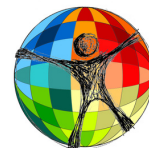


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# **Conscription as a Human Rights Violation: A Consideration in the Prosecution of Russian Soldiers for Crimes Against Humanity**

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# ABSTRACT

Recent developments in human rights scholarship posit that conscription itself is a human rights violation—and potentially even a crime against humanity. This paper is concerned with how this consideration might impact the future prosecution of conscripted Russian soldiers for human rights atrocities committed in Ukraine. More specifically, this paper explores the potential for Russian conscription, and its particularly barbaric practices, to impact the prosecutorial task of establishing soldiers' mens rea, as required for the conviction of crimes against humanity.

Firstly, this paper examines the body of literature on conscription as a human rights violation. Secondly, the particular harshness of Russian conscription practices and their de facto lack of conscientious objection is examined. Thirdly, this paper assesses the criminal liability of soldiers for crimes against humanity, including an analysis of the superior orders defence, the concept of individual responsibility for state-sanctioned violence, and the role of mens rea in convictions for such crimes. Fourthly, this paper will examine the various legal pathways through which Russian soldiers could potentially be prosecuted for crimes against humanity committed in Ukraine, paying special attention to the mens rea requirements under each mechanism.

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*"I deny the right of the State to compel me to undertake any service to which I have a conscientious objection. My life is my own and I claim to dispose of it as I will, particularly as the State has had no part in my introduction to this part of the earth, nor has it assumed any responsibility for my life in the past."*<sup>1</sup>

— Sydney Turner, Deptford Tribunal, 1916.<sup>2</sup>

## I. Introduction

After weeks of threatening troop movements,<sup>3</sup> Vladimir Putin's army launched a full-scale attack in Ukraine on 24 February, 2022. Although information on the Russian military has become increasingly "fragmented and unreliable", it is estimated that conscripted soldiers make up more than fifty percent of some units.<sup>4</sup> From the start of the invasion, reports from within Ukraine have suggested that Russian troops are committing crimes against humanity, as per the definition contained in Article 7 of the *Rome Statute*.<sup>5</sup> The alleged crimes include summary executions, the deliberate targeting of civilians, indiscriminate attacks in city centres, and widespread instances of torture and rape, among

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<sup>1</sup> Çınar Özgür Heval, *Conscientious Objection to Military Service in International Human Rights Law* (New York, NY: Palgrave Macmillan, 2013) at 25.

<sup>2</sup> Sydney Turner was a British conscientious objector who was prosecuted at the Deptford Military Service Tribunal for refusing to serve military service in 1916.

<sup>3</sup> See Robyn Dixon et al, "Russia Moves Troops and U.S. Sends Weapons as Fear of War Mounts in Ukraine", *Washington Post* (25 January 2022), online: <[washingtonpost.com/world/2022/01/25/ukraine-russia-nato-biden/](https://www.washingtonpost.com/world/2022/01/25/ukraine-russia-nato-biden/)>.

<sup>4</sup> Joris Van Bladel, News Release, "The Russian Soldiers' Question Revisited" (19 May 2022), online: *The Egmont Papers* <[egmontinstitute.be/the-russian-soldiers-question-revisited/](https://egmontinstitute.be/the-russian-soldiers-question-revisited/)>.

<sup>5</sup> See Human Rights Watch, "Ukraine: Torture, Disappearances in Occupied South—Apparent War Crimes by Russian Forces in Kherson, Zaporizhzhia Regions" (22 July 2022), online (pdf): *Human Rights Watch* <[hrw.org/news/2022/07/22/ukraine-torture-disappearances-occupied-south](https://hrw.org/news/2022/07/22/ukraine-torture-disappearances-occupied-south)>; *Rome Statute of the International Criminal Court*, UN. Doc. A/Conf. 183/9 (1998) [*Rome Statute*].

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other grave human rights abuses.<sup>6</sup> Not only have many witnesses attested to the occurrence of such crimes, some of these brutalities have even been caught on camera.<sup>7</sup> Nonetheless, it is likely that the prosecution of soldiers for human rights violations will prove to be quite difficult.<sup>8</sup> Moreover, recent developments in human rights scholarship have posited that conscription itself is a human rights violation—and potentially even a crime against humanity.

This paper is concerned with how the consideration of conscription itself as a human rights violation might impact the future prosecution of conscripted Russian soldiers for human rights atrocities committed in Ukraine. More specifically, this paper explores the potential for Russian conscription, and its particularly barbaric practices, to impact the prosecutorial task of establishing soldiers' *mens rea*, as required for the conviction of crimes against humanity. The scope of this assessment is limited to crimes against humanity, rather than all war crimes, as the defence of superior orders is unavailable for crimes against humanity.<sup>9</sup> Given that the mere presence of conscripted soldiers in war zones is due to superior orders, this defence's inapplicability for these offences is particularly salient in regards to an assessment of conscription as a human rights violation—thus making the prosecution of crimes against humanity a particularly ripe area for research.

Firstly, this paper will examine the pre-existing body of literature on conscription as a human rights violation, including a brief assessment of the history of conscription and of conscientious

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<sup>6</sup> See Human Rights Watch, "Ukraine: Apparent War Crimes in Russia-Controlled Areas—Summary Executions, Other Grave Abuses by Russian Forces" (3 April 2022), online (pdf): [Human Rights Watch <hrw.org/news/2022/04/03/ukraine-apparent-war-crimes-russia-controlled-areas>](https://www.hrw.org/news/2022/04/03/ukraine-apparent-war-crimes-russia-controlled-areas) [Human Rights Watch, "Apparent War Crimes"].

<sup>7</sup> See Yousur Al-Hlou et al, "New Evidence Shows How Russian Soldiers Executed Men in Bucha", *New York Times* (19 May 2022), online: [nytimes.com/2022/05/19/world/europe/russia-bucha-ukraine-executions.html](https://www.nytimes.com/2022/05/19/world/europe/russia-bucha-ukraine-executions.html).

<sup>8</sup> The nature of these difficulties will vary depending on the mechanism being used, as national courts, hybrid tribunals, and international criminal courts each face significant challenges in the successful prosecution of crimes against humanity. See generally Steven Ratner, Jason Abrams & James Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 3rd ed (Oxford: Oxford University Press, 2009).

<sup>9</sup> See *Rome Statute*, *supra* note 5, art 33.

objection. Secondly, the particular harshness of Russian conscription practices and their *de facto* lack of conscientious objection will be assessed. Thirdly, this paper will assess the criminal liability of soldiers for crimes against humanity, including an analysis of the superior orders defence, the concept of individual responsibility for state-sanctioned violence, and the role of *mens rea* in convictions for such crimes. Fourthly, this paper will examine the various legal pathways through which Russian soldiers could potentially be prosecuted for crimes against humanity committed in Ukraine, paying special attention to the *mens rea* requirements under each mechanism.

#### A. Preliminary Considerations

Firstly, the relevant legal standards for the prosecution of crimes against humanity ought to be defined. In general, criminal prosecutions require the fulfillment of the high burden of *mens rea* associated with criminal liability. This includes proving both the accused's intention to commit the *actus reus* constituting a crime, as well as their knowledge of the harm that was likely to occur as a result.<sup>10</sup> Importantly, these elements must be proven beyond a reasonable doubt—a much higher burden for the prosecution than that posed by the civil standard of a balance of probabilities.<sup>11</sup> Additionally, International Criminal Court (ICC) jurisprudence has specified that in cases of crimes against humanity, the prosecution can be required to prove either general or specific intent, depending upon the particular crimes in question.<sup>12</sup> This high burden—though crucial for upholding the rights of accused persons—will undoubtedly prove to be a major obstacle in the prosecution of Russian troops.

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<sup>10</sup> See Geert-Jan Alexander Knoops, *Mens Rea at the International Criminal Court*, vol 10, International Criminal Law Series (Leiden: Brill Nijhoff, 2017) at 70.

<sup>11</sup> See generally Mark Klamberg, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events*, International Criminal Law Series (Leiden: Martinus Nijhoff).

<sup>12</sup> See Knoops, *supra* note 10 at 74; see also Johan Van der Vyver, "The International Criminal Court and the Concept of Mens Rea in International Criminal Law" 2004 12:1 U Miami Intl & Comp L Rev 57 at 69, 84.



In addition to the prosecutorial difficulties stemming from the high burden of *mens rea* associated with criminal offences, a second preliminary consideration which must be addressed is the defence of superior orders, such as that provided in Article 33 of the *Rome Statute*.<sup>13</sup> This Article relieves the criminal liability of soldiers acting under the orders of a superior—unless such orders were “manifestly unlawful.”<sup>14</sup> The meaning and scope of the term ‘manifestly illegal’ will be closely examined in section IV(A).

Finally, it should be noted that although neither Russia nor Ukraine are parties to the *Rome Statute*, which grants the ICC the power to enact its jurisdiction, Ukraine has granted the ICC jurisdiction “over crimes committed on its territory” since 2014.<sup>15</sup> Thus, although the ICC will not have the authority to prosecute *all* crimes associated with Russia’s invasion of Ukraine—notably, the crime of aggression, which requires that both aggressor and victim states are party to the *Rome Statute*—it will indeed have the authority to advance prosecutions for crimes against humanity committed in Ukraine.<sup>16</sup>

## B. A Gap in the Existing Literature

Legal scholars have previously explored the challenges associated with both defining the relevant standard of *mens rea* for violations of international humanitarian law committed under superior orders, as well as the difficulty of proving said *mens rea* beyond a reasonable doubt.<sup>17</sup> However, the intersection of conscription and its potential implications for *mens rea* in cases of

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<sup>13</sup> See *Rome Statute*, *supra* note 5, art 33.

<sup>14</sup> *Ibid.*

<sup>15</sup> Monique Cormier, “Can the ICC prosecute Putin, the head of a non-member state?”, 360info (23 May 2022), online: <360info.org/can-the-icc-prosecute-putin-the-head-of-a-non-member-state/>.

<sup>16</sup> *Ibid.*

<sup>17</sup> See Ratner, *supra* note 8 at 79; see generally Yoram Dinstein, *The Defence of 'Obedience to Superior Orders' in International Law* (Oxford: OUP Oxford, 2012); Carmel O’Sullivan, *Killing on Command: The Defence of Superior Orders in Modern Combat*, Critical Criminological Perspectives Series (London: Palgrave Macmillan, 2016); Hitomi Takemura, *The International Human Right to Conscientious Objection to Military Service and Individual Duties to Disobey Manifestly Illegal Orders* (Berlin: Springer, 2009).

crimes against humanity (as well as other violations of international humanitarian law) has been left largely unexamined—with the exception of cases of conscripted child soldiers.<sup>18</sup> This gap ought to be filled, as the fight to end impunity for some of the world’s most heinous acts is ongoing, and legal doctrine ought to be readily available to provide insight and guidance regarding the handling of ongoing challenges to this mission.

One such category of challenges is indeed those posed by legal standards and concepts themselves, as well as their evolving definitions. For example, the difficult prosecutorial task of demonstrating *mens rea* in cases of crimes against humanity—although extremely important for maintaining the presumption of innocence and protecting the rights of the accused—can nonetheless pose a major challenge to the prosecution of those responsible for such acts. Indeed, the requisite *mens rea* for convictions of crimes against humanity is based upon the “highest ethical standards of [this] legal idea.”<sup>19</sup>

This is not to say that prosecutors should not face this high burden of proof, as they absolutely should, but that legal research ought to assist the courts in ensuring that such strict legal standards are equipped to handle the evolution of legal concepts and ideas. For example, in recent years, some scholars have begun to consider forced military service as a human rights violation in and of itself,<sup>20</sup> and potentially even a crime against humanity, given the potential for conscription to have extremely traumatic or deadly consequences upon conscripts. At a bare minimum, conscription clearly violates one’s right to freedom of movement. Thus, given this evolution in how conscription is being defined by human rights scholars and advocates, legal analysis ought to examine how this development could impact the already challenging task of proving *mens rea* in cases of conscripted soldiers. If courts, prosecutors, and defence attorneys alike are left without guidance in regard to this issue, this risks enabling miscarriages of justice, including impunity for serious violations of

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<sup>18</sup> See generally Fanny Leveau, *Liability Under International Criminal Law for International Crimes Committed by Child Soldiers* (Master of Laws Thesis, University of Western Ontario, 2011).

<sup>19</sup> Van der Vyver, *supra* note 12 at 149.

<sup>20</sup> See Ratner, *supra* note 8 at 79.

international humanitarian and human rights law. This paper thus both recognizes the potential for conscription itself to be considered a human rights violation and is also concerned with how conscription relates to the establishment of soldiers' *mens rea* for crimes against humanity committed under superior orders.

## II. Conscription as a Human Rights Violation

Before turning to the literature on conscription as a human rights violation, a brief examination of the legal and socio-political history of conscription and conscientious objection is warranted. Although conscientious objections to military service have been recorded as early as the year 295, the first formal legislation granting any sort of reprieve to conscientious objectors was enacted in Great Britain in the mid-1700s.<sup>21</sup> Acknowledging their devotion to religious pacifism, the *Militia Ballot Act* of 1757 allowed for the exemption of Quakers from military service on these grounds.<sup>22</sup> Although this signified the beginning of legalized objection to military service for religious reasons, until well into the twentieth century, most conscientious objectors were nonetheless labelled as "cowards or traitors, or were incarcerated for years at a time in prisons or mental hospitals."<sup>23</sup>

The severity of these consequences stemmed from conscription's great importance to the modern nation-state. The systems of modern conscription which are still active in some states today originated after the French Revolution of 1789, which changed the meaning of conscription from merely having protective purposes, to contributing to the "process of nation-building" through, notably, garnering importance in the collective and individual psyches of the state's citizenry.<sup>24</sup> It was only during

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<sup>21</sup> See United Nations Office of the High Commissioner for Human Rights, "Conscientious objection to military service" (2012) at 2, online (pdf): *United Nations* <[ohchr.org/sites/default/files/Documents/Publications/ConscientiousObjection\\_en.pdf](http://ohchr.org/sites/default/files/Documents/Publications/ConscientiousObjection_en.pdf)>. (Maximilianus rejected his conscription to the Roman Army on religious grounds and was ultimately executed as a result of his pacifism.)

<sup>22</sup> See *ibid* at 2.

<sup>23</sup> Heval, *supra* note 1 at 22.

<sup>24</sup> *Ibid* at 21.

the First World War that a semblance of compatibility was found between the idea of the nation-state and the conscientious objection debate—notably, through opposition to “the causes of war” themselves rather than to the concept of war as a whole.<sup>25</sup> This propelled the transformation of conscientious objection from a religious concept to a political one, while also allowing for the possibility that an objector could have nuanced reasoning underpinning their objection, rather than simply religious ideologies.

Regardless of one’s reasons for objecting to military service, today’s international human rights discourse has disentangled the idea of conscription as justifiable out of necessity to the nation-state. Indeed, interpretations of international human rights statutes, notably Article 18 of the *International Covenant on Civil and Political Rights* (ICCPR),<sup>26</sup> have opened the door to recognizing conscientious objection as a human right.<sup>27</sup> The Human Rights Committee has interpreted Article 18 of the ICCPR as recognizing the right of all persons to conscientiously object to performing military service on the grounds that this is a legitimate exercise of the “right to freedom of thought, conscience and religion.”<sup>28</sup> Notably, in its General Comment No. 22, issued in 1993, the Human Rights Committee specified that:

The Covenant does not explicitly refer to a right of conscientious objection, but the Committee believes that such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one’s religion or belief.<sup>29</sup>

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<sup>25</sup> *Ibid* at 23.

<sup>26</sup> *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 art 18 (entered into force 23 March 1976) [ICCPR].

<sup>27</sup> See United Nations Office of the High Commissioner for Human Rights, “OHCHR and conscientious objection to military service” online: *United Nations* <[ohchr.org/en/conscientious-objection](https://ohchr.org/en/conscientious-objection)>.

<sup>28</sup> ICCPR, *supra* note 26, art 18.

<sup>29</sup> *General Comment Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights*, CCPR/C/21/Rev.1/Add.4 at 4. (It should be noted that the Human Rights Committee emphasized the importance of the availability of conscientious objection on both religious and nonreligious grounds.)

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This interpretation of Article 18 was broadened beyond merely the use of lethal force in 2006, with the Committee's decision in *Yoon et al. v. Republic of Korea*.<sup>30</sup> In this case, the Committee determined that refusing to be drafted altogether—as opposed to merely refusing to use lethal force—on the basis of religious beliefs entails a violation of one's Article 18 rights to freedom of conscience and religion.<sup>31</sup> In their decision, the Committee also emphasized the availability of:

[...] alternatives to compulsory military service that do not erode the basis of the principle of universal conscription but render equivalent social good and make equivalent demands on the individual, eliminating unfair disparities between those engaged in compulsory military service and those in alternative service.<sup>32</sup>

Thus, in addition to expanding the applicability of Article 18, this decision also neutralized the state's argument that allowing citizens to avoid military service through conscientious objection could result in social tension or divisiveness. To the contrary, the Committee emphasized that safeguarding the rights to freedom of thought, conscience, and religion through protecting the availability of conscientious objection is important to ensuring social cohesion. This position was later reaffirmed in both *Jung et al. v. Republic of Korea*<sup>33</sup> and *Jeong et al. v. Republic of Korea*.<sup>34</sup> Notably, in *Jung*, without explicitly equating Article 18 to a state obligation to provide an alternative to military service, the Committee nonetheless found that Korea's lack of an alternative option—apart from criminal prosecution and imprisonment—

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<sup>30</sup> CCPR/C/88/D/1321-1322/2004, Communications Nos. 1321/2004 and 1322/2004. Views adopted on 3 November 2006.

<sup>31</sup> See *Yeo-Bum Yoon and Myung-Jin Choi v Republic of Korea*, CCPR/C/88/D/1321-1322/2004, UN Human Rights Committee (HRC), 23 January 2007 at para 8.3.

<sup>32</sup> *Ibid* at para 8.4.

<sup>33</sup> See *Jung, Oh, Yeom, Nah, Lim, Lim, Goh v The Republic of Korea*, CCPR/C/98/D/1593-1603/2007, UN Human Rights Committee (HRC), 30 April 2010 [*Jung et al v Korea*].

<sup>34</sup> See *Min-Kyu Jeong et al. v The Republic of Korea*, CCPR/C/101/D/1642-1741/2007, UN Human Rights Committee (HRC), 27 April 2011 [*Jeong et al v Korea*].

constituted a violation of the applicants' Article 18 rights and stated that Korea was under an obligation to provide "an effective remedy."<sup>35</sup> Thus, in the choice between a state tolerating "a considerable amount of law breaking by those unwilling to perform their duties, punishing them for this refusal, or [creating] some form of accommodation of these objections," the Human Rights Committee has been clear as to which path states ought to follow.<sup>36</sup>

In regard to conscription as not only a human rights violation but a crime against humanity, the *Rome Statute's* definition of a crime against humanity elucidates how conscription might fit this framework. Article 7 defines crimes against humanity as being "[...] any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack" and lists:

- a. Murder;
- b. Extermination;
- c. Enslavement;
- d. Deportation or forcible transfer of population;
- e. Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- f. Torture;
- g. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- h. Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this

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<sup>35</sup> *Jung et al v Korea*, *supra* note 33 at para. 9.

<sup>36</sup> Constance Brathwaite, *Conscientious Objection to Compulsions Under the Law* (York: The Ebor Press, 1995) at 87.

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paragraph or any crime within the jurisdiction of  
the Court;

- i. Enforced disappearance of persons;
- j. The crime of apartheid;
- k. Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.<sup>37</sup>

Many of the conditions of conscription have striking similarities, or are even analogous, to the above crimes. For instance, some have argued that conscription is slavery,<sup>38</sup> due to its involuntariness as well as the often impoverished conditions of troops—which is indeed the case in the Russian military.<sup>39</sup> Conscription also involves the “forcible transfer” of conscripts, as well as their “severe deprivation of physical liberty”, particularly in cases where detention is used as a means of conscripting young men before forcibly sending them for military evaluations and training.<sup>40</sup> Perhaps most striking is the applicability of the targeting of men as conscripts, which could be classified as “persecution against any identifiable group” on the grounds of “gender,” especially given that conscripts are at risk of “great suffering or serious injury to body or to mental or physical health”—particularly in war time.<sup>41</sup>

Moreover, if conscription is indeed to be viewed as violating human rights, then it must necessarily be of a forcible and

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<sup>37</sup> *Rome Statute*, *supra* note 5, art 7(1)(a–k).

<sup>38</sup> See Robin Hanson, “Conscription Is Slavery” (16 May 2011), online (blog): *Overcoming Bias* <[overcomingbias.com/2011/05/conscription-is-slavery.html](http://overcomingbias.com/2011/05/conscription-is-slavery.html)>.

<sup>39</sup> See Human Rights Watch, “Russia: Conscripts Denied Adequate Food and Health Care: U.N. Urged to Review Privations of First-Year Conscripts” (13 November 2003), online: *Human Rights Watch* <[hrw.org/news/2003/11/13/russia-conscripts-denied-adequate-food-and-health-care](http://hrw.org/news/2003/11/13/russia-conscripts-denied-adequate-food-and-health-care)> [Human Rights Watch, “Conscripts Denied Adequate Food and Health Care”].

<sup>40</sup> *Rome Statute*, *supra* note 5, art 7(1)(d)(e); see Human Rights Watch, “Conscription Through Detention in Russia’s Armed Forces” (November 2002) at 2, online (pdf): *Human Rights Watch Report* <[hrw.org/reports/2002/russia/russia1102.PDF](http://hrw.org/reports/2002/russia/russia1102.PDF)> [Human Rights Watch, “Conscription Through Detention”].

<sup>41</sup> *Rome Statute*, *supra* note 5, art 7(1)(h)(k).

involuntary nature. To highlight this point, the following section will turn to an assessment of Russian conscription processes in the context of its *de facto* lack of the option of conscientious objection.

### III. Russia's Extreme Conscription Practices and *de facto* Lack of Conscientious Objection

Despite Russian law providing for conscientious objection to military service, there are three primary reasons for which conscientious objection is *de facto* absent in the Russian Federation. Firstly, the process for appealing a conscription order lacks the necessary characteristics of a fair trial and one's status can be suddenly and arbitrarily revoked. Secondly, the alternative to military conscription, performing 'alternative service', is punitive in nature due to its harsh conditions and does not guarantee that the alternative service assignment will actually consist of civilian, rather than military, work. Thirdly, the stigma associated with conscientious objectors and their frequent labelling as draft evaders, combined with the penalties for those even merely *perceived* to be attempting to evade the draft, create sufficient pressure so as to deter potential conscientious objectors from even attempting to gain this status.

#### A. *The Conscription Appeals Process and the Precarious Status of Conscientious Objectors*

Like the Republic of Korea, the Russian Federation has ratified the ICCPR as well as its Optional Protocol,<sup>42</sup> and, as a UN

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<sup>42</sup> See United Nations Office of the High Commissioner for Human Rights, "Status of Ratification Interactive Dashboard" (last visited 13 July 2023), online: *United Nations Office of the High Commissioner for Human Rights* <indicators.ohchr.org>. (It should be noted that although Russia has ratified the Optional Protocol which gives the Committee jurisdiction over individual complaints regarding ICCPR violations, the state has not ratified the Second Optional Protocol concerning the abolition of the death penalty); see generally United Nations Office of the High Commissioner for Human Rights, "Introduction to the Committee: Human Rights Committee" (last visited 13 July 2023), online: *United Nations Office of the High Commissioner for Human Rights* <ohchr.org/en/treaty-bodies/ccpr/introduction-committee> [OHCHR, "Introduction to the Committee"].



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Member State, is subject to the Human Rights Committee's oversight. This oversight consists of the Committee monitoring ICCPR implementation by its State parties, namely by reviewing individual and inter-state complaints,<sup>43</sup> as well as examining obligatory state-submitted reports and issuing its recommendations.<sup>44</sup> After reviewing a Russian State report in 2009, the Committee expressed concerns with the appeals process for conscription orders.<sup>45</sup> Notably, they raised issues regarding the impartiality of these proceedings, given that they are conducted by a military recruitment panel composed of members of the Ministry of Defence itself, rather than by civilian authorities.<sup>46</sup>

It should be noted, however, that these panels can sometimes include non-military members, even a majority of them,<sup>47</sup> however, this does not appear to improve the perceived impartiality of said trials. For example, in the European Court of Human Rights (ECtHR) case of *Dyagilev v. Russia*, the applicant had provided the military recruitment panel with evidence of his adherence to a pacifist philosophy, including his attendance at a seminar promoting pacifism, his curriculum vitae demonstrating his Master's degree in philosophy, and a letter of recommendation from his workplace.<sup>48</sup> In this case, the military recruitment commission overseeing his appeal was composed of seven members, four of whom the ECtHR ultimately declared were independent of the Ministry of Defence.<sup>49</sup> The Court said that these four members were representing public bodies that were structurally independent from the Defence Ministry—namely, the municipal administration, the local police, the administration's educational department, a municipal entity, and an employment

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<sup>43</sup> See *ibid*, OHCHR, "Introduction to the Committee".

<sup>44</sup> See *ibid*.

<sup>45</sup> See *Concluding observations of the Human Rights Committee on the Russian Federation*, HRC CCPR/C/RUS/CO/6, 97th Sess (2009) at para 23 [*Concluding observations*, HRC].

<sup>46</sup> See *ibid*.

<sup>47</sup> See e.g. *Dyagilev v Russia*, No. 49972/16, ECtHR (Third Section), 10 March 2020.

<sup>48</sup> See *ibid* at paras 7–9.

<sup>49</sup> See *ibid* at para 69.

office.<sup>50</sup> Nonetheless, Dyagilev's appeal was dismissed under the broad reasoning that his documents were "not sufficiently persuasive for [the commission] to conclude that he was a genuine pacifist."<sup>51</sup> With regard to future cases, however, it should be noted that Russia's relationship to the ECtHR has drastically changed in recent months. After 26 years of membership, in March 2022, the Council of Europe expelled Russia as a member state.<sup>52</sup> Six months later, on 16 September 2022, Russia ceased to be a party of the European Convention on Human Rights (ECHR).<sup>53</sup> Consequently, the ECtHR does not have jurisdiction over ECHR violations if they occurred on or after 16 September, however, the Court retains its competency over applications for violations if they occurred prior to that date.<sup>54</sup> The Council of Europe will also continue to supervise the execution of the Court's decisions, which Russia is legally bound to implement.<sup>55</sup> Russia's expulsion from the Council, however, does nothing to entice Russia to implement the Court's rulings.<sup>56</sup>

In addition to the seeming arbitrariness of the granting of conscientious objector status, as shown in *Dyagilev v. Russia*, there have also been reports of the sudden and arbitrary revocation of said status before one's service has even begun. For example, in late 2016, then 16-year-old Igor Suvorov's application for alternative civilian service was accepted by

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<sup>50</sup> See *ibid* at para 10.

<sup>51</sup> *Ibid* at para 11.

<sup>52</sup> See Council of Europe, News Release, "The Russian Federation is excluded from the Council of Europe" (16 March 2022), online: *Committee of Ministers* <coe.int/en/web/portal/-/the-russian-federation-is-excluded-from-the-council-of-europe>.

<sup>53</sup> See Council of Europe, News Release, ECHR 286 2022, "Russia ceases to be party to the European Convention on Human Rights" (16 September 2022), online: *Council of Europe* <coe.int/en/web/portal/-/russia-ceases-to-be-party-to-the-european-convention-on-human-rights>.

<sup>54</sup> See European Court of Human Rights, Press Release, "The Russian Federation ceases to be a Party to the European Convention on Human Rights" (16 September 2022), online: *Registrar of the European Court of Human Rights* <hudoc.echr.coe.int/eng-press?i=003-7435446-10180882>.

<sup>55</sup> See *ibid*.

<sup>56</sup> See Priyanka Shankar, "What does Russia leaving the Council of Europe mean?", *Deutsche Welle* (17 March 2022), online: <p.dw.com/p/48dgt>.

military officials, on the grounds that he was a pacifist. Then in late 2017, Suvorov learnt that he was being charged with “evasion of conscription in the absence of lawful grounds for release from the military service” under Article 328(1) of the Russian *Criminal Code*.<sup>57</sup> It was with this criminal charge that he learnt that the acceptance of his alternative service application had been revoked several months before, without any notice and without any stated rationale.<sup>58</sup>

Thus, not only are there serious issues with the fairness and impartiality of the appeals process, but even when conscientious objector status is granted, it can seemingly be arbitrarily revoked at any point. The ability to revoke the status of conscientious objectors also contributes to the punitiveness of alternative service, as their status remains precarious throughout the duration of their service.<sup>59</sup>

## B. *The Punitiveness of So-called ‘Alternative Service’*

The conditions of Russia’s alternative service have also been criticized for being “punitive in nature,” in direct contradiction of the Human Rights Committee’s decision in *Jeong* which made it explicit that alternative service cannot be punitive.<sup>60</sup> The conditions designated in this manner by the Committee included:

[...] the requirement to perform such services  
outside places of permanent residence, the receipt of  
low salaries, which are below the subsistence level for  
those who are assigned to work in social

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<sup>57</sup> Tatyana Voltskaya & Robert Coalson, “Shoveling NATO’s S\*\*\*: A Russian Pacifist’s Three-Year Fight For The Right To Perform Alternative Civilian Service”, *Radio Free Europe/Radio Liberty* (11 March 2020), online: <[rferl.org/a/russian-pacifist-three-year-fight-for-the-right-to-perform-alternative-civilian-service/30482016.html](http://rferl.org/a/russian-pacifist-three-year-fight-for-the-right-to-perform-alternative-civilian-service/30482016.html)>; *The Criminal Code of the Russian Federation* No. 63-FZ of 13 June 1996, (13 June 1996) art 328(1).

<sup>58</sup> See Voltskaya, *ibid.* (Note that online information regarding the Suvorov case is limited, however, according to this source, he was convicted and his conviction was upheld on appeal).

<sup>59</sup> See Australia Refugee Review Tribunal, “Research Response - RUS17614” (17 October 2005) at 3, online (pdf): *Australia Refugee Review Tribunal* <[refworld.org/pdfid/4b6fe2ee6.pdf](http://refworld.org/pdfid/4b6fe2ee6.pdf)>.

<sup>60</sup> See *Concluding observations, HRC, supra* note 45 at para 23; see also *Jeong et al v Korea, supra* note 34 at para 7.3.

organizations, and the restrictions in freedom of movement for the persons concerned.<sup>61</sup>

Indeed, Article 4.2 of the Law on Alternative Civilian Service highlights the deliberately punitive nature of these conditions, as it states that alternative service is to be performed outside the home area of the conscientious objector “as a rule”. This can create particular hardship given Article 21.2, which states that those performing alternative service are forbidden from leaving the city where they have been assigned, with the potential consequence of the withdrawal of their conscientious objector status.<sup>62</sup> This punitiveness is increased further by the fact that the length of Russia’s alternative service is nearly double that of conscripted military service.<sup>63</sup> Moreover, the lasting precariousness of conscientious objector status throughout the term of one’s alternative service contributes to this option’s punitiveness by ensuring that one continuously lives in fear of one’s status being revoked. It also ought to be recognized that living in fear has significant human rights implications, particularly in regard to human dignity and individual freedom, as both are jeopardized when living in a state of fear. The term “freedom from fear” is even mentioned in the preamble to the Universal Declaration of Human Rights (UDHR) as one of the “highest aspirations” of the human rights movement.<sup>64</sup>

In addition, the Human Rights Committee has also found that Russia’s alternative service option “does not appear to guarantee that the tasks to be performed by conscientious objectors are compatible with their conviction.”<sup>65</sup> Indeed, not only are alternative service placements administered by the Ministry of Defence itself, but Article 14 of Russia’s Law on Alternative Military Service states that “military authorities may assign [conscientious objectors] to either civilian work outside the armed

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<sup>61</sup> *Concluding observations*, HRC, *supra* note 45 at para 23.

<sup>62</sup> See Australia Refugee Review Tribunal, *supra* note 59 at 3.

<sup>63</sup> See *ibid.*

<sup>64</sup> UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), at the Preamble. See generally James Spigelman, “The Forgotten Freedom: Freedom from Fear” (2010) 59:3 ICLQ 543.

<sup>65</sup> *Concluding observations of the Human Rights Committee on the Russian Federation*, HRC CCPR/CO/79/RUS, 99th Sess (2003) at para 17.

forces or to non-combatant duties within the armed forces.”<sup>66</sup> This provision renders it legal for the list of federal and regional organizations in which alternative service may be performed to include the Ministry of Defence, the Russian Agency for Conventional Weapons, and the Russian Organization for Ammunitions.<sup>67</sup>

### C. Overview of Russia’s Prosecution and Sentencing of Those Charged with Evasion of Military Service

There is also serious stigma associated with conscientious objectors in Russia,<sup>68</sup> which, particularly when also considering the severe penalties for those even merely *perceived* to be attempting to evade the draft, can create sufficient pressure so as to deter potential conscientious objectors from even attempting to gain this status. Indeed, some conscientious objectors have reported being disowned by their families, who believe them to be cowards or traitors.<sup>69</sup> This social stigma works in favour of the Putin regime, as it creates yet another counter-pressure for those not wanting to follow draft orders, and thus the regime’s statements have propelled this ideology.<sup>70</sup> Notably, Russian Federation Senator Andrei Klimov threatened that draft evaders could be designated as “foreign agents,” a label that was used derogatorily in the Soviet-era, and Valentina Matviyenko, the head of the Russian Federation Council, said draft dodgers were “rats” and “not welcome in the country anymore.”<sup>71</sup>

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<sup>66</sup> Australia Refugee Review Tribunal, *supra* note 59 at 3.

<sup>67</sup> See *ibid* at 2.

<sup>68</sup> See Flemming S Hansen, “The Moscow Patriarchate and the Right to Conscientious Objection” (2009) 37:4 Religion St & Soc’y 403.

<sup>69</sup> See Daniel Stewart, “Chechen Leader Criticizes Russians Who Do Not Want to Participate in the War: “You Are a Coward, a Traitor””, MSN 360News (23 September 2022), online: <[msn.com/en-ca/news/world/chechen-leader-criticizes-russians-who-do-not-want-to-participate-in-the-war-%C2%AByou-are-a-coward-a-traitor%C2%BB/ar-AA12aP0a](https://www.msn.com/en-ca/news/world/chechen-leader-criticizes-russians-who-do-not-want-to-participate-in-the-war-%C2%AByou-are-a-coward-a-traitor%C2%BB/ar-AA12aP0a)>.

<sup>70</sup> See Kirill Ponomarev, “Russians Who Fled Military Draft Return Home as Panic Fades”, *The Moscow Times* (4 November 2022), online: <[themoscowtimes.com/2022/11/04/russians-who-fled-military-draft-return-home-as-panic-fades-a79275](https://themoscowtimes.com/2022/11/04/russians-who-fled-military-draft-return-home-as-panic-fades-a79275)>.

<sup>71</sup> *Ibid*.

In addition to experiencing this social stigma, potential conscientious objectors must also face increasingly harsh penalties for refusal of service or desertion. In September 2022, the Kremlin stiffened the punishments for these offences to ten years in prison.<sup>72</sup> Moreover, even in cases where young men have merely been perceived as attempting to dodge the draft, the Russian military has responded by frequently employing the use of detention—both as punishment and for the purpose of rapid conscription. A Human Rights Watch report details how each year, even in times of peace, hundreds of young men in Russia’s largest cities are “detained and sent, often the same day, to military bases” without so much as a phone call to their families.<sup>73</sup> This fast-tracked conscription process typically occurs after military officials have not been able to serve these men with draft summonses, which results in their names being given to police and their subsequent detainment.<sup>74</sup> After their arrest, their conscription is then fast-tracked, as they are perceived as potential draft dodgers and likely to try to evade military service.<sup>75</sup> These men are thus denied their right to appeal their conscription order, which Russian law provides for.<sup>76</sup> In addition, this accelerated process typically also involves bypassing thorough medical examinations and thus denies conscripts the “benefit of medical or other exemptions and deferrals that are clearly provided for in the law.”<sup>77</sup> This can result in pre-existing health problems being ignored or overlooked, which can then be exacerbated by the particularly harsh conditions of Russian soldiers, who often go hungry, lack medical

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<sup>72</sup> See Charles Maynes, “Russians Are Protesting and Fleeing the Country as Putin Orders a Draft for Ukraine”, *NPR* (23 September 2022), online: <[npr.org/2022/09/23/1124678888/russia-ukraine-military-draft-protests-flight](https://www.npr.org/2022/09/23/1124678888/russia-ukraine-military-draft-protests-flight)>.

<sup>73</sup> Human Rights Watch, “Conscription Through Detention”, *supra* note 40 at 2. See also Radio Free Europe/Radio Liberty (RFE/RL), “Activists in St. Petersburg Say Men Being Forced Into Army”, *Radio Free Europe/Radio Liberty* (22 December 2009), online: <[rferl.org/a/Activists\\_In\\_St\\_Peterburg\\_Say\\_Men\\_Being\\_Forced\\_Into\\_Army/1910265.html](https://www.rferl.org/a/Activists_In_St_Peterburg_Say_Men_Being_Forced_Into_Army/1910265.html)>.

<sup>74</sup> See Human Rights Watch, “Conscription Through Detention”, *supra* note 40 at 2.

<sup>75</sup> See *ibid.*

<sup>76</sup> See *ibid.*

<sup>77</sup> *Ibid.*

care, and are subjected to violent hazing in their first year of service.<sup>78</sup> These conditions can prove deadly, as in the case of Viacheslav Turov, a 19-year-old conscript who died in 2001 due to a combination of malnutrition and complications from double pneumonia.<sup>79</sup>

Thus, despite Russian law providing for conscientious objection to military service, this option is *de facto* absent in the Russian Federation. Not only is the process for appealing a conscription order manifestly unfair, but even when granted, this status can be suddenly and arbitrarily revoked. In addition, the conditions of alternative service are punitive in nature and do not even guarantee that the work assignment will be civilian. Moreover, the penalties for those even merely *perceived* to be attempting to evade the draft, and the social stigma faced by those labelled as draft dodgers, have the consequence of deterring potential conscientious objectors from even attempting to assert this right.

#### IV. Potential Options for Prosecuting Crimes Against Humanity in Ukraine

Now that the recent scholarship regarding conscription as a human rights violation and the primary reasons for Russia's *de facto* lack of conscientious objection have been laid out, this paper will turn to examining the judicial mechanisms which could be utilized to prosecute crimes against humanity committed by Russian troops in Ukraine. Importantly, this section will emphasize differences in the applicable standard of *mens rea* in each jurisdiction, in order to facilitate this paper's final analysis of the applicability of conscription to *mens rea* in each jurisdiction.

This section will, firstly, assess the general potential for ICC prosecution of Russian troops. Secondly, other prosecutorial mechanisms will be explored. This will include those already imbedded in national Ukrainian criminal law, prosecutions which

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<sup>78</sup> See Human Rights Watch, "Conscripts Denied Adequate Food and Health Care", *supra* note 39.

<sup>79</sup> See *ibid.*

could be advanced under universal jurisdiction, as well as the potential for the creation of a hybrid tribunal.

#### A. *The Potential for ICC Prosecution of Russian Troops*

While the mechanisms for bringing the perpetrators of such crimes to justice have been in place since the *Rome Statute* created the first permanent international criminal court in 2002, impunity for crimes against humanity remains all too common—in part, due to the ICC’s own limitations.<sup>80</sup> Thus, despite ample evidence of the occurrence of crimes against humanity since the start of Russia’s invasion,<sup>81</sup> it is likely that the prosecution of soldiers at the ICC would prove to be quite difficult given that ICC prosecutions typically suffer from an array of obstacles. To name a few, the ICC is a “court without a police force,” meaning that to even bring an accused into custody, they must either hand themselves in or a state’s police force must participate in fulfilling the ICC’s arrest warrant.<sup>82</sup> In addition, the ICC budget “enables only a handful of prosecutions per year” and have typically focused on targeting state leaders<sup>83</sup>—and African leaders at that,

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<sup>80</sup> See Sang-Hyun Song, “The Role of the International Criminal Court in Ending Impunity and Establishing the Rule of Law” (December 2012), online (pdf): *United Nations* <[un.org/en/chronicle/article/role-international-criminal-court-ending-impunity-and-establishing-rule-law](http://un.org/en/chronicle/article/role-international-criminal-court-ending-impunity-and-establishing-rule-law)>. (The ICC was indeed created to “prevent impunity for the worst atrocities known to mankind” by addressing the “absence of credible enforcement mechanisms” to adjudicate violations of international human rights treaties and guidelines, the first of which were adopted in the aftermath of World War II. Without a mechanism of enforcement, these international rules—such as the Nuremberg Principles, the Geneva Conventions, and the Convention on the Prevention and Punishment of the Crime of Genocide (the “Genocide Convention”)—continued to be violated with “glaring impunity”).

<sup>81</sup> See e.g. Al-Hlou, *supra* note 7 (it should be noted that the Court will not have the authority to prosecute *all* crimes associated with Russia’s invasion of Ukraine, notably the crime of aggression).

<sup>82</sup> Feisal G Mohamed, “How the International Criminal Court Could Prosecute Putin” (29 August 2022), online: *Boston Review* <[bostonreview.net/articles/how-the-international-criminal-court-could-prosecute-putin/](http://bostonreview.net/articles/how-the-international-criminal-court-could-prosecute-putin/)>.

<sup>83</sup> Margaret M deGuzman, “Choosing to Prosecute: Expressive Selection at the International Criminal Court” (2012) 33:2 *Mich J Intl L* 265 at 267.



for which it has been criticized.<sup>84</sup> Consequently, since its creation, the ICC has only issued charges for crimes against humanity against 33 people, and of the few that have gone to trial, only one has resulted in a conviction for this category of crime.<sup>85</sup>

In regard to the potential for ICC prosecutions for the events in Ukraine, however, some initial perceived hurdles would in fact not pose an issue. Firstly, although neither Russia nor Ukraine is party to the *Rome Statute*, this would in fact not be a problem in regard to the ICC prosecution of Russian soldiers as Ukraine granted the ICC jurisdiction “over crimes committed on its territory” in 2014.<sup>86</sup> Secondly, while Article 33 of the *Rome Statute* may, at first glance, appear to grant prosecutorial immunity to soldiers acting under a superior’s orders, this Article does not apply to manifestly illegal orders<sup>87</sup>—such as orders to commit crimes against humanity. Other major obstacles to ICC prosecution are not so easily addressed.

With regard to the prosecutorial burden of proving *mens rea* beyond a reasonable doubt, past ICC cases have demonstrated how this task can be extremely complicated in cases of accused violations of international humanitarian law. An initial difficulty stems from the language used in the ICC Statute itself.<sup>88</sup> In defining the various crimes against humanity, the Statute’s drafters included “language denoting intent” for some crimes, but not others.<sup>89</sup> More specifically, some (but not all) of these definitions refer to “knowledge of the attack” but fail to mention *intent*.<sup>90</sup> As written by Johan Van der Vyver, this “is particularly problematic, since it could be taken to exclude the element of

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<sup>84</sup> See deGuzman, *ibid* at 271; see generally Everisto Benyera, *The Failure of the International Criminal Court in Africa: Decolonising Global Justice*, 1st ed (London: Routledge, 2022).

<sup>85</sup> See *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07 OA 8, Judgment pursuant to article 74 of the Statute (7 March 2014). (Katanga was convicted of one count of crimes against humanity as an accessory).

<sup>86</sup> Cormier, *supra* note 15.

<sup>87</sup> See *Rome Statute*, *supra* note 5, art 33(1)(c).

<sup>88</sup> See Van der Vyver, *supra* note 12 at 61.

<sup>89</sup> *Ibid*.

<sup>90</sup> *Ibid*.

intent that would otherwise constitute a vital component of *mens rea*.”<sup>91</sup> In other words, the language used to describe the *mens rea* requirements for crimes against humanity could leave a loophole through which prosecutors might secure a conviction merely through proving that the accused knowingly committed the crime, without proving that they *intentionally* committed said crime.<sup>92</sup>

To add to the lack of clarity regarding these legal standards, the sole ICC conviction for crimes against humanity was achieved using the standard of mere *awareness*.<sup>93</sup> In this case, the ICC deemed that, regardless of the accused’s intention, it was sufficient that he was aware that the crimes would occur.<sup>94</sup> This could signify the Court’s departure from the language used in the ICC statute in favour of an even lesser standard of *mens rea* than the lower of the two statutorily mandated options—knowledge—would have implied. However, in the absence of additional ICC convictions for crimes against humanity, it is difficult to know whether this change would hold in future cases related to the events in Ukraine.

## B. Other Prosecutorial Options

Although a Ukrainian national court would be a rational court of first instance to adjudicate crimes committed on its territory and against its citizens, the Ukrainian criminal justice system may lack the capacity to prosecute the *many* crimes against humanity which have been reported.<sup>95</sup> Indeed, only one trial for war crimes has occurred so far, and the Ukrainian criminal code was in fact altered to allow for the prosecution of this case.<sup>96</sup>

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<sup>91</sup> *Ibid.*

<sup>92</sup> See *ibid*; see also Ratner, *supra* note 8 at 71.

<sup>93</sup> See *The Prosecutor v Germain Katanga*, ICC-01/04-01/07, Order for Reparations pursuant to Article 75 of the Statute (24 March 2017) at para 249 [*Prosecutor v Katanga*, Order for Reparations].

<sup>94</sup> See *ibid* at para 249.

<sup>95</sup> See Human Rights Watch, “Apparent War Crimes”, *supra* note 6.

<sup>96</sup> See Bryan Pietsch, “Russian soldier gets life in prison in Ukraine’s initial war crimes trial”, *Washington Post* (23 May 2022), online:

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However, the newly created War Crimes Unit is now receiving international support in order to ready it to prosecute international war crimes.<sup>97</sup> This underpins the concepts of complementarity and subsidiarity to local actors by highlighting that Ukrainian legal personnel are in a unique position to “investigate, prosecute, adjudicate and monitor international crimes” occurring within its borders.<sup>98</sup> An additional option, however, could consist of Ukrainian resources being used to expedite the investigations already underway by the ICC.<sup>99</sup>

The ICC has indeed already begun its investigations into war crimes and crimes against humanity in Ukraine.<sup>100</sup> Additionally, the European Union has voiced its intention to create a hybrid tribunal in relation to the invasion of Ukraine, however, the vision for this tribunal appears to be restricted to the crime of aggression, which would seek the prosecution of Russian leaders responsible for starting the war.<sup>101</sup> This limited scope recognizes that both Ukraine and the ICC have already expressed their willingness to prosecute other crimes of war. Moreover, given that the ICC does not have jurisdiction to prosecute Russia for the crime of aggression since neither Russia nor Ukraine are parties to the *Rome Statute*,<sup>102</sup> setting up a limited hybrid tribunal to adjudicate this matter is particularly justified. Consequently, however, it is unlikely that an additional hybrid tribunal is to be announced.<sup>103</sup>

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<washingtonpost.com/world/2022/05/23/ukraine-russia-soldier-war-crimes-verdict/>.

<sup>97</sup> See Asser Institute Centre for International and European Law, “Strengthening Ukraine’s Capacity to Investigate and Prosecute International Crimes” (2022), online: *Projects & legal advice* <asser.nl/projects-legal-advice/projects/?rId=1161>.

<sup>98</sup> *Ibid.*

<sup>99</sup> See Reuters, “EU seeks tribunal to probe possible Russian war crimes in Ukraine”, *Reuters* (30 November 2022), online: <reuters.com/world/europe/eu-seeks-set-up-russian-war-crimes-tribunal-von-der-leyen-2022-11-30/>.

<sup>100</sup> See *ibid.*

<sup>101</sup> See *ibid.*

<sup>102</sup> See Cormier, *supra* note 15.

<sup>103</sup> See generally Reuters, *supra* note 99; Cormier, *supra* note 15.

A further option could lie in universal jurisdiction. Numerous states have expressed their desire to advance investigations and prosecutions against Russia pursuant to this doctrine, including Estonia, Germany, Latvia and Lithuania, whose investigations have already begun.<sup>104</sup> While some Ukrainian legal experts are in support of such efforts, others are concerned that judicial processes under universal jurisdiction would take even more time than it would to get the new War Crimes Unit prepared to prosecute violations of international law.<sup>105</sup>

Thus, at present, the ICC and Ukrainian national courts (if the War Crimes Unit builds its capacity) are the most probable potential judicial options for the prosecution of Russian soldiers for crimes against humanity committed in Ukraine.

## V. Conscription, *Mens Rea*, and Soldiers' Criminal Liability for Crimes Against Humanity

Now that the recent scholarship regarding conscription as a human rights violation and the primary reasons for Russia's *de facto* lack of conscientious objection have been laid out, this paper will turn to addressing the potential for Russian soldiers to face prosecution for crimes against humanity committed during the ongoing invasion of Ukraine. Given the ICC's ongoing investigation and proven capacity to adjudicate these matters, this section will focus on the ICC's mechanisms. To evaluate the potential for these prosecutions, the applicability of the superior orders defence must first be examined. This section will pay special attention to post-Nuremberg Tribunal developments in this area, such as the types of orders which are considered "manifestly illegal" and therefore outside the scope of the superior orders defence.<sup>106</sup> Secondly, the potential fallacy of a soldiers' own

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<sup>104</sup> See Mykola Pashkovsky, "Universal Criminal Jurisdiction in Ukraine" (20 September 2022), online: *Institute for War & Peace Reporting* <iwpr.net/global-voices/universal-criminal-jurisdiction-ukraine#:~:text=Four%20countries%20%E2%80%93%20Estonia%2C%20Germany%2C,full%2Dscale%20invasion%20of%20Ukraine>.

<sup>105</sup> See *ibid.*

<sup>106</sup> *Rome Statute*, *supra* note 5, art 33.

volition is examined, as well as the consequences of individual criminal responsibility for crimes against humanity. Thirdly, the concepts of conscription and crimes against humanity will be intersected through an analysis of the requisite *mens rea* for the conviction of such crimes. This section will focus predominantly on the relevant international legal standards and norms, as well as ICC jurisprudence.

#### A. *The Superior Orders Defence and 'Manifestly Unlawful' Orders*

There are many factors which can complicate or impede a court's ability to ascertain whether a criminal act committed by a soldier was done under orders, or of the soldiers' own volition. Moreover, the concept of a conscripted soldier even *having* any volition during the course of their military service is debatable. However, before considering how a court might determine whether or not a soldier was following orders in committing criminal behaviour, the scope and applicability of this defence must be outlined.

The Nuremberg trials forever altered this concept, to the extent that the 'Nuremberg defence' is now synonymous with superior orders. Although the first recorded use of the superior orders defence dates back to the fifteenth century,<sup>107</sup> in the aftermath of the unspeakable atrocities of the Second World War, both its meaning and scope were narrowed significantly.<sup>108</sup> Indeed, Nuremberg Principle No. 4 refuses to allow superior orders to negate a soldier's own criminal responsibility when the orders were contrary to morality. It states:

The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.<sup>109</sup>

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<sup>107</sup> See William Schabas, *An Introduction to the International Criminal Court*, 3rd ed (Cambridge: Cambridge University Press, 2007) at 1.

<sup>108</sup> See *Report of the International Law Commission covering its Second Session, 5 June - 29 July 1950*, Document A/1316, art IV ["Nuremberg Principles"].

<sup>109</sup> *Ibid.*

Nuremberg thus limited the scope of this defence's applicability such that it cannot be used to relieve an accused's liability for human rights atrocities.<sup>110</sup> In 1998, this was reiterated in Article 33 of the *Rome Statute*, although the idea of a "moral choice" was replaced with the language of "manifestly unlawful" crimes, which Article 33(2) characterizes as "genocide or crimes against humanity."<sup>111</sup> In Article 7, the statute further defines crimes against humanity to include a wide array of serious offences when committed in particular circumstances (see extracted Article above).<sup>112</sup>

Thus, even if Russian soldiers can prove that they acted under superior orders, under international law, Article 33 would prevent this defence from negating their criminal responsibility to a wide breadth of serious crimes, many of which have been reported in Ukraine. Additionally, it should be noted that although there are many factors which can complicate or impede a court's ability to ascertain whether or not a soldier's criminal behaviour was ordered by a superior, this question is a moot point in regard to crimes against humanity.

#### *B. The Consequences of Individual Responsibility and the Potential Fallacy of a Conscripted Soldier's Own Volition*

There are many arguments in favour of upholding individual responsibility for crimes against humanity, many of which stem from the Nuremberg Trials which was a "watershed" moment for this principle's development.<sup>113</sup> Notably, individual responsibility can further the pursuit of four important post-conflict goals.

Firstly, holding the individual perpetrators of atrocities accountable "clearly has significance for some victims" in regard to their feeling that justice has been done.<sup>114</sup> Indeed, in instances

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<sup>110</sup> See *ibid*; see also United Nations, *Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis* (8 August 1945), art 8.

<sup>111</sup> *Rome Statute*, *supra* note 5, arts 33, 33(2).

<sup>112</sup> See *ibid*, art 7(1)(a-k).

<sup>113</sup> Ratner, *supra* note 8 at 6.

<sup>114</sup> *Ibid* at 172.

of state-sanctioned violence, victims often hold both the state and the individual responsible. Secondly, individual responsibility can play a critical role in “repairing the damage done to a society” and “promoting national reconciliation.”<sup>115</sup> Societal reparation can indeed be impaired when a traumatized population does not perceive the perpetrators as having been held accountable.<sup>116</sup> Thirdly, punishing individuals may help deter future violations of human rights, however, empirical evidence to support this is lacking.<sup>117</sup> Fourthly, although this is a less common goal for post-conflict societies compared to other reasons for promoting individual responsibility, the offender rehabilitation is “a stated goal of many societies” in the aftermath of conflict.<sup>118</sup>

While these goals can be vital to a society’s successful post-conflict rebuilding, there are reasons to question whether individual responsibility for crimes against humanity ought to be used as a means to pursue this end. This is particularly true given the further complication that certain crimes committed in war time have been more frequently viewed as committed of a soldiers’ own volition than others’—thus stereotyping certain crimes as being the result of a “bad apple” (or apples) rather than a systemic problem originating from superior orders.<sup>119</sup> For example, only in recent years have scholars begun to describe rape as a “weapon of war,” replacing the overly simplistic explanation that war time rape is simply the collateral damage of soldiers’ misbehaviour when the rule of law—and criminal liability—is nowhere to be found.<sup>120</sup> These perceptions can result

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<sup>115</sup> *Ibid.*

<sup>116</sup> See *ibid.*

<sup>117</sup> See *ibid.*

<sup>118</sup> See *ibid.*

<sup>119</sup> See generally Peter Rowe, “Military Misconduct during International Armed Operations: ‘Bad Apples’ or Systemic Failure?” (2008) 13:2 J Confl & Sec L 165.

<sup>120</sup> See generally Carol Rittner & John Roth, *Rape: Weapon of War and Genocide* (St. Paul, MN: Paragon House, 2012); Sharon Frederick, *Rape: Weapon of Terror* (River Edge, NJ: Global Publication for the Association of Women for Action and Research, 2001); Sabine Hirschauer, *The Securitization of Rape: Women, War and Sexual Violence* (New York, NY: Palgrave MacMillan, 2014); Sarah Danielsson, “The Genocidal Politics of Rape, Shame, and Disgust” in: *War and Sexual Violence: New Perspectives in a New Era* (Boston: Brill, 2019).

in a state being shielded from the true extent of their culpability for these crimes, whether legally or in terms of public perception, as the individual perpetrator (the “bad apple”) is treated as the fundamental cause of the violence.<sup>121</sup>

Another important consideration regarding the suitability of individual responsibility as a means to promote post-conflict rebuilding is the potential fallacy of a conscripted soldier having his own volition. Especially given that conscription can be defined as a human rights violation, and even a crime against humanity itself, criminally pursuing individuals for crimes against humanity committed during conscripted military service may be misguided in some cases.<sup>122</sup> Given the link between assessing a soldier’s volition and their state of mind, the following section on *mens rea* will examine this issue.

### C. *Duress, Conscription, and Mens Rea at the ICC*

This section intersects the concepts of conscription and crimes against humanity through assessing the requisite *mens rea* for the conviction of such crimes, as well as the potential complications posed by forced military service. The ability for a prosecutor to prove *mens rea* based on the evidence at hand is not a matter which only comes up at trial—it is a crucial factor in whether the prosecution will pursue a charge at all.<sup>123</sup>

In regard to trials at the ICC, one significant complication is the previously mentioned ambiguity of the ICC statute in regards to qualifying the standard of *mens rea* for crimes against humanity.<sup>124</sup> This distinction between having knowingly versus intentionally committed a crime is elucidated by the United States Model Penal Code, which identifies four levels of *mens rea*—purposely, knowingly, recklessly, and negligently.<sup>125</sup> Section 2.02

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<sup>121</sup> See generally Rowe, *supra* note 119.

<sup>122</sup> See generally Yasmin Naqvi, “Amnesty for War Crimes: Defining the Limits of International Recognition” (2003) 85:851 IRRC 583.

<sup>123</sup> See Ratner, *supra* note 8 at 79.

<sup>124</sup> See Van der Vyver, *supra* note 12 at 61; see also Ratner, *supra* note 8 at 71.

<sup>125</sup> While this model is a useful illustration for definitional purposes, it should be noted that “[each] system of law may define the requisite *mens rea* differently.” See Ratner, *supra* note 8 at 71.



on the general requirements of culpability characterizes  
purposely committing a crime in the following manner:

§ 2.02(2)(a) A person acts purposely with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.<sup>126</sup>

Whereas the lower prosecutorial burden of having knowingly committing a crime is defined in section 2.02(2)(b):

§ 2.02(2)(b) A person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.<sup>127</sup>

Given that the single ICC conviction for crimes against humanity used the standard of mere awareness,<sup>128</sup> rather than either of the standards outlined in the ICC Statute (that of either purposefully or knowingly committing the crime), assessing which standard would apply in future prosecutions is particularly challenging. However, if the standard of mere awareness proves to be permanent, then this would provide a firm answer to the issue of how conscription would likely be treated in relation to *mens rea* at the ICC. This is because the fact of being conscripted is not related to one's awareness of a given crime, and thus conscription would simply be entirely irrelevant under the standard of awareness. This same rationale would likely hold for the 'knowingly' standard of *mens rea*, for the same reasons. It is

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<sup>126</sup> American Law Institute, "Model Penal Code with commentary" (1 January 1962) at 32, online (pdf): *American Law Institute* <archive.org/details/ModelPenalCode\_ALLI>.

<sup>127</sup> *Ibid* at 32.

<sup>128</sup> See *Prosecutor v Katanga*, Order for Reparations, *supra* note 93 at para 249.

only if the highest standard were to apply, that of purposely committing a crime against humanity, that conscription might be able to call a soldier's *mens rea* into question.

However, even if the highest *mens rea* standard were to apply, a defence would need to exercise caution in attempting to advance this argument at the ICC, due largely to Article 33 of the *Rome Statute*. Given that this article precludes the defence of superior orders from applying to crimes against humanity, the defence's argument would need to steer clear of focusing upon the soldier's lack of volition—even as it applies to his mere presence in the war zone—as this would only highlight that he was acting under someone else's volition, which is not a defence. Moreover, even the defence of duress “does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings.”<sup>129</sup> This remains the case in most circumstances, regardless of more recent interpretations of Article 31(1)(d) of the *Rome Statute* allowing the defence of duress in a limited number of cases—namely those where the duress consisted of the threat of imminent death or seriously bodily harm to themselves or another.<sup>130</sup>

Thus, despite developments illuminating conscription as a serious human rights violation, and even a crime against humanity, as it stands, the ICC Statute and its jurisprudence do not enable this to be considered in regard to a soldier's *mens rea* for accusations of crimes against humanity—regardless of the deplorable conditions or suffering of conscripts. Essentially, being a victim of a crime against humanity is no defence to committing a crime against humanity oneself.

## IV. Conclusion

In conclusion, courts handling international human rights cases must find ways to manage the intersection of legal concepts, such as conscription and *mens rea*, when their evolving definitions create new legal questions. Given that conscription is now being

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<sup>129</sup> *Prosecutor v Erdemović*, IT-96-22-A, ICTY 7, October 1997.

<sup>130</sup> *Rome Statute*, *supra* note 5, art 31(1)(d).

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characterized as a violation of human rights, and even a crime against humanity, legal mechanisms adjudicating international human rights cases ought to seriously consider how the prosecution of victims of crimes against humanity for *committing* other crimes against humanity ought to be dealt with. With the two crimes being so interlinked (as a conscripted soldier would not even be in a war zone if it were not for conscription), the goal of criminally pursuing these individuals ought to be reevaluated—and the *mens rea* element not only expanded upon, but clearly defined in the first place.

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