

# Russia's war on Ukraine: Investigating and prosecuting international crimes

## SUMMARY

Since the start of Russia's war on Ukraine there has been mounting evidence of what may constitute violations of international criminal law in the conduct of the war. Active investigations into alleged core international crimes (which are classified as war crimes, crimes against humanity and genocide) have begun, with the involvement of the Ukrainian authorities, the International Criminal Court, and other international organisations.

The EU is playing an active role in this process, with Eurojust assisting a Joint Investigation Team established by Ukraine, Poland and Lithuania, and with the participation of a number of other Member States. The Office of the Prosecutor of the International Criminal Court is also participating, the first time it has joined a Joint Investigation Team. However, investigations of the crime of aggression, relating to Russia's invasion of Ukraine, are hampered by the fact that neither Russia nor Ukraine are signatories of the Statute of Rome, which established the International Criminal Court and brought this crime within its jurisdiction.

This briefing discusses investigations into core international crimes in Ukraine. It looks at the identification, gathering and assessment of information to ensure that it is admissible as evidence in trials of those accused of these crimes. It also analyses the specific challenges involved in the assessment of digital information and how to ensure that it is properly evaluated in an era of deepfakes and digital manipulation.



## IN THIS BRIEFING

- Background – Russia's war on Ukraine
- What is an international crime?
- Who can investigate alleged breaches of international law in Ukraine?
- In focus: The work of Eurojust
- Gathering forensic evidence – The duty to investigate and prosecute
- Evaluation of open source intelligence

## Background – Russia's war on Ukraine

Since 24 February, when Russia's invasion of Ukraine began, millions of people have fled the country, in what the UN has [termed](#) the most serious global peace and security crisis of recent years. [Figures](#) provided by the UN High Commissioner for Refugees (UNHCR) indicate that, by 3 June, there were 4.7 million refugees from Ukraine present across Europe. It notes that there are over 7.1 million people displaced by the war within Ukraine and 15.7 million people estimated to require urgent humanitarian assistance and protection. Media reports indicate that those who decided to remain in Ukraine or were trapped in besieged cities have been subject to shelling and other forms of violence, with a growing number of attacks reported on schools, hospitals, childcare facilities, and other [civilian infrastructure](#), in breach of [international humanitarian law](#).

As of 3 June, the number of [civilian casualties](#) recorded by the Office of the UN High Commissioner for Human Rights (OHCHR) had reached 9 197, with 4 183 killed – including 268 children – and 5 014 injured. However, these figures could be higher given that information from areas subject to intense hostilities, and where many civilian casualties are believed to have occurred, including Mariupol, is incomplete. The OHCHR reports that: 'Most of the civilian casualties recorded were caused by the use of explosive weapons with a wide impact area, including shelling from heavy artillery and multiple launch rocket systems, and missile and air strikes'. Overall, the conflict in Ukraine has had a massive impact on the human rights of millions of civilians, with [women](#) and [children](#) among the most badly affected.

## What is an international crime?

International humanitarian law is the term used to describe the rules that seek to limit the effect of armed conflict. It is designed to protect those who do not participate, or are no longer participating, in hostilities, such as civilians or injured combatants, and imposes limits on how war can be waged. While it was traditionally held that international human rights law did not apply in times of armed conflict, modern international law is of the [view](#) that this distinction is not accurate, and the two bodies of law are seen as complementary sources of obligations in situations of armed conflict. The international community regards certain forms of serious violations of international human rights and international humanitarian law as being of such gravity that they are regulated under [international criminal law](#), establishing the principle of [individual criminal responsibility](#) for these acts. This is critical to ensure accountability and avoid impunity for violations of international human rights and international humanitarian law.

The [Rome Statute](#) of the International Criminal Court provides the most recent and complete definition of 'core' international crimes, the elements of which comprise violations of international human rights and humanitarian law. These are genocide, war crimes, and crimes against humanity. They are also often referred to as 'atrocities crimes'. These crimes are defined in a number of legal instruments: the [1948 Convention on the Prevention and Punishment of the Crime of Genocide](#), the 1949 [Geneva Conventions](#) and their 1977 Additional Protocols, and the 1998 Rome Statute of the International Criminal Court (ICC), among other treaties.<sup>1</sup>

It is important to note that the conduct of war is not only regulated by treaties concluded by state parties but also by [customary international humanitarian law](#). The latter refers to the obligations arising from established international practices, as opposed to those obligations defined by treaties and formal written conventions. While international treaties regulating the conduct of warfare are binding only on those states which are parties to them, customary international humanitarian law is binding on all states, filling gaps left by treaty law and so strengthening the protection offered to victims. As it is based on established international practices during wartime, there is a substantial overlap between customary international law and treaty-based international humanitarian law.

International criminal law provides for a number of fundamental principles: [individual criminal responsibility](#), which holds that individuals can be held criminally responsible directly under

international law, and [universal jurisdiction](#), which allows core international crimes to be prosecuted in national courts, regardless of where they were committed, or the nationality of the perpetrator or the victim.<sup>2</sup> The Rome Statute also established the [principle of complementarity](#), which provides that the ICC only assumes jurisdiction where states are unable or unwilling to do so. This legal landscape thus allows a variety of actors, comprising individual states, EU and international bodies, and international tribunals to investigate and potentially prosecute core international crimes.

## Who can investigate alleged breaches of international law in Ukraine?

### Investigations by Ukraine

Treaty-based international humanitarian law imposes a duty on contracting states to investigate and prosecute international crimes.<sup>3</sup> This principle is also found in [customary international law](#). Ukraine, therefore, though not a signatory of the Rome Statute, is obliged to investigate and prosecute crimes of war committed in its own territory, and indeed its own legislation permits it to do so. War crimes committed in Ukraine and the crime of aggression are included in similarly worded provisions of the Ukrainian [Criminal Code](#). In May 2021, the Ukrainian Parliament [adopted a law](#) (Bill 2689) designed to bring Ukrainian law into closer alignment with international humanitarian law, thus making it easier for the Ukrainian authorities to investigate and prosecute breaches of international humanitarian law carried out there, and [address gaps](#) in existing national legislation which have prevented the prosecution of international crimes taking place in its territory. In [resolution](#) 2022/2655(RSP), adopted on 19 May 2022, the European Parliament called for the President of Ukraine to sign this bill into law and for Ukraine to urgently ratify the Rome Statute and 'adopt a clear and practical framework for cooperation with the ICC and other bodies investigating crimes committed in Ukraine'.

The Ukrainian authorities have opened a [web platform](#) in order to 'properly document war crimes and crimes against humanity committed by the Russian army in Ukraine'. It invites witnesses of international crimes to submit videos, photographic materials and other information to 'be used to bring to justice those guilty of the most serious international crimes, both in Ukrainian courts and in the International Criminal Court in The Hague and in a special tribunal after its creation'. It has also launched an app so that Ukrainians can report alleged atrocity crimes via their phones. By 30 May 2022, [media reports](#) indicated that the office of Ukraine's prosecutor-general had registered more than 13 000 investigations relating to breaches of international humanitarian law in the conduct of the war on Ukraine, with 600 suspects identified.

As part of a push for accountability for crimes of war, the first prosecution of a Russian soldier for war crimes has already taken place. On 23 May 2022, Sergeant Vadim Shishimarin was found [guilty](#) of violating the laws and customs of war and of committing premeditated murder, and was sentenced to life imprisonment. On 31 May, two more Russian soldiers were [convicted](#) of violating the laws and customs of war and sentenced to 11 and a half years in prison. They were accused of shelling civilian sites in the eastern Kharkiv region.

The Ukrainian push to prosecute alleged war crimes has led the Russians to [threaten](#) to do the same, with pro-Russian separatist leaders in the Donbas region announcing that they are preparing a war tribunal to try the Ukrainian soldiers who surrendered at the Azovstal steel plant. As no countries other than [Russia](#) recognise the self-proclaimed Donetsk People's Republic and Luhansk People's Republic, such proceedings would not be recognised under international law but could be used to attempt to justify the invasion of Ukraine, fitting into the Russian narrative of the war as being aimed at the 'denazification' of Ukraine. In that context, the head of the Donetsk People's Republic, Denis Pushilin, [stated](#) on 22 May that 'a number of countries preliminarily agreed to take part in the international tribunal'.

On 8 June 2022, media [reports](#) indicated that prosecutors from the self-proclaimed Donetsk People's Republic are preparing a trial against three soldiers from the Ukrainian army, of British and Moroccan nationality, and captured at Mariupol. If convicted, the men are said to be facing the death penalty for 'terrorism' and for fighting as 'mercenaries' against the Russian invasion.

Ukraine has cooperated with other states' investigations of alleged core international crimes taking place in its territory under the principle of universal jurisdiction. At the time of writing, several EU Member States have opened investigations in relation to suspected atrocity crimes committed by Russian forces, including [Czechia](#), [Estonia](#), [France](#), [Germany](#), [Latvia](#), [Lithuania](#), [Poland](#), [Slovakia](#), [Spain](#) and [Sweden](#). Ukraine is also participating in a joint investigation team, along with other Member States, assisted by Eurojust, with the participation of the Office of the Prosecutor of the ICC, as discussed below. It has also lodged cases with the ICC and the International Court of Justice. The obligation to investigate possible violations of international humanitarian law also applies to acts carried out by each side's own soldiers, but to date neither Ukraine nor Russia are reported to have done so.

## Investigations by international organisations

The unprecedented amounts of information flooding from Ukraine from NGOs, the media and social media, as well as individual Ukrainians, documenting acts which may constitute breaches of international humanitarian law, has led to repeated calls for investigation of these alleged crimes, with a view to ensuring the full accountability of those involved. This has led to the opening of investigations by various international organisations, which can be summarised as follows:

### The International Criminal Court

The [ICC](#), established by the Rome Statute, is the first permanent treaty-based international criminal court. It is competent to investigate and try cases of genocide, crimes against humanity and war crimes, as well as the crime of aggression, if committed from 17 July 2018, and under specific conditions (see below). The ICC has jurisdiction over these crimes only if they were committed in the territory of a State Party or by one of its nationals. However, if a situation is referred to the ICC's Prosecutor by the United Nations Security Council, or if a state makes a declaration accepting the jurisdiction of the Court, the ICC may hear cases not relating to State Parties. Since the Russian Federation, as a permanent member of the Security Council, has a right to veto its resolutions, a referral by the Security Council is unlikely to proceed.

Neither Ukraine nor the Russian Federation is a State Party to the Rome Statute, but Ukraine has twice [granted](#) the ICC jurisdiction to investigate alleged atrocity crimes in its territory, the second time on an open-ended basis from February 2014 onwards in the context of the Russian annexation of Crimea. On 2 March 2022, the ICC Prosecutor, Karim A.A. Khan QC, [announced](#) that, pursuant to referrals received by Lithuania and 39 other State Parties (including all the EU Member States) under Article 14 of the Rome Statute, his office would 'immediately proceed with active investigations in the Situation [war in Ukraine]'. On 16 March, he stated that his office will investigate attacks 'intentionally directed against the civilian population' and therefore in breach of international humanitarian law. He also confirmed that the investigation will include a 'full range of documentary, digital, forensic and testimonial evidence'.

On 25 April 2022, the ICC Prosecutor signed an [agreement](#) to participate in the Joint Investigation Team (JIT) set up by Poland, Lithuania and Ukraine, and supported by Eurojust, to investigate atrocity crimes committed in the Russian war on Ukraine, the first time the Office of the ICC Prosecutor has participated in a JIT. However, in the context of the Russian war on Ukraine, the ICC does not have the *vires* to investigate the crime of aggression (see below).

### OSCE Moscow Mechanism

On 3 March 2022, the Organization for Security and Co-operation in Europe (OSCE) invoked its [Moscow Mechanism](#), at the instigation of 45 states and with the support of Ukraine. This provides

for experts to assist OSCE member states with issues relating to human rights and democracy. Three experts were appointed on 14 March with a mandate to 'establish the facts and circumstances surrounding possible ... violations and abuses of international human rights law and international humanitarian law; to establish the facts and circumstances of possible cases of war crimes and crimes against humanity; ... and to collect, consolidate, and analyse this information with a view to presenting it to relevant accountability mechanisms, as well as national, regional, or international courts or tribunals'.

They delivered their [report](#) to Ukraine on 13 April. It found 'credible evidence suggesting that such violations, including violations of fundamental human rights (right to life, prohibition of torture and other inhuman and degrading treatment and punishment), have been committed, mostly in the areas under the effective control of Russia'. The three experts were not able to 'conclude whether the Russian attack on Ukraine per se may qualify as a widespread or systematic attack directed against any civilian population'. But they reported that systemic acts 'documented in the course of the conflict, such as targeted killing, enforced disappearance or abductions of civilians, including journalists and local officials, are likely to meet this qualification. Any single violent act of this type, committed as part of such an attack and with the knowledge of it, would then constitute a crime against humanity.'

## UN Human Rights Council

Arising from resolutions by the UN Human Rights Council (HRC) and the UN General Assembly, the HRC [established](#) an independent international commission of inquiry, made up of three human rights experts, appointed on 30 March 2022 for an initial period of one year. The commission's mandate is to investigate all alleged violations of human rights and international humanitarian law, to collect and analyse evidence of these violations, and to record and preserve information and evidence for use in any future legal proceedings. The commission will work with the UN High Commissioner for Human Rights and the [UN Human Rights Monitoring Mission in Ukraine](#). While Russia was suspended from the HRC at the UN General Assembly meeting of 7 April 2022, this will not impact on the work of the international commission or the monitoring mission.

## European Court of Human Rights

The European Court of Human Rights (ECtHR) adjudicates claims involving alleged violations of the Convention for the Protection of Human Rights and Fundamental Freedoms (termed the [European Convention on Human Rights](#)). It does not adjudicate on individual criminal responsibility. On 28 February 2022, Ukraine lodged an application to the ECtHR requesting urgent interim measures, under Rule 39 of the Court rules, regarding 'massive human rights violations being committed by the Russian troops in the course of the military aggression against the sovereign territory of Ukraine'. On 1 March 2022, the ECtHR [granted](#) the interim urgent measures, deciding to 'indicate to the Government of Russia to refrain from military attacks against civilians and civilian objects'. On 4 March, the ECtHR made a similar decision in response to applications made by a number of civilians in Ukraine.

Both Ukraine and Russia were parties to the Convention; however, the decision of the Council of Europe's Committee of Ministers to expel Russia from the Council for violation of its obligations under Article 3 of the Statute means that, from 16 September 2022 onwards, the Russian Federation ceases to be a party to the Convention and the ECtHR is no longer competent to hear cases arising from alleged abuses and violations carried out after that date. The ECtHR has clarified that it 'remains competent to deal with applications directed against the Russian Federation in relation to acts or omissions capable of constituting a violation of the Convention' up to 16 September 2022. This would include the cases lodged by Ukraine relating to the Russian invasion, as well as a number of other cases arising from the Russian annexation of Crimea and the downing of Malaysian Airlines flight MH17 over Ukraine in July 2014. See the [briefing](#) on 'Russia's war on Ukraine in international law and human rights bodies: bringing institutions back in', for further discussion.



## In focus: The work of Eurojust

On 28 March 2022, [Eurojust](#), the EU agency for criminal justice cooperation, [announced](#) its support for a **joint investigation team** (JIT), created by the authorities of Lithuania, Poland and Ukraine,<sup>4</sup> to look into alleged core international crimes committed in Ukraine. Eurojust is competent with regard to the serious crimes listed in Annex I to [Regulation \(EU\) 2018/1727](#), which since 2018 have included genocide, crimes against humanity and war crimes, and criminal offences related to these crimes.

[Joint investigation teams](#) are a tool enabling cooperation between judicial and law enforcement authorities, are limited in time – usually between 12 and 24 months – and pursue a specific objective, such as the collection of evidence. The 2014 [strategy](#) of the EU Genocide Network recommends that Member States should consider using JITs to investigate and prosecute core international crimes because of their 'significant added value to law enforcement authorities in Member States, in light of the support of Eurojust, Europol, and the funding by the EU'. As of May 2022, Eurojust has supported three JITs in relation to core international crimes.

In this case, the JIT will collect evidence and facilitate cooperation with the ICC, in particular with the Office of the Prosecutor ([OTP-ICC](#)), so as to ensure information exchange. Eurojust supports the JIT by means of, *inter alia*, legal, financial and operational assistance to the team of investigators. The JIT is also open to the participation of other Member States, as well as third countries. On 23 May 2022, the European Commissioner for Justice, Didier Reynders, [announced](#) the participation of additional Member States, comprising Estonia, Latvia and Slovakia, [confirmed](#) by Eurojust on 31 May. On 25 April, it was [announced](#) that the OTP-ICC will take part, the first time that the Prosecutor's Office has participated in a JIT.

The European Commission has [declared](#) its intention to provide technical and financial support on the ground, involving both Eurojust and Europol,<sup>5</sup> to support the Ukrainian Prosecution Services. On 13 April, following the visit of Commission President Ursula von der Leyen and High Representative Josep Borrell to Kyiv and Bucha, the Commission announced a [proposal](#) to revise the mandate of Eurojust to permit it to collect, preserve and share evidence on war crimes, specifically videos, audio recordings and satellite images. It is difficult to securely store such information in Ukraine under the current circumstances, and secure storage of information with potential evidential value is essential to ensure accountability for crimes alleged to have been committed there (see below).

On 19 May, the European Parliament [voted](#) to support the Commission proposal, having previously decided to accelerate the timetable for this file, pursuant to [Rule 163](#), to allow the new mandate to enter into force as soon as possible. On 26 May, the Council [adopted](#) the amending regulation, and the [regulation](#) entered into force on 1 June 2022.

### The crime of aggression: How to impose accountability on those responsible for ordering the invasion of Ukraine

Article 8 of the Rome Statute defines the crime of aggression as the planning, preparation, initiation, or execution by a political or military leader, of acts of aggression in violation of the UN Charter, such as an invasion, occupation or annexation by force. It enables the ICC to prosecute senior political or military leadership for the illegal waging of war against another State. While aggression was included in the original Rome Statute of 1998, its definition and conditions for jurisdiction and activation were not defined until the [Kampala Amendments](#) agreed by State Parties in 2010. The ICC's jurisdiction over the crime of aggression was activated in July 2018, and of the 123 State Parties to the Rome Statute only 43 have ratified the Kampala Amendments to date, with none of the permanent UN Security Council (UNSC) members ratifying the Amendments.

Countries which are not State Parties to the ICC, like Ukraine and Russia, are excluded from the Court's jurisdiction over the crime of aggression unless there is a referral by the UNSC, which is unlikely given Russia's veto over UNSC decisions.<sup>6</sup> For this reason, there have been [proposals](#) from legal experts and politicians to establish an ad hoc international tribunal to prosecute the crime of aggression with regard to the war on

Ukraine. Such a tribunal would have jurisdiction to prosecute the individuals responsible for aggression, which would constitute the Russian political and military leadership and those involved in the financing of the war. These proposals have been supported by Ukraine and by the [Chairs of the Foreign Affairs Committees](#) of the parliaments of 11 Member States, and the United Kingdom, as well as by [private individuals](#). The European Parliament's [Human Rights Subcommittee](#) discussed the challenges involved in establishing such a tribunal at a meeting on 28 March 2022 and the issue is currently under consideration by legal experts from a number of Member States.

On 28 April 2022, the Parliamentary Assembly of the Council of Europe (PACE) unanimously adopted a [resolution](#) calling for the setting up of an ad hoc international criminal tribunal, to investigate and prosecute the crime of aggression (as defined in customary international law) 'allegedly committed by the political and military leadership of the Russian Federation'. The decision to base the jurisdiction of the proposed tribunal on customary international law bypasses the problem of the absence of jurisdiction for the prosecution of aggression as defined under the Rome Statute.

In its [resolution](#) adopted on 19 May 2022, and noting the ICC's lack of jurisdiction over the crime of aggression in the war on Ukraine, the European Parliament called for the setting up of a 'special international tribunal ... mandated to investigate and prosecute the alleged crimes of aggression committed against Ukraine by the political and military commanders of Russia and its allies'. It further called upon the European Commission to 'support the creation of an appropriate legal basis' for the tribunal and, along with other EU institutions, to provide 'all the necessary human and budgetary resources and administrative, investigative and logistic support for the establishment of the tribunal'. Finally, it asked the EU institutions, specifically the Commission, to seek support from the UN General Assembly and other like-minded organisations for the establishment of the tribunal.

## Gathering forensic evidence – The duty to investigate and prosecute

The duty to investigate and prosecute international crimes, along with a parallel duty to either prosecute or extradite, *aut dedere aut judicare*, is a national one, falling on states rather than international bodies. This duty is reflected in the principle of complementarity enshrined in the Rome Statute, but it is much broader than that, being found in numerous international treaties, as well as customary international law.<sup>7</sup> From the perspective of preventing impunity and ensuring individual accountability of the perpetrators of these crimes, such an approach makes sense.

The ICC, as the only permanent tribunal for the prosecution of international crimes, suffers from a number of restrictions which limit its jurisdiction, and which are set out in detail in the 2014 [strategy](#) of the EU Genocide Network. Therefore, it falls primarily on national authorities to investigate and prosecute these crimes, regardless of where the crimes have been committed, and irrespective of the nationality of the perpetrator or the victim, or to extradite those responsible to other states who will do so. In order for states to successfully comply with this duty, they must have adopted a complete legislative framework, which goes far beyond simply transposing the definitions of international crimes into national legislation. They must ensure that their legislation incorporates key concepts such as command and superior responsibility, and permits the use of structural investigations.

The Genocide Network [defines](#) these investigations as focusing on the 'general and structural aspects of the situation at hand, instead of an individual incident or perpetrator', necessary given the scale and complexity typical of these crimes. Essential legal concepts such as [extraterritorial jurisdiction](#) must also be carefully defined in national legislation in order to prevent national authorities wishing to prosecute core international crimes from having to rely on prosecutions for lesser offences (murder, terrorism, sanctions violations).

As well as legislative reform, the effective investigation of international crimes requires specialist staff, either operating in units exclusively dealing with these crimes, or working solely on these crimes within the wider prosecution, law enforcement and judicial cooperation services. A multi-

disciplinary approach is also required, with digital experts, historians, anthropologists, asset recovery and financial investigation experts, as well as media and military specialists, among the skills involved. As well as ensuring that there is an effective framework for international cooperation, necessary given that evidence and witnesses of international crimes can be scattered across the globe, states should also ensure that similar cooperation mechanisms apply to key stakeholders at national level.

The [Genocide Network](#) has pointed to the importance of involving national immigration and/or asylum authorities in the investigation of these crimes. Through their work, they are likely to meet potential victims and witnesses, and are also best placed to identify suspects and to collect initial information as part of the immigration or asylum process. It has reported that, in the reception of refugees from Ukraine, 'most Member States have taken the initiative to provide immigration/asylum and police authorities with information forms, leaflets and questionnaires to be handed to Ukrainian refugees on arrival in the EU to detect potential witnesses of war crimes'. As these crimes frequently overlap with other forms of serious crime, including terrorism, money laundering, and violations of sanctions or restrictive measures, national authorities should also ensure that they have an effective form of cooperation with revenue and customs, counter-terrorist units and intelligence agencies to ensure crucial information is not missed.

To assist Member States in their duties to investigate and prosecute international crimes, the Council [established](#) the European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes (the [Genocide Network](#)) in 2002. With a secretariat hosted by Eurojust, this body enables close cooperation between key stakeholders to share knowledge and best practice in the investigation and prosecution of these crimes, thereby supporting the principle of complementarity. Genocide Network members are made up of national authorities of EU Member States. In addition, the Network has six Observer States (Bosnia and Herzegovina, Canada, Norway, Switzerland, the United Kingdom and the United States), with the Office of the Prosecutor of the ICC, Eurojust and Europol also enjoying Observer status. The Council and the Commission, the Exclusion Network of the EU Agency for Asylum, four UN investigative mechanisms, and representatives of civil society have associate status in the Network.

In the context of universal jurisdiction, it is possible that multiple states will be investigating potential crimes originating from the same region, as is the case currently with the war in Ukraine. Therefore, it is imperative that effective means of cooperation between national authorities are in place to ensure effective information sharing and avoid duplication of work. Eurojust's JIT provides this for EU Member States, but for third countries the EU, the United States and the United Kingdom have established the Atrocity Crimes Advisory Group ([ACA](#)). This will support the War Crimes Units of the Office of the Prosecutor General (OPG) of Ukraine in its investigation and prosecution of conflict-related crimes. The EU, US and UK will provide expert staff to assist the OPG and other Ukrainian criminal justice stakeholders in the 'collection and preservation of evidence, operational analysis, investigation of conflict-related sexual violence, crime scene and forensic investigations, drafting of indictments, and co-operation with international and national accountability mechanisms'. The ACA will also participate in Mobile Justice Team (MJTs), composed of both international and Ukrainian experts and designed to increase the capacity of the Ukrainian authorities to conduct field investigations.

## Evaluation of open source intelligence

Active [intervention](#) by the Ukrainian government to protect their digital infrastructure, with possible further [assistance](#) from the United States, means that the country's cyber infrastructure has continued to function. As a result, digital information is appearing in real time, which, when properly evaluated, can constitute potential evidence of alleged atrocity crimes being carried out in the country. The focused collection and analysis of publicly accessible information, now mostly online, using specialised methods and tools, produces open source intelligence which can then constitute legally admissible evidence of core international crimes.



One of the best known users of open source intelligence is [Bellingcat](#), which has documented the use of banned [cluster munitions](#) in Ukraine. Such digital information, when properly assessed and evaluated, can constitute valuable evidence for the purpose of prosecuting international crimes, especially to corroborate witness testimony, or, given the difficulties involved in the use of witness testimony, in some cases as an alternative.

This widespread availability of digital information on social media poses challenges for those engaged in obtaining digital evidence of alleged atrocity crimes in Ukraine. A [study](#) has shown that Tiktok users can be exposed to false or misleading content on the war in Ukraine within 30 minutes of scrolling on the application. This content, both pro-Russian and pro-Ukrainian, took the form of videos containing digitally manipulated media depicting highly realistic videos, also known as [deepfake technology](#).

A complicating factor in accessing credible information which may document atrocity crimes is that legitimate content with the potential to be used as evidence can often be buried or obscured amidst the deepfakes and falsified content. Another major problem is that explicit images and videos are frequently removed from social media platforms through their content moderation systems, or [arising from legal obligations](#), meaning that evidence of possible crimes can be lost. A number of NGOs and investigators have [called](#) for social media companies to create semi-private repositories to store relevant content for access and review in order to verify its potential for use as evidence. The recent proposal to amend Eurojust's mandate to allow it to collect and preserve information on war crimes, specifically videos, audio recordings and satellite images, is therefore of critical importance to ensure that digital information with the potential to become evidence of atrocity crimes is not lost and will be available for use in prosecutions of these crimes.

NGOs play an essential role in the evaluation of open source information by collecting, verifying and preserving digital information. [Mnemonic](#) is a Berlin-based organisation that specialises in preserving and archiving digital information from social media platforms. This ensures that there are multiple copies of the archives in different locations and that they are accessible to investigators. Organisations are also training witnesses to film the conflict in a way that will be credible to judicial investigators. The [Witness](#) NGO is urging citizens to film content using a wide variety of shots and in 360 degrees to capture landmarks and monuments. Video recordings filmed under these guidelines are harder to falsify and help investigators to identify the location of the crimes.

By identifying the geo-location of a scene, investigators can consult satellite images, or use tools such as Google Earth and Google Street View. Satellite images play an essential role in the verification of open source information. They can reveal the scope, scale, time and dates of attacks. [Amnesty International Citizens Evidence Lab](#) is currently focusing on verifying military attacks by using video footage, satellite images and witness interviews. Their [verification methods](#) involve geo- and chrono-location by cross-checking content with satellite imagery and remote sensing for signs of attack, as well as identifying weapons and collecting eyewitness interviews.

In the fight against disinformation, particularly in the era of deepfakes, researchers are developing manual and automated [methods](#) for detecting deepfakes, including examining the content's metadata, noise analysis and consulting databases with side-by-side comparisons of thousands of examples of deepfakes. Having been evaluated, material deemed genuine can then be preserved to document atrocity crimes. Such verification techniques have proven to be successful, as seen with the downing of Malaysian Airline flight MH17 in Ukraine in 2014. The investigative group [Bellingcat](#) used this method of cross-checking open source information, comprising videos and images of the scene, with Google Maps and other similar tools, along with analysis of social media data, to identify the [weapon](#) used and [link](#) the incident to Russian involvement.

While NGOs have adopted successful and effective measures for collecting and verifying digital information, it is still difficult to transform digital information into evidence that is legally admissible in court proceedings. One problem is that there are no universally agreed standards or guidelines to provide for the legal accountability of open source intelligence. [The Berkeley Protocol](#) is an

international protocol developed by Berkeley University's Human Rights Centre, in partnership with the UN Human Rights Office, that aims to do so. The Protocol is a guide to the 'effective use of digital open source information in investigating violations of international criminal, human rights and humanitarian law' by setting professional standards in the identification, collection, preservation, analysis and presentation of digital open source information and its use in international criminal and human rights investigations. The Protocol divides the open source investigation into a number of cycles, consisting of online inquiries, preliminary assessment, collection, preservation, verification and investigative analysis.

The [Content Authenticity Initiative](#) is a group working towards adding a layer of verifiable trust on all types of open source digital content through provenance and attribution solutions. Although the lack of commonly agreed standards in this field poses some challenges for the evaluation of digital open source intelligence, it has been successfully used in the prosecution of core international crimes, as an [analysis](#) by the Genocide Network shows.

## MAIN REFERENCES

Byron C., War crimes and crimes against humanity in the Rome Statute of the International Criminal Court, Melland Schill Studies in International Law, 2009.

Clapham A. and Gaeta P., The Oxford Handbook of International Law in armed conflict, Oxford University Press, 2014.

Lerch M., [Russia's war on Ukraine in international law and human rights bodies: bringing institutions back in](#), Directorate-General for External Policies of the Union, European Parliament, April 2022.

Eurojust, [Strategy of the EU Genocide Network to combat impunity for the crime of genocide, crimes against humanity and war crimes within the European Union and its Member States](#), The Hague, 2015.

Eurojust, [20 years on: main developments in the fight against impunity for core international crimes in the EU](#), The Hague, May 2022.

Eurojust, [Key factors for successful investigations and prosecutions of core international crimes](#), The Hague, May 2022.

## ENDNOTES

- <sup>1</sup> For definitions of these crimes, see the UN's [Framework of Analysis for Atrocity Crimes: a tool for prevention](#), 2014, and the briefing on [Russia's war on Ukraine in international law and human rights bodies: bringing institutions back in](#), April 2022.
- <sup>2</sup> Universal jurisdiction, while an important and well-established principle of international law aimed at combating impunity, has limits in many countries and is not uncontested. See European Parliament, Policy Department for External Relations, [Workshop – Universal jurisdiction and international crimes: constraints and best practices](#), September 2018, and UN General Assembly A/RES/75/142, [The scope and application of the principle of universal jurisdiction](#).
- <sup>3</sup> See, for instance, in relation to war crimes, Article 49 of the 1949 Geneva Convention I, Article 50 of the 1949 Geneva Convention II, Article 129 of the 1949 Geneva Convention III and Article 146 of the 1949 Geneva Convention IV, as well as Article 85(1) of the 1977 Additional Protocol I. Ukraine is a signatory of all four Geneva Conventions and the Additional Protocol I, so this obligation is binding on it. The USSR ratified all four Geneva Conventions in 1954 and the Additional Protocol I in 1989.
- <sup>4</sup> Third countries may post a Liaison Prosecutor (LP) to Eurojust in support of cross-border investigations when the specific country is involved. At the time of writing, 10 countries have posted a LP to Eurojust: Albania, Georgia, Montenegro, North Macedonia, Norway, Serbia, Switzerland, Ukraine, the United Kingdom and the United States. Eurojust concluded an agreement on cooperation with Ukraine on 27 June 2016 and, as a consequence, a Ukrainian LP is posted to the agency.
- <sup>5</sup> Since the application of the new Europol [regulation](#) from 1 May 2017, Europol includes the crimes of genocide, crimes against humanity and war crimes in its mandate. It runs the analysis project on core international crimes (AP CIC), which supports Member States' competent authorities, as well as third parties and other organisations, in preventing and combating international crimes. For more information, see Eurojust, [20 years on: main developments in the fight against impunity for core international crimes in the EU](#), The Hague, 2022.
- <sup>6</sup> [ICC Statute Article 15 bis \(5\), Article 15 ter ICC Statute](#).
- <sup>7</sup> See, for instance, the Convention on the Prevention and Punishment of the Crime of Genocide 1948, the Four Geneva Conventions of 1949 and the three Additional Protocols, the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 and its Second Additional Protocol, the Convention against Torture 1984, the Rome Statute 1998, and the International Convention for the Protection of All Persons from Enforced Disappearances 2006. For this principle in customary international law, see [The obligation to extradite or prosecute \(aut dedere aut judicare\)](#), Final Report of the International Law Commission, 2014.

## DISCLAIMER AND COPYRIGHT

This document is prepared for, and addressed to, the Members and staff of the European Parliament as background material to assist them in their parliamentary work. The content of the document is the sole responsibility of its author(s) and any opinions expressed herein should not be taken to represent an official position of the Parliament.

Reproduction and translation for non-commercial purposes are authorised, provided the source is acknowledged and the European Parliament is given prior notice and sent a copy.

© European Union, 2022.

Photo credits: © Алексей Синельников / Adobe Stock.

[eprs@ep.europa.eu](mailto:eprs@ep.europa.eu) (contact)

[www.eprs.ep.parl.union.eu](http://www.eprs.ep.parl.union.eu) (intranet)

[www.europarl.europa.eu/thinktank](http://www.europarl.europa.eu/thinktank) (internet)

<http://epthinktank.eu> (blog)

