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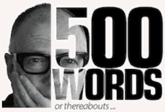

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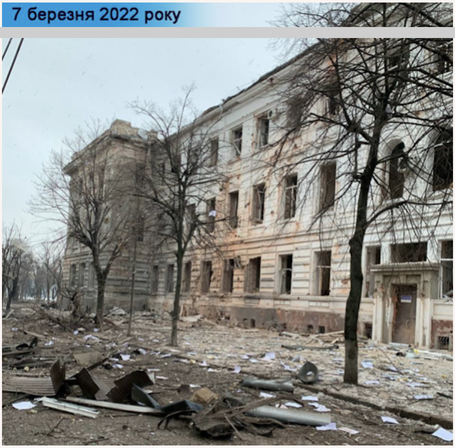
Justice on a war footing

LAW AND JUSTICE • TUESDAY, SEPTEMBER 20, 2022

The war-torn justice system in Ukraine ... Struggling to cope when courts are bombed ... Judges and staff dislocated ... Law firms shuttered ... Expansion of state powers ... War crimes ... Collaboration with occupiers ... Extraordinary circumstances ... Max Shanahan reports



Bombed out Kharkiv Court of Appeal

The business of a court reporter changes drastically in wartime. For Irina Salii - founder and editor of the groundbreaking court reporting site *SudReporter* – daily work has changed from covering the predictable rounds of bribery, assaults and car accidents, to being in the courtroom for internationally significant treason, collaboration and war crimes prosecutions.

Beset by destruction, defection and violence, the Ukrainian justice system has soldiered on in the midst of war - its docket and procedures changed radically, but attempting to provide justice for individuals and the nation at large in the face of invasion.

In a sense, the legal system has always played a role in the conflict. In his February 21 speech laying the ground for the invasion, Vladimir Putin bizarrely singled out the courts for special treatment.

"There is no independent judiciary in Ukraine" he said, before laying out a set of oddly specific grievances against Ukrainian judicial selection committees, anti-corruption courts and prosecutors.

Yet for Salii, the war has served only to increase Ukrainians' appreciation for their struggling judicial system:

> *"Justice has always been important for many people. But now, during the war, we understand it better, because when you face crime and injustice, you need your rights to be protected."*

Nevertheless, an upsurge in public support makes little practical difference in the day-to-day reality of wartime courtroom procedure.

Justinian spoke to those familiar with the situation in the Ukrainian courts to show how the courts continue to operate under martial law and in a time of crisis.

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"Liberty Corrie, from Suffolk, was

Practicalities

In the early days of the war, simply finding the staff, resources and security to operate were the main priorities of the courts. At one point, 20% of courts were suspended due to violence or occupation, while approximately 10% - a conservative estimate - of court buildings were damaged or destroyed.

Courthouses and judicial buildings have been targeted by shelling and occupying forces - looting has been a significant issue, and in some cases Russian troops have actively destroyed documents pertaining to investigations of collaborators and supporters of Russia.

The International Legal Assistance Consortium's (ILAC) 'Status Report on the Ukrainian Judiciary' found that "in some areas, members of the judiciary became targets of direct attacks [and] "unlike some other civil servants, judges and court staff were particular targets for attackers".

Andriy Kostin - Ukraine's Prosecutor-General - said that a number of court staff had been killed or injured as a result of shelling and other attacks. In one reported instance, a Chernihiv judge and her family were shot at a traffic stop after her occupation was discovered.

Prosecutor-General Kostin: courts have not missed a day amid war turmoil

Displacement from occupied areas and the continual threat of violence has further thinned the ranks of the justice system.

William D. Meyer, author of the ILAC report, told *Justinian* that "the greatest impact on the courts has been the dislocation of judges and court staff, as well as prosecutors and the defence bar".

With men of a fighting age prohibited from leaving the country, displacement has disproportionately affected the numbers of women in the legal profession, many of whom have taken their families abroad or to safer parts of the country.

Even before the invasion, the courts faced critical staffing issues. According to the ILAC report, recent anti-corruption measures left 40% of judges suspended from "administering justice", in addition to an already high 28% vacancy rate on the bench.

Political machinations and entrenched opposition to the reforms from some quarters slowed the pre-war reform process, leaving the judiciary in its current parlous state.

Indeed, just two days before the invasion, almost 50% of the 'High Council of Justice' – established in 2016 with the power to make judicial appointments – resigned in protest at new anti-corruption measures, leaving the body inquorate and unable to function.

Kostin was blunt: "history will judge their actions."

Another difficulty has been defection and allegations of collaborationism within the judiciary and prosecutorial service. Since the beginning of the war, court dockets have been dotted with collaboration prosecutions against members of the prosecution service.

Ukrainian prosecutors and judges have been popping up in senior roles in Luhansk and other occupied regions. Collaborationism prosecutions – specifically the offence of 'holding positions in an illegal law enforcement agency' – have been brought against the defecting lawyers *in absentia*. In July, President Zelensky dismissed his Prosecutor-General over a failure to stamp out collaborationism within the organisation.

He said at the time that a substantial number of former prosecutors were working against

standing outside the palace gates when Queen Elizabeth II's death was announced. She broke down as soon as she heard.

'Me and my brother looked at eath other. He was crying. I was crying. We were just in shock,' she said.

'It was very surreal'. I've always looked up to her, especially for a woman in such a high position'."

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Ukraine in occupied regions, and that 651 collaboration and treason cases had been opened against law enforcement officials.

New docket, new powers

Russian missile attack on a building close to Kyiv

Despite these challenges, the wheels of justice have continued to turn. According to Kostin:

> *"There was not a single day in which the judicial administration stopped working, even when shots and explosions could be heard outside on the streets of Kyiv."*

Jurisdiction transfers have enabled the courts to continue hearing matters from occupied or war affected areas, while the stabilisation of the conflict and the gradual return of some staff from western Ukraine and abroad has slightly eased initial struggles.

As a result of the war, new case filings have fallen dramatically, with reductions of 80-90% according to the ILAC report, while an estimated 30% of private law firms shut down in the months immediately following the invasion.

Meyer says:

> *"A lot of the private practitioners - particularly those in areas of conflict - are basically destitute. They don't have a way to make a living because their clients are gone, the courts are often closed, and many of them have had to flee. Even in the west of the country, the disruption has been significant."*

As a matter of both necessity and policy, war crimes and collaboration prosecutions have come to dominate the dockets of courts. Prosecutor-General Kostin said: "

> *"We told judges that first and foremost they should hear criminal cases related to those suspected of sabotage, war crimes and collaboration with the enemy."*

In some areas, prosecutors have been spending up to 95% of their time dealing with war crimes and collaboration cases.

Martial law has granted extraordinary new powers to prosecutors dealing with war related matters. The period of detention permissible without a warrant has increased from 72 to 260 hours, prosecutors have been given powers to determine bail restrictions, or refuse it altogether, bypassing judges, and may authorise continuing pre-trial detention in serious cases.

In addition to these detention powers, prosecutors have gained additional authorisation to conduct covert searches, seize property, and rely on admissions in interrogation.

The extent of these powers, in addition to the breadth of prosecutions being undertaken, have raised concern in some quarters. Valentyn Gvozdiy, Vice-President of the Ukrainian National Bar Association, has said:

> *"Such legislative changes infringe constitutional rights and freedoms, and are risky steps for the legislature to take ... We can only hope that the prosecutors will exercise these new powers responsibly, but we are concerned that the risk of abuse cannot be discounted."*

Gvozdiy critical of the expansion of proscutors' powers

Likewise, new discretion granted to the courts in wartime has played out unpredictably across the country. Access to online court lists was suspended at the beginning of the war, and continues to be patchy. While closed sessions were common in February and March, the majority of courts have since reopened to the public, though with seemingly little correlation to their degree of vulnerability.

Court reporter Irina Salii has faced some problems in trying to cover cases since the invasion:

> *"Sometimes courts try to limit journalists and the public because they say that publicity could be dangerous for judges and prosecutors. I generally don't have problems in the capital, but in some regional areas there are difficulties. In Poltava - which is not close to the borders and isn't especially threatened - the court has been closed for all cases connected with treason. They don't even publish decisions. But in the capital and other regions, these trials have been kept public. So I don't know what the rationale is."*

War crimes

Alongside new prosecutorial and judicial powers, the institution of new criminal offences coupled with the recapture of previously occupied territory has seen a rapid profusion of war-related prosecutions appearing before the courts.

These prosecutions present their own set of new problems, both procedurally and politically. As Mark Ellis, president of the International Bar Association, tells *Justinian:*

> *"To undertake a war crimes trial is challenging at the best of times because of the unfamiliarity of the subject matter to all parties - but in a time of war and crisis, the challenges are extraordinary."*

Accordingly, a great deal of international assistance has gone towards assisting citizens and prosecutors in documenting and investigating breaches of international humanitarian law.

Mass grave at Bucha

While extensive resources have been poured into the training of judges and prosecutors, comparatively little attention has been paid to training defence lawyers.

Ukraine's first war crimes trial of a Russian soldier saw the shortcomings. According to Meyer, the prosecution "was not handled well," while for Ellis "there were some eyebrows raised and concerns expressed about some of the processes".

While initial teething problems have been improved upon, the IBA has since run online seminars aimed at training defence counsel in war crimes cases, and is planning further in-person training in collaboration with the Ukrainian National Bar Association.

Recently returned from Ukraine, where he held meetings with senior political and legal figures, Ellis said:

> *"Every Ukrainian I spoke to - including government officials, judges and the bar associations - all were on the same page as to the importance of ensuring defendants get proper representation. They do not want to be tainted in the eyes of the international community by having failed to provide basic procedural rights - and certainly do not want to be compared to the show trials happening in Russia."*

Even with the best of intentions, however, the realities of war continue to bite: one of

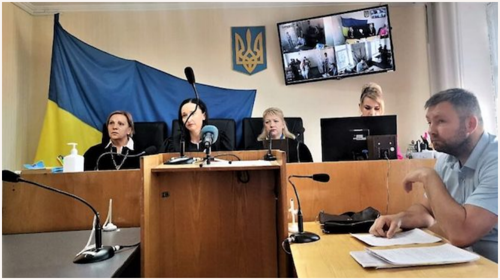
Ukraine's most experienced defence counsels, who acted for a Russian accused of war crimes, was recently mobilised in the nation's defence.

Collaboration

While the initial war crimes prosecutions of Russian soldiers garnered international attention, it is treason and collaboration cases that fill the dockets of Ukraine's courts.

Indeed, after an initial burst, war crimes trials of Russians have since slowed. According to Meyer:

> *"There's a sense that they've put a pause on that. Firstly, they got some pushback from the West about their initial handling. And secondly, they have their own soldiers that are now in Russian hands - I don't think Ukrainians want to give any more incentives to bring war crimes charges against Ukrainian soldiers."*



Court in Krovynystskyi

As a result, it has been domestic crimes - ranging from high treason to convictions over social media posts - that have been most prominent in the legal response to the invasion.

With the declaration of martial law, a number of new offences were created. These include a broad anti-collaboration provision, as well as prohibitions on "justification" - recognising the legality, or denying the existence of, the Russian invasion; dissemination of information regarding the location of troops and military assets; and defamation of soldiers' "honor and dignity".

The breadth of collaboration cases before the courts in just the last fortnight give a unique insight into life under occupation, the details of warfare, and the mammoth legal and political task which awaits Ukraine as the war continues.

In one case, a Kharkiv taxi driver had his taxi licence suspended for 10 years for expressing support for Russia to two passengers. In another, a Ternopil pensioner with Parkinson's disease will serve two years in prison for sharing pro-Russian posts on social media in the lead-up to the invasion.

Such small, seemingly inconsequential cases, sit alongside matters of murder and betrayal. A woman from Krovynystskyi is facing trial for high treason – according to the prosecutors, "in exchange for food, money and freedom of movement," the woman provided Russian troops with the locations of a Ukrainian cavalry unit, and informed on her fellow villagers.

As a result, the prosecutors allege, two men were killed and others were tortured.

In another instance, a Zaporizhzhia grandfather received the maximum penalty for high treason after passing on information to his son in the Russian army about the location of Ukrainian weapons, equipment and soldiers. His counsel told the court "it was all based on emotions, he was worried about the fate of his son ..."

The third category of domestic war prosecutions has been the indictment of fighters and officials from the occupied territories of Luhansk and Donetsk.

While their loyalties may lie with Russia, militants from the LPR and DPR largely retain Ukrainian citizenship, enabling treason prosecutions to proceed. Captured fighters have had their trials processed with extraordinary haste and are often prepared for prisoner swaps.

Yelkiy: speedy trial and conviction for one-legged treason accused

Recently, the District Court of Odessa took less than a day to convict and sentence Ruslan Yelkiy, a one-legged DPR grenade launcher, to 15 years imprisonment for treason and terrorism.

The haste with which treason and collaboration cases have been processed stands in stark contrast to the gridlock which characterised pre-war Ukrainian justice.

According to Irina Salii:

> *"Cases are rarely short. In most cases they last for a couple of years, and sometimes three or four."*

While the drop in regular filings, the commonality of guilty pleas, and enhanced prosecutorial powers can explain the change in speed and delivery, the breadth of prosecutions being pursued remains extraordinary.

Meyer sounds a note of warning: the zealous pursuit of retributive justice, especially at the low level:

> *"... has caused concern with some in the international community ... But in the middle of an invasion, in the fog of war, it is hard to see what the future might look like - hopefully things will calm down as the conflict subsides."*

The future

With Russians repulsed from the north, and suffering a major reversal in Kharkiv, thoughts in some quarters have begun to turn towards the next stage of Ukraine's wartime justice agenda.

While the prospect of International Criminal Court prosecutions have been raised since the beginning of the war, any justice there, even with complete cooperation, is likely to be years, if not decades, away.

According to Mark Ellis, the prospects of a prosecution for the crime of aggression in an ad hoc international chamber:

> *"... was a major talking point in meetings. Every government official talked about this - they are singularly focused on ensuring that Putin and others are brought to justice. But any prosecution will take the combined political will and resources of the international community."*

While international prosecutions may remain a postwar goal, in the short to medium term, any legal consequences for the war will continue to play out in domestic courts. Ensuring the rigour and fairness of collaboration and war crimes trials will remain a major priority for a legal system which continues to face a plethora of challenges. Ellis continues:

> *"I think Ukraine's legacy will be partly defined by how well they implement a system that meets international standards of fairness and impartiality."*

IBA's Mark Ellis: pressing for international standards of "fairness and impartiality"

The Russian invasion caught the Ukrainian legal system in a period of great change. Long-needed reforms had begun to root out corruption within the judiciary, and newly established institutions sought to safeguard the system's independence. Like everything in Ukraine, much will depend on the outcome of the war, but for Mark Ellis, there is cause for optimism:

"I've seen this in other conflict zones where the legal system prior to the conflict was continuing to work on reforms and becoming more efficient, and during the conflict there was - by necessity - an acceleration of that, so that you actually come out of it with a stronger system. My sense is that is what will happen in Ukraine."

When Putin thundered that "there is no independent judiciary in Ukraine" and singled out its "corrupt" courts as a pretext for invasion, an upsurge in confidence and support for the legal system would not have been his aim.

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