoration of truth and justice for society. She emphasises that these processes should begin during the conflict, including preparations for reconciliation and justice, and not be postponed until after the conflict.

The article by Ukrayinska Pravda (2019) differs from the others in that it links transitional justice to the reintegration of the military, and draws attention to the case of former FARC fighters in Colombia as a possible example for Ukraine.

The video on the YouTube channel 'TO_MY' (2022) focuses on the complexity of implementing transitional justice during a protracted conflict. The main thesis of the video

is the importance of accountability and justice as key elements. The content of the video promotes an understanding of the systemic complexity of the process and that protracted conflict can slow down or even block some aspects of transitional justice.

In contrast, the video 'Transitional Justice | DURA LEX SED LEX' (QIRIM Media, 2024) focuses more on practical aspects, such as the need to prepare for de-occupation, changes to legislation and addressing war crimes.

All of the authors reviewed generally define transitional justice in the same way as a mechanism aimed at establishing justice, reconciliation and overcoming the consequences of the conflict. However, they present the possibilities of its implementation in different ways. This can result in the impression that transitional justice is a complex process that requires a comprehensive approach. Some emphasise the importance of institutional reforms, while others focus on preparations for de-occupation and addressing war crimes. A common feature of all approaches is the idea of the need for a systematic (strategic) approach that includes legal, social and institutional aspects of transitional justice.

It is important to emphasise that publications on transitional justice provide a general framework for public understanding of the process, shaping the context and emphasising the need for a systemic approach. However, the way the state plans to implement the concept in practice can be assessed by the initiatives and steps taken. Oleh Martynenko (2018) notes that work on the introduction of a systemic approach to transitional justice in Ukraine began in 2015, and in 2018 this topic became of interest to the Ukrainian government. The first important steps in this direction were taken in 2021, when two decrees of the President of Ukraine set the goal of introducing a national model of transitional justice in order to overcome the negative consequences of the armed conflict caused by Russia's aggression and create conditions for the de-occupation and safe reintegration of the temporarily occupied territories, including the Autonomous Republic of Crimea. These two decrees can be considered incentives for the legal development of the concept in Ukraine.

In 2021, the government made its first systematic attempt by drafting a law 'On the Principles of State Policy for the Transitional Period', which was later submitted to parliament. This law aimed to establish the basic principles of the state policy of the transition period aimed at unifying approaches to the de-occupation of the temporarily

occupied territories, reintegration with the local population, overcoming the consequences of the armed aggression of the Russian Federation and preventing the recurrence of occupation (Ukraine, 2021). It defined transitional justice as ‘a set of actions aimed at overcoming the consequences of violations of the rule of law, human rights and freedoms caused by the Russian aggression, including restoration, compensation, justice and reconciliation, as well as preventing the recurrence of occupation’.

However, this definition left some uncertainty, in particular as to whether the draft law covered crimes committed by all parties to the conflict or only by the Russian side (European Commission for Democracy through Law (Venice Commission), 2021). Such uncertainty may affect the principles of justice and reconciliation, which are key to a successful transitional justice process. In its conclusion, the European Commission for Democracy through Law (Venice Commission) (2021) recommends that these definitions be expanded to include crimes committed by all parties to the conflict and that a more comprehensive approach to transitional justice be adopted, focusing on reconciliation within society (European Commission for Democracy through Law (Venice Commission), 2021).

The European Commission for Democracy through Law (Venice Commission) (2021) also expresses concern that the draft law attempts to provide a one-sided interpretation of history that may ignore other perspectives on the events of the past. This could deepen the conflict and hinder reconciliation, which is an important goal of transitional justice. The Commission emphasises that reconciliation is only possible through a comprehensive approach that includes all parties to the conflict (European Commission for Democracy through Law (Venice Commission), 2021).

In addition, analysing the proposals of the NGO Donbass SOS *et al.* (2021), there is reason to conclude that the introduction of other new terms in the draft law, such as ‘transitional period’, ‘conflict period’, ‘post-conflict period’, was also not always in line with international legal terminology. These terms not only create confusion, but also partially duplicate existing concepts in national legislation, such as the ‘special period’ defined in the Law of Ukraine ‘On Mobilisation Preparation and Mobilisation’ (NGO ‘Donbass SOS’ *et al.*, 2021).

The introduction of such new terms should comply with the principle of legal certainty (Constitutional Court of Ukraine, no date), especially when it comes to key aspects of transitional justice. In particular, it is necessary to avoid duplication of concepts and ensure clarity in definitions for their effective implementation. It is important that the legislation recognises all human rights violations, regardless of who committed the crime, and ensures that all victims of the conflict have access to justice without creating conflicts or duplication.

Beyond any doubt, the draft law ‘On the Principles of State Policy for the Transitional Period’ is an important step towards shaping national policy to overcome the consequences of Russia's armed aggression and reintegrate the occupied territories. However, some provisions of the draft law raise concerns about possible negative consequences for the realisation of victims' rights. In particular, civil society representatives draw attention to proposals to repeal the laws regulating the status of the Autonomous Republic of Crimea and the city of Sevastopol, as well as the need to finalise new terms to avoid legal uncertainty (NGO ‘Donbass SOS’ *et al.*, 2021).

In view of this, to ensure the effectiveness of transitional justice in Ukraine, it is necessary to apply a victim-based approach, as was done in Colombia under the Colombian Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace (National Legislative Bodies / National Authorities, 2016) or in the documents of the European Union (Council of the European Union, 2015). This will ensure that the rights of all victims are duly considered and contribute to the achievement of justice and reconciliation, which are essential for building a sustainable peace in Ukraine. In this context, it would be worthwhile to involve experts from national and international organisations, research centres, and academic institutions in the qualitative revision to ensure clarity and compliance with legal standards and best practices.

Application of Transitional Justice

Truth-seeking

As noted in the previous section, one of the components of transitional justice is truth-seeking or access to truth. Over the past decades, the attention and number of studies

highlighting the importance of this transitional justice mechanism has increased, including those by Ruti Teitel in her book *Transitional Justice*, which forms the basis for many subsequent studies on transitional justice mechanisms, Priscilla Hayner in her *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2011), with an in-depth analysis of the history and implementation of truth commissions, Jon Elster in *Closing the Books: Transitional Justice in Historical Perspective* (2004), where he examines how truth commissions achieve truth and reconciliation goals and how they can be exploited by political elites, Kathryn Sikkink (2011), who explores the relationship between truth commissions and judicial investigations, and others.

The goals of transitional justice focused on addressing the past can be achieved in different ways. Judicial justice is certainly one of the key and prioritised objectives, however, it is often the most difficult to implement during a transitional period. At times, political transitions require compromises, such as granting immunity from punishment for past crimes. However, even in the absence of these trade-offs, judicial justice often faces serious challenges: corrupt judicial systems, court overload and other factors that may prevent full justice from being delivered.

A well-known and pioneering scholar of transitional justice, Teitel (2000), considers truth as an important element for historical justice as well as for justice processes that follow regime transition, which may take the form of trials, but also official histories or truth commissions. Most often, this mechanism takes the form of a truth commission, which is a temporary state body mandated to investigate systemic human rights violations that occurred in the past and provide a public report (Hayner, 2011). Notably, the first widely known commissions - the Commission of Inquiry into the Disappearances of People in Uganda (1974) and the National Commission on the Disappearance of Persons in Argentina (1983) - were aimed at investigating disappearances, although not formally called 'truth commissions', and only later did this term gain popularity. Hayner (2011) identifies the primary goal of truth commissions as the intention to impact social comprehension and acceptance of the nation's past, not just to uncover particular facts. This suggests that the results of the commission's work can have an impact not only on reconciliation and judicial investigations, but also on the formation of collective memory.

The right to the truth and international law

The right to the truth also finds its place in international law, for example, Article 32 of Geneva Conventions Protocol I. However, in general, in international human rights law, the right to the truth is enshrined in the updated Set of principles for the protection and promotion of human rights through action to combat impunity (Economic and Social Council, 2005). Historically, it arose in relation to missing persons and has expanded to cover a wider range of human rights violations (UN Office of the High Commissioner for Human Rights, 2006). This right includes obtaining information not only about the fate of victims, but also about the circumstances of the crimes, the causes and conditions of the violations, the progress of the investigation and, potentially, the identification of the perpetrators. One of the key questions is whether the right to truth includes the right to know the identity of perpetrators. While acceptance of this aspect is supported by the practice of various international bodies, there is a problem with identifying perpetrators through extrajudicial mechanisms such as truth commissions. In order to avoid conflicts between the right to truth and the principle of presumption of innocence, the UN Office of the High Commissioner for Human Rights (2006) recommends guidelines that guarantee legal protection for all parties, as shown by the experience of national truth commissions, such as in El Salvador and Argentina.

As also noted by Cavallaro and Brewer (2008), the Inter-American Court of Human Rights has played an important role in promoting the right to truth in Latin America, in the context of enforced disappearances. It encouraged states to ensure that families have the right to know the fate of their loved ones, thereby incorporating the right to the truth into international jurisprudence.

Implementing the right to the truth

South Africa

The South African Truth and Reconciliation Commission was not only one of the most famous but also one of the most controversial truth commissions in history. Its mandate was remarkably broad, which made it possible to experience all the complexities of transitional justice.

During the 45 years of apartheid, the official policy of racial segregation pursued by the ruling National Party, as well as the 30-year resistance of the African National Congress

(ANC), the country experienced mass killings, torture, prolonged imprisonment of activists, and economic and social discrimination against the black majority.

The idea of establishing a truth commission was proposed in 1992, but was only implemented in 1994 after the election of Nelson Mandela, a well-known human rights activist and Nobel Peace Prize winner, as president. The aim of the Commission was to promote national unity and reconciliation by establishing a full and objective picture of gross human rights violations, taking into account both the perspective of victims and the motives of perpetrators; to promote amnesty for those who fully disclosed all facts of violations related to political motives; to establish the fate and location of victims, restore their dignity by providing them with the opportunity to speak about their experiences; and to prepare a report with recommendations for the prevention of human rights violations in the future (South Africa, 1995). During the course of its work, the commission received testimony from more than 21,000 victims and witnesses, 2,000 of whom also spoke at public hearings (Hayner, 2011, p. 28).

Hayner (2011) also emphasises the innovativeness of the commission, since it was the first to use a model of individual and conditional amnesty in exchange for full disclosure of the truth, in contrast to the practice of unconditional amnesty often used in other countries. This approach helped to expose politically motivated crimes and encouraged criminals to cooperate in exchange for protection from prosecution. An important innovation was also the requirement of public hearings for some applicants, which ensured transparency of the process and the opportunity for victims to express themselves. However, criticism was raised about the amnesty for perpetrators who were not required to express remorse or apology, which created a sense of injustice among victims.

In terms of the effectiveness of such a commission, an action research study by Vora and Vora (2004) on the perceptions of Xhosa, Afrikaners, and English in South Africa found that the commission was more effective in revealing the truth and less effective in reconciliation.

Argentina

CONADEP (National Commission on the Disappearance of Persons) was established in Argentina in December 1983 at the initiative of President Raul Alfonsin to investigate

disappearances during the military dictatorship that lasted from 1976 to 1983. The commission's mandate was to collect facts, testimonies and evidence on enforced disappearances, document places of illegal detention and locate the bodies of disappeared victims (United States Institute of Peace, 2018). The main goal of the commission was to uncover the scale of repression and to establish the responsibility of those behind these crimes.

On 20 September 1984, CONADEP published its report entitled *Nunca Más* (Never Again), which became one of the key documents in uncovering the crimes of the regime, listing 8,960 confirmed cases of disappearances (CONADEP, 1984), however, human rights organisations suggested that the actual number could be as high as 30,000 due to the fear of relatives to disclose information (Crenzel, 2015). The report highlighted the horrific methods of repression, which included abductions, torture and killings. The full report is available online and has had a huge impact on shaping truth and justice policies in Argentina, as well as attracting much attention around the world (Crenzel, 2015).

CONADEP was one of the first commissions and became an example for many others to follow. Unlike the TRC in South Africa, it did not grant exemptions from criminal liability, and the information from victims received by the commission became the basis for further judicial investigations and prosecutions (Hayner, 2011, pp. 46-47).

Perhaps the main purpose of the truth-seeking component of transitional justice is to document the crimes and experiences of the victims. In addition to documenting human rights violations, it also provides victims with relief through the acknowledgement of their suffering. Depending on the context, documentation can serve as a basis for future legal proceedings, memorial initiatives or academic research. In many cases, such as in South Africa, truth commissions also aim to promote reconciliation, helping society to overcome the trauma of the past through collective reflection on crimes (to a certain extent).

However, in the Ukrainian context of an ongoing international armed conflict, the involvement of both sides in a truth commission does not seem feasible. Ukraine continues to defend its independence from Russia's aggression, and in this situation, the possibilities for establishing a bilateral commission to investigate the crimes of both sides of the conflict seem utopian. This greatly complicates the process of achieving reconciliation through the mechanisms that worked in the countries with internal conflicts mentioned above.

It is worth noting that in the context of internal conflicts, victims' testimonies often face serious obstacles because people remain in the territories controlled by their perpetrators or under the authority of state institutions that may have been involved in human rights violations. This creates an environment of fear and repression, where testimony can lead to harassment or threats to personal safety. The internal nature of the conflicts makes it difficult to openly discuss the crimes experienced due to political pressure that keeps victims silent until the transition period.

The context is quite different in cases of international conflicts, such as the war in Ukraine. In an international conflict, where one side is the aggressor and the other is defending its territory, testimonies from victims in government-controlled areas can be provided much more freely. Victims in government-controlled areas can testify openly, knowing that their safety is guaranteed by Ukrainian law enforcement. They can testify in relative safety, knowing that the state will not prosecute them for reporting crimes, unlike in situations of internal conflict, where such testimony can lead to persecution by non-democratic state structures.

However, in the case of the occupied territories of Ukraine, it is more difficult for victims of the conflict to share their experiences due to repressive measures taken by the occupying authorities. The occupied territories are often more difficult to access for international observers and human rights organisations, which complicates the process of collecting testimonies. Victims in these territories are in danger due to the threat of reprisals, abductions or even physical violence for testifying about war crimes. In such cases, documentation becomes extremely difficult, as there are no protection mechanisms for victims, and their testimonies often require secret means of transmission or testimony through third parties.

If there were a Truth Commission in Ukraine (for example, only for victims on the territory of Ukraine), as a transitional justice mechanism, it could serve as a tool for systematic collection of information about war crimes, human rights violations and other crimes related to the aggression against Ukraine. Such a commission could serve as a platform for collecting testimonies from victims and witnesses, forming a (public) picture of what happened, and contributing to the establishment of historical justice. However, it is worth noting that there are already some systemic initiatives in Ukraine aimed at documenting

and investigating war crimes. One such initiative is the Unified State Hub for the Collection of War Crimes Evidence, which was established to centrally collect and systematise evidence of human rights violations and war crimes committed during the war. The Hub operates as a platform coordinated by the Office of the Prosecutor General. The main goal of the hub is to create a single database for collecting evidence, which will help avoid duplication of investigations and facilitate the effective prosecution of war criminals both in Ukraine and abroad (Rivne Regional State Administration, 2022). In order to submit information for documentation, a person has to provide information about the witness, when and where the crime was committed, information about the crime, and possible information about the perpetrator.

In addition to state authorities, international and national human rights organisations play an important role in documenting crimes. The United Nations Human Rights Monitoring Mission in Ukraine actively collects evidence of human rights violations at all stages of the conflict, and as of 2024, more than 60 reports on human rights violations in Ukraine, including those caused by the conflict, have been published (Office of the United Nations High Commissioner for Human Rights, no date). Civil society organisations, such as the Centre for Civil Liberties, also collect testimonies from victims of the war, often working with international partners to ensure that the situation is presented as fully and objectively as possible.

Documentation, information gathering by organisations and a single state hub for collecting evidence of war crimes are important steps to document crimes and further support prosecutions, as did truth commissions in the past. However, key issues regarding the right to truth remain unresolved. In particular, the issue of determining the fate of victims, ensuring public access to information, which is difficult in the context of the ongoing conflict, and reporting on crimes committed. These aspects require further development in order to fully guarantee the right to truth in Ukraine and can be further implemented based on the practice of opening archives on the activities of the Soviet government.

Prosecutions

The war between Ukraine and Russia, which has been going on since 2014 and escalated significantly in 2022, has caused serious violations of international law and numerous war crimes, including mass killings of civilians and the transfer of Ukrainian children to the

territory of the Russian Federation. In this context, the issue of accountability for these crimes becomes one of the key elements of transitional justice in Ukraine.

As an instrument of transitional justice, accountability has been described by many researchers in the field of genocide studies, international law, and global justice, in particular, by Tatel (2000), who examines the dilemma of amnesty and punishment, Akhavan (2001) examines the role of the International Criminal Tribunal for the former Yugoslavia (ICTY) and Rwanda (ICTR) in the perception of international justice, and recognises their limitations, Jones (2016) comprehensively describes national and international judicial practices for punishing perpetrators of massive human rights violations.

Accountability is an important and logical component of transitional justice, as ‘the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation’ (International Criminal Court, 1998).

The question of how to bring perpetrators to justice has no simple answer and is complex in organisational, political and other dimensions. However, Ukrainian institutions are actively working to create mechanisms to bring perpetrators to justice. This includes both domestic legal processes and the search for international instruments of justice.

As mentioned, since 2014, the Ukrainian state has faced numerous cases of human rights violations and war crimes in the temporarily occupied territories. The forced displacement of children has become one of the most significant examples of such violations. According to the Office of the Prosecutor General of Ukraine, more than 19,000 children have been illegally transferred to Russia or the occupied territories (State portal for searching for children ‘CHILDREN OF WAR’, 2024). Such actions violate Article 49 of the Geneva Convention IV relative to the Protection of Civilian Persons in Time of War, which prohibits the forcible transfer or deportation of persons from occupied territories (International Committee of the Red Cross, 1949). In addition, such actions may qualify as the crime of genocide under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (United Nations, 1948).

In March 2023, the International Criminal Court (ICC) issued arrest warrants for Russian President Vladimir Putin and Children's Commissioner Maria Lvova-Belova on suspicion of illegally deporting children from Ukraine to Russia. In a statement by Prosecutor Karim A. A. Khan KC states that there are reasonable grounds to believe that each of the suspects is responsible for the war crime of illegal deportation of the population and illegal transfer of population from the occupied territories of Ukraine to the Russian Federation (Office of the Prosecutor, 2023). This was one of the first steps in bringing war criminals to justice.

In August 2024, Ukraine ratified the Rome Statute of the ICC, completing a long process of integration into the international criminal justice system (Ukraine, 2024). This action of the state will promote cooperation with the ICC and the use of its tools to bring perpetrators to justice, in particular, representatives of Ukraine will be able to participate in the preparation of documents related to the activities of the International Criminal Court, in the selection of judges, nomination of judges, policy development, participation in meetings, etc.

Despite the cooperation with the ICC, there is a need to create additional mechanisms for prosecuting the crime of aggression, as the ICC's jurisdiction over this crime is limited. In this regard, Ukrainian policy makers are considering several options.

The first option is an internationalised Ukrainian tribunal, which integrates international standards into the Ukrainian judicial system by allowing for the involvement of international judges and prosecutors (Smyrnov, 2023). Such a solution could increase the legitimacy of trials and ensure compliance with international standards of justice. However, there may be challenges related to limited international support and recognition of such a tribunal.

The second option is a hybrid tribunal model that combines national and international elements. This approach has been applied successfully in Sierra Leone and Cambodia, where hybrid tribunals have ensured effective prosecution of war crimes and crimes against humanity (Ciorciari and Heindel, 2014). A hybrid tribunal can provide a high level of international legitimacy and effectiveness, but requires complex international arrangements and significant resources, as has been the case in the past.

The third option is to establish the tribunal through the UN General Assembly. This would circumvent Russia's veto in the Security Council and ensure wider international support.

Establishing a tribunal through the UN General Assembly could provide the necessary legitimacy and promote accountability at the highest level (Tropin, 2023). However, such a process can be lengthy and requires the consolidation of the international community, which can take a long time.

Ukraine may also conclude an agreement with a group of states or international organisations to establish a special tribunal. The European Union, for example, has expressed support for the idea of establishing a special tribunal to investigate the crime of aggression against Ukraine (European Parliament, 2023). Such a tribunal could be established on the basis of a multilateral agreement, which would ensure its international legitimacy. However, the establishment of any institution to prosecute the crime of aggression faces a number of legal challenges. The crime of aggression is difficult to prosecute, as the practice of prosecuting this crime is limited. In addition, there are issues with the immunity of state officials. Under international law, heads of state and government enjoy immunity from prosecution in foreign courts (International Court of Justice, 2002).

Enforcing court decisions is another challenge. Without Russia's cooperation, the arrest and prosecution of high-ranking officials appears unlikely. Therefore, it is important to strengthen international pressure and sanctions mechanisms that can encourage cooperation or at least limit the ability of suspects to travel following an arrest warrant issued by the Russian president.

Given these challenges, the most effective option for Ukraine may be to establish a hybrid tribunal with the participation of international partners. This would ensure the necessary level of internationalisation, increase the credibility of the trials and attract international resources. The hybrid tribunal could have jurisdiction over the crime of aggression, war crimes and crimes against humanity committed on the territory of Ukraine.

Ukraine should continue its diplomatic efforts to gain international support and cooperation, and work to strengthen its national judiciary. The involvement of civil society and victims in the justice process is also an important element of a successful transitional justice strategy, as it should be a comprehensive process that includes not only prosecution, but also truth and reparation and institutional reforms.

Reparations

While bringing perpetrators to justice is critical to establishing justice, it is equally important to provide reparations to victims. International standards, such as 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' (UN General Assembly, 2005), emphasise that reparations are aimed at restoring violated human rights. This includes both material and non-material measures aimed at ensuring justice, compensation, rehabilitation and guarantees of non-recurrence.

In the case of Ukraine, the main purpose of reparations is to remedy the damage caused to Ukrainian citizens by the Russian Federation during the conflict. This is not only a matter of material compensation, but also of recognising the fact of human rights violations, restoring the dignity of victims and ensuring their rights. At the same time, the Ukrainian state, for its part, has the obligation to create conditions for the restoration and protection of the human rights of its citizens. This includes providing support to victims, ensuring access to justice, reforming institutions and implementing policies aimed at protecting human rights.

International experience shows a variety of approaches to reparations, their effectiveness and challenges in implementation.

In the Republic of South Africa, the Truth and Reconciliation Commission (TRC) recommended the implementation of reparations programmes for victims of systematic human rights violations. Individual reparations were provided for victims of gross violations, but their implementation faced financial difficulties and delays in payment. The government approved a lump sum payment significantly lower than recommended by the TRC, which has led to disappointment among victims and criticism from civil society (Pradier, Rubin and van der Merwe, 2018). Although politicised, collective reparations have been more successful in improving the living conditions of the population, they have not always been appropriate to specific contexts (Pradier, Rubin and van der Merwe, 2018). South Africa's experience shows that political will and sufficient funding are critical factors for the success of reparations programmes. However, it is equally important to balance, or rather prioritise, the needs of victims over political interests to ensure the goals of transitional justice.

Rwanda, after the 1994 genocide, faced numerous challenges, especially in terms of bringing perpetrators to justice and reparations. Rwanda's experience is an example of transition, with a clear community-based approach, as a system of traditional gacha courts was introduced to deal with crimes and restore justice (Lakin and Wibabara, 2023). Material reparations have faced resource constraints, and victims have been provided with mostly symbolic measures, such as formal apologies. Collective reparations have also included community reconstruction, infrastructure development and memorialisation, which have contributed to the restoration of social cohesion. However, issues of security and psychological support for victims remained problematic (Lakin and Wibabara, 2023).

Another example, which also had an international context, is the reparations to the victims of Nazism, including financial compensation and property restitution after the end of World War II, paid by Germany, as described by Barkan (2000). This author also describes this long process of negotiation and payment, and that political will and international pressure contributed to the success of the process.

In the Ukrainian context, the reparations process faces a number of challenges.

First, in the theory of transitional justice, there is a lot of research on reparations following domestic human rights violations, while in Ukraine the aggressor is another state - the Russian Federation - which refuses to acknowledge its responsibility and pay reparations, making it difficult to obtain compensation through interstate mechanisms and requiring active diplomatic efforts and international pressure.

Secondly, the ongoing conflict complicates the implementation of reparations programmes and the restoration of basic human rights, especially in the war zones.

Third, Ukraine has limited financial resources due to military spending and economic difficulties, which limits the state's ability to finance large-scale reparations programmes.

Despite the ongoing war, the Ukrainian state is implementing legislative initiatives aimed at supporting victims. The Law 'On Ensuring the Rights and Freedoms of Internally Displaced Persons' was adopted, which provides financial assistance, access to housing, healthcare and education for IDPs (Ukraine, 2014). Parliament is working on a draft law on reparations for victims of sexual violence, which provides for medical, psychological and

legal assistance, as well as financial compensation (Ukraine, 2024b), which also brings the legislation closer to international standards on compensation and rehabilitation of victims.

In addition to legislative work, Ukraine, according to the Minister of Justice, is also exploring the possibility of using frozen Russian assets abroad, which could be used, among other things, to finance reparations programmes (Maliuska, 2024).

For effective implementation of reparations in Ukraine, it is necessary to take into account international experience and adapt it to the Ukrainian context.

A combination of different types of reparations may be the best approach. Individual reparations can be targeted at the most vulnerable groups, such as victims of sexual violence and returned children. Meanwhile, collective and symbolic reparations, such as commemorative events, monuments, and the restoration of territories and infrastructure, would help restore dignity to a wider range of people.

Given the ongoing work, the Ukrainian state should take a comprehensive approach to reparations, including reducing bureaucratic obstacles, ensuring that victims are involved in the design and implementation of programmes to ensure they meet their real needs, and ensuring victims' safety and psychological support, where relevant.

And as the conflict continues, international work is crucial to provide financial and technical assistance, as well as to help pressure Russia to hold it accountable.

Institutional reforms

The other component of transitional justice, which is institutional reforms and guarantees of non-recurrence, is closely linked to the other components, as it is the institutions that must ensure the restoration of rights, reparations, and contribute to the reconstruction of society and the non-recurrence of past horrors.

Unlike in countries where human rights violations were caused by internal conflicts or repressive regimes, in Ukraine the main source of violations is external, so approaches to institutional reform require different strategies aimed at strengthening state institutions and their ability to counter external threats.

Peace agreements often serve as key instruments in post-conflict processes and transitional justice, establishing a framework for ending the conflict and providing guarantees of non-recurrence, as was the case in Colombia. In the case of Ukraine, a post-conflict agreement with Russia could be an important mechanism for restoring territorial integrity and establishing a sustainable peace.

However, the challenges lie in the lack of trust in Russia to comply with the provisions of a possible agreement, given its previous experience of violating international obligations (Mälksoo, 2014). This situation complicates the possibility of consideration, elaboration, public acceptance and, consequently, reaching an effective agreement that would provide guarantees of non-recurrence.

For Ukraine, this is primarily due to the experience associated with the 1994 Budapest Memorandum, which was signed by Ukraine, Russia, the United States and the United Kingdom and provided Ukraine with security guarantees in exchange for giving up nuclear weapons. However, the subsequent annexation of Crimea and aggression in Donbas showed that these guarantees were not respected by Russia (Budjeryn, 2019). Subsequent political agreements in the form of the Minsk Agreements also failed to provide certainty about the reliability of cooperation with the Russian authorities, which demonstrates the low effectiveness of international agreements that lack enforcement mechanisms. This experience of Ukraine and Russia, on the one hand, may stimulate the search for additional ways to ensure non-recurrence through agreements, for example, through additional international guarantees, sanctions mechanisms and the participation of international organisations in monitoring the implementation of agreements, or, on the other hand, may become a reason for refusing to sign any international document with Russia.

In case Ukraine decides to develop and sign a peace agreement, international experience shows that for a successful peace agreement, it is important to have political will of the parties, mechanisms for monitoring implementation (Stedman, 1997), and involvement of civil society from the process of agreement development to implementation (Paffenholz, 2014). However, the likelihood of signing such an agreement does not seem high in the near term in my opinion.

In general, any transitional period inevitably entails institutional changes. For example, in Rwanda, the 1994 genocide was organised and carried out by the government, followed by

the establishment of justice mechanisms and reform of institutions (which are now tending towards authoritarianism) (Mitchell, 2018). In Colombia, years of internal conflict led to massive human rights violations by all parties, including state institutions, and government transition began as the end of the conflict approached (Saffon and Uprimny, 2010). In South Africa, too, the apartheid regime led to systematic human rights violations due to an institutionalised system of racial discrimination (Gibson, 2004), which subsequently required a paradigm shift.

Although Ukrainian institutions are not the main perpetrators of human rights violations, they face internal challenges that may impede effective protection of human rights and resistance to external aggression, which include corruption, eroding trust and effectiveness (Transparency International, 2024); a dependent and non-transparent judiciary; and low law enforcement capacity, which limits the ability to protect human rights (Laboratory of Legislative Initiatives *et al.*, 2023).

Nevertheless, at the moment, it is more concrete to focus on actions that Ukraine as a state can take without Russia's involvement - institutional reforms that will help restore rights and build statehood. European integration is one of the key factors driving reforms in Ukraine, as Ukraine has committed itself to implementing European legislation in various areas in order to join the EU. European integration also stimulates political processes of whole-of-government institutional reform, as it is a prerequisite for financial support from the EU, which has been critical in recent years.

In 2024, the Government of Ukraine approved the Action Plan for Law Enforcement Reform for 2023-2027 (Klymenko, 2024), which includes not only measures to reform law enforcement agencies or bodies with the function of pre-trial investigation of criminal offences, but also other law enforcement agencies, executive authorities with controlling powers and prosecutors. In this regard, the title of the document 'reform of law enforcement agencies' is much narrower than its content, which is, among other things, due to the negotiation process with the EU, which sets out a universal framework covering the entire criminal justice sector. Thus, the Action Plan contains provisions not only for institutional reforms, but also for the development of criminal procedure, the introduction of a formalised criminal policy, and public control over the activities of these bodies.

This and similar steps may be considered to be in line with general recommendations on the implementation of transitional justice and institutional change, such as the Secretary-General's Guidance note (UN, 2023), but some of the government's actions have been criticised in terms of involving stakeholders and civil society in the development of strategic documents (Krapyvin, 2024). As for other challenges to institutional reforms, the general lack of significant progress in recent years, regardless of European integration, is the first thing to mention. As noted above, it is important for Ukraine not only to reform institutions and their functions, but also to strengthen their capacity.

According to the OECD (2024), the public administration reform that began in 2016 has slowed down significantly since 2018. This was due to several factors, including political change, a lack of a clear vision for the continuation of the reform, and a lack of human resources and funding. This has resulted in many key reforms, particularly in the area of law and order, remaining at the planning or partial implementation stage.

Within the framework of transitional justice, the fight against corruption in state institutions, in particular in law enforcement agencies, remains an important issue, as it undermines trust in justice and becomes a serious obstacle to the effective implementation of reforms.

The main challenges to institutional reforms in Ukraine remain the human resources and funding shortages that were already present even before COVID19 and the full-scale Russian invasion (Soroka, 2019). According to the National Agency of Ukraine on Civil Service (2022), there are about 160,000 civil servants in Ukraine, which is significantly less than, for example, in Sweden, where the population is smaller and the number of civil servants exceeds 250,000 (European Public Administration Network, 2020). Obviously, the lack of staff limits the ability of state bodies to effectively perform their functions, especially in times of war.

In addition, the dependence of state institutions on international technical assistance projects is also a challenge. In Ukraine, there are a significant number of ITA projects that sometimes replace the work of civil servants, which does not contribute to the development of institutional capacity. Of course, there is a need to use international assistance more effectively, which is an important condition for the successful implementation of institutional reforms, but adequate funding and staffing are key aspects.

Despite the challenges, the digitalisation of public services has been a major step forward, improving the interaction between the state and citizens. In this way, technology simplifies access to public services and increases the transparency of government work. One of the most notable achievements in this area is the creation of the Diia app, which allows citizens to apply for various services, including compensation for war-related damage (Bielikova, 2022). This improves the efficiency of interaction between the state and citizens and avoids bureaucratic delays, although legal regulation remains important and difficult to address.

Digitalisation also contributes to the transparency of the transitional justice process, as it allows citizens to easily access information on legal procedures, including war crimes investigations, compensation for war victims, and informing the state about crimes and victims, as mentioned above.

Conclusions

Ukraine has had a unique and difficult experience with the processes of restoring justice since the collapse of the Soviet Union. One of the first major steps that can be considered part of transitional justice was the restoration of historical truth through the opening of the archives of the Soviet secret services, which contributed to the formation of collective memory. Since independence, materials have been opened, allowing scholars and the public to access documents that were previously closed, which has revealed the truth about the crimes of the totalitarian regime.

On the other hand, the post-communist transformation of Ukraine has left significant gaps, so it would be difficult to conclude that all possible options for overcoming the crimes of the Soviet Union have been implemented.

The current situation with Russian aggression has put forward new challenges for Ukraine, which stimulates the reconsideration of approaches to transitional justice and the development of strategies for the new conditions.

The right to truth is one of the main elements of transitional justice. In this context, Ukraine can benefit from the experience of other countries that have established institutions, including truth commissions, to document crimes and collect testimonies from victims. At

the moment, the country is building a system for collecting information and testimonies, but the issue of access to this data remains open. Access to data on victims and crimes now may put victims or even perpetrators in danger, so the best solution may be to make such information available after a certain period following the conflict, thus ensuring the right to truth for society.

Accountability for war crimes is one of the most important elements of transitional justice, as without fair punishment for crimes, it is impossible to build sustainable peace. Ukraine is actively deepening its cooperation with the International Criminal Court, which has issued arrest warrants for Russian politicians.

In order to effectively bring the perpetrators to justice, Ukraine must choose a model of an institution that will receive international recognition and will be able to recognise the crime of aggression. A hybrid tribunal may be the most appropriate option. Based on international experience, accountability requires independent judicial processes, sufficient funding and broad international support, including pressure.

Reparations are a complex but integral part of the transitional justice process. In Ukraine's case, the main problem is that the aggressor is another state that refuses to acknowledge its responsibility for the crimes and pay reparations. In this regard, Ukraine needs active diplomatic efforts and support from the international community to ensure compensation for victims of aggression. A possible solution is to use frozen Russian assets abroad to finance reparations programmes that should be developed with the active involvement of individual and collective victims.

Institutional reforms are important to ensure the effective use of transitional justice instruments and to prevent future human rights violations. At the moment, guarantees of non-recurrence are a complicated issue, and it is difficult to choose an approach. However, institutional changes can take place now and should cover all aspects of public administration, from reforming the judiciary and law enforcement agencies to anti-corruption measures and ensuring transparency in the work of state institutions.

Strengthening the capacity of state institutions is one of the priority tasks that can be accomplished within the framework of EU integration.

In general, the application of transitional justice in Ukraine is a multifaceted process that requires a combination of international experience and national realities and capacities. Ukraine has already made important steps on this path, but many challenges remain to be overcome. It is important to ensure that this process is transparent, open to civil society participation and supported by international partners.

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