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Command Responsibility and the War in Ukraine: Can Customary International Law Hold Russian Commanders Accountable for War Crimes?

Nicholas J. Nizinski

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Command Responsibility and the War in Ukraine: Can Customary International Law Hold Russian Commanders Accountable for War Crimes?

Nicholas James Nizinski*

ABSTRACT

Currently, neither Ukraine's Constitution nor its criminal code establish the principle of command responsibility as a mode of criminal liability within the country. Key international statutes like Article 28 of the International Criminal Court and international case law, like the recently decided *Case of Milanković v. Croatia*, have firmly established the doctrine of command responsibility as a fundamental principle of customary international law applicable in the context of an armed conflict. Furthermore, the *Milanković* court affirmed a conviction based on command responsibility even in the absence of a clear domestic governing statute at the time the crime was committed, surviving an *ex post facto* law challenge.

This Comment posits that Ukraine should pass legislation to amend their criminal code to provide for command responsibility as a new mode of criminal liability. Ukraine should then use the doctrine of command responsibility to hold Russian commanders accountable for their war crimes committed after the bill's passage.

* J.D. Candidate, Penn State Dickinson Law, 2025. My sincere gratitude goes out to Professor Dermot Groome, Professor of Law and Harvey A. Feldman Distinguished Faculty Scholar at Penn State Dickinson Law, for his brilliant guidance and assistance in the editing of this Comment. Thank you to my editors: Chad Rosander, Jake Toth, Ben Moyer, and Ana Maria Matovic. Lastly, my thanks and appreciation to my loving wife, Brianna Nizinski, and parents, James and Lora Nizinski, for leading me through life and providing the support needed to finish this project. This Comment is dedicated in loving memory to my grandfather, James Nizinski (1941–2023), whose unfailing love and support shaped me into the man I am today. I also dedicate this Comment to my dear friend, Zachary Dart Galli (2000–2024), whose brotherly love and unbridled wit will never be forgotten. May they both rest in God's everlasting peace.

Furthermore, despite its constitutional ban on *ex post facto* laws, Ukraine can, and should, rely confidently on *Milanković* and other international precedent to begin prosecuting Russian military commanders under the theory of command responsibility for crimes perpetrated by their subordinates *before* the new legislation's passage. Case law suggests command responsibility has been *tempore criminis* an essential component of customary international law for the entire span of the War in Ukraine, meaning Ukraine can retroactively hold Russian commanders liable for their subordinates' war crimes even when there was no law on the books.

Adoption of this principle will provide Ukrainian prosecutors with yet another (and arguably a more appropriate) mode of criminal responsibility to aid them in their pursuit of justice against even the most senior Russian military commanders and mercenary fighters alike for their subordinates' war crimes committed in the ongoing War in Ukraine.

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INTRODUCTION

Certain legal principles and crimes, like genocide, are so widely recognized and abided to by States throughout the world that they become universally applicable as a matter of “customary international law.”¹ “Command responsibility” is a principle of customary international law that describes the duty of military commanders to prevent their subordinates from committing crimes.² Under this doctrine, if subordinates commit war crimes or other unlawful acts of aggression, it is the commander’s responsibility to punish the offending subordinates.³ If the commander neglects this duty and fails to punish subordinates they have effective control over, the commander becomes liable for the underlying crime committed by their subordinates.⁴

However, neither Ukraine’s Constitution nor penal code incorporate the principle of command responsibility into its criminal justice system as a mode of criminal responsibility in general, including for war crimes.⁵ Therefore, to hold someone liable for a crime not previously deemed to be an offense when the act was committed

1. See *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 248 (2d Cir. 2003) (“In short, customary international law is composed only of those rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern.”).

2. See *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1288 (11th Cir. 2002). The majority defined command responsibility as follows:

The essential elements of liability under the command responsibility doctrine are: (1) the existence of a superior-subordinate relationship between the commander and the perpetrator of the crime; (2) that the commander knew or should have known, owing to the circumstances at the time, that his subordinates had committed, were committing, or planned to commit acts violative of the law of war; and (3) that the commander failed to prevent the commission of the crimes, or failed to punish the subordinates after the commission of the crimes.

Id.

3. See *id.*

4. See *id.*

5. See generally UKR. CONST.; CRIM. CODE OF UKR.

would be a *prima facie* violation of Article 58 of the Ukrainian Constitution and of Article 5(2) of the Criminal Code of Ukraine, which both clearly prohibit *ex post facto* laws.⁶

The *Milanković v. Croatia*⁷ case, explored in depth below,⁸ suggests that using command responsibility as a vehicle for indirect liability could apply in Ukraine's ongoing international armed conflict.⁹ Ukraine would first need to pass a law amending Section II of its criminal code to allow for prosecutions under the theory of command responsibility as a mode of criminal liability.¹⁰ While that solution would facilitate prosecuting future crimes, the law by itself would create a retroactive legality problem if Ukraine tried to prosecute under a theory of command responsibility for any crimes committed before the bill's passage. As such, Ukrainian prosecutors would need to demonstrate sufficient authority to overcome their country's prohibition against *ex post facto* laws.

This Comment is an effort to do exactly that. The general framework of command responsibility is already widely considered an essential mode of criminal responsibility in international criminal law.¹¹ Convictions on the basis of command responsibility when the commander has actual knowledge of wrongdoing are widely practiced and accepted as law by many States internationally.¹² Adopting the same would aid Ukraine in its pursuit of justice for the countless war crimes committed within its country's borders in this historic international armed conflict.¹³ Ukraine should rely on the European Court

6. UKR. CONST. art. 58 (“[N]o one shall bear responsibility for acts that, at the time they were committed, were not deemed by law to be an offence.”); CRIM. CODE OF UKR. art. 5(2) (“The law on criminal liability that criminalizes an act or increases criminal liability or otherwise deteriorates the situation of a person shall not be retroactive in time.”).

7. *Milanković v. Croatia*, App. No. 33351/20 (Jan. 20, 2022), <https://tinyurl.com/56apnzmd> [<https://perma.cc/R5DC-AYWZ>].

8. See discussion *infra* Section (III)(A)(3).

9. See Noëlle Quénivet, *Command Responsibility and the Ukraine Conflict*, LIEBER INST.: ARTICLES OF WAR (Mar. 30, 2022), <https://tinyurl.com/ds52ct2p> [<https://perma.cc/FFL8-XYHV>]; *Milanković*, App. No. 33351/20 ¶ 60 (stating that “[i]t is beyond doubt that the responsibility of commanders for war crimes committed in the course of an international armed conflict was *tempore criminis* an existing rule of international law”).

10. See generally CRIM. CODE OF UKR. § II (setting out Ukraine's laws on criminal liability and modes of criminal responsibility—or lack thereof, presently).

11. See Roee Bloch, *Should Have Known Better? The Standard of Knowledge for Command Responsibility in International Criminal Law*, 100 INT'L L. STUD. 312, 321 (2023).

12. See *id.*

13. See *Ukraine Probing Over 122,000 Suspected War Crimes, Says Prosecutor*, REUTERS (Feb. 23, 2024, 9:12 AM), <https://tinyurl.com/2s3b8tyk> [<https://perma.cc/EB5Q-3EFY>] [hereinafter *122,000 Suspected War Crimes*] (reporting in February of 2024 the number of estimated war crimes committed in Ukraine at the time).

of Human Rights' (ECHR) ruling in *Milanković* and amend their criminal code to codify command responsibility as an additional, and arguably a more appropriate, mode of criminal responsibility with which to prosecute Russian commanders and leaders.¹⁴ This amendment, which must first make its way through the legislative approval process of the Verkovna Rada¹⁵, would provide proactive domestic justification for prosecutions based on command responsibility, and would put commanders on notice of their potential to be prosecuted for taking—or refusing to take—certain actions. Additionally, relying on customary international law as described herein will grant Ukrainian prosecutors the power to overcome their country's prohibition against *ex post facto* laws and retroactively prosecute Russians for their war crimes already committed in the ongoing conflict.

I. BACKGROUND

A. *The War in Ukraine*

1. *An Abridged Account of the Events in Ukraine from 2014 through 2024*

Ukraine is no stranger to Russian aggression—back in early 2014, political unrest erupted after Ukraine's then-President Viktor Yanukovich rejected a deal for greater economic integration with the European Union (EU).¹⁶ This unrest culminated in Ukrainian citizens taking to the streets to protest Yanukovich's decision and would later become known as the Maidan Revolution.¹⁷ There, on Maidan Square in Kyiv,¹⁸ nearly 100 civilians and a dozen police officers died in violent clashes with Russian-backed security forces.¹⁹

14. See *Milanković*, App. No. 33351/20 ¶ 63 (stating that “accessibility does not exclude reliance being placed on a law which is based on custom”).

15. The Verkovna Rada is the unicameral parliament of Ukraine. *Verkhovna Rada of Ukraine*, <https://tinyurl.com/jfhhb6kvn> [<https://perma.cc/B7LA-PTJA>] (last visited June 29, 2024).

16. Ctr. for Preventive Action, *War in Ukraine*, GLOB. CONFLICT TRACKER (May 20, 2024), <https://tinyurl.com/2jsk6hn8> [<https://perma.cc/97NV-ZR7W>].

17. *Ukraine Marks 10-Year Anniversary of the Maidan 'Revolution of Dignity'*, AL JAZEERA (Nov. 21, 2023), <https://tinyurl.com/445hpria> [<https://perma.cc/NPA8-BMNM>] [hereinafter *10-Year Anniversary*].

18. ‘Kyiv’ or ‘Kiev’—Here’s Why the Difference is Political, CBC NEWS (Mar. 4, 2022, 4:00 AM), <https://tinyurl.com/ycwrx4px> [<https://perma.cc/P2Y4-ZESQ>] (explaining how the name “Kiev” is now associated with the “Russification of Ukraine”; and how many sources have switched to using the spelling “Kyiv” to recognize that Ukraine “does have the right to exist as an independent nation, contrary to what Vladimir Putin has been stating”).

19. *10-Year Anniversary*, *supra* note 17; see also Constant Méheut, *Ukraine Remembers Popular Uprising that Foreshadowed War*, N.Y. TIMES (Nov. 21, 2023), <https://tinyurl.com/mt5btt36> [<https://perma.cc/8UZR-SQ3F>].

The Maidan Revolution led to then-President Yanukovich fleeing to Russia and his eventual removal from office by the Verkhovna Rada, but also thereafter led to Russian troops marching into Crimea and annexing the southern Ukrainian region.²⁰ Active (albeit contained) armed conflict raged between the two adversaries for the next eight years following Russia's invasion of Crimea in 2014.²¹ This conflict lasted until February 24, 2022, when Russian forces invaded Ukraine a second time to begin what Russian President Vladimir Putin would call a "special military operation," but what others would quickly refer to as the War in Ukraine.²²

Violence quickly consumed much of Ukraine, with reports and videos depicting significant damage to many urban areas with large civilian populations.²³ Russian forces waged war through bombing attacks that damaged hospitals and reduced cities (like Mariupol) to rubble, all while putting Ukrainian civilians in harm's way.²⁴ Western intelligence officials estimate the number of Ukrainian military casualties alone to be upwards of 62,000, with no end in sight.²⁵ Due to numerous violations of international law alleged against the Russian forces invading Ukraine, the United Nations Human Rights Council created the Independent International Commission of Inquiry on Ukraine (IICIU) to "investigate violations and abuses of human rights, violations of international humanitarian law, and other crimes that may have been committed in the context of the aggression by the Russian Federation against Ukraine."²⁶ Based on their investigations, the IICIU was quick to ascertain what the world already suspected—war crimes were indeed being committed in Ukraine.²⁷

20. Méheut, *supra* note 19; see also Ctr. for Preventive Action, *supra* note 16.

21. See, e.g., NIGEL WALKER, HOUSE OF COMMONS LIBR. RSCH. BRIEFING, CBP 9476, CONFLICT IN UKRAINE: A TIMELINE (2014 – EVE OF 2022 INVASION) (2023) (providing a detailed account of the eight years of conflict in eastern Ukraine between Ukrainian government forces and Russia-backed separatists).

22. See *Our Experts Decode the Putin Speech that Launched Russia's Invasion of Ukraine*, ATL. COUNCIL (Feb. 22, 2023), <https://tinyurl.com/2ru4bkna> [<https://perma.cc/2SP6-CLL5>]; see also Ctr. for Preventive Action, *supra* note 16.

23. See Ctr. for Preventive Action, *supra* note 16.

24. See *id.*

25. Ishaan Tharoor, *In a 'Meat Grinder' of a War, Russian and Ukrainian Casualties Rise*, WASH. POST (Apr. 30, 2024, 12:00 AM), <https://tinyurl.com/vxrjt942> [<https://perma.cc/56JD-A7EV>] ("Western intelligence officials dispute Zelensky's estimate for Ukraine's casualties—some 31,000 soldiers killed in the fighting—and believe the figure is far higher, likely more than double.").

26. *Press Release: UN Commission Concludes That War Crimes Have Been Committed in Ukraine, Expresses Concern About Suffering of Civilians*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R (Sept. 23, 2022), <https://tinyurl.com/48sc8a27> [<https://perma.cc/J8BC-ESGM>].

27. *Id.* (reaching these conclusions based on the IICIU's investigations into events in the regions of Kyiv, Chernihiv, Kharkiv and Sumy).

2. *War Crimes in Ukraine by Russian Commanders*

Based on its investigations, the IICIU reported on September 23, 2022, that Russian forces indeed committed war crimes in Ukraine against both its military and civilian personnel, including extensive damage to residential buildings and infrastructure in populated areas (like schools and hospitals) caused by explosive weapons.²⁸ Erik Møse, Chair of the IICIU, reported that the Commission interviewed witnesses and investigated reports of alleged executions of civilians, ill-treatment and torture, and sexual and gender-based violence, among many other atrocities allegedly committed by Russian forces.²⁹ During the first summer of fighting alone, Ukraine was said to have already been investigating more than 21,000 war crimes and crimes of aggression committed by Russia since the start of its invasion, exemplified by their strike on the Mariupol drama theater sheltering hundreds of civilians.³⁰ Well into the year 2024, that number has dramatically increased, with the Office of the Prosecutor General of Ukraine estimating that 134,992 war crimes have been committed.³¹ A report from early 2024 documents how Ukrainian authorities have reason to believe that anywhere from at least 19,546 children to up to 200,000 children have been forcibly removed from Ukrainian soil.³² The number of total allegations has grown far greater as the

28. *Id.* (“The Commission has documented violations, such as the illegal use of explosive weapons, indiscriminate attacks, violations of personal integrity, including executions, torture and ill-treatment, and sexual and gender-based violence. It also found that the rights of children have been violated.”).

29. Erik Møse, Chair of the Commission of Inquiry on Ukraine, *Update by the Chair of the Independent International Commission of Inquiry on Ukraine, at the 51st session of the Human Rights Council*, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R (Sept. 23, 2022), <https://tinyurl.com/77eka956> [<https://perma.cc/TH3R-NFMG>].

30. Yaroslav Lukov, *Ukraine War: 21,000 Alleged War Crimes Being Investigated, Prosecutor Says*, BBC NEWS (July 6, 2022), <https://tinyurl.com/yc4mwrtj> [<https://perma.cc/7CN2-DQQP>]; *Ukraine: Deadly Mariupol Theater Strike ‘A Clear War Crime’ by Russian Forces*, AMNESTY INT’L (June 30, 2022), <https://tinyurl.com/42yj8uwH> [<https://perma.cc/22AU-2UAP>].

31. *See Crimes Committed During the Full-Scale Russian Invasion*, OFF. OF THE PROSECUTOR GEN. OF UKR., <https://tinyurl.com/5n6knb9x> [<https://perma.cc/9CNN-G37N>] (last visited June 29, 2024) (reporting the running estimation of alleged war crimes); *see also 122,000 Suspected War Crimes*, *supra* note 13.

32. *See Children of War*, <https://tinyurl.com/bdz63js6> [<https://perma.cc/GN9Y-ZPTT>] (last visited June 29, 2024) (reporting that 19,546 children have been deported and/or forcibly displaced between the dates February 24, 2022 through June 30, 2024); Hiroyuki Akita, *Ukraine Wages a Dogged Fight against Russian ‘War Crimes’*, NIKKEI ASIA (Jan. 15, 2024, 10:40 PM), <http://tinyurl.com/4858vyr9> [<https://perma.cc/P79J-7H2G>] (reporting that Ukrainian authorities “assume that Russians could deport or forcibly remove approximately up to 200,000 children”). *But see* *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ. Fed’n: 32 States Intervening)*, Public Sitting: Introduction, 2023 I.C.J. 14, ¶ 15 (Sept. 19) (citing to a slightly different number of

war continues with no immediate end in sight, as Russia continues to reject Ukraine's calls for an end to its over ten-year occupation.³³

After its initial report from September 23, 2022, the IICIU continued to document countless more indiscriminate attacks by Russian armed forces over the next two years, and concluded in another report issued on October 19, 2023, that "Russian authorities have committed the war crimes of wil[l]ful killing, torture, rape and other sexual violence, and the deportation of children to the Russian Federation."³⁴ The prosecutor general's office in Kyiv has reported that the list of alleged crimes committed in Ukraine since Russia's 2022 invasion include murders and executions, shelling of civilian infrastructure, forced deportations, child abductions, torture, sexual violence, and illegal detention.³⁵ While the numbers and reports will undoubtedly vary as this ongoing war grows ever more costly for Ukraine, one conclusion is clear—war crimes have already been, and will likely continue to be, committed by Russian forces against Ukrainians.

3. *How Ukraine Is Currently Carrying Out Justice*

On March 17, 2023, the International Criminal Court (ICC) issued arrest warrants for President Putin and Maria Lvova-Belova, Russia's Commissioner for Children's Rights, relating to an alleged war crime surrounding the unlawful deportation and transportation

children (19,474 children) allegedly illegally transferred from Ukraine to Russia); *Ukraine has Already Verified Almost 19.5 Thousand Children in Russia*, UKR. CRISIS MEDIA CTR. (Nov. 7, 2023, 2:49 PM), <https://tinyurl.com/vyfbfhnr> [<https://perma.cc/AF3J-KHHC>] ("Ukraine has already verified 19,498 children in Russia.").

33. See Holly Ellyatt, *Ukraine Won't Accept a Frozen Conflict, Yermak Tells CNBC*, CNBC: WAR UPDATES LIVE BLOG (Jan. 15, 2024, 4:29 AM), <http://tinyurl.com/bdezkdjb> [<https://perma.cc/U3W9-LE8E>] (describing how Russia refused to participate in peace talks with Ukraine at the World Economic Forum in Davos, Switzerland); WALKER, *supra* note 21 (recalling that sources define the current conflict in Ukraine as having begun on February 24, 2022, when Russian military forces entered the country from Belarus, Russia and Crimea). *But see* Yash Roy, *Ukraine Rejects Putin's Cease-Fire Proposal of Ceding Land on Eve of Peace Summit*, THE HILL (June 14, 2024, 12:09 PM), <https://tinyurl.com/bdhhbhe6d> [<https://perma.cc/BL5L-GPMV>] (detailing Ukraine's rejection of a Russian cease-fire proposal that would have required Ukraine to hand over certain territory to Russia and drop its NATO membership goals).

34. Indep. Int'l Comm. of Inquiry on Ukraine, Rep. of the Indep. Int'l Comm. of Inquiry on Ukraine, U.N. Doc. A/78/540, at 2 (Oct. 19, 2023), <http://tinyurl.com/3we48byb> [<https://perma.cc/S2XX-5ND9>] [hereinafter Oct. 2023 IICIU Report]; *see also* Pjotr Sauer, *UN Finds Further Evidence of Russian War Crimes in Ukraine*, THE GUARDIAN (Oct. 21, 2023, 11:23 AM), <https://tinyurl.com/26vpf8cb> [<https://perma.cc/9BB2-RLGR>].

35. Stephanie van den Berg & Anthony Deutsch, *Explainer: How Are War Crimes in Ukraine Being Investigated?*, REUTERS (Mar. 17, 2023, 1:37 PM), <https://tinyurl.com/4pn89bvr> [<https://perma.cc/EZ3B-HF6D>].

of children from occupied areas of Ukraine to the Russian Federation.³⁶ Since then, four other senior Russian officials have also been indicted for the alleged war crimes and crimes against humanity committed during the invasion of Ukraine.³⁷ The issuance of these arrest warrants represents one potential method of holding even the most senior of Russian officials liable for their war crimes. However, the ICC's arrest warrants may be more theoretical than they are practical—barring the unlikely capture or the even more unlikely voluntary surrender of Russian officials—though high-profile indictments have succeeded before.³⁸

In its currently ongoing case with Ukraine in the International Court of Justice (ICJ), Russia claimed that the legality of its actions, particularly the ongoing “special military operation” in Ukraine and the recognition of two puppet States by Russia in eastern Ukraine, do not fall under the Geneva Convention, but rather the U.N. Charter and customary international law.³⁹ To that end, Russia claimed its conflict

36. See *Press Release: Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova*, INT'L CRIM. CT. (Mar. 17, 2023), <https://tinyurl.com/ywdz7fu9> [<https://perma.cc/HS3Z-2XP5>] [hereinafter *Putin/Lvova-Belova Arrest Warrants*] (stating within that both President Putin and Commissioner Lvova-Belova are “allegedly responsible 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”).

37. See *Press Release: Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Sergei Kuzhugetovich and Valery Vasilyevich Gerasimov*, INT'L CRIM. CT. (June 25, 2024), <https://tinyurl.com/7bwm8eda> [<https://perma.cc/2HSL-D2W2>] (detailing the arrest warrants for Sergei Kuzhugetovich Shoigu, Minister of Defense, and for Valery Vasilyevich Gerasimov, Chief of the General Staff of the Armed Forces of the Russian Federation, for war crimes allegedly committed while in their official positions); Andrii Mikheiev, *More Senior Russian Officials Join Putin on War Crimes Wanted List*, ATL. COUNCIL (June 27, 2024), <https://tinyurl.com/mrxp-k8pm> [<https://perma.cc/JT87-J3QQ>] (explaining that Mr. Shoigu and Mr. Gerasimov face charges related to the bombing of Ukraine's civilian energy infrastructure during the first winter of Russia's invasion, and detailing other indictments for Russian Air Force Chief Sergei Kobylash and Russian Fleet commander Viktor Sokolov over the bombing of Ukraine's power grid).

38. Compare *Putin/Lvova-Belova Arrest Warrants*, *supra* note 36, with van den Berg & Deutsch, *supra* note 35 (describing how “the capture and arraignment of Russia's president is almost inconceivable”). But see *Prosecutor v. Milošević*, Case No. IT-02-54, Indictment (Int'l Crim. Trib. for the Former Yugoslavia May 22, 1999) (indicting the former sitting President of Serbia, Slobodan Milošević, for various general and specific charges, including for his command responsibility over certain actions taken by his subordinates in violation of Article 7(3) of the ICTY statute). For a further discussion on the ICTY statute, see *infra* note 111.

39. See *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ. Fed'n: 32 States Intervening)*, Public Sitting: Introduction, 2023 I.C.J. 13, ¶ 23–24 (Sept. 18) (citing to President Putin's publicly broadcast speech which “expressly refer[s]” to Article 51 of the United Nations Charter as its legal basis for Russia's special military operation in

with Ukraine lies outside the ICJ's jurisdiction.⁴⁰ On February 2, 2024, in response to Russia's various preliminary objections as to jurisdiction, the ICJ partially rejected Russia's claims.⁴¹ Therein, the ICJ stated that it does possess jurisdiction to hear Ukraine's request for the court to declare that there was no "credible evidence that Ukraine is committing genocide in violation of the Genocide Convention" in eastern Ukraine, which Russia used as a pretext to invade Ukraine in 2022.⁴² However, while a final, legally binding decision from the ICJ is estimated to be years away, the War in Ukraine rages on in present time.⁴³

Importantly, the ICJ and the ICC, along with other world courts like the European Court of Human Rights (ECHR), lack police powers and must instead rely on the cooperation of national governments for enforcement of its orders.⁴⁴ Thus, like President Putin, it is reasonably unlikely that Russian commanders will voluntarily submit themselves to these international courts' jurisdictions to be held accountable for their crimes.⁴⁵

The ECHR, another international court, ruled in early 2023 that cases brought by Ukraine against Russia were justiciable.⁴⁶ Perhaps more importantly, the ECHR also stated that Russia's invasion of February 24, 2022, was actually a "continuation of the war which began eight years earlier in 2014."⁴⁷ This ruling means the ECHR now has authority to hear numerous human rights violations allegedly committed by Russia since 2014, but only those committed until

Ukraine); Jess Bravin, *Russia, Ukraine Clash Over Genocide Charges at World Court*, WALL ST. J. (Sept. 19, 2023, 5:17 PM), <https://tinyurl.com/2rhjt3ra> [<https://perma.cc/35LM-DE77>].

40. See Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ. Fed'n: 32 States Intervening), Public Sitting: Second Preliminary Objection, 2023 I.C.J. 13, ¶ 3 (Sept. 18) ("The legality of these actions [are] not under the Genocide Convention, but under the UN Charter and customary international law.").

41. See Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ. Fed'n: 32 States Intervening), Judgment: Preliminary Objection, ¶ 151, (Feb. 2, 2024), <https://tinyurl.com/ywsadavb> [<https://perma.cc/6F4J-MB27>] (stating that the ICJ does have limited jurisdiction to entertain certain issues raised by Ukraine in its Memorial).

42. See *ICJ Rules That It Will Hear Part of Ukraine-Russia Genocide Case*, AL JAZEERA (Feb. 2, 2024), <https://tinyurl.com/4txkkxpb> [<https://perma.cc/YTB3-PXR3>].

43. *Id.*

44. Claire Klobucista & Mariel Ferragamo, *The Role of the ICC*, COUNCIL ON FOREIGN REL. (May 22, 2024, 12:40 PM), <http://tinyurl.com/mr42zyj2> [<https://perma.cc/28EB-Z9ZJ>].

45. See *id.*

46. Zakhar Tropin, *ECHR Ruling Confirms Russian Invasion of Ukraine Began in 2014*, ATL. COUNCIL (Feb. 14, 2023), <https://tinyurl.com/237sa3pc> [<https://perma.cc/UE9X-T28K>].

47. *Id.*

September 16, 2022, when Russia terminated its participation in the ECHR.⁴⁸ Thus, Ukraine requires another vehicle to hold Russian actors accountable for their war crimes, the vast majority of which have occurred after Russia withdrew from the ECHR's jurisdiction.⁴⁹

There are other possible domestic and international avenues for both Ukraine and other international entities, like the ICC, to theoretically seek justice against Russian forces—for example, Ukraine's rules of criminal procedure provide for trials *in absentia*.⁵⁰ However, convicting Russian commanders through trials *in absentia* will not prevent the perpetrators from committing further violations of the law until they are either brought—or submit themselves—to face the judgment of the courts, notwithstanding the host of procedural limitations and ethical dilemmas associated with such trials.⁵¹

Ultimately, it is not the onus of the international community, but rather the courts of Ukraine which have the primary responsibility to prosecute Russian offenders who have committed crimes within Ukraine.⁵² Thus, the question this Comment seeks to answer remains: how should Ukrainian prosecutors best go about prosecuting these crimes?

48. *Id.*

49. See Julia Emtseva, *The Withdrawal Mystery Solved: How the European Court of Human Rights Decided to Move Forward with the Cases Against Russia*, EJIL: TALK! (Feb. 8, 2023), <https://tinyurl.com/2s2kprs5> [<https://perma.cc/PWD2-LJ72>] (“The Russian government has repeatedly stated that it ceases the compliance with Court’s judgments . . . Sadly, but perhaps better than nothing, the Court now seems to function almost merely symbolically when it comes to the Russian cases.”). But see *Ukraine v. Russia*, App. Nos. 20958/14 & 38334/18 (June 25, 2024), <https://tinyurl.com/yzc766c6> [<https://perma.cc/GAW7-UA7A>] (representing a recent judgement from the ECHR even after Russia withdrew its participation from the court).

50. See CRIM. PROC. CODE OF UKR. art. 323(3) (“The court hearing in criminal proceedings as to the crimes specified in part 2 of Article [1] of this Code may be held in absentia, without the accused . . .”); van den Berg & Deutsch, *supra* note 35 (“A number of mostly European States have universal jurisdiction laws that would also allow them to prosecute Ukrainian war crimes.”).

51. See, e.g., Sarah C. Sykes, “Defense Counsel, Please Rise”: A Comparative Analysis of Trial in Absentia, 216 MIL. L. REV. 170, 171–72 (2013) (considering the controversial nature of trials in absentia in the international arena, as well as the ethical and moral questions unique to trials conducted without the defendant present). See generally CRIM. PROC. CODE OF UKR. art. 323(3) (discussing the various safeguards and procedures relating to trials *in absentia* in Ukraine).

52. See Rome Statute of the International Criminal Court, Preamble, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (“Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes . . . Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions. . . .”); C.H. BECK ET AL., *ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 13 (Otto Triffterer & Kai Ambos eds., 3d ed. 2016) (“The ICC is only meant to supplement national criminal justice systems. Primary responsibility for enforcing criminal liability for violations of the subject-matter jurisdiction of the Court rests on the States Parties.”).

B. *The Doctrine of Command Responsibility*

1. *Command Responsibility*

At its core, the doctrine of command responsibility holds commanders criminally liable for crimes physically perpetrated by subordinates under the superior's effective command and control.⁵³ In other words, "a superior may be held criminally responsible, not for his part in the commission of crimes by his subordinates, but because of a personal and culpable failure on his part to adopt necessary and reasonable measures to prevent or punish those crimes."⁵⁴ Command responsibility is distinguishable from vicarious responsibility—rather, it is responsibility for the commander's *own* acts or omissions in failing to prevent or punish the crimes of his subordinates whom he knew or had reason to know were about to commit serious crimes or had already done so.⁵⁵

At the international level, Article 28(1) of the Rome Statute of the International Criminal Court ("Rome Statute") is the main body of law that codifies criminal responsibility standards for commanders and other superiors within the ICC's jurisdiction.⁵⁶ Specifically, Article 28(1) provides that:

[1] military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where: (a) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and (b) That military commander or person

53. GUÉNAËL METTRAUX, *INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS* 296 (Oxford Univ. Press 2005) [hereinafter *INTERNATIONAL CRIMES*] ("The principle of command responsibility provides that under certain circumstances a commander (or superior) may be held criminally responsible if he or she fails to prevent or punish the criminal acts of his or her subordinates of which he or she knew or had reason to know."); see Bloch, *supra* note 11, at 316 ("[T]he doctrine of command responsibility seeks some other association between the commander and the offense that may amount to criminal liability that is equal or graver in severity with respect to the main perpetrator.").

54. GUÉNAËL METTRAUX, *THE LAW OF COMMAND RESPONSIBILITY* 38 (Oxford Univ. Press 2009) [hereinafter *LAW OF COMMAND RESPONSIBILITY*].

55. *INTERNATIONAL CRIMES*, *supra* note 53, at 297 (citing *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgment, ¶ 239 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001) (noting that "superior responsibility" is not equivalent to a "vicarious liability doctrine, insofar as vicarious liability may suggest a form of *strict imputed liability*").

56. Rome Statute, *supra* note 52, art. 28(1).

failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.⁵⁷

Phrased differently, to be held liable under the command responsibility doctrine, there must be: (1) a superior-subordinate relationship between a commander and perpetrator of a crime; (2) the superior must have known—or should have known—about a crime that was committed, is being actively committed, or is about to be committed; and (3) the superior failed to stop their subordinate from committing the crime, or failed to punish his subordinates appropriately for any crimes committed.⁵⁸ International tribunals of Rwanda and the former Yugoslavia have historically held that the prosecutor must prove that the military commanders charged under a command responsibility theory had effective control over his troops to be found liable.⁵⁹ Article 28(2) of the Rome Statute applies liability more broadly to “superior and subordinate relationships not described in” Article 28(1).⁶⁰

2. *Ukraine Does Not Currently Prosecute Under the Theory of Command Responsibility*

As mentioned above, Ukraine has not yet incorporated the principle of command responsibility as a mode of criminal liability into their Constitution, penal code, or any other laws.⁶¹ Similar to the

57. *Id.*

58. *Id.*; see also *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1288 (11th Cir. 2002) (explaining how the United States Congress intended to adopt the doctrine of command responsibility based on its international law construction by passing the Torture Victim Protection Act (TVPA)).

59. See INTERNATIONAL CRIMES, *supra* note 53, at 299 (citing *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-A, Judgment, ¶ 50 (Int’l Crim. Trib. for Rwanda July 3, 2002) (“[A]s long as a superior has effective control over subordinates, to the extent that he can prevent them from committing crimes or punish them after they committed the crimes, he would be held responsible for the commission of the crimes if he failed to exercise such abilities of control.”); *Ford*, 289 F.3d at 1290–91 (“Recent international cases consistently have found that effective control of a commander over his troops is required before liability will be imposed under the command responsibility doctrine.”); see, e.g., *Delalić et al.*, Case No. IT-96-21-A, Judgment, ¶ 197 (“In determining questions of responsibility it is necessary to look to effective exercise of power or control and not to formal titles.”).

60. Rome Statute, *supra* note 52, art. 28(2); LAW OF COMMAND RESPONSIBILITY, *supra* note 54, at 25 (“[The] statutory instrument expressly acknowledges that the fact that the doctrine applies, not only to military commanders, but also to non-military superiors.”).

61. See generally UKR. CONST. Compare CRIM. CODE OF UKR. § II, art. 3 (discussing Ukraine’s stance on criminal liability, which is notably lacking a provision for command responsibility as a mode of liability), with CRIM. CODE OF UKR.

United States Constitution, Article 58 of the Ukrainian Constitution clearly prohibits *ex post facto* laws, stating that “no one shall bear responsibility for acts that, at the time they were committed, were not deemed by law to be an offence.”⁶² Therefore, to hold a commander liable under the new theory of command responsibility which was otherwise unavailable at the commission of the crime, would be a textbook *prima facie* violation against *ex post facto* laws.⁶³

The Ukrainian government could—in theory—pass legislation adding command responsibility as a new mode of liability as early as *today* and apply the doctrine moving forward for any war crimes committed post-adoption.⁶⁴ However, Ukraine is still actively fighting in this war well into the year 2024.⁶⁵ Of the tens-of-thousands of alleged crimes reported by the Ukrainian government, only 511 alleged Russian war criminals have been positively identified, and only 80 have been convicted, mostly *in absentia*.⁶⁶ A new law would assist Ukrainian prosecutors moving forward, but Ukraine is also in desperate need of a method of prosecuting the immeasurable number of Russian war crimes *already committed*. Additionally, Ukraine needs a way to “catch the bigger fish”; that is, Ukraine needs to impose criminal liability on the commander ordering the war crimes to be committed in the first place, not just the junior soldier who executes the atrocity.⁶⁷

§ II, art. 6(1) (“Any person who has *committed an offence* in the territory of Ukraine shall be criminally liable under this Code”), and CRIM. CODE OF UKR. § II, art. 6(3) (“An offence shall be deemed committed in the territory of Ukraine if the *principal* to such offence, or at least one of the accomplices, has acted in the territory of Ukraine.”) (emphasis added).

62. See *Cummings v. Missouri*, 71 U.S. 277, 287–88 (1866) (explaining the American prohibition against convicting someone under an *ex post facto* law); UKR. CONST. art. 58 (“[N]o one shall bear responsibility for acts that, at the time they were committed, were not deemed by law to be an offence.”).

63. See *Cummings*, 71 U.S. at 288.

64. But see CRIM. CODE OF UKR. art. 4 (providing that new laws on criminal liability shall enter into force 10 days after its official promulgation, unless otherwise provided by the law itself).

65. See Ctr. for Preventive Action, *supra* note 16.

66. *122,000 Suspected War Crimes*, *supra* note 13 (“We have identified already 511 perpetrators. And we have already 80 convictions in Ukrainian courts, mostly in *absentia* . . .”); see Ctr. for Preventive Action, *supra* note 16; Maggie Miller, *Ukraine Says It Has Evidence of 109,000 Russian War Crimes*, POLITICO (Nov. 18, 2023, 6:42 PM), <https://tinyurl.com/r4d6rd7b> [<https://perma.cc/PZQ3-MF76>] (reporting that “[t]he Ukrainian government has collected evidence of around 109,000 alleged Russian war crimes, including physical and cyberattacks, according to Ukrainian Prosecutor General Andriy Kostin” and indicted 300 suspected perpetrators).

67. See LAW OF COMMAND RESPONSIBILITY, *supra* note 54, at 15–16 (describing various arguments supporting preference for prosecutions of high-ranking officials, and suggesting that high-profile prosecutions might “neutralize [a commander’s] political influence” in a given region and better “combat the general culture of

C. *The Principle of Customary International Law*

1. *Customary International Law*

“Customary international law has long been one of the cornerstones of the international legal order, alongside treaties.”⁶⁸ Richard Zouche, professor of civil law at Oxford University, described customary international law as “a law which has been accepted by customs conforming to reason among most nations or which has been agreed upon by single nations.”⁶⁹ Customary international law governs a wide range of subjects, notably the responsibility of States for international law violations, the law of international armed conflict, international criminal law, and human rights.⁷⁰ Such a complex body of law is “created by the general customs and practices of nations and therefore does not stem from any single, definitive, readily-identifiable source.”⁷¹ Rather, customary international law is composed of a set of “clear and unambiguous rules by which States universally abide, or to which they accede, out of a sense of legal obligation and mutual concern.”⁷²

Article 38(1)(b) of the Statute of the ICJ outlines how, in the absence of an international convention or treaty between two nations, custom is the controlling legal source that shapes the obligations and rights of those two nations.⁷³ More broadly, Article 38 states that “customary law” arises from multiple sources, including international conventions, international custom evidenced by general practice accepted as law, general principles of law recognized by “civilized nations,” judicial teachings, and reputable public opinions.⁷⁴ To establish a rule of customary international law, Article 38 has been interpreted by the ICJ to mean that two elements must be met: (1) general practice of the custom by States, and (2) acceptance as law by States.⁷⁵ General practice without acceptance as law by the

impunity that has long characterized the international society” than prosecution of foot-soldiers and low-ranking officials would).

68. BRIAN D. LEPARD, *REEXAMINING CUSTOMARY INTERNATIONAL LAW* 1 (Cambridge Univ. Press 2017).

69. *Id.* at 2 (quoting ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 167 (1954)).

70. *Id.* at 3.

71. *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 248 (2d. Cir. 2003).

72. *Id.* at 252.

73. Statute of the International Court of Justice, art. 38(1), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993; Bloch, *supra* note 11, at 321.

74. Statute of the International Court of Justice, *supra* note 73, art. 38.

75. *Continental Shelf (Libya v. Malta)*, Judgment, 1985 I.C.J. 13, ¶ 27 (June 3) (“[T]he material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom,

States, even if “widespread and consistent,” is insufficient to create a body of customary international law.⁷⁶ Furthermore, mere belief about whether a law is—or should be—universally binding is also not sufficient to establish a principle as part of customary international law.⁷⁷ Instead, States must feel that they are “conforming to what amounts to a legal obligation,” not merely a moral one.⁷⁸

State practice consists of conduct, including both physical and verbal conduct, undertaken by a State in an official capacity by any functional branch of their government, such as laws passed by a State’s legislature or treaties enacted by a country’s executive.⁷⁹ State acceptance as law of said practices, on the other hand, demands that a “sufficient magnitude” of States legitimately believe that they all *must* adhere to the practice as a matter of binding international law irrespective of domestic actions or concerns.⁸⁰ The International Law Commission (ILC) describes this second element as a more “subjective” standard, distinguishable from “mere usage or habit” outwardly observable by a country’s actions.⁸¹ The ILC suggests that States

or indeed in developing them.”); Bloch, *supra* note 11, at 323 (interpreting the ICJ’s language in *Continental Shelf* to what Bloch refers to as “State practice” and “acceptance as law”).

76. Int’l L. Comm’n, Rep. on the Work of its Seventieth Session, U.N. Doc. A/73/10, at 125–26 (2018) [hereinafter ILC Draft Conclusions].

77. *Id.* at 126 (“[A] belief that something is (or ought to be) the law unsupported by practice is mere aspiration . . .”).

78. See *North Sea Continental Shelf* (Ger. v. Den.; Ger. v. Neth.), Judgment, 1969 I.C.J. 4, ¶ 77 (Feb. 20) (“The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitates*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.”).

79. ILC Draft Conclusions, *supra* note 76, at 132–33 (discussing how States can exercise “executive, legislative, judicial, or other functions” to demonstrate state practice, and listing various examples of state practice that would be considered sufficient to establish that element of customary international law).

80. *North Sea Continental Shelf*, Judgment, 1969 I.C.J. ¶ 77. The court stated the following:

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. (quoting S.S. “*Lotus*” (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10 23, at 28 (Sept. 7) (“Even if the rarity of the judicial decisions to be found . . . were sufficient to prove . . . the circumstance alleged . . . it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom.”)).

Id.; see also Bloch, *supra* note 11, at 327.

81. ILC Draft Conclusions, *supra* note 76, at 138 (referring to the *opinio juris* element as the “‘subjective’ or ‘psychological’ element”).

may demonstrate evidence of *opinio juris* through “a wide range of forms,” such as a State’s public opinions, publications, and general demeanor on principles of international importance.⁸²

2. *Applying Customary International Law Apply to Ukraine*

As discussed above, a principle of customary international law does not depend on Ukraine’s *acceptance* of that principle for it to be binding on Ukraine.⁸³ Rather, Ukraine is merely one country’s behavior to take note of in assessing whether or not a certain principle has been sufficiently adopted into customary international law.⁸⁴ Much the same, Russia need not believe that customary international law governs their actions taken in the War in Ukraine—the practice or principle in question must merely be “both extensive and virtually uniform” and be a “settled practice.”⁸⁵

That said, Ukraine has clearly made efforts to align itself more with other European countries, evidenced by its attempts to join the European Union (EU).⁸⁶ In June 2022, the EU granted candidate status to Ukraine.⁸⁷ In doing so, they noted that Ukraine had made great strides in cracking down on government corruption and “aligning Ukrainian law to the full body of EU law.”⁸⁸ They also praised Ukraine’s completion of over 90 percent of the Commission’s established prerequisites before joining the EU.⁸⁹ Furthermore, Ukrainian President Volodymyr Zelenskyy called world leaders to show solidarity and support Israel by condemning the “terrorist attack” by

82. *Id.* at 140. The Commission gave numerous examples:

Forms of evidence of acceptance as law (*opinio juris*) include, but are not limited to: public statements made on behalf of States; official publications; government legal positions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or an intergovernmental conference.

Id.

83. *See generally supra* Section (II)(C)(1) (discussing how principals of law becomes part of the customary international law framework).

84. *See* ILC Draft Conclusions, *supra* note 76, at 135–36 (“The relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent.”).

85. *North Sea Continental Shelf*, Judgment, 1969 I.C.J. ¶¶ 74, 77.

86. *See* Mykhailo Minakov et al., *Ukraine is Now an EU Member Candidate. What’s Next?*, WILSON CTR. (July 12, 2022), <https://tinyurl.com/5n8t25pr> [<https://perma.cc/2LGM-QVMN>].

87. Aleksander Cwalina, *What’s Next for Ukraine’s Bid to Join the European Union*, ATL. COUNCIL (Nov. 14, 2023), <https://tinyurl.com/2vba9nfw> [<https://perma.cc/6VUH-N3BB>].

88. *Id.*

89. *Id.*

Palestinian Islamist group Hamas in late 2023.⁹⁰ This demonstrates that Ukraine continues to stay abreast of other major world events despite their own ongoing conflict.⁹¹ These two instances—Ukraine’s reformation efforts to join the EU and open support of Israel—demonstrate Ukraine’s interest in seeking to adopt similar principles and draw support from other Western powers, echoing their call-to-action to Western allies put forth by President Zelenskyy last year when the War in Ukraine first broke out.⁹² These observations support the notion that Ukraine is motivated to follow the law and hold others accountable for breaking it within their borders.⁹³

Having examined the present landscape in Ukraine and the role of command responsibility as a part of customary international law, the logical analysis forward is twofold: (1) determining whether command responsibility was already a recognized principle of customary international law at the time war crimes were committed in Ukraine, and (2) if it was, determining whether this fact grants Ukraine the power to prosecute senior military commanders for their war crimes under a theory of command responsibility, which would otherwise violate its prohibition on *ex post facto* laws.⁹⁴

II. ANALYSIS

A. Current Governing International Law and Case Precedent

Recall that in order to consider a doctrine or practice as a fundamental principle of customary international law, States must both *actually practice* the doctrine and, equally as important, conduct said practice “out of a sense of legal obligation” demonstrating widespread *acceptance* of the principle as governing law.⁹⁵ The same is true for the doctrine of command responsibility—in order to qualify, States must actually practice command responsibility in a widespread manner because they feel legally bound to hold

90. Dan Peleschuk & Nick Starkov, *Ukraine’s Zelenskiy Calls for World Solidarity with Israel*, REUTERS (Oct. 7, 2023, 6:49 PM), <https://tinyurl.com/mryf59hu> [<https://perma.cc/79AP-D83J>].

91. *See id.*

92. *See* Joe McCarthy, *The Ukraine Call to Action from President Volodymyr Zelenskyy*, GLOB. CITIZEN (Mar. 6, 2022), <https://tinyurl.com/4j46eh2y> [<https://perma.cc/C3RP-KJZN>] (discussing a video call-to-action where President Zelenskyy addressed other major world powers to aid their efforts in repelling the ongoing Russian invasion).

93. *See* Cwalina, *supra* note 87 (“[Ukraine] has made progress in aligning Ukrainian law to the full body of EU law, or the *acquis*.”).

94. UKR. CONST. art. 58 (“[N]o one shall bear responsibility for acts that, at the time they were committed, were not deemed by law to be an offence.”).

95. *See* Bloch, *supra* note 11, at 323 (discussing the two elements of customary international law).

commanders responsible. Next, this Comment explores some of the key statutory components of international law that govern in this space and examines how courts have interpreted said statutes by way of international “common law.”⁹⁶

1. *Geneva Conventions, ICC Statutes, and International Tribunals*

Article 85 of the Protocol Additional to the Geneva Conventions (“Protocol I”) defines what actions are considered grave breaches of the Convention.⁹⁷ More specifically, Protocol I states that grave breaches of the Conventions and Protocol I shall be regarded as war crimes.⁹⁸ Article 86 of Protocol I states that parties to a conflict shall take measures necessary to suppress all other breaches of the Geneva Conventions which result from a failure to act when under a duty to do so.⁹⁹ In other words, Article 86 introduces criminal liability through the failure to act as a standalone method of committing war crimes.¹⁰⁰ Further, Article 86 imposes indirect liability onto superiors provided they knew, or should have known, that their subordinates would breach the Conventions by committing war crimes.¹⁰¹ Article 87 extends this duty to military commanders and

96. See generally *Milanković v. Croatia*, App. No. 33351/20 (Jan. 20, 2022), <https://tinyurl.com/56apnzmd> [<https://perma.cc/E7CZ-PRGZ>].

97. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 85(3), June 8, 1977, 1125 U.N.T.S. 17512 [hereinafter Protocol I]. With regard to the War in Ukraine, Article 85 claims in relevant part that, when willfully committed and causing death or serious injury to body or health, the following acts are regarded as grave breaches of the Geneva Conventions:

(a) making the *civilian population or individual civilians* the object of attack; (b) launching an indiscriminate attack affecting the *civilian population or civilian objects* in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects . . . (c) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, *injury to civilians or damage to civilian objects* . . . (d) making non-defended localities and demilitarized zones the object of attack . . .

Id. (emphasis added).

98. *Id.* art. 85(5).

99. *Id.* art. 86(1).

100. See *id.*

101. *Id.* art. 86(2). Relating to liability, the text states that:

The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

Id.

requires them to prevent, suppress, report, and punish breaches of the Conventions.¹⁰² Notably, both Ukraine and Russia are parties to the 1949 Geneva Conventions and Protocol I.¹⁰³

Recall that the ICC defined command responsibility and solidified it as a key piece of customary international law in the Rome Statute.¹⁰⁴ This Article specifically codifies the indirect criminal liability of superiors for all crimes committed by forces under their effective control at a time when the superior failed to exercise proper control over them, either by failing to prevent the criminal acts outright or failing to punish after-the-fact.¹⁰⁵

However, due to misunderstandings of how the ICC operates and fears that the ICC would prosecute the Ukrainian military, Ukraine has not yet ratified the Rome Statute and consequentially is not yet a party to it.¹⁰⁶ Nevertheless, Ukraine has twice exercised its prerogative to accept the ICC's jurisdiction over alleged crimes under the Rome Statute occurring on its territory, pursuant to Article 12(3) of the Statute.¹⁰⁷ Consequentially, the ICC is empowered to investigate war crimes and other crimes committed within the territory of Ukraine—by both Russians and Ukrainians—even though they have not yet ratified the Rome Statute.¹⁰⁸ Ukraine will be obligated to ratify the Rome Statute before it is granted membership to the EU.¹⁰⁹ Ukraine stands to gain credibility with other nations when it does eventually ratify, especially considering its demands for

102. *Id.* art. 87(1–3).

103. *Russia, Ukraine & International Law: On Occupation, Armed Conflict and Human Rights*, HUM. RTS. WATCH (Feb. 23, 2022, 5:25 PM), <http://tinyurl.com/kdz-4vckf> [<https://perma.cc/ZTS7-DDL3>].

104. Rome Statute, *supra* note 52, art. 28(1).

105. *Id.*

106. Mariia Buleiko, *Why Has Ukraine Not Ratified the Rome Statute?*, INST. FOR WAR & PEACE REPORTING (Apr. 4, 2023), <http://tinyurl.com/52n2s4pv> [<https://perma.cc/T55U-ASN2>] (“Instead, myths arose around the Rome Statute and the ICC in the highest political circles of Ukraine, all because of a misunderstanding of how the ICC and the Rome Statute work.”).

107. *Press Release: Ukraine Accepts ICC Jurisdiction Over Alleged Crimes Committed Since 20 February 2014*, INT’L CRIM. CT. (Sept. 8, 2015), <http://tinyurl.com/3ftkft32> [<https://perma.cc/Y5C9-LZ9Y>]; see Rome Statute, *supra* note 52, art. 12(3). The applicable text of the Rome Statute states:

If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may . . . accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception

Id.

108. Buleiko, *supra* note 106; see also *Russia, Ukraine & International Law*, *supra* note 103 (discussing how Ukraine accepted the court’s jurisdiction over alleged crimes committed on its territory since November 2013, and in doing so, the obligation to cooperate with the court).

109. Buleiko, *supra* note 106.

international justice within its borders.¹¹⁰ Ukraine's ceding of jurisdiction and efforts to join the EU lend in favor of its efforts to more greatly involve itself with the ICC and recognize the international law principles the Rome Statute professes.

However, while the ICC codified it, it is really the work of international criminal tribunals—such as those held for Rwanda and the former Yugoslavia—which have served to develop and incorporate the doctrine of command responsibility as a mode of criminal liability.¹¹¹ Article 7(3) of the Statute of the International Criminal Tribunal for the former Yugoslavia (“ICTY Statute”) is similar to the Articles from Protocol I mentioned above. It states that acts committed by subordinates do not relieve superiors of criminal liability if the superior knew or should have known the subordinates did or were about to commit crimes, yet failed to act.¹¹² Likewise, Article 6(3) of the Statute for the International Criminal Tribunal for Rwanda (ICTR) and Article 6(3) of the Statute of the Special Court for Sierra Leone (ICTSL), which both govern individual criminal responsibility under those tribunals, respectively, are virtually identical in language and effect to Article 6(3) in the ICTY Statute.¹¹³

Considering that Ukraine is already a party to the Geneva Conventions (including Protocol I), has granted the ICC jurisdiction despite being a nonparty, and will eventually need to ratify the Rome Statute, Ukraine projects a growing acceptance of international law

110. *See id.* (discussing how it is contradictory for Ukraine to demand support from other States yet not wanting to support or implement the system and discussing Article 8 of the Association Agreement between the EU and Ukraine, which mandates ratifying the Rome Statute before joining the EU).

111. *See* LAW OF COMMAND RESPONSIBILITY, *supra* note 54, at 21 (“It has already been noted that the doctrine of superior responsibility is now a recognized mode of criminal liability under customary international law.”); *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1292 (11th Cir. 2002).

112. *See* U.N. Secretary-General, *Report of the Secretary General Pursuant to Paragraph 2 of the Security Council Resolution 808*, art. 7(3), U.N. Doc. S/25704 (May 3, 1993) (proposing the eventual establishment of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, adopted by S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (May 25, 1993)) [hereinafter ICTY Statute].

113. *See* Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in Rwanda, U.N. SCOR, 49th Sess., 3453d mtg. art. 6(3), U.N. Doc. S/RES/955 (Aug. 11, 1994) (discussing criminal responsibility for superiors in Rwanda); Agreement on the Establishment of a Special Court for Sierra Leone, art. 6(3), U.N.-Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 137, U.N. Doc. S/RES/1315 (Aug. 14, 2000) (discussing criminal responsibility for superiors in Sierra Leone); *Milanković v. Croatia*, App. No. 33351/20, ¶ 34 (Jan. 20, 2022), <https://tinyurl.com/56apnzmd> [<https://perma.cc/5LQS-S6MC>] (describing the similarities in statutory language of the various statutes creating the aforementioned international criminal tribunals).

principles. This is consistent with its general governmental reformation efforts and attempt to join the EU, which collectively demonstrate Ukraine's desire to hold Russian actors accountable for their war crimes.¹¹⁴ However, recall that Ukraine does not yet possess the legal authority to prosecute under a theory of command responsibility because their criminal code is bereft of such indirect liability for a subordinate's actions. An international criminal tribunal could be established to prosecute war crimes committed during the War in Ukraine, which would presumably mirror the previous precedent tribunals that came before it and incorporate command responsibility directly.¹¹⁵ However, unless and until such a tribunal is created, Ukraine needs domestic justification to prosecute Russian commanders and a solution to overcome their retroactivity legality problem.

2. *The Customary International Humanitarian Law Study and International Case Law*

Regretfully, other countries have experienced travesties similar to the conflict Ukraine is currently weathering.¹¹⁶ However, this has served to build up a sizable body of international precedent governing command responsibility's place in the customary international law domain.¹¹⁷ The Customary International Humanitarian Law study ("CIHL Study") by the International Committee of the Red Cross (Red Cross) lists a number of rules that dissects and interprets the growing body of case law about command responsibility and its incorporation into international law.¹¹⁸

The CIHL Study declares that Rule 152, which states that commanders and other superiors are criminally responsible for war crimes committed pursuant to their orders, is a "norm of customary international law applicable in both international and non-international armed conflicts."¹¹⁹ Additionally, Rule 153 states that commanders

114. See *supra* notes 86–93 and accompanying text.

115. See PATRICK BUTCHARD, HOUSE OF COMMONS LIBR. RSCH. BRIEFING, CBP 9968, CONFLICT IN UKRAINE: A SPECIAL TRIBUNAL ON THE CRIME OF AGGRESSION (2023) (discussing proposals for a special tribunal for Ukraine relating directly to the specific crime of aggression); Rein Tammsaar, *An International Special Tribunal is the Only Viable Path to a Just and Lasting Peace in Ukraine*, JUST SEC. (May 9, 2023), <https://tinyurl.com/46y2mvtm> [<https://perma.cc/M69C-WLKU>] (advocating for the creation of an international criminal tribunal for the War in Ukraine).

116. See *generally* Prosecutor v. Hadžihasanović and Others, Case No. IT-01-47-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Apr. 22, 2008).

117. See *generally id.*

118. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME 1: RULES 556 (Int'l Comm. of the Red Cross, 2005).

119. *Id.* at 556–58 (citing within to the Geneva Conventions, ICC Statute, various International Criminal Tribunal statutes, and case law).

and other superiors are vicariously criminally liable for war crimes committed by their subordinates, using a definition much akin to that used in ICC Article 28.¹²⁰ Like Rule 152, the Red Cross lays the foundation that Rule 153 is also a “norm of customary international law applicable in both international and non-international armed conflicts.”¹²¹ Notably, command responsibility as espoused in Rule 153 has been interpreted in case law to apply to civilian command authority, meaning that civilians can also be liable for war crimes on the basis of their command responsibility.¹²² Additionally, the relationship between commander and subordinate need not be direct, and actual knowledge of a subordinate’s wrongdoing is not required—instead, constructive knowledge of wrongdoing is sufficient to convict.¹²³

These applications of traditional command responsibility to civilian superiors who have effective control over the direct perpetrators of crimes may become quite useful for Ukraine, considering the use of private military organizations—like the Wagner Group—alongside Russian forces.¹²⁴ Similar to the Russian military, private military organizations like the Wagner Group may also be responsible for war crimes, perhaps even more so considering around 40,000 of Wagner Group fighters are supposed convicts.¹²⁵

There are a plethora of important decisions arising out of the various International Criminal Tribunals (which in part inform the

120. *Id.* at 558. Rule 153 is stated as follows:

Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed to punish the persons responsible.

Id.

121. *Id.* at 559–61 (citing to previously mentioned international statutes and case law beyond the scope of this Comment).

122. *Id.* at 561 (interpreting Rule 153 based on precedential decisions arising out of the ICTY, including the *Delalić* Judgment in 1998).

123. *Compare id.* (discussing and citing to various decisions arising out of the international criminal tribunals previously mentioned), *with* Bloch, *supra* note 11, at 364–65 (2023) (arguing that currently standing customary doctrine of command responsibility must rest on actual knowledge, not constructive knowledge).

124. *See* Nathan Luna et al., *What is The Wagner Group? The ‘Brutal’ Russian Military Unit in Ukraine*, ABC NEWS (Aug. 23, 2023, 2:07 PM), <http://tinyurl.com/2ufbztza> [<https://perma.cc/Z3YS-6PMP>] (“The Wagner Group is a private military organization run by an ally of Russian leader Vladimir Putin with tens of thousands of fighters . . .”).

125. *Id.* (“Around 40,000 of the fighters are believed to be convicts . . . which could lead to more allegations of human rights abuses. A video that has circulated online appears to show the group’s leader, businessman Yevgeny Prigozhin, asking prisoners to join the Wagner Group.”).

basis of the CIHL Study's assertions) on the finer details of command responsibility.¹²⁶ Two of these cases, which feature prominent roles in the ensuing *Milanković* case analysis, warrant discussion of their pertinent language.¹²⁷

In the case of *Prosecutor v. Hadžihasanović and Others*¹²⁸, Defendants Enver Hadžihasanović and Amir Kubura were tried and convicted by the International Criminal Tribunal for the Former Yugoslavia (ICTY) for having failed to prevent or punish certain criminal offenses committed by their respective subordinates pursuant to Article 7(3) of the ICTY Statute.¹²⁹ In the ICTY's appellate judgment upholding the convictions, the court reaffirmed several practical principles and other points of law which will be key for Ukrainian prosecutors to demonstrate.¹³⁰

First, the *Hadžihasanović* court affirmed a previous ruling from the *Čelebići*¹³¹ case, and held that superiors must be shown to have had effective control over their subordinates in all cases hinging on command responsibility regardless of whether they are a *de jure* or a *de facto* superior.¹³² In other words, the prosecutor has the burden of proof to show that the commander more than merely outranked a subordinate—rather, they must have exercised some cognizable level of effective control over their subordinates.¹³³

Further, in defining the “had reason to know” standard from Article 7(3)'s language, *Hadžihasanović* affirmed that courts must ascertain whether a superior had sufficiently alarming information which would have put that superior on notice as to the risk that crimes had been (or might be) committed by his subordinates.¹³⁴ Trial

126. See generally *Prosecutor v. Hadžihasanović and Others*, Case No. IT-01-47-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Apr. 22, 2008); *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgment, ¶ 197 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001); see, e.g., *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Jan. 31, 2005).

127. See generally *Hadžihasanović*, Case No. IT-01-47-A, Judgment; *Delalić*, Case No. IT-96-21-A, Judgment.

128. See generally *Hadžihasanović*, Case No. IT-01-47-A, Judgment.

129. *Id.* ¶¶ 4–5 (describing how Hadžihasanović was convicted for his command responsibility in failing to prevent murders and cruel treatment committed by his subordinates, and how Kubura was convicted for failing to prevent his subordinates from plundering villages).

130. See *id.* ¶ 20.

131. *Delalić*, Case No. IT-96-21-A, Judgment, ¶ 197.

132. *Hadžihasanović*, Case No. IT-01-47-A, Judgment, ¶ 20 (quoting *Delalić*, Case No. IT-96-21-A, Judgment, ¶ 197 (“In determining questions of responsibility it is necessary to look to effective exercise of power or control and not to formal titles.”)).

133. *Id.* ¶ 21.

134. *Id.* ¶ 31 (citing to the *Hadžihasanović* court's Trial Chamber judgment and affirming that standard on appeal); see INTERNATIONAL CRIMES, *supra* note 53, at

courts may also take into account the failure of a superior to punish crimes committed by subordinates, because failure to punish is relevant to the question of whether the superior was on notice of the risk of similar crimes occurring.¹³⁵

With respect to a superior's duty to punish, the *Hadžihasanović* court held that measures taken by superiors to punish subordinates for any crimes committed are relevant to the discussion of whether a superior discharged his duty to prevent or punish under Article 7(3), but are not themselves determinative.¹³⁶ Rather, evidence and circumstances dictate sufficiency of the superior's corrective action taken.¹³⁷

Lastly, command responsibility does not require that a causal link be established between a commander's failure to prevent subordinates' crimes and the occurrence of these crimes.¹³⁸ However, assessment of causation may still be offered, and may still lend to a court's finding that a superior failed to take necessary and reasonable measures to prevent a subordinate's crimes.¹³⁹

Overall, this Comment posits that the *Hadžihasanović* and *Čelebići* cases, along with the continually growing bank of decisions arising out of the various international courts and tribunals, all stand for the proposition that the doctrine of command responsibility is a widely established principle of customary international law applicable in the context of an armed conflict.¹⁴⁰

301–06, for a detailed explanation of the “Knowledge Requirement” and its interpretations in international case law.

135. *Hadžihasanović*, Case No. IT-01-47-A, Judgment, ¶ 31 (citing Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgment, ¶ 169 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 17, 2003) (discussing how the Accused superior knowing about prior acts of beating was relevant and sufficient to put the superior on notice that acts of torture may be occurring within his ranks, warranting further investigation)).

136. *Id.* ¶ 33 (citing Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgment, ¶ 417 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004)).

137. *See id.*

138. *Id.* ¶¶ 40–41.

139. *See id.* ¶ 41 (discussing how the Trial Chamber's assessment of causation was unnecessary, but the error ultimately did not have an impact on their decision because it led to further analysis by the court); INTERNATIONAL CRIMES, *supra* note 53, at 310 (“Complete dissociation between the superior's failure to act and the crimes committed by his subordinates would render command responsibility dangerously close to an objective form of strict liability whereby a commander could be held responsible for *any* crimes committed by his subordinates.”) (emphasis in original).

140. *See* Milanković v. Croatia, App. No. 33351/20, ¶¶ 37–38 (Jan. 20, 2022), <https://tinyurl.com/56apnzmd> [<https://perma.cc/GE8E-BB5V>] (citing Prosecutor v. Hadžihasanović and Others, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction (Int'l Crim. Trib. for the Former Yugoslavia Nov. 12, 2002) (“[T]he doctrine of command responsibility [was] already in – and [has been] since – 1991 . . . applicable in the context of an internal armed conflict under customary international law.”), *aff'd*, Prosecutor v. Hadžihasanović and Others, Case No. IT-01-47-AR72,

The major difference between Ukraine's future cases and previous cases like *Hadžihasanović* and *Čelebići* lies in the fact that Ukraine currently has no domestic equivalent to ICTY Statute Article 7(3).¹⁴¹ However, a recent case arising out of the ECHR provides the international justification Ukraine so desperately needs to employ command responsibility within its borders, both for crimes yet-to-be committed and those already committed.¹⁴²

3. *Case of Milanković v. Croatia*

Perhaps the single-most influential international decision connecting previous case law with Ukraine's current disposition is the recent *Milanković* case, a case arising out of the European Court of Human Rights that affirmed a conviction on the basis of command responsibility and validated the doctrine as a vehicle for vicarious liability.¹⁴³

In this recent ruling decided on January 20, 2022, Croatian prosecutors utilized command responsibility to hold Vladimir Milanković, former deputy head of the Sisak-Moslavina Police Department, liable for failing to prevent numerous crimes committed against Croatian civilians by his subordinates.¹⁴⁴ In June 2011, Croatia opened a comprehensive investigation into the killings and other criminal offenses committed against individuals within Croatia back between the years 1991 and 1992.¹⁴⁵ This investigation led Croatian prosecutors to indict Mr. Milanković with 22 counts of war crimes against the civilian population.¹⁴⁶ While the State alleged that Mr. Milanković committed some crimes himself, they argued that he was criminally

Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility (Int'l Crim. Trib. for the Former Yugoslavia July 16, 2003)).

141. Compare ICTY Statute, *supra* note 112, art. 7(3), with UKR. CONST. and CRIM. CODE OF UKR. (2023).

142. See generally *Milanković*, App. No. 33351/20.

143. See Quénivet, *supra* note 9; *Milanković*, App. No. 33351/20 ¶ 60 (stating that "[i]t is beyond doubt that the responsibility of commanders for war crimes committed in the course of an international armed conflict was *tempore criminis* an existing rule of international law").

144. *Milanković*, App. No. 33351/20 ¶ 66.

145. *Id.* ¶¶ 5–7.

146. *Id.* ¶¶ 8–9. Paragraph 8 discusses the original accusations:

He was accused of having, in the period between 18 August 1991 and 20 June 1992, personally ill-treated civilians, ordered attacks against them, ordered their illegal arrests and detentions, the ill-treatment and killings of civilians and the ill-treatment and killing of a prisoner of war perpetrated by the police units under his command.

Id.

responsible for 18 of these crimes because of his failure to prevent or punish the police units which committed the crimes.¹⁴⁷

However, like Ukraine, Croatia's Basic Criminal Code did not contain any specific provisions regarding command responsibility as a form of liability.¹⁴⁸ To overcome this, the State Attorney's Office argued that Mr. Milanković's actions were criminal under "universally recognized rules of customary international law of war and [of customary international] humanitarian law"—that is, Mr. Milanković was indirectly responsible as a commander.¹⁴⁹ Mr. Milanković defended with many theories, notably how command responsibility should not apply to him because it was not enumerated as a domestic crime before or after the time the crimes were committed, violating Croatia's ban on *ex post facto* laws.¹⁵⁰ However, Croatia's trial court found Mr. Milanković guilty of the 18 war crimes on the basis of his command responsibility, and the State's Supreme Court and Constitutional Court affirmed his convictions.¹⁵¹ Mr. Milanković petitioned to the European Court of Human Rights to decide whether his conviction was a violation of Article 7 of the ECHR—more specifically, whether command responsibility in non-international armed conflicts was sufficiently a rule of customary international law at the time when Mr. Milanković's police units perpetrated their crimes.¹⁵²

147. *Id.* ¶¶ 11–12.

148. *Id.* ¶¶ 13, 42. *See generally* OSNOVNI KRIVIČNI ZAKON REPUBLIKE HRVATSKE [BASIC CRIM. CODE OF CROAT.] (eff. July 1, 1977, to Dec. 31, 1997) (containing no direct mention of the principle of "command responsibility" at the time when Mr. Milanković's subordinates committed the crimes in 1991 and 1992).

149. *Milanković*, App. No. 33351/20 ¶ 13.

150. *See id.* ¶ 15 (discussing the applicant's defenses to the charges, notably how "the Basic Criminal Code had not contained the concept of command responsibility" and how interpreting other blanket provisions in Croatia's code was legally inadequate).

151. *Id.* ¶¶ 17–25.

152. *Id.* ¶ 25 (discussing the legal bases that the Constitutional Court used in determining command responsibility's place in customary international law); *see also* Convention for the Protection of Human Rights and Fundamental Freedoms, art. 7, Nov. 4, 1950 213 U.N.T.S. 221, E.T.S. No. 5 [hereinafter European Convention on Human Rights]. In whole, Article 7 of the European Convention on Human Rights states that:

[1.] No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. [2.] This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.

Id.

In the *Milanković* court's exploration of international precedent, it examined *Hadžihasanović*, *Čelebići*, and other court decisions arising out of ICTY.¹⁵³ The court cited *Hadžihasanović* for its notion that command responsibility was a part of customary international law in its application to war crimes committed in the course of an *internal* armed conflict.¹⁵⁴ Additionally, the court confirmed that command responsibility also exists in non-international armed conflicts.¹⁵⁵ Lastly, the court affirmed that the concept of command responsibility created by ICTY Statute Article 7(3) extends to non-military commanders as well, including political leaders and other civilian superiors in positions of authority.¹⁵⁶

The *Milanković* court ultimately held that it is beyond doubt that the responsibility of commanders for war crimes committed in the course of an international armed conflict was *tempore criminis*¹⁵⁷ an existing rule of international law.¹⁵⁸ The ECHR also agreed with the ICTY that this concept applies equally to internal armed conflicts, and extends beyond mere military commanders to other non-military superiors as well.¹⁵⁹ Further, the court held that it was foreseeable for Mr. Milanković to appreciate that his conduct was criminal, despite there not being an exact law defining and criminalizing command

153. See *Milanković*, App. No. 33351/20 ¶¶ 38–41.

154. *Id.* ¶ 38 (citing Prosecutor v. Hadžihasanović and Others, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ¶ 31 (Int'l Crim. Trib. for the Former Yugoslavia July 16, 2003)).

155. *Id.* ¶ 39 (citing Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, ¶ 275 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004)) ("The Appeals Chamber has held that "[t]he principle that military and other superiors may be held criminally responsible for the acts of their subordinates is well-established in conventional and customary law. This applies both in the context of international as well as internal armed conflicts."); Prosecutor v. Strugar, Case No. IT-01-42-T, Judgment, ¶ 357 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 31, 2005) ("The principle of individual criminal responsibility of superiors for failure to prevent or to punish crimes committed by subordinates is an established principle of international customary law, applicable to both international and internal armed conflicts.").

156. *Id.* ¶ 40 (citing Prosecutor v. Delalić et al., Case No. IT-96-21-T, Judgment, ¶¶ 355–59 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) ("It is apparent from the text of this provision that no express limitation is made restricting the scope of this type of responsibility to military commanders or situations arising under a military command."), *aff'd*, Prosecutor v. Delalić et al., Case No. IT-96-21-A, Judgment, ¶ 195 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001) ("[T]he Trial Chamber also concluded that the principle of superior responsibility reflected in Article 7(3) of the Statute encompasses political leaders and other civilian superiors in positions of authority.").

157. Translation of "Tempore Criminis", GOOGLE TRANSLATE, <https://tinyurl.com/2pbkrbsh> [<https://perma.cc/5GAF-B6BZ>] (Translation of *tempore criminis* (Latin) into English: "At the time of the crime").

158. *Milanković*, App. No. 33351/20 ¶ 60.

159. *Id.* ¶¶ 60–61.

responsibility, because of this sufficiently clear basis in international custom.¹⁶⁰ In other words, even though there was no law codifying command responsibility in Croatia at the time of the crimes, customary international law made it foreseeable that Mr. Milanković's failure to prevent the war crimes committed by police units under his command would make him criminally liable.¹⁶¹

There are similarities between the *ex post facto* challenge that Croatian prosecutors needed to overcome in the *Milanković* case with the legality problem Ukrainian prosecutors will eventually face if the Verkhovna Rada provides for the addition of command responsibility. For one, like the Basic Criminal Code of Croatia in 1991–1992, Ukraine's current criminal code has not yet provided for command responsibility as a mode of criminal liability for the entire timeframe from 2014 to present.¹⁶² Thus, prosecuting any Russian war criminals under a theory of command responsibility for crimes occurring after 2014 would invite the same retroactive legality problem encountered by Croatia. However, just like Croatia, Ukraine can rely on customary international law—and, more specifically, the holding in *Milanković*—to bridge the legality gap and counter any *ex post facto* challenge brought in defense, considering command responsibility has been an essential aspect of customary international law since at least 1991.

Additionally, Article 7 of the ECHR and Article 58 of the Ukrainian Constitution are near parallels of each other. Both the ECHR Statute and the Ukrainian Constitution protect the same fundamental interest—prohibiting retroactive punishment.¹⁶³ That said, *Milanković* essentially held that, because command responsibility *already* existed as a principle of customary international law at the time crimes were committed in Croatia, there was no valid *ex post facto* challenge in the first place.¹⁶⁴ Thus, it follows that Ukraine can likewise circumvent their retroactivity problem for the same reason. Since *Milanković* states that command responsibility does not pose a retroactivity problem *at all* for purposes of Article 7 of the ECHR Statute in instances after 1991, Ukrainian and international courts alike should reasonably conclude that the Ukrainian Constitution is

160. *See id.* ¶ 63.

161. *Id.* ¶ 66.

162. *See generally* CRIM. CODE OF UKR.

163. *Compare* European Convention on Human Rights art. 7 (“[1.] No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.”), *with* UKR. CONST. art. 58 (“[N]o one shall bear responsibility for acts that, at the time they were committed, were not deemed by law to be an offence.”).

164. *See Milanković*, App. No. 33351/20 ¶ 60.

also not violated by prosecuting war criminals for their crimes after 1991. Since command responsibility has been *tempore criminis* part of international law for the entirety of the War in Ukraine, all war crimes committed from 2014 through the present day are potentially fair game for prosecution under a theory of command responsibility.

B. Ukraine Can Rely on International Precedent and Begin Prosecutions Under the Theory of Command Responsibility

Despite their ban on *ex post facto* laws, Ukraine can, and should, rely on international precedent and begin prosecuting Russian military commanders and applicable Russian civilian superiors under the theory of command responsibility. As demonstrated above,¹⁶⁵ command responsibility is widely considered an essential doctrine of customary international law, and has been *tempore criminis* a valid mode of liability at all points of the War in Ukraine—notably, between the years 2014 through 2024. As such, the Verkhovna Rada should immediately work to pass legislation amending Section II of the Criminal Code of Ukraine to add command responsibility as a mode of liability for crimes.¹⁶⁶ Doing so will give Ukrainian prosecutors the legal authority to investigate and charge responsible superiors, both military and civilian, on account of their command responsibility for war crimes committed by soldiers under their effective control. This additional mode of liability will aid in Ukraine's pursuit of justice for the war crimes committed against it by allowing Ukraine to prosecute the military commanders behind the war crimes themselves.

1. Command Responsibility Is Widely Considered an Essential Element of International Criminal Law

First, Ukraine should pass a law that amends their penal code to provide for command responsibility as a mode of criminal liability for war crimes.¹⁶⁷ Passing a law is necessary because Ukraine's legal system is largely based on a civil code, as opposed to a common law system like the United States; as such, until command responsibility is added as a mode of liability to the criminal code, Ukrainian prosecutors and judges are without authority to prosecute and judge criminals under a theory of command responsibility.¹⁶⁸ Second, because this action would only establish command responsibility as a mode

165. See *supra* Sections (III)(A)(1–3).

166. See *supra* note 10 and accompanying text.

167. See *Milanković*, App. No. 33351/20 ¶ 63 (stating that “accessibility does not exclude reliance being placed on a law which is based on custom”).

168. Taras Tertychnyi & Natalia Antonyuk, *Survey of International Litigation Procedures: A Reference Guide*, FOUND. INT'L ASS'N OF DEF. COUNSEL, <https://tinyurl.com/...>

of liability for crimes that happen after the bill's adoption, Ukraine should rely on the ECHR's holding in *Milanković* to investigate and prosecute even those whose orders or oversight occurred at a time prior to the bill's adoption.

Between Articles 85–87 of the Geneva Convention, Article 28 of the Rome Statute, the CIHL Study, and the statutes of the various international criminal tribunals, Ukraine has plenty of international statutory law from which to derive their codification of command responsibility as a mode of criminal liability.¹⁶⁹ Consequentially, just as Croatian prosecutors were able to overcome their country's *ex post facto* prohibition on command responsibility, so too can Ukraine overcome their present lack of laws regarding the same because *Milanković* expressly determines that command responsibility has been a rule of customary international law since at least 1991.¹⁷⁰ Thus, command responsibility has been an internationally accepted mode of criminal liability for the entirety of the War in Ukraine, even when the conflict was comparatively more contained between the years 2014 through 2022. Therefore, prosecution of war crimes under a potential Ukrainian provision for command responsibility would *not* be a retroactive application of law.

For many factual circumstances, command responsibility will be a more accurate mode of liability to prosecute war crimes. Take, for example, President Putin's affirmation of a Russian brigade accused of committing war crimes in the Ukrainian town of Bucha.¹⁷¹ Despite the 64th Separate Guards Motor Rifle Brigade having been accused of murdering civilians and filling mass graves following their withdrawal from Bucha, President Putin signed a letter congratulating the unit for their "great heroism and courage" in "protecting Russia's sovereignty."¹⁷² President Putin's affirmations of the slaughter

com/4se8987f [https://perma.cc/NTR5-FZK3] (last visited June 30, 2024) ("Ukraine is a civil code jurisdiction featuring some elements of common law system.").

169. See generally *Prosecutor v. Hadžihasanović and Others*, Case No. IT-01-47-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Apr. 22, 2008) (laying foundation for adoption of command responsibility as a part of customary international law); *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) (laying further foundation for adoption of command responsibility as a part of customary international law).

170. See *Milanković*, App. No. 33351/20 ¶ 57 ("In *Hadžihasanović and Others* the ICTY held that the application of the concept of command responsibility to war crimes committed in an internal armed conflict was already in 1991 a rule of customary international law.").

171. Hannah Ritchie et al., *Putin Gives Honorary Title to Russian Brigade Accused of War Crimes in Bucha*, CNN (Apr. 19, 2022, 6:50 AM), <http://tinyurl.com/yx5yz8yz> [https://perma.cc/92NX-GFUG].

172. *Id.* (describing in greater detail the extent of President Putin's remarks praising troops of the 64th Separate Guards Motor Rifle Brigade).

may well be evidence that he failed to punish or investigate Russian troops accused of war crimes, thus implicating him for the war crimes via his command responsibility over Russian military forces that perpetrated the crimes.¹⁷³ This specific example falls prey to the same logic discussed earlier of why the ICC's arrest warrants for President Putin and his other senior leaders may not be a perfect solution, despite the existence of trials *in absentia*.¹⁷⁴ Nevertheless, one can imagine a scenario where a lesser Russian military commander is captured and able to be prosecuted—and, more importantly, sentenced—for his similar failures to address the 64th Separate Guards Motor Rifle Brigade's atrocious crimes committed in Bucha.¹⁷⁵

Recall that international courts, including the ICJ, ICC, and ECHR, lack police powers and must instead rely on the cooperation of national governments for enforcement of their orders.¹⁷⁶ Because Russian commanders cannot be expected to submit themselves to justice, Ukrainian prosecutors must be empowered to seek it themselves. That battle for justice is strengthened by the addition of command responsibility to Ukraine's arsenal of liability theories upon which to convict.

In conjunction with amending their criminal code to provide for command responsibility in the first place, Ukrainian prosecutors will also need to conduct a great deal of research into the ever-growing body of international precedent on the matter to ensure they understand the legal requirements and intricacies of the doctrine. Recall that the doctrine of command responsibility exists as a fixed aspect of customary international law.¹⁷⁷ Ukraine may not merely pick-and-choose which technical aspects of the doctrine it pleases to adopt; if it adopts command responsibility at all, it also adopts the many associated legal safeguards and requirements along with it. Cases like those examined above, notably the *Milanković*, *Hadžihasanović*, and

173. For the same reasons as President Putin, multiple levels of commanders of the 64th Separate Guards Motor Rifle Brigade may also be liable on account of their command responsibility for the war crimes committed in Bucha. Cf. *64th Separate Guards Motor Rifle Brigade*, FANDOM, <https://tinyurl.com/334csd7z> [<https://perma.cc/QK8F-4G97>] (last visited July 11, 2024) (citing Tatyana Tsvenger & Marina Goncharenko, *Victory Parade in Khabarovsk May 9, 2022: Live Online Broadcast*, KOMSOMOLSKAYA PRAVDA (UKR.) (May 8, 2022, 8:03 PM) (URL unavailable) (reporting that the 64th Separate Guards Motor Rifle Brigade's acting commander at the time of the Bucha massacre was Lt. Colonel Vasilii Shcherbakov)).

174. See *supra* notes 36–37 and accompanying text (discussing the ICC's indictments of President Vladimir Putin and Commissioner Maria Lvova-Belova for the unlawful deportation of children, among other senior Russian officials for various alleged war crimes).

175. See Ritchie et al., *supra* note 171 (discussing the crimes committed).

176. See Klobucista & Ferragamo, *supra* note 44.

177. See *supra* note 140 and accompanying text.

Čelebići decisions, are excellent examples of international courts discussing and recognizing customary international law's place in international armed conflicts, both internal and external. However, those cases are far from the only relevant opinions on the matter.¹⁷⁸

Similarly, Ukrainian prosecutors need to examine international precedent and glean how courts have further broken down the practical elements of command responsibility. For example, with regards to the knowledge element of command responsibility, Article 28(1) of the Rome Statute clearly states on its face that military commanders who knew or "should have known" that their subordinates were committing or would commit war crimes shall be criminally liable for those crimes.¹⁷⁹ This statutory language could reasonably lead one to believe that both actual *and* constructive knowledge may be sufficient to convict under a theory of command responsibility. However, current precedent suggests that to convict a commander of a war crime on the basis of command responsibility, they must have *actual* knowledge of the underlying crimes, not merely constructive knowledge of any wrongdoing of subordinates.¹⁸⁰ This is merely one of a great host of existing legal complexities that make convicting under a theory of command responsibility more difficult than pure statutory interpretation may initially suggest.¹⁸¹ This unsuspecting distinction in requirements highlights the depth of understanding Ukrainian prosecutors will need to develop to successfully prosecute using command responsibility as their chosen mode of responsibility.

178. See, e.g., Prosecutor v. Pavle Strugar, Case No. IT-01-42-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Jan. 31, 2005); Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgment, ¶ 169 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 17, 2003); Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgment, ¶ 417 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004); Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, ¶ 275 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004).

179. See Rome Statute, *supra* note 52, art. 28(1).

180. For an in-depth investigation of current international interpretation of actual versus constructive knowledge as a requirement for convictions under a theory of command responsibility, which exceeds the scope of this Comment, see Bloch, *supra* note 11, at 361–65 ("Therefore, the notion that command responsibility may rest on a mens rea of negligence or constructive knowledge simply lacks the requisite volume and extent of practice necessary to establish a customary norm of international law.").

181. See generally Prosecutor v. Hadžihasanović and Others, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ¶¶ 17–31 (Int'l Crim. Trib. for the Former Yugoslavia July 16, 2003) (examining issues such as whether de jure power over subordinates creates a presumption of effective control, the "had reason to know" standard, the scope of a superior's duty to punish, and the causal link between a commander's failure to act and his subordinates' crimes). See also *supra* notes 131–39 and accompanying text.

Thankfully, ample secondary sources exist to aid prosecutors in that process.¹⁸²

2. *Application of the Facts in Ukraine to that of Precedent Cases and International Law*

Legal assessment of individuals under the command responsibility doctrine is a highly factualized and evidentiary investigation which could (and conceivably does) differ on a case-by-case basis.¹⁸³ Ukrainian prosecutors and law enforcement personnel will still be faced with the challenges of collecting evidence necessary to prove their cases against all war criminals, not just commanders and superiors.¹⁸⁴ One advantage Ukrainian prosecutors possess is the fact that the War in Ukraine is by far the most publicized armed conflict in history.¹⁸⁵ Government-funded and private media groups alike are constantly recording videos of the devastating attacks and other war crimes taking place, not to mention the many more submitted by citizens via the government's evidence solicitation mediums.¹⁸⁶

Ukrainian officials and other documenting third parties like the IICIU are continuously uncovering additional evidence of potential war crimes.¹⁸⁷ The Report of the IICIU to the U.N. General Assembly describes—in horrific detail—a mass of evidence and testimony the

182. See generally LAW OF COMMAND RESPONSIBILITY, *supra* note 54; Bloch, *supra* note 11.

183. See, e.g., Quénivet, *supra* note 9 (discussing how legal assessment under this theory of culpability must be carried out on the established facts in any given case).

184. See Zeba Siddiqui, *FBI Working with US Companies to Collect War Crime Evidence in Ukraine*, REUTERS (Apr. 26, 2023, 1:07 AM), <http://tinyurl.com/3f5w36u9> [<https://perma.cc/XB7A-KDSU>] (documenting one example of Ukraine working with external agencies to collect evidence pertaining to Russian-committed war crimes).

185. See, e.g., Vera Bergengruen, *How Ukraine Is Crowdsourcing Digital Evidence of War Crimes*, TIME (Apr. 18, 2022, 6:00 AM), <https://tinyurl.com/2zubm86w> [<https://perma.cc/5M3T-2ERM>] (discussing the systematic efforts of digital evidence collection by the Ukrainian government made possible by the 21st century).

186. See Jon Jackson, *Video Shows Russian Soldiers Using Captured Ukrainians as Shields*, NEWSWEEK (Dec. 14, 2023, 7:09 AM), <https://tinyurl.com/ywr6mf4y> [perma.cc/H6V5-V7AL] (“A U.S. government-funded media organization on Wednesday reported it had received video that allegedly shows Russian soldiers using captured members of Ukraine’s military as shields.”). But see Joyce Sohyun Lee et al., *Kyiv Will Investigate Video That Appears to Show Ukrainian Forces Shooting Russian Prisoners of War*, WASH. POST (Mar. 28, 2022), <https://tinyurl.com/pu4wde49> [<https://perma.cc/2QCE-43LD>] (emphasizing how the digital aspect of the War in Ukraine exposes conduct taken by both sides in the war).

187. *Commission of Inquiry Finds Further Evidence of War Crimes in Ukraine*, U.N. NEWS (Oct. 20, 2023), <http://tinyurl.com/f5wr9epz> [<https://perma.cc/YYK4-D2JA>] (referring to the “Advanced Unedited Version” of the IICIU’s Oct. 2023 report, *supra* note 25, concerning evidence of war crimes committed in Ukraine).

Commission gathered in their investigation.¹⁸⁸ In one instance, the Commission reported that in May 2022, three Russian soldiers came to the house of a married couple where they beat the 52-year-old man and raped the 50-year-old woman in turns.¹⁸⁹ The couple reported the rape to the Russian armed forces commander.¹⁹⁰ However, the couple's neighbors told the Commission that after the couple reported the incident, three different Russian soldiers "were looking for a woman who reported the rape," went to the couple's house, and shot them both dead.¹⁹¹ The Commission concluded that, in addition to rape, the soldiers had committed the war crimes of willful killing and torture against the victims.¹⁹² This was only one of many documented incidents of sexual and gender-based violence reported by the Commission, which was one of four specific categories of crimes reported.¹⁹³

At the very least, this commander—whom the couple reported the crime to—failed to respond with enough authority to punish and prevent the soldiers from committing further harm to the innocent civilians.¹⁹⁴ While the Commission did not report in greater detail on this particular instance regarding the Russian commander's involvement, he outwardly appears to hold liability on account of his command responsibility. To that effect, Ukraine can theoretically prosecute multiple commanders involved in this incident for simultaneous liability, provided they can prove the required elements of command responsibility. To hold this (or any) Russian commander accountable for the horrific actions taken, Ukraine would need to demonstrate: (1) a superior-subordinate relationship, (2) actual knowledge of the crimes, and (3) a lack of adequate response by the commander.¹⁹⁵

Assuming the Russian armed forces commander who received the report from the victims was the same commander of the three soldiers, Ukraine could certainly argue that the couple's report of the crime gave the commander actual knowledge of a war crime that

188. See generally Oct. 2023 IICIU Report, *supra* note 34.

189. *Id.* ¶ 85 (describing in further detail the extent of the soldier's actions).

190. *Id.*

191. *Id.*

192. *Id.*

193. See *id.* ¶ 82 (noting how the Commission reported on only a "few" of the cases of rape and sexual violence committed by Russian armed forces during house visits in Kherson Province. Other categories of crimes included in the report were: (A) violations committed during the conduct of hostilities, (B) personal integrity violations, (C) sexual and gender-based violence, and (D) transfers and deportations of children).

194. *Id.* ¶ 85.

195. Rome Statute, *supra* note 52, art. 28(1) (listing the elements of command responsibility).

was committed against the Ukrainian civilian population by three of his soldiers.¹⁹⁶ If Ukraine succeeded in proving that the commander did possess actual knowledge of the rapes and tortures committed, Ukraine would then need to offer evidence that the commander failed to stop his subordinates from committing crimes or inadequately punished them for crimes already committed. Without further evidence to the contrary, the fact that the soldiers then *hunted down* the couple who reported the crime certainly opens the door for the argument that the commander either: (a) ordered the behavior, (b) failed to adequately punish his soldiers, or (c) failed to prevent his soldiers from committing further crimes by detaining them after their crimes were reported. Regardless, Ukrainian prosecutors can likely prove a case to hold this particular Russian commander indirectly liable for the rape, torture, and willful killing of this Ukrainian couple on account of his command responsibility.

This case is but one of an ever-growing number of war crimes cases bombarding Ukrainian prosecutors, with more and more allegations being confirmed each passing day.¹⁹⁷ Article 29 of the Rome Statute states that all crimes within the ICC's jurisdiction are not subject to any statute of limitations, which necessarily implies that Article 28's command responsibility criminal liability can be applied indefinitely to Russian commanders.¹⁹⁸ This bodes well for Ukraine because, assuming the *Milanković* timeline is reflective of how long prosecution of military commanders from past wars can take, Ukraine will likely be prosecuting alleged war criminals for decades.¹⁹⁹ This timeline highlights the breadth of Ukraine's upcoming battles, and reinforces why Ukraine needs different modes of liability to prosecute war crimes committed against its people.

196. See Bloch, *supra* note 11, at 364–65 (2023) (arguing that currently standing customary doctrine of command responsibility must rest on actual knowledge, not constructive knowledge).

197. See generally Oct. 2023 IICIU Report, *supra* note 34; Lisa Schlein, *UN Investigators Find Growing Evidence of Russian War Crimes in Ukraine*, VOA (Sept. 25, 2023, 11:18 AM), <http://tinyurl.com/5dy22m59> [<https://perma.cc/MC9G-VT37>] (depicting photographs of a forest mass grave site during an exhumation in the town of Izium, in Ukraine's Kharkiv region, and of the interior of a children's hospital hit by a Russian military strike).

198. Rome Statute, *supra* note 52, art. 29 (“The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.”).

199. See generally *Milanković v. Croatia*, App. No. 33351/20 (Jan. 20, 2022), <https://tinyurl.com/56apnzmd> [<https://perma.cc/9PKQ-J8BS>] (illustrating how the war crimes in question were committed between the period mid-August 1991 and mid-June 1992, even though the ECHR did not release their opinion in the matter until January 20, 2022—a lapse of approximately 30 years).

CONCLUSION

Command responsibility is a time-tested and internationally approved mode of criminal liability for both military and civilian superiors.²⁰⁰ It does not matter whether future history books refer to the War in Ukraine as an international armed conflict or an internal armed conflict.²⁰¹ Command responsibility has long been cemented as a key principle of customary international law, applies to both international and internal armed conflicts, and is capable of overcoming a country's ban on *ex post facto* laws.²⁰²

As soon as practical, Ukraine's Verkhovna Rada should pass legislation to formally codify command responsibility as an alternate mode of criminal responsibility. Doing so will grant Ukrainian prosecutors the necessary power to investigate and prosecute Russian commanders for the war crimes perpetrated by their subordinates—whether they be under the commander's order, or by their failure to punish accordingly. After they do, Ukraine should begin prosecuting war criminals under the theory of command responsibility for crimes occurring after the bill's passage. They should also confidently rely on the ECHR's ruling in *Milanković* to prosecute any and all applicable war crimes committed before the bill's passage. *Milanković* is the metaphorical bridge that overcomes Ukraine's prohibition against *ex post facto* laws.

Prosecuting Russian military and civilian commanders based on their command responsibility for the horrific crimes committed by subordinates under their effective control has the potential to be a particularly potent weapon for prosecutors as Ukraine strives to hold even the most senior—and oftentimes the most culpable—Russian leaders accountable for atrocities committed in the War in Ukraine.

200. *Id.*

201. *Id.*

202. *Id.*
