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## **Ukraine: the intimate geopolitics of evidence gathering in war crime investigation**

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### Abstract

The Russian invasion of Ukraine illustrates the increasingly judicialized nature of international relations and geopolitics. By viewing aspects of the invasion as *illegal* – in particular through the identification of war crimes and crimes against humanity – the international response draws attention to the political geographies of international criminal investigation. Human rights groups, academics, journalists, and open-source forensic investigations have joined forces to collect, evaluate and analyze the violent nature of war crimes. While similar shifts in evidence gathering have been observed in the case of the Bosnia-Herzegovina war and the Assad regime's violence against Syrian citizens, the use of evidence-gathering technologies and evidence-securing institutions in the case of Ukraine is distinctive. In this scholarly intervention we seek to illustrate the intimate geopolitics of evidence gathering by zooming in on two different elements that shape evidential procedures in Ukraine: i) the blurring of civilian/military boundaries; and ii) the challenges of access. By evaluating what is new and what is similar to previous war sites, we suggest that these two areas reflect a geopolitics of evidence gathering, highlighting its global-local intimacies. Both these areas are well positioned to foster new research on the (geo)legal nature of war crimes in political geography and beyond.

### Introduction

The response of external actors to the Russian invasion of Ukraine illustrates what has been identified as the increasingly judicialized nature of international relations (Alter et al., 2019; Oomen, 2005). Human rights groups, academics, journalists, and open-source forensic investigations have joined forces to collect, evaluate, and analyze the violent nature of war crimes. These new tendencies are the intellectual starting point for our intervention, as they are shaping the legal processes seeking justice in Ukraine and may influence how law and criminal investigation operate in the future. Given that the Russian invasion of Ukraine is ongoing as we write this piece, and that the evaluation of war crime evidence remains limited, our analysis around these tendencies is preliminary and meant as the starting point for future research. We would like to share two initial observations to set the scene for our endeavour:

First, while relations between states have always been shaped by rules, it is the extent to which these can be “challenged in court [...] and the diversity of actors that can invoke and influence adjudication processes and outcomes” that are “novel, wide-ranging, and underspecified both theoretically and empirically” (Alter *et al.*, 2019: 449). Critical approaches to geopolitics and international relations have long identified the varying ability of state actors to define violence or security breaches as

“crimes” (Dalby, 2003). But an increasing focus on judicialization, often referred to as legalism by international relations scholars, draws attention to a wide array of acts that become involved in the work of interstate relations. For example, within international judicial processes, the responsibility for the work of international relations at least partially migrates from state actors into legal, intergovernmental, non-governmental, and human rights agencies (Le Billion, 2001; Jeffrey & Jakala, 2014; Gill & Hynes, 2021).

Second, a focus on the judicialized nature of international relations also necessitates attention to the practical, institutional, and embodied mechanisms through which international court processes take place. On the one hand, this orientates attention to the role and availability of *evidence*. Thus, political and legal geographers are beginning to explore the politics and cultures of evidence gathering, focussing, in particular, on the challenges of gathering evidence of international crime (e.g. Faria et al. 2020; Klosterkamp & Reuber, 2017; Jeffrey, 2021) and on the use of new technologies to identify and validate evidence (e.g. Cioffi & Cecannecchia, 2022). On the other hand, it encourages an embodied approach to testimony that recognizes the politics surrounding the assignment of identity labels within judicial processes (for example civilian/victim/combatant). This approach brings into focus the gendered dimensions of defining who is fighting and who is protected, whereby women and children tend to be written out of the combatant narrative to more easily answer the question of who the law is meant to protect (Enloe, 2004; Kinsella, 2006).

Building on our previous work on war crime investigations in Syria (Klosterkamp) and Bosnia-Herzegovina (Jeffrey), we want to point to new tendencies and technicalities of evidence gathering in the Russian-Ukraine context. In doing so, we want to emphasize how evidence gathering – enabled through the use of advanced technologies (e.g. Open-Source Intelligence, or OSINT), media coverage, and human rights organizations on the ground – connect the global and the intimate. Specifically, we explore how physical harms that are experienced by, communicated through, and located within individual bodies are used as testimony in legal proceedings on an international level. This recalls the concept of *intimate geopolitics*, which has sought “to disrupt the customary divisions between global/local, familial/state, and personal/political”, and, in turn, to illustrate how these categories are “mutually constituted, affected, and integrated” (Fluri, 2018: 143).

More than a simple extension of interest to the scale of the body, we are suggesting here that the violent act of war urges us to pay attention to the co-constitution of law and the body both through acts of violence and investigative techniques. Accounts of genocide, from the coining of the term by Raphael Lemkin (1944), have drawn attention to a wider set of relations and possibilities that are killed in an act of violence, especially as mass killing may take place after many years of ‘slow violence’ through legal and political marginalisation. Within these more expansive understandings of genocide, the physical killing of people operates in conjunction

with legal and cultural practices that exclude and erase on the basis of identity (Jeffrey, 2023; Tyner, 2012) and the division of civilian/combatants (Carpenter 2006). This perspective is reflected in feminist political and legal geographical work focussing on the importance of intimate geopolitics of the home (Brickell, 2012), the production of global-intimacies in everyday life (Mountz & Hyndman, 2006; Pratt & Rosner, 2012; Williams & Massaro, 2013), gendered notions of accountability for (war) crime participation and international relations (see Carpenter, 2006; Dowler, 2001; Fluri, 2011; Klosterkamp, 2023a), and different shades of nationalism and nationalist hostility (e.g. Pain, 2009; Christian, Dowler & Cuomo, 2016). We argue that the field of intimate geopolitics has much to offer to a political-geographical analysis of war crimes and the socio-legalities of war crime tribunals.

### **Toward Intimate Geopolitics of Evidence Gathering in War Crime Investigation**

Intimacy is not, of course, a conventional starting point for considering the complex and plural legal mechanisms that currently coexist in the international response to Russia's invasion of Ukraine. But we think it is a valid starting point to foster debate on evidence gathering, both for conceptual and empirical reasons. Three examples illustrate our argument and serve as the exemplary starting point for our intervention: First, in March 2023 a case was launched at the International Criminal Court (ICC) against Russian President Vladimir Putin and Russian Commissioner for Children's Rights Maria Lvova-Belova for the war crime of unlawful deportation of children. Second, since February 2022, a case has been launched against Russia at the International Court of Justice (ICJ) for breaches of the 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide. Third, four states - Germany, Sweden, Lithuania and Spain - have brought universal jurisdiction cases against Russia for war crimes and crimes against humanity through their domestic legal institutions (Heller, 2023). Russia is not the only target of international legal action. The Ukrainian military has also been accused of potential war crimes when deploying cluster munitions, in certain instances supplied by the United States, which if used against civilian populations would constitute a war crime (Docherty, 2023).

While in the abstract these actions point to the intersecting geopolitical and geo-legal manoeuvres that seek to uphold the rights of civilians, their success rests upon the production, gathering and storing of potential (war crime) "evidence" that must be reliable enough to be admissible to court proceedings (for more conceptual insights on evidence, see Jeffrey, 2021). These legal processes, in general, are highly distributed both in terms of the actors enrolled in gathering material and testimonial evidence, and the socio-technical infrastructures through which evidence increasingly moves (see, for Syria, Klosterkamp, 2021; also Bennett and Layard, 2015). Herein, the rise of smartphone technology and the increased circulation of images and video through social media has rapidly diversified the sites of evidence gathering. For example, from the outset of the Russian invasion in February 2022, the Euromaidan SOS initiative has sought to provide a portal for the submission of

crowdsourced war crimes evidence whilst simultaneously seeking to harmonize Ukrainian law with international humanitarian norms (Центр Громадянських Свобод (Center for Civil Liberties), 2022). In other conflict settings, civil society initiatives such as these have been complemented by “public outreach” programmes from the courts themselves—practices of communication and education that seek to build trust and public engagement with legal processes (Jeffrey, 2020).

While such practices can be interpreted as a “democratization” of evidence gathering, they also challenge directives to ensure the correct storage of evidence and to prevent tampering, both essential to ensuring its ultimate admissibility. It is for this reason that the UN in 2022 established the Berkeley Protocol, setting guidelines for the collection of open-source information and establishing “international standards for conducting online research into alleged violations of international human rights law and international humanitarian and criminal law [while providing] guidance on methodologies and procedures for gathering, analysing and preserving digital information in a professional, legal and ethical manner” (Human Rights Center, 2022). While the protocol is suggestive of some technical procedures that can assist in ensuring the admissibility and ethical probity of open-source investigations, we want to draw attention to two key areas that may shape the process in Ukraine and that demonstrate the intimate geopolitics of evidence gathering: 1) the blurring of civilian/military boundaries; and 2) the challenges of access. As the war unfolds across, and is interpreted through, different scales, attention needs to be paid to how these new forms of evidence gathering might bring forth more just ways of seeking redress through legal processes. As a scholarly intervention, our contribution offers a preliminary comparative analysis of technical extensions of war crime investigations and new legal trajectories of human-rights claims. Our analysis draws on insights from media coverage, human rights organizations, and ground-level observations. We end by reflecting on what can be gained from this perspective in future political geographical research.

### **Blurring boundaries: Civilian/military involvements.**

Legal claims around human rights abuses often rest on a gendered distinction between military and civilian personnel and sites, where violence deliberately targeting civilians may constitute a war crime (Carpenter, 2006; D’Alessandra & Gillett, 2019). This also applies in part to the Ukraine-Russian war. Hence, one of the explicit features of the Russian invasion of Ukraine has been the blurring of lines between civilian and military personnel on both sides of the conflict (see Wolfe et al., 2022). The role of the Wagner Group, a Russian private military company formerly with close ties to Putin, is a prominent example of this blurring (see Congressional Research Service, 2023). In the early months of the conflict the group recruited prison inmates and used public billboards across Russia to fill its ranks, establishing what it termed “volunteer battalions” (United Nations Office of the High Commissioner of Human Rights, 2023). By using such a strategy, Moscow could

present the deployment in Ukraine as less substantial than a full-fledged invasion, playing to its narrative of the action as a “special military operation”. The Russian use of purportedly non-state militia was also a key feature in the annexation of Crimea in 2014 and was used to distance the state from any potential legal violations committed while asserting its claim over the territory. Of course, the assignment of non-military status does not erase the presence of legal obligations and frameworks. Rather, it creates new forms of legal or para-legal activity. But this raises the question of who can be held (legally) accountable for which actions – a question that has often applied to other war crimes in complicated (geo)legal settings (see Enloe, 2004; Kinsella, 2006). For example, the designation of non-state military agents as “unlawful combatants” during the US-led “war on terror” in Afghanistan and Iraq meant that captured personnel were not offered the protections of the Geneva Conventions in relation to prisoner of war status, and instead were subject to indefinite detention (see Hannah, 2006). The only legal recourse for inmates was to challenge the legality of this detention through habeas corpus petitions in the US courts (see Meltzer, 2008).

What does this have to do with Ukraine and international crime investigations happening on the ground today? Despite the legal significance of targeting civilians, the Geneva Conventions do not draw a clear distinction between military and civilian personnel, focusing instead on the types of activity carried out and the performance of work “of a military character” (United Nations, 1950). It is this focus on the “military character” of certain practices that draws the discussion back to practices of OSINT. While evidence gathering usually takes place with future legal cases in mind, in other circumstances OSINT has been used to assist ongoing military actions. For instance, scholars and activists have begun to examine the outsourcing of targeting activities by state intelligence agencies to civilians, who share geolocated information to the Ukrainian Army via smartphone technology (Global Defence Technology, 2022). While blurring the civilian and military roles, these practices also complicate the territorial dimensions of the conflict, as civilian intelligence gathering is not necessarily located in Ukraine itself. One of the most prominent open-source investigators, @intelcrab, has over 300,000 followers and is based in Alabama, USA.

These rich libraries of “lived experiences” of both civilian and military personnel on the ground and directly affected by, or actively involved in, war battlefields, are proliferating new ways of “knowing” and thus are shaping how war crimes are addressed and potentially criminalized through institutions like the ICC or ICJ. Similar processes have occurred in the Syrian war, where European Foreign Fighters have “reported back” to their families and friends a wide variety of different war scenes via Facebook postings, WhatsApp messages, taped phone calls and YouTube videos. Consequently, all the cruelty inherent in warfare entered the living rooms of those mostly detached from its consequences and losses (Brown, 2014; Gentry & Sjoberg, 2016, Klosterkamp, 2023b). During prosecution and ongoing criminal proceedings, these seemingly private conversations happened to be the

most reliable sources of evidence; many, especially German Foreign Fighters, were sentenced – e.g. for being involved in proliferation and combat missions with terrorist organizations like ISIS – by these digital traces, as there was nothing much else that prosecutors could count on or refer to (Klosterkamp, 2021). Similarly, in war trials, where most witnesses are dispossessed of their homes, or have died as a result of military manoeuvres and battles, German courts have relied on the ways perpetrators have narrated their involvement publicly (on social media) or privately (as personal text messages shared with family and friends) (Klosterkamp, 2023b).

Tying these observations back to the military action in Ukraine, such intimate geopolitical practices of evidence gathering might intensify as the boundaries between military and private involvement become more blurred. At the same time, the existence of social media “evidence influencers” (such as @interlcrab) points to the ways evidence gathering can be monetized through advertising income. While beyond the scope of this research note, this raises the issue of how images and data can be verified when they are so easily faked and manipulated to elicit public interest (discussed most recently in light of the Israel-Gaza war; e.g. *The Washington Post*, 2023; Human Rights Watch, 2023).

### **Access: the challenge of accessing territory**

While open-source data can help to geolocate atrocities and can provide first-hand video or photographic evidence, the practice of gathering witness testimony often requires on-the-ground investigators. In May 2022 the ICC deployed a team of 42 investigators, both international and domestically sourced, to gather testimony of war crimes and other atrocities. This new dimension of collecting evidence in real time is also distinctive vis-à-vis previous war crime proceedings, where (inter-)national investigations only gathered momentum after a war was about to end or when a country was investigating its own (and/or foreign) citizens for involvement in war crimes (for Syria, see Klosterkamp, 2021; for Bosnia-Herzegovina, see Jeffrey & Jakala, 2014). These current happenings push us to reflect on and to rethink the relationship between legal systems, contested territories, accounts of neutrality, and the right to remain in conflict zones.

While the ICC has been invited onto the territory of Ukraine at the request of the Ukrainian government, security cannot be guaranteed in Russian-occupied areas. With over 1,800 Ukrainian towns and villages occupied by Russian forces in early 2023 (The Kyiv Independent, 2023), investigators are severely limited in terms of who they can reach to provide testimony; they are thus likely to miss grave abuses occurring beyond the reach of the investigative gaze, at least at present. It should also be noted that it is under occupation that potential war crimes and human-rights abuses are most prevalent. As mentioned above, the only crime for which any individual has been indicted thus far in the Russia-Ukraine conflict relates to the forced deportation of children under occupation. In these instances, parents who fled occupied areas have provided testimony, recalling how, fearing the violence of

occupation, they allowed Russian forces to move their children to so-called “recreation camps”; as the OSCE has subsequently reported, the children were, in fact, moved into other Russian-occupied areas of Ukraine (Bilkova *et al.*, 2023). In this case, the intimate relations of familial care became the target of Russia’s geopolitical-territorial strategy. Without the public reporting of such events carried out through organizations like OSCE, such intimate accounts of war crime evidence would remain unnoticed and therefore less likely to be the focus of future legal challenge and prosecution.

Navigating access to those who can give testimony has required a complex investigative ecosystem of organizations and individuals working across the territory of Ukraine and beyond. For example, the work of the ICC is supported by a range of non-governmental organizations such as Human Rights Watch, Trial International and the Pilecki Institute (among others), which seek to document events on the ground with a view to challenging impunity. One particularly prominent actor in Ukraine is the Reckoning Project, which integrates practices of investigative journalism with the legal processes of gathering admissible evidence (Reckoning Project, 2023). Led by human rights activist, writer and reporter Janine di Giovanni, this project has sought to train Ukrainian journalists, filmmakers, and human rights researchers in the technical and ethical aspects of investigation while raising public consciousness of war crimes. In the words of di Giovanni “What we do is harness the power of storytelling with legal accountability” (Institute for War and Peace Reporting, 2023). While the training of investigators has inevitably focused on issues of evidential admissibility, it also has involved training in the compassionate and professional treatment of victims from the Dart Centre at the Columbia University School of Journalism. Where providing testimony can be retraumatizing (see Brannon, 1994; also Coddington & Micieli-Voutsinas, 2017; Pain, 2021) this training has sought to instruct investigators on how to do as little harm as possible while reactivating memories of atrocities for the sake of achieving justice.

Intimacy is, again, a significant aspect of these evidence-gathering activities, as the investigators probe crimes that were often enacted within homes with the intention of destroying communities and familial relations. Relationality and lost intimacy are at the heart of many of the testimonies, with those providing testimony driven by a desire not to forget what has happened to family members and friends and to seek legal redress for loved ones. Testimony in these instances operates at two levels, at once highlighting the brutality of the events of the occupation, including summary executions, tortures, and disappearances, and placing this brutality within the context of communities, localized relationships, and livelihoods. One of the most challenging parts of war crime proceedings is to detach these accounts from intimate contexts and to translate them for use in the legal sphere (Jeffrey, 2021). These intimate insights into the daily life within a war zone are hard to grasp. They can seem mundane and irrelevant, or alternatively, they can lead to claims of complicity in the violence (Klosterkamp, 2023b). Access to such testimony is crucial to the success of

legal proceedings, but prosecutors regularly struggle to identify meaningful evidence and to demonstrate its credibility in front of international courts.

The Reckoning Project's account of the Russian occupation of the village of Yahidne, located north-east of Kyiv, is a paradigmatic example of gathering such intimate evidence. This account documents how occupation incarcerated much of the community in the cramped and unsanitary conditions of a school basement (Oslavska, 2023). The Reckoning Project's account carefully outlines the struggle to survive and to find medicine, food, and water; against this, the wilful letting-die by occupying soldiers of those hiding in the basement stands as a clear contravention of international humanitarian law. This account necessitates the question of "who is fighting" (against whom and by what means) and "who is protected" (Kinsella, 2006). These rich depictions of Russian forces targeting civilian bodies and spaces illuminate how war crimes cause ruptures in everyday life and lives. What makes this evidence especially useful for legal proceedings seeking justice on the international level is the wide range of materials collected, the careful archiving of testimony, and the corroboration between different evidential sources. It underscores how international law will require these collaborations between purportedly "non-legal" and legal enterprises in the accomplishment of justice.

### **Closing Remarks**

The increased emphasis on the prosecution of individuals and states for contraventions of international humanitarian law can be seen as one aspect of the increasing judicialization of international relations. These initiatives, so prevalent in the case of the Russian invasion of Ukraine, place particular emphasis on the availability, gathering and storage of evidence for future legal proceedings. We have focused, first, on the challenges posed by the blurriness of civilian/combatant identities and, second, by limitations on access to evidence gathering. There is also the wider task of addressing the manipulation and faking of evidence by a wide array of actors—a task resulting in multilateral attempts, such as the Berkeley Protocol, to establish fixed guidelines for the gathering and storage of evidence. Alongside such frameworks, we would argue there is an important role for feminist political geographers to challenge and trace the production of evidence—a set of processes that fuse intimate bodily violence with wider geopolitical projects. Indeed, it is through detailed engagement with situated practices of evidence gathering that the construction and implications of binaries such as civilian/combatant, home/military target, and real/fake can be probed in sufficient depth.

We believe that methods and modalities of reporting and collecting evidence also have an impact on the ways international criminal law addresses questions of jurisdiction. The field of feminist geopolitics – with its emphasis on material, structural, representational, and performative aspects of gendered identities at interconnected scales (cp. Dowler and Sharp, 2001; Dixon, 2016; Brickell and Cuomo, 2018; Conlon and Hiemstra, 2016) – is well positioned to investigate the

spatial dimensions of evidence and prosecutorial authority. As political geographers, we can draw together the multiple scales at which practices of evidence gathering for legal redress operate: from the intimate practices of gathering testimonies of violence, through to the deliberations taking place within the spaces of international criminal courts.

As the Russian invasion of Ukraine continues, we invite colleagues to join us in working collectively on monitoring and analyzing how the proliferation of new forms of evidence, and new modes of evidence gathering outside of state-led investigations, may allow us to foster justice for war crime victims in timelier and perhaps more just ways. Intimate geopolitics offers a vital lens for such efforts by focusing scholarly attention on modes of violence that simultaneously defy boundaries (e.g. rape, manslaughter, trafficking) and have highly localized effects (the destruction of particular homes and communities and the assault on particular bodies and lives). This intervention has sought both to illuminate these new evidentiary practices while highlighting how feminist political geographers can begin to assess their potential impact. Together these activities seek to contribute to the broader aim of considering the complex interactions between civilian practices of watching, monitoring and evidence gathering with the political and legal quest to end impunity in contexts of violence.

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**Declaration of interests**

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