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**INTERNATIONAL EFFORTS TO COLLECT EVIDENCE RELATED  
TO RUSSIA’S AGGRESSION AGAINST UKRAINE**

STEVEN HILL\*

ABSTRACT

*International law has been at the very center of the global response to Russia’s aggression against Ukraine since February 2022. Evidence collection has become one of the core elements of this international law response. The April 2023 keynote address on which this article is based focused on international efforts to collect evidence related to Russia’s aggression against Ukraine. Specifically, this article focuses on responses in Ukraine, the United States, the European Union, and other jurisdictions on behalf of governments, international organizations, and civil society organizations to collect evidence related to war crimes, crimes against humanity, genocide, and aggression by all parties to the conflict.*

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International law has been at the very center of the global response to Russia's aggression against Ukraine since February 2022. Evidence collection has become one of the core elements of this international law response.

The keynote address on which this article is based focused on international efforts to collect evidence related to Russia's aggression against Ukraine.<sup>1</sup> Specifically, this article will focus on responses in Ukraine, the United States, and the European Union on behalf of governments, international organizations, and civil society organizations to collect evidence related to war crimes, crimes against humanity, genocide, and aggression by all parties to the conflict.

## I. STATE OF PLAY

### A. *Work in Ukraine*

In Ukraine, efforts to gather evidence have been going on since Russia's illegal and illegitimate annexation of Crimea in 2014 and increased dramatically starting immediately after Russia's further invasion in February 2022.<sup>2</sup>

In this context, Ukraine and Russia bear the primary responsibility for investigating allegations of international crimes. Indeed, Ukrainians have taken the lead; as of February 2023, Ukraine's Prosecutor General Andriy Kostin claimed authorities had registered more than 65,000 Russian war crimes since the further invasion began nearly a year ago.<sup>3</sup> Kostin said the crimes registered include "indiscriminate shelling of civilians, willful killing, torture, conflict-related sexual violence, looting, and forced displacement on a massive scale."<sup>4</sup> As a result, Kyiv's government has opened up a portal dedicated for the public to report war crimes and to submit photos, videos, and other documentation.<sup>5</sup>

In addition to the Ukrainian government's efforts, an impressive array of Ukrainian civil society organizations have contributed to the evidence gathering missions, including the Center for Civil Liberties ("CCL"), which was the recipient of the 2022 Nobel Peace Prize for its work documenting cases of

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1. Ashlynn Zapolski, *International Scholars Travel for CICL and Law Journal Symposium*, SLU LAW (Apr. 24, 2023), <https://www.slu.edu/law/news/2023/cicl-symposium-23.php> [https://perma.cc/2Z9N-T5B5].

2. Michael Biesecker & Erika Kinetz, *Evidence of Russian Crimes Mounts as War in Ukraine Drags on*, AP (Dec. 30, 2022), <https://apnews.com/article/russia-ukraine-war-crimes-government-international-criminal-court-a6edd7e6ed0de527b42a1790dccc33ea> [https://perma.cc/WV6C-MP GG].

3. Amanda Macias, *Russia has Committed More than 65,000 War Crimes in Ukraine, Prosecutor General Says*, CNBC (Feb. 1, 2023), <https://www.cnbc.com/2023/02/01/ukraine-russia-war-65000-war-crimes-committed-prosecutor-general-says.html> [https://perma.cc/6QC5-QV8R].

4. *Id.*

5. Vera Bergengruen, *How Ukraine is Crowdsourcing Digital Evidence of War Crimes*, TIME (Apr. 18, 2022), <https://time.com/6166781/ukraine-crowdsourcing-war-crimes> [https://perma.cc/EZN7-DVLF].

unlawful imprisonment and other abuses against the civilian population in Crimea, Donetsk, and Luhansk.<sup>6</sup> While some organizations, like the CCL, have been working on documenting criminal evidence since the 2014 annexation of Crimea, much of this work was thrust to the front and center starting mere hours after the initial shock of the invasion in February 2022. Indeed, the very name of one of the principal Ukrainian civil society coordinating groups—the 5AM coalition—was born out of that exact day.<sup>7</sup>

As a result of the work done by the Ukrainian government and by Ukrainian civil society groups, Ukraine is “The Most Documented War” with “[a]n overwhelming number of projects . . . reflect[ing] a broad spectrum of needs, motivations, and methodologies of documenting crisis events: preserving endangered heritage, documenting war developments, investigating war crimes and atrocities, tracking destruction and recovery needs, or capturing a multiplicity of everyday practices and war experiences across the country.”<sup>8</sup>

Lastly, to respond to Ukraine’s capacity building needs, numerous international efforts have been launched to support the collection of evidence in Ukraine.

First, the United States and its international partners helped build the capacity of Ukraine’s domestic authorities by contributing \$30 million in support for documentation and prosecution provided through the European Democratic Resilience Initiative launched in March 2022.<sup>9</sup> Second, the Atrocity Crimes Advisory Group (“ACA”), “a partnership between the United States, the European Union, and the United Kingdom [was created] to coordinate institutions to Ukraine’s Office of the Prosecutor General (“OPG”).”<sup>10</sup> The ACA was funded with an initial grant of \$10 million to “assist the OPG in documenting, preserving, and analyzing evidence of war crimes and other atrocities committed in Ukraine, with a view to criminal prosecutions.”<sup>11</sup>

In addition to international governments, international civil society organizations have also stepped in to support evidence-gathering efforts. For example, in May 2022, the State Department announced the launch of the Conflict Observatory, an independent program based at Yale University that

6. Nora Buli & Gwladys Fouche, *In Echo of Cold War, Nobel Peace Prize Goes to Ukraine, Russia, Belarus Rights Campaigners*, REUTERS (Oct. 7, 2022), [https://news.yahoo.com/nobel-peace-prize-2022-ales-090908121.html?fr=sycsrp\\_catchall](https://news.yahoo.com/nobel-peace-prize-2022-ales-090908121.html?fr=sycsrp_catchall) [https://perma.cc/EX2D-JE8F].

7. Bergengruen, *supra* note 5.

8. *The Most Documented War. Symposium for Documentation and Archiving Initiatives*, LVIV CTR. (Mar. 6, 2023), <https://www.lvivcenter.org/en/conferences/the-most-documented-war-2/> [https://perma.cc/AE73-LYXM].

9. *Supporting Justice and Accountability in Ukraine*, U.S. DEP’T OF STATE (Feb. 18, 2023), <https://www.state.gov/supporting-justice-and-accountability-in-ukraine/> [https://perma.cc/DCY7-M2EN].

10. *Id.*

11. *Id.*

uses commercially and publicly available information and geospatial data to identify, track, and document possible atrocities in Ukraine committed by members of Russia's military and its proxy forces.<sup>12</sup> The Conflict Observatory publicly shared reports on Russia's relocation of children, filtration operations, large-scale damage assessments of the cities Mariupol and Bakhmut, and the destruction of crop storage facilities across the country.<sup>13</sup>

A separate report traces and documents cases of individuals, including Ukrainian POWs and civilians, subjected to filtration and forced deportations to Russia and territories under its control and, whenever possible, provides them with relevant legal assistance.<sup>14</sup>

### B. *Work at the International Level*

At the international level, the International Criminal Court ("ICC"), under the leadership of Prosecutor Karim A.A. Khan KC, has been at the forefront of promoting mechanisms for international accountability.<sup>15</sup> Although Ukraine is not a State Party to the Rome Statute and, therefore, crimes committed in the conflict are not automatically under the jurisdiction of the ICC, Ukraine has made two declarations accepting ICC jurisdiction.<sup>16</sup> Forty State Parties

12. *Promoting Accountability for War Crimes and Other Atrocities in Ukraine*, U.S. DEP'T OF STATE (May 17, 2022), <https://www.state.gov/promoting-accountability-for-war-crimes-and-other-atrocities-in-ukraine/> [https://perma.cc/T379-2EMP].

13. Kaveh Khoshnood et al., *Russia's Systematic Program for the Re-Education & Adoption of Ukraine's Children*, YALE SCH. OF PUB. HEALTH (Feb. 14, 2023), <https://hub.conflictobservatory.org/portal/sharing/rest/content/items/97f919ccfe524d31a241b53ca44076b8/data> [https://perma.cc/F6Q3-AYD7]; *Bakhmut Damaged Building Assessment*, CONFLICT OBSERVATORY (Jan. 31, 2023), <https://hub.conflictobservatory.org/portal/apps/sites/#/home/pages/bakhmut-1> [https://perma.cc/JX38-6X6K]; *A Timeline of Mariupol's Destruction*, CONFLICT OBSERVATORY (Nov. 15, 2022), <https://hub.conflictobservatory.org/portal/apps/sites/#/home/pages/mariupol-1> [https://perma.cc/A9Q9-Y87Q]; *Ukraine's Crop Storage Infrastructure: Post-Invasion Impact Assessment*, YALE SCH. OF PUB. HEALTH (Sept. 15, 2022), <https://hub.conflictobservatory.org/portal/sharing/rest/content/items/67cc4b8ff2124d3bbd5b8ec2bdaece4f/data> [https://perma.cc/25TD-LBQ9]; Kaveh Khoshnood et al., *System of Filtration: Mapping Russia's Detention Operations in Donetsk Oblast*, YALE SCH. OF PUB. HEALTH (Aug. 25, 2022), <https://hub.conflictobservatory.org/portal/sharing/rest/content/items/7d1c90eb89d3446f9e708b87b69ad0d8/data> [https://perma.cc/LB24-Q9NF].

14. Kaveh Khoshnood et al., *Extrajudicial Detentions and Enforced Disappearances in Kherson Oblast*, YALE SCH. OF PUB. HEALTH (Nov. 18, 2022), <https://hub.conflictobservatory.org/portal/sharing/rest/content/items/90f22f80754042c597f85529c42e8f6b/data> [https://perma.cc/QC48-RAVV]; Kaveh Khoshnood et al., *System of Filtration: Mapping Russia's Detention Operations in Donetsk Oblast*, YALE SCH. OF PUB. HEALTH (Aug. 25, 2022), <https://hub.conflictobservatory.org/portal/sharing/rest/content/items/7d1c90eb89d3446f9e708b87b69ad0d8/data> [https://perma.cc/CJV3-X48G].

15. For an overview of the actions of the ICC Prosecutor since February 2022, see *Situation in Ukraine*, INT'L CRIM. CT. (Mar. 2, 2022), <https://www.icc-cpi.int/situations/ukraine> [https://perma.cc/V67K-3NYL].

16. *Id.*

subsequently referred the situation to the ICC on March 1, 2022.<sup>17</sup> Subsequently, an investigation was opened on March 2, 2022, that focused on alleged crimes committed in the context of the situation in Ukraine since November 21, 2013, when the initial investigation began.<sup>18</sup>

On March 17, 2023, the ICC Pre-Trial Chamber II “issued warrants of arrest for two individuals in the context of the situation in Ukraine: Mr. Vladimir Vladimirovich Putin,” President of the Russian Federation, and Ms. Maria Alekseyevna Lvova-Belova, Commissioner for Children’s Rights in the Office of the President of the Russian Federation.<sup>19</sup>

Based on the Prosecution’s applications of 22 February 2023, Pre-Trial Chamber II considered that there are reasonable grounds to believe that each suspect bears responsibility for the war crime of unlawful deportation of population (children) and that of unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation, in prejudice of Ukrainian children.<sup>20</sup>

Like the Office of the Prosecutor in Ukraine, the ICC “Office of the Prosecutor has established a dedicated portal through which any person that may hold information relevant to the Ukraine situation can contact ICC investigators.”<sup>21</sup>

Furthermore, on March 4, 2022, the UN Human Rights Council established the UN Independent International Commission of Inquiry (“COI”) on Ukraine.<sup>22</sup> The COI issued its first written report on October 18, 2022, finding that war crimes and violations of human rights and international humanitarian law had been committed in Ukraine since February 24, 2022.<sup>23</sup> On March 15, 2023, the second report found that war crimes, indiscriminate attacks on infrastructure, and systematic and widespread torture show disregard for civilians.<sup>24</sup>

In addition, in March and June 2022, forty-five participating States invoked the OSCE’s Moscow Mechanism.<sup>25</sup> Two reports to date have found “clear

17. *Id.*

18. Press Release, International Criminal Court, Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation (Mar. 2, 2022), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states> [<https://perma.cc/6XG2-YU7P>].

19. Press Release, International Criminal Court, Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Vladimir Vladimirovich Putin and Maria Alekseyeva Lvova-Belova (Mar. 17, 2023), <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and> [<https://perma.cc/RB2T-NQN2>].

20. INT’L CRIM. CT., *supra* note 16.

21. *Id.*

22. *Human Rights Council to Establish Commission of Inquiry on Ukraine*, UN NEWS (Mar. 4, 2022), <https://news.un.org/en/story/2022/03/1113292> [<https://perma.cc/JYG9-9QJ3>].

23. U.N. GAOR, 77th Sess., 533d mtg. at 6-8, U.N. Doc. A/77/533 (Oct. 18, 2022).

24. U.N. HRC, 52nd Sess., 62d mtg. at 1, U.N. Doc. A/HRC/52/62 (Mar. 15, 2023).

25. *Ukraine Appoints Three Experts to be Part of a Mission Under the OSCE’s Moscow Mechanism*, OSCE OFF. DEMOCRATIC INST. & HUM. RTS. (June 7, 2022), <https://www.osce.org>

patterns of serious violations of international humanitarian law attributable mostly to Russia's armed forces . . . in the territories under the effective control of the Russian Federation' as well as evidence of direct targeting of civilians, attacks on medical facilities, rape, torture, executions, looting, and forced deportation of civilians to Russia."<sup>26</sup>

Moreover, "the Eurojust Genocide Network, which promotes close cooperation between European national authorities investigating and prosecuting genocide, crimes against humanity, and war crimes . . . is supporting the coordination of investigations and prosecutions between Ukraine and Member States through the JIT on Ukraine, which includes Lithuania, Poland, Ukraine, Estonia, Latvia, Slovakia, Romania, and the International Criminal Court."<sup>27</sup> Further, Eurojust is in the process of setting up the International Centre for Prosecution of the Crime of Aggression against Ukraine ("ICPA").<sup>28</sup> The main purpose of the ICPA is to support and enhance investigations into the crime of aggression by securing key evidence and facilitating case building at the earliest possible stage.<sup>29</sup> Eurojust has also established the Core International Crimes Evidence Database, a tailor-made judicial database to preserve, store, and analyze evidence of core international crimes in a secure mode.<sup>30</sup>

Finally, as the debate continues about whether prosecution for the crime of aggression should proceed in an international or hybrid tribunal, the United States has expressed support for the establishment of a special tribunal dedicated to prosecuting those most responsible for the crime of aggression: one that is rooted in Ukraine's judicial system but enhanced with international elements in the form of personnel, expertise, structure, and support (including in terms of funding and cooperation).<sup>31</sup> Given the multiplicity of venues for prosecuting war

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/odih/519834#:~:text=On%2020June%202022%20and%20following%20consultation%20with,within%20Ukraine%20%80%99s%20internationally%20recognized%20borders%20and%20territorial%20waters%20%80%9D [https://perma.cc/ZWS8-KXGW].

26. *Supporting Justice and Accountability in Ukraine*, U.S. EMBASSY GUAT. (Feb. 22, 2023), <https://gt.usembassy.gov/supporting-justice-and-accountability-in-ukraine/> [https://perma.cc/XH8V-H85M].

27. *Id.*

28. Mike Corder, *Eurojust to Support Probes into Aggression in Ukraine War*, AP NEWS (Feb. 23, 2023), <https://apnews.com/article/european-union-crime-europe-bed731959f2d1fd749d4e4e95668ff97#:~:text=The%20new%20International%20Center%20for%20Prosecution%20of%20the,facilitating%20case%20building%20at%20the%20earliest%20possible%20stage.%20%80%9D> [https://perma.cc/EE2V-CMYL].

29. *See International Center for Prosecution of the Crime of Aggression Against Ukraine*, EUR. UNION AGENCY CRIM. JUST. COOP., <https://www.eurojust.europa.eu/international-centre-for-the-prosecution-of-the-crime-of-aggression-against-ukraine> [https://perma.cc/8746-4HJN].

30. *Core International Crimes Evidence Database (CICED)*, EUR. UNION AGENCY CRIM. JUST. COOP. (Feb. 23, 2023), <https://www.eurojust.europa.eu/publication/core-international-crimes-evidence-database-ciced> [https://perma.cc/WB9S-ZJFJ].

31. Jennifer Hansler, *US Announces It Supports Creation of Special Tribunal to Prosecute Russia for 'Crime of Aggression' in Ukraine*, CNN POL. (Mar. 28, 2023), <https://edition.cnn.com>

crimes and the crime of aggression, it is especially essential to have venue-neutral evidence gathering in order to make sure that evidence is admissible in all potential venues.<sup>32</sup>

### C. *Work in Other Countries*

“Many countries—including the United Kingdom, Germany, Lithuania, and Sweden—have announced the opening of investigations into atrocity crimes within their domestic legal systems.”<sup>33</sup> These countries are capable of domestic investigation and prosecution due to universal jurisdiction, which provides jurisdiction for a court to examine certain acts no matter where they were committed, even if the suspects and the victims are foreign citizens.<sup>34</sup>

In contrast, the United States does not possess the same tools to investigate and potentially prosecute international crimes. In particular, the U.S. does not have universal jurisdiction over crimes against humanity and other atrocity crimes.<sup>35</sup> However, in December 2022, Congress strengthened U.S. law in this respect by passing the Justice for Victims of War Crimes Act, which provides universal jurisdiction in cases where the defendant is present in the United States.<sup>36</sup> This amendment to the U.S. war crimes statutes closed some loopholes but left many still open.

## III. CHALLENGES

While much progress has been made by the international community, many challenges remain.

/2023/03/28/politics/us-support-special-tribunal-crime-of-aggression/index.html [https://perma.cc/7PB3-N74B].

32. See, e.g., Lauren Baillie, *Ukraine: Justice for War Crimes Must Begin with Evidence*, U.S. INST. FOR PEACE (Apr. 7, 2022), <https://www.usip.org/publications/2022/04/ukraine-justice-war-crimes-must-begin-evidence> [https://perma.cc/ZX5D-WZ5X] (“Achieving the fullest accountability for crimes will require these disparate investigations to efficiently share information and to collaborate on prosecution strategies for offenders within different venues.”).

33. U.S. EMBASSY GUAT., *supra* note 26.

34. See generally *Basic Facts on Universal Jurisdiction: Prepared for the Sixth Committee of the United Nations General Assembly*, HUM. RTS. WATCH (Oct. 19, 2009, 8:45 AM), <https://www.hrw.org/news/2009/10/19/basic-facts-universal-jurisdiction#:~:text=Over%20the%20past%2015%20years%2C%20a%20number%20of,Switzerland%2C%20the%20United%20Kingdom%2C%20and%20the%20United%20States%29> [https://perma.cc/E7V3-S6JP].

35. See, e.g., Jeremy Gutner, *How to Get Away with Crimes Against Humanity: The Statutory Gap in US Law*, JUST SEC. (Sept. 8, 2023), <https://www.justsecurity.org/88084/how-to-get-away-with-crimes-against-humanity-the-us-statutory-gap> [https://perma.cc/5EZ8-YPBC] (“While many specific acts that are considered crimes against humanity are illegal in the United States, such as murder, rape, or torture, the U.S. laws that punish such behavior lack universal jurisdiction, which limits their scope and application.”).

36. Paras Shah, *Congress Passes Justice for Victims of War Crimes Act*, JUST SEC. (Dec. 22, 2022), <https://www.justsecurity.org/84588/senate-passes-justice-for-victims-of-war-crimes-act/> [https://perma.cc/2TXS-CQBD].



A. *U.S. Posture Vis-à-Vis International Criminal Court*

First, though the Biden administration has taken decisive action in support of the International Criminal Court, the United States' posture vis-à-vis the court has a complicated history.

The United States is not a party to the Rome Statute of the ICC.<sup>37</sup> In 2000, the Clinton administration signed the Rome Statute (which founded the ICC) but did not submit it for Senate ratification.<sup>38</sup> The George W. Bush administration then withdrew the U.S. signature, though it accepted the "reality" of the court.<sup>39</sup> Under the Obama administration, the United States established a working relationship with the Court as an observer, and relations thawed.<sup>40</sup> However, when the ICC tried to investigate the United States in 2017, the Trump administration imposed sanctions (which have since been reversed by the Biden administration) on the court's personnel.<sup>41</sup>

Since April 2022, the United States has supported a range of international investigations into atrocities in Ukraine, "includ[ing] those conducted by the International Criminal Court, the United Nations, and the Organization for Security and Cooperation in Europe."<sup>42</sup>

In March 2023, when the ICC Office of the Prosecutor came forth with arrest warrants for President Vladimir Putin and Maria Lvova-Belova for terrible crimes against Ukraine's children, President Biden publicly stated that the warrant for President Putin's arrest was justified.<sup>43</sup>

Also in March 2023, Beth Van Schaack, the U.S. Ambassador-at-Large for Global Criminal Justice, announced that "[t]he ICC occupies an important place in the ecosystem of international justice, and the United States supports the investigation by the ICC Prosecutor."<sup>44</sup> She also noted that "Congress passed,

37. Charlie Savage, *The U.S. Has Long Been Wary of the I.C.C., But Relations Have Been Thawing*, N.Y. TIMES (Mar. 17, 2023), <https://www.nytimes.com/2023/03/17/world/europe/icc-us-relations.html> [<https://perma.cc/B4HE-NGHQ>].

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. Beth Van Schaack, Ambassador-at-Large, Office of Global Criminal Justice, Remarks at a UN Security Council Arria-Formula Meeting on Ensuring Accountability for Atrocities Committed by Russia in Ukraine (Apr. 27, 2022), <https://usun.usmission.gov/remarks-at-a-un-security-council-arria-formula-meeting-on-ensuring-accountability-for-atrocities-committed-by-russia-in-ukraine/> [<https://perma.cc/3PX6-GJZD>].

43. *US Biden Says War Crimes Charge Against Russia's Putin Justified*, AL JAZEERA (Mar. 18, 2023), <https://www.aljazeera.com/news/2023/3/18/us-biden-says-war-crime-charges-against-russias-putin-justified> [<https://perma.cc/3AKH-7GR4>].

44. Beth Van Schaack, Ambassador-at-Large, Office of Global Criminal Justice, Remarks at the Nuremberg Principles Meeting at Catholic University of America (Mar. 27, 2023), <https://www.state.gov/ambassador-van-schaacks-remarks> [<https://perma.cc/A8FQ-DM23>].

on an overwhelmingly bipartisan basis, legislative amendments to facilitate U.S. cooperation with the ICC relating to the situation in Ukraine.”<sup>45</sup>

### B. *Role of Intelligence*

In addition to efforts undertaken to improve the United States’ relationship with the ICC, another challenge has been coordinating intelligence sharing for the purpose of investigation and prosecution.

The strategic disclosure of intelligence has been a central part of U.S. strategy since before February 2022.<sup>46</sup> NPR’s conclusion at the time of the February invasion was that “[a]ccurate U.S. intelligence didn’t prevent the attack, but it did counter Russian disinformation.”<sup>47</sup> Crucially, the choice to disclose intelligence with allies and to the public raised awareness and prepared the ground for a coordinated and powerful international response.<sup>48</sup>

Beyond the initial role that intelligence played in laying the groundwork for an international response to the further invasion of Ukraine in February 2022, information derived from intelligence or military sources can be essential to obtaining justice for victims. Unfortunately, however, sharing this kind of intelligence poses challenges for states because the information must be transmitted in a manner that protects national security interests, including protecting sources and methods of intelligence collection.<sup>49</sup> Thus, in weighing the decision to share information, intelligence communities in different states must carefully vet incoming requests from international criminal courts or other mechanisms to determine the impact on their security interests against the information’s potential probative value in those fora.<sup>50</sup> Moreover, they may need to navigate internal declassification and other policy processes which are typically complicated and demand intense interagency coordination.<sup>51</sup>

This work has traditionally proceeded on a very confidential basis behind the scenes. That said, given that intelligence will likely become more central in future international prosecutions, there is a need for a forum where states and international mechanisms can exchange their experiences in sharing information

45. *Id.*

46. See, e.g., Rachel Martin & Greg Myre, *U.S. Intelligence Didn’t Stop the Invasion of Ukraine, But It Had Positive Effects*, NPR (Feb. 25, 2022, 5:14 AM), <https://www.npr.org/2022/02/25/1083003294/u-s-intelligence-didnt-stop-the-invasion-of-ukraine-but-it-had-positive-effects> [<https://perma.cc/GMH9-T9D8>].

47. *Id.*

48. See *id.*

49. See Huw Dylan & Thomas Maguire, *Why Are Governments Sharing Intelligence on the Ukraine War With the Public and What Are the Risks?*, THE CONVERSATION (Sept. 26, 2022, 11:09 AM), <https://theconversation.com/why-are-governments-sharing-intelligence-on-the-ukraine-war-with-the-public-and-what-are-the-risks-191114> [<https://perma.cc/AN53-L5L6>].

50. Ashley Deeks, *Intelligence Communities, Peer Restraints, and the Law*, 7 HARV. NAT’L SEC. J. 1, 9 (2015).

51. See *id.* at 10.

to advance accountability with the goal of identifying common challenges as well as concrete steps to improve future work.

### C. *Risks Related to Documentation*

What are we documenting? Who is documenting? Whom are we documenting? These are all extremely important questions.

Since Russia launched its further invasion of Ukraine, a mountain of credible reports of sexual violence have been amassed.<sup>52</sup> In November 2022, President Biden signed a Presidential Memorandum aimed at promoting greater accountability for perpetrators of Conflict-Related Sexual Violence (“CRSV”).<sup>53</sup> To further bolster efforts to combat CRSV, the Department of State has strengthened its support to Pramila Patten, the UN Special Representative to the Secretary General (“SRSG”) on Sexual Violence in Conflict, who has done excellent work towards increasing international attention to the issue.<sup>54</sup> As part of this support, the State Department has committed an additional \$400,000 to its annual \$1.75 million funding contribution to the UN General Assembly for the specific purpose of combating CRSV.<sup>55</sup> The United States and the international community at large need to focus on CRSV reporting and on enhancing pathways for justice and accountability for CRSV crimes.

The Political Declaration of the Ministerial Ukraine Accountability Conference, issued at The Hague in July 2022, suggests that states are attuned to the risks inherent in documentation of CRSV, like “over-documentation, re-interviewing of witnesses, victims, and survivors by various actors, and of exposing those that have already suffered to re-traumatisation through unnecessary recounting of their experiences, as well the risk of secondary victimization, intimidation and retaliation during investigations and trials.”<sup>56</sup> The Declaration “urge[s] all those involved in the documentation of harms to adopt a survivor-centered, trauma-informed approach in keeping with international best practices.”<sup>57</sup>

52. U.S. DEP’T OF STATE, *supra* note 9.

53. *Id.*

54. *Id.* For more information on this office, see *Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict*, U.N., <https://www.un.org/sexualviolenceinconflict/about-us/about-the-office/> [<https://perma.cc/TM95-RBTY>].

55. U.S. DEP’T OF STATE, *supra* note 9.

56. Ukraine Accountability Conference, *The Political Declaration of the Ministerial Ukraine Accountability Conference*, ¶ 16 (July 14, 2022), <https://www.government.nl/documents/diplomatic-statements/2022/07/14/political-declaration-of-the-ministerial-ukraine-accountability-conference> [<https://perma.cc/LL4Z-A5XX>].

57. *Id.*

#### D. Digital Evidence Issues

Just as there have been considerable advances in technology that have generated vast amounts of digital evidence, the magnitude of digital evidence and the disparate nature of the efforts to catalog such evidence have generated challenges. Consequently, there have been efforts to systematize and provide structure to digital evidence.

Specifically, Daragh Murray and the Digital Verification Unit at the University of Essex have worked with Amnesty International and other partners to conduct investigations into human rights violations around the world using open source techniques.<sup>58</sup> As a result of their efforts (as well as the efforts of others like them), “[v]ictims of, and witnesses to, human rights abuses can now document their experiences and share them directly with the world. . . [t]his information can then contribute to broader human rights documentation and accountability mechanisms.”<sup>59</sup>

However, as Alexa Koenig of University of California Berkeley School of Law wrote in a recent article in the *Journal of International Criminal Justice*, “[t]hese digital documentation efforts require training, as well as the sharing of information between various institutions, including UN mechanisms and commissions of inquiry, courts, NGOs and international humanitarian organizations.”<sup>60</sup> The Berkeley Protocol on Digital Open Source Investigations is one example of an attempt to set up some common international standards and guidance on using open source information for international criminal investigations.<sup>61</sup>

In addition to practical guidance like the Berkeley Protocol, there are also some technical solutions being advanced, such as “digital evidence lockers,” to archive social media evidence of atrocity crimes.<sup>62</sup> However, even the most impressive technical solutions will raise questions about governance: What evidence gets preserved? How does it get preserved? Who gets access to it? How do you adjudicate legal and ethical access? How do you cooperate with legitimate authorities? Which ones? What about privacy and informed consent?

58. Matthew Gillett & Erin Pobjie, *Digital Verification Unit*, U. OF ESSEX, <https://www.essex.ac.uk/research-projects/digital-verification-unit>; *A Conversation with Daragh Murray*, QUEEN MARY U. LONDON (Dec. 9, 2022), <https://www.qmul.ac.uk/law/newsletter/items/a-conversation-with-daragh-murray.html> [<https://perma.cc/AVF2-A2XC>].

59. Gillett & Pobjie, *supra* note 58.

60. Alexa Koenig, *From ‘Capture to Courtroom’: Collaboration and the Digital Documentation of International Crimes in Ukraine*, 20 J. INT’L CRIM. JUST. 829, 832 (2022).

61. Lindsay Freeman et al., *Berkley Protocol on Digital Open-Source Investigations*, HUM. RTS. CTR.: U.C. BERKLEY SCH. OF L. 1, 3 (2022), [https://www.ohchr.org/sites/default/files/2022-04/OHCHR\\_BerkeleyProtocol.pdf](https://www.ohchr.org/sites/default/files/2022-04/OHCHR_BerkeleyProtocol.pdf) [<https://perma.cc/6F83-2LSL>].

62. Alexa Koenig et al., *Digital Lockers: Archiving Social Media Evidence of Atrocity Crimes*, HUM. RTS. CTR.: U.C. BERKLEY SCH. OF L. 1, 15-16 (2021), [https://humanrights.berkeley.edu/sites/default/files/digital\\_lockers\\_report5.pdf](https://humanrights.berkeley.edu/sites/default/files/digital_lockers_report5.pdf) [<https://perma.cc/T8KX-W72S>].

What about disclosure to the defense? What happens when the Kremlin subpoenas the evidence?

As a result, there is a need for more international dialogue that brings together legal and technical experts to discuss best practices for digital evidence and good governance of digital archives.

#### *E. Need for More International Coordination*

Finally, underlying all of the aforementioned challenges is a broad need for greater international coordination. As the Netherlands Minister of Foreign Affairs, Wopke Hoekstra, explained at the United for Justice Conference held in March 2023 in Lviv, Ukraine: “[i]t’s great to see so more [sic] support from the international community for investigating crimes committed during this war and achieving justice for Ukraine. But with so many initiatives and good ideas circulating, there’s a need for coordination and oversight. This Dialogue Group will play an important and highly necessary role in that regard.”<sup>63</sup>

While the recently created Dialogue Group is a laudable development with respect to coordination between international institutions and state governments, there is a need for a stronger relationship between these institutions and civil society groups.

#### *F. Involving the Global South*

Finally, a major element of the international response to the further invasion of Ukraine that needs to be addressed is the relative lack of inclusion to date of perspectives from the Global South. The fact that the “Friends of Accountability” only includes three states from the Global South—and none from Africa or the Middle East—is highly problematic.<sup>64</sup> The same can be said about the recent meetings about Ukraine accountability such as the conference in The Hague in July 2022 and even the meeting held in Lviv in March 2023.<sup>65</sup>

63. *Minister Hoekstra Launches ‘Dialogue Group on Accountability for Ukraine’ in Ukraine*, GOV. NETH. (Mar. 3, 2023), <https://www.government.nl/latest/news/2023/03/03/minister-hoekstra-launches-dialogue-group-on-accountability-for-ukraine> [<https://perma.cc/VU7G-NRK2>].

64. The members of this group are: Albania, Australia, Austria, Belgium, Bosnia-Herzegovina, Bulgaria, Canada, Colombia, Croatia, Cyprus, Czechia, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Guatemala, Iceland, Ireland, Italy, Japan, Kingdom of the Netherlands, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Marshall Islands, Moldova, Montenegro, New Zealand, North Macedonia, Norway, Poland, Portugal, Republic of Korea, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, Ukraine, United Kingdom, and United States of America. See Kitlang Kabua, Minister for Foreign Affairs and Trade of the Marshall Islands, Joint Statement at the 52nd Session of the Human Rights Council (Feb. 27, 2023), <https://Geneva.usmission.gov/2023/02/27/joint-statement-of-the-group-of-friends-of-accountability/> [<https://perma.cc/D25N-MM3V>].

65. The attendees at the July 2022 meeting were: Governments of Albania, Australia, Austria, Belgium, Colombia, Bosnia Herzegovina, Bulgaria, Canada, Costa Rica, Croatia, Cyprus, Czechia, Denmark, Estonia, Finland, France, Germany, Georgia, Greece, Iceland, Ireland, Italy,

## CONCLUSION

While successful evidence collection is central to the successful prosecution of international crimes, it is also a long and difficult process. Evidence from locations where atrocities have been committed can be difficult to access long after crimes have taken place and in-person evidence often relies on witness testimony, which can be conflicting or incomplete due to the traumatic nature of the events. By coordinating evidence collection in advance of litigation, Ukrainian actors and the international community are setting the stage to effectively generate accountability for international crimes and reduce the obstacles in the way of achieving justice. This process could be strengthened by proactively addressing the challenges identified to date.

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Liechtenstein, Latvia, Lithuania, Luxembourg, Malta, Mexico, Marshall Islands, Montenegro, New Zealand, North Macedonia, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, Ukraine, United Kingdom and the United States. *See* Ukraine Accountability Conference, *supra* note 56, ¶ 1. The March 2023 conference in Lviv was organized by the Council of Europe. *See* “No Peace without Justice and Accountability” — Council of Europe Participated in the High-Level International Lviv Conference “United for Justice”, COUNCIL EUR. (Mar. 3-5, 2023), <https://www.coe.int/en/web/human-rights-rule-of-law/-/no-peace-without-justice-and-accountability-council-of-europe-participated-in-the-high-level-international-lviv-conference-united-for-justice-d> [<https://perma.cc/3PR9-KYSM>].

