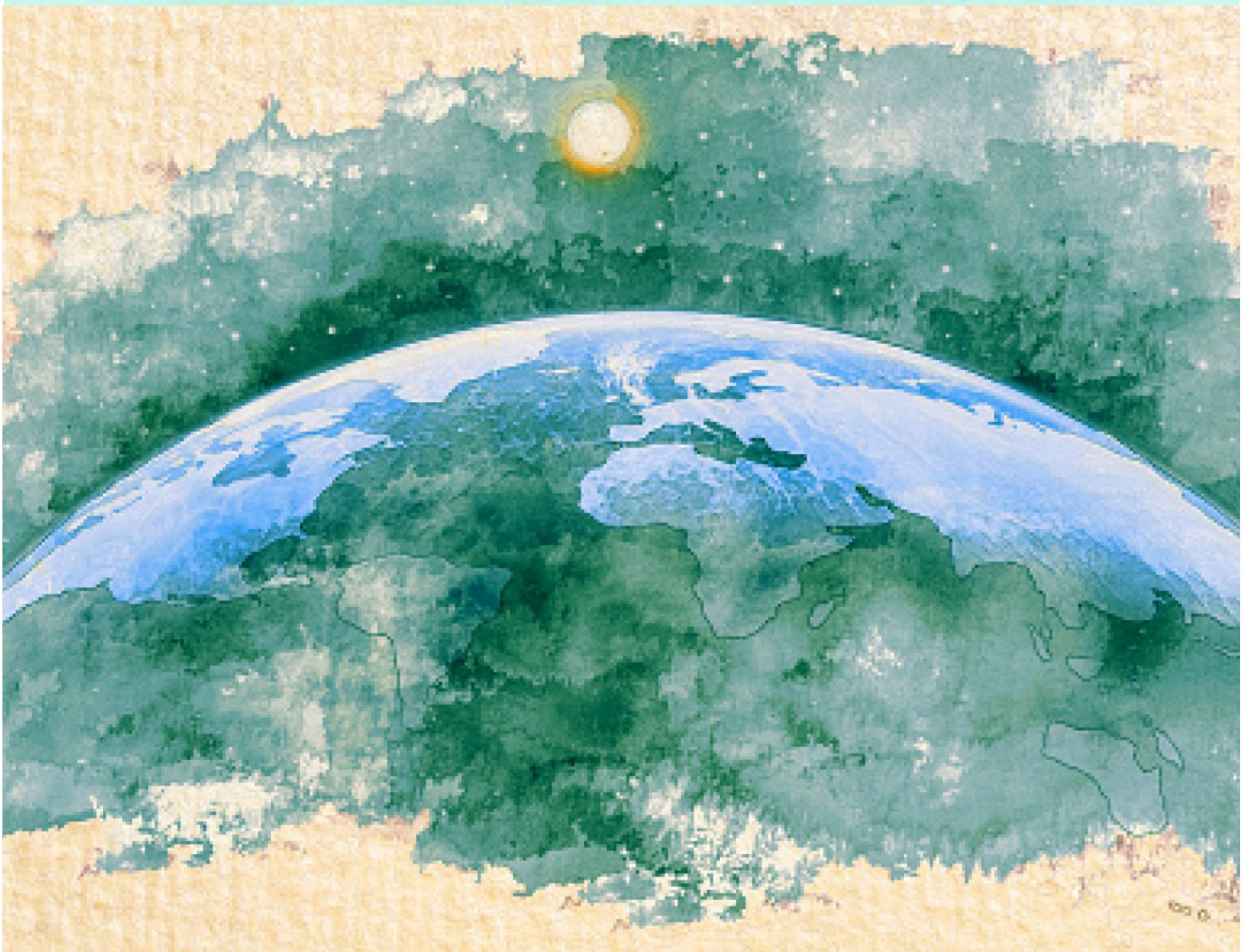


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International Law Section

# INTERNATIONAL LAW NEWS

VOLUME 50 / ISSUE 2 / WINTER 2023

FEATURING A MINI-SERIES ON  
WAR IN UKRAINE





# INTERNATIONAL LAW NEWS

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Jai Lee, Editor-in-Chief and Kelly Blount, Managing Editor



# After the *Kaavan* Decision: A New Wave of Animal Law Litigation in Pakistan

Hira Jaleel

In May 2020, Pakistan's Islamabad High Court rendered an unprecedented decision in *Islamabad Wildlife Management Board vs. Metropolitan Corporation Islamabad*. Authored by the court's Chief Justice, J. Minallah, the decision resulted in the shutting down of the Marghazar Zoo in Pakistan's capital city, Islamabad.<sup>1</sup> All of the zoo's animals, among them an Asian elephant named Kaavan, were ordered to be relocated to appropriate sanctuaries either within Pakistan or abroad.<sup>2</sup> The court's judgment, hereinafter referred to as the '*Kaavan* decision,' was groundbreaking in several important ways. Firstly, the court recognized that nonhuman animals have certain natural and legal rights, which are implied and protected by the relevant anti-cruelty legislation in Pakistan.<sup>3</sup> Secondly, the decision linked the rights of animals with the right to life and liberty of human beings as enshrined in Article 9 of Pakistan's Constitution, by concluding that animal maltreatment violates the fundamental right to life and that state authorities have a duty to prevent cruelty against animals.<sup>4</sup> Lastly, the *Kaavan* decision set important precedent for animal protection litigation in Pakistan, setting up the judicial system as an avenue for those seeking to protect the interests of nonhuman animals. This article attempts to map and examine the ways in which the *Kaavan* decision contributed to the development of animal law jurisprudence in Pakistan.

## I. The *Kaavan* Decision was the first in Pakistan to acknowledge the legal rights of animals.

Gifted to Pakistan by the Sri Lankan Government in 1985,<sup>5</sup> Kaavan had resided in the Marghazar Zoo for the better part of four decades at the time of the court's decision. After his sole elephant partner at the zoo, Saheli, died due to infection in 2012, Kaavan quickly

became depressed and aggressive, resulting in him being kept chained.<sup>6</sup> Kaavan also exhibited clear signs of psychological distress, including swaying and pressing his head into a wall. His plight resulted in him being referred to as the "world's loneliest elephant."<sup>7</sup>

In 2019, a petition was filed before the Islamabad High Court, challenging the conditions in which animals were kept at the zoo and seeking that Kaavan be relocated to a sanctuary.<sup>8</sup> Deciding this petition along with two others, the court posed two fundamental questions: Do nonhuman animals have legally enforceable rights? And does the Constitution impose duties on the State to safeguard the welfare of nonhuman animals?<sup>9</sup> The court answered both these questions in the affirmative. In reaching its conclusions, the court examined international and domestic animal law jurisprudence, including, notably, efforts made by the Nonhuman Rights Project and PETA in the U.S.<sup>10</sup>

With respect to the question of whether animals have legal rights, J. Minallah concluded that because nonhuman animals are the subject of a life and sentient beings, they possess certain natural rights, such as the right to live in an environment that meets their social, behavioral and physiological needs and the right to not be subjected to unnecessary pain and suffering.<sup>11</sup> The court found these natural rights have been codified within the anti-cruelty law in Pakistan, specifically the Prevention of Cruelty to Animals Act 1890, which prohibits, among other things, subjecting animals to unnecessary pain and suffering.<sup>12</sup> Hence, according to the court, since animals have certain natural rights recognized by law, they possess legal rights, which the

<sup>1</sup> *Islamabad Wildlife Management Board v. Metropolitan Corporation of Islamabad*, (2021) PLD (Islamabad) 6 (Pak.).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Rachel Nuwer, *How Cher Helped Rescue the World's Loneliest Elephant*, *Smithsonian Magazine* (Apr. 21 2021),

<https://www.smithsonianmag.com/science-nature/how-cher-helped-rescue-worlds-loneliest-elephant-180977562/>

<sup>7</sup> *Id.*

<sup>8</sup> *Supra* Note 2.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

court defined, relying on Black’s Law Dictionary as “a right related to or recognized by law.”<sup>13</sup>

The *Kaavan* decision also created a link between the legal rights of nonhuman animals and the fundamental rights of humans contained in the Constitution of Pakistan,<sup>14</sup> which the State has a duty to safeguard. The court discussed how the well-being and survival of animal species is directly linked to the survival of human beings. The court further relied on the link between cruelty to animals and violence against human beings to hold that animal mistreatment has a nexus with the right to life as guaranteed by and contained in article 9 of the Constitution.<sup>15</sup> Hence, the court concluded that protecting animals against harm is a constitutional obligation of the State and its authorities.<sup>16</sup>

Because the authorities managing the zoo were not fulfilling their obligations to its inhabitants and were subjecting the animals to unnecessary pain and suffering, the court ordered the zoo be shut down and the animals relocated to sanctuaries.<sup>17</sup> By the end of 2020, all the animals from the zoo, including *Kaavan*, had been relocated to various sanctuaries.<sup>18</sup>

## II. The *Kaavan* principles have been expanded in animal protection cases concerning domestic animals.

Since the *Kaavan* decision was rendered, its principles have been relied on by lawyers, judges, and quasi-judicial bodies alike to advance protections for nonhuman animals in a variety of contexts. In April 2021, the Council of Complaints, a body tasked with receiving and reviewing complaints against television channels licensed by the Pakistan Electronic Media Regulatory Authority (PEMRA),<sup>19</sup> rendered its decision in an animal cruelty related complaint. The complainant, a member of the public, alleged that a channel had aired a game show that involved piling rabbits and pigeons on the laps of contestants, causing unnecessary pain and suffering to them.<sup>20</sup> The complainant relied on the *Kaavan*

decision to argue that animals should not be treated as mere property and that animals too have inherent rights that need to be safeguarded.<sup>21</sup> In its response, the channel attempted to distinguish the *Kaavan* judgement from the facts in the complaint by arguing that the *Kaavan* decision related to captive wild animals and did not apply to domestic animals such as rabbits and pigeons.<sup>22</sup> However, the Council rejected the channel’s attempt to distinguish *Kaavan* and held that it had been established that subjecting animals to ill-treatment amounts to a violation of the right to life under Article 9 of the Constitution.<sup>23</sup>

Additionally, the Council held the channel to be in violation of PEMRA’s Code of Conduct and the Prevention of Cruelty to Animals Act 1890.<sup>24</sup> Ultimately, the Council recommended that a fine of Pak Rupees 500,000/- (approximately US \$2100) be imposed on the channel.<sup>25</sup> This holding expanded the *Kaavan* decision to a situation and a category of animals that *Kaavan* did not directly address—that is, domestic animals used in entertainment, and indicated a regulatory shift towards protecting animals in the media.

## III. The *Kaavan* decision has been relied upon by other High Courts and its principles affirmed in other High Court decisions in Pakistan.

Being a High Court decision, the holding in *Kaavan* is not binding for other High Courts in Pakistan, since the Islamabad High Court is not superior to other High Courts. However, it has been relied upon by sister courts in other provinces to advance protections for animals. One such example can be seen in the case of *Zawar Hussain v. Province of Punjab*, decided by the Lahore High Court in 2022.<sup>26</sup>

The case arose out of a notification issued by the Punjab Wildlife and Parks Department banning the use of electronic decoys, mojos, and pre-charged pneumatic airguns in hunting. The governing law, the Punjab Wildlife (Protection, Preservation, Conservation and

<sup>13</sup> *Id.*

<sup>14</sup> Pakistan Const. Part II, Chapter I.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Rvel Zahid, *Lonely Elephant Kaavan Moves to Cambodia from Controversial Islamabad Zoo*, Zenger News, (Dec. 6, 2020),

<https://www.zenger.news/2020/12/06/lonely-elephant-kaavan-moves-to-cambodia-from-controversial-islamabad-zoo/>

<sup>19</sup> The Pakistan Electronic Media Regulatory Authority Ordinance 2002, S 26, <https://pemra.gov.pk>

<sup>20</sup> *Mr. Faizullah Khan Niazi v. Express Entertainment*, F. No.

14(02)/RO-LHR/106/36309, (Pakistan Regulatory Media Authority), 29 April 2021.

<sup>21</sup> *Id.* at 1.

<sup>22</sup> *Id.* at 2.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Zawar Hussain v. Province of Punjab*, (2022) PLD (Lahore) 445 (Pak.).

Management) Act 1974, already prohibited the use of live decoys in hunting.<sup>27</sup> However, since the law did not expressly address the use of electronic decoys, hunters had increasingly been using these gadgets to hunt waterfowl, leading to a decline in the waterfowl population in the province of Punjab.<sup>28</sup> The ban was challenged by the petitioner, a hunter, on the grounds that the department had exceeded its jurisdiction by imposing a ban the law did not expressly envision.<sup>29</sup>

In ultimately upholding the ban, the Lahore High Court partially relied on the *Kaavan* decision to affirm that since animals are sentient beings, they have legal rights, including the right to life, and that it is the duty of the state to ensure these rights are not infringed upon.<sup>30</sup> Since one of the core purposes of the Punjab Wildlife Act 1974 is to protect wildlife, the court held that the Wildlife Department has discretion to adopt measures to protect the lives of wild animals and birds.<sup>31</sup>

Therefore, even though the Lahore High Court was not bound by the *Kaavan* decision, it adopted *Kaavan's* principles and declared that animals have legal rights, further linking those rights to Article 9 of the Constitution. The adoption of the holding in *Kaavan* by the Lahore High Court, which is the High Court for Pakistan's most populous province, indicates further entrenchment of animal rights within Pakistan's jurisprudence.

#### **IV. *Kaavan* continues to be cited and relied upon by petitioners and lawyers seeking to advance protections for nonhuman animals through the legal system.**

In addition to the judicial pronouncements affirming or expanding the principles espoused by *Kaavan*, the decision has been used to bring additional legal challenges to the treatment of certain categories of animals, and to advance creative legal arguments for animals.

For example, in 2021, a public interest petition was brought before the Lahore High Court, challenging the Punjab Wildlife Department's practice of allowing private individuals to keep exotic wildlife, most notably lions, as pets.<sup>32</sup> Section 12 of the governing law in this case, the

Punjab Wildlife Act 1974, allows the Wildlife Department to issue certificates of lawful possession to those individuals wishing to possess a wild animal.<sup>33</sup> The petitioner challenged the constitutionality of section 12 of the Act on the grounds that the *Kaavan* decision held that animals have the legal right to live in an environment that meets their behavioral, social, and physiological needs.<sup>34</sup> The petitioner argued that since keeping wild animals as pets inherently means that they cannot be kept in an environment that meets those core needs, the provision allowing for such possession is unconstitutional and should be declared as such by the Lahore High Court.<sup>35</sup>

In its admitting note for this case (through which the court held that the case was maintainable and would be heard on merits), the Lahore High Court specifically noted that in Pakistan, after the *Kaavan* judgement, the link between the rights of animals and constitutional rights needs further elaboration.<sup>36</sup> The court also observed that under Article 199 of the Pakistani Constitution, which establishes the writ jurisdiction of the High Courts, any "aggrieved party" can approach the High Court in its writ jurisdiction.<sup>37</sup> Therefore, one of the questions the court might examine in this case is whether animals can be an "aggrieved party" and directly approach the High Court for violation of their fundamental rights. While a decision in this litigation is still pending, a detailed judgement on the point of whether animals can have standing to bring suit (without the need of an intervening human party to demonstrate injury or demonstrate maintainability) could have immense implications for animal personhood in Pakistan.

#### **V. Conclusion.**

Suffice it to say, the animals in the Marghazar Zoo were not the only beneficiaries of the holding in *Kaavan*. The decision paved the way for other successful animal law litigation in Pakistan and continues to be relied upon by lawyers and petitioners seeking to advance constitutional animal protections. Going forward, it remains to be seen how the Supreme Court of Pakistan,

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<sup>27</sup> The Punjab Wildlife (Protection, Preservation, Conservation and Management) Act 1974, S 9, <http://punjablaws.gov.pk/laws/290.html>

<sup>28</sup> *Supra* Note 28.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Sanita Gulzar v. Province of Punjab*, Writ Petition No. 30173 of 2021, Lahore High Court, (Pak.)

<sup>33</sup> *Supra* Note 29, S. 12.

<sup>34</sup> *Supra* Note 34.

<sup>35</sup> *Id.*

<sup>36</sup> *Sanita Gulzar v. Province of Punjab*, Writ Petition No. 30173 of 2021, Lahore High Court (Pak.), order dtd. May 06 2021.

<sup>37</sup> *Id.*

which is the highest court in the country and the only court with the power to uphold or overturn the Islamabad High Court's judgments, approaches the principles laid down in the *Kaavan* decision. The *Kaavan* holding has put animal law on the map in Pakistan, and will hopefully continue to serve as the base upon which stronger legal protections for animals are built within the country.

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# Uses of Rape as a Military Weapon by Russian Forces in Ukraine

Elizabeth M. Zechenter

*After every war  
Someone has to clean up.  
Things won't straighten themselves up, after all<sup>1</sup>*

The use of rape and other sexual violence as a weapon by the Russian forces in Ukraine has been a problem since the beginning of the Russian aggression in February of 2022.<sup>2</sup> We now have numerous verified reports from human rights organizations and first-hand testimonies of the survivors confirming the existence of a pervasive culture of rape and sexual violence carried out by the Russian military.<sup>3</sup>

Pramila Patten, the UN Secretary General's Special Representative for Sexual Violence in Armed Conflict, stated that Russian forces have been carrying out sexual assaults as a "deliberate tactic to dehumanize the victims" as part of their military strategy because "when you hear women testify about Russian soldiers equipped with Viagra, it's clearly a military strategy." Patten stated that the UN had verified that the first cases of rape were reported just three days after the Russian invasion in

February.<sup>4</sup> She observed that the reported cases are only the tip of the iceberg because maintaining reliable statistics is difficult during an active conflict, and sexual violence against women is largely a "silent crime."<sup>5</sup>

The Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Cooperation in Europe (OSCE) issued in April a Report on Violations of International Humanitarian and Human Rights Law as a result of their investigation between February and March 2022. The report found numerous law violations, including "instances of conflict-related gender-based violence, such as rape, sexual violence or sexual harassment."<sup>6</sup> In March of 2022, the ICC prosecutor opened an investigation into alleged serious crimes in Ukraine.<sup>7</sup> Shortly thereafter, the UN Human Rights Council established an Independent Commission of Inquiry (IICI) to investigate human rights and humanitarian law violations associated with the war.<sup>8</sup> In October, the IICI published its report, reporting that war crimes and numerous violations of human rights have been committed in Ukraine.<sup>9</sup>

<sup>1</sup> The beginning stanza of a poem by Wislawa Szymborska titled *The End and the Beginning* from *Miracle Fair: Selected Poems*, translated by Joanna Trzeciak, Norton & Company, 2001. Szymborska is a Polish poet who received the Nobel Prize in literature in 1996.

<sup>2</sup> McKernan, Bethan, "Rape as a weapon: huge scale of sexual violence inflicted in Ukraine emerges," *The Guardian*, Apr. 4, 2022, <https://www.theguardian.com/world/2022/apr/03/all-wars-are-like-this-used-as-a-weapon-of-war-in-ukraine>; "Ukraine: Apparent War Crimes in Russia-Controlled Areas," Human Rights Watch, Apr. 3, 2022, <https://www.hrw.org/news/2022/04/03/ukraine-apparent-war-crimes-russia-controlled-areas#>

<sup>3</sup> Bloom, Mia, "Rape by Russian soldiers in Ukraine is the latest example of a despicable wartime crime that spans the globe," *The Conversation*, Apr. 7, 2022, <https://theconversation.com/rape-by-russian-soldiers-in-ukraine-is-the-latest-example-of-a-despicable-wartime-crime-that-spans-the-globe-180656>; UNHCR, Independent International Commission of Inquiry on Ukraine, <https://www.ohchr.org/en/hr-bodies/hrc/iicir-ukraine/index>; Macias, Amanda, "UN report details horrifying Ukrainian accounts of rape, torture and executions by Russian Troops," *CNBC*, Oct. 28, 2022, <https://www.cnbc.com/2022/10/28/russia-ukraine-war-un-report-details-accounts-of-rape-torture-and-executions.html>

<sup>4</sup> Gans, Jared, "UN official: Russia using rape as war strategy in Ukraine," *The Hill*, Oct. 15, 2022, <https://thehill.com/policy/international/3689522-un-official-russia-using-rape-as-war-strategy-in-ukraine/>

<sup>5</sup> Mordowanec, Nick, "U.N. Envoy Details Russian Weaponization of Rape, Sexual Assault in Ukraine," *Newsweek*, Oct. 14, 2022, <https://www.newsweek.com/un-envoy-details-russian-weaponization-rape-sexual-assault-ukraine-1751976>

<sup>6</sup> Wolfgang Benedek et al, Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity Committed in Ukraine since 24 February 2022, OSCE, Apr. 12, 2022, <https://www.osce.org/files/f/documents/f/a/515868.pdf>

<sup>7</sup> "War crimes court prosecutor opens Ukraine investigation," *Reuters*, Mar. 3, 2022, <https://www.reuters.com/world/europe/war-crimes-court-prosecutor-opens-ukraine-investigation-statement-2022-03-02/>; Vaswani, Sharnam, "ICC prosecutor to investigate alleged war crimes in Ukraine," *Jurist.org*, Mar. 1, 2022, <https://www.jurist.org/news/2022/03/icc-to-investigate-alleged-war-crimes-in-ukraine/>

<sup>8</sup> "Human Rights Council to establish Commission of Inquiry on Ukraine," *UN News*, Mar. 4, 2022, <https://news.un.org/en/story/2022/03/1113292>

<sup>9</sup> "A/77/533: Independent International Commission of Inquiry on Ukraine - Note by the Secretary-General" UN Office of the High Commissioner for Human Rights, Oct. 18, 2022, <https://www.ohchr.org/en/documents/reports/a77533-independent-international-commission-inquiry-ukraine-note-secretary>; Vella, Lauren, "UN panel reports Ukrainian children have been raped, tortured by Russian forces," Sept. 23, 2022,

The Ukrainian Prosecutor, Iryna Didenko, stated in January 2023 that her office had opened prosecutions into acts of sexual violence committed by Russian soldiers and added that the actual number of incidents is far higher because Russian invaders have a clear pattern of behavior when seizing territory: “ground forces arrive, and rapes start on the second or third day.”<sup>10</sup>

All of the various reports and investigations confirm that Ukrainian women are targeted for rape and other forms of sexual violence in order to intimidate and demoralize Ukrainian civilians, with youngest victim reported to be just four years old and the oldest over 80.

This development is not entirely surprising as the Russian military has a long and inglorious history in that area. For example, during WWII, the Russian army engaged in mass rapes of women in Germany, which were sometimes “justified” by the fact that these German women were Nazi party members or Nazi sympathizers.<sup>11</sup> Plus, the Russian army engaged in mass looting everywhere they went.<sup>12</sup> While the exact numbers of rapes committed are debated, historical sources suggest that as many as two million German women were victimized, and many were raped multiple times by several soldiers until they died of pain, wounding, and exhaustion.<sup>13</sup> It is reported that after

being told about the Red Army’s mass rapes of women in Germany, Poland, and elsewhere, Stalin is supposed to have said, “**what is so awful in having fun with a woman after such horrors?**”<sup>14</sup> Even if this anecdote is apocryphal, it does reflect the Russian military attitudes prevalent at that time and seemingly now.<sup>15</sup> And even if one would argue that after four years of German atrocities, the mass rapes of German women were somehow a one-off expression of pent-up anger and a form of retribution, the Russian army engaged in the mass rape of Polish women while they were advancing West toward Berlin while “liberating” Poland.<sup>16</sup> Since Polish women who were being brutally raped by the Russian “liberators” were not German nor Nazis, the “explanation” of Russian behavior lies elsewhere. One explanation is a longstanding culture of permissiveness, lack of discipline and professionalism in the Russian military; another is the ingrained culture of violence against women, misogyny, as well as prevailing ideals of masculinity.<sup>17</sup> Interviews with some of the Russian soldiers showed that they believed that rape was a form of restitution and that they had a “right” to rape as part of the reward.<sup>18</sup> Natalya Gesse, a war correspondent who observed the behavior of the Red Army in 1945, remarked that the Russian army was “an army of

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<https://thehill.com/policy/international/3659023-un-panel-reports-ukrainian-children-have-been-raped-tortured-by-russian-forces/>

<sup>10</sup> “Russian commanders in occupied Ukrainian territories encouraged sexual violence,” *Yahoo News*, Jan. 5, 2023,

<https://news.yahoo.com/russian-commanders-occupied-ukrainian-territories-214300159.html>

<sup>11</sup> Westervelt, Eric, “Silence Broken on Red Army Rapes in Germany,” NPR All Things Considered, July 17, 2009,

<https://www.npr.org/templates/story/story.php?storyId=106687768>;

Ash, Lucy, “The Rape of Berlin,” May 1, 2015,

<https://www.bbc.com/news/magazine-32529679>

<sup>12</sup> See, for example, <https://www.outono.net/elentir/2022/05/09/the-liberation-of-poland-by-the-ussr-an-overview-of-the-soviet-crimes-and-looting/>; also <https://warfarehistorynetwork.com/article/wretched-misconduct-of-the-red-army/>

<sup>13</sup> Norman M. Naimark, *The Russians in Germany: A History of the Soviet Zone of Occupation 1945-49*, Cambridge: Harvard University Press, 1995; Bransten, Jeremy, “Russia: New Book Details Dark Side of Red Army’s Liberation of Germany,” May 8, 2022,

<https://www.rferl.org/a/1099647.html>

<sup>14</sup> Donovan, John, “7 Atrocities Dictator Joseph Stalin Committed,” *How Stuff Works*, Apr. 1, 2021,

<https://history.howstuffworks.com/historical-figures/joseph-stalin.htm#pt7>

<sup>15</sup> Dan Healey, *Bolshevik Sexual Forensics: Diagnosing Disorder in the Clinic and Courtroom, 1917–1939*, Cornell University Press, 2009; see also <https://www.rbth.com/lifestyle/326597-how-sexist-is-russia>; and Catherine Merridale, “Culture, Ideology and Combat in the Red Army, 1939-45,” *Journal of Contemporary History* 41(2), 2016.

<sup>16</sup> Poland never surrendered to the Nazis and had the largest and continuously active underground army in Europe. Polish women not only actively took part in underground and endured full five years of brutal Nazi (as well as Soviet occupation in Eastern Poland), but Poland lost six million citizens during WWII (approximately of whom three million were Jewish Poles, and three million were Catholic, Roma, and Poles of other denominations).

While it was well-known that mass rapes took place in 1945 when Red Army entered Poland, it was only after the fall of the Soviet Union that additional archival materials became available, and the research into these crimes became finally possible, see

<https://www.ceeol.com/search/article-detail?id=10473>. The true accounting of the gravity and the scale of rapes inflicted by the Russian army, be it in Poland, Germany, Ukraine, or elsewhere may not be possible much longer, as the Russian parliament passed several laws which punish anyone who “denigrates” Russia’s record either during WWII or after that. Such persons face fines and prison. See, Reuters, “Russian lawmakers vote for jail penalties for online slander,” <https://www.reuters.com/article/us-russia-politics-law-defamation-idUSKBN28X1RX>; also, Maureen Breslin, “Russian parliament passes law to punish journalists for ‘fake’ news,” *The Hill*, Mar. 4, 2022,

<https://thehill.com/policy/international/596849-russian-parliament-passes-law-to-punish-journalists-for-fake-news/>

<sup>17</sup> “A culture of brutality is ingrained in the Russian army,” archyde.com, Apr. 5, 2022, <https://www.archyde.com/a-culture-of-brutality-is-ingrained-in-the-russian-army/>; James Morrow, *The Laws of War as an International Institution*, Cambridge University Press, 2014.

<sup>18</sup> Joanna Ostrowska, Marcin Zaremba “*Kobiecea gehenna*,” No 10 (2695) Mar. 7, 2009, *Polityka*, pp. 64–66.



rapists.<sup>19</sup> The documents show that Russian soldiers raped even fellow Russian women while liberating them from the concentration camps.<sup>20</sup>

The use of rape by armies may be as old as human aggression. However, there are significant variations among armies and cultures in the magnitude of rapes and the cultural permission to weaponize rape.<sup>21</sup> Rape may be the cheapest weapon known to man, yet it is quite effective.<sup>22</sup> Rape can shame and humiliate and break the nation's fighting spirit; it can be used to destroy the biological potential of the nation by maiming women of reproductive age, it can be a form of genocide or terrorism. Rape communicates dominance over a victim and establishes the dominance of one population over another, demonstrating the loss of agency and independence. It reinforces the traditional role of women as the property of men. Rape has also been known to be used by military commanders as a tool to create bonds of solidarity among enlisted soldiers and to create fear among them for being exposed later, which can be helpful in disciplining and managing them.<sup>23</sup>

Various national laws have prohibited rape during wartime.<sup>24</sup> Unfortunately international law has been slow in recognizing the uses of rape during wartime as a significant crime it is.<sup>25</sup>

The Fourth Geneva Convention (GC) and the Additional Protocols do prohibit rape;<sup>26</sup> specifically, Article 27 provides that women shall be "especially protected against any *attack on their honour*, in

particular against rape, enforced prostitution, or any form of indecent assault." Article 76 of Additional Protocol I to the GC states women are deemed as an '*object of special respect*' and "shall be protected in particular against rape, forced prostitution and any other form of indecent assault."<sup>27</sup> However, these documents do not include rape among the "grave crimes" subject to universal jurisdiction.

Some scholars have argued that Article 46 of the Hague Convention IV, stating the "family honor and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected" could be construed to cover military rape. But that is quite a generous interpretation, and in practice, that law has not been effective in supporting such prosecutions.<sup>28</sup> The Hague Conventions contain no obligation for state parties to prevent rape by their armed forces. Article 46 concerns itself primarily with vague ideas of respect for "*family honor and rights*" rather than creating an explicit prohibition and punishment for wartime rape. Ironically, the Hague Conventions prohibit war-related "pillage" protecting private property more adequately than protecting women. Few or no women were involved in drafting these documents.

Wartime use of rape was not prosecuted during the Nuremberg trials as a war crime under customary international law, albeit it was prosecuted in Tokyo as a war crime.<sup>29</sup>

<sup>19</sup> See, <https://www.nvgesse.org>; see also, "The Russians soldiers raped every German female from eight to 80," *The Guardian*, <https://www.theguardian.com/books/2002/may/01/news.features11>; and Walter Zapotoczny Jr., *Beyond Duty: The Reason Some Soldiers Commit Atrocities*, Fonthill Media, 2017.

<sup>20</sup> Daniel Johnson, "Red Army troops raped even Russian women as they freed them from camps," *The Telegraph*, Jan. 24, 2022, <https://www.telegraph.co.uk/news/worldnews/europe/russia/1382565/Red-army-troops-raped-even-Russian-women-as-they-freed-them-from-camps.html>

<sup>21</sup> Morris, Madeline, "By Force of Arms: Rape, War, and Military Culture," *Duke Law Journal* 45 (4): 651-781, 1996.

<sup>22</sup> Christina Lamb, *Our Bodies, Their Battlefields: War Through the Lives of Women*, William Collins, 2020. See also <https://www.theguardian.com/books/2020/mar/08/our-bodies-their-battlefield-christina-lamb-review-women-war-rape-victims>

<sup>23</sup> Militaries have been known to use rapes to build "solidarity" among the rapists and destroy friendships between neighbors. *Mass Rape: The War against Women in Bosnia-Herzegovina*, Stiglmyer, Alexandra, ed., Translations by Marion Faber, Lincoln: the University of Nevada Press, 1994.

<sup>24</sup> Vikman, Elisabeth, "Ancient Origins: Sexual Violence in Warfare," *Anthropology & Medicine*, Vol. 12 (1), April 2005; Theodor Meron,

*Henry's Wars and Shakespeare's Laws*, Oxford University Press, 1993.

<sup>25</sup> Meron, Theodor. "Rape as a Crime Under International Humanitarian Law," *The American Journal of International Law* 87, no. 3 (1993): 424-28.

<sup>26</sup> 20 ICRC, Aide-Memoire, Dec. 3, 1992. Article 27 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War provides that women shall be "especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault" (1949).

<sup>27</sup> Article 76, Protection of Women, Protocol Additional to the Geneva Convention, Commentary of 1987, <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/article-76>

<sup>28</sup> Convention Respecting the Laws and Customs of War on Land, Annex of Regulations, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 (Hague Convention No. IV), <https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-iv-1907/regulations-art-46?activeTab=undefined>

<sup>29</sup> Charter of the International Military Tribunal for the Far East, January 19, 1946, amended April 26, 1946, TIAS No. 1589, 4 Bevans 20. The International Military Tribunal in Tokyo found some Japanese military and civilian officials guilty of war crimes, including rape, because they failed to perform their duty to ensure that their subordinates complied with international law. See John Appleman, *Military Tribunals and International Crimes*, 1971.

The more recent Rome Statute (RS) of the International Criminal Court (ICC) has a comprehensive catalog of crimes against humanity, and it explicitly includes rape. The Statute defines crimes against humanity as one of the enumerated acts when those acts are committed as part of a widespread or systematic attack directed against any civilian population, among them rape, sexual slavery and similar crimes.<sup>30</sup>

From the 1990s on, various *ad hoc* tribunals, the International Criminal Tribunal for the Former Yugoslavia (ICTY)<sup>31</sup> and the International Criminal Tribunal for Rwanda (ICTR)<sup>32</sup> and the Special Court for Sierra Leone (SCSL),<sup>33</sup> largely adopted the Rome Statute's definitions and produced case law establishing international precedents for prosecuting rape as a crime against humanity, a form of genocide and a war crime.<sup>34</sup> These international tribunals established and clarified legal protections against the use of tactical rape and sexual violence in conflict, reaffirming that the use of rape contravenes the existing international law and is subject to prosecution while recognizing that weaponized rape can be a form of genocide.<sup>35</sup>

Judgments of these tribunals helped to change the old conceptions of rape as a crime against a woman's or her family's "honour" (as seen in the Geneva and Hague Conventions) to rape as a violation of women's bodily integrity and as actual crime causing severe bodily injury and grave psychological harm, a significant step forward.

In June of 2000, Mary Robinson, High Commissioner for Human Rights, presented a report on "Systematic rape, sexual slavery and slavery-like practices during

armed conflict."<sup>36</sup> This was followed by Security Council (SC) Resolution 1325 on Women and Peace and Security (WPS), which stated that all parties to an armed conflict must "respect fully international law applicable to the rights and protection of women and girls, especially as civilians" and called upon parties to "take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict."<sup>37</sup> Resolution 1325 created international recognition that women are vulnerable during conflict and subject to sexual violence, including tactical rape.<sup>38</sup> Human Rights Watch called Resolution 1325 historic because, for the first time, SC addressed various ways conflict affects women and recognized the link between peace and women's life experience.<sup>39</sup> Nevertheless, Resolution 1325 did not include proper mechanisms for monitoring implementation or prevention. Hence, while undeniably a sign of progress, Resolution 1325 is largely lacking teeth.

In June 2008, the Security Council passed another WPS resolution: Resolution 1820<sup>40</sup> which demanded parties to an armed conflict to take measures to protect women from sexual violence. The language of Resolution 1820 is weak; for example, Clause 4 states that rape *can* be a war crime, a crime against humanity, or an act of genocide, yet rape and sexual violence have already been recognized as such by other international instruments (e.g., Rome Statute). Hence Resolution 1820 could be interpreted as potentially undermining these previously existing protections.<sup>41</sup>

<sup>30</sup> Rome Statute, Art. 7, 1998. Article 7 states: The term "Crime against humanity" means 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: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty ...; (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 para 3) or other grounds...

<sup>31</sup> See, International Criminal Tribunal for the former Yugoslavia, fact sheet, <https://www.icty.org/>

<sup>32</sup> See, United Nations International Residual Mechanism for Criminal Tribunals, fact sheet, <https://unict.irmct.org/>

<sup>33</sup> See, Special Court for Sierra Leone, Global Policy Forum, fact sheet, <https://archive.globalpolicy.org/international-justice/international-criminal-tribunals-and-special-courts/special-court-for-sierra-leone.html>

<sup>34</sup> United Nations Department of Peacekeeping Operations (DPKO), Review of the sexual violence elements of the judgments of the

International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone in the Light of Security Council Resolution 1820. March 9, 2009.

<sup>35</sup> International Criminal Tribunal for the former Yugoslavia (ICTY), fact sheet, <https://www.icty.org/en/features/crimes-sexual-violence>

<sup>36</sup> Robinson, Mary, "Systematic rape, sexual slavery, and slavery-like practices during armed conflict," OHCHR, E/CN.4/Sub.2/2000/20.

<sup>37</sup> UN Doc. S/RES/1325, Women and peace and security, Oct. 31, 2000, see para 9 and 10.

<sup>38</sup> UN Security Council, Security Council Resolution 1325 On women and peace and security, S/RES/1325, Oct. 31, 2000.

<sup>39</sup> Human Rights Watch, [www.hrw.org/legacy/pub/2008/women/HRW\\_AIUSA\\_HFAC\\_Subcommittee\\_Submission\\_UNSC\\_Res1325.pdf](http://www.hrw.org/legacy/pub/2008/women/HRW_AIUSA_HFAC_Subcommittee_Submission_UNSC_Res1325.pdf)

<sup>40</sup> UN Security Council, Women and peace and security, S/RES/1820, June 19, 2008, <http://unscr.com/en/resolutions/1820>

<sup>41</sup> UN Security Council, Women and peace and security, S/RES/1888, Sept. 30, 2009, <http://unscr.com/en/resolutions/1888>; Goetz, Anne-

In total, ten resolutions on WPS have been adopted by the SC,<sup>42</sup> all attempting to build on previous work.<sup>43</sup> However, more than ten years after Resolution 1325, the briefing member, Phumzile Mlambo-Ngcuka, an Executive Director of the UN Entity for Gender Equality and the Empowerment of Women observed that “progress is too slow, political will is not strong enough, and pushback against the needs and interests of women is threatening the progress made.”<sup>44</sup>

The progress in criminalizing and preventing rape and other sexual violence from being used as tools of war has indeed been painfully slow and these behaviors continue, seemingly with impunity and brutality. Effective prosecution of such crimes is time-consuming and difficult, and assuring jurisdiction is challenging.

That is especially the case in the case of Russian aggression against Ukraine. While this war is distinctive in that many crimes are being actively documented soon after they occurred by using modern technologies and internet connectivity,<sup>45</sup> rape is often not one of these crimes. Rape is particularly hard to document as the victims are often ashamed and traumatized and may need a longer time to describe their ordeals. It is relatively recently that the international community began to develop instruments aimed at creating international standards for collecting evidence of rape and other sexual crimes while doing so ethically and without re-victimizing the survivors.<sup>46</sup>

Even with proper evidence, the path to actual prosecution of these crimes is neither clear nor assured.

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Marie, “Sexual Violence as a War Tactic – Security Council Resolution 1888: Next Steps,” *UN Chronicle*, <https://www.un.org/en/chronicle/article/sexual-violence-war-tactic-security-council-resolution-1888-next-steps>; UN Security Council, Women and peace and security, S/RES/1889, Oct. 5, 2009, <http://unscr.com/en/resolutions/1889>

<sup>42</sup> The United Nations Security Council has adopted ten resolutions on “Women, Peace and Security” namely: 1325 (2000); 1820 (2009); 1888 (2009); 1889 (2010); 1960 (2011); 2106 (2013); 2122 (2013); 2242 (2015), 2467 (2019), and 2493 (2019).

<sup>43</sup> *Id.*

<sup>44</sup> “Security Council Urges Recommitment to Women, Peace, Security Agenda, Unanimously Adopting Resolution 2493 (2019),” SC/13998, Oct. 29, 2019, <https://press.un.org/en/2019/sc13998.doc.htm>; See also, Ni Aolain, Fionnuala, “Gutting the Substance of a Security Council Resolution on Sexual Violence,” *Just Security*, Apr. 24, 2019, <https://www.justsecurity.org/63750/gutting-the-substance-of-a-security-council-resolution-on-sexual-violence/>

<sup>45</sup> See, for example, ‘Civilian Harm in Ukraine,’ <https://ukraine.bellingcat.com/>

<sup>46</sup> The Murad Project and the resulting draft of the Murad Code (or the Global Code of Conduct for Investigating and Documenting Conflict-Related Sexual Violence) is a result of much research and

Neither Russia nor Ukraine are parties to the ICC Statute, albeit in 2015, Ukraine made a declaration under Art. 12(3) of the Statute that allows the ICC to have jurisdiction over war crimes and crimes against humanity committed on its territory.<sup>47</sup> Both countries are parties to the four Geneva Conventions of 1949, the 1977 Additional Protocol I, and the 1907 Hague Convention IV with its annexed Regulations (Hague Regulations). However, as discussed, these Conventions do not adequately address the uses of rape, as these are examples of older laws drafted at a time when women’s input and opinions were neither considered valid nor included. Besides, rape was not conceptualized as a violation of women’s fundamental human rights at that time. There are ongoing deliberations on whether to create a special tribunal for Ukraine, albeit the main focus at the moment appears to be the “crime of aggression” and not rape and other sexual violence against women.<sup>48</sup>

Pramila Patten, the UN Secretary-General’s Special Representative for Sexual Violence in Armed Conflict, while speaking in May 2022 to Olga Stefanishyna, Ukraine’s Deputy Prime Minister, stated: “My promise to you is that international law will not be an empty promise. Today’s documentation will be tomorrow’s prosecution. And I want you to know that your rights don’t end when wars begin.”<sup>49</sup>

Rape and gender-based sexual abuse is not an inevitable “byproduct” of war.<sup>50</sup> Instead, these are assaults and violent crimes. Nations need to increase

collaboration among various scholars, lawyers, and human rights defenders. The goal of the Murad Code is to create an international standard for collecting evidence of rape and sexual crimes without re-victimizing the survivors. It sets up various practices needed to support survivors’ rights and to ensure that investigators document and secure evidence for the prosecution in a manner that is safe, ethical, and effective in upholding survivor’s human rights, see, <https://www.muradcode.com/>

<sup>47</sup> Declaration by Ukraine lodged under Article 12(3) of the ICC Statute, Sept. 8, 2015, [https://www.icc-cpi.int/iccdocs/other/Ukraine\\_Art\\_12-3\\_declaration\\_08092015.pdf](https://www.icc-cpi.int/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf)

<sup>48</sup> Dannenbaum, Dan, “A Special Tribunal for the Crime of Aggression?” *Journal of International Criminal Justice* 20(4), Sept. 2022, <https://academic.oup.com/jicj/article-abstract/20/4/859/6827448>

<sup>49</sup> Horne, Cynthia M. “Accountability for atrocity crimes in Ukraine: Gendering transitional justice,” *Women Studies International Forum*, 96, 2023; See also, Tweet from Olga Stefanishyna, May 3, 2022, Deputy Prime Minister for European and Euro-Atlantic integration of Ukraine, <https://t.co/6YYFoJJwQH>

<sup>50</sup> United Nations Peacekeeping, “Conflict Related Sexual Violence,” fact sheet, <https://peacekeeping.un.org/en/conflict-related-sexual-violence>.



education and awareness, create support mechanisms for the survivors, enact laws and create an adequate international system that deters potential perpetrators. Most of all, we must change the appalling reality that rape and other sexual violence remain to be low-risk and cost-free crime to most perpetrators and their leaders.

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# How Russia Came to Occupy the Soviet Seat on the Security Council

Susan Colbourn

In late February 2022, right on the heels of Russia's full-scale invasion, Ukrainian diplomats challenged the legitimacy of Russia's place on the United Nations Security Council. Sergiy Kyslytsya, Ukraine's ambassador to the United Nations, requested copies of the formal documentation and legal memoranda permitting the Russian Federation to sit on the Security Council as the direct successor of the Soviet Union following the latter's dissolution in December 1991. After all, as 1991 came to a close, a majority of the Soviet Union's fifteen constituent republics—including the Russian Federation and Ukraine—agreed that the old union would “cease to exist” as a legal and geopolitical entity. So, Kyslytsya wondered, how could the Russians still hold a seat on the Security Council intended for a state that had been formally declared defunct?<sup>1</sup>

Ukraine's answer is simple: it is a Russian occupation. “The Russian Federation,” one December 2022 statement from Ukraine's Ministry of Foreign Affairs concluded, “has never gone through the legal procedure to be admitted to membership and therefore illegally occupies the seat of the USSR in the UN Security Council.”<sup>2</sup>

How did the Soviet Union's permanent seat end up in the hands of the Russian Federation?

A founding member of the United Nations, the Soviet Union held three seats in the new international organization. Article 23 of the United Nations Charter listed the Union of Soviet Socialist Republics as one of the five permanent members of the Security Council, alongside the Republic of China, France, the United Kingdom of Great Britain and Northern Ireland, and the United States of America.<sup>3</sup> In addition to this seat, the Soviet Union also managed to secure a place in the General Assembly for two of its constituent republics: the

Ukrainian Soviet Socialist Republic and the Byelorussian Soviet Socialist Republic. (An earlier Soviet attempt to secure general assembly membership for each of the Union's constituent republics collapsed after the United States responded with a request that each state in the United States be seated as a member of the general assembly.)

That three-seat arrangement governed Soviet participation for decades to come, until the centralized authority of the Soviet Union eroded in the early 1990s. After a group of hardliners attempted a coup d'état to overthrow Soviet leader Mikhail Gorbachev in August 1991, three of the republics – Estonia, Latvia, and Lithuania – declared independence from the Soviet Union. International recognition of the Baltic states soon followed, including by the Soviet Union. Estonia, Latvia, and Lithuania ended up admitted to the United Nations General Assembly in September. The remaining twelve republics seemed poised to follow suit quickly, ultimately unleashing a political process that would dissolve the Union before the year was through.<sup>4</sup> In Ukraine, for instance, a referendum on independence turned out an overwhelming majority: over 92 percent of Ukrainians backed independence in the December 1 vote.

The Soviet Union's fate was clear on December 8, when representatives from Russia, Ukraine, and Belarus met in Minsk. Together, the three republics, each initial founders of the Union of Soviet Socialist Republics first formed in 1922, agreed to dissolve the Union. “The U.S.S.R. is ceasing its existence as a subject of international law and a geopolitical reality,” the agreement's preamble affirmed.<sup>5</sup>

Despite the Russian endorsement of this principle, Russian President Boris Yeltsin did not intend to let all aspects of the Soviet Union cease to exist, whether as a

<sup>1</sup> Patrick Wintour, “Effort under way to challenge Russia's right to seat on UN security council,” *The Guardian*, February 25, 2022.

<sup>2</sup> Ministry of Foreign Affairs of Ukraine, “Statement of the MFA of Ukraine on the illegitimacy of the Russian Federation's presence in the UN Security Council and in the United Nations as a whole,” December 26, 2022, <https://mfa.gov.ua/en/news/zayava-mzs-ukrayini-shchodo-nelegitimnosti-perebuvannya-rosijskoyi-federaciyi-v-radi-bezpeki-oon-ta-organizaciyi-obyednanih-nacij-u-cilomu>.

<sup>3</sup> United Nations Charter, <https://www.un.org/en/about-us/un-charter/full-text>.

<sup>4</sup> On the process of dissolving the Soviet Union, with particular emphasis on Russia and Ukraine in that process, see Serhii Plokhyy, *The Last Empire: The Final Days of the Soviet Union*, updated (New York: Basic Books, 2014).

<sup>5</sup> Quoted in Elisabeth Rubinfiel, “Three Slavic Republics Act to Dissolve Soviet Union,” *Wall Street Journal*, December 9, 1991.

subject of international law or a geopolitical reality. Yeltsin continued to cling selectively to some aspects of the old Soviet Union, including its permanent seat on the Security Council. On December 16, he publicly indicated Russia's intention to "continue" to hold the Soviet seat.<sup>6</sup>

Russia's position contained clear contradictions. It endorsed the complete dissolution of the Soviet Union, its legal existence, and international presence, yet it staked a claim to a seat at the United Nations that was a direct outgrowth of the Union's existence as a subject of international law. These contradictions ended up enshrined in the Alma-Ata Protocol to formally establish the Commonwealth of Independent States (CIS), signed on December 21, 1991. In doing so, the eleven signatories—each of the remaining republics, apart from Georgia (which signed two years later)—affirmed the position adopted at Minsk earlier that month: the creation of the Commonwealth meant that the Union of Soviet Socialist Republics would no longer exist.<sup>7</sup>

On December 24, Yeltsin dispatched a letter to Javier Pérez de Cuéllar, the secretary general of the United Nations, containing formal notification that the Russian Federation would take over the Soviet Union's permanent seat, along with its rights and obligations in the organization. Yuli Vorontsov, the Soviet-turned-Russian representative to the United Nations, made clear that the Russians assumed it was a done deal and would require no further deliberation or decisions.<sup>8</sup>

Vorontsov assumed correctly. The United Nations accepted the hand-off to the Russian Federation without meaningful debate. The Western members of the Security Council greeted the Alma-Ata Protocol with a sense of relief. It offered an easy solution that would spare them from facing undesirable questions about the body's make-up and how it might be changed to better reflect the geopolitical realities of the 1990s. A simple transfer of the Soviet seat to the Russian Federation would avert a situation in which the Charter ended up an open question, emboldening various proposals for reform gaining steam. Britain and France, for instance, resisted calls to transfer the Soviet seat to any

commonwealth or federation of post-Soviet states lest it set a precedent that would pressure them to establish a single "Euro-seat" representing all members of the European Community (EC).<sup>9</sup> "The less said the better," one U.S. official quietly admitted in late December 1991.<sup>10</sup>

The lack of debate did depart from past precedent on similar questions of seating and representation. In 1971, the United Nations General Assembly voted to recognize the People's Republic of China as "the only lawful representatives of China to the United Nations." That decision, enshrined in Resolution 2758, also made explicit that the People's Republic of China seat included a permanent place on the Security Council.<sup>11</sup> Despite this formal transfer, the original language in the Charter remained unchanged; Article 23 still makes mention of the Republic of China, not the People's Republic of China. The same, it should be noted, is true of the Union of Soviet Socialist Republics.

No such debate occurred on the fate of the Soviet seat. Instead, other members of the Security Council accepted Russia as the obvious heir to the international benefits of the old Soviet Union, even as the Russian Federation played an active role in dissolving that union and ensuring it was declared null and void.

In other cases of state dissolution in the 1990s, different procedures carried the day. Representatives of Czechoslovakia, for instance, notified the United Nations that their federation would cease to exist on December 31, 1992, and indicated that both successor states would apply for membership in the organization. Both the Czech Republic and the Slovak Republic were formally admitted to the United Nations as member states on January 19, 1993.<sup>12</sup> As a result, neither inherited Czechoslovakia's position as a founding member of the body.

The Russian Federation operated under the assumption that it would not be considered a successor state, but a continuing one. Those assumptions stood in stark contrast to the actual mechanics of how the Soviet Union came to an end. Politicians like Boris Yeltsin

<sup>6</sup> "Continuing' the Soviet seat," *Bulletin of the Atomic Scientists* 48, no. 3 (April 1992): 41.

<sup>7</sup> An English translation was printed in "Text of Accords by Former Soviet Republics Setting Up a Commonwealth," *New York Times*, December 23, 1991.

<sup>8</sup> "Soviet U.N. Seat Taken by Russia," *New York Times*, December 25, 1991.

<sup>9</sup> Paul Lewis, "3 Western Powers Favor Russian Takeover of Soviet U.N. Seat," *New York Times*, December 24, 1991.

<sup>10</sup> "Continuing' the Soviet seat," *Bulletin of the Atomic Scientists* 48, no. 3 (April 1992): 41.

<sup>11</sup> "Restoration of the lawful rights of the People's Republic of China in the United Nations," A/RES/2758(XXVI), October 25, 1971.

<sup>12</sup> "Czechoslovakia and Successor States: Czech Republic, Slovakia," United Nations, <https://www.un.org/en/about-us/member-states/czechoslovakia>.



moved against the central authority of the Soviet Union, consolidating power in a distinct Russian Federation. And yet, even as they worked to nullify the union, they laid exclusive claim to the benefits of the same Soviet structures deemed defunct.

The United Nations permitted the Russian Federation to act as a *continuing* state to the Soviet Union, conveniently ignoring the terms on which the Soviet Union had dissolved, in the hopes of *continuing* relative peace and stability in the region.

As Russia systematically violates Ukraine's sovereignty, in a campaign marked by war crimes and mass atrocities, the price is all too clear. An organization purportedly dedicated to maintaining peace boasts a flagrant aggressor in its top ranks. And Russia occupies a seat at the United Nations' most powerful table—a seat earmarked for the old empire its leaders now aim to recapture parts of—with virtual impunity. It is little wonder, then, that Ukrainian President Volodymyr Zelenskyy has called on the United Nations to either evict Russia or “dissolve yourself altogether.”<sup>13</sup>



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<sup>13</sup> “Speech by the President of Ukraine at a meeting of the UN Security Council,” April 5, 2022, <https://www.president.gov.ua/en/news/vistup-prezidenta-ukrayini-na-zasidanni-radi-bezpeki-oon-74121>.

# Removing Russia from the UN: Grounds, Procedures, and Precedents

Thomas D. Grant

With Russia's war against Ukraine now in its second year, legislators on both sides of the Atlantic have proposed that the United Nations expel or suspend Russia, including from the veto-wielding Permanent Member seat Russia holds in the UN Security Council. The Parliamentary Assembly of the Council of Europe (PACE) in Strasbourg in October 2022 suggested that Russia should cease to hold the seat,<sup>1</sup> and more recently in December, U.S. Representatives Steve Cohen (D-TN) and Joe Wilson (R-SC) introduced a draft resolution in the U.S. House of Representatives, H. Res. 1517, that would call on the Executive Branch to take all appropriate steps to limit, suspend, or terminate Russia's participation in the Security Council and other UN organs.<sup>2</sup> PACE and Representatives Cohen and Wilson are not acting in a vacuum. Ukraine has called for similar steps at the UN in response to Russia's aggression.<sup>3</sup> Moreover, as H. Res. 1517 notes in its recitals, a number of international organizations outside the UN have already removed Russia or otherwise curtailed its participatory rights,<sup>4</sup> and the UN General Assembly has suspended Russia from the UN Human Rights Council, one of the Assembly's subsidiary organs.<sup>5</sup>

What legal grounds exist for a more thorough-going exclusion of Russia from the UN, and what procedures, if any, could the UN use toward that end?

## Expulsion on the Merits

There is no circumstance in which the UN Charter expressly *requires* the expulsion of a Member. While UN Charter Article 4 allows the UN to admit a country as a new Member if it is "peace-loving," no authority has interpreted Article 4 to mean that a Member, once

admitted to the UN, must *remain* peace-loving in order to remain a Member. In any event, the UN long ago came to treat the "peace-loving" requirement as more formal than real.<sup>6</sup> Then there is Article 6 providing that a Member "which has persistently violated the Principles contained in the... Charter *may* be expelled" (emphasis added). Article 6 does not require expulsion. To expel a Member, the UN must form a judgment that the Member's conduct amounts to persistent violation of the UN Charter. That judgment is one of legal character, but there is also a requisite policy choice.<sup>7</sup>

On the merits, the facts compel the legal judgment that Russia is a persistent violator as contemplated in Article 6. Russia's atrocities in Ukraine exceed any in Europe since 1945 and at least rival the worst of the UN era.<sup>8</sup> It is the aggressive intent behind Russia's war, however, that imparts unusual gravity to the matter. The post-1945 legal order rests on the proposition, which enjoys practically universal acceptance, that boundaries, once settled between States, do not change except by agreement between States. Using force to settle a *bona fide* dispute over borders is a violation of international law; using force to vindicate an ambition of territorial aggrandizement unfettered from any cognizable legal dispute is an attack on the system of law. There is no legal dispute concerning Ukraine's borders, which the parties settled in terms clear beyond cavil.<sup>9</sup> In its war against Ukraine, Russia does not pursue a legal claim of any kind. Instead, it both declares in word and pursues in fact its intention to destroy a country of 43 million people and to subject vast lands and resources to its rule. It was precisely to prevent that kind of violation of law that led the Allies to establish the UN following World

<sup>1</sup> PACE Resolution 2463 (2022), Oct. 13, 2022, ¶ 4.

<sup>2</sup> H. Res. 1517, 117<sup>th</sup> Cong. 2d Sess., Dec. 13, 2022: [https://cohen.house.gov/sites/evo-subsites/cohen.house.gov/files/evo-media-document/cohen\\_140\\_xml.pdf#page=10](https://cohen.house.gov/sites/evo-subsites/cohen.house.gov/files/evo-media-document/cohen_140_xml.pdf#page=10)

<sup>3</sup> Legislators in Ukraine on December 1, 2022 voted for Russia's removal: <https://www.pravda.com.ua/eng/news/2022/12/1/7378838/> and Ukraine's Foreign Ministry on December 26, 2022 formally called for the same:

[https://twitter.com/MFA\\_Ukraine/status/1607373500876206080](https://twitter.com/MFA_Ukraine/status/1607373500876206080)

<sup>4</sup> *Id.* at pp. 8-9.

<sup>5</sup> By GAR ES-11/3 (Apr. 7, 2022).

<sup>6</sup> Grant, *Admission to the United Nations: Charter Article 4 and the Rise of Universal Organization* (2009) *passim*.

<sup>7</sup> As to the mixed legal-political function of the Assembly and Council under Art. 6, see Tams, *Article 6* in Simma, Khan, Nolte, Paulus & Wessendorf (eds.), *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* (3<sup>rd</sup> edn.) (2012) p. 380 ¶16 & *id.* n. 33.

<sup>8</sup> See H. Res. 1517, p. 1, third recital.

<sup>9</sup> For relevant treaty practice, see Grant, *Aggression Against Ukraine: Territory, Responsibility, and International Law* (2015), pp. 104-119.

War Two. If the Members of the UN judge Russia's aggression as *anything but* a persistent violation of the principles of the Charter, then they will have rendered the Charter nugatory.

Members of the UN will also have implied their acceptance of the arrangement by which the Security Council in December 1991 welcomed Russia to fill the Permanent Member seat reserved by Charter Article 23(1) for a representative of the USSR. Belarus, Russia, and Ukraine agreed at that time that the USSR had “as a subject of international law... ceas[ed] its existence.”<sup>10</sup> The agreed position that the USSR had ceased to exist does not comport with descriptions of Russia in 1991 having “continued” the legal personality of the USSR by an automatic operation of law. Doubts have been expressed whether even a further agreed arrangement could have produced a constitutionally valid succession of Russia to the USSR seat, and even if one sets those doubts aside, it is not plausible that any such arrangement would survive such manifest violations of international law as those for which Russia is responsible.<sup>11</sup>

The current violations for which Russia is responsible have policy repercussions beyond the damage they inflict on the UN Charter. When Russia's leaders speak of restoring the Tsarist empire, they directly threaten the many countries that the empire once ruled. When they threaten nuclear war, Russia tells would-be-aggressors elsewhere, and potential victims too, that Ukraine erred when it relinquished a nuclear arsenal in 1994 under the Budapest Memorandum in return for a Russian pledge toward its security and, by necessary inference, that only the foolhardy observe commitments to nuclear non-proliferation.<sup>12</sup> There is also the dangerous example set by Russia's baseless purported annexations of Ukrainian territory—acts that disregard the 1991 mutually agreed settlement of post-Soviet borders between Russia and the other former Soviet republics. If the UN treats such aggression as a mere garden-variety law violation, then it will throw in doubt post-independence borders in

scores of places, in particular across the “global South,” and auger a new era of intractable territorial demands and war. It will also erode the credibility of the Security Council, as Russia continues its aggression against Ukraine with weapons procured from North Korea and Iran, despite the prohibition on arms trade with North Korea and Iran imposed by resolutions of the Security Council itself.<sup>13</sup> Then there are Russia's violations of the UN grain deal—violations in furtherance of Russia's strategy to use food as a weapon against third countries, including some of the poorest in the world. To say that Russia's aggression threatens countries outside Europe is not speculation; it is a fact. Expelling Russia would demonstrate that the UN rejects Russia's threats and would signal to other countries that Russia's aggression should be treated as an aberration, not a precedent.

Expelling Russia would serve other immediate policy goals as well. By expelling Russia, Ukraine and its supporters would acquire a bargaining chip. Unlike territorial concessions, which would derogate the internationally recognized borders of Ukraine and reward Russia for its armed aggression, expulsion from the UN would be a bargaining chip acquired at Russia's expense. Another immediate policy goal served by expulsion is that it would open the door to action in the Security Council; by removing Russia, the Council would free itself of the disruptive effect of Russia's Permanent Member veto. In the absence of Russia's veto, the Council could establish a global mechanism for comprehensive and compulsory sanctions against Russia and to freeze, seize, and re-allocate Russian assets. This would resemble the mechanism constituted in 1991 to compel Iraq to pay compensation for the injuries its war against Kuwait had caused.<sup>14</sup> The Council also might adopt an international criminal procedure to address war crimes, as it did in 1993 for the former Yugoslavia.<sup>15</sup> States are currently exploring multilateral mechanisms that do not rely on the Council, but the Council is the most-tested tool for measures of this kind.<sup>16</sup>

<sup>10</sup> See Ukraine Foreign Ministry statement, op. cit., [https://twitter.com/MFA\\_Ukraine/status/1607373500876206080](https://twitter.com/MFA_Ukraine/status/1607373500876206080). See also Yehuda Z. Blum, *Russia Takes Over the Soviet Union's Seat at the United Nations*, 3 EUR'N J. INT'L L. 254-361 (1992).

<sup>11</sup> See Grant, *Removing Russia from the Security Council: Part One*, OPINIO JURIS (Oct. 18, 2022), <http://opiniojuris.org/2022/10/18/removing-russia-from-the-security-council-part-one/>

<sup>12</sup> See Thomas D. Grant, *The Budapest Memorandum of 5 December 1994: Political Engagement or Legal Obligation*, 34 POLISH YEARBOOK OF INT'L L. 89, 113 (2014).

<sup>13</sup> See Statement by Amb. Thomas-Greenfield (Dec. 22, 2022), <https://ru.usembassy.gov/statement-by-ambassador-linda-thomas-greenfield-on-russias-use-of-weapons-illegally-acquired-from-the-dprk-and-iran-in-its-brutal-war-against-ukraine/> and SCR 1718 (2006), Oct. 14, 2006 (esp. ¶ 8(b)); SCR 2231 (2015), July 20, 2015, Annex B.

<sup>14</sup> SCR 687 (1991), Apr. 8, 1991, ¶¶ 8-14, 16.

<sup>15</sup> SCR 827 (1993), May 25, 1993; SCR 808 (1993), Feb. 22, 1993.

<sup>16</sup> See GAR ES-11/5, Nov. 14, 2022, esp. ¶ 3. See also *Multilateral Action Model on Reparations: Draft Conclusions in Regard to Russia Assets Abroad*, <https://newlinesinstitute.org/wp-content/uploads/2022/10/31-MAMOR-Doc-w-toc-NLISP.pdf#page=13>.



## A Procedure to Address the Aggressor

Expelling Russia from the UN, however, if it is expulsion in the Article 6 sense, would be well-nigh impossible—unless Russia loses the USSR's Permanent Member veto. To expel a Member, Article 6 requires a two-thirds vote of the General Assembly and a substantive vote of the Security Council—i.e., a Security Council vote subject to the Permanent Member veto.<sup>17</sup> If Members sought expulsion, Russia would veto.

Unlike its predecessor, the League of Nations, the UN has never expelled a Member.<sup>18</sup> Though Article 6 has never been used and is all but impossible to use where it is a Permanent Member of the Security Council that is the persistent violator, Article 6 is not the only means at the UN's disposal for effectively unseating a country. The United Nations in four cases has curtailed the participatory rights of a Member by other means.

First, after the USSR invaded and imposed a puppet regime on Hungary (1956), the General Assembly refused to allow that regime's representatives to participate in Assembly proceedings for three subsequent years.<sup>19</sup> The refusal was backed by reference to its Credentials Committee—the body that determines whether diplomats whom a Member sends to represent it have arrived in proper form.<sup>20</sup>

The General Assembly again referred to credentials in 1971, this time to remove Taiwan's representatives and replace them with Communist China's.<sup>21</sup> While not formally expelling a Member State in the sense that Article 6 contemplates, the General Assembly practically

excluded Taiwan from all UN participation from 1971 onward.

The next time the General Assembly referred to its credentials procedure to prevent a Member from participating was in 1974. A whites-only government ruled South Africa under racial apartheid, a system that deprived the overwhelming majority of the country's population of political representation and human rights. Consequently, the General Assembly rejected South Africa's credentials.<sup>22</sup> South Africa thus, for practical purposes, was excluded from the UN.

Finally, after the Socialist Federal Republic of Yugoslavia collapsed in the early 1990s, the UN curtailed the participation of the successor state, the Federal Republic of Yugoslavia (FRY).<sup>23</sup> FRY's serious violations of international law, including its failure to prevent genocide in Bosnia, influenced the UN's approach to FRY representation at that time.<sup>24</sup>

In each of these cases, with the exception of Taiwan, the General Assembly had been confronted by a Member involved in flagrant disregard of the Charter. In none of them did the General Assembly rely on expulsion procedure but, instead, improvised under its credentials procedure to limit or suspend a Member.

The General Assembly addresses the credentials of representatives of Members under its Rules of Procedure,<sup>25</sup> as does the Security Council under its Provisional Rules of Procedure.<sup>26</sup> Rule 27 of the General Assembly's Rules and Rule 17 of the Security Council's Provisional Rules provide, in similar terms, for objection

<sup>17</sup> This follows from UN Charter Art. 6 read together with Art. 18(2), Art. 27(3), Security Council practice, and the interpretation of the phrase "recommendation of the Security Council" that the International Court of Justice articulated in *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, I.C.J. Rep. 1950 p. 4, 7 (Mar. 3).

<sup>18</sup> The League expelled the USSR in 1939 in response to the USSR's aggression against Finland. See <https://soviethistory.msu.edu/1939-2/soviet-territorial-annexations/soviet-territorial-annexations-texts/expulsion-of-the-ussr-from-the-league-of-nations/> See generally Hans Kelsen, *The Old and the New League: The Covenant and the Dumbarton Oaks Proposals*, 39(1) *American Journal of International Law* 45-83 (1945): <https://www.jstor.org/stable/2192309>

<sup>19</sup> See Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963) 158–9; Szikszóy, *The Legal Aspects of the Hungarian Question* (1963); Whiteman, 2 *Digest of U.S. Practice* 398–400.

<sup>20</sup> *Repertory of Practice of United Nations Organs*, Article 9, Suppl. 2, vol. II (1955-1959) p. 8 para. 13.

<sup>21</sup> GA res. 2758 (XXVI) (Restoration of the lawful rights of the People's Republic of China in the United Nations).

<sup>22</sup> GAR 3207 (XXIX) (Relationship between the United Nations and South Africa), Sept. 30, 1974, preamble; GAR 3206 (XXIX) (Credentials of representatives to the twenty-ninth session of the General Assembly), Sept. 30, 1974, sole operative para. See further *Repertory of Practice of United Nations Organs*, article 9, Suppl. 5, vol.

I (1970-1978), p. 99 paras. 61- 66; and Farrokh Jhabvala, "The Credentials Approach to Representation Questions in the U.N. General Assembly," 7(3) *California Western International Law Journal* 615-638 (1977).

<sup>23</sup> See SCR 821 (1993), April 28, 1993; GAR 47/1, September 19, 1992. See generally Michael C. Wood, "Participation of Former Yugoslav States in the United Nations and in Multilateral Treaties," 1 *Max Planck Yearbook of United Nations Law* 231-257 (1997).

<sup>24</sup> See statement of the Secretary of State (USA) (May 18, 1993): *Digest of U.S. Practice* (1991-1999) 528; Ms Albright (USA): S/PV.3204 p 7 (April 28, 1993). To similar effect, see *Staatsekretär Lintner's* statement of March 8, 1995 to the German Bundestag: *Völkerrechtliche Praxis der Bundesrepublik Deutschland 1995*, 57 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 937 (1997). See also claims lodged under the Genocide Convention at the ICJ: Application of the Republic of Bosnia and Herzegovina instituting proceedings (ICJ) (20 March 1993); Application of Croatia instituting proceedings (2 July 1999). The Court determined that, toward Bosnia and Herzegovina, Serbia had violated, *inter alia*, its obligation to prevent genocide: *Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, ICJ Rep 2007 at p 238 (at para. 471).

<sup>25</sup> <https://www.un.org/en/ga/about/ropga/credent.shtml>

<sup>26</sup> S/96/Rev.7: <https://www.un.org/securitycouncil/content/provisional-rules-procedure> No legal consequence is associated with the continued titling of the Rules as "Provisional." The form of words has remained unchanged since 1946.

to credentials. Any Member of the Assembly or of the Council may object to the credentials of a representative in the respective organ. Where objection is made, the organ decides the matter as one of procedure. In the Council, decisions on matters of procedure are not subject to Permanent Member veto. Nine votes of the Council's fifteen Members constitutes the majority required for a decision.

Herein is a procedural path that other Member States could use to remove Russia from the Security Council. As recalled above, suspension under credentials procedure has been the remedy in several cases in the General Assembly. The Security Council has yet to use credentials procedure the same way, but no consideration of principle prevents it from doing so. If another Member were to raise objection under Rule 17 to the credentials of Russia's representative, and if a nine-Member majority decided to sustain the objection, then Russia for all practical purposes would be unseated from the Council. As a matter of the politics of the Council, attaining a nine-Member majority is no mean feat.<sup>27</sup> However, it is not unattainable; the Council voted 11 to 1 against Russia on February 27, 2022 to convene an Emergency Special Session of the General Assembly,<sup>28</sup> the first time the Council has convened such a session in forty years. If they were to act in similar solidarity on Russia's credentials, then the Council's Members would achieve an important legal and policy goal.

The UN's two chief political organs have procedures to prevent a State from exercising rights, including voting rights, in those organs. The record shows how those procedures can be used all but to remove a wrongdoer. It remains to be seen whether the UN will use those procedures to hold Russia to account for the persistent and flagrant violations of international law for which that State is responsible.

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<sup>27</sup> For a tally of sympathetic votes in the Council, see Grant, *Removing Russia from the Security Council: Part Two*, OPINIO JURIS (Oct. 19, 2022), <http://opiniojuris.org/2022/10/19/removing-russia-from-the-security-council-part-two/>

<sup>28</sup> S/PV.8980 p. 2 (Feb. 27, 2022), <https://documents-dds-ny.un.org/doc/UNDOC/PRO/N22/270/77/PDF/N2227077.pdf?OpenElement#page=2>, adopting SCR 2623 (2022).

# Global Immigration Responses to the Ukrainian Refugee Crisis

Catherine E. van Kampen and Elizabeth M. Zechenter

February 2023 marks the first anniversary of Russia's full-scale attack on Ukraine, representing a grave and violent escalation of military conflict that has been ongoing since 2014 with Russia's illegal occupation of Crimea and its support of separatists in Ukraine's Donbas region. Russia's invasion of a sovereign country is unprecedented in post-WWII Europe. Moreover, it has caused millions of people to flee from Ukraine.

The global response to the subsequent Ukrainian refugee crisis varied. The majority of Ukraine's neighboring countries enacted immigration laws and support schemes. Poland, which took the most significant number of Ukrainian refugees, and other European Union (EU) member states immediately granted Ukrainian refugees the right to live, work, obtain access to education and receive benefits comparable to those their citizens are entitled to. More geographically removed from the war, other countries used different models and immigration quotas. The ongoing refugee crisis is not only vast - over 10 million Ukrainians have already fled, and many are still internally displaced or forcefully removed to Russia – but it is also unique in that refugees are mostly women with children, as Ukrainian men are required to stay in fight. Some forty thousand Ukrainian women have also stayed to serve in Ukraine's military.

This article provides a brief review of the immigration response models for countries that have accepted the vast majority of Ukrainian refugees.

## Poland

The case of Poland is unique in that Poland took the highest number of refugees than any other country. In

addition, no other society has such massive involvement of citizens in providing help to Ukrainian women and children, most of it out of their pocket. Although the data keeps changing as people cross the border back and forth, recent data suggest that over eight million Ukrainian citizens have arrived in Poland so far,<sup>1</sup> Poland has thirty-eight million people and is the size of half of Texas. Over 10% of Poland's population now consists of refugees.

Ukrainian refugees can make up almost a third or more of the population in some Polish cities. While many refugees have returned to Ukraine during the last six months, about 2 million Ukrainians remain in Poland.<sup>2</sup> In only the first three months of the war, the Polish Economic Institute estimates that private citizens of Poland spent over \$2 billion of their own money to help Ukrainian refugees while the Polish government spent or allocated approximately \$3.5 billion. Surveys showed that by March 2022, already 70% of Polish citizens were involved in helping Ukrainians, and an additional 11% were planning to do so.<sup>3</sup> That number has been revised in recent months and it is estimated that approximately 80% of Poles were involved in providing some form of aid to fleeing Ukrainians.<sup>4</sup> As Helena Krajewska, a spokesperson for the NGO Polish Humanitarian Action, said, "everybody was doing something, either providing a room or a house or looking for transport, going to the border and back, fundraising with friends, organizing a concert, or something. It was overwhelming how many people wanted to help."

Poland provides an interesting case study of the Ukraine refugee crisis on how a state, civil society, and its citizens can and should respond by creating an

<sup>1</sup> A Lewicka, "Polacy Pomagają Ukrainie. Druga Fala Uchodźców w Zimie," *Dziennik*, Sept. 24, 2022, <https://gospodarka.dziennik.pl/news/artykuly/8554410.ukraina-polacy-pomoc-druga-fala.html>, <https://300gospodarka.pl/news/uchodzczy-z-ukrainy-w-polsce-liczba>

<sup>2</sup> BBC, "How Many Ukrainian Refugees Are There and Where Have They Gone?" July 4, 2022, [www.bbc.com/news/world-60555472](http://www.bbc.com/news/world-60555472)

<sup>3</sup> M Badowski, "Jak Polacy pomagają Ukraińcom?, Polska jest jednym z państw, które najbardziej zaangażowały się w pomoc", (*Strefa*

Biznesu, April 30, 2022) <https://strefabiznesu.pl/jak-polacy-pomagaja-ukraincom-polska-jest-jednym-z-panstw-ktore-najbardziej-zaangazowaly-sie-w-pomoc/ar/c3-16315707>;

see also E Reidy, 'Is Poland's Smooth Reception of Ukrainian Refugees Heading for Trouble?' *The New Humanitarian*, Aug. 4, 2022, <https://www.thenewhumanitarian.org/news-feature/2022/08/04/Poland-Ukraine-refugee-concern-grows>;

*Pulshr.pl*, 'Tak Polacy pomagają Ukrainie. Zarobki nie mają znaczenia,' April 28, 2022, <https://www.pulshr.pl/po-godzinach/tak-polacy-pomagaja-ukrainie-zarobki-nie-maja-znaczenia89479.html>

<sup>4</sup> *Reidy*, *Supra* Note 3.

immigration policy and compassionate social response that minimizes risks of exploitation to refugees. Poland may be seen as a test case for what works well in the context of a massive and fast-developing refugee crisis.<sup>5</sup> Poland should also be considered an exceptional case because, as the Eastern European historian, Professor Snyder of Yale, aptly observed one "cannot recall a case where so many refugees have been admitted so quickly by any one country."

The Polish government enacted a legally progressive law within a month of the start of the Russian aggression as well.<sup>6</sup> Given that Poland is less affluent than many other EU countries,<sup>7</sup> that most Poles, after many months of helping, seem to have exhausted their funds,<sup>8</sup> and that the Polish government appears to lack the funds to sustain that generous welcome, this model, while unique, humane, commendable, and incredibly effective in the short-run, would need to be properly funded to be sustained and repeated.<sup>9</sup>

On March 12, the Polish parliament promulgated the Act on Assistance for Ukrainian Nationals (AAUN).<sup>10</sup> Under AAUN, all Ukrainian nationals fleeing Russian aggression became entitled to legal rights and most, if not all, social benefits available to Polish citizens.<sup>11</sup> Under AAUN, Ukrainian citizens fleeing the war have the right to residence and work in Poland.<sup>12</sup> Ukrainian citizens are allowed to undertake and conduct business activities in the territory of Poland on the same terms as Polish citizens. Under AAUN, Ukrainian refugees are assigned a Polish Social Security Number (PESEL),

which allows them, like Poles, to access free public healthcare, schooling, university education, subsidized housing, transportation, and other benefits.<sup>13</sup> The AAUN also provides access to funding to reduce the fees paid by parents for child daycare and similar services.<sup>14</sup>

### European Union

On March 4, 2022, the EU rolled out a "temporary protection" status for those who have been displaced, which eliminated the need to apply for asylum and created a temporary migration status good for one year but that may be extended to three years depending on how the situation evolves.<sup>15</sup> The right to apply for Temporary Protection in the EU includes the right to establish residency, the right to housing and work, the right to receive social welfare and medical care, and the right for children and teenagers to attend schools, as well as the right to access banking and open an account with basic features.

### United Kingdom

On March 14, 2022, the UK launched "Homes for Ukraine," which provides different Ukraine Schemes to support those who wish to either come to or remain in the UK.<sup>16</sup> The Ukraine Family Scheme allows applications by a Ukrainian national who has a family already settled in the UK.<sup>17</sup> Homes for Ukraine admits a Ukrainian national who is sponsored by a UK household for six months.<sup>18</sup> The Ukraine Extension Scheme permits application by a Ukrainian national who had permission

<sup>5</sup> Unless otherwise the information on Poland is based upon the extensive interview, observations, and analysis of Elizabeth M. Zechenter, during the summer of 2022 in Poland, Slovakia, Czechia, and Austria.

<sup>6</sup> Ministry of the Interior and Administration, "The Act on assistance to citizens of Ukraine in connection with armed conflict on the territory of that country signed by the President," March 12, 2022

[www.gov.pl/web/mswia-en/the-act-on-assistance-to-citizens-of-ukraine-in-connection-with-armed-conflict-on-the-territory-of-that-country-signed-by-the-president](http://www.gov.pl/web/mswia-en/the-act-on-assistance-to-citizens-of-ukraine-in-connection-with-armed-conflict-on-the-territory-of-that-country-signed-by-the-president)

<sup>7</sup> Economy of Poland - statistics & facts Statista; See also [https://compareeconomy.com/compare/country\\_poland\\_vs\\_european\\_union\\_\(eu\)](https://compareeconomy.com/compare/country_poland_vs_european_union_(eu)); <https://statisticstimes.com/economy/european-countries-by-gdp.php>

<sup>8</sup> Fundusze Europejskie pomagają pomagać Ukraincom, Portal Funduszy Europejskich, Aug. 8, 2022, <https://www.funduszeuropejskie.gov.pl/strony/wiadomosci/fundusze-europejskie-pomagaja-pomagac-ukraincom/>

<sup>9</sup> Eden, Caroline, "Dispatch: How long can Poland bear the Ukrainian refugee burden?" *The New Statesman*, June 20, 2022.

<https://www.newstatesman.com/world/europe/2022/06/poland-solidarity-for-ukrainian-refugees-how-long>

<sup>10</sup> Ministry of the Interior and Administration, "The Act on assistance to citizens of Ukraine in connection with armed conflict on the territory of that country signed by the President (March 12, 2022),

[www.gov.pl/web/mswia-en/the-act-on-assistance-to-citizens-of-ukraine-in-connection-with-armed-conflict-on-the-territory-of-that-country-signed-by-the-president](http://www.gov.pl/web/mswia-en/the-act-on-assistance-to-citizens-of-ukraine-in-connection-with-armed-conflict-on-the-territory-of-that-country-signed-by-the-president).

<sup>11</sup> *Id.*

<sup>12</sup> See <https://www.gov.pl/web/uw-mazowiecki/dostep-do-ryнку-pracy-dla-obywateli-ukrainy2>

<sup>13</sup> Smurlik et al, "Ukraińcy - pierwsze kroki w Polsce (poradnik)" March 3, 2022, <https://www.rp.pl/prawo-dla-ciebie/art35882301-ukraincy-pierwsze-kroki-w-polsce-poradnik>

<sup>14</sup> *Id.*

<sup>15</sup> PW Walsh and M Sumption, "Q&A: The UK and the Ukraine Refugee Situation," The Migration Observatory, August 24, 2022, <https://migrationobservatory.ox.ac.uk/resources/briefings/qa-the-uk-and-the-ukraine-refugee-situation/>

<sup>16</sup> Gov. UK, "Apply for Visa Under the Ukraine Sponsorship Scheme (Homes for Ukraine)" March 18, 2022, [www.gov.uk/guidance/apply-for-a-visa-under-the-ukraine-sponsorship-scheme](http://www.gov.uk/guidance/apply-for-a-visa-under-the-ukraine-sponsorship-scheme)

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*



to be in the UK at any time on or between March 18, 2022, and May 16, 2023, or had permission to be in the UK, and that permission expired on or after January 1, 2022.<sup>19</sup> The Office for National Statistics (ONS) estimates that from June 2020 to June 2021, there were on average, around 35,000 people living in the UK who were born in Ukraine, with the true value likely to be between 25,000 and 45,000 people.<sup>20</sup>

## Canada

Canada's immigration policies are much closer to the European model than their UK and U.S. counterparts. The Canada-Ukraine Authorization for Emergency Travel (CUAET) is one of the many special measures the Government of Canada has introduced to support the people of Ukraine.<sup>21</sup> This immigration program is a generous immigration scheme that does not require sponsorship.<sup>22</sup> The program offers Ukrainians and their family members free, extended temporary status and allows them to work, study, and stay in Canada until it is safe for them to return home.<sup>23</sup> Ukrainian nationals and the family members of Ukrainian nationals of any nationality can apply.<sup>24</sup> Ukrainians and their family members coming to Canada from overseas can apply for a free visitor visa and may be allowed to stay in Canada for up to 3 years, as opposed to the standard 6-month authorized stay for regular visitors.<sup>25</sup> They have the option to apply, free of charge, for an open work permit with their visa application, enabling them to find work as quickly as possible.<sup>26</sup>

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<sup>19</sup> *Id.*

<sup>20</sup> UK Parliament House of Commons Library, "How Many Ukrainians Live in the UK?" March 7, 2022, <https://commonslibrary.parliament.uk/how-many-ukrainians-live-in-the-uk/>

<sup>21</sup> Canada-Ukraine Authorization for Emergency Travel - Canada.ca, <https://www.canada.ca/en/immigration-refugees-citizenship/news/2022/03/canada-ukraine-authorization-for-emergency-travel.html>

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

## United States

In the U.S., President Joe Biden announced on March 24 that the U.S. would 'welcome 100,000 Ukrainians to the United States with a focus on reuniting families.'<sup>27</sup> Admission was to be "through the full range of legal pathways," while the U.S. was "working to expand and develop new programs" focusing on Ukrainians who already have family in the U.S.<sup>28</sup> On April 21, 2022, the U.S. announced the "Uniting for Ukraine" (U4U) program, which provides a pathway for Ukrainian citizens and their immediate family members who are outside the U.S. to come to the U.S. temporarily for a two-year period of parole.<sup>29</sup> Ukrainians participating in Uniting for Ukraine must have a supporter or private sponsor in the U.S. who agrees to provide them with financial support for the duration of their stay in the U.S.<sup>30</sup> As of June 3, 2022, 48,000 people had applied for the parole initiative, 30,000 Ukrainians had received authorization to travel, and about 7,000 people had arrived.<sup>31</sup> President Biden also renewed the Lautenberg Amendment, which allows members of persecuted religious groups to reunite with family members living legally in the U.S., and the Department of Homeland Security gave Ukrainians Temporary Protected Status (TPS) if they can prove continuous residence in the U.S. from a date certain.<sup>32</sup>

## Conclusion

As Russia's war against Ukraine continues to escalate and large parts of Ukraine are destroyed, Ukrainians will continue to flee the country. The international legal and human rights communities must be prepared to continue to support Ukrainian refugees and advocate on their behalf so that the immigration policies designed to support Ukraine can be modified to accommodate the longer-term needs of Ukraine's refugees.

<sup>27</sup> M Czopek, "How US Immigration Policies Will Affect Ukrainian Refugees" Poynter, April 13, 2022, <http://poynter.org/fact-checking/2022/how-us-immigration-policies-will-affect-ukrainian-refugees>

<sup>28</sup> *Id.*

<sup>29</sup> United States Citizenship and Immigration Services, "Uniting for Ukraine" April 21, 2022, [www.uscis.gov/ukraine](http://www.uscis.gov/ukraine)

<sup>30</sup> *Id.*

<sup>31</sup> M Reynolds, "Uniting for Ukraine draws criticism and praise from resettlement groups" *ABA Bar Journal*, June 14, 2022, [www.abajournal.com/web/article/uniting-for-ukraine-draws-criticism-and-praise-from-resettlement-groups](http://www.abajournal.com/web/article/uniting-for-ukraine-draws-criticism-and-praise-from-resettlement-groups)

<sup>32</sup> *Id.*

For a more detailed analysis of the topic, please see "[A Survey of Immigration Models and Refugee Protection Schemes and their Consequences: The Case of Ukrainian Refugees](#)" by van Kampen and Zechenter, et al., published by Journal of Human Trafficking, Enslavement and Conflict-Related Sexual Violence, volume. 3, nr.2., <https://lnkd.in/euzBttZx>

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Catherine E. van Kampen specializes in commercial litigation and securities fraud settlements. Catherine is deeply dedicated to pro bono work supporting immigrant and refugee women and children. Catherine has written extensively on the cyber exploitation and online human trafficking of at-risk women and children. Catherine has written extensively on the cyber exploitation and online human trafficking of at-risk women and children residing in war zones and conflict areas. She is a Fellow at the American Bar Foundation and the current co-chair of the Women's Interest Network of the ABA International Law Section.

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# Emergency Protection for Ukrainians

Omar Hegazi

On February 24, 2022, the European Council condemned Russian offensive military action in Ukraine because it violated international law and the principles of the United Nations Charter.<sup>1</sup> On March 4, 2022, an unprecedented action in the history of the European Community, Decision 2022/382 was undertaken for the implementation of Council Directive 2001/55/EC for the exceptional temporary protection of refugees arriving from Ukraine.<sup>2</sup> The Temporary Protection Directive is the most effective and rapid response to the humanitarian emergency caused by the Ukrainian crisis in the European immigration regulatory system. It is a revolutionary, problem-solving approach within the European immigration regulatory system.

Before delving into specific details, it is necessary to understand that at the European level, the requirements and process for obtaining permanent residence in the Schengen area typically take over ninety days. They are limited and the conditions are rigorous, in terms of the ordinary procedures for obtaining a residence permit and the procedures associated with requests for political asylum. In a nutshell, it is important to note that under normal circumstances, the process begins with a visa application at the relevant embassy, followed by an application for a residence permit for reasons such as: study, work, or family. The time typically required for completing the process may be up to 24 months.<sup>3</sup> Regarding the emergency procedure for political asylum or humanitarian protection applicants, residence permits are issued after a rigorous investigation of the claims and personal profiles of the applicants by a committee appointed by the Ministry of the Interior.<sup>4</sup>

The process to gain Ukrainian temporary protection (emergency request for asylum) differs from the ordinary procedure. This is due to the standardization and simplification of the application procedure for all States of the European Union, which require only proof of Ukrainian nationality. They further proceed without additional investigation, requests for evidence, or

examination by the national standing committees for the assessment of asylum applications.

In Italy, as an exemption to existing immigration laws, the state of emergency and the opportunity to apply for a residence permit for temporary protection of Ukrainians are effective until December 31, 2022. For people with limited or no financial means, there is a special reception with authorization to activate additional beds in each municipality. Available places allotted to and financed for Afghan citizens has also been extended to refugees from Ukraine.<sup>5</sup> The Italian legislation that regulates the emergency is provided for by the D.P.C.M. of March 28, 2022, which regulates the extraordinary and comprehensive measures for receiving Ukrainian refugees.<sup>6</sup> The Ministry of the Interior has advised the Italian Immigration and Border Police Service to receive applications for temporary protection from Ukrainians as of March 11, 2022, and to issue receipts of acceptance to them immediately upon submission of their applications.

On April 11, 2022, the Notice for the expression of interest to conduct widespread reception activities by private individuals and associations was published.<sup>7</sup> The aim is to promote and experiment on a nationwide model of reception that involves the hosting of Ukrainian citizens by private individuals, families, and associations. Services offered to applicants also includes career guidance, counseling, and employment support services such as vocational training and retraining programs, with particular emphasis on strengthening the skills necessary for employment and retention of Ukrainian citizens upon their eventual return to Ukraine.

There is also a special basic subsistence allowance of EUR 300 per capita per month and an additional monthly allowance of EUR 150 per child under 18. The benefits will be granted for a maximum of three months from the date of entry into Italy. If the beneficiary finds a job in Italy, he may continue receiving the contribution for a maximum of 60 additional days.

<sup>1</sup> Limes Rivista Italiana di Geopolitica, Feb. 25, 2022.

<sup>2</sup> DPCM, EU Decision n.384 2022.

<sup>3</sup> Decreto legislativo 25/07/1998 n° 286, G.U. 18/08/1998.

<sup>4</sup> D.L. 14/2022 - Disposizioni urgenti sulla crisi in Ucraina

<sup>5</sup> *Id.*

<sup>6</sup> Gazzetta ufficiale del 13 aprile 2022, legge n.28 del 2022, decreto legge 25 febbraio 2022, n. 14, urgent Ukraina crisis.

<sup>7</sup> *Supra* Note 2.

Upon applying for a residence permit for temporary protection, a tax identification number is issued to each applicant by the Immigration and Border Police, in accordance with the existing protocol for International Temporary Protection Directive which automatically identifies the applicant as a recipient of free health care.

Applicants obtain one-year residence permits from the Immigration and Border Police, renewable for another year, thereby allowing them to register with the National Health System and to work or study.

Emergency temporary protection is granted to Ukrainian nationals and their family members who were residing in Ukraine before February 24, 2022; stateless persons and nationals of third countries other than Ukraine who enjoyed international protection or equivalent national protection in Ukraine before February 24, 2022; and stateless persons and nationals of third countries other than Ukraine who were staying in Ukraine before February 24, 2022, based on a permanent residence permit who cannot return to their country or region of origin safely.<sup>8</sup>

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<sup>8</sup> *Supra* Note 5.



# Brief Reflections on International Protection in Europe

## Part One

Salvatore Filippini La Rosa

The conflict between Ukraine and Russia began on February 24, 2022.

After more than a year from that date, it may be appropriate to briefly summarize the European legislation governing international protection in favor of those who are entitled to it, no matter if they come from Ukraine or other non-European countries. Furthermore, it is my intention to briefly explain in part two of this article how this protection is carried out in one of the EU member states, Italy.

The recognition of refugees and their inviolable rights are regulated by the Geneva Convention of July 28, 1951<sup>1</sup> and the New York Protocol of January 31, 1967.<sup>2</sup> In particular, the principle of *non-refoulement* is sanctioned by article 33 of the Geneva Convention.

This principle is also established by the Charter of Fundamental Rights of the European Union, whose article 19 states that no one can be removed, expelled or extradited to a State where there is a serious risk of being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

The European Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950, subsequently amended and supplemented by 14 additional Protocols, sanctioned the same rights.

As regards the reasonable fear of being persecuted, which is an essential condition for the recognition of refugee status, the evaluation of the same is based on both subjective and objective elements.

The first consists of the applicant's personal characteristics: age, sex, family and personal background, or membership in a social, political, religious group. These condition the applicant's

perception of the dangers to which he/she is exposed and, therefore, his/her well-founded fear of persecution. The second concerns the objective situation of the country of origin.<sup>3</sup>

In the European context, the definition of a refugee established by the Geneva Convention was taken up by Directive 2004/83/EC of April 29, 2004,<sup>4</sup> that had the merit of widening the scope of the protection due to aliens.

This directive defined as "international protection" not only the refugee status, but also the so-called subsidiary protection, as defined in letters (e) and (f) of the same article.

Thereby, the spectrum of protections is expanded in favor of those who, due to the risk of non-compliance with one or more fundamental rights pertaining to each human being, cannot return to their country of origin.

In letters (e) and (f) of article 2, in fact, the aforementioned Directive established that subsidiary protection belongs to any citizen of a third country (or to any stateless person) lacking the necessary requisites for the recognition of refugee status.

Subsidiary protection also applies in the event there are well-founded reasons to believe that his/her return to the country of origin or habitual residence (if stateless) presents a real risk of suffering serious harm such as a death sentence, torture or another form of inhuman or degrading punishment or treatment. A serious individual threat to his/her life or person due to indiscriminate violence in situations of internal or international armed conflict also warrants subsidiary protection.

As regards the acts of persecution, they must be sufficiently serious to represent a violation of rights for which any derogation pursuant to article 15,<sup>5</sup> paragraph

<sup>1</sup> UNHRC, The 1951 Refugee Convention,

<https://www.unhcr.org/1951-refugee-convention.html>

<sup>2</sup> Protocol relating to the Status of Refugees, Dec. 16, 1966,

<https://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolStatusOfRefugees.aspx>.

<sup>3</sup> See Handbook on procedures and criteria for determining refugee status, Geneva, 1979, p. 13, available at <https://www.unhcr.org/it/wp-content/uploads/sites/97/2020/07/Manuale-procedure-e-criteria-determination-status-refugee-compressed.pdf>.

<sup>4</sup> Council Directive 2004/83/EC of April 29, 2004 laying down minimum standards on the attribution of the qualification of refugee and person otherwise in need of international protection, in *OJEU*, L304 of September 30, 2004, p. 12 ff.

<sup>5</sup> See ECHR, article 15, "Derogation in case of urgency": "1. *In the event of war or other public danger threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations under this Convention, insofar as the situation so requires and provided that such measures do not conflict with other obligations under international law.*

2, of the ECHR, must be excluded. They may be acts of physical or mental violence, including sexual violence, or legislative, administrative, police and/or judicial measures, discriminatory by their nature or implemented in a discriminatory manner, as well as actions disproportionate or discriminatory judicial or criminal sanctions.<sup>6</sup>

This directive was then replaced by Directive 2011/95/EU of December 20, 2011,<sup>7</sup> which confirmed the definitions and, more generally, the regulatory framework of the previous directive (also with regard to subsidiary protection).

As we can see, there is therefore a protection system defined as international, which makes use of the recognition of refugee status and, in the alternative, of subsidiary protection. Part Two of this article will address the application of this protection in the context of Italy.

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Salvatore Filippini La Rosa is a lawyer and international observer.

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*2. The previous provision does not authorize any derogation from article 2, except in the case of death caused by legitimate acts of war, and from articles 3, 4 § 1 and 7.*

*3. Any High Contracting Party exercising this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures taken and the reasons which led to them. It must equally inform the Secretary General of the Council of Europe of the date on which these measures cease to be in force and when the provisions of the Convention regain full application".*

<sup>6</sup> See Directive 2004/83 / EC cit., Article 9 "Acts of persecution": "1. Acts of persecution pursuant to article 1A of the Geneva Convention must: a) be sufficiently serious, by their nature or frequency, to represent a serious violation of fundamental human rights, in particular those rights for which any derogation is excluded under Article 15 (2) of the Convention European Union for the protection of human rights and fundamental freedoms; or b) constitute the sum of several measures, including violations of human rights, the impact of which is sufficiently severe to have an effect similar to that referred to in letter a) on the person.

*2. Acts of persecution that fall within the definition in paragraph 1 may, inter alia, take the form of: a) acts of physical or mental violence, including sexual violence; b) legislative, administrative, police and / or judicial measures, discriminatory by their very nature or implemented in a discriminatory manner; c) disproportionate or discriminatory prosecution or criminal sanctions; d) refusal of access to legal remedies and consequent disproportionate or discriminatory sanction; e) prosecution or criminal sanctions as a result of refusing to perform military service in a conflict, when this would result in the commission of crimes, offenses or acts falling under the exclusion clauses referred to in Article 12 (2); f) acts specifically directed against a sex or against childhood.*

*3. In accordance with Article 2 (c), the grounds referred to in Article 10 must be linked to acts of persecution as defined in paragraph 1".*

<sup>7</sup> Directive 2011/95 / EU of the European Parliament and of the Council of December 13, 2011 laying down rules on the attribution of the qualification of beneficiary of international protection, in OJEU, L337 of December 20, 2011, p. 9 ss.

# ABA Pilot Program Seeks to Qualify Afghan Legal Professionals as Lawyers in U.S.

Michael H. Byowitz, Dana Katz, and Harry Baumgarten

With the 2021 Taliban takeover of Afghanistan, judges, prosecutors, and lawyers have been persecuted, targeted, and forced to flee the country. Many of those remaining in Afghanistan are in grave danger for having assisted the United States and other outside entities prior to the government's collapse. Legal professionals who are women face particular risk, and women judges have been assassinated for ruling against men, even before the Taliban regained control. Many have come to the United States after being driven from Afghanistan, leaving behind their homeland and families and losing their life savings and legal careers.

Faced with this challenge, the ABA ILS has formed the *ABA Afghan Legal Professionals Scholarship & Mentoring Pilot Program* (Pilot Program) to serve Afghan judges, prosecutors, and lawyers—especially women—who are seeking to practice law or work in law-related positions in the U.S. The Pilot Program was approved by the ABA Board of Governors in June 2022, and it is being administered by the all-volunteer ABA ILS Afghan Legal Professionals Resettlement Task Force (Task Force).

## Pilot Program Structure

The Task Force has already secured thirteen to fifteen full-tuition scholarships from nine law schools,<sup>1</sup> and many more law schools are likely to participate. But scholarships are only tuition waivers, and participants will need to support themselves (and, in some cases, their families) while they earn their LLM degrees and take the bar exam. The Pilot Program seeks to provide stipends to help cover the cost of their housing and other living expenses. In its first year, the Pilot Program seeks to serve up to ten and no more than twenty Afghan legal professionals who are already in the U.S.

The Pilot Program will provide mentors to help Afghan legal professionals apply for admission to LLM programs, answer questions during those programs, and

address issues that may arise during bar exam preparation. The Task Force plans to arrange for bar review courses for Pilot Program participants, free of charge.

The Pilot Program will include preparatory mentoring for individuals not ready to pursue an LLM, and it will assist participants with finding employment. The Pilot Program plans to arrange for English proficiency assistance and testing.

## Financial Assistance

Pilot Program participants cannot be enrolled without funding, and financial support ensures that participants can focus on their studies. The Pilot Program seeks contributions. For information on ABA recognition levels for contributions by law firms, corporations and individuals, go to:

[http://www.wlrk.com/docs/ABA\\_Afghan\\_Legal\\_Professionals\\_Pilot\\_Program\\_Recognition\\_Levels.pdf](http://www.wlrk.com/docs/ABA_Afghan_Legal_Professionals_Pilot_Program_Recognition_Levels.pdf). You can make a tax-deductible contribution online at <http://www.ambar.org/donateITL>.

## Employment

Before starting LLM programs, our Afghan colleagues need jobs. The Task Force urges law firms, corporations, and court systems<sup>2</sup> to employ Afghan judges, prosecutors, and lawyers. Firms should consider hiring participants as paralegals, legal assistants, document reviewers, or translators until they become eligible to practice law in the US. Firms with an Islamic Finance practice or other legal practice involving Sharia law and customs, as well as those that require Dari or Pashto language expertise, may wish to engage participants as consultants. Law firms, corporations, and other organizations are encouraged to hire Afghan LLM graduates as lawyers, once they are qualified.

Program participants are highly motivated, educated, and experienced professionals, who will benefit firms in

<sup>1</sup> The nine law schools offering scholarships for eligible candidates are: Fordham University School of Law (NY), St. John's University School of Law (NY); The George Washington University School of Law (DC); Loyola Law School, Los Angeles (CA); Mitchell Hamline School of Law (MN); Northwestern Pritzker School of Law (IL); St. Louis University

School of Law (MO); University of Connecticut School of Law (CT); and University of New Hampshire Franklin Pierce School of Law (NH).  
<sup>2</sup> New York State has implemented J-COR, a program that hires Afghan legal professionals as court analysts for one-year appointments.

many ways, including civic and diversity initiatives. Participating law firms will receive public recognition through the ABA Fund for Justice and Education and other ABA communications. Most of all, firms will help our Afghan colleagues rebuild their professional lives and support the rule of law from within the U.S. legal system.

### **Volunteers Needed**

The Pilot Program seeks volunteers to help in several ways:

1. Refer participants to entities that provide *pro bono* immigration legal services (the provision of such legal services is outside the Pilot Program's scope);
2. Serve as mentors to help Afghan legal professionals (a) apply to LLM programs and guide participants throughout those programs, (b) answer questions regarding the bar exam, (c) seek employment within the U.S. legal system; and
3. Raise funds to pay for housing and living expenses for Pilot Program participants.

Support from the U.S. legal community will help ensure that our brave and accomplished colleagues from Afghanistan will rebuild their legal careers in the United States.

For more information, please contact Task Force Chair Mike Byowitz ([mhbyowitz@wlrk.com](mailto:mhbyowitz@wlrk.com)), Task Force Vice Chair Dana Katz ([dkatz@danakatzlaw.com](mailto:dkatz@danakatzlaw.com)) or Task Force Member Harry Baumgarten ([harry.baumgarten@gmail.com](mailto:harry.baumgarten@gmail.com)).

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Michael H. Byowitz was a partner for more than 30 years and has been Of Counsel for the past seven years (and counting) at Wachtell, Lipton, Rosen & Katz in New York. Mike is active in the ABA currently serving as a Delegate At-Large in the ABA House of Delegates. He is a former member of the ABA Board of Governors and a Past Chair of the ABA International Law Section (ILS). He currently serves as Chair of the ABA ILS Afghan Legal Professionals Resettlement Task Force.

Dana Katz is the Vice Chair of the ABA ILS Afghan Legal Professionals Resettlement Task Force. She also serves as the Division Chair of the Legal Practice, Ethics, & Delivery of Legal Services Division of the ILS. Dana is Immediate Past Chair & Senior Advisor of the Women's Interest Network (WIN) of the ILS.

Harry William Baumgarten is Vice President and General Counsel of the Grundy Industrial Complex, Inc. He previously served as Legislative Director and Counsel to Members of Congress, in which capacity he advised on foreign policy, rule of law, and international development. A graduate of the Georgetown University Law Center, he is licensed to practice law in New York State, Washington, DC, the Supreme Court of the United States, and elsewhere.



# Q&A Spotlight: Hena Salehi

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## Humaa Siddiqi

*Hena Salehi is a dual LLM graduate of Fordham University School of Law and Fulbright Scholar. Born in Kabul, Afghanistan, Salehi now resides in the United States working for a top global law firm. The ABA's Middle East Review highlights her extraordinary circumstances and great achievements.*

Q: Where did you grow up?

A: I was born in Kabul, Afghanistan. However, when I was a few months old, my family moved to Pakistan due to the war. I grew up as an immigrant child and teen in Pakistan. When I was starting high school, my family moved back to Kabul to give me better educational opportunities.

Q: When did you know that you wanted to pursue law and why?

A: I was fond of math and physics while growing up and wanted to pursue science but spending my last two years of high school in Afghanistan changed my perspective and I grew an interest in law. Eventually I studied law, graduated from Kabul University, took the bar exam, and practiced as a commercial lawyer in Afghanistan for around seven years before coming to the United States. My experiences growing up in a different country and as an immigrant child also grew an immense desire in me for working for human rights and women's rights. It was important for me to educate myself and work in a male-dominated industry where women you couldn't see women's footprints. In traditional definitions, law was not a common or dignified career for a woman, and I wanted to change that narrative and especially you wouldn't see many women players in the commercial law industry. I am proud that I am the first lawyer in my family.

Q: What was it like coming to the United States to pursue law?

A: Before the collapse of the Afghanistan government, I was awarded the Fulbright Scholarship and my admission was for the fall of 2020, but COVID postponed my start date. In 2021, I got my student visa and moved to New York City to attend Fordham University School of

Law to pursue my LLM. My departure from Afghanistan coincided with the collapse of the Afghan government and I happened to be on the last commercial flight out of Kabul. So, it was a mix of feelings: happy for starting a new journey and sad for losing everything we had.

Q: What type of law do you wish to practice in the United States?

A: I recently graduated from Fordham Law in December 2022 with two LLM degrees, Corporate Compliance and International Business and Trade Law. With my previous experience in commercial contracts and education in international trade law, I would like to do something in the sidelines of trade and cross-border agreements. However, that doesn't stop me from learning and exploring different areas of law. I consider myself a student of the law forever and would like to explore unique practice areas in the United States.

Q: How are you enjoying your time at Hogan Lovells?

A: I am currently a Paralegal for Global Regulatory at Hogan Lovells. In my role, I will be working with the FDA team of the firm. It's a great opportunity to work in a whole new practice area and a different legal system in a big law firm set up. I am super excited about this opportunity, and I believe it gives me a platform to learn, grow more, and unfold the new capacities ahead of me.

*Hena Salehi plans to sit for the bar exam and is excited to be further involved in the ABA International Law Section.*

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Humaa Siddiqi is an ABA International Law Section Diversity Fellow and practices corporate immigration law in Chicago, IL. She graduated from the University of Iowa College of Law in 2020.

# How to Rate the Legal Risks of a Chosen Governing Law

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You can get a credit rating of corporations. You can get a political risk rating of countries. Now you can also get a legal risk rating of the chosen governing law and courts of a contract. A recent treatise ranked the Big Four foundational law jurisdictions of England, New York, France, and Germany on more than a dozen criteria, such as predictability, business orientation, and debtor-creditor friendliness, as the governing law of international business transactions by using more than 70 specific key indicators. The study is contained in Philip Wood's *Governing Law Risks in International Business Transactions* just published by Oxford University Press.

New York law and English law are thought to be the most commonly chosen governing laws for these transactions, such as international bond issues, syndicated bank credits, derivatives, and large long-term sales agreements. The study shows why. Those two jurisdictions are together believed to hold about 80 per cent of the international wholesale business-to-business market. They are international public utilities conferring soft and hard power. The book mentions all 320 jurisdictions of the world.

“Most lawyers are trained only in one country’s laws, but lawyers documenting international transactions need to be able to advise on the appropriate governing law as well,” said Philip Wood. “My aim was that they should be able to do that task with confidence.”

Philip Wood CBE, KC Hon was a leading practitioner at international law firm Allen & Overy. He has written more than 25 books, notably nine volumes on the law and practice of international finance. He has lectured at more than 75 universities, including several in the U.S.

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