

STUDIES IN POLITICAL TRANSITION 15

Igor Lyubashenko

# Ukraine's Search for Justice in the Shadow of the Donbas Conflict

Strategic Reforms or Crisis Management?



PETER LANG

Igor Lyubashenko

## Ukraine's Search for Justice in the Shadow of the Donbas Conflict

Should we punish wrongdoers? Should we take care of the ones who suffered from wrongdoings? Although we may believe answers to these questions are obvious, they become less so when similar questions are asked under exceptional circumstances, such as armed conflicts. These answers may decide about the continuation of hostilities or their end. The stakes are high, while we can hardly ignore the need to deal with the consequences of violence generated by a conflict.

This book discusses the dilemmas and challenges associated with the provision of justice in the context of the armed conflict in Ukrainian Donbas in 2014–2019.

### The Author

Igor Lyubashenko is a political scientist who focuses on the problems of political development and transition, but also on approaches of societies to reconciliation in the contexts of large-scale conflicts and violence. He obtained his doctorate from the Faculty of Political Science, at the Maria Curie-Skłodowska University (2010), and his habilitation from the Institute of Political Studies of the Polish Academy of Sciences (2018).



## Ukraine's Search for Justice in the Shadow of the Donbas Conflict

# STUDIES IN POLITICAL TRANSITION

Edited by Klaus Bachmann

Advisory Board:

Aleksandar Fatic, University of Belgrade (Serbia)  
Tom Junes, Human and Social Studies Foundation, Sofia (Bulgaria)  
and Imre Kertész Kolleg Jena (Germany)  
Gerhard Kemp, Stellenbosch University (South Africa)  
Irena Ristić, Institute of Social Sciences, Belgrade (Serbia)  
Lavinia Stan, Nova Scotia University (Canada)

VOLUME 15



**PETER LANG**

Igor Lyubashenko

# Ukraine's Search for Justice in the Shadow of the Donbas Conflict

Strategic Reforms or Crisis Management?



**PETER LANG**

**Bibliographic Information published by the Deutsche Nationalbibliothek**

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data is available in the internet at <http://dnb.d-nb.de>.

**Library of Congress Cataloging-in-Publication Data**

A CIP catalog record for this book has been applied for at the Library of Congress.

Preparation of this book was possible thanks to support from the National Science Centre, Poland, grant no. 2016/23/D/HS5/02600.

This Publication has been financially supported by the University of Social Sciences and Humanities, SWPS in Warsaw.



Printed by CPI books GmbH, Leck

ISSN 2191-3307 · ISBN 978-3-631-81215-0 (Print)  
E-ISBN 978-3-631-82289-0 (E-PDF) · E-ISBN 978-3-631-82290-6 (EPUB)  
E-ISBN 978-3-631-82291-3 (MOBI) · DOI 10.3726/b17089



Open Access: This work is licensed under a Creative Commons Attribution Non Commercial No Derivatives 4.0 unported license. To view a copy of this license, visit <https://creativecommons.org/licenses/by-nc-nd/4.0/>

© Igor Lyubashenko, 2020

Peter Lang – Berlin · Bern · Bruxelles · New York · Oxford · Warszawa · Wien

This publication has been peer reviewed.

[www.peterlang.com](http://www.peterlang.com)

*For Aleksandra*





*“...and generally it never happens that anything goes back to what it used to be.”*

*Mikhail Bulgakov*

*“It is not given to man to know what is right and what is wrong. Men always did and always will err, and in nothing more than in what they consider right and wrong.”*

*Leo Tolstoy*



Igor Lyubashenko

Ukraine's Search for Justice in the Shadow of the Donbas Conflict:

Strategic Reforms or Crisis Management?



# Content

|  |           |
|--|-----------|
| Preface .....  | 15        |
| Acknowledgements .....   | 21        |
| <b>Chapter 1. Theoretical introduction: the essence of transitional justice and peculiarities of its application in the conditions of ongoing armed conflict .....</b> | <b>23</b> |
| 1.1. Explaining the phenomenon of transitional justice .   | 23        |
| 1.2. Transitional justice and armed conflicts: normative expectations .....  | 28        |
| 1.3. Transitional justice and armed conflict: empirical evidence .....   | 35        |
| 1.4. Summary and analytical framework for the research of a previously unstudied case .....  | 40        |
| <b>Chapter 2. Ukrainian politics and the context for transitional justice addressed at the legacies of the Donbas conflict .....</b>                                   | <b>47</b> |
| 2.1. Specificity of the political system .....   | 47        |
| 2.2. The specificity of the Donbas conflict: susceptibility to multiple interpretations ....   | 54        |
| 2.3. Economic constraints .....  | 59        |
| 2.4. Public perception of the Donbas conflict .....  | 61        |
| <b>Chapter 3. Truth-seeking .....</b>  | <b>67</b> |
| 3.1. The significance of truth-seeking for conflict-affected societies .....   | 67        |

|  |            |
|--|------------|
| 3.2. The establishment and evolution of Ukrainian authorities’ “official truth” about the Donbas conflict .....          | 70         |
| Separatism .....   | 74         |
| Terrorism .....  | 75         |
| Aggression .....   | 77         |
| Narratives in the authorities’ public rhetoric .....   | 78         |
| 3.3. The consistency of Ukrainian authorities’ “official truth” about the Donbas conflict .....                          | 86         |
| 3.4. Effects and challenges .....  | 93         |
| <b>Chapter 4. Retributive justice .....</b>  | <b>97</b>  |
| 4.1. Retributive justice in conflict-affected societies: specificity and significance .....                              | 97         |
| 4.2. The evolution of Ukrainian authorities’ approach to punishment for conflict-related crimes                          | 99         |
| Retribution as a tool to deter separatism .....  | 99         |
| Retribution as deterrence from the engagement in anti-governmental warfare .....   | 101        |
| Retribution becomes an object of negotiations .....  | 102        |
| Increasing bids in political negotiations over accountability .....  | 103        |
| Reset .....  | 105        |
| 4.3. The practice of punishment for conflict-related crimes .....  | 107        |
| 4.4. Effects and challenges .....  | 117        |
| <b>Chapter 5. Restorative justice .....</b>  | <b>121</b> |
| 5.1. Restorative justice in conflict-affected societies: specificity and significance .....                              | 121        |
| 5.2. The evolution of Ukrainian authorities’ approach to restorative justice in the context of the Donbas conflict ..... | 123        |

|  |     |
|--|-----|
| Setting up foundations of policy toward IDPs<br>and citizens in non-controlled territories .....       | 123 |
| Restoration of infrastructure in the uncontrolled<br>territories: bargaining and conditionality .....  | 126 |
| Development of controlled territories: attempt<br>to build soft power .....                            | 128 |
| Relegation of responsibility to Russia .....   | 131 |
| 5.3. Effects and challenges .....  | 132 |
| <b>Conclusion</b> .....  | 139 |
| <b>Bibliography</b> .....  | 145 |
| <i>Annex 1. Timeline of events and development of policies<br/>discussed in the book.</i> .....        | 159 |
| <i>Annex 2. Description of database of court decisions used for<br/>the purpose of this book</i> ..... | 163 |
| <i>Annex 3. Contents of Minsk-1 and Minsk-2 protocols</i> .....  | 165 |
| <b>Index of names</b> .....  | 167 |
| <b>Index of subjects</b> .....   | 169 |





## Preface

Should wrongdoers be punished? Should society take care of the ones who suffered from wrongdoings? These questions stem from our intuitive and most basic understanding of justice. Common sense tells us that the majority of us would answer these questions affirmatively without much hesitation. However, it is enough to think about the abundance of existing normative systems – even without going beyond the civilizational circle of the broadly understood West – to quickly learn that, in practice, there are no universally applicable detailed answers to questions like these. In other words, different societies prefer different approaches to the provision of justice in situations when someone breaks the “rules of the game” established in a given society; not to mention the fact that the “rules” themselves often appear to be quite diverse.

Things become even more complicated when similar questions are asked in the context of extreme situations, when breaking the “rules of the game” stops being isolated accidents and turns into a systemic problem. Armed conflicts constitute a perfect – though not the only – example of such situations. When looking at a conflict retrospectively, historians manage to provide us with convincing explanations of pathways that led to the outbreak of violence; thus, they provide a point of reference for prescribing general responsibility. Things become much more challenging when trying to assess individual acts committed in the “fog of war.” Conflicts do not happen between angels and demons, but they engage people with their immanent ability to commit evil.<sup>1</sup> To what extent can a given act of violence – whether committed by “us” or by “them” – be regarded as just? To what extent can a person be responsible for damage? Who should bear the costs of restoration? It is tricky to answer such questions. Furthermore, answering them in one way or another may have a direct impact on the prolongation of hostility or – on the contrary – contribute to establishing peace. In other words, the provision of justice to address large-scale violence

---

1 Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, Penguin Classics (New York: Penguin Books, 2006).

is inevitably associated with high political stakes. These considerations briefly reflect the scope of problems, which are in the center of attention of the concept of transitional justice. The latter contains both normative considerations and attempts to understand regularities associated with the practice of provision of justice in transgressive moments of history.

This book is devoted to the outlined problem of the provision of justice in the context of armed conflict that emerged in the east of Ukraine at the beginning of 2014. Allow me to remark at the very beginning that the notion of transitional justice does not appear often in the literature fully or partially devoted to Ukraine. The reason is simple: unlike many other post-communist states, Ukraine started implementing policies that could be categorized as transitional justice only in the aftermath of the notorious Euromaidan protests; i.e. at the end of 2013 and the beginning of 2014. During the extremely intense and turbulent months that followed, my scientific attention was drawn by these practices, which addressed different types of wrongdoings: the ones committed during the already distant Soviet period, the ones associated with high-level corruption in the post-1991 period, and the ones associated with the mentioned Donbas conflict. As time passed, the latter overshadowed all other “dimensions” of the Ukrainian transitional justice project. This is not a surprise, considering the urgency of Donbas hostilities and their impact on different aspects of social and political life in Ukraine. Policies designed and implemented by Ukrainian authorities with the aim of addressing injustices generated by the Donbas conflict constitute the main subject of research that became the foundation of this book.

When compared to other cases of transitional justice applied to address legacies of armed conflicts, the case under scrutiny in this book is quite peculiar. The reason is the unresolved nature of the Donbas conflict and the ongoing – although low intensity – violence that continued during the whole period covered by the book. As a result, the book essentially discusses the process of transitional justice policies “in-the-making.” It traces relevant decisions of Ukrainian authorities since the beginning of the conflict, which constitutes a “pathway” that inevitably determines the further development of attempts to construct a comprehensive approach to deal with the legacy of the Donbas conflict. The book covers the period from the beginning of the Donbas conflict to the beginning of 2019. Due to coincidence with the

presidency of Petro Poroshenko, this period of time can be regarded as a more or less logical stage of Ukraine's modern history.

When preparing the book, I aimed at achieving two goals. The first one was to provide insight into aspects of the Donbas conflict that are covered by virtually no literature. The second was to expand our understanding of the relationship between transitional justice and conflict resolution processes. Therefore, the book contributes to the better understanding of the dynamics of one of the most intensive armed conflicts happening in Europe since the Yugoslav Wars, but also to the better understanding of peculiarities in the application of transitional justice in conditions of ongoing armed conflicts.

The research underlying the preparation of the book had an exploratory nature. It primarily sought to study the evolution of the approach of Ukraine's authorities to the design and implementation of policies that may be categorized as transitional justice, which address the legacy of the Donbas conflict, and at understanding the conditions that determined this evolution. The research was primarily based on the analysis of official documents that reflect the essence of policies, supplemented by the analysis of available data of various kind, which serve as a means to understand the conditions, in which the policies were developed.

By no means can this book be regarded as a work that covers all possible aspects of the problem under scrutiny. There are at least two important limitations. First, the book does not address another important problem, which is closely related to the "situation in Donbas," and which also constitutes the ground for the application of transitional justice, namely Russian annexation of Crimea. The latter is mentioned only to the extent that is necessary to explain the processes that constitute the primary object of my inquiry. The problem of Crimea deserves a separate analysis, taking into account the significantly different circumstances, namely the undisguised involvement of Russian military to conduct the occupation of the peninsula and its incorporation into the Russian Federation. What is important, I do not claim that the discussed warfare in Donbas is not a part of wider process, which can be called the Ukrainian-Russian conflict.

Second, due to the methodology, the book provides only a limited insight into how people involved in or affected by the conflict experience the political processes under scrutiny, how do emotions that drive the expectations

of justice form, and to what extent are they satisfied. These are important issues that certainly deserve a separate study based on more appropriate methods.

Moreover, we should note that the analysis provided in this book should not be treated as a source of “absolute truth” about the Donbas conflict *per se*. I focus exclusively on a specific type of conflict-related policies, designed and implemented by Ukrainian authorities; I assess them from the perspective of normative principles that are expected to underlie transitional justice in conflict-affected societies. One of the consequences of the conflict’s hybridity – discussed in Chapter 2 – is the existence of multiple interpretations of conflict-related facts in the public sphere. It was not my goal to assess any of these facts and, as a result, the book does not contain claims regarding whether the policies under scrutiny were “correct” from the perspective of their correspondence with any specific way to understand the essence of the conflict. Throughout the book, readers will find references to works that provide better foundations for understanding the origins and the specificity of the Donbas conflict.

At this point, I must make a confession. While doing my best to follow the principles of academic objectivity, I certainly do not want to pretend that the fate of Ukraine and its people is indifferent to me. Instead, I have a strong conviction that good-quality research in this case can have a real practical value, as it may genuinely contribute to the process of reconciliation of Ukraine’s divided society. Nevertheless, I invite all readers to approach this work critically and engage in a debate about the problems covered in the book. The truth is being born in a dispute, they say. In this case, the academic dispute may help solve the biggest conflict Europe has witnessed since the end of the Yugoslav Wars.

Chapter 1 introduces the theoretical aspects of transitional justice and provides the analytical framework for empirical research conducted in the following parts. Chapter 2 provides an overview of scope conditions, within which the process of setting up conflict-related policies that fit into the category of transitional justice was initiated and which to a certain extent determine the evolution of these policies. Scope conditions are understood as relatively permanent circumstances (boundaries), within which relevant decisions are taken by the Ukrainian authorities. Chapters 3–5 present the results of empirical research of the evolution of transitional justice policies

that address the legacy of the Donbas conflict, aimed at achieving normative goals of transitional justice: truth-seeking, retribution, and restoration. The conclusion summarizes findings of the empirical research and also indicates the most important fields for further research.

I definitely recommend everyone to read the book as a whole. It was consciously planned to be brief in form so as to make its reading as easy a task as possible. However, chapters with empirical analysis (3, 4, and 5) are constructed in a way that allows their reading in separation from the larger whole of the book. In particular, they contain brief theoretical parts that are intended to introduce readers into the topic.



# Acknowledgements

This book would not have come into being without the support of many wonderful people.

First and foremost, I would like to express my gratitude to experts with whom I consulted the different aspects of research at various stages of its realization: Stanislav Batryn, Kyiv-based lawyer and human rights activist; Mykola Hnatovskyi and Anton Korynevych from the Institute of International Relations of the Taras Shevchenko National University in Kyiv; Oleh Martynenko and Oleksandr Pavlichenko from the Ukrainian Helsinki Human Rights Union; Oleksii Bida, coordinator of the “Memorial Map” project; Alina Pavliuk from the Ukrainian Legal Advisory Group; Oleksii Melnyk from the Razumkov Centre; Maria Zolkina from the Democratic Initiatives Foundation. Special gratitude goes to professor Klaus Bachmann, who was the first reader of the draft manuscript and whose constructive comments helped me form the book into its final shape.

Moreover, the ideas expressed in this book have been discussed at several international conferences and working seminars. I would like to express my gratitude to the following institutions who provided platforms to make these inspiring discussions possible: the European Consortium for Political Research, the Association for the Study of Nationalities, the University of Lodz, the Institute of Central Europe in Lublin and – last but not least – my home institution: the University of Social Sciences and Humanities in Warsaw.





# Chapter 1. Theoretical introduction: the essence of transitional justice and peculiarities of its application in the conditions of ongoing armed conflict

## 1.1. Explaining the phenomenon of transitional justice

It would not be an exaggeration to state that the notion of justice – even if not called by its name – can be found in the heart any philosophical thought that focuses on the social nature of humans. From a psychological perspective, justice can be regarded as a sort of point of reference, which allows people to assess fairness of different forms of social interactions. The existing research suggests that humans possess an intuitive ability to recognize the harm of others.<sup>2</sup> The innate understanding of fairness can be regarded as one of the main drivers of human motivation.<sup>3</sup> However, the subjective understanding of justice simultaneously provides ample space for conflict: something that is just from the perspective of person A may be perceived as unjust by person B.<sup>4</sup>

Thus, it is no surprise that justice appears to be one of central concepts of political thought. To a significant extent, existing political orders are designed to provide and maintain a certain vision of justice, understood as the basis of a socioeconomic model.<sup>5</sup> However, no institutionalized political order is permanent. When the existing rules regulating functioning of a society break down as a result of different circumstances, the challenge of the provision of justice gains significant weight, and it simultaneously

---

2 Jonathan Haidt, *The Righteous Mind: Why Good People Are Divided by Politics and Religion* (New York: Pantheon Books, 2012).

3 Bernard Weiner, *Social Motivation, Justice, and the Moral Emotions: An Attributional Approach* (Mahwah: Lawrence Erlbaum Associates, 2006).

4 Krystyna Skarżyńska, “Sprawiedliwość jako kryterium oceny systemu ekonomiczno-politycznego,” *Civitas et Lex* 5, no. 1 (2015), pp. 19–30.

5 Young Kim, *Justice: Classical Foundations and Contemporary Debates* (Lanham: Lexington Books, 2018).

becomes much less attainable. This is the central problem addressed by the concept of transitional justice, and this part of the book is devoted to explain the essence of transitional justice.

Along with the acceleration of the process of globalization in the second half of the twentieth century, we observe a dynamic development of international law, but also of attempts to formulate more or less universal principles for dealing with important problems that humanity faces. One of such problems is to address the harms associated with large-scale violence. Obviously, this phenomenon is closely related to the unprecedented atrocities committed during the Second World War. Nuremberg and Tokyo trials became a sort of points of reference for further attempts to formulate a comprehensive and systematic approach to deal with the aftermath of large-scale violence; although they were not the first instances of international post-war trials. Probably the main legacy of these trials is the development of idea that the instances of injustice can be assessed from the perspective of some universal norms and values, which do not have to correspond to local codes. This idea is, in turn, closely related to the concept of human rights, which also rapidly developed after the Second World War. To put it simply, the idea that any human being possesses a certain, clearly defined set of rights, opens the possibility to address any case of their violation, regardless of when and by whom it occurred.

Since the beginning of the 1990s, the discussed efforts to systematize the practice of addressing large-scale violence through judicial means intensified. The reasons for that seem twofold. The first reason was ideological: it was related to the spread of ideas of liberal peacebuilding and the widespread opinion about the ultimate triumph of liberal democracy, which is inseparably connected to the concept of human rights. The second reason was more practical. According to Forsythe, modern attention paid to internationally organized criminal prosecutions was strongly affected by the desire of the West – led by the US Clinton administration – to appear concerned about atrocities in the Balkans and Rwanda, while seeking to avoid a decisive military intervention.<sup>6</sup>

---

6 David P. Forsythe, “Human Rights and Mass Atrocities: Revisiting Transitional Justice,” *International Studies Review* 13, no. 1 (2011), pp. 85–95.

Furthermore, the end of the 1980s and the beginning of the 1990s is the moment of what Huntington describes as “democracy’s third wave.”<sup>7</sup> Like in the case of armed conflict, the fall of autocratic regimes also released the expectations to address their injustices. A much wider scope of mechanisms was in action in these cases that went far beyond trials: vetting, truth commissions, but also such policies as the reconfiguration of public space to ensure the commemoration of victims of past injustices. Once again, the concept of human rights became a helpful tool to avoid spontaneity and act in accordance to some underlying principles.

The concept of transitional justice crystallized in the beginning of the 1990s, encompassing all the abovementioned efforts. Since that time, transitional justice significantly evolved and today should be regarded as a set of policies – often called a toolkit – that includes:

full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (and none at all) and individual prosecutions, reparations, truth seeking, institutional reform, vetting and dismissals, or a combination thereof.<sup>8</sup>

This definition lacks precision. Having in mind that it is not my goal to present all nuances of the constantly ongoing theoretical debate regarding the essence of transitional justice, I propose focusing on the most essential features of the latter, which should help us to better understand the criteria that allow to place a given policy in the set of transitional justice.

Transitional justice is applied in situations that can be called *extraordinary*. These are the situations when a political community is forced to operate outside of an existing institutional framework, which “describe political origins and account for originary and transgressive moments of symbolic and legal innovation and for constitutional creation.”<sup>9</sup> The kind

---

7 Samuel P. Huntington, “The Third Wave: Democratization in the Late 20th Century,” *Journal of Democracy* 2, no. 2 (1991), pp. 384.

8 United Nations, “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies. Report of the Secretary-General,” September 23, 2004.

9 Andreas Kalyvas, *Democracy and the Politics of the Extraordinary: Max Weber, Carl Schmitt, and Hannah Arendt* (Cambridge: Cambridge University Press, 2008), p. 292.

of extraordinary that interests me in this book is the one characterized by the occurrence of *large-scale violence*. One might speak about situations when violence is personal and direct – when it is clear who commits violent acts, and against whom they are targeted – but also about situations when violence is indirect or structural; when it is built into the social structure and shows up as unequal power.<sup>10</sup> In any case, the scale of violence is crucial. Although it is hardly possible to set a clear quantitative threshold that would distinguish large-scale from small-scale violence, an indicator that may prove helpful for defining situations when extraordinary measures like transitional justice are applicable is whether we deal with the case when “crime becomes the rule [and] no justice system can adequately cope with the fallout – least of all one in a state of transition and fragility.”<sup>11</sup>

The provision of justice in such situations inevitably requires *the involvement of politics*. Transitional justice policies are situated on a continuum between purely political and purely legal motivations of their application. The design and implementation of transitional justice policies can be explained on a very general level by the interplay between three types of interests: Wrongdoers want to avoid prosecution, victims want to obtain compensation (not necessarily a material one), and political parties want to utilize the transitional justice policies to increase their share in electorate.<sup>12</sup>

Thus, the concept of transitional justice refers not to a specific *type* of justice but to a specific *procedure* of provision of justice in the situations when resting upon existing rules is impossible or undesirable. The “transitional” element of the concept refers to what was called above the extraordinary situation when – due to some sort of crisis – society undergoes a fundamental shift; a transition between political regimes or a transition from war to peace. To a certain extent, transitional justice can be regarded as a purposeful, politically motivated manipulation of law, aimed at the establishment of extraordinary measures to address the perception of injustice

---

10 Johan Galtung, “Violence, Peace, and Peace Research,” *Journal of Peace Research* 6, no. 3 (1969), pp. 170–71.

11 Mark Freeman, *Necessary Evils: Amnesties and the Search for Justice* (Cambridge: Cambridge University Press, 2009), p. 18.

12 Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge: Cambridge University Press, 2004), pp. 84–89.

existing in a society. Large-scale violence generates the demand for such measures, while politics generate the supply understood as specific design and implementation of relevant policies. The only element missing from the definition so far is moral background, which inevitably accompanies extraordinary policies, as they mark periods of political flux: what justifies the change? what makes us think that the *status quo ante* was unjust? how exactly do we define justice? what makes us construct policies that go beyond the constituted legal reality? Answering these and other similar questions requires a point of reference defined by a certain set of norms and values; something that may be called the *normative anchor* of extraordinary policies. Without such normative anchor, there is a risk of implementing into the set of transitional justice practices like victor's justice.

Due to the context, in which the concept of transitional justice developed – transitions to democracy – theoretical considerations in this field became strongly linked with the literature on democratization. As a result, the general normative expectation prescribed to transitional justice is that it should contribute to building a more liberal political order than the one that led to the occurrence of the extraordinary situation. For example, Ruti Teitel, one of the key theorists of transitional justice, defines it as a concept that „seeks to clarify law's relations to political development in periods of radical flux, as it demonstrates processes that reconstitute societies on a basis of political liberalisation.”<sup>13</sup> I will return to the more specific normative goals of transitional justice applied in conflict-related societies later in this chapter.

To summarize, the notion of transitional justice refers on the one hand to what can be called an objective phenomenon of human longing for justice. On the other hand, it refers to normative concepts whose nature is intersubjective and which are defined by dominating beliefs, norms, and values specific to a society. This normative framework is aimed at channeling the natural pursuit of justice in the aftermath of large-scale violence into some sort of constructive effort.

---

13 Ruti G. Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2002), p. 223.

For obvious reasons, I do not pay attention to peculiarities of the post-authoritarian “type” of transitional justice in this book, focusing only on the post-conflict one. At this moment, let me clarify something. Dealing with justice-related consequences of armed conflict is an object of interest also for another concept: *jus post bellum*. The latter is more legalist, it is focused on formulating principles on how to terminate war and establish a long-lasting peace, with less attention for the circumstances that actually lead to an armed conflict. Taking into account the obvious similarity of both concepts of transitional justice and *jus post bellum*, there appeared voices in favor of establishing closer connections between the two.<sup>14</sup> I propose to regard *jus post bellum* as a subset of transitional justice. Steps that are usually regarded as elements of *jus post bellum* – like formulating principles of just termination of a conflict – are not covered in this book, because during the period under scrutiny there is no ground to talk about the termination of conflict. Moreover, there is a term *post-conflict justice*, which essentially refers to the same phenomenon as transitional justice applied in conditions of transition from war to peace. I will regard these notions as synonyms.

In the following parts of the chapter, I will focus on the main conclusions that can be drawn from existing literature. I will first focus on purely normative deliberations: what transitional justice *should* do? Then, I will analyze available empirical evidence: what transitional justice actually *does*?

## 1.2. Transitional justice and armed conflicts: normative expectations

It goes without saying that any armed conflict generates resentment. In turn, resentment almost inevitably becomes a tool in ongoing politics. Therefore, a significant part of literature consists of normative considerations, which suggest how to design transitional justice mechanisms to deal with these resentments. The traces of this “school” of thinking about transitional justice can be found, among other places, in UN documents referring to the

---

14 Larry May and Elizabeth Edenberg, eds., *Jus Post Bellum and Transitional Justice*, ASIL Studies in International Legal Theory (New York: Cambridge University Press, 2013).

problem of post-conflict justice,<sup>15</sup> thus making it very influential from the perspective of practitioners.

Generally, it would be correct to say that normative considerations in the field of post-conflict transitional justice are essentially about avoiding any forms of what can be called rough revenge and, instead, channeling the emotions generated by injustices before and during the conflict into some form of constructive effort. In other words, the most fundamental and universal normative assumption that accompanies transitional justice policies implemented as a response to an armed conflict is that they should not only address the existing emotional demand but also provide some public good.

Obviously, in the case of an armed conflict, *peace* would be the most important public good. It is not always easy to identify the moment when peace starts. A well-known distinction between negative peace (essentially mere absence of violence) and positive peace (assuming the restoration of relationships in a society)<sup>16</sup> demonstrates this ambiguity: it is hard to identify the moment when negative peace turns into the positive one. Therefore, I find the notion of *reconciliation* a more accurate way to understand the fundamental normative goal of transitional justice. Reconciliation itself is far from being unequivocal, taking into account its different levels (individual, interpersonal, socio-political and institutional) and degrees (“thin” and “thick”).<sup>17</sup> For the sake of clarity, in this work I base on the understanding of reconciliation proposed by Maddison: it is not any sort of idealized state of affairs, when all antagonisms are eliminated, but a dynamic process of transferring a conflict into political field, “a mode of political

---

15 The Office of the United Nations High Commissioner For Human Rights has elaborated a series of “manuals” devoted to specific transitional justice mechanisms: archives, truth commissions, reforms of the justice sector, monitoring legal systems, prosecutions, vetting, reparations, hybrid courts, amnesties and national consultations. These documents are available on the official website of the OHCHR: <https://www.ohchr.org/EN/PublicationsResources/Pages/MethodologicalMaterials3.aspx>.

16 Galtung, “Violence, Peace, and Peace Research,” pp. 167–91.

17 Paul Seils, “The Place of Reconciliation in Transitional Justice,” ICTJ Briefing (International Center for Transitional Justice, June 28, 2017), <https://www.ictj.org/publication/reconciliation-transitional-justice>.

engagement and agonistic struggle,” that tries to balance between short-term stability and long-term aspirations.<sup>18</sup>

Achieving the fundamental goal of reconciliation requires the provision of at least two other public goods that can be regarded as auxiliary normative goals of transitional justice. The first one is *justice* itself. A good way to understand the essence of justice in a straightforward and intuitive way was proposed by Aleksander Solzhenitsyn: the virtue triumphs and the vice is punished.<sup>19</sup> Leaving aside the question of how exactly should justice be granted, the fundamental causal claim that connects justice with peace says the following: achieving positive peace presupposes that leaving injustices that led to hostility with no response at all is not an option; it is hardly possible to build reconciliation on impunity.

Addressing impunity requires obtaining knowledge about what actually happened: what kind or wrongdoings were committed, by whom, and why? As a result, *truth* should be regarded as yet another auxiliary normative goal of post-conflict transitional justice. More specifically, we should speak about *truth-seeking*, having in mind that we write about a process of both revealing facts and their proper interpretation.

Ideally, transitional justice policies should be constructed in such a way that the mentioned normative goals reinforce each other, leading to an ultimate goal of long-lasting positive peace. However logically correct the presented relationships between the notions of peace/reconciliation, justice, and truth may look, they become less clear when relevant policies are applied in practice. In other words, any decision-maker seeking to construct a policy that would fit into the category of transitional justice will almost inevitably face several dilemmas. Let us take a closer look at them.

As the mentioned Solzhenitsyn’s definition of justice suggests, it has two functions. The first one is retributive: it refers to the punishment of vice. The second is restorative, which is closer to providing conditions for virtue to triumph; more specifically, it refers to the restoration of the state of

---

18 Sarah Maddison, *Conflict Transformation and Reconciliation: Multi-Level Challenges in Deeply Divided Societies* (London, New York: Routledge, 2017), p. 13.

19 Aleksandr Solzhenitsyn, *Gulag Archipelago 1918-1956: An Experiment in Literary Investigation* (Harper Perennial Modern Classics, 2007), p. 175.



affairs as it was before the vice entered the game. Even though one regards justice as a necessary prerequisite of peace, it is impossible to definitely settle, which of the mentioned functions is more conducive to achieving the ultimate goal of reconciliation. Trying to eliminate impunity, it is easy to provide “too much” or “not enough” justice. For example, any perspective of punishment can discourage parties of a conflict from constructive negotiations on peace agreement.<sup>20</sup> Therefore, although justice seems to be a necessary condition of positive peace, it may hamper the attempts to put end to violence (achieving negative peace). On the other hand, transitional justice is by no means the only policy that accompanies final stages of an armed conflict, along with the period after its termination. In contemporary post-conflict states, also the disarmament, demobilization, and reintegration (DDR) programs are widely applied, paying special attention to perpetrators of violence. According to Waldorf, both DDR and transitional justice have many contact points and can be easily integrated into a comprehensive post-conflict strategy. Nevertheless, improper balance between them may bear the risk of turning ex-combatants into a privileged group; thus, once again hamper the reconciliation process.<sup>21</sup> Similarly, the provision of compensation for damages – one of the most common way to provide restorative justice – may also induce controversies regarding the fairness of such practices. These problems are at the heart of what is referred to as a justice vs. peace dilemma.

The goal of truth-seeking is also not devoid of contradictions. They may appear in the process of establishing the very procedures of revealing the facts about the violence, their interpretations and their use by political players.<sup>22</sup> Furthermore, some researchers provide convincing arguments for

---

20 It should be noted, however, that modern international criminal law sets a clear threshold for “minimal justice:” international crimes must be punished.

21 Lars Waldorf, “Just Peace? Integrating DDR and Transitional Justice,” in *Transitional Justice and Peacebuilding on the Ground: Victims and Ex-Combatants*, ed. Chandra Lekha Sriram et al. (Milton Park, Abingdon, Oxon; New York: Routledge, 2013), p. 65.

22 Janine Natalya Clark, “Transitional Justice, Truth and Reconciliation: An Under-Explored Relationship,” *International Criminal Law Review* 11 (2011), pp. 241–61.

the value of forgetting.<sup>23</sup> As a result, we may speak about the existence of justice vs. truth dilemma.

Last but not least, the development of transitional justice as a normative concept has led to what is usually referred to as a transformative turn. Here, the normative assumptions state that the implementation of transitional justice should support such institutions as good governance or the rule of law. These claims are clearly formulated from the positions that could be called liberal in a sense that they support the idea that any transitional policies should result in more inclusive political order that eliminates the possible systemic sources of inequalities of different types, namely problems that led to the outbreak of violence.

Along with normative considerations regarding *what* should be achieved by means of transitional justice, an international normative framework was developed to establish some standards of *how* the mentioned goals should be achieved.

First of all, the already cited report by the UN Secretary-General constitutes an attempt to create a comprehensive set of principles for transitional justice efforts conducted in post-conflict conditions. Being addressed primarily to the UN institutions engaged in conflict resolutions, it is clearly a good reference point for decision-makers responsible for formulating transitional justice policies in UN member states. Three issues are worth special attention here. First and foremost, the restoration of and respect for the rule of law should be regarded as the guiding principle of transitional justice policies. Second, any peace agreement should

reject any endorsement of amnesty for genocide, war crimes, or crimes against humanity, including those relating to ethnic, gender and sexually based international crimes, ensure that no such amnesty previously granted is a bar to prosecution before any United Nations-created or assisted court.<sup>24</sup>

Last but not least, respect for the rule of law is hardly possible without appropriate quality of procedures. Peace agreements should

---

23 David Rieff, *In Praise of Forgetting: Historical Memory and Its Ironies* (New Haven: Yale University Press, 2016).

24 United Nations, "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies. Report of the Secretary-General." para. 64(c)

require that all judicial processes, courts and prosecutions are credible, fair, consistent with established international standards for the independence and impartiality of the judiciary, the effectiveness, impartiality and fairness of prosecutors and the integrity of the judicial process.<sup>25</sup>

In 2015, the European Union (EU) adopted the Policy Framework on Support to Transitional Justice as part of the implementation of the EU Action Plan on Human Rights and Democracy 2015–2019. This document primarily focuses on post-conflict situations; it goes in line with the abovementioned UN approach to transitional justice and does not formulate any fundamentally different principles. The goal here is to formulate more concrete steps that the EU can take to engage in post-conflict situations.<sup>26</sup>

Neither the UN nor the EU normative frameworks for post-conflict transitional justice contain a concrete prescription, a catalogue of “dos and don’ts” – except from clear opposition to amnesty for international crimes, including in the context of peace negotiations – or an explanation how to construct policy to address a specific situation. On the contrary, both frameworks encourage eschewing one-size-fits-all approaches and, instead, favor taking into account the specificity of a context, underline the need to reform national criminal law to ensure that it complies with international law, and particularly support the functioning of the International Criminal Court (ICC). Therefore, the mentioned documents are far from being binding obligations for any government on how to construct transitional justice policies. They leave a significant field for political maneuvering, thus setting very wide and not always unequivocal boundaries for what may be regarded by the international community as acceptable. Nevertheless, one should assume that it is in the best interest of any decision-maker willing to secure a political support of the international community at least not to ignore the principles mentioned above.

In the European context, separate attention should be given to the European Court of Human Rights (ECHR) case law, which constitutes

---

25 United Nations, “The Rule of Law,” para. 64(e)

26 European Union, “The EU’s Policy Framework on Support to Transitional Justice,” 2015, [http://eeas.europa.eu/archives/docs/top\\_stories/pdf/the\\_eus\\_policy\\_framework\\_on\\_support\\_to\\_transitional\\_justice.pdf](http://eeas.europa.eu/archives/docs/top_stories/pdf/the_eus_policy_framework_on_support_to_transitional_justice.pdf).

much “harder” normative framework for post-conflict transitional justice; taking into account that the ECHR’s decisions are obligatory for members of the Council of Europe and therefore may directly impact the design of policies in countries subject to its jurisdiction. Obviously, in this case the impact on transitional justice is limited to the extent, in which relevant policies may affect the rights guaranteed by the European Convention on Human Rights. Basing on Brems’ research of ECHR<sup>27</sup> verdicts in cases that referred to the practice of transitional justice, states have the following obligations: (1) perpetrators of terror and violent repressions must be prosecuted; (2) room must be left for free debate about the past (the freedom of expression to seek historical truth); (3) no amnesty must be granted for perpetrators of human rights violations. A significant number of ECHR verdicts may also have limited utility in terms of setting up guidelines for dealing with the aftermath of the Donbas conflict, as they are more applicable for cases of post-authoritarian – especially post-communist – transitional justice. At least two types of normative expectations can be mentioned in this category: (1) the state is expected to provide restitution or compensation for the lost property, although not at all cost; (2) some restrictions of political freedoms (i.e. vetting) is acceptable, however in such case the state must ensure that the people affected enjoy all procedural guarantees under the Convention.

Summing up, transitional justice has become a permanent element of widely understood conflict resolution and peacebuilding strategies. Policies that fit into this category may be implemented on very different stages of transition from war to peace. Much is expected from the very fact of their implementation – not only that they serve as “moderators” among potentially contradictory goals of peace, justice, and truth but also that they should help transform the political order of the state in order to eliminate possible sources of new conflicts. Such a huge scope of expectations opens the risk of leading to the domination of “faith-based” policy prescription, which are not based on robust empirical evidence that retributive (or any other) justice actually has an impact on the dynamics of the conflict. In the

---

27 Eva Brems, “Transitional Justice in the Case Law of the European Court of Human Rights,” *International Journal of Transitional Justice* 5, no. 2 (2011), pp. 282–303.

following part, I will review the available empirical evidence of what transitional justice can actually do in post-conflict environments.

### 1.3. Transitional justice and armed conflict: empirical evidence

There are several types of research that provide empirical evidence for how the application of transitional justice can influence the dynamics of conflict and post-conflict situations.

First and foremost, there are several positions based on quantitative methods. The most outstanding among them is the attempt to create a comprehensive analysis of different factors that impact the efficacy of transitional justice in a multitude of different circumstances by Olsen, Payne, and Reiter.<sup>28</sup> Their study focuses primarily on transitional justice applied in post-authoritarian contexts, although it contains several conclusions that may be also relevant for post-conflict situations. The most important conclusion is probably the one that – despite expectedly greater constraints put on post-conflict states compared to post-authoritarian states – the probability of the use of transitional justice is similarly high in both contexts.<sup>29</sup> Furthermore, international involvement – primarily UN peacekeeping – increases the likelihood that country leaders will apply some mechanisms of accountability.<sup>30</sup> Eventually, the authors summarize that it is hardly possible to clearly state which elements of transitional justice “toolkit” may appear the most efficient in terms of achieving policy goals. Instead, one should think in terms of balance among legal imperatives, public safety, and pragmatic considerations.<sup>31</sup>

Binningsbo et al. worked on a different dataset with the aim to establish the links between transitional justice and conflict resolution.<sup>32</sup> The results of

---

28 Tricia D. Olsen, Leigh A. Payne, and Andrew G. Reiter, *Transitional Justice in Balance. Comparing Processes, Weighing Efficacy* (Washington: United States Institute of Peace, 2010).

29 Olsen, Payne, Reiter, *Transitional Justice*, p. 129.

30 Olsen, Payne, Reiter, *Transitional Justice*, p. 129.

31 Olsen, Payne, Reiter, *Transitional Justice*, p. 154.

32 Helga Malmin Binningsbø et al., “Armed Conflict and Post-Conflict Justice, 1946–2006,” *Journal of Peace Research* 49, no. 5 (2012), pp. 731–40.

this research suggest that some forms of accountability are generally more probable in the case of conflicts over the government control than in the case of territorial conflicts. Moreover, civil wars lead to more amnesties than other types of conflict, which may indicate that those in power after civil wars often forgo accountability processes to secure conflict termination.<sup>33</sup> Statistics provide further evidence that bargaining elites are willing to make concessions for settlement. As a result, amnesties and restorative forms of justice occur more frequently in cases when there is no clear resolution of the conflict.<sup>34</sup> In other words, these data show how the peace vs. justice dilemma is usually solved in different circumstances.

Rothe and Maggard conducted another quantitative research focusing exclusively on conflicts in Africa. The main conclusion in this case is that involvement of the UN or international NGOs enhance the probability of some form of post-conflict justice to be applied.<sup>35</sup>

The feature that links all such studies is that they provide evidence essentially reflecting the correlation between different types of conflicts and transitional justice mechanisms applied in their aftermath; between specific transitional justice mechanisms applied and the effect understood as long-lasting sustainable peace; between the involvement (or its lack) of different external and internal actors and the very fact of application of any type of transitional justice. However, as Sriram underlines, such findings usually do not show causation,<sup>36</sup> which often remains a matter of authorial interpretation. In particular, this refers to the expected transformative effects of transitional justice: there is no unequivocal empirical evidence to prove that the implementation of transitional justice inevitably reinforces democratic institutions. The causal connection may as well go

---

33 Binningsbø et al., "Armed Conflict," p. 737.

34 Binningsbø et al., "Armed Conflict," p. 738.

35 Dawn L. Rothe and Scott Maggard, "Factors That Impede or Facilitate Post-Conflict Justice Mechanisms?", *International Criminal Law Review* 12, no. 2 (2012), pp. 193–217.

36 Chandra Lekha Sriram, "Beyond Transitional Justice: Peace, Governance, and Rule of Law," *International Studies Review* 19, no. 1 (2017), pp. 53–69.

in the other direction: the implementation of transitional justice may be dependent on institutional preconditions.<sup>37</sup>

On the other hand, there is a number of case studies, which provide much deeper insights, explain nuances of complex relations between different goals of transitional justice. For example, one can find good quality arguments supporting the claim that institutions associated with retributive forms of justice (tribunals) may have a positive impact on the restoration of post-conflict societies; suffice to mention the cases of Rwanda and Sierra Leone.<sup>38</sup> Moreover, there are convincing arguments about the limitations of restorative forms of justice; basing on the case of South Africa's Truth and Reconciliation Commission.<sup>39</sup>

The examples of South Africa and former Yugoslavia help Clark explain the ambiguous relationship between truth-seeking and reconciliation. Her main conclusion is that truth as such is not enough for reconciliation and that truth should rather be thought of as an element of a more comprehensive strategy.<sup>40</sup> Somehow similar conclusions emerge from the analysis that puts the idea of reconciliation under scrutiny:

mechanisms aiming at accountability do not automatically pave the road to reconciliation, conflict transformation and a stable peace.... post-war societies need a combination of approaches aiming at legal justice/accountability, truth recovery ..., compensation for victims, institutional reform ..., and restoration of trust in order to support relationship-building and healing.<sup>41</sup>

---

37 Lars Waldorf, "Institutional Gardening in Unsettled Times: Transitional Justice and Institutional Contexts," in *Justice Mosaics. How Context Shapes Transitional Justice in Fractured Society*, ed. Roger Duthie and Paul Seils (New York: International Center for Transitional Justice, 2017), [https://www.ictj.org/sites/default/files/ICTJ\\_Book\\_JusticeMosaics\\_2017.pdf](https://www.ictj.org/sites/default/files/ICTJ_Book_JusticeMosaics_2017.pdf).

38 Mba Chidi Nmaju, "The Role of Judicial Institutions in the Restoration of Post-Conflict Societies: The Cases of Rwanda and Sierra Leone," *Journal of Conflict and Security Law* 16, no. 2 (2011), pp. 357–84.

39 Cody Corliss, "Truth Commissions and the Limits of Restorative Justice: Lessons Learned in South Africa's Cradock Four Case," *Michigan State International Law Review* 21, no. 2 (2013), pp. 273–78.

40 Clark, "Transitional Justice, Truth and Reconciliation."

41 Martina Fischer, "Transitional Justice and Reconciliation: Theory and Practice," in *Advancing Conflict Transformation*, ed. Beatrix Austin et al., The Berghof Handbook 2 (Michigan: Barbara Budrich Publishers, 2011), p. 422.

The common problem of such empirical studies is that their conclusions – however important – are hardly generalizable. Each conflict has its own dynamics, defined by specific circumstances like underlying causes or engaged parties; there are no transitional justice mechanisms of the same type (trials, truth commissions etc.) that are perfectly comparable, due to different legal and political circumstances in which they are implemented. Taking all these doubts into account, the most recent transitional justice literature tends to move away from formulating universal law-like rules, but rather regard application of transitional justice as an element of a much larger puzzle of policies, which are in turn constrained by interests, values, and resources of parties directly or indirectly engaged in the conflict. Post-conflict transitional justice is now understood as a policy that not only combats impunity and seeks reconciliation but also addresses the conditions that made such interventions necessary. As McAuliffe argues, to analyze such post-conflict justice comprehensively one should take into account the agency of all involved actors within the framework of a complex network of factors that impact their actions and perceptions of reality: state functionality, domestic politics, economics, and specific post-conflict variables.<sup>42</sup>

Among the specific post-conflict variables, we should pay special attention to the very process of peace negotiations that may eventually lead to the resolution of a conflict; this issue is usually omitted in normative considerations mentioned in the previous part. Some researchers underline that power-sharing agreements – one of the most common modalities of ending armed conflicts in the contemporary world – constitute a contradiction of the very idea of transitional justice.<sup>43</sup> Power-sharing agreements are by definition about concessions in terms of security, territory, politics, and economics. Such concessions may hamper the interplay between the demand and supply of accountability mechanisms which, as mentioned above, constitute the main driving force of transitional justice policies. This

---

42 Pádraig McAuliffe, *Transformative Transitional Justice and the Malleability of Post-Conflict States* (Cheltenham, Northampton: Edward Elgar Publishing, 2017).

43 Stef Vandeginste and Chandra Lekha Sriram, “Power Sharing and Transitional Justice: A Clash of Paradigms?”, *Global Governance* 17, no. 4 (2011), pp. 489–505.



problem has much in common with the described peace vs. justice dilemma. Obviously, it is hard, if possible at all, to provide any kind of universal solution to this dilemma.

However, if we primarily regard transitional justice as an outcome of the interplay of forces of political demand and supply, a different perspective opens. Focusing on the very process of peace negotiations, which eventually lead to some form of power sharing, the results of comparative research suggest that the durability of peace agreements depends to a much bigger extent on the quality of negotiation process. What matters in particular is the equality of the sides of the conflict, understood as nondiscriminatory treatment and equal opportunities of all interested groups to participate in negotiations. Scholars explain this effect by the trust established between the belligerents.<sup>44</sup> Later research confirmed the importance of the quality of negotiations for the durability of peace.<sup>45</sup> From the perspective of the topic of this book, these findings suggest that the more forward-looking the solution of the conflict – including provisions on transitional justice – the more plausible the durable agreement. In other words, the research suggests that too much focus on the past may be harmful from the perspective of the goal of peace. Moreover, we can hypothesize that building trust among former enemies may have an impact on the demand for some form of accountability. From this perspective, power sharing negotiations should not be regarded as an obstacle to transitional justice but as one of the factors that finds its reflection in both the demand and supply of transitional justice.

Therefore, when speaking about links between justice and peace, we should focus not only on the outcome of the final agreement or some form of resolution that puts an end to a conflict. We should also take into account the process of negotiations. Achieving the goal of peace is not influenced only by whether the variable of justice is “imprinted” in the final agreement, putting the conflict to an end, but also by how it is achieved.

---

44 Cecilia Albin and Daniel Druckman, “Equality Matters: Negotiating an End to Civil Wars,” *Journal of Conflict Resolution* 56, no. 2 (2012), pp. 155–82.

45 Lynn Wagner and Daniel Druckman, “Drivers of Durable Peace: The Role of Justice in Negotiating Civil War Termination,” *Group Decision and Negotiation* 26, no. 1 (2017), pp. 45–67.

Summing up, existing empirical research obviously proves that transitional justice policies became an important part of contemporary political reality. Extensive datasets present the abundance and differentiation of practices that fit into the discussed category. On the other hand, the same datasets present similar abundance of conclusions that sometimes go in different directions. As a result, they appear not as helpful in terms of formulating clear hypotheses regarding what transitional justice can help achieve in a given conflict-related context. Thus, for the sake of the following analysis, I agree with ever stronger voices that there is no kind of one-size-fits-all universal approach in the application of transitional justice in post-conflict settings to achieve and sustain the ultimate goal of reconciliation, and thus there can be no one-size-fits-all kind of correct hypotheses. Taking into account the extraordinary – thus highly politicized – nature of transitional justice in general, we may legitimately expect that the implementation of such policies will not remain without impact on the political development of a given state.

#### **1.4. Summary and analytical framework for the research of a previously unstudied case**

Let me summarize the above considerations and explain the most fundamental assumptions underlying the empirical research presented in the following chapters.

Putting aside normative considerations, existing empirical research appears to not be helpful in terms of formulating clear hypotheses for the analysis of a new, previously unexamined case of elaboration of transitional justice policies. The conclusions of quantitative research do demonstrate the impact of different approaches to transitional justice on the quality of the process of reconciliation and are indeed helpful when it comes to the ex-post explanation of effects of some variables in an outcome. However, these conclusions remain very general, as in the mentioned conclusion that UN peacekeeping increases the probability that some form of accountability will be applied in post-conflict situation. Moreover, they do not provide much ground for formulating expectations such as: which elements of “transitional justice toolkit” will be applied in a given post-conflict situation? what will be the answer to peace vs. justice and truth vs. justice dilemmas? will

the application of transitional justice support the peacebuilding process? how will it affect the political development of a society that applies it? On the other hand, more thorough case studies provide a good understanding of peculiarities of specific instances of transitional justice application in societies affected by conflicts but – for obvious reasons – the conclusions from such studies can hardly be generalized.

As mentioned above, the definition of transitional justice is very broad. The only law-like rule that seems to be valid in this field is that if a given society faces the problem of large-scale violence, there will be attempts to deal with the injustices it caused. It is precisely among such attempts that one should seek policies that fit into the category of transitional justice. If we exclude cases that follow the change of political regime and narrow down the field of interest only to instances of post-conflict transitional justice, we will still have to deal with a multitude of conditions, situations, and specific decisions that eventually lead to different modalities of dealing with injustices.

In other words, the supply of transitional justice in practice assumes a variety of different forms, and even seemingly similar transitional justice mechanisms like trials or truth commissions significantly differ from case to case. Thus, they appear in a potentially unlimited number of conditions and conjunctions, which leads to a certain model of transitional justice. As a result, the presence or absence of some conditions that led to, for instance, establishing a truth commission in one case, cannot be regarded as an absolute proof that in different case truth commission will become the main mechanism of transitional justice.

In other words, there are all reasons to regard transitional justice as an essentially complex phenomenon. The notion of complexity in this context is “first and foremost a matter of the number and variety of an item’s constituent elements and of the elaborateness of their interrelational structure, be it organisational or operational.”<sup>46</sup> Looking at the phenomenon under scrutiny through the prism of complexity theory requires regarding it in terms of a system, which has some important features. First of all, transitional

---

46 Nicholas Rescher, *Complexity: A Philosophical Overview*, Science and Technology Studies (New Brunswick: Transaction Publishers, 1998), p. 1.

justice is *dynamic*: complex systems change with time. Furthermore, it is *time-asymmetric*, which means that although a situation in a given moment of time may be the logical consequence of former events, it is hard to predict the conjunction of all states of system's elements and external influence in the future. Moreover, complex systems are *emergent*, which means that the structure of the system is formed by interaction of its components and by the conjunction of external conditions.<sup>47</sup> In social reality, emergency may be significantly explained by the *agency* of elements that are part of a complex system; their ability to learn and adapt in response to interactions with others. A proper way to study complex phenomena is thus trying to understand rules that drive changes of the state of system over time.<sup>48</sup> Last but not least, the functioning of complex systems is characterized by *equifinality*: the existence of different, mutually non-exclusive explanations of the same outcome. These features perfectly fit the above considerations about the phenomenon of transitional justice, which therefore should be regarded as a set of different policies that share basic features, as explained earlier.

While the above elements of complexity theory appear to provide a useful way of looking at transitional justice, they also suggest that a level of conscious caution is needed when analyzing complex phenomena. According to Byrne and Callaghan, "hypotheses in the strict sense have very little place in complexity-informed research and that even models, which are not the same thing as hypotheses ... most usefully emerge in dialogue with data of whatever form as opposed to being tested on data having been fully formed in advance of engagement with that data."<sup>49</sup> In other words, while trying to understand rules governing the evolution of a complex system, one should be careful with formulating any law-like claims predicting the future state of the system.

---

47 Lasse Gerrits and Stefan Verweij, "Critical Realism as a Meta-Framework for Understanding the Relationships between Complexity and Qualitative Comparative Analysis," *Journal of Critical Realism* 12, no. 2 (2013), pp. 169–70.

48 John H. Holland, *Complexity: A Very Short Introduction*, Very Short Introductions (Oxford, New York: Oxford University Press, 2014).

49 David Byrne and Gill Callaghan, *Complexity Theory and the Social Sciences: The State of the Art*, First Edition (New York: Routledge, 2014), p. 201.

The following chapters of the book will present an empirical analysis of transitional justice aimed at dealing with the consequences of the Donbas conflict. How the above theoretical considerations are reflected in my research?

First, I regard political order as a complex social system. An extraordinary situation (conflict) plays the role of the so-called strange attractor<sup>50</sup> that significantly changes the system's development trajectory. From this perspective, transitional justice can be regarded as one of the government reactions, an attempt to steer the system's development dynamics during this extraordinary period of significant change of state and stabilize it to reduce unpredictability; a transit from the extraordinary that destabilized the "old ordinary" to the stable "new ordinary." Thus, from a normative perspective, reconciliation is a desirable outcome, the feature of the "new ordinary" that should be achieved, but whose achievement is by no means automatic due to the problem of emergency.

Second, I focus on relevant steps and decisions taken by the Ukrainian government; regarded as the social agent interested in and able of designing relevant policies in attempts to steer the destabilized political order. The notion of government is used here in a broad sense, as a synonym of state authorities; not merely as the executive branch of power. Both notions are used interchangeably. Obviously, one can argue that government as such can easily be presented as a complex system that consists of interacting agents. Aware of this, I nevertheless assume the existence of a fundamental level in the cohesion of values and interests of actors who constitute a government, and therefore I regard the latter as an entity characterized by agency. Of course, it is a simplification, which is a trade-off for the sake of obtaining a comprehensive picture of policies that fit into the category of transitional justice and their mutual relationships.<sup>51</sup>

Third, I assume rationality of the main agent. In this research, rationality is understood as a quality of an agent that is essentially subjective: this rationality is defined by the function of utility of action as assessed by the agent. Of course, utility may be defined differently by different agents, depending

---

50 Byrne, Callaghan, *Complexity Theory and the Social Sciences*, pp. 26–29.

51 Of course, it would be interesting to conduct a different research that will trace the process of making relevant decisions in the government.

on their values, information possessed, and even the ability to process information. For example, a study of the motivation of German soldiers who fought in the Second World War proved that values and beliefs can perfectly play the role of force that drives an essentially rational behavior.<sup>52</sup>

Thus, the empirical research presented in the following chapters clearly fits into the mentioned category of narrowly focused case studies in the application of transitional justice policies. At the same time, this research is quite original. The peculiarity of the Donbas conflict will be discussed in more detail in Chapter 2; however, there is one feature of it that should be mentioned here. Taking into account the unresolved nature of the Donbas conflict – along with the lack of a clear perspective of its resolution at the time I write this book – the final model of transitional justice designed to deal with its legacy remains unknown. Therefore, the analysis presents what can be called transitional justice *in statu nascendi* or “transitional justice in-the-making.” In other words, I focus on adaptive reactions of a social agent aimed at stabilizing a complex social system stamped out from the state of equilibrium. The evolution of the system as a whole remains largely outside of the scope of my analysis; that is, I will not scrutinize the political development of Ukraine.

To obtain the comprehensive picture, I focus on tracing the evolution of policies designed by the Ukrainian government, which directly or indirectly aim at achieving the specific normative goals prescribed to transitional justice aimed at dealing with the consequences of an armed conflict. The empirical analysis begins with the dissection of context for the application of transitional justice addressed at the effects of the Donbas conflict (Chapter 2). In other words, I look here at relatively constant circumstances, which to a certain extent determine the behavior of the social agent under scrutiny. The analysis of the evolution of relevant policies starts with truth-seeking (Chapter 3), which is supposed to play a fundamental role in creating narratives that may constitute frameworks for providing retributive and restorative aspects of justice, respectively discussed in Chapters 4 and

---

52 Sönke Neitzel et al., *Żołnierze: protokoły walk, zabijania i umierania* (Warszawa: Wydawnictwo Krytyki Politycznej, 2014).

5. Chapters 3, 4, and 5 begin with brief theoretical remarks that provide additional insight into the peculiarities of discussed normative goals.

All in all, the research is inspired by the explain-outcome variant of process tracing: my ambition here is to build a minimally sufficient explanation of the observed outcome. In other words, the research seeks to understand basic principles that explain the “pathways” of development of relevant policies up to a certain moment in time. Mutual relationships between three “policy lineages” – truth-seeking, retributive justice, and restorative justice – are explained in conclusions. At the same time, theory-building can be regarded as a secondary goal.<sup>53</sup> In particular, I hope that the research will produce some conclusions which will be applicable for testing in further comparative studies, and therefore become the basis for more generalizable regularities regarding how the creation process of transitional justice policies determines the eventual modality. Having in mind the mentioned limitations dictated by the complexity-informed research regarding the possibility of prediction, determinism is understood in the following way: the past determines the present and the future in the sense that it limits their possibilities.<sup>54</sup>

---

53 Derek Beach and Rasmus Brun Pedersen, *Process-Tracing Methods: Foundations and Guidelines* (Ann Arbor: University of Michigan Press, 2013), pp. 60–62.

54 Byrne, Callaghan, *Complexity Theory and the Social Sciences*, p. 49.





## Chapter 2. Ukrainian politics and the context for transitional justice addressed at the legacies of the Donbas conflict

### 2.1. Specificity of the political system

Political system of any state sets up the most fundamental “rules of the game” for the policymaking process. The topic of Ukraine’s political system is in itself very wide and, for an obvious reason, I will not discuss it in detail. In this section, I pay attention to its most significant feature, which can be called a dualism between formal and informal institutions. This feature appears to last throughout the numerous developments in the history of independent Ukraine; there are sufficient grounds to regard the institutional dualism as able to exert influence on the shape of extraordinary policies at the center of this analysis.

Let us start with what can be called the “formal side” of Ukraine’s political system. On July 16, 1990, the Verkhovna Rada of the Soviet Socialist Republic of Ukraine (the parliament) adopted the “Declaration of state sovereignty.”<sup>55</sup> The document provides formal grounds for the legal and territorial continuity of the Ukrainian state, as well as the basis for adoption of a new constitution. Ukraine’s independence was eventually declared by the parliament on August 24, 1991.<sup>56</sup> As soon as on September 12, 1991, the law on the legal succession of Ukraine was adopted<sup>57</sup> to regulate the basic principles of the transitional period from one of the former soviet republics to an independent state. According to the document, Ukraine announced itself a legal successor of the rights and obligations under international

---

55 Verkhovna Rada of the Soviet Socialist Republic of Ukraine, “Declaration on state sovereignty of Ukraine,” Pub. L. No. 55-XII (1990), <https://zakon.rada.gov.ua/go/55-12>.

56 Verkhovna Rada of Ukraine, “On declaration of independence of Ukraine,” Pub. L. No. 1427-XII (1991), <https://zakon.rada.gov.ua/go/1427-12>.

57 Verkhovna Rada of Ukraine, “On legal succession of Ukraine,” Pub. L. No. 1543-XII (1991), <https://zakon.rada.gov.ua/go/1543-12>.

treaties of the USSR, which do not contradict the Constitution of Ukraine and its interests. What is even more important from the perspective of this work is that the law confirmed the institutional continuity of the state: the constitution of the Ukrainian SSR remained in force until the adoption of the new constitution. The Verkhovna Rada of the USSR was renamed into the Verkhovna Rada of Ukraine – leaving the deputy composition unchanged – and proclaimed to be the supreme organ of Ukrainian state power. Moreover, state authorities and agencies, public prosecutor's office, courts, and arbitration courts formed on the basis of the Ukrainian SSR constitution remained in force until the establishment of state authorities and agencies, public prosecutor's office, courts, and arbitration courts on the basis of the new constitution.

The new constitution of Ukraine was adopted in 1996,<sup>58</sup> reaffirming democracy, the rule of law, the separation of powers, along with political, economic, and ideological diversity, as fundamental principles upon which the state is based. Ukraine is a unitary state, it acknowledges and guarantees local self-government, but also the autonomy of the Autonomous Republic of Crimea that nevertheless remains an integral part of Ukraine. Furthermore, the constitution proclaims human rights and freedoms as inalienable and inviolable.

According to the 1996 constitution, Ukraine can be characterized as a semi-presidential republic. The one-chamber parliament – the Verkhovna Rada – is the only legislative organ of the state. The executive is divided between the popularly elected president and the government: the Cabinet of Ministers. The president obtains the power to nominate the prime minister and dismiss members of government. The judiciary power is carried out exclusively by the courts. Finally, the constitution established the Constitutional Court of Ukraine, responsible for decisions on the compliance of laws and other legal acts with the constitution, but also for the official interpretation of the constitution.

Since that time, the constitution underwent several changes, all of which essentially referred to the issue of relations between the legislature and the

---

58 Verkhovna Rada of Ukraine, "Constitution of Ukraine," Pub. L. No. 254k/96-BP (1996), [https://zakon.rada.gov.ua/go/254 %D0 %BA/96-%D0 %B2 %D1 %80](https://zakon.rada.gov.ua/go/254%D0%BA/96-%D0%B2%D1%80).

executive. In December 2004, the parliament amended the constitution by weakening the presidential power.<sup>59</sup> The task of nominating the prime minister was transferred to the parliament; the president also lost the power to dismiss the government. However, (s)he has gained the right to dissolve the parliament and call new parliamentary elections if the latter fails to appoint the prime minister. In other words, in 2004 Ukraine essentially became a parliamentary republic. This amendment was closely connected to the developments known as the Orange Revolution.<sup>60</sup>

In 2010, the 2004 amendment was overturned by the Constitutional Court of Ukraine, who considered them unconstitutional.<sup>61</sup> This change of the constitution should be regarded as a part of the process of power consolidation by Ukraine's fourth president, Viktor Yanukovich, and later became the basis for his indictment for the usurpation of power. Yanukovich's presidency ended early in the aftermath of probably the most remarkable event in the country's contemporary history: the mass protests known as Euromaidan.<sup>62</sup> Facing the unprecedented situation that followed the culmination of Euromaidan, the parliament delegitimized the 2010 verdict of the Constitutional Court, thus restoring the version of the constitution introduced in December 2004 and bringing back the parliamentary republic.<sup>63</sup>

---

59 Verkhovna Rada of Ukraine, "On amendments to the constitution of Ukraine," Pub. L. No. 2222-IV (2004), <https://zakon.rada.gov.ua/go/2222-15>.

60 More on this topic, see Anders Åslund and Michael McFaul, eds., *Revolution in Orange: The Origins of Ukraine's Democratic Breakthrough* (Washington: Carnegie Endowment for International Peace, 2006). Andrew Wilson, *Ukraine's Orange Revolution* (New Haven: Yale University Press, 2005).

61 Constitutional Court of Ukraine, "The decision of the Constitutional Court of Ukraine in the case of the constitutional petition of 252 deputies of Ukraine on the compliance with the Constitution of Ukraine (constitutionality) of the Law of Ukraine "On Amendments to the constitution of Ukraine" of December 8, 2004, No. 2222-IV," Pub. L. No. 20-pp/2010 (2010), <https://zakon.rada.gov.ua/go/v020p710-10>.

62 I discuss this issue in more details elsewhere: Igor Lyubashenko, "Euromaidan: From the Students' Protest to Mass Uprising," in *The Maidan Uprising, Separatism and Foreign Intervention: Ukraine's Complex Transition*, ed. Klaus Bachmann and Igor Lyubashenko, Studies in Political Transition, vol. 4 (Frankfurt am Main: Peter Lang Edition, 2014).

63 Verkhovna Rada of Ukraine, "On the text of the Constitution of Ukraine in the wording of June 28, 1996, as amended and supplemented by the Laws of

The above paragraphs briefly present the evolution of the Ukrainian political system as seen from the formal perspective.<sup>64</sup> The institutional structure remained relatively stable and the state proclaimed commitment to broadly understood Western standards of liberal democracy. At the same time, Ukraine's political system faced several attempts to "fine-tune" it for the sake of ongoing political game; these attempts could be regarded as manifestations of the system's "informal side."

In order to understand the "informal side" of Ukraine's political system, we should consider the specificity of the economic policy of the state in the early stages of its development. The *perestroika* policy initiated at the end stage of USSR's existence allowed, among other things, more freedom to managers of state-owned enterprises.<sup>65</sup> Thus, this group of people obtained some experience of acting in a relatively competitive environment; they also had relatively high positions in the social hierarchy. As a result, they predominantly managed to take control over significant parts of the economy, when the already independent Ukraine started the process of privatization. This group gave rise to a specific class of large capitalists who eventually became new powerful stakeholders in the political game, able of forming alliances with the opposition and eventually leading to changes in the ruling elite.<sup>66</sup> This class is widely referred to as oligarchs.<sup>67</sup>

---

Ukraine of December 8, 2004 No. 2222-IV, February 1, 2011 No. 2952-VI, September 19, 2013 No. 586-VII," Pub. L. No. 750-VII (2014), <https://zakon.rada.gov.ua/go/750-18>.

- 64 For more about the specificity of Ukraine's political system, see Andrew Wilson, *The Ukrainians: Unexpected Nation*, 2. ed. with new material (New Haven: Yale University Press, 2002); Andrew Wilson, *Virtual Politics: Faking Democracy in the Post-Soviet World*, 1st ed (New Haven: Yale University Press, 2005); Kataryna Wolczuk, *The Moulding of Ukraine: The Constitutional Politics of State Formation* (Budapest; New York: Central European University Press, 2001).
- 65 Paweł Kowal, "Oligarchy, Tyranny and Revolutions in Ukraine 1991–2014," in *The Maidan Uprising, Separatism and Foreign Intervention: Ukraine's Complex Transition*, ed. Klaus Bachmann and Igor Lyubashenko, Studies in Political Transition, vol. 4 (Frankfurt am Main: Peter Lang Edition, 2014), p. 120.
- 66 Scott Radnitz, "The Color of Money: Privatization, Economic Dispersion, and the Post-Soviet "Revolutions," *Comparative Politics* 42, no. 2 (2010), p. 127.
- 67 It should be clearly noted here that this briefly explained process is by no means a specifically Ukrainian phenomenon. Similar developments could be observed in the majority of post-communist states.

Understanding the role of oligarchs in the political system of Ukraine is crucial. To make the long story short, oligarchs should be regarded as important political actors. They usually do not hold formal positions but use the existing formal institutional structure of the state as a “playground” that provides more or less equal and predictable conditions for all “players” participating in the “game.” According to Matuszak:

Big business not only controls entire sectors of the Ukrainian economy and the electronic mass media—it also has a vast influence within political parties. It is often the case that the overriding goal of a given grouping’s existence is to represent the oligarchs who sponsor it. [...] One may risk stating that it is the interplay of the interests of the oligarchs that is the real mechanism which shapes Ukrainian politics. When giving their support for a given political grouping, representatives of big business are guided by nothing more than their own interests, and they do not identify themselves with the views of the political parties and politicians they are offering financial support to. If the political configuration changes, the oligarchs usually have no problems finding common ground with the new government.<sup>68</sup>

In other words, during the period of independence Ukrainian politics turned primarily into a tool of conducting business: it allowed either preferential access to public resources or the possibility to create favorable regulations.

Such a system is not without positive features. First and foremost, the plurality of existing oligarch clans appeared to be contributing to the pluralism in political life and the media.<sup>69</sup> Moreover, pre-2014 oligarchy is argued to strengthen Ukraine’s position vis-à-vis Russia, because none of the richest Ukrainians was interested in doing business on Russian terms.<sup>70</sup>

Among the most obvious weaknesses of the system one can mention the monopolization of Ukrainian economy, which is in turn one of the causes of the country’s unfavorable investment climate. The mentioned plurality of political actors also (somehow counterintuitively) led to the politicization

---

68 Sławomir Matuszak, *The Oligarchic Democracy: The Influence of Business Groups on Ukrainian Politics* (Warsaw: Centre for Eastern Studies, 2012), p. 5.

69 Matuszak, *The Oligarchic Democracy*.

70 Kowal, “Oligarchy, Tyranny and Revolutions in Ukraine 1991–2014,” p. 133.

of the judiciary; unsure about how long will they manage to stay in politics, incumbents had more incentives to manage the current policy control also by pressuring courts.<sup>71</sup>

The oligarchic system proved to be very resilient to changes. It survived several significant extraordinary moments. The already mentioned Orange Revolution of 2004–2005 led to a reshuffle among the oligarchs without the alteration of the system itself. Viktor Yanukovich's attempts to concentrate power by reversing the 2004 constitutional amendment are interpreted as yet another try to alter the Ukrainian oligarchic system and institute its "Russian variant;" thus, a situation when the government finds a way to dominate the oligarchy and turns it into one of the tools of support. Yanukovich's attempt eventually ended in his removal from the office.<sup>72</sup> The Euromaidan protest was to a great extent driven by the popular demand to at least weaken the "informal side" of Ukraine's political system, defined by the oligarchy. Nevertheless, the described oligarchic system remains a key mechanism that shaped Ukrainian politics and economy in the post-Euromaidan period,<sup>73</sup> which is covered by this study.

Let me summarize the above considerations and explain their relevance for the analysis of transitional justice policies designed to address the legacy of the Donbas conflict. First of all, the institutional structure of the Ukrainian state is formally based on normative acts that clearly define its liberal democratic nature, but also its commitment to the rule of law principle and human rights. However, this structure remains immature due to the existence of its very strong "informal side;" this statement remains true also in the period covered by this book.

The discussed duality of the political system suggests that authorities in reality have a greater scope of freedom when designing different sorts of policies, than it can be deduced from the analysis of the formal "rules of the

---

71 Maria Popova, *Politicized Justice in Emerging Democracies: A Study of Courts in Russia and Ukraine*, (Cambridge: Cambridge University Press, 2014), p. 169.

72 Kowal, "Oligarchy, Tyranny and Revolutions in Ukraine 1991–2014," pp. 132–34.

73 Wojciech Konończuk, *Fundament systemu: starzy i nowi oligarchowie na Ukrainie*, Punkt Widzenia, no. 59 (Warszawa: Ośrodek Studiów Wschodnich im. Marka Karpia, 2016), p. 5.

game” like constitutions or specific laws. In other words, one may say that Ukrainian authorities have a significant experience in operating beyond the existing formal rules, which is also an essential feature of extraordinary politics. However, this sort of traditional greater freedom from legalism does not necessarily lead to a conclusion that it can automatically be used in a constructive way to deal with the previously unknown problem of armed conflict. In particular, a significant part of Ukrainian society has expressed its dissatisfaction with the discussed duality of the political system; which manifested itself in the form of the Orange Revolution and Euromaidan. Therefore, there is an uncertainty about how the society as a whole – and some elements of it in particular – may react to an extraordinary decision.

Finally, the “informal side” of political system should be taken into account when analyzing any political process in Ukraine. This causes an obvious problem, because the informality of the rules can only be traced through their manifestations in political reality, rather than simply read from normative acts. Taking into account that this research project primarily focuses on the evolution of transitional justice policies as available in official documents issued by Ukrainian authorities, the exact explanation of the processes that led to a certain outcome remains outside the scope of this research.<sup>74</sup> In other words, I focus on the visible outcomes of both formal and informal political processes. In this book, I regard two things as certain: (1) the outcome of decision-making processes in the form of official documents may reflect the influence of political actors who formally reside outside of that process; (2) the continuous functioning and development of the specific connections between business and politics led to what may be called the socialization of political class to functioning in such a system. In other words, personal profitability of a given policy or solution should be taken into account as one of the main criteria of its utility in the rational decision-making process (see Chapter 1). In yet other words, the

---

74 This problem is worthwhile but requires a separate research that would base on a different research design. In particular, it would be interesting to trace the actual interplay of formal and informal connections between political actors in the process of creation of specific elements of transitional justice. The results of such research would inevitably show an even narrower picture but would be helpful in the better understanding of mechanisms that led to certain decisions.

past “normal” behavior of political actors who treated politics in business terms may play a role of a filter that limits possible variants of action in new circumstances.

## 2.2. The specificity of the Donbas conflict: susceptibility to multiple interpretations

The armed conflict in the east of Ukraine started to evolve in the aftermath of the mentioned Euromaidan protests that took place at the end of 2013 and the beginning of 2014. The protests ended with the escape of President Yanukovych to Russia on February 22, 2014. Almost immediately, on March 1, the event incited rallies in the cities of Kharkiv, Odesa, Donetsk, Kherson, and Mykolaiv – all situated in the south and east of Ukraine – whose participants openly expressed their disagreement with the change of authorities in Kyiv. It is important to note that the support for Euromaidan was concentrated in the western and central regions of the country. However, this statement should not be regarded as a proof that the ideas and values of Euromaidan were not supported in other regions of Ukraine; although, the support was limited to an extent.<sup>75</sup> Therefore, it was no surprise that the narrative presenting the protests and their outcome as an illegal *coup d'état* gained fertile ground in the east and in the south of the country. I discuss the problem of narratives used to describe the essence of the conflict in more detail in Chapter 3.

Rallies against the post-Euromaidan change of authorities also happened in Crimea. The latter were used by local pro-Russian groups openly supported by the Russian military to organize a referendum on the independence of Crimea on March 16, 2014. Two days later, on March 18, 2014, an agreement was signed in Moscow on the joining of Crimea to the Russian Federation. There is sufficient evidence to regard these events as an act of aggression against Ukraine.<sup>76</sup>

---

75 Democratic Initiatives Foundation, “Dva misiatsi protestiv v Ukraini: shcho dali?”, January 21, 2014, <https://dif.org.ua/article/dva-misyatsi-protestiv-v-ukraini-shcho-dali>.

76 Thomas D. Grant, *Aggression against Ukraine: Territory, Responsibility, and International Law*, (New York: Palgrave Macmillan, 2015).



The events in Donbas generally fit the same pattern. Anti-government meetings were soon complemented with separatist rallies. There were instances of occupation of official buildings throughout the region, accompanied by the proclamation of “people’s authorities.” On May 11, 2014, the “authorities” conducted unconstitutional referendums. According to Ukraine’s constitution, issues of altering the territory of Ukraine are resolved exclusively by an all-Ukrainian referendum. Thus, the referenda provided a dubious basis for the so-called independence of the self-proclaimed “people’s republic” of Donetsk (DNR) and Luhansk (LNR). Although Russia clearly supported the emergence of both putative states, there was no attempts to annex the secessionist territories as it happened in the case of Crimea.

Unlike in the case of Crimea, Ukrainian government decided to use force against the secessionists in Donbas. On April 13, 2014, a counter-terrorist operation (ATO) was authorized to oppose growing centrifugal tendencies. By summer 2014, the conflict escalated to a full-fledged war. Russian forces were documented to be directly engaged in the conflict, although Russian authorities never acknowledged their participation, consequently refusing being regarded as a side in the conflict, instead positioning themselves in the role of a mediator. A more nuanced analysis of preconditions and the evolution of the conflict is available in works by Wilson<sup>77</sup> and Kuzio.<sup>78</sup>

Peace talks regarding the situation in Ukraine began already at the early stages of the conflict’s escalation. On April 17, 2014, representatives of the Ukrainian government, the European Union, the United States of America, and the Russian Federation concluded an agreement in Geneva with the main aim to deescalate growing tensions and providing security. In June 2014, the so-called Normandy Format was created – an informal group of leaders from France, Germany, Russia, and Ukraine – which became the main political platform for consulting the possibilities of finding a resolution of the Donbas conflict. On a more technical level, the Normandy Format is supplemented by the Trilateral Contact Group (TCG), which

---

77 Andrew Wilson, *Ukraine Crisis: What It Means for the West* (New Haven: Yale University Press, 2014).

78 Taras Kuzio, *Putin’s War against Ukraine: Revolution, Nationalism, and Crime*, 2017.

consists of representatives of Ukraine, Russia, and the Organisation for Security and Co-operation in Europe (OSCE). The group drafted the first ceasefire agreement signed on September 5, 2014, in Minsk by the representatives of the OSCE, Ukraine, Russia, and leaders of the self-proclaimed “republics” of DNR and LNR. The second ceasefire agreement was signed on February 12, 2015, following a new wave in the escalation of violence at the beginning of 2015. Below, I will refer to them respectively as Minsk-1 and Minsk-2 protocols. Both documents have a status of political declaration and cannot be regarded as legally binding; neither of them was ratified into the legal system of Ukraine. The texts of both protocols can be found in Annex 3.

The Minsk-2 protocol achieved a relative calm, although not a complete end of violence. Annex 1 presents a schematic timeline of the conflict since its beginning until the end of 2018, including the information about the number of conflict-related casualties and the most important decisions that can be regarded as milestones in the evolution of the conflict.

The whole period of time covered by this book is characterized by constant negotiations and consultations taking place within the framework of both the TCG and the Normandy Format. However, these led to no legally binding agreement that would put an end to the conflict.

Along with the significant number of victims of direct violence, the conflict generated additional problems, whose solution may be interpreted in terms of the provision of or restoration of justice. First, international organizations and NGOs report violations of human rights as a direct or indirect result of warfare, not only by combatants of the “people’s republics,” but also by the Ukrainian government forces.<sup>79</sup> Second, for the first time since independence, Ukraine has faced the problem of internally displaced persons (IDPs), whose number is estimated around 1.4 million people.<sup>80</sup>

---

79 International Federation for Human Rights, “Eastern Ukraine. Civilians Caught in the Crossfire,” October 2015, [https://www.fidh.org/IMG/pdf/eastern\\_ukraine-ld.pdf](https://www.fidh.org/IMG/pdf/eastern_ukraine-ld.pdf).

80 Office of the United Nations High Commissioner for Human Rights, “Report on the Human Rights Situation in Ukraine 16 May to 15 August 2015,” August 15, 2015, <https://www.ohchr.org/Documents/Countries/UA/11thOHCHRreportUkraine.pdf>.

IDPs are reported to face problems in the protection of their social rights.<sup>81</sup> Third, the conflict provided a new context to the process of necessary state reforms, in particular its decentralization, pretty much obvious even before the outbreak of the war. The emergence of separatism further politicized the issue, creating a field of new problems: how to conduct reforms necessary for better socio-economic development – thus providing the basis for socio-economic rights – and simultaneously avoid accusations of unjustified concessions given to the government’s adversaries who question the legitimacy of central authorities?

This briefly presented combination of external aggression and separatism constitutes the most significant feature of the conflict that inevitably has an impact on any policy aimed at dealing with the consequences of such conflict. Justice-related policies are not an exception here. In the Ukrainian public sphere, the notion of *hybridity* was widely used to grasp the essence of the conflict. For example, one of the most well-known Ukrainian political scientist devoted a monograph to this problem, defining hybrid war as a

totality of previously prepared and promptly implemented measures of military, diplomatic, economic, and informational nature, aimed at achieving strategic goals. The main objective of [the hybrid war] is the subordination of interests of one state to the interests of another under conditions of formal preservation of a political order of the victim-state. Following components can be regarded as the basic elements of hybrid warfare: traditional and non-standard threats, terrorism, subversion, and new or nonconventional technologies used to confront the military power of the enemy.<sup>82</sup>

Without any doubt, the Donbas conflict is not the first one to be labelled as hybrid; it would not be an exaggeration to state that any war witnessed by history contained some elements of *hybridity*, as defined by Mahda. It is not the goal of this study to argue for or against the correctness of the use of the term of *hybridity* to explain the essence of the Donbas conflict. Nevertheless, I mention it because the notion draws attention to the important ambiguities that accompany the conflict since the moment of its

---

81 Ukrainian Helsinki Human Rights Union, “Zahubleni v papirtsiakh: dotrymannia sotsialnykh prav vnurishn’o peremishchenykh osib,” 2017, [https://helsinki.org.ua/wp-content/uploads/2018/01/zagubleni\\_ukr.pdf](https://helsinki.org.ua/wp-content/uploads/2018/01/zagubleni_ukr.pdf).

82 Yevhen Mahda, *Hibrydna ahresiya Rosiyi: uroky dlya Yevropy* (Kyiv: Kalamar, 2017), 28.

emergence, and thus constitute a significant element of scope conditions, in which occurs the process of designing and implementation of transitional justice policies by Ukrainian authorities.

In particular, one should pay attention to the existence of local pro-Russian groups in Ukraine, which organized a series of “referenda” on the independence of a certain territory and, finally, openly supported the Russian military when it entered into combat. The “referenda” became the main argument supporting the emergence of the putative states, later either incorporated into the Russian Federation – as in the case of Crimea – or supported by it, as in the case of the DNR and the LNR. In other words, although there is no serious doubt that Russia’s *de facto* aggression against Ukraine became a necessary condition for the emergence of “people’s republics” in the Ukrainian Donbas, and the following outbreak of violence, the existence of some local popular support for the “republics” cannot be denied.

As a consequence, it is possible to provide evidence supporting both claims that the conflict is essentially an interstate armed conflict and claims that it is essentially a non-international armed conflict. Furthermore, favoring any of these claims can be regarded as a political declaration of support for one of the sides of the conflict.

I do not aim to provide a definite solution of this problem. At the moment of writing, some of its aspects are under consideration of international courts (see Chapter 3) and – for the sake of objectivity – it would be wise to rely on their eventual verdicts. What is important from the perspective of this book is that this ambiguity – whether legitimate or not – cannot be ignored in the process of creating a comprehensive model of transitional justice addressing the legacy of the Donbas conflict, which requires us to answer several fundamental questions, such as: What actually happened (truth)? who should bear primary responsibility (justice)? who should reconcile with whom (peace/reconciliation)?

International law seems to have only a limited potential to find satisfactory answers to these and similar questions. For example, Ukraine and Russia are parties to Geneva conventions and therefore are obliged to apply international humanitarian law. From the perspective of the convention, the existence of an armed conflict does not depend on the fact of recognition of its existence by the states but emerges from the very fact of armed

confrontation. Thus, the very existence of an armed conflict in Donbas can be regarded as a legal fact. However, while the international humanitarian law sets up the standards of behavior during an armed conflict, it does not provide any reference point to establish, who is a party of the conflict. On the other hand, international criminal law provides the basis for investigating the chains of command, and thus to bring to accountability the ones who hold the effective control over the combatants, and through their actions may be responsible for committing serious atrocities.<sup>83</sup> Still, taking into account the problem of potential peace vs. justice and truth vs. justice dilemmas (see Chapter 1), addressing the violent legacy of an armed conflict by legal means does not constitute any guarantee of reconciliation. To put it differently, numerous mentioned uncertainties inevitably require the engagement of essentially political means to solve them.

Summing up, from the perspective of this study's goal, it impossible to ignore the existing uncertainties referring to the legal status of the conflict and its combatants. On the one hand, such uncertainty is unfavorable. On the other hand, it creates space for what can be called political maneuvering when trying to create policies aimed at achieving the normative goals of transitional justice. Of course, such maneuvering in the field devoid of more or less clear legal framework is associated with the risk of criticism for breaking the principle of the rule of law; keeping in mind that – from the normative perspective – transitional justice is expected to reinforce the latter.

### 2.3. Economic constraints

Along with the unprecedented crisis of military nature, 2014 also marks the beginning of a period of significant economic turbulence in Ukraine. This circumstance cannot be omitted in this analysis due to the simple fact that justice costs.

Costs are generated by actions that are aimed at provision of both retributive and restorative functions of justice. The former is probably less evident

---

83 Greg R. Vetter, "Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)," *Yale Journal of International Law* 25 (2000), p. 89.

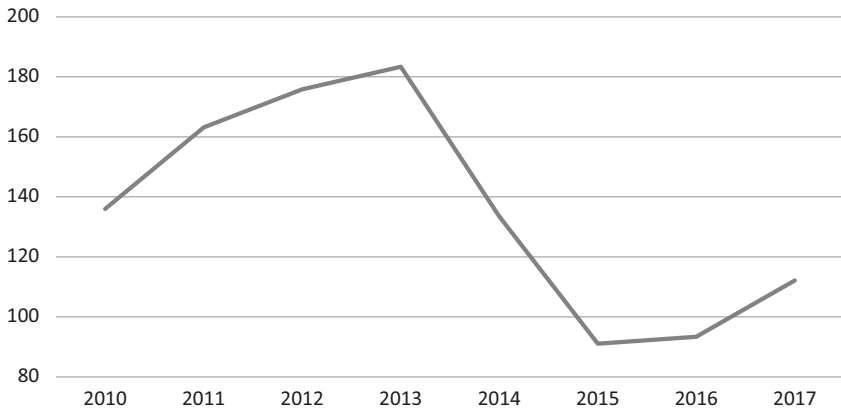


Figure 2.1. GDP of Ukraine (current USD, billion USD)

Source: World Bank.

from the perspective of an average citizen, but the main instruments of retributive justice (investigations and trials) are generally quite expensive. The latter is more obvious, taking into account that material compensations are one of the most obvious tools to restore the situation affected by an extraordinary event. In both cases, there is a need to spend the relevant amount of public money.

Figure 2.1 presents the value of Ukraine's GDP between 2010 and 2017. As a result of economic slowdown, Ukrainian economy shrank by about fifty percent over the first two years of the conflict. In other words, the size of the "cake," which is the source of resources that could be somehow distributed by the state to address injustices generated by the conflict became much smaller.

One can hardly realistically assess the costs needed for investigations and trials, so attempts to calculate the costs needed for restorative needs are more tangible.<sup>84</sup> What is important from the perspective of this study is

---

84 For example: The World Bank, "Ukraine. Recovery and Peacebuilding Assessment. Analysis of Crisis Impacts and Needs in Eastern Ukraine," March 2015, <http://documents.worldbank.org/curated/en/879011468188335375/pdf/96487-REPLACEMENT-FILE-WP-v1-Box391453B-PUBLIC-RPA-A4-Vol1-Eng-Web.pdf>.

that – along with some constraints of legal and political nature mentioned in other sections of this chapter – Ukrainian authorities willing to design and implement transitional justice policies can hardly avoid calculations of economic and financial costs and benefits of possible policies. For example, retributive efforts may lead to quick benefits of moral and emotional nature. On the other hand, policies fitting into the category of restorative justice, despite their more obvious costliness may also be regarded as a sort of investment, which can support development.<sup>85</sup>

## 2.4. Public perception of the Donbas conflict

The Donbas conflict permanently redefined the public perception of most significant problems faced by the Ukrainian state. Basing on available research, we may name its two important features.<sup>86</sup>

First, the majority of Ukrainians tend to believe that things generally go wrong in their country (Figure 2.2). Since the beginning of 2014, the Donbas conflict is clearly considered to be the most important problem that prevents Ukraine from moving “in the right direction” (Table 2.1). These data can be interpreted as follows: Ukrainians predominantly expect steps to be taken towards the resolution of the conflict; this expectation did not weaken as the conflict transformed from the most violent phase in 2014 to the phase of low intensity from the beginning of 2015. Noteworthy, the outbreak of the conflict is regarded as an additional problem, which overshadows what can be called the pre-conflict priority issues such as combating corruption and widely understood steps toward the improvement of economic conditions; still, the conflict did not remove these elements from the view of the public.

---

85 Pablo De Greiff and Roger Duthie, eds., *Transitional Justice and Development. Making Connections* (New York: Social Science Research Council, 2009).

86 All data cited in this part and in the whole book refer to public opinion in Ukraine’s mainland, unless indicated otherwise. The notion of mainland refers to Ukraine’s territories under control of the Ukrainian government, thus they exclude Crimea and territories occupied by the “people’s republics” of DNR and LNR. Our knowledge about the public opinion of inhabitants of the latter is very limited due to physical danger associated with conducting research on site. In the following chapters, I offer references to some available sources.

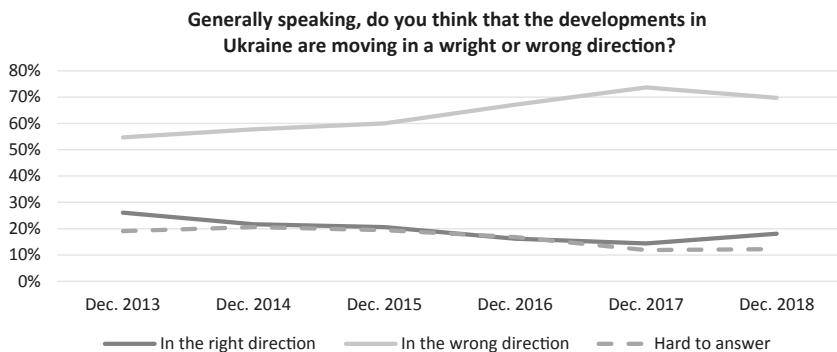


Figure 2.2. Ukrainians' perception of the state of affairs in the country.  
Source: Democratic Initiatives Foundation.

Second, a series of surveys exclusively devoted to the problem of Donbas conflict reveals some stable preferences of Ukrainians regarding how the goal of normalization should be achieved, which does not change significantly along with the development of the conflict. According to the data presented in Figure 2.3, the predominant majority of Ukrainians believe that the conflict should eventually be solved without the use of force and would accept all compromises. Regular public opinion surveys further confirm that only a small minority (around sixteen percent) believes that peace can be achieved only as a result of military victory. Moreover, there is an obvious regional disproportion in the level of acceptance of possible compromises: the farther respondents live from the conflict area the more uncompromising position they tend to have; for those living in the direct vicinity of the self-proclaimed “republics” – and thus those who most likely witnessed or experienced the war in person – the undisputable priority is the end of warfare at all possible costs.<sup>87</sup>

<sup>87</sup> Democratic Initiatives Foundation, “Poshuky shliakhiv vidnovlennia suverenitetu Ukraïny nad okupovanyim Donbasom: stan hromadskoï dumki naperedodni prezydent’skykh vyboriv,” February 13, 2019, <https://dif.org.ua/article/poshuki-shlyakhiv-vidnovlennya-suverenitetu-ukraini-nad-okupovanim-donbasom-stan-gromadskoi-dumki-naperedodni-prezidentskikh-vyboriv>.



Table 2.1. Ukrainians' perception of the main obstacles preventing the country from moving in the right direction.<sup>88</sup>

| Dec. 2014   | Dec. 2015   | Dec. 2016   | Dec. 2017   | Dec. 2018   |           |
|---|---|---|---|---|-----------|
| At the moment, Ukraine faces a lot of difficult problems. But if you talk about the most important ones, which one of them would you highlight as the top priority? | %<br>79,4   | %<br>78,5   | %<br>74,9   | %<br>74,6   | %<br>69,8 |
|   | On what should the authorities focus their effort at the moment?                        | On what should the authorities focus their effort at the moment?                        | What would be the signal that the country is moving "in the right direction?" | If you think that Ukraine does not move in the right direction, then why? |           |
| Normalization of the situation in Donbas, the achievement of peace  | Normalize the situation in Donbas, achieve of peace                                     | Normalize of the situation in Donbas, achieve of peace                                  | The end of war, establishment of peace in the Donbas region                   | War in the east still continues   |           |
| Improvement of the material situation of people; growth of wages and pensions   | 47,9 Stimulate the development of the economy, create favorable conditions for business | 43,3 Stimulate the development of the economy, create favorable conditions for business | 48,2 The prosecution of corrupt officials                                     | 45,6 Prices grow, wages do not  | 50        |

*(continued on next page)*

<sup>88</sup> In different years, questions were formulated differently. Respondents could select not more than five answers. For each year, five most popular answers are presented.

Table 2.1. Continued

| Dec. 2014  | Dec. 2015  | Dec. 2016  | Dec. 2017   | Dec. 2018                                      |
|--|--|--|---|--|
| Ensuring economic growth   | 43,4 Provide social protection for unsecured persons                     | 31,5 Provide social protection for unsecured persons                 | 27,1 General growth of the Ukrainian economy                | 49,8 People have no confidence in their future |
| Combating corruption   | 33,8 Combat corruption and corrupt officials                             | 56,3 Combat corruption and corrupt officials                         | 45,6 Focusing budget spendings primarily on social security | 16,5 Municipal tariffs increase strongly       |
| Strengthening the national currency, fighting inflation, stopping the growth of prices | 29,8 Limit the influence of oligarchs on the authorities and the society | 25,8 Limit the influence of oligarchs on the authorities and society | 19,5 Creation of new jobs                                   | 29,7 The level of corruption remains high      |
|  |  |  |   | 31,7   |

Source: Democratic Initiatives Foundation.

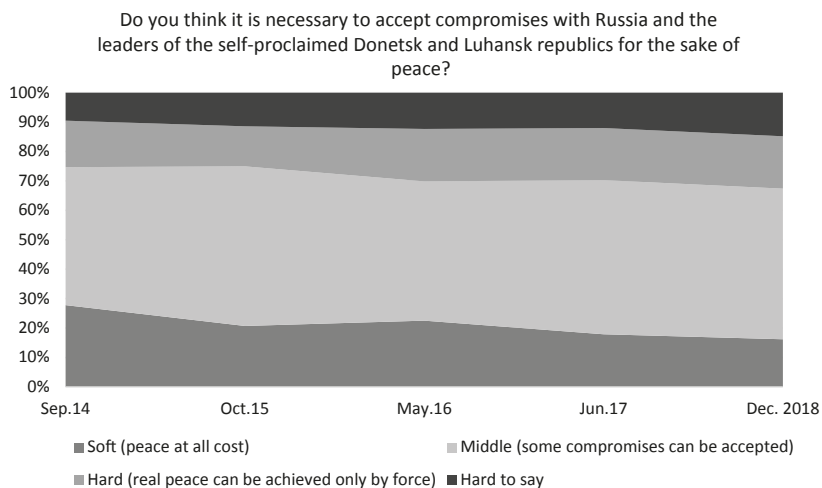


Figure 2.3. Readiness of Ukrainians to accept compromises with Russia and the DNR/LNR.

Source: Democratic Initiatives Foundation.

From the perspective of the objective of this book, these data show the virtual impossibility of Ukrainian decision-makers to avoid engaging in steps towards the resolution of the Donbas conflict; however banal it may sound. At the same time, hawkish solutions are clearly not a preferable option, as the clear majority of constituents opts for following the path of political concessions. This clearly provides decision-makers with a large field for manoeuvring when trying to meet the public expectation of achieving peace by primarily political means. At the same time, this casts a shadow on the goal of justice, whose achievement may be delayed in time and – as a result – lead to some tensions in the Ukrainian society.

\* \* \*

Summing up, any steps by Ukrainian authorities addressed to deal with injustices generated by the Donbas conflict are expected to be constrained by the number of relatively constant conditions: the strong mutual penetration between politics and business; legal and political ambiguities regarding

the very nature of the conflict; limited resources caused by the economic crisis, and the general public expectation to end the conflict by peaceful means. In the following chapters of the book, I will focus on the evolution of policies that fit into the category of transitional justice, as defined above. One of questions that guided the analysis is to what extent did the above-discussed constraints actually impact these policies.

## Chapter 3. Truth-seeking

### 3.1. The significance of truth-seeking for conflict-affected societies

As mentioned in Chapter 1, truth-seeking should be regarded as an “auxiliary” goal of transitional justice in the sense that it may help achieve the ultimate goal of reconciliation. From this perspective, the primary function of truth-seeking is to set a reference point for assessment, which should be regarded as wrongdoing worth punishing or, on the other hand, a harm worth a reparative action. Sometimes, these issues are obvious; in complex social reality and especially in extraordinary situations things may look different.

As a starting point of the analysis I propose to focus on the concept of four different categories of truth proposed by Albie Sachs, former South African Constitutional Court justice: (1) microscopic truth (e.g. positivist truth in science or legal truth in the court of law); (2) logical truth (implicit in a proposition or statement); (3) experiential truth (which is essentially about storytelling); and (4) dialogical truth (“the whole mix of evidential testimonial, experiential, the truths of many people being interpreted in many ways; and it’s never ending”).<sup>89</sup> What we should clearly state is that such approach to understanding truth has nothing to do with relativism. The value of the idea presented by Sachs, an experienced legal practitioner, is that it reflects the extreme complexity close to practical impossibility to grasp the absolute objective truth about a certain event.

How Sachs’s concept of truth can be useful for this analysis? To correct a situation created by some instance of injustice, we should possess a *knowledge* about what actually happened. Thus, the provision of justice depends on establishing facts. This statement can be regarded as a conventional wisdom that raises no significant doubts in what I call here ordinary circumstances. To deal with inevitable minor conflicts and wrongdoings that occur on everyday basis, contemporary societies tend to trust the

---

89 Albie Sachs, “Archives, Truth, and Reconciliation,” *Archivaria* 62, no. 1 (2006), pp. 8–9.

combination of Sachs's microscopic and logical types of truth, as established by proper state institutions, primarily courts, and based on existing institutionalized norms obliging in a given society.

Things may look different under extraordinary circumstances, when the existing institutionalized reality breaks down and societies must deal with the legacy of mass-scale violence. In such situations, additional problems usually arise.

First, there is no consensus among legal theorists regarding the possibility of a universally infallible knowledge.<sup>90</sup> This argument may refer to any judicial or non-judicial process that rests upon searching for evidence. However, the argument may appear to be especially relevant when trying to establish truth understood as knowledge that perfectly reflects the full picture of causes, course, and outcome of an extremely complex phenomenon or process, such as an armed conflict and participation of individuals.

Second, even if one assumes that establishing truth – understood as knowledge – about a certain event or process is within reach, there is no guarantee that beliefs and attitudes to this event will necessarily change.<sup>91</sup> In other words, political divisions that underlie the escalation of violence obviously do not vanish along with the ceasefire; in fact, they may even deepen. As a result, we may deal with different frameworks of interpreting the meaning of events, even when there is certainty about facts.<sup>92</sup>

Therefore, in the context of transitional justice, the understanding of truth should be expanded toward what can be called *acknowledgement*. Indeed, this way of understanding truth is clearly prescribed to the specific element of “transitional justice toolkit:” truth commissions. Truth commissions are expected to “provide a public platform for victims to address the nation directly with their personal stories and can facilitate

---

90 Donald Nicolson, “Taking Epistemology Seriously: “Truth, Reason and Justice” Revisited,” *The International Journal of Evidence & Proof* 17, no. 1 (2013), pp. 1–46.

91 Erin Daly, “Truth Skepticism: An Inquiry into the Value of Truth in Times of Transition,” *International Journal of Transitional Justice* 2, no. 1 (2008), pp. 23–41.

92 Janine Natalya Clark, “Transitional Justice, Truth and Reconciliation: An Under-Explored Relationship,” *International Criminal Law Review* 11 (2011), pp. 241–61.

public debate about how to come to terms with the past,”<sup>93</sup> and can “assist in investigating current and past human rights violations or abuses, thus contributing to public recognition of these violations and of the suffering of victims.”<sup>94</sup>

Thus, acknowledgement is close to Sachs’s concept of experiential truth, which is about “analyzing one’s experience of a phenomenon, in which one’s participated.”<sup>95</sup> Acknowledgement is usually understood as a victim-oriented practice. However, in complex situations, when the dividing line between perpetrators/wrongdoers and victims is not always obvious, this way of understanding acknowledgement suggests the need of at least considering a wide range of stories from those engaged in conflict.

Summing up, we may say that the relation between justice and truth when addressing a wrongdoing strongly depends on broader political circumstances. In what I call here ordinary circumstances, justice “produces” truth – primarily understood as knowledge – by establishing facts and assessing them from the perspective of existing institutionalized reality. In extraordinary circumstances, truth extended towards the acknowledgement of actual experience of those engaged in violence may appear to be the necessary condition for creating an adequate framework that allows for the assessment of facts in a way that contributes to the (re)creation of institutions constituting the backbone of political order. Moreover, mindful of the victims’ perspective, acknowledgement as such may serve the function of restorative justice.<sup>96</sup>

In other words, while judiciary and non-judiciary investigations inevitably “produce” microscopic and logical truths like data or facts, such “production” under extraordinary circumstances should be to some extent sensitive to experiential truths of those engaged in and affected by large-scale

---

93 United Nations, “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies. Report of the Secretary-General,” September 23, 2004.

94 European Union, “The EU’s Policy Framework on Support to Transitional Justice,” 2015, [http://eeas.europa.eu/archives/docs/top\\_stories/pdf/the\\_eus\\_policy\\_framework\\_on\\_support\\_to\\_transitional\\_justice.pdf](http://eeas.europa.eu/archives/docs/top_stories/pdf/the_eus_policy_framework_on_support_to_transitional_justice.pdf).

95 Sachs, “Archives, Truth, and Reconciliation,” p. 8.

96 Margaret Urban Walker, “How Can Truth Telling Count as Reparations?”, in *Historical Justice and Memory*, ed. Klaus Neumann and Janna Thompson, Critical Human Rights (Madison: The University of Wisconsin Press, 2015).

violence. Ultimately, if we understand reconciliation not as a static ideal situation but an open-ended agonistic process that creates space for the peaceful coexistence of “multiple truths, multiple histories,”<sup>97</sup> a bridge is established with Sachs’s idea of dialogical truth.

Basing on the above considerations, under the term of truth-seeking I will understand a process of establishing claims and narratives that are “sufficiently responsive to the experiences of relevant individuals and communities to be counted as truth.”<sup>98</sup> Noteworthy, the term “truth-seeking” is used here deliberately instead of “truth-telling,” a term more commonly used in transitional justice literature and which refers to specific policies primarily aimed at revealing facts about violent events.

### 3.2. The establishment and evolution of Ukrainian authorities’ “official truth” about the Donbas conflict

During the period covered by this book, Ukrainian authorities have not established any sort of formal mechanism that could be categorized as truth-telling understood in transitional justice literature; such as fact-finding missions or truth commissions. Therefore, I focus here on what was defined above as truth-seeking, which is essentially about attempts to frame the potential dialogue between adversaries and aims at making the task of finding a common ground easier.<sup>99</sup> This leads me to begin the analysis with what can be called “official truth.” Under this term I mean the meta-narratives used by Ukrainian authorities as a comprehensive framework for the interpretation of different aspects of the Donbas conflict in general, and relevant individual experiences in particular. It can be partly understood

---

97 Sarah Maddison, *Conflict Transformation and Reconciliation: Multi-Level Challenges in Deeply Divided Societies* (London, New York: Routledge, 2017), p. 208.

98 Cindy Holder, “Truthfulness in Transition: The Value of Insisting on Experiential Adequacy,” in *Jus Post Bellum and Transitional Justice*, ed. Larry May and Elizabeth Edenberg, ASIL Studies in International Legal Theory (New York: Cambridge University Press, 2013), p. 246.

99 Lee Ross, “Perspectives on Disagreement and Dispute Resolution: Lessons from the Lab and the Real World,” in *The Behavioral Foundations of Public Policy*, ed. Eldar Shafir (Princeton: Princeton University Press, 2013).



as similar to Sachs's concept of experiential truth, a "story" of the conflict, however told not by a certain individual but by a collective entity. Obviously, it will present only one "side of equation," simply due to the fact that there has been no genuine dialogue between the adversaries aimed at establishing a common narrative of the conflict.

In order to identify these narratives, I looked at Ukrainian legislation adopted since the beginning of the conflict aimed at addressing the problems it generated. Tracing the emergence of these narratives requires us to move back in time to the period that preceded the outbreak of the Donbas conflict itself, and which follows the dramatic culmination of the Euromaidan protest.

On February 22, 2014, the Verkhovna Rada of Ukraine adopted a series of important resolutions. In particular, the Verkhovna Rada declared President Yanukovich's *de facto* self-removal from office;<sup>100</sup> it restored the parliamentary political regime by annulling the 2010 change of the constitution introduced to reinforce Yanukovich's presidential power;<sup>101</sup> and it accepted political responsibility for the situation in the country,<sup>102</sup> thus opening the way for the formation of an interim government.

These documents are crucial because of their extraordinary character: without any doubt, Ukrainian legislation did not foresee procedures for removing the president from the office, changing the constitution, or forming the interim government. These decisions were dictated by the political necessity to stabilize the situation.

However, the mentioned documents also provided arguments for the opponents of the interim government arguing that these events could be

---

100 Verkhovna Rada of Ukraine, "On self-abolition of the President of Ukraine from the exercise of his constitutional powers and the appointment of early elections of the President of Ukraine," Pub. L. No. 757–VII (2014), <https://zakon.rada.gov.ua/go/757-18>.

101 Verkhovna Rada of Ukraine, On the text of the Constitution of Ukraine in the wording of June 28, 1996, as amended and supplemented by the Laws of Ukraine of December 8, 2004 No. 2222-IV, February 1, 2011 No. 2952-VI, September 19, 2013 No. 586-VII.

102 Verkhovna Rada of Ukraine, "On taking political responsibility for the situation in Ukraine," Pub. L. No. 753–VII (2014), <https://zakon.rada.gov.ua/go/753-18>.

interpreted as an illegal *coup d'état*. So, in Yanukovych's statement of March 1, 2014, in which he asks President Putin to use Russian armed forces to "restore law, peace, stability and protect the population of Ukraine," the mentioned events were characterized as "the illegal capture of power," which led the country on the "verge of civil war."<sup>103</sup> The notion of civil war unleashed by "fascists" who came to power as a result of a *coup d'état* later became a cornerstone of identity policies of the self-proclaimed "people's republics."<sup>104</sup> These were also fundamental for the Russian narrative about the discussed events.<sup>105</sup>

The considerations of Ukrainian government about how to respond to the developing crisis are well reflected in the minutes of the meeting of the National Security and Defense Council of Ukraine (NSDC),<sup>106</sup> which happened on February 28, 2014. The document presents the discussion of events by Ukrainian decision-makers as Russian preparation to war, which could take the form of a full-scale invasion. It also reflects the awareness of decision-makers of the growing threat to the territorial integrity of Ukraine – although the crisis at that moment centered around Crimea – but also the awareness of the weakness of the Ukrainian state. From the perspective of this analysis, the most important idea contained in the document is the need to avoid any steps that could be used by Russia as an argument for invasion and the need to construct policies addressing the threat for

---

103 Censor.NET, "Yanukovych's Letter to Putin with Request to Send Troops to Ukraine: Censor.NET Publishes Historical Document," *Censor.NET*, January 18, 2017, [https://censor.net.ua/en/news/423877/yanukovychs\\_letter\\_to\\_putin\\_with\\_request\\_to\\_send\\_troops\\_to\\_ukraine\\_censornet\\_publishes\\_historical\\_document](https://censor.net.ua/en/news/423877/yanukovychs_letter_to_putin_with_request_to_send_troops_to_ukraine_censornet_publishes_historical_document).

104 Yulia Abibok, "Identity Policy in the Self-Proclaimed Republics in East Ukraine," OSW, June 6, 2018, <https://www.osw.waw.pl/en/publikacje/osw-commentary/2018-06-06/identity-policy-self-proclaimed-republics-east-ukraine-0>.

105 A prominent example of using this argument can be seen in 2015 documentary by Andrey Kondrashov "Krym. Put' na Rodinu" (Crimea. A way back to Motherland). The movie is published on the official YouTube channel of "Rossiya 24" TV channel: <https://youtu.be/t42-71RpRgI>.

106 NSDC is the institution headed by the president of Ukraine, which aims to coordinate and control activities of the executive in the field of national security and defense.

territorial integrity in such a way that would ensure the support of international community.<sup>107</sup>

The manifestation of such deliberate cautiousness could be observed soon. On March 1, 2014, the Russian State Duma allowed for the use of force on Ukrainian territory, to what the Verkhovna Rada responded with an appeal to President Putin to not use this right,<sup>108</sup> along with an appeal to the parliaments of states-guarantors of Ukraine's security and international organizations.<sup>109</sup> The latter document referred to ongoing events as "military actions against Ukraine," thus avoiding the use of more specific terms such as "war" or "aggression."

To a significant extent, this cautious approach explains the virtually non-violent process of Crimea's annexation, where Russian forces faced virtually no resistance from the Ukrainian side. Another profound manifestation is the reluctance of Ukrainian authorities to introduce martial law. The latter could be interpreted as formal confirmation that Ukraine was in the state of war, thus could once again indirectly trigger Russia's intervention on a much larger scale.

All in all, the initial phase of the conflict is characterized by the indecisiveness of the Ukrainian authorities on how to frame the emerging conflict. Ukraine's interim government sought a narrative framework in a responsive way, looking for cautious claims that could not be read as an incentive for further escalation and at the same time not discourage international partners from providing political support.

Along with the development of events, Ukrainian authorities managed to crystallize several narratives that were used to tell a more or less comprehensive story about the Donbass conflict. Let me now discuss them in the chronology of their appearance.

---

107 National Security and Defence Council of Ukraine, "Transcript of the Meeting of the National Security and Defence Council of Ukraine," February 28, 2014, <http://www.rnbo.gov.ua/files/2016/stenogr.pdf>.

108 Verkhovna Rada of Ukraine, "On the Statement of the Verkhovna Rada of Ukraine," Pub. L. No. 844-VII (2014), <https://zakon.rada.gov.ua/go/844-18>.

109 Verkhovna Rada of Ukraine, "On the appeal of the Verkhovna Rada of Ukraine to the parliaments of the states – guarantors of security of Ukraine and international organizations," Pub. L. No. 845-VII (2014), <https://zakon.rada.gov.ua/go/845-18>.

## Separatism

The notion of separatism appeared very early in the discourse that accompanies the analyzed conflict. Along with the mentioned extraordinary decrees that referred to the basic issues of the organization of political life after the culmination of the Euromaidan protest on February 22, 2014, the Verkhovna Rada adopted another decree condemning the manifestations of separatism and other forms of attacks on the national security of Ukraine.<sup>110</sup> Obviously, at that particular moment the document referred first and foremost to developments in Crimea. Moreover, the transcript of the NSDC meeting on February 28, 2014, several times mentions separatism as the fundamental threat to Ukrainian statehood.

However, the notion of separatism never later appeared in any legal act formulating principles of state policy toward the discussed problems. For example, the law establishing the special status of the “people’s republics” adopted on September 16, 2014, after signing the Minsk-1 protocol, refers to these entities as the “certain parts of Donetsk and Luhansk oblasts;” the conflict as such was referred to as “events” and government’s adversaries, the *de facto* separatists, as “participants of the events.”<sup>111</sup> In other words, the law establishing main principles of state policy toward separatist entities used notions devoid of unambiguous political meaning.

On the other hand, the notion of separatism appeared to be very popular in general public discourse. Although this issue is not covered by this research, it would be not an exaggeration to state that the notion of separatism was and continues to be one of the most popular terms used by the Ukrainian media to address the problem of the self-proclaimed “republics” and the parts of Ukrainian society that became adversaries of the government. The notion was also present in the rhetoric of key political figures and parties, which I will consider later.

---

110 Verkhovna Rada of Ukraine, “On preventing the manifestations of separatism and other attacks on the foundations of the national security of Ukraine,” Pub. L. No. 756-VII (2014), <https://zakon.rada.gov.ua/go/756-18>.

111 Verkhovna Rada of Ukraine, “Law on special regime of local self-government in certain districts of Donetsk and Luhansk Oblasts,” Pub. L. No. 1680-VII (2014), <https://zakon.rada.gov.ua/go/1680-18>.

The reason of such split between the use range of the notion of separatism in legal and political domain can be explained as follows. The notion of separatism is too vague and unclear to be used in the process of creating legal foundations for provision of justice. Neither international law nor Ukrainian legislation provide hard ground for treating separatism per se as a wrongdoing. This problem was reflected in the practice of punishing those who are referred to as “separatists:” Ukrainian law enforcement agencies and the judiciary had to develop relevant criminal cases basing on a section of the Criminal Code of Ukraine (CCU) devoted to crimes against state security (see Chapter 4).

When observed from the political perspective, the notion of separatism appears to be quite a convenient tool. It allows for the creation of a simple category containing different problems and thus simplify political communications; suffice to use the term “separatism” or “separatist” to make it clear which set of issues, problems, and persons we refer to. Thus, the notion of separatism became an important element of the “story” of the conflict as told by the Ukrainian government, although it did not strike roots in relevant legislation.

## **Terrorism**

After the annexation of Crimea, the spark of the conflict moved to the eastern region of Donbas. Although protests against the change of authorities in Kyiv occurred in numerous cities of eastern and southern Ukraine as early as on March 1, 2014, events started to develop more quickly at the beginning of April, when separatists declared the sovereignty of the “Donetsk People’s Republic” and the city of Slovyansk was seized by a group of combatants under the command of Russian citizen Igor Girkin (aka Strelkov).

In a response to these events, acting president Oleksandr Turchynov issued a decision to initiate a counter-terrorist operation (ATO) on April 14, 2014,<sup>112</sup> basing on the recommendation of the NSDC issued a day earlier.

---

112 President of Ukraine, “Decree on the Decision of the Council of National Security and Defense of Ukraine of April 13, 2014 “On Urgent Measures to Overcome the Terrorist Threat and Preserve Territorial Integrity of Ukraine,” Pub. L. No. 405/2014 (2014).

On the one hand, this decision was dictated by the obvious need to introduce countermeasures to avoid the repetition of the “Crimean scenario” of Ukrainian state’s de facto withdrawal from secessionist regions. On the other hand, it was dictated by the mentioned considerations regarding the need to avoid any steps that could be used by Russia as a justification for undisguised military intervention. Using force within the legal framework of a counter-terrorist operation was thus decided to be the most optimal way to act.

As a result of this decision, the notion of terrorism was introduced for good into the Ukrainian public debate for the issues of Donbas conflict. More specifically, the government started to call its adversaries terrorists.

Along with positive effects like the possibility to use force without announcing martial law and the rhetorical “joining” of international efforts aimed at fighting international terrorism, the introduction of the terrorism narrative had several important pitfalls. In particular, it introduced serious legal ambiguities regarding the status of fighters and prisoners on both sides of the conflict; it added uncertainty regarding the responsibility to pay compensations to persons affected by warfare; which is a subject I briefly develop in Chapters 4 and 5. Last but not least, the notion of terrorism can hardly become a basis for reconciliation or even a starting point for dialogue between adversaries.

At the beginning of 2018, Ukrainian authorities undertook an attempt to establish as a single legal act the different elements of state policy toward secessionist territories in Donbas, which were often created in an ad hoc manner, which is popularly referred to as the “reintegration law.”<sup>113</sup> Among other changes, the document created a possibility to end the ATO, eventually reorganized as the Joint Forces Operation (JFO) in April 2018. The notion of terrorism was thus officially removed from relevant legislation.

---

113 Verkhovna Rada of Ukraine, “Law on the Peculiarities of the State Policy Aimed at Protecting the State Sovereignty of Ukraine in Temporarily Occupied Territories in the Donetsk and Luhansk Oblasts,” Pub. L. No. 2268-VIII (2018).

## Aggression

The fate of the notion of aggression can be regarded as a mirror reflection of the fate of the notion of separatism. As mentioned above, in the initial phase of the conflict Ukrainian authorities were reluctant to use any notion that could be associated with war.

This approach started to change after the annexation of Crimea. As the first step, notions of occupation and occupied territories were introduced in the law “On ensuring the rights and freedoms of citizens and legal regime in the temporarily occupied territory of Ukraine,” adopted on April 15, 2014. However, it was only in January 2015 when the Verkhovna Rada of Ukraine issued a statement, in which it explicitly states that “Ukraine remains the object of military aggression on the part of the Russian Federation, which is conducted, among other things, through the support and provision of supplies necessary for large-scale terrorist attacks.”<sup>114</sup>

The narrative of aggression was later used in a number of legal acts aimed primarily at introducing sanctions against Russia. Finally, the narrative was reinforced by the adoption of the mentioned “reintegration law,” which explicitly defines the conflict under scrutiny as the result of a crime of aggression committed by the Russian Federation against Ukraine. The reintegration law defines both Crimea and the “people’s republics” in Donbas as temporarily occupied territories under effective control of the Russian Federation.

The notion of aggression differs from the previously discussed notions of separatism and terrorism, primarily because it provides a much more consistent “story” about the conflict. First and foremost, it puts responsibility for violence and injustices primarily on an external enemy; the cause of the conflict is definitely removed outside of the Ukrainian state; whereas separatism could have been interpreted as a response to injustices committed by the

---

114 Verkhovna Rada of Ukraine, “On the appeal of the Verkhovna Rada of Ukraine to the United Nations, the European Parliament, the Parliamentary Assembly of the Council of Europe, the NATO Parliamentary Assembly, the OSCE Parliamentary Assembly, the GUAM Parliamentary Assembly, the national parliaments of the countries of the world on the recognition of the Russian Federation as an aggressor state,” Pub. L. No. 129-VIII (2015), <https://zakon.rada.gov.ua/go/129-19>.

central government. Furthermore, the notion of aggression is well-grounded in legal terms.<sup>115</sup>

### **Narratives in the authorities' public rhetoric**

As the second step of analysis, I looked at how these key narratives appeared in the public rhetoric of key politicians aspiring for or holding important official positions. In this book, I do not conduct a comprehensive analysis of public discourse referring to the problem of Donbas conflict. Instead, I focus on several sources that can be regarded as important channels of communication between the political elites and citizens: (a) programs of political parties and candidates for presidency and (b) the most significant regular speeches of the president. Obviously, political programs are by no means sources of accurate information about politicians' real beliefs or preferences. Especially in Ukrainian context, political programs usually assume the shape of brief broad sketchy slogans, a list of general mottos a politician would like to be associated with, rather than a detailed proposal of actions planned for implementation in an upcoming electoral term. This is exactly the feature of these documents that is useful for my analysis: I regard political programs as sets of simple narratives, which are used by politicians to communicate with constituents at the moments when "authorities" are being shaped: elections. These narratives reflect the attempts to adjust political "supply" (proposals by candidates willing to be elected to the office) to political "demand" (expectations of the electorate).

However, political programs present only a static picture, clearly visible at moments of elections. To add some dynamism, I added speeches of the president to the analysis. In the Ukrainian political system, the president has a special position: he has significant power in forming the Cabinet of Ministers, thus the government in a narrow sense. President Poroshenko in particular appeared to have an especially strong position due to support in the parliament. These statements should not be understood as arguments

---

115 Thomas D. Grant, *Aggression against Ukraine: Territory, Responsibility, and International Law*, (New York: Palgrave Macmillan, 2015).



that in the period of time covered by the analysis Ukraine faced the rule of one man. Nevertheless, the position of the president was strong enough to regard him as one of the key decision-makers able of having a significant impact on the general political course of an entity that I call here “Ukrainian authorities.”

Having in mind the goal of my research, I analyzed the mentioned documents through the prism of the following questions:

1. Are Donbas conflict-related issues underlined as priorities?
2. How is the essence of the conflict presented?
3. Who are the wrongdoers/adversaries of Ukrainian state?
4. Who are the victims of the conflict?
5. Are there any proposals regarding post-conflict justice?

On May 25, 2014, early presidential elections in Ukraine took place, won in the first round by Petro Poroshenko who obtained 54.7 per cent of all votes. Table 3.1 presents the analysis of programs of main candidates for presidency in 2014.<sup>116</sup> The campaign happened after the annexation of Crimea but simultaneously to the escalating warfare in Donbas. The data presented in the table show general consistency of narratives proposed by main presidential candidates. The conflict is characterized as a result of Russian aggression, which contrasts with the cautious approach of interim government to use such narratives in legal acts at that time. There are no references to victims of the conflict; although we should remember that the most violent phase of the conflict was still ahead. As for the “visions of justice,” they remain either absent or very vague and general.

The interim period that followed the Euromaidan protests was definitely ended on 26 October 2014, when early parliamentary elections took place. This time, elections were held soon after the most violent phase of the conflict, and after signing the Minsk-1 protocol. Table 3.2 presents the analysis of programs of six parties that managed to get to the Verkhovna

---

116 It should be noted that 21 candidates for presidency were registered in 2014. The overwhelming majority of have failed to receive more than 2 % of votes. Therefore, we concentrate attention on four leaders of the race, whose combined result was around 81 % of votes.

**Table 3.1. Conflict-related rhetoric in programs of candidates for presidency (May 2014).**

|  | <b>Petro Poroshenko</b>                         | <b>Yulia Tymoshenko</b>  | <b>Oleh Liashko</b>  | <b>Anatoliy Hrytsenko</b>                                      |
|--|---|--|--|--|
| <b>Conflict-related issues as priority</b> | No (focus on the need of comprehensive reforms) | Yes  | Yes  | No (focus on the need of comprehensive reforms)                |
| <b>Essence of the conflict</b>             | Russian aggression                              | Military aggression against Ukraine  | War; “separatist sabbath;” Russian aggression  | Aggression   |
| <b>Wrongdoers/ adversaries</b>             | n/a   | The Russian Federation   | Internal and external enemies (“parasites:” occupants, separatists, embezzlers and corruptionists); Russia, Putin, Putin’s bandits   | n/a  |
| <b>Victims</b>                             | n/a   | n/a  | n/a  | n/a  |
| <b>Visions of justice</b>                  | De-escalation by political and diplomatic means | Ratification of the Rome Statute to stop “the military capture of Ukraine and bring to justice the perpetrators of crimes against humanity;” the expansion of powers and financial autonomy of local authorities | Freeing Ukraine from “parasites:” occupants, separatists, embezzlers and corrupt officials; bringing wrongdoers to justice in accordance with the rules of martial law; more powers to local authorities | Need to restore trust between the east and west of the country |

Source: Central Election Commission of Ukraine, <http://www.cvk.gov.ua>.

Rada and form parliamentary fractions. Furthermore, all of these parties (with the exception of the Opposition Block, the party that was formed out of remnants of Yanukovych's Party of Regions) have joined into a ruling coalition, thus forming the government.<sup>117</sup>

As we can see, the narrative of aggression was once again used by all ruling parties. At the same time, there are several differences that can be observed when comparing parliamentary electoral campaign with the previously discussed presidential one. First, the notion of terrorism appeared on agenda, used in the program of one of two major parties (Aresniy Yatseniuk's National Front). Second, notions that could be understood as calls for restorative justice were introduced: the need to restore regions affected by warfare; the need of decentralization of the state, and providing more power to local authorities (though, such proposals should not be understood as concessions to authorities of self-proclaimed "republics," but as a proposal to restore common political order on new principles that would be more sensitive to specific needs and preferences of local population). Third, an "alternative story" of the conflict was introduced in the campaign of the Opposition Block. The party claimed the conflict to be a civil war and underlined the responsibility of Ukrainian authorities for its outbreak. The fact of the party has managed to get to the parliament clearly suggests that such interpretation of events was at least to some extent supported by part of Ukrainians.

Table 3.3 presents the evolution of the narrative referring to the Donbas conflict in the period without electoral campaigns, as seen from the perspective of the most important speeches of President Poroshenko. Here, I focus on the following speeches: inauguration speech held on June 7, 2014; public speeches traditionally delivered on the Independence Day (August 24); and yearly messages delivered by the president to the parliament. I call the latter "States of the Union," referring to the similarity to speeches held

---

117 It should be noted that Ukrainian parliamentary elections in 2014 were held in accordance with mixed electoral system. As a result, significant amount of candidates who entered the parliament from single-member constituencies, often created their own political programs. Nevertheless, the majority of them usually joins fractions formed by parties. The latter are thus the main "aggregators" of political narratives present in the parliament.

Table 3.2. Conflict-related rhetoric in programs of political parties participating in parliamentary elections (October 2014).

|                                     | Petro Poroshenko's Block   | National Front  | Fatherland   | Samopomich  | Radical Party  | Opposition Block  |
|-------------------------------------|--|---|--|---|--|---|
| Conflict-related issues as priority | Yes  | Yes   | Yes  | No  | Yes  | Yes   |
| Essence of the conflict             | Russian aggression   | Aggression  | Military aggression of the Russian Federation, war aggressors, terrorists  | n/a   | War, aggression  | Civil conflict (deduced from the need to establish 'civil peace')   |
| Wrongdoers/adversaries              | Occupants  | external enemies, foreign troops and mercenaries, terrorists                          | aggressors, terrorists   | n/a   | Russia, internal enemies   | Underlined the responsibility of Ukrainian authorities  |
| Victims                             | n/a  | n/a   | n/a  | n/a   | n/a  | n/a   |
| Visions of justice                  | Underlined the need of decentralization as a response to regional aspiration | Special attention: protection of ATO participants the restoration of affected regions | War-like rhetoric; victory as a precondition of any successful policy; protection of ATO participants; reparations from Russia | Underlined the necessity to protect sovereignty and unity; crisis as an opportunity to implement deep reforms | "Deseparatization;" the necessity of bringing "internal enemies" to political and criminal accountability; the restoration of destroyed infrastructure | The Necessity to elaborate a national reconciliation plan: dialogue between representatives of regions; an investigation of cases of mass killings; amnesty; wide-scale restorative actions |

Source: Central Election Commission of Ukraine, <http://www.cvk.gov.ua>.

Table 3.3. Conflict-related rhetoric in public speeches of President Poroshenko.

|  | Inauguration speech (Jun 07, 2014) | Independence Day (Aug 24, 2014)                       | “State of the Union” (Jun 04, 2015)   | Independence Day (Aug 24, 2015)                               | Independence Day (Aug 24, 2016) | “State of the Union” (Sep 06, 2016) | Independence Day (Aug 24, 2017) | “State of the Union” (Sep 07, 2017) | Independence Day (Aug 24, 2018) | “State of the Union” (Sep 20, 2018) |
|--|------------------------------------|---|---|---|---------------------------------|-------------------------------------|---------------------------------|-------------------------------------|---------------------------------|-------------------------------------|
| <b>Essence of the conflict</b>   | war                                | not declared, but real war against foreign aggression | Russian aggression; occupation of territories from the East                               | war for independence; aggression against neighbouring country | war                             | Russia’s aggression against Ukraine | war                             | war                                 | Russian aggression; war         | war; aggression                     |
| <b>Wrongdoers/adversaries</b>  | Russian mercenaries; terrorists    | n/a   | Russian militants; separatists, incited by Moscow; fifth column criminal terrorist regime | n/a   | Russian aggressor               | Russian terrorist troops            | Russian aggressor               | n/a                                 | Russian aggressor               | n/a                                 |
| <b>Victims (referring to UA citizens remaining in the “republics”)</b> | peaceful citizens of Ukraine       | n/a   | Ukrainian prisoners   | n/a   | n/a                             | n/a                                 | n/a                             | n/a                                 | n/a                             | n/a                                 |

Source: website of the President of Ukraine, <https://www.president.gov.ua>.

by the US president to the joint session of the US Congress. These speeches are broadly transmitted and widely discussed in the media, thus having a significant reach among citizens.

A tendency present in the data is the following: along with the passage of time, the president narrowed down the abundance of notions used to tell the story of the conflict. Closer to the end of President Poroshenko's term in office, as the conflict went on with no clear perspective of resolution, notions suggesting the international nature of the conflict ("aggression," "war") became the main elements of the discussed narrative.

Table 3.4 presents narratives used in the 2019 presidential campaign.<sup>118</sup> These data do not introduce any significant novelty. What should be noted is that more candidates decided not to underline the priority of the conflict, understood as a problem detached from other challenges faced by the country. This is not to say that the Donbas conflict lost its "political appeal;" rather that it is presented as one of equally important problems, such as poor economic situation, poverty, or corruption, whose solution should be comprehensive and depend primarily on economic and political development of the state. Like in the case of the 2014 parliamentary campaign, there is an "outsider," a candidate representing the mentioned Opposition Block (Yuriy Boyko) who consequently underlined that the conflict's fundamental causes are not exclusively external.

We should pay special attention to the fact that victims are virtually absent in all discussed sources. In other words, Ukrainian decision-makers avoided expressing claims about who actually suffered from the conflict. Only in some cases and mainly at the beginning of the conflict some general statements appeared in presidential speeches that referred to all peaceful Ukrainians as those suffering the consequences of the conflict or to the ones who directly experienced captivity by the representatives of the "people's republics." I interpret this phenomenon as compatible with the overall

---

118 In 2019, 39 candidates registered to run in the presidential elections. Eventually, the elections were won by Volodymyr Zelenskyi. Here, I focus on the leaders of the first round: the five candidates who gained joint support of around eighty percent of voters.

Table 3.4. Conflict-related rhetoric in programs of candidates for presidency (March 2019).

|   | Petro Poroshenko  | Yulia Tymoshenko   | Anatoliy Hrytsenko  | Volodymyr Zelenskiy   | Yuriy Boyko  |
|---|---|--|---|---|--|
| Conflict-related issues are clearly highlighted as a priority | No (embedded into a comprehensive proposal of further reforms)  | Yes  | No (embedded into a proposal of comprehensive reforms)  | No (embedded into a proposal of comprehensive reforms with special attention paid to economic issues) | Yes  |
| Essence of the conflict                                       | Russian aggression  | Aggression   | n/a   | War   | Armed conflict   |
| Wrongdoers/adversaries  | Russian aggressor   | Russia: state-aggressor  | n/a   | Aggressors  | n/a  |
| Victims   | Hostages of Russian aggressor (referring to prisoners of war)   | All Ukrainian citizens are victims   | n/a   | n/a   | n/aw   |
| Visions of justice  | The need to bring Russia to accountability for repression in occupied territories and force it to pay compensation for caused damages; continuation of decentralization | The need for an inventory of damages caused by Russia; the need of efforts to bring Russia as an aggressor state to legal liability and force it to pay compensation | The need to return occupied territories without any sort of “special status:” by diplomatic, military, economic, sanctioning means in cooperation with foreign partners | “We have to make the aggressor pay for damages;” decentralization                                     | The new government will go on direct negotiations with all parties to the conflict: for the sake of peace and the return of territories and population under the jurisdiction of Ukraine; decentralization |

Source: Central Election Commission of Ukraine, <http://www.cvk.gov.ua>.

tendency to narrow down the government’s meta-narrative about the conflict to the notion of aggression. In such a case, it is indeed logical not to identify any specific group as having a special status of victims, because it is the whole nation that is the object of aggression. Such interpretation

provides an answer to one of the uncertainties related to hybridity. The goal of reconciliation primarily refers to Ukrainian citizens, who appeared to be separated from the mainland as a result of the warfare. In turn, reconciliation with the aggressor is removed to unspecified future.

\* \* \*

At this point, I wish to briefly summarize both the analysis of official documents and political rhetoric. Generally, Ukrainian authorities tend to simplify their “official truth” about the conflict. Interim government that took power immediately after the Euromaidan and faced the first phase of the emerging conflict tried to avoid confrontational notions. One of the effects was the introduction of the notion of terrorism. It provided Ukrainian authorities with the possibility to use the force against the “people’s republics.” On the other hand, it could hardly be regarded as the basis for the coexistence of “multiple stories” supported by different parts of the divided society. As time passed and the situation on the front stagnated – although the violence never stopped definitely – a turn was made toward what can be called a unification of narrative: the conflict was now called the result of external aggression.<sup>119</sup> A schematic timeline of this process is presented in Annex 1.

### **3.3. The consistency of Ukrainian authorities’ “official truth” about the Donbas conflict**

As mentioned, I understand truth-seeking primarily as attempts to construct a meta-narrative, which could create space for the coexistence of individual interpretations of facts about the conflict, a common ground for reconciliation in the form of an agonistic but peaceful coexistence of different detailed stories of the conflict as seen from the perspectives of different parts of Ukraine’s divided society. Such a view of the conflict would also be a reference point for the provision of justice. Taking into account the specificity of circumstances – the ongoing conflict – steps discussed in the previous part are essentially efforts taken by one side of the conflict.

---

<sup>119</sup> Noteworthy, this statement does not mean that the notions of separatism and terrorism were removed from public debate in general.



They are not an outcome of any sort of agreement and therefore lack what can be called a “joint ownership.” The question that arises here is to what extent can the identified narratives become the basis for reconciliation? The rest of this chapter will attempt to answer this question.

Let me start by looking at the consistency of “stories about the conflict” identified in the previous part. The following considerations are based on the assumption that the lack of serious controversies and inconsistencies in narratives designed to frame the potential dialogue between hostile parts of society constitutes a necessary condition for achieving the normative goals prescribed to truth-seeking. Potentially, a situation when different entities constituting broadly understood state authorities disagree with each other is the most obvious source of such inconsistencies. Therefore, it is worthwhile to confront the “official truth” formulated at the political level with the microscopic and logical truths “produced” as a result of investigations, when actual individual acts and experiences of those engaged in the conflict are taken under scrutiny. In other words, I assume that any significant inconsistency in this field can become one of the obstacles in the process of reconciliation and a source of further tensions and conflicts; which is the essence of the truth vs. justice dilemma.

Ukrainian law enforcement agencies and courts were engaged to address instances of conflict-related wrongdoings. As a result, Ukrainian courts issued a number of verdicts basing on provisions of the criminal code that were virtually not used before the outbreak of the conflict. In the framework of this research, I created a database of court decisions in conflict-related cases available in Annex 2. In particular, the database contains information about the following categories of crimes:

- a) crimes against foundations of the national security of Ukraine, in particular: actions seeking to violently change or overthrow the constitutional order or the seizure of state power (art. 109 of the CCU); attack on the territorial integrity and inviolability of Ukraine (art. 110, 110-2 of the CCU); treason (art. 111 of the CCU);
- b) terrorism-related crimes, in particular: terrorist act (art. 258 of the CCU), involvement in committing a terrorist act (art. 258-1 of the CCU), public appeals to commit a terrorist act (art. 258-2 of the CCU), creation of a terrorist group or terrorist organization (art. 258-3 of the

- CCU), facilitating the commission of a terrorist act (art. 258-4 of the CCU), financing terrorism (art. 258-5 of the CCU);
- c) creation of illegal paramilitary or armed units (art. 260 of the CCU);
  - d) planning, preparing, starting, and conducting an aggressive war (art. 437 of the CCU).

Clearly, these categories significantly correspond with the mentioned narratives that frame the Donbas conflict. Two issues should be underlined. First, taking into account that the criminal code of Ukraine does not contain a crime defined as separatism, acts widely referred to as *de facto* separatism – e.g. public support, agitation for ideas of some form of secession of a part of the country – were addressed as crimes against foundations of the national security of Ukraine. Second, there is a category of crimes that does not refer directly to any of the abovementioned narratives: the creation of illegal paramilitary or armed units.

Along with the mentioned database of court decisions, I use data regularly published by the Prosecutor General's Office of Ukraine that presents the amount of crimes registered by law enforcement agencies at the particular period of time. Having both sources of information, I can compare the number of instances when the state through its law enforcement agencies accuses someone of committing a crime with the number of instances when the accusation is confirmed by the court. In other words, a ratio of issued convictions to the number of registered crimes can be treated as an indicator of the level of consistency between what the authorities call the "official truth" and the microscopic and logical truths established by courts.

Of course, the result of such analysis should be treated with caution. First, the data originate from different sources; there is no technical possibility to trace the fate of each act registered as a crime; some may not end in court at all, investigation of other cases may last longer and be finally resolved by the court in the period of time that is not reflected in the analysis. Second, one should bear in mind that Ukrainian judiciary cannot be regarded as perfectly independent (see Chapter 2). Therefore, we cannot exclude that – at least to a certain degree – verdicts issued by Ukrainian courts are dictated by political motivations rather than by a willingness to investigate the case accurately. This issue is discussed in more detail in Chapter 4.

On the other hand, we may deduce from the database that the average time that passes between the moment of committing a crime and issuing a decision

is fifteen months; in other words, the average path of a case from committing an act to the issuance of court decision is relatively short. The overwhelming majority of cases covered by the database conveys no “big fishes” in whose situation we would logically expect politicized decisions. Finally, I operate with a relatively large number of cases, which allows for the possibility to identify some regularities and patterns. Basing on these arguments, I assume that the proposed indicator can contribute some value added to this sort of analysis.

The results of comparison are reflected in Figures 3.1–3.4. Basing on the above considerations, we may conclude that the narratives of separatism (Figure 3.1) and especially the narrative of terrorism (Figure 3.2) appear to

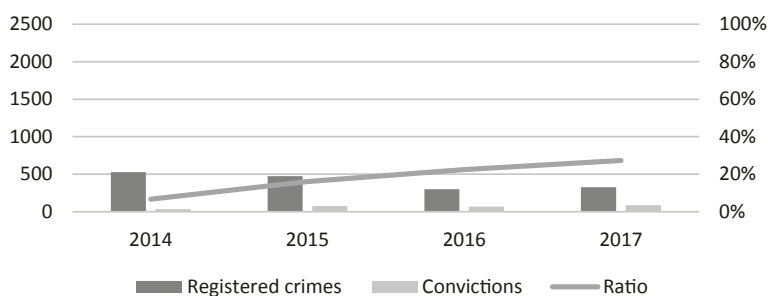


Figure 3.1. The number of registered crimes vs. issued convictions: crimes against foundations of national security of Ukraine.

Source: <https://reyestr.court.gov.ua>, <https://www.gp.gov.ua>.

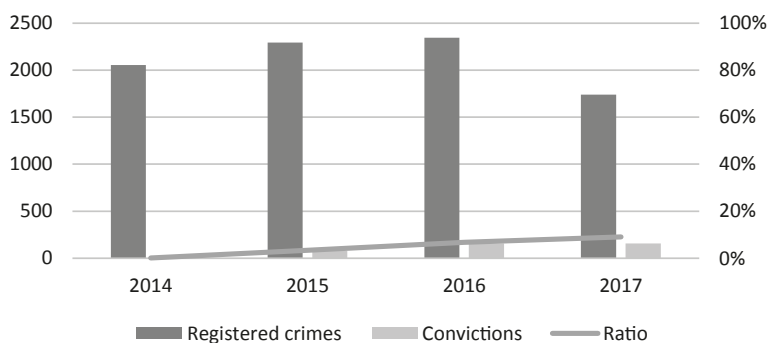


Figure 3.2. The number of registered crimes vs. issued convictions: terrorism.

Source: <https://reyestr.court.gov.ua>, <https://www.gp.gov.ua>

Truth-seeking

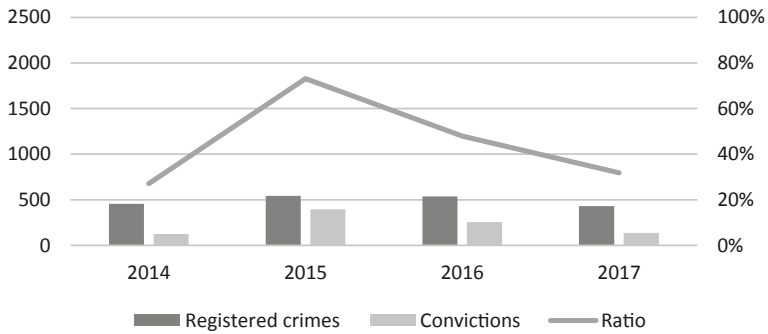


Figure 3.3. The number of registered crimes vs. issued convictions: illegal armed groups.

Source: <http://reyestr.court.gov.ua>, <https://www.gp.gov.ua>.

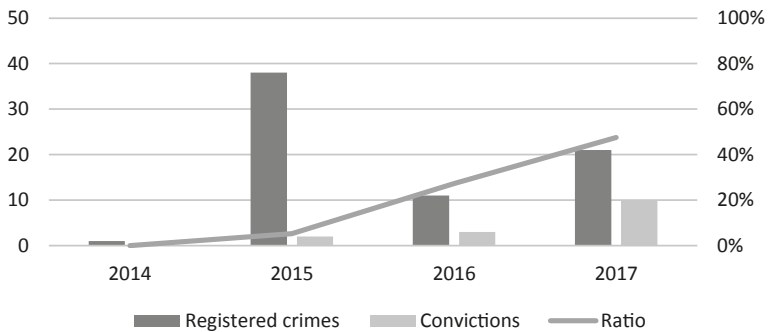


Figure 3.4. The number of registered crimes vs. issued convictions: aggressive warfare.

Source: <http://reyestr.court.gov.ua>, <https://www.gp.gov.ua>.

have the weakest support in the form of relevant court decisions. In the case of crimes against foundations of the national security of Ukraine – which I treat here as equivalents of separatism – the ratio under scrutiny grew regularly. It suggests that Ukrainian authorities have learned how to approach this type of wrongdoings in a way that does not create contradictions. In the case of terrorism-related crimes, the gap between the number of registered crimes and issued convictions is indeed huge.

The gap between the number of registered crimes and issued convictions confirming that the crime was actually committed appears to be the narrowest in the cases of illegal paramilitary or armed units creation (Figure 3.3). This category can be called a “neutral” one: it does not directly support any of the identified “stories” of the conflict. On the other hand, it also does not contradict any of the mentioned narratives, and therefore can be “channeled” into any of them; participants of illegal armed groups can be framed as “separatists,” “terrorists,” or “aggressor’s collaborators” with equal ease.

The data referring to acts qualified as aggressive warfare (Figure 3.4) should be interpreted with special caution. The ratio under scrutiny in this case is higher, however the number of cases – which refers to both registered crimes and court decisions – is much smaller; in fact, these figures would hardly be visible if placed on the same scale as other types of wrongdoings. To an extent, this is not a surprise: alleged principal authors of aggression remain outside of the reach of the Ukrainian judiciary.

Summarizing, the proposed indicator does not tell us much about the fate of individual cases when the Ukrainian state addresses acts interpreted as conflict-related wrongdoings. Therefore, we cannot use this indicator to assess the accuracy of the work of Ukrainian law enforcements, authorities, or courts. We should interpret it only from the perspective of what can be called the “practical effectiveness” of main narratives used by Ukrainian authorities to “tell the story” of the conflict. On the one hand, we have the language of political rhetoric. The number of registered crimes is likely to be sensitive to it: law enforcement agencies and the prosecution are part of the executive branch of power. Registering a particular act as a certain type of crime can be used by the government as proof of their effective work to deal with the problem.

On the other hand, there are the courts whose task is to establish what was called above a microscopic and logical truth about a certain case. Indeed, the general number of committed conflict-related crimes confirmed by the courts is impressive. However, the existing gap between both numbers can be used as evidence that the authorities are “overzealous” in labelling certain types of deeds. In turn, this opens the way for regarding these labels (narratives) as unfounded. The narratives of separatism and terrorism appear especially prone to this kind of criticism.

International courts provide another potential point of reference for assessing the consistency of narratives used by Ukrainian authorities to “tell the story” of the conflict. On January 27, 2017, Ukraine submitted a lawsuit against Russia at the International Court of Justice (ICJ), alleging that the latter violates the International Convention for the Suppression of the Financing of Terrorism (ICSFT) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).<sup>120</sup>

On February 14, 2015, the Verkhovna Rada adopted a declaration about a self-referral to the International Criminal Court (ICC), with the intention to cover the annexation of Crimea and warfare in Donbas.<sup>121</sup> The declaration alleges that Ukraine has been the subject of aggression by the Russian Federation, as a result of which “the highest officials of the Russian Federation and the leaders of terrorist organizations of DNR and LNR” committed crimes against humanity and war crimes on the territory of Ukraine.

Finally, Ukraine lodged several inter-state applications against Russia at the European Court of Human Rights (ECHR), whose common denominator is the allegation that Russia holds effective control over the occupied territories, which obviously suggests the fact of aggression.<sup>122</sup>

At the time of writing, none of these cases ended with a court decision, which may be used as an argument in support or against the narratives of aggression and terrorism that the mentioned lawsuits obviously recall.

---

120 International Court of Justice, “Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation),” April 19, 2017, <https://www.icj-cij.org/files/case-related/166/19410.pdf>.

121 Verkhovna Rada of Ukraine, “On the statement of the Verkhovna Rada of Ukraine “On the recognition by Ukraine of the jurisdiction of the International Criminal Court over the crimes against humanity and war crimes committed by senior officials of the Russian Federation and the leaders of the terrorist organizations “DNR” and “LNR,” which led to particularly grave consequences and the massacre of Ukrainian citizens,”“ Pub. L. No. 145– VIII (2015), <https://zakon.rada.gov.ua/go/145-19>.

122 European Court of Human Rights, “New Inter-State Application Brought by Ukraine against Russia. Press Release,” August 27, 2018.

### 3.4. Effects and challenges

Finally, I focus on indicators reflecting to what extent does the presented approach to truth-seeking actually contribute to the ultimate goal of reconciliation. Clearly, the most significant issue in this regard is the extent to which the mentioned narratives are actually accepted by constituents. Let us note that despite relative abundance of surveys conducted in Ukraine devoted to the problems of the Donbas conflict, not all of them are conducted systematically; different research centers formulate questions differently and the majority of surveys are not repeated, so there is a limited possibility to trace relevant changes of public opinion. Thus, our understanding of the evolution of public perception of the conflict is far from perfect.

Figures 3.5 and 3.6 respectively reflect the public opinion of Ukrainians regarding the role of Russia in the conflict and opinion about self-proclaimed “people’s republics;” unfortunately, there are no similar data going beyond the beginning of 2016. Both figures confirm that the narratives of Russian aggression and terrorism are accepted by the majority of citizens who reside in Ukraine’s mainland. At the same time, it reflects the existence of a minority that does not accept Ukrainian authorities’ “official truths.” This phenomenon also explains the existence of “alternative stories” of the conflict that could be found in political programs of some political parties and candidates for presidency.

What is much more important from the perspective of this research, is to what extent the authorities’ narratives speak to the part of Ukrainian citizens who live on the territories of self-proclaimed “republics.” However, in this case the problem of imperfect knowledge is much more severe: according to our best knowledge, only one publicly available survey was conducted on the territories of the DNR/LNR during the conflict.<sup>123</sup> Despite its undoubtful informative value, the survey does not provide grounds for direct comparison of public moods with the Ukrainian mainland: it was

---

123 Gwendolyn Sasse, “The Donbas – Two Parts, or Still One? The Experience of War through the Eyes of the Regional Population,” ZOiS Report, May 2017, [https://www.zois-berlin.de/fileadmin/media/Dateien/ZOiS\\_Reports/ZOiS\\_Report\\_2\\_2017.pdf](https://www.zois-berlin.de/fileadmin/media/Dateien/ZOiS_Reports/ZOiS_Report_2_2017.pdf).

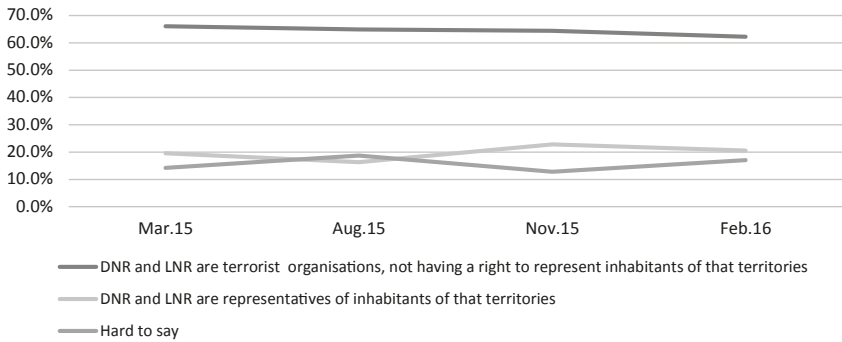


Figure 3.5. Perception of DNR and LNR by Ukrainians. Source: Razumkov Centre.

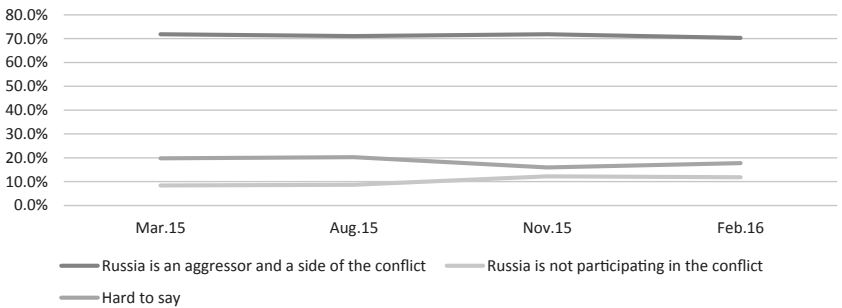


Figure 3.6. Ukrainians' perception of Russia's role in the Donbas conflict. Source: Razumkov Centre.

based on different questions. Therefore, we are condemned to some general observations only.

Figure 3.7 presents one of the result of the mentioned survey conducted in Donbas; both in parts under the control of Ukraine and under the control of the DNR/LNR. The assessment of the conflict by inhabitants of the “republics” is radically incompatible with narratives proposed by Ukrainian authorities. In particular, the belief that the conflict was caused by Russia – that would correspond with the dominating narrative of aggression – appears to be the less popular. A qualitative research based on the method of focus-groups conducted in February 2018 revealed that inhabitants of



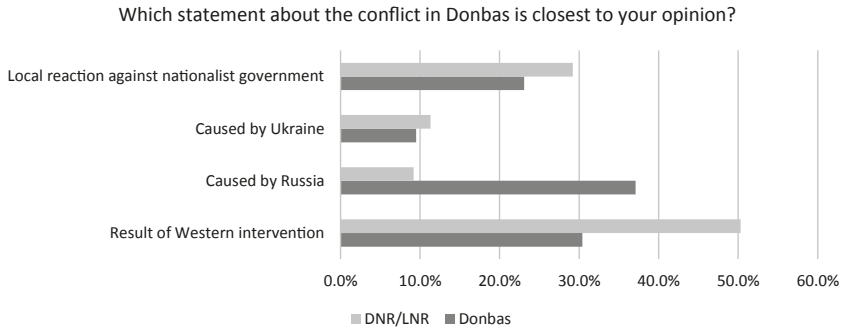


Figure 3.7. The essence of the Donbas conflict in the perception of its inhabitants (2017).

Source: Gwendolyn Sasse, “The Donbas – Two Parts, or Still One? The Experience of War through the Eyes of the Regional Population,” ZOiS Report, May 2017, [https://www.zois-berlin.de/fileadmin/media/Dateien/ZOiS\\_Reports/ZOiS\\_Report\\_2\\_2017.pdf](https://www.zois-berlin.de/fileadmin/media/Dateien/ZOiS_Reports/ZOiS_Report_2_2017.pdf).

the DNR/LNR are characterized by a lack of trust in Ukrainian authorities. Furthermore, they tend to regard the conflict primarily as an internal one.<sup>124</sup>

However, on the optimistic side, different available studies lead to a common conclusion that for the majority of Ukrainians living both in the mainland and in the DNR/LNR, a preferable future for these territories is within the Ukrainian state. This fact suggests that there is some common ground for a unifying narrative framework that can potentially lead to reconciliation. The problem is that the narratives proposed by the Ukrainian authorities to “tell the story” of the conflict indeed appear to be appealing to the majority of Ukrainians living in the mainland. At the same time, they are far from reflecting the perception of Ukrainians who remain in the territories controlled by the DNR/LNR. In other words, these narratives serve the function of consolidating the public opinion of Ukraine’s mainland rather than the function of “building a bridge” between divided parts of the society.

124 Petro Burkovs’kyi, Ruslan Kermach, and Andrii Hirnyk, “Chym zhyvut’ tymchasovo nekontrol’ovani terytorii Donbasu? Osoblyvosti horzontal’noï komunikatsii meshkantsiv rozdilenoho rehionu” (Kyiv: Democratic Initiatives Foundation, 2018).

Therefore, truth-seeking efforts conducted in the context of the Donbas conflict face one crucial challenge, which arises from the problem of the so-called reactive devaluation. In the negotiations process, the evaluation of specific deals and compromises may change if they were offered by the adversary.<sup>125</sup>

Indeed, having in mind the proclaimed goals of reintegration of the occupied territories, Ukrainian authorities have no other choice but to start “building their part of the bridge,” which is expected to reunite the divided society. Much has been done to achieve it. In particular, Ukrainian authorities took steps to consolidate the “official truth” about the conflict around one notion: aggression. It is much less exclusive in comparison to other notions that were also used to frame the conflict (separatism and terrorism). If the responsibility for violence lies on the side of forces that come from outside of our community, it is easier to argue that all representatives of our community are in fact victims of the situation and not our adversaries. At the same time, there is evidence that this narrative does not correspond with beliefs of the part of the society that appears to be separated from the mainland, who predominantly do not trust Ukraine’s central government. Thus, the process of “building a bridge” continued with no coordination with persons standing on “the opposite side.” As a result, truth-seeking initiatives initiated by the Ukrainian government conducted in the period covered by this research were sentenced to a certain level of ineffectiveness.

---

125 Ross, “Perspectives on Disagreement and Dispute Resolution: Lessons from the Lab and the Real World,” p. 117.

## Chapter 4. Retributive justice

### 4.1. Retributive justice in conflict-affected societies: specificity and significance

The concept of retributive justice refers to the most intuitive and straightforward understanding of what “justice” may mean in the face of a wrongdoing: punishment. In other words, retributive justice focuses on the problem of how to treat those who somehow break the obliging rules and norms; they may be called offenders, perpetrators, or wrongdoers.

The idea of retributive justice can be traced to the oldest known legal documents. It is based on what can be called codified revenge for a harm done: “If a man destroy the eye of another man, they shall destroy his eye.”<sup>126</sup> Indeed, punishment can be regarded as a measure motivated by a scope of so-called retributive emotions: anger, indignation, contempt, hatred, and pity for the victims.<sup>127</sup>

Contemporary understanding of the function of retribution is more sophisticated than mere revenge. First and foremost, retributive justice focuses not on a certain act but on guilt. In other words, retributive justice does not boil down to an algorithm: if A commits X, the punishment is Y; which is the kind of logic present in the Hammurabi code. Punishment requires assessment to what extent the culprit can be regarded responsible for committing a certain act; for example, killing a person in self-defense assumes less guilt than killing a person with the intent to rob her.

Contemporary understanding of retributive justice regards the culprit to be a part of society. Criminal codes – the main tools of retributive justice – assume that committing a crime reflects one’s conscious contestation

---

126 “The Code of Hammurabi,” *Internet Sacred Text Archive*, accessed April 3, 2019, <http://www.sacred-texts.com/ane/ham/ham06.htm>.

127 Jon Elster, “Retribution,” in *Retribution and Reparation in the Transition to Democracy*, ed. Jon Elster (Cambridge: Cambridge University Press, 2006), pp. 34–35.

of rules established by the will of the whole.<sup>128</sup> Retribution also affirms individual autonomy and the responsibility of a perpetrator as an agent of the common good.<sup>129</sup> Therefore, providing retributive justice is to a significant extent a relational matter: imposing a sanction on an individual is expected to contribute to the improvement of relations in an affected community, among others by means of deterrence, incapacitation, or rehabilitation of wrongdoers.<sup>130</sup> A detailed review of retribution theories exceeds the scope of this analysis. What should be underlined is that despite different justifications for punishment and expectations of specific effects of punishment, there is a common ground in terms of an idea that a wrongdoer is subject to accountability for committed crimes, which in turn is expected to lead to a change in the behavior of the wrongdoer; hopefully in a constructive direction.

Extraordinary circumstances (see Chapter 1) create specific constraints for retributive justice. In particular, there may appear the problem of the growing gap between legal codes and community sentiments. People generally tend to perceive how strongly the offenders deserve punishment basing on their beliefs about how wrongfully the offenders behave.<sup>131</sup> When the community faces new, previously unexperienced types of wrongdoings, perceptions of wrongfulness of such deeds and deservingness of punishment are likely to arise; at the same time, the adequacy of relevant legal codes is not guaranteed. Some wrongdoings can be codified but remain “asleep.” For example, as we will see below, criminal code can contain a provision on aggressive warfare, which is nevertheless unused in practice simply due to the lack of such kind of wrongdoings. As a result, the judiciary has no experience in the assessment of guilt if such a problem emerges. Alternatively,

---

128 Michel Foucault, *Zło czynić, mówić prawdę: funkcja wyznania w sprawiedliwości: wykłady z Louvain, 1981* (Kraków: Społeczny Instytut Wydawniczy Znak, 2018), p. 251.

129 Charles Villa-Vicencio, “The Reek of Cruelty and the Quest for Healing: Where Retributive and Restorative Justice Meet,” *Journal of Law and Religion* 14, no. 1 (1999), p. 175.

130 Elster, “Retribution.”

131 John M. Darley and Adam L. Alter, “Behavioral Issues of Punishment, Retribution and Deterrence,” in *The Behavioral Foundations of Public Policy*, ed. Eldar Shafir (Princeton: Princeton University Press, 2013), pp. 184–85.

one can imagine a situation when a wrongdoing is not codified at all. The problem may appear to be even more complicated, if we take into consideration that those labelled as wrongdoers by the interested state may raise the argument that it is their cause that is actually just; therefore, it is not they who break the laws established by the community.<sup>132</sup> All in all, these examples illustrate a certain level of the inevitability of retribution's politicization in extraordinary circumstances. From the perspective of the goal of reconciliation, the conclusion is that the matter of guilt may become a matter of bargain between interested sides. As a result of such a bargain, specific retributive measures can be introduced, such as retroactive justice<sup>133</sup> or amnesty, understood as measures aimed at removing the prospect of criminal liability for designated persons or classes of persons.<sup>134</sup>

Below, I will focus on measures taken by the Ukrainian authorities that directly or indirectly aim to meet the retributive goal of transitional justice in the context of the Donbas conflict.

## 4.2. The evolution of Ukrainian authorities' approach to punishment for conflict-related crimes

The approach of Ukrainian authorities to accountability for conflict-related wrongdoings has evolved over time. One can identify several stages of development in this approach, which I discuss in this section. The schematic timeline is presented in Annex 1.

### Retribution as a tool to deter separatism

The outline of this initial approach of Ukraine's authorities to accountability for anti-governmental actions, have not yet transformed into a violent armed conflict, can be deduced from the minutes from the meeting of the National Security and Defense Council of Ukraine (NSDC), which

---

132 David Armitage, *Civil Wars: A History in Ideas* (New Haven and London: Yale University Press, 2017), p. 132.

133 Ruti G. Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2002), pp. 33–34.

134 Mark Freeman, *Necessary Evils: Amnesties and the Search for Justice* (Cambridge: Cambridge University Press, 2009), p. 13.

occurred on February 28, 2014.<sup>135</sup> One should remember that at that particular moment Crimea was the main center of events of separatist nature, and that the conflict had not turned into a direct armed confrontation. Ukrainian authorities decided to avoid any engagement of the military against spreading anti-governmental rallies, which was believed to may serve the Russian authorities as a pretext to use their armed forces openly on a much larger scale than they were actually used. Clearly, this assumption was not without grounds, taking into account the decision of the Russian authorities to allow the use of armed forces on the territory of Ukraine. At the same time, an instruction was given to law enforcement agencies to “develop steps to detain and bring to Kyiv the traitors who captured power in the Autonomous Republic of Crimea.”

As I already mentioned in Chapter 3, separatism as such is not a crime according to Ukrainian legislation; that is, Ukraine’s penal system is based on the *nullum crimen sine lege* principle. Therefore, the notion of separatism here has no obvious legal definition. The presented approach is based on the assumption that to underline the prospect of criminal accountability may at least to some extent deter further actions that can be called a de facto separatism; actions which undermine the sovereignty of the state yet fall short of direct violence, such as participation in meetings devoted to the idea of capturing power in a particular region or city or actions of spreading ideas that undermine territorial integrity of the state.

The presented approach remained dominant in the following several weeks, when the wave of separatism spread across the eastern and southern regions of Ukraine. Basing on its logic, the criminal code of Ukraine was amended on April 8, 2014,<sup>136</sup> increasing the punishment for encroachment against territorial integrity and treason.

---

135 National Security and Defence Council of Ukraine, “Transcript of the Meeting of the National Security and Defence Council of Ukraine.”

136 Verkhovna Rada of Ukraine, “On amendments to the Criminal Code of Ukraine,” Pub. L. No. 1183-VII (2014), <https://zakon.rada.gov.ua/go/1183-18>.

### **Retribution as deterrence from the engagement in anti-governmental warfare**

The Ukrainian authorities eventually failed to achieve the goal of bringing leaders of Crimean separatists to accountability; with minor exceptions, the annexation of Crimea was finalized without much violence. It was different in the eastern regions of Ukraine's mainland, where the conflict escalated, and the problem of direct violence emerged.

The decision to initiate the ATO on April 14, 2014<sup>137</sup> had a profound impact on the approach to retribution in the discussed context. This decision reflected the attempt to spread the logic of using the prospect of criminal accountability as a tool of deterrence, this time addressing the ones who engage in acts of direct violence against the Ukrainian law enforcement forces, the military, and the pro-governmental volunteer battalions.

The rationale behind the use of the counter-terrorist operation format was the one already mentioned: it was an intermediate solution between a complete lack of engagement and the introduction of martial law, which once again might have provoked Russia to a more intense military operation under the guise of supporting the emerging "people's republics." The ATO allowed to frame anti-governmental fighters as terrorists, which in turn opened the possibility to engage the existing but to mostly unused counter-terrorist provisions of the criminal code. These provisions have been additionally tightened in the following months: on August 26, 2014, the Prosecutor General issued an order to allow easier detention of persons suspected of widely understood terrorism;<sup>138</sup> on October 7, 2014, the authorities amended criminal code once again, this time to introduce a

---

137 President of Ukraine, Decree on the decision of the Council of National Security and Defense of Ukraine of April 13, 2014 "On urgent measures to overcome the terrorist threat and preserve territorial integrity of Ukraine."

138 Ministry of Interior of Ukraine, "On approval of the Instruction on the procedure for preventive detention in the area of the counter-terrorist operation of persons involved in terrorist activities and the special regime of pre-trial investigation in conditions of martial law, state of emergency or in the area of anti-terrorist operation," Pub. L. No. 872/88/537 (2014), <https://zakon.rada.gov.ua/go/z1038-14>.

more severe punishment for terrorism and to introduce the institution of investigation *in absentia*.<sup>139</sup>

### Retribution becomes an object of negotiations

As the conflict continued escalation towards a full-fledged war, which culminated in August 2014, the Ukrainian authorities agreed to turn the issue of accountability into an object of political negotiations. The Minsk-1 protocol of September 5, 2014, serves as the main marker of this decision: the agreement provided an immediate release of all hostages and illegally detained persons, along with amnesty for DNR/LNR combatants (see Annex 3 for more details). As mentioned above, the Minsk-1 protocol was never ratified in Ukraine's legal system; nevertheless, it is possible to trace its political effects. On September 16, 2014, Ukrainian government adopted the law "On special regime of local self-government in certain districts of Donetsk and Luhansk oblasts"<sup>140</sup> – a term used to refer to the territories controlled by the self-proclaimed "people's republics" – which, among others, contained a provision on de facto amnesty for anti-governmental combatants. However, this provision remained ineffective due to the fact that it was conditioned by the prior conduct of local elections in accordance with Ukrainian legislation, which was not fulfilled.

We should note that, along with the mentioned law, President Poroshenko proposed a bill on amnesty for persons involved in anti-governmental armed formations and taking part in activities of organs of self-proclaimed "republics," which was not conditioned by any political concessions from their side.<sup>141</sup> However, this proposal was not supported by the parliament and eventually withdrawn in December 2014.

---

139 Verkhovna Rada of Ukraine, "On amendments to the Criminal and Criminal Procedural Codes of Ukraine regarding the inevitability of punishment for certain crimes against foundations of national security, public security and corruption crimes," Pub. L. No. 1689– VII (2014), <https://zakon.rada.gov.ua/go/1689-18>.

140 Verkhovna Rada of Ukraine, "On special regime of local self-government in certain districts of Donetsk and Luhansk oblasts," Pub. L. No. 1680– VII (2014), <https://zakon.rada.gov.ua/go/1680-18>.

141 President of Ukraine, "Draft Law "On prevention of the persecution and punishment of persons – participants of events in Donetsk and Luhansk



Generally, the Minsk-1 protocol can be regarded a milestone that marks the opening of Ukrainian authorities' thinking about accountability for conflict-related wrongdoings on the acceptability of an essentially political solution; that is, they accepted that there will be no punishment if certain criteria are fulfilled.

### **Increasing bids in political negotiations over accountability**

The Minsk-1 protocol resulted in only temporary decrease in the intensity of warfare and – as a result of the new wave of escalation – the second Minsk protocol was signed on February 12, 2015. Minsk-2 protocol did not alter the essence of the agreement (see Annex 3 for more details). Moreover, it did not result in the adoption of any new legislation that would be treated as a step toward its implementation. Nevertheless, the signing of the agreement marks the beginning of a period of relative calm on the frontline, although not a definite ceasefire. In this situation, the Ukrainian authorities decided to refer to the institution of international criminal justice. On February 4, 2015, the Verkhovna Rada of Ukraine adopted a declaration on the acceptance of jurisdiction of the International Criminal Court (ICC) over alleged war crimes on Ukrainian territory starting February 20, 2014.<sup>142</sup>

In the period between the parliament's agreement to accept the ICC jurisdiction over what can be generally called a situation in Donbas and its official lodging to the ICC – which happened in September 2015 – the Ukrainian authorities made several steps that could be interpreted as attempts to prepare themselves for potential investigation; in particular, to limit grounds for arguments that Ukrainian law enforcement agencies and the judiciary focus exclusively on cases of anti-governmental action.

---

oblasts,” Pub. L. No. 5082 (2014), [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=52183](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=52183).

142 Verkhovna Rada of Ukraine, “On the statement of the Verkhovna Rada of Ukraine “On the recognition by Ukraine of the jurisdiction of the International Criminal Court over the crimes against humanity and war crimes committed by senior officials of the Russian Federation and the leaders of the terrorist organizations “DNR” and “LNR,” which led to particularly grave consequences and the massacre of Ukrainian citizens.”

Thus, in April 2015 a new law was adopted that increases responsibility for committing war crimes.<sup>143</sup> According to the April law, the term of imprisonment was increased as a punishment for abuse of power by military officials. Furthermore, in March 2015, the Ukrainian government initiated first investigations of crimes committed by representatives of pro-governmental forces, widely covered by the media. The most prominent of the investigations is the process against members of the “Tornado” battalion.<sup>144</sup>

At the moment of writing, the ICC’s Office of the Prosecutor continues preliminary investigation of the situation in Ukraine, and it remains unclear whether the case eventually becomes an object of a more thorough investigation. From the perspective of this book, the decision to engage the institution of international criminal justice may be interpreted as an additional argument in an essentially political negotiation over the shape of retributive policies aimed at addressing wrongdoings committed during the Donbas conflict: in addition to prospect of accountability in accordance with Ukrainian legislation, a prospect (however vague) of being tried before the ICC was presented primarily to the decision-makers of the “people’s republics.”

Another specificity of the discussed stage is the revived debate about the possibility to apply amnesty. In March 2015, a bill was proposed to the Verkhovna Rada by a group of opposition MPs, once again proposing “the prevention of criminal prosecution, punishment, and administrative accountability of participants in the events in Donetsk, Luhansk oblasts;”<sup>145</sup>

---

143 Verkhovna Rada of Ukraine, “On amendments to the Criminal Code of Ukraine on the abuse of power by the military officials,” Pub. L. No. 290-VIII (2015), <https://zakon.rada.gov.ua/go/290-19>.

144 For more information about the “Tornado” case, see: “What You Need to Know about the Case of Former Tornado Battalion Servicemen,” *Ukraine Crisis Media Center*, April 11, 2017, <http://uacrisis.org/55087-need-know-case-former-tornado-battalion-servicemen>.

145 Verkhovna Rada of Ukraine, “Draft Law “On prevention of criminal persecution, bringing to criminal, administrative responsibility and punishment of participants of events in the territory of Donetsk, Luhansk oblasts,” Pub. L. No. 2425 (2015), [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=54470](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=54470).

in other words, a wide-ranging amnesty for those who can be called separatists. On the other hand, in April 2016 others presented a proposal of amnesty for participants of ATO; in other words, broadly understood pro-governmental combatants.<sup>146</sup> Both proposals remained on paper only. The former was criticized primarily for being a too far-going concession to the government's adversaries. The latter was criticized for being incompatible with the principle of the inadmissibility of amnesty for persons who committed serious crimes, which is present in Ukrainian legislation. In other words, Ukrainian authorities clearly became aware of the need of some sort of going beyond an ordinary approach to retribution, however displayed the lack of readiness to design and implement relevant policies.

## Reset

As a result of lowering the intensity of warfare after signing the Minsk-2 protocol, there were no new incentives for the Ukrainian authorities to alter the approach to accountability for conflict-related crimes. On the other hand, the conflict remained unresolved, and its public perception as an urgent problem remained unchanged (see Chapter 2).

At the beginning of 2018, a new framework law was adopted aimed at ordering the policy of Ukrainian state toward territories occupied by the "people's republics" (the already mentioned "reintegration law").<sup>147</sup> Among other things, the law created a ground for reformatting the ATO that lasted since April 2014 into the Joint Forces Operation – which happened on April 30, 2018 – and therefore opened the way for eliminating inconsistencies caused by the fact of applying counter-terrorist legislation to regulate criminal accountability in the context of a *de facto* armed conflict. However, the law generally omitted issues of retributive justice; unlike measures that

---

146 Verkhovna Rada of Ukraine, "Draft Law "On amnesty for the persons who at the time of committing a crime participated in the Counter-Terrorist Operation,"" Pub. L. No. 4519 (2016), [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_2?pf3516=4519&skl=9](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?pf3516=4519&skl=9).

147 Verkhovna Rada of Ukraine, Law on the peculiarities of the state policy aimed at protecting the state sovereignty of Ukraine in temporarily occupied territories in the Donetsk and Luhansk oblasts.

can be interpreted as elements of restorative justice, discussed in details in the following chapter.

At the same time, at the beginning of 2018, influential representatives of the Ukrainian authorities started signaling the need for the elaboration of a new comprehensive strategy of reintegration of the “people’s republics” with Ukraine, containing elements of DDR, justice, and reconciliation. The most important proposal of this type was presented in June 2018 by the interior minister Arsen Avakov.<sup>148</sup> This proposal directly refers to the idea of the need to operate outside of existing retributive provisions, and therefore suggests introducing two extraordinary mechanisms. The first one is the adoption of the law on amnesty for the majority of people living in the “republics” – except from those with “blood on their hands” – and thus having something to do with the conflict. The second one is the adoption of the law on collaborators that would define the basic principles of their punishment. Taking into account the informal status of this proposal, we cannot treat it as a position shared by the broadly understood authorities. Nevertheless, this law may be interpreted as a signal that, after the end of ATO and the change of authorities as a result of presidential elections in 2019, Ukrainian decision-makers started thinking about a “reset” in the approach to the accountability of separatists. More specifically, it corresponds with the dominant interpretation of events by the Ukrainian authorities in terms of an outcome of external aggression (see Chapter 3). Introduction of the category of “collaborators” suggests that the primary responsibility for committed wrongdoings rests on an external agent; obviously, this agent is Russia. The logical consequence of this approach is the introduction of relatively harsh sanctions against the group of “traitors” who decided to collaborate with the external enemy and thus contributed to the scale of injustices generated by the conflict. On the other hand, this approach leaves an open door for those whose engagement in warfare was somehow forced by circumstances, or who simply continued doing their jobs providing basic public goods to the population. From this perspective, the proposal takes

---

148 Arsen Avakov, “Strategy of Restoration of the Integrity of Ukraine and De-Occupation of the Donbass. “SMALL STEPS MECHANISM,” accessed May 23, 2019, <https://avakov.com/strategy-of-restoration-of-the-integrity-of-ukraine-and-de-occupation-of-the-donbass-small-steps-mechanism.html>.

into account the lessons learned from the discussed evolution of approach to retributive justice: it underlines the need to provide both a stick and a carrot, creates space for both deterrence and a rehabilitation of those who contributed to the emergence and escalation of the conflict. To what extent will actual policies move in this direction and what final shape will they assume should become the subject of future studies.

Thus, we can trace a clear evolution in the approach of Ukrainian authorities to the problem of accountability of those responsible for the rise of separatism since the beginning of 2014. The initial “legalist” approach was gradually opened toward accepting “political” solutions. While basing on tools of ordinary justice (existing provisions of the criminal code), a way was given for extraordinary tools; in particular, opening a field for negotiations over possible amnesty, which nevertheless did not materialize itself during the period covered by the analysis.

### **4.3. The practice of punishment for conflict-related crimes**

Having at my disposal the database of court decisions in conflict-related criminal cases (see Annex 2), as a next step of the analysis I take a closer look at this source of information with the aim to analyze the mentioned practice of engagement of the Ukrainian judiciary in relevant retributive practices. Is the above-presented evolution in the approach of Ukrainian authorities to accountability for conflict-related crimes observable only at the political level? That is, in decisions issued by the legislature and the executive, which are by definition sensitive to political “demand” in the shape of public opinion and accordingly provide political “supply” in the shape of design of relevant policies. Or, can similar changes be traced also in decisions issued by the judiciary? That is, a segment of state authorities responsible primarily for the interpretation and application of law. In other words, did the evolution of approach to retributive justice happen only in the field of political thought, or was it also reflected in decisions that directly affect persons engaged in the conflict? This section is devoted to answering these questions.

Each court trial is unique by definition. Ideally, a court is expected to assess the guilt of the accused by taking into account all the circumstances in which a given act was committed. Therefore, to find firm evidence that

a political motivation impacted the issuing of any particular verdict<sup>149</sup> requires conducting a thorough audit of the course of a case from its beginning to the end. Such a task was beyond the reach of this research project (and so, it constitutes a potentially interesting subject for further research). My approach here is based on the assumption that – due to the relatively large number of analyzed documents (ca. 1900) – any significant changes in the approach of the judiciary in punishing conflict-related wrongdoings can be deduced from the dynamics of the most fundamental information about the outcome of relevant court cases: the dynamics of the number of issued verdicts – including the proportion of convictions and acquittals – but also the dynamics of the average severity of punishment expressed in months of imprisonment.

Another assumption is that Ukrainian courts are characterized by “traditional sensitivity” to the will of the executive (see Chapter 2). This assumption is reinforced by the following argument. Before the outbreak of the Donbas conflict, Ukrainian judiciary had virtually no experience in dealing with the types of crimes covered by the database. During the four-years period preceding the beginning of the conflict – a timespan similar to the one covered by the database – we find only seventeen similar court decisions. There is no formal role of precedence in Ukrainian criminal law. At the same time, court practice in general is regarded as the source of law. However, it is not created by individual court decisions but established in the case of repeatability of problems faced by the court.<sup>150</sup> Therefore, Ukrainian judiciary did not have any sort of established practice in dealing with these sorts of wrongdoings. Taking into account that the discussed cases appeared on agenda in circumstances that are essentially extraordinary, the lack of established practice in dealing with them makes courts’ sensitivity to the approach proposed by the executive even more plausible. In other words, looking at the mentioned fundamental information about conflict-related court decision, I expect to observe the effect of hypothetical

---

149 As mentioned in Chapter 1, the provision of justice in extraordinary circumstances inevitably contains a significant element of political motivations, which from a normative perspective should contribute to reconciliation.

150 O. Dashkovs’ka, “Sudovi pretsedent i sudova praktyka iak dzherela prava,” *Visnyk Akademii Pravovykh Nauk Ukrainy*, no. 1 (64) (2011).

informal decisions to change the practice of bringing to accountability for some sort of wrongdoing. Data should reveal proper tendencies if there is a decision to stop prosecutions for an act interpreted as a manifestation of separatism or, on the contrary, if there is a decision to provide more severe punishments for an engagement in anti-governmental activities.

Figures 4.1–4.4 present the visualization of mentioned data. Each figure reflects court decisions addressing different types of wrongdoings. Such division is dictated by two reasons. First, it allows formulating some conclusions regarding the establishment of court practice, taking into account the mentioned principle of repeatability. Second, it creates ground for the search for mutual connections with the practices of truth-seeking discussed in Chapter 3. As a reminder, these are the following types of wrongdoings:

- 1) crimes against foundations of the national security of Ukraine (they cover the activities that can be popularly referred to as separatism), in particular actions aimed at violent change or overthrow of the constitutional order or the seizure of state power (art. 109 of the CCU); attack on the territorial integrity and inviolability of Ukraine (art. 110, 110-2 of the CCU); treason (art. 111 of the CCU);
- 2) terrorism-related crimes, in particular a terrorist act (art. 258 of the CCU), involvement in committing a terrorist act (art. 258-1 of the CCU), public appeals to commit a terrorist act (art. 258-2 of the CCU), creation of a terrorist group or terrorist organization (art. 258-3 of the CCU), facilitating the commission of a terrorist act (art. 258-4 of the CCU), financing terrorism (art. 258-5 of the CCU);
- 3) the creation of illegal paramilitary or armed units (art. 260 of the CCU);
- 4) planning, preparing, starting, and conducting aggressive war (art. 437 of the CCU).

Figures reflecting the practice of punishing crimes against foundations of the national security of Ukraine (4.1) have an irregular yet symmetric shape. There is no clear increasing or decreasing tendency. This suggests the non-existence of any sort of informal decisions taken by the Ukrainian authorities aimed at either treating this kind of essentially political acts in a more indulgent way or, on the contrary, increasing the deterring potential of these punishments. Furthermore, the figures provide no ground for claims that there is a tendency toward a crystallization of an established

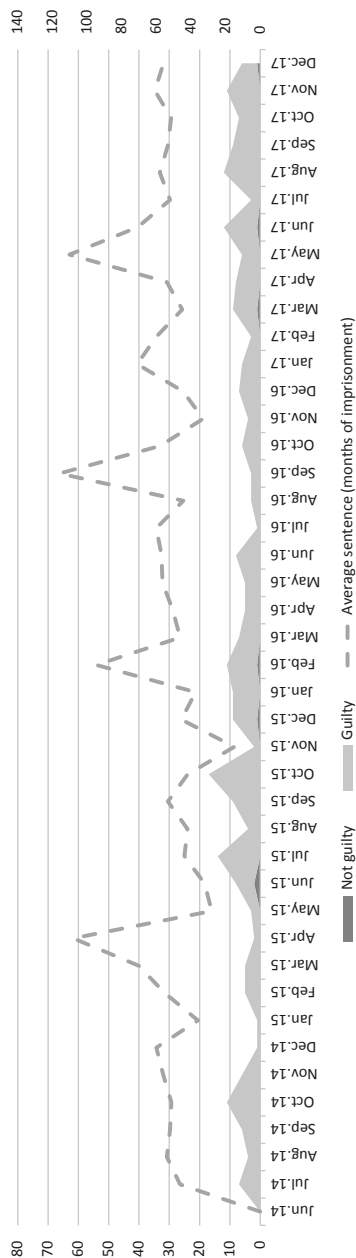


Figure 4.1. Court decisions referring to Donbas conflict-related wrongdoings: crimes against foundations of national security of Ukraine.

Source: own analysis on the basis of documents retrieved from <http://reyestr.court.gov.ua>



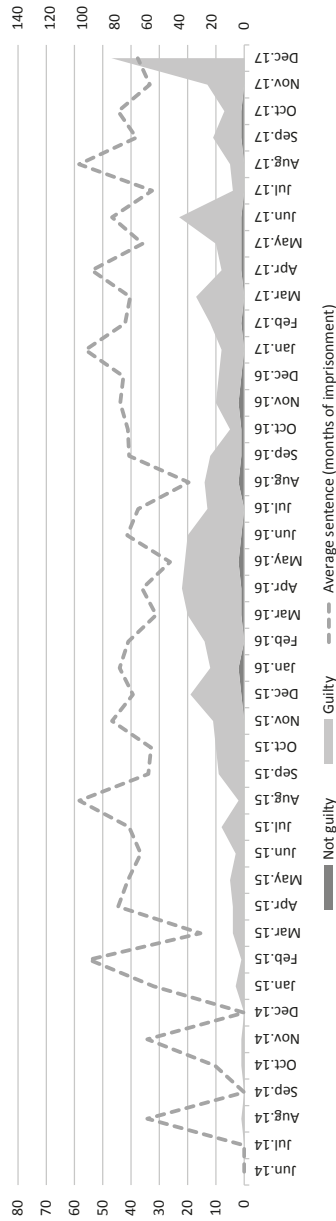


Figure 4.2. Court decisions referring to Donbas conflict-related wrongdoings: terrorism-related crimes. Source: own analysis on the basis of documents retrieved from <http://reyestr.court.gov.ua>.

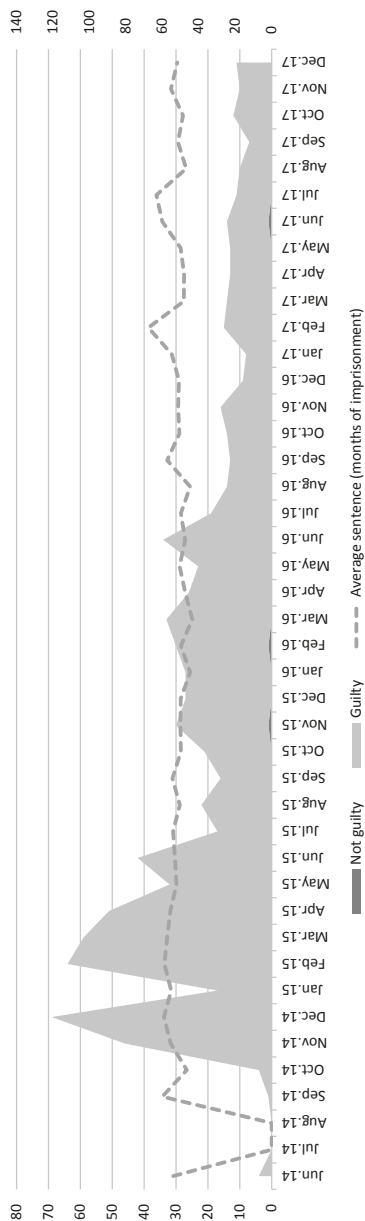


Figure 4.3. Court decisions referring to Donbas conflict-related wrongdoings: creation of illegal paramilitary or armed units. Source: own analysis on the basis of documents retrieved from <http://reyestr.court.gov.ua>.

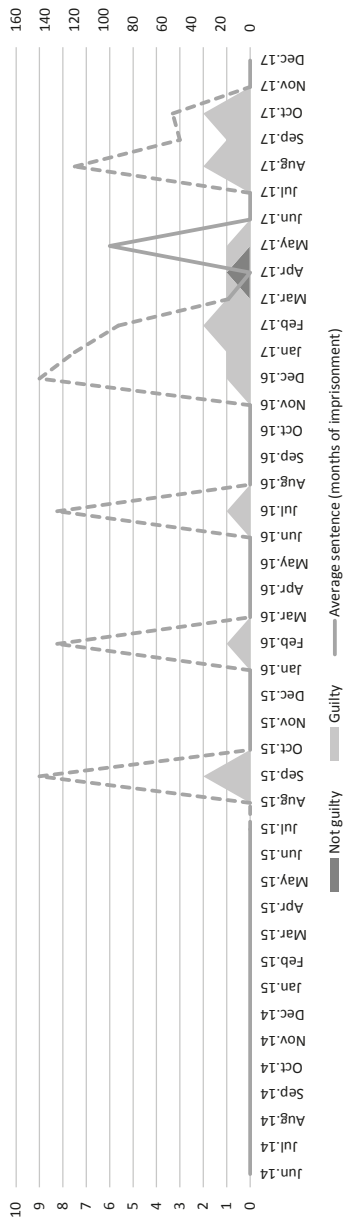


Figure 4.4. Court decisions referring to Donbas conflict-related wrongdoings: planning, preparing, starting, and conducting an aggressive war. Source: own analysis on the basis of documents retrieved from <http://reyestr.court.gov.ua>.

judicial practice visible at this level of analysis. Indeed, a deeper insight into randomly selected documents from this category reveals that similar provisions are applied to different types of actions; from support in organization of illegal referendums to spreading anti-governmental agitation in social media. As a result, the figures lack a clear pattern in terms of average punishment. What can be stated is that acts that could be interpreted as manifestations of or support to separatist ideas remained under constant scrutiny of Ukrainian authorities.

Figures reflecting the practice of punishing terrorism-related crimes (4.2) show a different picture. The figure reveals no sudden increases or decreases in the number of issued decisions, however there is a general growing tendency, which starts to be clearly visible since the middle of 2015. In other words, unlike in the case of other types of crimes, in which courts started issuing verdicts relatively quickly, terrorist-related cases were initially treated with reluctance. Furthermore, if we take into account the large number of terrorism-related crimes registered by the prosecution (see Chapter 3), one of the possible interpretations of this picture is the following. By taking a decision to operate within the framework of the ATO, Ukrainian authorities created a pressure that eventually “forced” courts to confirm that incumbents are indeed guilty of terrorism. In other words, in terrorism-related cases we deal with the process of establishing a court practice “inspired” by the executive branch of power. At the same time, the average punishment remained relatively stable, which does not suggest that there were any further informal decisions to mitigate or exacerbate punishments for this sort of acts beyond the very decision to frame the use of force against the government in terms of terrorism.

When it comes to participation in illegal armed groups, the figure (4.3) reflecting the number of issued decisions reveals a decreasing tendency. This figure shows some similarity with the figure reflecting the number of conflict-related casualties (see Annex 1). This suggests that peaks reflecting the increased number of issued verdicts can be explained as an outcome of increased intensity of warfare in summer 2014 and at the beginning of 2015. Moreover, the figure reflecting average punishment remained here stable. Generally, neither tendency suggests the existence of informal

decisions regarding changes in approach to the practice of punishment in this category of wrongdoers. As mentioned in Chapter 3, this category of cases is neutral from the perspective of narratives used by the Ukrainian authorities to “tell the story” of the conflict. Therefore, it would be also correct to state that retributive practices in these cases are also the less susceptible to incorrect or unjust interpretations. Indeed, the almost flat figure reflecting the average punishment suggests the existence of a unanimity in courts’ assessment of such actions.

Figures reflecting the practice of punishing crimes related to aggressive warfare (4.4) appear to be less informative. In fact, the much smaller amount of cases here disallows any inference basing on tendencies, as there are only sixteen relevant cases in the database. Therefore, the scale of the axis reflecting the number of verdicts is smaller than in previous figures and the figures themselves only reflect individual verdicts issued during the period covered by the book, so I provide them for illustrative purposes only.

All figures have an obvious common feature: acquittals constitute a small minority of all issued decisions. In other words, having in mind the disproportion between the number of crimes registered by the prosecutor and the number of verdicts (see Chapter 3), it would be correct to state that the Ukrainian judiciary appears to be severe toward wrongdoers, whose cases eventually end up in courts. Unfortunately, available data disallow any general conclusions regarding the fate of the accused whose cases are not finalized in courts.

There are some additional observations from the database, which do not arise from the presented figures, but which are nevertheless important from the perspective of this book. First, none of the documents covered by the database contain any sort of reference to notions of justice, truth, or peace in parts justifying the issued decisions. In other words, there is no formal trace of courts taking into account the logic of extraordinary situation, which is theoretically possible due to the existence of room for judiciary discretion. Second, none of the documents covered by the database refers to the “big fish” cases; that is, persons belonging to the small group of high-level leaders of the self-proclaimed “republics.” Third, there are no cases referring to pro-governmental combatants, although there are cases of investigations against persons serving in spontaneously created

volunteer battalions, which theoretically can be treated as illegal armed groups.<sup>151</sup>

The latter two observations should not be interpreted as a sufficient proof that Ukrainian judiciary practices a selective approach to punishment. These lacks result from the fact that numerous cases were pending at the moment of conducting the analysis, and some types of conflict-related cases remained beyond the scope of the database due to technical problems with their extraction (see the discussion about the limitations of the database in Annex 2).

All in all, we find no ground to state that there is a strong evidence supporting the claim that Ukrainian authorities somehow attempt to influence the practice of courts in their dealings with conflict-related wrongdoings with the aim to “fine-tune” this practice with the evolving political thought on how to use available retributive instruments in the context of the ongoing armed conflict. The only exception here is a sort of “suggestion” to engage counter-terrorist provisions of the criminal code in the shape of decisions to use force within the framework of ATO. As a result, since the beginning of the conflict till the end of 2017, approximately 400 persons were found guilty of committing terrorism-related crimes.

The above-presented findings are relevant first and foremost from the perspective of an “average wrongdoer:” a Ukrainian citizen<sup>152</sup> who for some reason engaged in anti-governmental activity. It is exactly this category of persons that is primarily affected by the discussed retributive measures. From this viewpoint, the judiciary acted in a rather “ordinary” way: if you commit an act regarded by the Ukrainian authorities as a conflict-related wrongdoing – and if you get into the gears of the judiciary – you will most likely be punished; there is not much possibility to alter your fate by referring to the circumstances of the armed conflict.

Still, there are potential spaces in which retributive practice could be modified to take into account the extraordinary circumstances of the armed conflict. The first is the timespan between the registration of a given crime and the court’s verdict. Indeed, Ukrainian authorities initiated a program

---

151 My interview with a representative of the Ukrainian Helsinki Human Rights Union, Kyiv, September 2017.

152 Although there are instances of foreigners in the database.

entitled “They wait for you at home,” which allows DNR/LNR combatants to return to peaceful life in the mainland in exchange for cooperation with law enforcement agencies. The program does not provide any formal guarantee of avoidance of criminal responsibility but obviously aims at a tradeoff between the state and an individual wrongdoer. There is no details about the program’s implementation, as they are classified.<sup>153</sup> However, its very existence suggests the possibility of informal decisions affecting the severity of punishment of individual wrongdoers before the case is lodged to the court. The second are the “big fish” cases along cases of punishing pro-governmental combatants. However, a systematic research of these issues requires conducting separate research designed in a different way.

#### 4.4. Effects and challenges

As the final step of analysis of retributive measures elaborated and implemented by the Ukrainian authorities to address the wrongdoings related to the Donbas conflict, I focus on the question: to what extent did they contribute to achieving normative goals prescribed to transitional justice? Taking into account the theoretical considerations mentioned at the beginning of this chapter, this question can be reformulated as follows: to what extent is the society-dominating perception of deservingness of punishment met, and to what extent does it contribute to settling down the existing retributive emotions, thus supporting reconciliation?

As discussed in Chapter 2, Ukrainians predominantly do not support a hawkish approach to policies aimed at putting an end to the conflict. Among other things, this refers to retributive measures. According to the research conducted with the aim to assess the degree of acceptability for “forgiveness” to inhabitants of the DNR/LNR, the overwhelming majority of Ukrainians (around 75 percent) agree that persons working in the areas of health, utilities, education, and social protection should be allowed to save their jobs in the event that the Ukrainian government returns control over these territories; in other words, they should not be punished in any

---

153 Tetiana Katrychenko, “Na tebe chekaiut’ vdoma, abo kolyshni terorysty na hachku u SBU,” *Ukrains’ka Pravda*, February 26, 2019, <https://www.pravda.com.ua/articles/2019/02/26/7207668/>.

way. On the contrary, a similar majority rejects the idea of amnesty provision to anti-governmental combatants.<sup>154</sup> However, when compared with other possible concession that could be provided by Ukrainian authorities, amnesty proves to be no priority issue (see Table 5.1 in Chapter 5).

When seen in this context, the discussed development of Ukrainian authorities' thinking about approach to punishments, but also practice of punishment are all conducted within the space designated by what can be called a "political demand." The application of existing retributive provisions to address relevant wrongdoers does not allow to claim that separatists and anti-governmental combatants generally enjoy impunity. At the same time, the presence of the idea of withdrawal from a strictly legalist approach to punishment and opening a possibility to conditionally remove punishment by some political concessions can also be argued to go in line with overall popular expectations. The same can be said about ideas that did not took the shape of legal acts: more or less concrete draft laws on amnesty, but also the idea to introduce the notion of collaborators into the legislation. All these initiatives can be regarded as "testing" different approaches to find possible solutions the peace vs. justice dilemma within the scope accepted by majority of Ukrainians.

However, there are at least several arguments that do not allow stating that the entirety of policies discussed in this chapter indeed bring the goal of reconciliation closer.

First, the discussed decision to start ATO and utilize counter-terrorist legislation greatly contributed to the abovementioned susceptibility of the conflict to multiple interpretations, as it introduced additional serious ambiguities regarding the status of combatants and prisoners on both sides.<sup>155</sup> Such circumstances allowed using the "retributive machine" not only to

---

154 "Chto ukraintsy dumaiut ob amnistii na Donbasse?," *Kalmius Group*, September 10, 2018, [https://www.kalmiusgroup.org/2018/09/blog-post\\_33.html](https://www.kalmiusgroup.org/2018/09/blog-post_33.html).

155 Media Initiative for Human Rights, Ukrainian Helsinki Human Rights Union, and Euromaidan Press, "V'iazni viiny. Mizhnarodna praktyka schodo zvil'nennia polonenykh, zaruchnykiv i politv'iazniv: vysnovky dlia Ukraïny" (Kyiv, 2018), <https://helsinki.org.ua/publications/v-yazni-vijny-mizhnarodna-praktyka-schodo-zvilnennya-polonenyh-zaruchnykiv-i-politv-yazniv-vysnovky-dlya-ukrajiny/>.



achieve its direct goals but for the sake of “taking hostages” – persons who could be exchanged for prisoners held by the “authorities” of the DNR/LNR.<sup>156</sup> The legality of such practices is doubtful. While in principle it can be regarded as going in line with the logic of acting in extraordinary situations, the lack of transparency in this regard may become a ground for further resentments. In other words, the practice of using the retributive apparatus by the Ukrainian state to address the problem of engagement of part of the population into anti-governmental warfare has created ground for claims about injustices that emerged as its result.

Second, the discussed judicial practice remained predominantly beyond attention of the public opinion. Effects of retributive apparatus in action were experienced by those directly affected by relevant investigations and trials. While this is not a small group, the results of these investigations and trials were not communicated in a systematic way to the rest of the citizens, whose opinions define the space for authorities to act, as it was mentioned above.<sup>157</sup> In other words, one can hardly find evidence that the discussed practice of punishment for conflict-related wrongdoings has a socialization effect. As a result, the questions remain unanswered whether dominating expectations regarding the deservingness of punishment are actually met and whether retributive emotions in the society are satisfied.

Last but not least, the presented data reflecting social expectations of retributive policies refer only to the Ukrainian mainland. Available data allow assuming, that inhabitants of the DNR/LNR are afraid of consequences of the contact with Ukrainian law enforcement agencies in the case these territories return under the control of Ukrainian central government.<sup>158</sup> Taking into account that the cited research was focused on “ordinary people” who do not participate in warfare, there is an obvious gap between the retributive expectations of mainland inhabitants and the

---

156 My interview with a representative of the Ukrainian Helsinki Human Rights Union, Kyiv, February 2019.

157 My interview with the representative of Ukrainian Legal Advisory Group, Kyiv, February 2019.

158 Petro Burkovs'kyi, Ruslan Kermach, and Andrii Hirnyk, “Chym zhyvut' tymchasovo nekontrol'ovani terytorii Donbasu? Osoblyvosti horyzontal'noï komunikatsii meshkantsiv rozdilenoho rehionu” (Kyiv: Democratic Initiatives Foundation, 2018).

fears of inhabitants of the “people’s republics.” This is probably the most serious argument in support of the statement that the proper modality of retributive justice that may serve the goal of reconciliation has not yet been elaborated.

## Chapter 5. Restorative justice

### 5.1. Restorative justice in conflict-affected societies: specificity and significance

The concept of restorative justice refers to measures aimed at healing and rehabilitation those affected by instances of injustice.<sup>159</sup> Repairing the consequences of previous law violations is an immanent principle of any legal system, including international law.<sup>160</sup> Unsurprisingly, this principle gained significant weight also in the process of provision of justice in extraordinary circumstances.

The concept of restorative justice requires some clarification, first and foremost because of the existence of alternative terms widely used in the literature: “reparations” and “reparative justice.” With no goal to enter the theoretical debate about the specificities of both these concepts, I regard them as more or less equivalent, therefore synonymous. As a result, we deal here with quite a capacious concept, as it refers to a multitude of specific measures such as restitution, compensation, rehabilitation, satisfaction, guarantees of nonrecurrence, and specific programs for providing benefits directly to the victims of certain types of crimes.<sup>161</sup> It is also extended onto the fields of dealing with historical injustices<sup>162</sup> and unintentional or incidental damages.<sup>163</sup> Generally, the abundance of issues covered by the

---

159 Charles Villa-Vicencio, “The Reek of Cruelty and the Quest for Healing: Where Retributive and Restorative Justice Meet,” *Journal of Law and Religion* 14, no. 1 (1999), p. 175.

160 Tomasz Lachowski, *Perspektywa praw ofiar w prawie międzynarodowym: sprawiedliwość okresu przejściowego (transitional justice)* (Łódź: Wydawnictwo Uniwersytetu Łódzkiego, 2018), p. 125.

161 Pablo De Greiff, “Justice and Reparations,” in *The Handbook of Reparations*, ed. Pablo De Greiff (Oxford: Oxford University Press, 2006), pp. 452–53.

162 Janna Thompson, “Reparative Claims and Theories of Justice,” in *Historical Justice and Memory*, ed. Klaus Neumann and Janna Thompson, *Critical Human Rights* (Madison: The University of Wisconsin Press, 2015).

163 Gabriella Blum and Natalie J. Lockwood, “Earthquakes and Wars: The Logic of International Reparations,” in *Jus Post Bellum and Transitional Justice*, ed. Larry May and Elizabeth Edenberg, *ASIL Studies in International Legal Theory* (New York: Cambridge University Press, 2013).

discussed concept can be regarded the consequence of the fact that relevant theoretical reflection refers primarily to questions that arise in the context of dealing with mass-scale violence; e.g. what can be regarded as a measure sufficient to provide healing and rehabilitation? what should be the extent of such measures?

To summarize, measures that can be categorized as belonging to the set of restorative justice complement those belonging to the set of retributive justice (see Chapter 4). They draw attention to “the other side of wrongdoing,” namely the victims. Restorative justice is aimed at achieving relational goals. In particular, the mentioned measures are expected to contribute to recognition of all individuals of a conflicted community as citizens with equal rights, the promotion of trust among citizens and solidarity understood as the disposition and willingness of people to put themselves in the place of others.<sup>164</sup>

Like other extraordinary measures, the practice of restorative justice application generates challenges. The latter originate from the specificity of measures under scrutiny which, despite focus on relational aims, are strongly dependent on the redistribution of material resources at the disposal of a society. Simply put, reparations generate costs, both as specific programs aimed at paying individual or collective compensations and as policies providing certain public goods. These costs inevitably constitute burden for some parts of the society. Whenever the issue of distribution of wealth is introduced into the political agenda, one can expect disputes regarding the fairness of specific solutions.<sup>165</sup> If restorative justice measures address the consequences of large-scale violence, the problem of proper calculation of the value to be provided to victims in one way or another becomes even more obvious.<sup>166</sup>

Furthermore, while in principle the responsibility of the offender to somehow compensate the harm done – and thus to contribute to

---

164 De Greiff, “Justice and Reparations,” pp. 460–66.

165 This problem is discussed in more detail in Harry Brighouse, *Sprawiedliwość* (Warszawa: Wydawnictwo Sic!, 2007).

166 Tyler Cowen, “How Far Back Should We Go? Why Restitution Should Be Small,” in *Retribution and Reparation in the Transition to Democracy*, ed. Jon Elster (Cambridge: Cambridge University Press, 2006), pp. 17–32.

reparation – raises no objection, in the situation of uncertainties and ambiguities regarding the division between offenders and victims, a focus on the latter is usually associated with the risk that it will revictimize and stigmatize both victims and offenders.<sup>167</sup> This leads to underlining once again the sensitivity of restorative justice to truth-seeking (see Chapter 3). Who is actually a victim? Who actually bears the responsibility for victims' suffering? The answers to these and other similar questions may significantly determine relevant policies of an interested state, and thus determine whether they lead to more social solidarity or revictimization of certain social groups.

Below, I will focus on measures that fit into the category of restorative justice, applied by Ukrainian authorities to address the consequences of wrongdoings associated with the Donbas conflict.

## **5.2. The evolution of Ukrainian authorities' approach to restorative justice in the context of the Donbas conflict**

Similar to other policies fitting into the category of transitional justice discussed in previous chapters, the approach of the Ukrainian authorities to restorative measures aimed at dealing with the legacy of the Donbas conflict has evolved over time. In this case, the specificity is in the fact that – along with the passage of time – new initiatives did not replace the previous ones but rather supplemented them, constituting an attempt to adjust the approach to changing needs. The schematic timeline of the approach's development is presented in Annex 1. Let us now turn to the analysis of the main stages of development of relevant policies.

### **Setting up foundations of policy toward IDPs and citizens in non-controlled territories**

The most evident problem that required the Ukrainian authorities to introduce measures fitting into the category of restorative justice manifested itself

---

<sup>167</sup> Jemima Garcia-Godos and Chandra Lekha Sriram, "Introduction," in *Transitional Justice and Peacebuilding on the Ground Victims and Ex-Combatants*, ed. Chandra Lekha Sriram et al. (London: Routledge, 2013), p. 7.

at the very early stages of the Donbas conflict. As a result of sovereignty loss over a part of its territory, the Ukrainian state de facto lost its ability to provide rights and freedoms guaranteed by the constitution to a significant part of its citizens. Some of them decided (and some were forced) to leave their places of residence and move to the mainland (territory under control of the government), which resulted in the emergence of the problem of internally displaced persons (IDPs). The very existence of IDPs, who by definition suffer a certain form of injustice, can be regarded as the most visible symptom of the discussed conflict and its impact on the Ukrainian society. Meanwhile, the citizens who remained in their places of residence constitute exactly that part of the society, which is to be “reintegrated,” and which is to become a party of the process of reconciliation in the first place. Thus, it is no surprise that the first steps that fit into the category of restorative justice were taken to address this particular problem and to outline the most fundamental principles of the state’s policy toward citizens whose “contract” with the state – in terms of guaranteed rights and freedoms – appeared to be violated as a result of the conflict: those who for different reasons remained in the occupied territories and those who moved to the mainland.

Unsurprisingly, foundations were laid during what was already called the Crimean phase of the conflict. Almost immediately after the finalization of the annexation of Crimea, on March 19, 2014, there was initiated the preparation of the law on ensuring civil rights and freedoms, along with the legal regime on the temporarily occupied territory of Ukraine. The law was adopted on April 15, 2014.<sup>168</sup> In the case of this document, the notion of temporarily occupied territory referred exclusively to Crimea. The goal of the law was to confirm the Ukrainian state’s obligation to guarantee the rights of its citizens; both those who decided to stay in Crimea and those who moved to Ukraine’s mainland. In particular, the law explicitly mentioned political (electoral) rights, the right of free movement, property rights, the right to inheritance, the right to justice; although, it did not set up any concrete mechanism to guarantee these rights. In August 2014,

---

168 Verkhovna Rada of Ukraine, “On ensuring civil rights and freedoms, and the legal regime on the temporarily occupied territory of Ukraine,” Pub. L. No. 1207-VII (2014), <https://zakon.rada.gov.ua/go/1207-18>.

the discussed document was supplemented by the law that provided the basis for the creation of the “Crimea” free economic area and established rules for the economic activity of Ukrainian citizens and companies originating from the occupied Crimean Peninsula. This document was declared to be aimed at maintaining the profitability of legal entities evacuated from Crimea and maintaining the living standards of citizens voluntarily or forcibly evacuated from this area.<sup>169</sup>

Obviously, the problem of IDPs gained additional significance along with the spread of the conflict to Donbas and the escalation of violence associated with it. On October 20, 2014, the law on IDPs was adopted with the aim of creating a comprehensive state policy to guarantee the rights of the latter.<sup>170</sup> The most significant innovation of the law was the formal creation of the special status of an IDP, which is confirmed by the special certificate – thus “indicating” those entitled to become beneficiaries of policies aimed at providing some form of compensation – and the creation of the specialized register of IDPs. Both elements were aimed at facilitating the management of relevant policies targeted at this most widespread category of persons affected by the conflict.

The law also established a connection to retributive measures (see Chapter 4). In particular, one basis to deprive a person of the IDP status is when he or she commits one of the crimes that became the basis for judging the government’s adversaries; then widely referred to as separatists. That is, crimes against foundations of the national security of Ukraine, terrorism-related crimes, genocide, crimes against humanity, and war crimes. In other words, active engagement in anti-governmental actions was defined as a criterion for distinguishing perpetrators from victims among the inhabitants of the conflict-affected territories. The fundamental principles laid down in

---

169 Verkhovna Rada of Ukraine, “On creation of a free economic zone “Crimea” and the peculiarities of economic activity in the temporarily occupied territory of Ukraine,” Pub. L. No. 1636-VII (2014), <https://zakon.rada.gov.ua/go/1636-18>.

170 Verkhovna Rada of Ukraine, “On ensuring the rights and freedoms of internally displaced persons,” Pub. L. No. 1706-VII (2014), <https://zakon.rada.gov.ua/go/1706-18>.

these documents remained in force over the whole period of time covered by this research.

### **Restoration of infrastructure in the uncontrolled territories: bargaining and conditionality**

Along with the escalation of the conflict, it became clear that restorative measures cannot be limited to mere legislation confirming the validity of the mentioned “contract” between the Ukrainian state and all its citizens in the extraordinary situation.

The destruction of infrastructure and deterioration of socio-economic situation of people directly or indirectly affected by the conflict – regardless of the side of the conflict they represent – obviously required further steps which were inevitably connected with the need of redistribution of public resources, such as compensations and programs of restoration of the infrastructure. As discussed above, the peak of violence in August 2014 led to the engagement of Ukrainian authorities in the process of political negotiations with their adversaries; however vague this category was due to the hybridity of the Donbas conflict. The combination of these circumstances was used by the Ukrainian authorities to apply a certain kind of conditionality targeted at the decisionmakers of the self-proclaimed “republics.” More specifically, the issue of provision of material resources necessary both for normal functioning and restoration of damages in the occupied territories was turned into a matter of bargain.

Two decisions illustrate this logic. The law on the special status of occupied territories adopted on September 16, 2014,<sup>171</sup> among other issues contained the provision for the creation of a special mechanism enabling the financial support of local authorities – having in mind the territories under control of the self-proclaimed “republics” – to ensure social, economic, and cultural development of these territories. However, this was conditioned by the prior conduct of local elections in accordance with

---

171 Verkhovna Rada of Ukraine, “Law on special regime of local self-government in certain districts of Donetsk and Luhansk oblasts,” Pub. L. No. 1680-VII (2014), <https://zakon.rada.gov.ua/go/1680-18>.



Ukrainian legislation. This condition was never fulfilled and, as a result, the mentioned proposal remains on paper.

On the other hand, Ukrainian authorities took several steps that can be interpreted as an attempt to exert economic pressure on the “authorities of republics.” First, in November 2014, the Ukrainian government decided to stop budgetary payments to local institutions under the control of separatists. In practice, this decision closed the possibility for the “authorities” to provide public goods and deploy social payments at the cost of Ukrainian budget; which was additionally used by the “authorities” as a means to legitimize themselves. Noteworthy, this decision was taken almost half a year after the beginning of the violent phase of the conflict. As a result, citizens remaining in the “republics” had to visit the mainland regularly to obtain due social payments (such as pensions). On June 9, 2015, the Ukrainian government informed the Council of Europe about its derogation from the European Convention on Human Rights under Article 15 of the Convention,<sup>172</sup> thus additionally underlining its readiness and ability to guarantee all sorts of civil rights only on the territory controlled by the Ukrainian government. Finally, in March 2017, economic restrictions against the “republics” were tightened when the economic blockade was enacted, significantly limiting the possibility of trade with the occupied territories.<sup>173</sup>

This what can be called “restorative proposal” formulated by the Ukrainian authorities in the aftermath of signing the Minsk-1 protocol did not result in any break-through in terms of evolution of the conflict. Nevertheless, it remained in force in the following years. The special status was initially planned to last for three years, but in October 2018 it was eventually prolonged till the end of 2019.<sup>174</sup> Another signal that Ukrainian authorities are potentially ready to bargain in this field was sent in March

---

172 “Ukraine Derogation from European Convention on Human Rights,” *Council of Europe*, June 10, 2015, [https://www.coe.int/en/web/secretary-general/news/-/asset\\_publisher/EY1BJNjXtA5U/content/ukraine-derogation-from-european-convention-on-human-rights/16695](https://www.coe.int/en/web/secretary-general/news/-/asset_publisher/EY1BJNjXtA5U/content/ukraine-derogation-from-european-convention-on-human-rights/16695).

173 National Security and Defense Council of Ukraine, “On urgent additional measures to counter hybrid threats to Ukraine’s national security,” Pub. L. No. 62/2017 (2017), <https://zakon.rada.gov.ua/go/n0002525-17>.

174 Verkhovna Rada of Ukraine, “On amendments to article 1 of the Law of Ukraine “Law on special regime of local self-government in certain districts

2015, after signing the Minsk-2 protocol. At that moment, the process of constitutional amendment on state decentralization was initiated. The reform was aimed primarily at meeting the generally understood European standards in terms of self-government, in particular the principles of subsidiarity, universality, and financial sustainability of local government. Nevertheless, its implementation would undoubtedly provide local authorities throughout the country with broader competences, which could be combined with obtaining additional resources on the basis of the law on special status. Once again, the process was suspended due to the lack of progress in peace talks.<sup>175</sup>

### Development of controlled territories: attempt to build soft power

Along with the above measures, Ukrainian authorities started the implementation of projects aimed at the restoration of parts of Donbas remaining under the control of central government.

In order to manage the area, a state agency for the restoration of Donbas was created on September 10, 2014.<sup>176</sup> In April 2016, together with the State Service of Ukraine for the Autonomous Republic of Crimea and the city of Sevastopol, the agency was transformed into the Ministry of Temporarily Occupied Territories and Internally Displaced Persons (MTOT), whose primary task is to manage relevant state policies.

After signing the Minsk-1 protocol, a number of plans and programs aimed at the restoration of the destroyed infrastructure were adopted:

- action plan for recovery of objects of social and transport infrastructure, housing, and life support systems (October 16, 2014);<sup>177</sup>

---

of Donetsk and Luhansk Oblasts,”“ Pub. L. No. 2588-VIII (2018), <https://zakon.rada.gov.ua/go/2588-19>.

175 I discuss this issue in more details elsewhere: Igor Lyubashenko, *Transitional Justice in Post-Euromaidan Ukraine: Swimming Upstream*, Studies in Political Transition, vol. 7 (Frankfurt am Main: Peter Lang Edition, 2017), pp. 135–39.

176 Cabinet of Ministers of Ukraine, “On the optimization of the system of central executive organs,” Pub. L. No. 442 (2014), <https://zakon.rada.gov.ua/go/442-2014-%D0%BE>.

177 Cabinet of Ministers of Ukraine, “On approval of the plan of measures for the organization of restoration of damaged (destroyed) objects of social and transport infrastructure, housing stock and life support systems in Donetsk

- decision of the Cabinet of Ministers regulating the procedure of obtaining subventions for the recovery of the destroyed infrastructure (April 29, 2015);<sup>178</sup>
- amendment to the Budgetary Code of Ukraine, according to which all unused resources in local budgets throughout the country are transferred to special funds in the local budgets of Donetsk and Luhansk oblasts, aimed at the restoration of damaged infrastructure (June 2, 2016);<sup>179</sup>
- action plan for the realization of some principles of state policy toward territories under the control of the “people’s republics” (January 11, 2017);<sup>180</sup>
- state program of the recovery of and peacebuilding in eastern regions of Ukraine (December 13, 2017).<sup>181</sup>

As a result, measures constituting the core of approach to restorative justice can be regarded as based on the principle of focusing on the restoration of public property situated in Ukraine’s mainland. Noteworthy, neither of the mentioned documents provides basis for individual compensations for

---

and Luhansk oblasts,” Pub. L. No. 1002-p (2014), <https://zakon.rada.gov.ua/go/1002-2014-%D1%80>.

- 178 Cabinet of Ministers of Ukraine, “On approval of the procedure and conditions of providing subventions from the state budget to local budgets for the restoration (construction, overhaul, reconstruction) of infrastructure in Donetsk and Luhansk oblasts,” Pub. L. No. 250 (2015), <https://www.kmu.gov.ua/ua/npas/248135239>.
- 179 Verkhovna Rada of Ukraine, “On amendments to subparagraph 4, paragraph 24, section VI “Final and Transitional Provisions” of the Budgetary Code of Ukraine,” Pub. L. No. 1406-VIII (2016), <https://zakon.rada.gov.ua/go/1406-19>.
- 180 Cabinet of Ministers of Ukraine, “On approval of a plan of measures aimed at implementation of certain principles of the state policy towards certain districts of Donetsk and Luhansk oblasts, where the state authorities temporarily do not exercise their powers,” Pub. L. No. 8-p (2017), <https://zakon.rada.gov.ua/go/8-2017-%D1%80>.
- 181 Cabinet of Ministers of Ukraine, “On approval of the state target program for the restoration and peacebuilding in the eastern regions of Ukraine,” Pub. L. No. 1071 (2017), <https://zakon.rada.gov.ua/go/1071-2017-%D0%BF>.

those who suffered as a result of warfare in Donbas. This can be explained in the following way.

Having in mind Ukraine's hard economic situation (see Chapter 2), the proper allocation of available – rather modest – material resources constitutes a challenge. Already in mid-2014 the Ukrainian government requested technical assistance and financial support from the international community to assess and plan priority recovery and peacebuilding efforts in the conflict-affected regions of eastern Ukraine. In response to this request, the Recovery and Peacebuilding Assessment was prepared by a consortium of the EU, the UN, and the World Bank.<sup>182</sup> The document indicated the most significant needs of the region affected by warfare, whose majority can be interpreted as measures fitting into the category of restorative justice. Moreover, it clearly indicated main governance problems, which constitute major obstacles for achieving identified goals (first and foremost, the problem of corruption). It also contains a suggestion that foreign support should be supplementary to Ukraine's own efforts.

In August 2015, the mentioned document was accepted by the Cabinet of Ministers of Ukraine as official “guidelines” for the further development of policies toward Donbas.<sup>183</sup> As a result, the mentioned state program of recovery and peacebuilding in the eastern regions of Ukraine adopted in December 2017 is based exactly on the proposals of the international consortium. In particular, the program assumes that the conflict is an important factor of deterioration in social and economic rights, however this problem is rooted deeper and has origins in the period that preceded the conflict. Therefore, reconstruction should be future-oriented. In other words, the goal is not to just “restore” social and economic situation from before the outbreak of the conflict but to create conditions for modernization.

---

182 The World Bank, “Ukraine. Recovery and Peacebuilding Assessment. Analysis of Crisis Impacts and Needs in Eastern Ukraine,” March 2015, <http://documents.worldbank.org/curated/en/879011468188335375/pdf/96487-REPLACEMENT-FILE-WP-v1-Box391453B-PUBLIC-RPA-A4-Vol1-Eng-Web.pdf>.

183 Cabinet of Ministers of Ukraine, “On approval of the report of the joint mission of the European Union, the United Nations and the World Bank “Recovery and Peacebuilding Assessment in Ukraine,” Pub. L. No. 797-p (2015), <https://zakon.rada.gov.ua/go/797-2015-%D1%80>.

Furthermore, the discussed aspect of Ukraine's policy reflects the dominating popular expectations that the conflict should be resolved primarily by peaceful means. More specifically, it is based on the assumption that what can be called the normalization of life in territories controlled by Ukraine's central government – and their anticipated development in the future – can serve as the most effective tool to reintegrate the occupied territories. Hence, the idea of soft power.<sup>184</sup>

### Relegation of responsibility to Russia

By adopting the already mentioned “reintegration law” at the beginning of 2018,<sup>185</sup> the Ukrainian authorities marked their will to consolidate and – at least to some extent – eliminate controversies in conflict-related policies (I will return to this issue in the following section). This had a significant impact on restorative measures.

The law confirmed that the protection of rights, freedoms, and lawful interests of physical and legal persons constitutes one of the goals of Ukraine's policy towards the occupied territories; along with the freeing of the occupied territories and the restoration of constitutional order there, ensuring the independence, unity, and territorial integrity of Ukraine. At the same time, the law established the principle according to which Ukraine does not bear responsibility for “unlawful actions of the Russian Federation or its occupation administration in the temporarily occupied territories in Donetsk and Luhansk oblasts or for unlawful decisions taken by them” (art. 6). Consequently, the “responsibility for material or non-material damages caused to Ukraine as a result of the armed aggression of the Russian Federation, relies on the Russian Federation in accordance with principles and norms of international law” (art. 2).

In other words, the law indirectly confirmed principles of restorative measures undertaken in the context of the Donbas conflict, established in the previously discussed stages: (1) the focus on guaranteeing rights of

---

184 Joseph S Nye, *Soft Power: The Means to Success In World Politics*. (New York: Public Affairs, 2009).

185 Verkhovna Rada of Ukraine, “Law on the peculiarities of the state policy aimed at protecting the state sovereignty of Ukraine in temporarily occupied territories in the Donetsk and Luhansk oblasts.”

citizens directly affected by the conflict and provision of necessary assistance to IDPs; (2) the provision of investments to recover “normal life” in parts of Donetsk and Luhansk oblasts under control of the central government. These were supplemented by the principle of the relegation of responsibility for all conflict-related damages to Russia as the aggressor. This step obviously goes in line with developments in other “lineages” of transitional justice policies discussed in previous chapters; in particular, in the field of truth-seeking.

### 5.3. Effects and challenges

Turning to the issue of effectiveness, I will deliberately omit the question of achieving the direct goals prescribed to above measures. Besides, progress in the process of restoration of destroyed infrastructure is a complex problem in itself, which should be studied separately according to principles of evaluation of public policies. Taking into account the goal of this study, I will focus on effects and challenges in achieving relational goals prescribed to restorative justice.

The most fundamental strength of presented measures is that they agree with dominating popular expectations regarding the necessary steps to establish peace. According to data presented in Table 5.1, conviction about the necessity of restorative measures – that is, the conviction about the potential effectiveness of the “soft power” approach – as a step toward peace is the most popular one, set aside the necessity to increase international pressure on Russia. At the same time, support declines to a position that can be regarded as opposite (stop financing the occupied territories).

On the other hand, the presented measures generated a number of problems. Some can be regarded as shortcomings in the process of policy implementation. In turn, some constitute what can be called unintended consequences of policies.

In terms of shortcomings, one should first and foremost underline problems in the field of execution of policy towards IDPs. The latter are reported to experience difficulties that question the actual ability of the state to fully implement proclaimed goals of protection of their social rights. In particular, IDPs experience arrears in payments (pensions, targeted assistance), problems with assistance in solving housing issues (providing housing, concluding a rental contract), problems with confirming the actual place of

Table 5.1. Preferable ways to solve the Donbas conflict, as seen by Ukrainians.

| <i>What decisions, in your opinion, should be taken in order to establish peace in Donbass? (respondents could select not more than three answers; answers in percentages)</i> | Oct. 15 | May. 16 | Jun. 17 | May. 18 |
|--|---------|---------|---------|---------|
| Separation of territories occupied by the DNR and LNR from Ukraine   | 8.2     | 12      | 8.8     | 9.8     |
| Providing the DNR and LNR with a special status within the borders of Ukraine  | 13.5    | 12.8    | 11.8    | 12.9    |
| Introduction of federalism in Ukraine  | 8.1     | 7.5     | 4.6     | 8.7     |
| The successful restoration of normal life in the territories of Donbas under the control of Ukraine  | 29.2    | 27.6    | 28      | 30.6    |
| Legal elections in the territories controlled by the DNR and LNR   | 12.9    | 12.6    | 11.7    | 13      |
| Providing Russian language with an official status   | 8.2     | 11.4    | 4.9     | 6.5     |
| Provision of amnesty to everyone who participated in warfare in Donbas   | 2.7     | 5.7     | 3.8     | 7.2     |
| Forcing Russia to stop interference in the Donbas conflict (strengthening international sanctions, having international institutions pressure Russia)                          | 35.2    | 40.6    | 38.1    | 32      |
| Stop financing the territories occupied by the DNR and LNR (pensions, salaries etc.)   | 13.2    | 19.6    | 11      | 7.1     |
| Resignation from the perspective of NATO membership, guaranteeing neutral status of Ukraine in the constitution  | 5.9     | 7.5     | 6.3     | 6.6     |
| Peace can be established only by force - Ukraine should regain control over territories of DNR and LNR by military means   | 13.6    | 14.8    | 13.5    | 14.2    |
| Other  | 0.8     | 1.8     | 3.3     | 2.1     |
| Hard to say  | 17.5    | 13.1    | 14.1    | 15.8    |

Source: Democratic Initiatives Foundation.

residence, problems with obtaining subsidies, problems with housing and communal services payments, along with instances of unfounded annulment of the IDP certificate.<sup>186</sup> Furthermore, IDPs were de facto deprived of their rights to vote in 2015 local elections.

<sup>186</sup> Ukrainian Helsinki Human Rights Union, “Zahubleni v papirtsiakh: dotrymanna sotsialnykh prav vnutrishn’o peremishchenykh osib,” 2017, [https://helsinki.org.ua/wp-content/uploads/2018/01/zagubleni\\_ukr.pdf](https://helsinki.org.ua/wp-content/uploads/2018/01/zagubleni_ukr.pdf).

Table 5.2. The level of trust toward IDPs among Ukrainians.

| <i>I am ready to accept IDPs from Donbas as...</i>   | 2015 | 2017 | 2018 |
|--|------|------|------|
| Members of my family   | 22.1 | 26.4 | 22.9 |
| Close friends  | 31.6 | 40.5 | 34.1 |
| Neighbours   | 51.1 | 65   | 58.3 |
| Persons I manage: hired workers, subordinates, etc.  | 21.3 | 23.4 | 20.8 |
| Colleagues at work, who work as my peers at different positions                                | 36.8 | 42   | 34   |
| Persons who manage me: employers, bosses, etc.   | 12.5 | 18.1 | 13   |
| Persons who head the administration of a town/village I currently live in                      | 9.8  | 15.1 | 10   |
| Persons, who head ministries or state services of Ukraine                                      | 9.2  | 15.1 | 9.6  |
| The President of Ukraine   | 7.7  | 13.8 | 8    |
| Citizens who vote in elections for the President, the Verkhovna Rada, or local self-government | 27   | 41.5 | 31.1 |
| Persons who obtain tax, credit, or other financial privileges                                  | 15.2 | 24.3 | 15.1 |
| I am not ready to accept them in any situation   | 19.6 | 12.8 | 12.9 |

Source: Democratic Initiatives Foundation

On the other hand, policies targeted at IDPs do not prevent the emergence of tensions between the latter and the local population. According to data presented in Table 5.2, along with the prolongation of the conflict, one can observe the tendency of growing distrust toward IDPs in the Ukrainian society. The reason for that is primarily due to the conviction about the “privileged status” of IDPs.<sup>187</sup> Another research revealed that IDPs themselves declare an increased interest in politics, which makes them a “politicized social group.” Both tendencies suggest that there is a potential for new tensions/conflicts between those who can be called victims of the conflict and “neutral citizens.”<sup>188</sup>

187 Democratic Initiatives Foundation, “Stavlennia naseleennia Ukraïny do vnutrishn’o peremishchenykh osib,” January 30, 2019, <https://dif.org.ua/article/stavlennya-naseleennya-ukraini-do-vnutrishno-peremishchenikh-osib>.

188 Gwendolyn Sasse, “The Displaced Ukrainians. Who Are They, and What Do They Think?” (Centre for East European and International Studies, March 2017), <https://www.zois-berlin.de/publikationen/zois-report/zois-report-12017/>.



In terms of what was called above the unintended consequences of discussed policies, we should pay attention to the mentioned principle of focus on the restoration of public property. The logic behind such an approach is clear. In conditions of limited resources, it is better to focus on measures that can serve, among other things, the function of investment. However, as a result of the specificity of Ukraine's political system (see Chapter 2), virtually all measures/initiatives proposed by the authorities bear the burden of "the lack of trust by default." Restorative measures are no exception here.

More specifically, Ukrainians who reside in parts of Donbas under the control of central government regard state policies as not aimed at the protection of citizen interests, but rather as instruments of personal enrichment of the authorities, both central and local.<sup>189</sup> Such views are not groundless. The economic blockade of the "republics" resulted in the emergence of the problem of contraband, which involves both Ukrainian officials and the DNR/LNR "authorities."<sup>190</sup> Furthermore, there are signals in public debate about instances of fraud of resources allocated to restoration programs.<sup>191</sup> Obviously, verifying such information requires an audit of these policies. Importantly, such reports do not reinforce the trust of all Donbas inhabitants in Ukrainian authorities. Figure 5.1 presents the relevant data; due to the scarcity of information originating from the occupied territories, there are unfortunately no available data to reflect a more nuanced picture.

The second unintended consequence of the presented approach to restorative justice originates from the fact that – at least to some extent – it appears to be at odds with other aspects of policies addressed at dealing

---

189 Petro Burkovs'kyi, Ruslan Kermach, and Andrii Hirnyk, "Chym zhyvut' tymchasovo nekontrol'ovani terytorii Donbasu? Osoblyvosti horzontal'noi komunikatsii meshkantsiv rozdileno ho rehionu" (Kyiv: Democratic Initiatives Foundation, 2018).

190 "Peretynaiuchy mezhu: nelehal'na torhivlia z okupovany m Donbasom, shcho pidryvaie oboronu" (Kyiv: The Independent Defence Anti-Corruption Committee, 2017).

191 Valentina Samar, "Gibridnyi yevroremont Donbassa," *ZN.Ua*, June 2, 2017, [https://zn.ua/internal/gibridnyy-evroremont-donbassa-250324\\_.html](https://zn.ua/internal/gibridnyy-evroremont-donbassa-250324_.html).

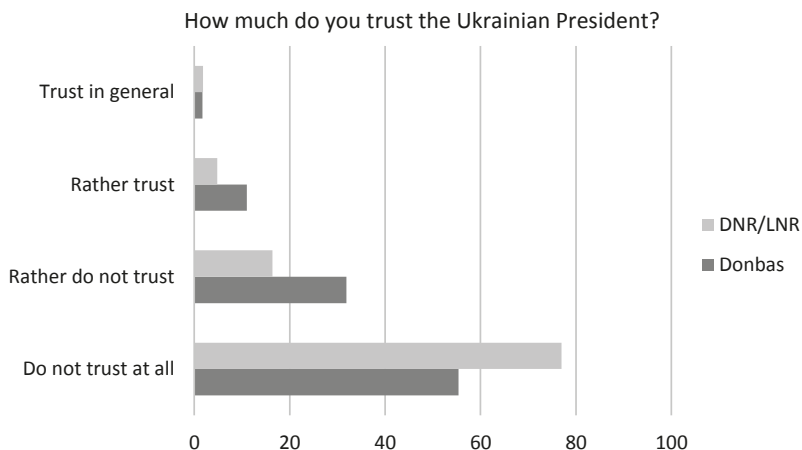


Figure 5.1. The level of trust in Ukrainian authorities among Donbas inhabitants.

Source: Gwendolyn Sasse, “The Donbas - Two Parts, or Still One? The Experience of War through the Eyes of the Regional Population,” ZOiS Report, May 2017, [https://www.zois-berlin.de/fileadmin/media/Dateien/ZOiS\\_Reports/ZOiS\\_Report\\_2\\_2017.pdf](https://www.zois-berlin.de/fileadmin/media/Dateien/ZOiS_Reports/ZOiS_Report_2_2017.pdf).

with the consequences of the Donbas conflict. According to the law on the fight against terrorism,<sup>192</sup> citizens are eligible for compensation for any damage caused during counter-terrorist operations. Therefore, the decision to regulate actions against self-proclaimed “republics” in the framework of ATO opened a legal possibility for citizens to demand corresponding individual compensations.

Of course, such summons were connected with risks of political nature, as it could be interpreted as a proof that Ukrainian authorities are responsible for instances of violence that resulted in the physical destruction of property, and financial nature, as there are no clear estimations of the potential value of private property destroyed or damaged as a result of the Donetsk warfare. Due to the lack of a clear state policy referring to this

192 Verkhovna Rada of Ukraine, “On fight against terrorism,” Pub. L. No. 638–IV (2003), <https://zakon.rada.gov.ua/go/638-15>.

particular problem, affected persons interested in obtaining compensations have to do it through courts.<sup>193</sup>

Several draft laws were proposed by MPs aimed at establishing mechanisms to solve the problem, but none of them was ever voted.<sup>194</sup> Furthermore, there are signals that the state is unwilling to pay individual compensations even when there is a positive court decision: state budget lacks appropriate provisions that would allow such payments.<sup>195</sup>

The decision to adopt the law containing a provision on the relegation of responsibility for conflict-related damages to Russia should be regarded, among other things, as a way to address this particular problem. However, it does not change the fact that the described inconsistency may serve as an additional variable that increases the distrust of interested citizens toward Ukrainian authorities' declarations referring to their will to protect the rights of all Ukrainians affected by the Donbas conflict.

Summing up, restorative measures constitute the most challenging aspect of transitional justice policies designed to address the legacy of the Donbas conflict. They have the potential to be experienced directly by the largest number of interested persons (direct and indirect victims of the conflict). On the other hand, these measures have to take into account the potential risks of both political and economic nature. The former are related to the possibility that the addressees of restorative redistribution may be regarded by some parts of the society as wrongdoers (or their collaborators) or that actual victims appear to be omitted by relevant programs. The latter stem from the simple fact that resources to be devoted to such restorative redistribution are always limited.

---

193 My interview with the representative of Ukrainian Legal Advisory Group, Kyiv, February 2019.

194 Oleh Shynkarenko, "Chy mozhlyvo otrymaty kompensatsiiu za zruinovane na Donbasi zhytlo?," *Precedent-UA*, August 8, 2016, <https://precedent.in.ua/2016/08/08/chy-mozhlyvo-otrymaty-kompensatsiyu-za-zrujnovane-na-donbasi-zhytlo/>.

195 Oleh Shynkarenko, "Kaznacheistvo vidmovliaiet'sia vyplachuvaty dva miliony za zruinovane v ATO zhytlo," May 30, 2018, <https://helsinki.org.ua/articles/kaznachejstvo-vidmovlyajetsya-vyplachuvaty-dva-miljony-za-zrujnovane-v-ato-zhytlo/>.

In search of a solution to these dilemmas, Ukrainian authorities primarily relied on instruments that can be regarded as future-oriented; the restoration of damaged infrastructure can be regarded such an investment. Similar proposal was presented to the “authorities” of DNR/LNR in exchange for the return of the self-proclaimed “republics” under Ukraine’s sovereignty, which nevertheless remained unanswered.

Proposed restorative measures generated a number of problems. However, all of them have a negative impact on the trust of persons interested in Ukrainian authorities. Solving these problems will constitute one of the main tasks in the process of further elaboration of a comprehensive transitional justice model.

# Conclusion

The book explored policies elaborated by the Ukrainian authorities in the context of the ongoing armed conflict in Donbas, which fits into the category of transitional justice.

Taking up this topic was in itself associated with considerable risk, which inevitably emerges whenever analysis focuses on ongoing processes: it is hard to draw unambiguous conclusions when the phenomenon under scrutiny is not concluded yet.

On the other hand, such an approach has an obvious advantage, as it allows us to follow the events as they unfold and thus make sense of gathered data, taking into account the much better understanding of the context when compared to an exclusively retrospective view.

Noteworthy, the period covered by the research appeared to be a certain “chapter” in the Ukrainian history. This “chapter” will be associated with the presidency of Petro Poroshenko. The Donbas conflict emerged after the “abdication” of Viktor Yanukovich from presidency. Escalating violence in spring 2014 appeared to be one of conditions of Poroshenko’s electoral success. In October 2014, Ukrainians reelected the parliament, also giving the majority of votes to pro-presidential political forces. As a result, the president gained significant possibilities to shape policies in different domains, including the one to which this book is devoted. Thus, there is every reason to speak about a “Poroshenko’s chapter” in the history of modern Ukraine. This “chapter” was closed on May 20, 2019, when president Volodymyr Zelenskyi was sworn into office and simultaneously announced early parliamentary elections. Thus, the book presents the development of a specific category of policies in a certain more or less closed historical period. In other words, the book contains an analysis of the part of a pathway, whose end defines the starting point for the new authorities’ attempts to develop their own policies. The existence of the pathway limits the possible options for further development but simultaneously does not force new authorities to continue the journey of their predecessors.

Taking all these reservations into account, I prefer to speak about lessons learned from the period covered in the book rather than to call them

definitive conclusions. These lessons can be divided into two groups: (1) those directly referring to the case under scrutiny, and (2) those referring more generally to the role of transitional justice mechanisms in managing ongoing armed conflicts.

Let us start with lessons from the first group. The questions typical for transitional justice appeared on the agenda of Ukrainian authorities almost immediately when first signals emerged that suggested the appearance of a threat to the territorial integrity of the state. What happens? Who is responsible? How to bring those responsible to accountability? As soon as the conflict generated a significant number of people whose lives were directly or indirectly affected by the warfare, these questions were supplemented by new ones. Who should be regarded a victim? How to restore the situation of victims? In attempts to answer these questions, the Ukrainian authorities took a number of steps that eventually became the foundations of what I call in this book transitional justice measures.

Without any doubt, the Donbas conflict brought the Ukrainian state off the tracks of its established order. The warfare generated problems that required measures of both retributive and restorative nature. The existing normative framework appeared to be insufficient to guide relevant policies. In other words, the provision of justice required to essentially operate in an extraordinary way: adjusting the existing norms “on-the-go” not only to create future-oriented “rules of the game” but also to provide an adequate framework for addressing the already committed deeds (and thus, at least to certain extent, acting retrospectively).

The policies analyzed in the book allow us to identify several regularities, all of which are interrelated. First and foremost, the elaboration of policies fitting into the category of transitional justice resulted not from a deliberate plan. They were created and later adjusted in a reactive manner: whenever a specific problem occurred the authorities proposed a solution. However, as the multitude of such small solutions lacked a clear overarching strategy, they started to intervene each other, which in turn generated unexpected consequences. The decision to start the counter-terrorist operation is probably the most brilliant and the most symptomatic example of this phenomenon. It could be indeed regarded a creative way to answer the problem of the conflict’s hybridity. It created a convenient narrative about the conflict that appeared to be convincing for the majority of Ukrainians, but it

also allowed the state to use existing counter-terrorist provisions as the basis for retributive measures. However, it also created the foundation for unexpected financial claims from some victims of the conflict and eventually appeared to be counterproductive in terms of “building bridges” between parts of the divided society. Eventually, the law aimed at providing a comprehensive regulatory framework for different aspects of state policies towards the occupied territories was adopted four years after the beginning of the conflict and had to address, among other things, the “mess” caused by previous policies. Undoubtedly, such an approach cannot be called irrational. The rationality in this case was focused primarily on limiting the chaos rather than making a new order.

Second, if we look at the policies under scrutiny from the perspective of their relationship with the goal of peace/reconciliation, we notice a change of focus. In the initial phases of the conflict, characterized by the threat of escalation and the outbreak of mass violence, Ukrainian authorities designed relevant steps that ensured minimally sufficient steps to satisfy relevant interests. First and foremost, these were aimed at avoiding any decision that could provoke Russia into a more active engagement.

This started to change after two waves of intensive warfare in summer 2014 and at the beginning of 2015, when the situation of low-intensity stalemate crystallized and the risk associated with escalation of Russia’s engagement diminished. Then, justice-related initiatives started being more future-oriented. In other words, Ukrainian authorities started regarding these initiatives as potential tools to “steer” the development of the conflict toward a preferable outcome. This approach manifested itself especially in what was referred to as the consolidation of the “story of the conflict” around the narrative of external aggression – avoided in the initial stages – and in the corresponding adjustment of approaches to the retributive and restorative functions of justice.

Third, the mentioned consolidation of approaches happened primarily in the domain of political thought rather than in the implementation of concrete elements of a “transitional justice toolkit.” One can observe the following regularity. In pursuing the goal of truth-seeking, Ukrainian authorities did not elaborate any policy mechanism aimed at producing a concrete result in the shape of either revealing unknown facts about the conflict or creating a consensual framework for the interpretation of facts both

known and unknown (truth commission could hypothetically become such a mechanism). At the same time, it is exactly in this field that the evolution of the authorities' approach to the conflict is the most visible; although it took the shape of a unilateral top-down framing of conflict-related issues.

In pursuing the goal of restorative justice, Ukrainian authorities obviously also evolved toward accepting the need of an extraordinary approach to punishments of those responsible for the outbreak of the conflict and engaged in the warfare. Furthermore, the approach to retributive measures was not limited to the domain of ideas, the corresponding practice appeared to be quite intensive. However, retributive measures were based on the adaptation of existing regulations to the needs of extraordinary times. The mentioned example of the initiation of the ATO and the consequent rise in the number of punishments for terrorism-related crimes constitutes a good example here. Nevertheless, the Ukrainian authorities remained reluctant to develop any retributive mechanism designed specifically to address the needs of the extraordinary situation such as amnesty or a special trial.

Actions in the field of restorative justice appeared to be the most practice oriented. It is here that the authorities elaborated and implemented a number of new regulations aimed at creating the rules of providing compensations for widely understood victims of the conflict. However, it is hard to avoid an impression that these rules were aimed at limiting the financial burden for the state rather than the provision of just compensations to those affected by the conflict. At the same time, the underlying conceptual thoughts did not go through significant evolution; instead, they created new layers, settling on the previous ones but not altering them.

All in all, this observation suggests the significant impact of calculations of economic nature on the final shape of policies under scrutiny. More attention was paid to the elaboration of new regulations that referred to the potentially most cost-absorbing aspect of transitional justice, whereas policies operating in the "symbolic domain" remained on the margin.

Moreover, let me underline that this book presents the phenomenon under scrutiny as an evolving process, not as an instantaneous outcome of interplay of some variables that could serve as the basis for formulating law-like claims. Hence, one of the most valuable insights proposed by the book is the one that allows "looking under the hood" of this evolving process in the approach to justice, from treating it in accordance with the principles



of “firefighting management” to first shy attempts in treating it as a tool that would allow – at least to some extent – to steer the whole complex situation of the ongoing armed conflict into a desirable direction. Whether the ultimate goal of reconciliation between the parts of divided society will be eventually reached? And, to what extent it will be the outcome of transitional justice policies? For obvious reasons, we will not find answers to these questions in this book. Will the indicated tendencies continue under President Zelenskyi? Or, will we observe a “new beginning?” Answers to these questions should be provided by future research.

The last of the above statements constitutes a bridge to the second category of lessons that could be learned from the analysis in this book: the category that refers more generally to the role of transitional justice mechanisms in managing ongoing armed conflicts. Of course, it would be wrong to generalize on the analysis of a single case. Therefore, I propose to treat the following considerations as hypothetical claims that can be verified in further comparative research.

First, I wish to underline the “spontaneous” nature of the modality of transitional justice that emerges in situations when the status of the conflict is unclear, when a divided society remains in a “gray zone” between war and peace. This observation confirms the assumption that transitional justice should always be regarded as an essentially complex phenomenon, highly dependent on specific circumstances. However, what should be taken into account is not only the combination of circumstances that create an opportunity for a given modality of transitional justice. Understanding why in a given case transitional justice policies look like this and not differently requires one to analyze the pathway of its emergence, along with the legacy of trials and errors that led to a given situation.

The second lesson is quite simple. Transitional justice can hardly be regarded a tool of effective management of the conflict, especially in the violent phase of the latter. However, as soon as the intensity of the conflict decreases, the ambition of decision-makers to use justice-related issues to steer the conflict increases. Nevertheless, it is correct to regard more general peacebuilding process as a space in which possibilities for the elaboration of transitional justice policies unfold.

The third lesson refers to the thesis on the significance of the quality of peace negotiations between the belligerents, mentioned in the theoretical

chapter of the book. The conducted analysis allows us to develop this thesis further. Whenever we talk about situations similar to the Ukrainian one – a conflict around a secessionist part of the country that leads to deep divisions in the society – communication between the adversaries constitutes a necessary condition to set up any transitional justice policy which could have chances to be regarded as equally just by citizens who support different sides of the conflict. However, this statement should be regarded a source of additional pessimism. If hybridity constitutes an immanent feature of modern conflicts, establishing effective channels of communication may be a hard task. If on the one side of the conflict there is no entity that could officially take responsibility for formulating a negotiation position and, consequently, implement the negotiated solution of the conflict, finding a working solution for the peace vs. justice dilemma can be virtually impossible. This is not to state that transitional justice as such loses its sense altogether, but the problem is that it will be devoid of the added value of “joint ownership” of the policies shared by representatives of both sides of the conflict.

Finally, I would like to underline that the book obviously does not provide answers to all possible questions. As I mentioned at the very beginning, among other things, I regard this book to be an invitation to join the research of this significant problem. Along with the simple continuation of analysis in the development of conflict-related transitional justice policies in the new “chapter” of Ukraine’s history, there are at least two problems that deserve special attention but require further research. The first one is deeper analysis of conflict-related criminal cases, which may shed more light on the extent to which the undertaken retributive measures are dictated by political calculations of managing the conflict. The second is a more thorough and more systematic research of public opinion – ideally representing both parts of the divided society – but also a more systematic engagement of methods typical for the humanities in order to obtain a better understanding of emotions of constituents, which in turn could provide a way to more effective approaches to manage such conflicts in the future.

# Bibliography

- Abibok, Yulia. "Identity Policy in the Self-Proclaimed Republics in East Ukraine." *OSW*, June 6, 2018. <https://www.osw.waw.pl/en/publikacje/osw-commentary/2018-06-06/identity-policy-self-proclaimed-republics-east-ukraine-0>.
- Albin, Cecilia, and Daniel Druckman. "Equality Matters: Negotiating an End to Civil Wars." *Journal of Conflict Resolution* 56, no. 2 (2012), pp. 155–82. doi:10.1177/0022002711431798.
- Arendt, Hannah. *Eichmann in Jerusalem: A Report on the Banality of Evil*. Penguin Classics. New York: Penguin Books, 2006.
- Armitage, David. *Civil Wars: A History in Ideas*. New Haven: Yale University Press, 2017.
- Åslund, Anders, and Michael McFaul, eds. *Revolution in Orange: The Origins of Ukraine's Democratic Breakthrough*. Washington: Carnegie endowment for international peace, 2006.
- Avakov, Arsen. "Strategy of Restoration of the Integrity of Ukraine and De-Occupation of the Donbass. "SMALL STEPS MECHANISM." Accessed May 23, 2019. <https://avakov.com/strategy-of-restoration-of-the-integrity-of-ukraine-and-de-occupation-of-the-donbass-small-steps-mechanism.html>.
- Beach, Derek, and Rasmus Brun Pedersen. *Process-Tracing Methods: Foundations and Guidelines*. Ann Arbor: University of Michigan Press, 2013.
- Binningsbø, Helga Malmin, Cyanne E Loyle, Scott Gates, and Jon Elster. "Armed Conflict and Post-Conflict Justice, 1946–2006." *Journal of Peace Research* 49, no. 5 (2012): pp. 731–40. doi:10.1177/0022343312450886.
- Blum, Gabriella, and Natalie J. Lockwood. "Earthquakes and Wars: The Logic of International Reparations." In *Jus Post Bellum and Transitional Justice*, edited by Larry May and Elizabeth Edenberg. ASIL Studies in International Legal Theory. New York: Cambridge University Press, 2013.
- Brems, Eva. "Transitional Justice in the Case Law of the European Court of Human Rights." *International Journal of Transitional Justice* 5, no. 2 (2011), pp. 282–303. doi:10.1093/ijtj/ijr010.

- Brighouse, Harry. *Sprawiedliwość*. Warszawa: Wydawnictwo Sic!, 2007.
- Bukrovs'kyi, Petro, Ruslan Kermach, and Andrii Hirnyk. "Chym zhyvut' tymchasovo nekontrol'ovani terytorii Donbasu? Osoblyvosti horizontal'noi komunikatsii meshkantsiv rozdilenoho rehionu." Kyiv: Democratic Initiatives Foundation, 2018.
- Byrne, David, and Gill Callaghan. *Complexity Theory and the Social Sciences: The State of the Art*. First Edition. New York: Routledge, 2014.
- Cabinet of Ministers of Ukraine. On approval of a plan of measures aimed at implementation of certain principles of the state policy towards certain districts of Donetsk and Luhansk oblasts, where the state authorities temporarily do not exercise their powers, Pub. L. No. 8-p (2017). <https://zakon.rada.gov.ua/go/8-2017-%D1%80>.
- . On approval of the plan of measures for the organization of restoration of damaged (destroyed) objects of social and transport infrastructure, housing stock and life support systems in Donetsk and Luhansk oblasts, Pub. L. No. 1002-p (2014). <https://zakon.rada.gov.ua/go/1002-2014-%D1%80>.
- . On approval of the procedure and conditions of providing subventions from the state budget to local budgets for the restoration (construction, overhaul, reconstruction) of infrastructure in Donetsk and Luhansk oblasts, Pub. L. No. 250 (2015). <https://www.kmu.gov.ua/ua/npas/248135239>.
- . On approval of the report of the joint mission of the European Union, the United Nations and the World Bank "Recovery and Peacebuilding Assessment in Ukraine," Pub. L. No. 797-p (2015). <https://zakon.rada.gov.ua/go/797-2015-%D1%80>.
- . On approval of the state target program for the restoration and peacebuilding in the eastern regions of Ukraine, Pub. L. No. 1071 (2017). <https://zakon.rada.gov.ua/go/1071-2017-%D0%BF>.
- . On optimization of the system of central executive organs, Pub. L. No. 442 (2014). <https://zakon.rada.gov.ua/go/442-2014-%D0%BF>.
- Censor.NET. "Yanukovych`s Letter to Putin with Request to Send Troops to Ukraine: Censor.NET Publishes Historical Document." *Censor.NET*, January 18, 2017. [https://censor.net.ua/en/news/423877/yanukovychs\\_letter\\_to\\_putin\\_with\\_request\\_to\\_send\\_troops\\_to\\_ukraine\\_censornet\\_publishes\\_historical\\_document](https://censor.net.ua/en/news/423877/yanukovychs_letter_to_putin_with_request_to_send_troops_to_ukraine_censornet_publishes_historical_document).

- “Chto ukrainsky dumaiut ob amnistii na Donbasse?” *Kalmius Group*, September 10, 2018. [https://www.kalmiusgroup.org/2018/09/blog-post\\_33.html](https://www.kalmiusgroup.org/2018/09/blog-post_33.html).
- Clark, Janine Natalya. “Transitional Justice, Truth and Reconciliation: An Under-Explored Relationship.” *International Criminal Law Review* 11 (2011), pp. 241–61. doi:10.1163/157181211X551390.
- Constitutional Court of Ukraine. The decision of the Constitutional Court of Ukraine in the case of the constitutional petition of 252 deputies of Ukraine on the compliance with the Constitution of Ukraine (constitutionality) of the Law of Ukraine “On Amendments to the constitution of Ukraine” of December 8, 2004, No. 2222-IV, Pub. L. No. 20-pp/2010 (2010). <https://zakon.rada.gov.ua/go/v020p710-10>.
- Corliss, Cody. “Truth Commissions and the Limits of Restorative Justice: Lessons Learned in South Africa’s Cradock Four Case.” *Michigan State International Law Review* 21, no. 2 (2013), p. 273–298.
- Cowen, Tyler. “How Far Back Should We Go? Why Restitution Should Be Small.” In *Retribution and Reparation in the Transition to Democracy*, edited by Jon Elster, pp. 17–32. Cambridge: Cambridge University Press, 2006. doi:10.1017/CBO9780511584343.004.
- Daly, Erin. “Truth Skepticism: An Inquiry into the Value of Truth in Times of Transition.” *International Journal of Transitional Justice* 2, no. 1 (2008), pp. 23–41. doi:10.1093/ijtj/ijn004.
- Darley, John M., and Adam L. Alter. “Behavioral Issues of Punishment, Retribution and Deterrence.” In *The Behavioral Foundations of Public Policy*, edited by Eldar Shafir. Princeton: Princeton University Press, 2013.
- Dashkovs’ka, O. “Sudovi pretsedent i sudova praktyka iak dzherela prava.” *Visnyk Akademii Pravovykh Nauk Ukrainy*, no. 1 (64) (2011).
- De Greiff, Pablo. “Justice and Reparations.” In *The Handbook of Reparations*, edited by Pablo De Greiff. Oxford: Oxford University Press, 2006.
- De Greiff, Pablo, and Roger Duthie, eds. *Transitional Justice and Development. Making Connections*. New York: Social Science Research Council, 2009.

- Democratic Initiatives Foundation. “Dva misiatsi protestiv v Ukraini: shcho dali?”, January 21, 2014. <https://dif.org.ua/article/dva-misyatsi-protestiv-v-ukraini-shcho-dali>.
- . “Poshuky shliakhiv vidnovlennia suverenitetu Ukraïny nad okupovanyim Donbasom: stan hromadskoi dumky naperedodni prezydents’kykh vyboriv,” February 13, 2019. <https://dif.org.ua/article/poshuki-shlyakhiv-vidnovlennya-suverenitetu-ukraini-nad-okupovanim-donbasom-stan-gromadskoi-dumki-naperedodni-prezidentskikh-vyboriv>.
- . “Stavlennia naseleennia Ukraïny do vnutrishn’o peremishchenykh osib,” January 30, 2019. <https://dif.org.ua/article/stavlennya-naseleennya-ukraini-do-vnutrishno-peremishchenikh-osib>.
- Elster, Jon. *Closing the Books: Transitional Justice in Historical Perspective*. Cambridge: Cambridge University Press, 2004. doi:10.1017/CBO9780511607011.
- . “Retribution.” In *Retribution and Reparation in the Transition to Democracy*, edited by Jon Elster, pp. 33–56. Cambridge: Cambridge University Press, 2006. doi:10.1017/CBO9780511584343.005.
- European Court of Human Rights. “New Inter-State Application Brought by Ukraine against Russia. Press Release,” August 27, 2018.
- European Union. “The EU’s Policy Framework on Support to Transitional Justice,” 2015. [http://eeas.europa.eu/archives/docs/top\\_stories/pdf/the\\_eus\\_policy\\_framework\\_on\\_support\\_to\\_transitional\\_justice.pdf](http://eeas.europa.eu/archives/docs/top_stories/pdf/the_eus_policy_framework_on_support_to_transitional_justice.pdf).
- Fischer, Martina. “Transitional Justice and Reconciliation: Theory and Practice.” In *Advancing Conflict Transformation*, edited by Beatrix Austin, Martina Fischer and Hans-Joachim Giessmann. The Berghof Handbook 2. Michigan: Barbara Bdrich Publishers, 2011.
- Forsythe, David P. “Human Rights and Mass Atrocities: Revisiting Transitional Justice.” *International Studies Review* 13, no. 1 (2011), pp. 85–95. doi:10.1111/j.1468-2486.2010.01000.x.
- Foucault, Michel. *Zło czynić, mówić prawdę: funkcja wyznania w sprawiedliwości: wykłady z Louvain, 1981*. Kraków: Społeczny Instytut Wydawniczy Znak, 2018.
- Freeman, Mark. *Necessary Evils: Amnesties and the Search for Justice*. Cambridge: Cambridge University Press, 2009. doi:10.1017/CBO9780511691850.

- Galtung, Johan. "Violence, Peace, and Peace Research." *Journal of Peace Research* 6, no. 3 (1969), pp. 167–91. doi:10.1177/002234336900600301.
- Garcia-Godos, Jemima, and Chandra Lekha Sriram. "Introduction." In *Transitional Justice and Peacebuilding on the Ground Victims and Ex-Combatants*, edited by Chandra Lekha Sriram, Jemima Garcia-Godos, Johanna Herman, and Olga Martin-Ortega. London: Routledge, 2013.
- Gerrits, Lasse, and Stefan Verweij. "Critical Realism as a Meta-Framework for Understanding the Relationships between Complexity and Qualitative Comparative Analysis." *Journal of Critical Realism* 12, no. 2 (2013), pp. 166–82. doi:10.1179/rea.12.2.p663527490513071.
- Grant, Thomas D. *Aggression against Ukraine: Territory, Responsibility, and International Law*. First edition. New York: Palgrave Macmillan, 2015.
- Haidt, Jonathan. *The Righteous Mind: Why Good People Are Divided by Politics and Religion*. New York: Pantheon Books, 2012.
- Holder, Cindy. "Truthfulness in Transition: The Value of Insisting on Experiential Adequacy." In *Jus Post Bellum and Transitional Justice*, edited by Larry May and Elizabeth Edenberg. ASIL Studies in International Legal Theory. New York: Cambridge University Press, 2013.
- Holland, John H. *Complexity: A Very Short Introduction*. Very Short Introductions. Oxford, New York: Oxford University Press, 2014.
- Huntington, Samuel P. "The Third Wave: Democratization in the Late 20th Century." *Journal of Democracy* 2, no. 2 (1991). doi:10.1353/jod.1991.0016.
- International Court of Justice. "Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)," April 19, 2017. <https://www.icj-cij.org/files/case-related/166/19410.pdf>.
- International Federation for Human Rights. "Eastern Ukraine. Civilians Caught in the Crossfire," October 2015. [https://www.fidh.org/IMG/pdf/eastern\\_ukraine-ld.pdf](https://www.fidh.org/IMG/pdf/eastern_ukraine-ld.pdf).

- Kalyvas, Andreas. *Democracy and the Politics of the Extraordinary: Max Weber, Carl Schmitt, and Hannah Arendt*. Cambridge: Cambridge University Press, 2008. doi:10.1017/CBO9780511755842.
- Katrychenko, Tetiana. ““Na tebe chekaiut’ Vdoma”, abo kolyshni terorysty na hachku u SBU.” *Ukraïns’ka Pravda*, February 26, 2019. <https://www.pravda.com.ua/articles/2019/02/26/7207668/>.
- Kim, Young. *Justice: Classical Foundations and Contemporary Debates*. Lanham: Lexington Books, 2018.
- Konończuk, Wojciech. *Fundament systemu: starzy i nowi oligarchowie na Ukrainie*. Punkt Widzenia, no. 59. Warszawa: Ośrodek Studiów Wschodnich im. Marka Karpia, 2016.
- Kowal, Paweł. “Oligarchy, Tyranny and Revolutions in Ukraine 1991–2014.” In *The Maidan Uprising, Separatism and Foreign Intervention: Ukraine’s Complex Transition*, edited by Klaus Bachmann and Igor Lyubashenko, First edition. Studies in Political Transition, volume 4. Frankfurt am Main: Peter Lang Edition, 2014.
- Kuzio, Taras. *Putin’s War against Ukraine: Revolution, Nationalism, and Crime*, 2017.
- Lachowski, Tomasz. *Perspektywa praw ofiar w prawie międzynarodowym: sprawiedliwość okresu przejściowego (transitional justice)*. Łódź: Wydawnictwo Uniwersytetu Łódzkiego, 2018.
- Lyubashenko, Igor. “Euromaidan: From the Students’ Protest to Mass Uprising.” In *The Maidan Uprising, Separatism and Foreign Intervention: Ukraine’s Complex Transition*, edited by Klaus Bachmann and Igor Lyubashenko, First edition. Studies in Political Transition, volume 4. Frankfurt am Main: Peter Lang Edition, 2014.
- . *Transitional Justice in Post-Euromaidan Ukraine: Swimming Upstream*. Studies in Political Transition, volume 7. Frankfurt am Main: Peter Lang Edition, 2017.
- Maddison, Sarah. *Conflict Transformation and Reconciliation: Multi-Level Challenges in Deeply Divided Societies*. London, New York: Routledge, 2017.
- Mahda, Yevhen. *Hibrydna ahresiya Rosiyyi: uroky dlya Yevropy*. Kyiv: Kalamar, 2017.



- Matuszak, Sławomir. *The Oligarchic Democracy: The Influence of Business Groups on Ukrainian Politics*. Warsaw: Centre for Eastern Studies, 2012.
- May, Larry, and Elizabeth Edenberg, eds. *Jus Post Bellum and Transitional Justice*. ASIL Studies in International Legal Theory. New York: Cambridge Univ. Press, 2013.
- McAuliffe, Pádraig. *Transformative Transitional Justice and the Malleability of Post-Conflict States*. Cheltenham, Northampton: Edward Elgar Publishing, 2017.
- Media Initiative for Human Rights, Ukrainian Helsinki Human Rights Union, and Euromaidan Press. “V’iazni viiny. Mizhnarodna praktyka shchodo zvil’nennia polonenykh, zaruchnykiv i politv’iazniv: vysnovky dlia Ukraïny.” Kyiv, 2018. <https://helsinki.org.ua/publications/v-yazni-vijny-mizhnarodna-praktyka-schodo-zvilnennya-polonenykh-zaruchnykiv-i-politv-yazniv-vysnovky-dlya-ukrajiny/>.
- Ministry of Interior of Ukraine. On approval of the Instruction on the procedure for preventive detention in the area of the counter-terrorist operation of persons involved in terrorist activities and the special regime of pre-trial investigation in conditions of martial law, state of emergency or in the area of anti-terrorist operation, Pub. L. No. 872/88/537 (2014). <https://zakon.rada.gov.ua/go/z1038-14>.
- National Security and Defence Council of Ukraine. On urgent additional measures to counter hybrid threats to Ukraine’s national security, Pub. L. No. 62/2017 (2017). <https://zakon.rada.gov.ua/go/n0002525-17>.
- . “Transcript of the Meeting of the National Security and Defence Council of Ukraine,” February 28, 2014. <http://www.rnbo.gov.ua/files/2016/stenogr.pdf>.
- Neitzel, Sönke and Harald Welzer. *Żołnierze: protokoły walk, zabijania i umierania*. Warszawa: Wydawnictwo Krytyki Politycznej, 2014.
- Nicolson, Donald. “Taking Epistemology Seriously: “Truth, Reason and Justice” Revisited.” *The International Journal of Evidence & Proof* 17, no. 1 (2013), pp. 1–46. doi:10.1350/ijep.2013.17.1.417.
- Nmaju, Mba Chidi. “The Role of Judicial Institutions in the Restoration of Post-Conflict Societies: The Cases of Rwanda and Sierra Leone.”

- Journal of Conflict and Security Law* 16, no. 2 (2011): 357–84.  
doi:10.1093/jcsl/krr012.
- Nye, Joseph S. *Soft Power: The Means to Success In World Politics*. New York: Public Affairs, 2009.
- Office of the United Nations High Commissioner for Human Rights. “Report on the Human Rights Situation in Ukraine 16 May to 15 August 2015,” August 15, 2015. <https://www.ohchr.org/Documents/Countries/UA/11thOHCHRreportUkraine.pdf>.
- Olsen, Tricia D., Leigh A. Payne, and Andrew G. Reiter. *Transitional Justice in Balance. Comparing Processes, Weighing Efficacy*. Washington.: United States Institute of Peace, 2010.
- “Peretynaiuchy mezhu: nelehal’na torhivlia z okupovanyim Donbasom, shcho pidryvaie oboronu.” Kyiv: The Independent Defence Anti-Corruption Committee, 2017.
- Popova, Maria. *Politicized Justice in Emerging Democracies: A Study of Courts in Russia and Ukraine*. Cambridge: Cambridge University Press, 2014.
- President of Ukraine. Decree on the decision of the Council of National Security and Defense of Ukraine of April 13, 2014 “On urgent measures to overcome the terrorist threat and preserve territorial integrity of Ukraine,” Pub. L. No. 405/2014 (2014).
- . Draft law “On Prevention of the persecution and punishment of persons - participants of events in Donetsk and Luhansk oblasts,” Pub. L. No. 5082 (2014). [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=52183](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=52183).
- Radnitz, Scott. “The Color of Money: Privatization, Economic Dispersion, and the Post-Soviet “Revolutions.”” *Comparative Politics* 42, no. 2 (2010), pp. 127–46.
- Rescher, Nicholas. *Complexity: A Philosophical Overview*. Science and Technology Studies. New Brunswick: Transaction Publishers, 1998.
- Rieff, David. *In Praise of Forgetting: Historical Memory and Its Ironies*. New Haven: Yale University Press, 2016.
- Ross, Lee. “Perspectives on Disagreement and Dispute Resolution: Lessons from the Lab and the Real World.” In *The Behavioral Foundations of Public Policy*, edited by Eldar Shafir. Princeton: Princeton University Press, 2013.

- Rothe, Dawn L., and Scott Maggard. "Factors That Impede or Facilitate Post-Conflict Justice Mechanisms?" *International Criminal Law Review* 12, no. 2 (2012), pp. 193–217. doi:10.1163/157181212X633262.
- Sachs, Albie. "Archives, Truth, and Reconciliation." *Archivaria* 62, no. 1 (2006), pp. 1–14.
- Samar, Valentina. "Gibridnyi yevroremont Donbassa." *ZN.Ua*, June 2, 2017. [https://zn.ua/internal/gibridnyy-evroremont-donbassa-250324\\_.html](https://zn.ua/internal/gibridnyy-evroremont-donbassa-250324_.html).
- Sasse, Gwendolyn. "The Displaced Ukrainians. Who Are They, and What Do They Think?" Centre for East European and International Studies, March 2017. <https://www.zois-berlin.de/publikationen/zois-report/zois-report-12017/>.
- . "The Donbas - Two Parts, or Still One? The Experience of War through the Eyes of the Regional Population." ZOiS Report, May 2017. [https://www.zois-berlin.de/fileadmin/media/Dateien/ZOiS\\_Reports/ZOiS\\_Report\\_2\\_2017.pdf](https://www.zois-berlin.de/fileadmin/media/Dateien/ZOiS_Reports/ZOiS_Report_2_2017.pdf).
- Seils, Paul. "The Place of Reconciliation in Transitional Justice." ICTJ Briefing. International Center for Transitional Justice, June 28, 2017. <https://www.ictj.org/publication/reconciliation-transitional-justice>.
- Shynkarenko, Oleh. "Chy mozhlyvo otrymaty kompensatsiiu za zruinovane na Donbasi zhytlo?" *Precedent-UA*, August 8, 2016. <https://precedent.in.ua/2016/08/08/chy-mozhlyvo-otrymaty-kompensatsiyu-za-zruinovane-na-donbasi-zhytlo/>.
- . "Kaznacheistvo vidmovliaiet'sia vyplachuvaty dva miliony za zruinovane v ATO zhytlo," May 30, 2018. <https://helsinki.org.ua/articles/kaznachejstvo-vidmovlyajetsya-vyplachuvaty-dva-miljony-za-zruinovane-v-ato-zhytlo/>.
- Skarżyńska, Krystyna. "Sprawiedliwość jako kryterium oceny systemu ekonomiczno-politycznego." *Civitas et Lex* 5, no. 1 (2015), pp. 19–30. doi:10.31648/cetl.2032.
- Solzhenitsyn, Aleksandr. *Gulag Archipelago 1918-1956: An Experiment in Literary Investigation*. Harper Perennial Modern Classics, 2007.
- Sriram, Chandra Lekha. "Beyond Transitional Justice: Peace, Governance, and Rule of Law." *International Studies Review* 19, no. 1 (2017), pp. 53–69.

- Teitel, Ruti G. *Transitional Justice*. Oxford: Oxford University Press, 2002.
- “The Code of Hammurabi.” *Internet Sacred Text Archive*. Accessed April 3, 2019. <http://www.sacred-texts.com/ane/ham/ham06.htm>.
- The World Bank. “Ukraine. Recovery and Peacebuilding Assessment. Analysis of Crisis Impacts and Needs in Eastern Ukraine,” March 2015. <http://documents.worldbank.org/curated/en/879011468188335375/pdf/96487-REPLACEMENT-FILE-WP-v1-Box391453B-PUBLIC-RPA-A4-Vol1-Eng-Web.pdf>.
- Thompson, Janna. “Reparative Claims and Theories of Justice.” In *Historical Justice and Memory*, edited by Klaus Neumann and Janna Thompson. Critical Human Rights. Madison: The University of Wisconsin Press, 2015.
- “Ukraine Derogation from European Convention on Human Rights.” *Council of Europe*, June 10, 2015. [https://www.coe.int/en/web/secretary-general/news/-/asset\\_publisher/EYIBJNjXtA5U/content/ukraine-derogation-from-european-convention-on-human-rights/16695](https://www.coe.int/en/web/secretary-general/news/-/asset_publisher/EYIBJNjXtA5U/content/ukraine-derogation-from-european-convention-on-human-rights/16695).
- Ukrainian Helsinki Human Rights Union. “Zahubleni v papirtsiakh: dotrymannia sotsialnykh prav vnutrishn’o peremishchenykh osib,” 2017. [https://helsinki.org.ua/wp-content/uploads/2018/01/zagubleni\\_ukr.pdf](https://helsinki.org.ua/wp-content/uploads/2018/01/zagubleni_ukr.pdf).
- United Nations. “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies. Report of the Secretary-General,” September 23, 2004.
- Vandeginste, Stef, and Chandra Lekha Sriram. “Power Sharing and Transitional Justice: A Clash of Paradigms?” *Global Governance* 17, no. 4 (2011), pp. 489–505.
- Verkhovna Rada of the Soviet Socialist Republic of Ukraine. Declaration on state sovereignty of Ukraine, Pub. L. No. 55– XII (1990). <https://zakon.rada.gov.ua/go/55-12>.
- Verkhovna Rada of Ukraine. Constitution of Ukraine, Pub. L. No. 254к/96-BP (1996). <https://zakon.rada.gov.ua/go/254%D0%BA/96-%D0%B2%D1%80>.
- . Draft law “On amnesty for the persons who at the time of committing a crime participated in the counter-terrorist operation,”

- Pub. L. No. 4519 (2016). [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_2?pf3516=4519&cskl=9](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?pf3516=4519&cskl=9).
- . Draft law “On prevention of criminal persecution, bringing to criminal, administrative responsibility and punishment of participants of events in the territory of Donetsk, Luhansk oblasts, Pub. L. No. 2425 (2015). [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=54470](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=54470).
- . Law on special regime of local self-government in certain districts of Donetsk and Luhansk Oblasts, Pub. L. No. 1680–VII (2014). <https://zakon.rada.gov.ua/go/1680-18>.
- . Law on the peculiarities of the state policy aimed at protecting the state sovereignty of Ukraine in temporarily occupied territories in the Donetsk and Luhansk oblasts, Pub. L. No. 2268– VIII (2018).
- . On amendments to article 1 of the Law of Ukraine “Law on special regime of local self-government in certain districts of Donetsk and Luhansk Oblasts,” Pub. L. No. 2588– VIII (2018). <https://zakon.rada.gov.ua/go/2588-19>.
- . On amendments to subparagraph 4, paragraph 24, section VI “Final and Transitional Provisions” of the Budgetary Code of Ukraine, Pub. L. No. 1406– VIII (2016). <https://zakon.rada.gov.ua/go/1406-19>.
- . On amendments to the constitution of Ukraine, Pub. L. No. 2222– IV (2004). <https://zakon.rada.gov.ua/go/2222-15>.
- . On amendments to the Criminal and Criminal Procedural Codes of Ukraine regarding the inevitability of punishment for certain crimes against foundations of national security, public security and corruption crimes, Pub. L. No. 1689-VII (2014). <https://zakon.rada.gov.ua/go/1689-18>.
- . On amendments to the Criminal Code of Ukraine, Pub. L. No. 1183-VII (2014). <https://zakon.rada.gov.ua/go/1183-18>.
- . On amendments to the Criminal Code of Ukraine on the abuse of power by the military officials, Pub. L. No. 290– VIII (2015). <https://zakon.rada.gov.ua/go/290-19>.
- . On creation of a free economic zone “Crimea” and the peculiarities of economic activity in the temporarily occupied territory of Ukraine, Pub. L. No. 1636-VII (2014). <https://zakon.rada.gov.ua/go/1636-18>.

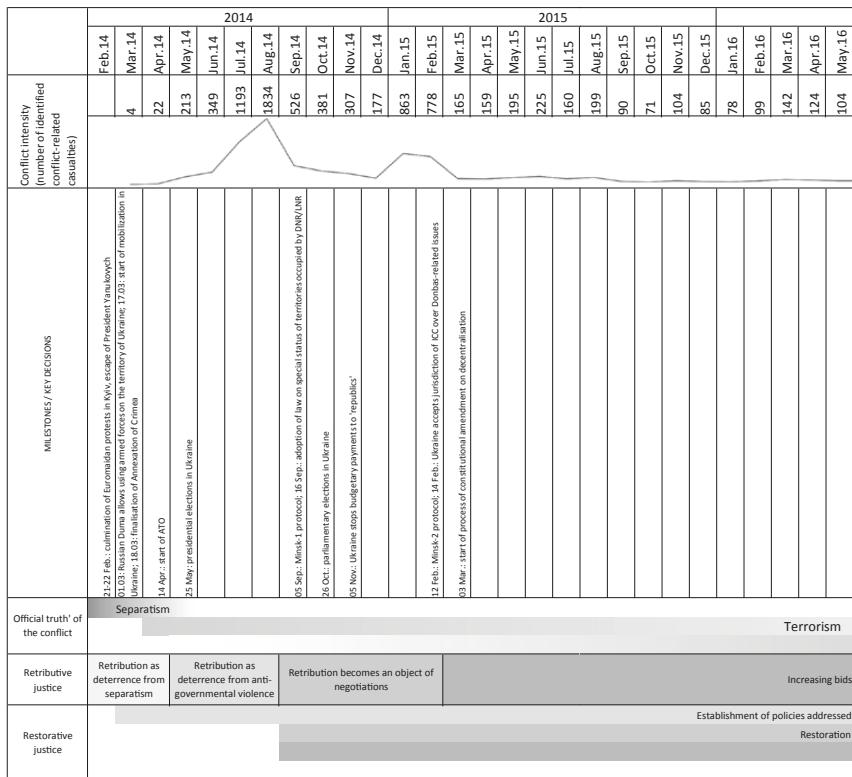
- . On declaration of independence of Ukraine, Pub. L. No. 1427-XII (1991). <https://zakon.rada.gov.ua/go/1427-12>.
- . On ensuring civil rights and freedoms, and the legal regime on the temporarily occupied territory of Ukraine, Pub. L. No. 1207– VII (2014). <https://zakon.rada.gov.ua/go/1207-18>.
- . On ensuring the rights and freedoms of internally displaced persons, Pub. L. No. 1706-VII (2014). <https://zakon.rada.gov.ua/go/1706-18>.
- . On fight against terrorism, Pub. L. No. 638-IV (2003). <https://zakon.rada.gov.ua/go/638-15>.
- . On legal succession of Ukraine, Pub. L. No. 1543-XII (1991). <https://zakon.rada.gov.ua/go/1543-12>.
- . On preventing the manifestations of separatism and other attacks on the foundations of the national security of Ukraine, Pub. L. No. 756-VII (2014). <https://zakon.rada.gov.ua/go/756-18>.
- . On self-abolition of the President of Ukraine from the exercise of his constitutional powers and the appointment of early elections of the President of Ukraine, Pub. L. No. 757-VII (2014). <https://zakon.rada.gov.ua/go/757-18>.
- . On taking political responsibility for the situation in Ukraine, Pub. L. No. 753-VII (2014). <https://zakon.rada.gov.ua/go/753-18>.
- . On the appeal of the Verkhovna Rada of Ukraine to the parliaments of the states - guarantors of security of Ukraine and international organizations, Pub. L. No. 845-VII (2014). <https://zakon.rada.gov.ua/go/845-18>.
- . On the appeal of the Verkhovna Rada of Ukraine to the United Nations, the European Parliament, the Parliamentary Assembly of the Council of Europe, the NATO Parliamentary Assembly, the OSCE Parliamentary Assembly, the GUAM Parliamentary Assembly, the national parliaments of the countries of the world on the recognition of the Russian Federation as an aggressor state, Pub. L. No. 129-VIII (2015). <https://zakon.rada.gov.ua/go/129-19>.
- . On the Statement of the Verkhovna Rada of Ukraine, Pub. L. No. 844-VII (2014). <https://zakon.rada.gov.ua/go/844-18>.
- . On the statement of the Verkhovna Rada of Ukraine “On the recognition by Ukraine of the jurisdiction of the International

- Criminal Court over the crimes against humanity and war crimes committed by senior officials of the Russian Federation and the leaders of the terrorist organizations “DNR” and “LNR,” which led to particularly grave consequences and the massacre of Ukrainian citizens,” Pub. L. No. 145-VIII (2015). <https://zakon.rada.gov.ua/go/145-19>.
- . On the text of the Constitution of Ukraine in the wording of June 28, 1996, as amended and supplemented by the Laws of Ukraine of December 8, 2004 No. 2222-IV, February 1, 2011 No. 2952-VI, September 19, 2013 No. 586-VII, Pub. L. No. 750-VII (2014). <https://zakon.rada.gov.ua/go/750-18>.
- Vetter, Greg R. “Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC).” *Yale Journal of International Law* 25 (2000): 89.
- Villa-Vicencio, Charles. “The Reek of Cruelty and the Quest for Healing: Where Retributive and Restorative Justice Meet.” *Journal of Law and Religion* 14, no. 1 (1999), pp. 165–87. doi:10.2307/1051783.
- Wagner, Lynn, and Daniel Druckman. “Drivers of Durable Peace: The Role of Justice in Negotiating Civil War Termination.” *Group Decision and Negotiation* 26, no. 1 (2017), pp. 45–67. doi:10.1007/s10726-016-9511-9.
- Waldorf, Lars. “Institutional Gardening in Unsettled Times: Transitional Justice and Institutional Contexts.” In *Justice Mosaics. How Context Shapes Transitional Justice in Fractured Society*, edited by Roger Duthie and Paul Seils. New York: International Center for Transitional Justice, 2017. [https://www.ictj.org/sites/default/files/ICTJ\\_Book\\_JusticeMosaics\\_2017.pdf](https://www.ictj.org/sites/default/files/ICTJ_Book_JusticeMosaics_2017.pdf).
- . “Just Peace? Integrating DDR and Transitional Justice.” In *Transitional Justice and Peacebuilding on the Ground: Victims and Ex-Combatants*, edited by Chandra Lekha Sriram, Jemima García-Godos, Johanna Herman, and Olga Martín-Ortega. Milton Park, Abingdon, Oxon; New York: Routledge, 2013.
- Walker, Margaret Urban. “How Can Truth Telling Count as Reparations?” In *Historical Justice and Memory*, edited by Klaus Neumann and Janna Thompson. Critical Human Rights. Madison: The University of Wisconsin Press, 2015.

- Weiner, Bernard. *Social Motivation, Justice, and the Moral Emotions: An Attributional Approach*. Mahwah: Lawrence Erlbaum Associates, 2006.
- “What You Need to Know about the Case of Former Tornado Battalion Servicemen.” *Ukraine Crisis Media Center*, April 11, 2017. <http://uacrisis.org/55087-need-know-case-former-tornado-battalion-servicemen>.
- Wilson, Andrew. *The Ukrainians: Unexpected Nation*. 2. ed. with new material. New Haven: Yale University Press, 2002.
- . *Ukraine Crisis: What It Means for the West*. New Haven: Yale University Press, 2014.
- . *Ukraine’s Orange Revolution*. New Haven: Yale University Press, 2005.
- . *Virtual Politics: Faking Democracy in the Post-Soviet World*. 1st ed. New Haven: Yale University Press, 2005.
- Wolczuk, Kataryna. *The Moulding of Ukraine: The Constitutional Politics of State Formation*. Budapest; New York: Central European University Press, 2001.



## **Annex 1. Timeline of events and development of policies discussed in the book.**



Notes: (a) data illustrating conflict intensity present the number of conflict-related casualties per month for both combatants and civilians representing all sides of the conflict. Data do not reflect 1103 instances when the exact date of death is unknown. Data provided by coordinators of the Memory Map project (<https://memorialmap.org/>).

(b) In the part reflecting the “Official truth of the conflict,” the intensity of fill in fields illustrating the usage of narratives is not based on any data, it presents the intensity of used narratives in a symbolic way.

| 2016  |        | 2017   |  |        |        |        |        |        |        |   |        |        |        | 2018   |        |  |   |        |  |        |        |        |                                   |        |        |        |        |        |        |        |  |  |
|---|--------|--------|--|--------|--------|--------|--------|--------|--------|---|--------|--------|--------|--------|--------|--|---|--------|--|--------|--------|--------|-----------------------------------|--------|--------|--------|--------|--------|--------|--------|--|--|
|   | Jun.16 | Jul.16 | Aug.16   | Sep.16 | Oct.16 | Nov.16 | Dec.16 | Jan.17 | Feb.17 | Mar.17                                    | Apr.17 | May.17 | Jun.17 | Jul.17 | Aug.17 | Sep.17                                 | Oct.17  | Nov.17 | Dec.17                                   | Jan.18 | Feb.18 | Mar.18 | Apr.18                            | May.18 | Jun.18 | Jul.18 | Aug.18 | Sep.18 | Oct.18 | Nov.18 | Dec.18   |  |
|   | 105    | 129    | 101  | 63     | 95     | 56     | 81     | 74     | 78     | 92  | 79     | 62     | 81     | 62     | 53     | 45                                     | 52  | 40     | 41                                       | 69     | 20     | 31     | 40                                | 47     | 29     | 38     | 45     | 33     | 40     | 24     | 24   |  |
|   |        |        | 31 Aug.: adoption of constitutional amendment on decentralization (referend) |        |        |        |        |        |        | 15 Mar.: start of landblockade of DNR/LNR |        |        |        |        |        |  | 16 Oct.: prolongation of law on special status of territories accepted by DNR/LNR |        | 18 Jan.: adoption of "reintegration law" |        |        |        | 30 Apr.: end of ATO; start of IFO |        |        |        |        |        |        |        | 25 Nov.: incident in Kerch Strait; 26 Nov.: introduction of martial law in 10 oblasts of Ukraine for the period of 30 days |  |
| <b>Aggression</b>   |        |        |  |        |        |        |        |        |        |   |        |        |        |        |        |  |   |        |  |        |        |        |                                   |        |        |        |        |        |        |        |  |  |
| in political negotiations over accountability                           |        |        |  |        |        |        |        |        |        |   |        |        |        |        |        | Reset                                  |   |        |  |        |        |        |                                   |        |        |        |        |        |        |        |  |  |
| at IDPs and inhabitants of uncontrolled territories                     |        |        |  |        |        |        |        |        |        |   |        |        |        |        |        |  |   |        |  |        |        |        |                                   |        |        |        |        |        |        |        |  |  |
| of infrastructure in uncontrolled territories: bargaining and condition |        |        |  |        |        |        |        |        |        |   |        |        |        |        |        |  |   |        |  |        |        |        |                                   |        |        |        |        |        |        |        |  |  |
| Development of controlled territories: building soft power              |        |        |  |        |        |        |        |        |        |   |        |        |        |        |        | Relegation of responsibility on Russia |   |        |  |        |        |        |                                   |        |        |        |        |        |        |        |  |  |



## Annex 2. Description of database of court decisions used for the purpose of this book

The database is based on documents retrieved from the publicly available online register of Ukrainian court decisions (<http://reyestr.court.gov.ua/>). It contains information about 1908 documents issued by Ukrainian courts between April 13, 2014, (beginning of ATO) and January 18, 2018 (adoption of the “reintegration law” on the basis of which the ATO was ended). The documents were selected and downloaded manually (automatized manipulations with the register are forbidden) and then processed and coded by a team of researchers. As a result, the following **information** were extracted from the documents:

- the time and place of issuing judgement;
- basic information about the accused (origin, citizenship, level of education – however such information was not available in all cases);
- information about the indictment and cooperation of the accused with the prosecution;
- information about the final decision of the court (whether the accused was found guilty and, if so, information about the punishment).

The database does not contain any personal data or information allowing to indicate individuals (documents published in the register are anonymized).

The database should be regarded as a tool supporting essentially qualitative research.

The collected data have several **limitations**:

1. Ukrainian experts underline the technical imperfection of the register, such as frequent technical problems with access, numerous mistakes in the classification of documents, and the irregular publication of new documents. Therefore, some court decisions issued in the mentioned period can be missing; this is a force majeure that cannot be overcome.
2. Some documents in the register are classified and thus inaccessible; in such cases court decisions visible in the register are empty. No information was extracted from such documents.
3. The very construction of the register does not allow to systematically track the developments of specific cases in higher instances. Therefore, each

entry in the database provides no distinction between the first and second instances; each entry reflects one case of a court's judgement of actions of one person, taking into account documented circumstances of the case.

4. The database does not contain information about decisions on all conflict-related crimes issued in the mentioned period. The reason is technical. The register allows for the selection of cases in accordance with type of crime (as defined by chapters of the Criminal Code of Ukraine; CCU) and articles of the CCU, which describe specific offences. Unfortunately, the register does not provide any possibility of automatic selection of cases related to the Donbas conflict. Therefore, the identification of all relevant cases is virtually impossible, it can only be done manually by looking through all the available documents and assessing whether each specific case can be regarded as relevant; the register contains more than 360 thousand decisions on criminal cases issued for the mentioned period. As a result, cases that refer to wrongdoings that can be regarded as "compatible" with ordinary peaceful circumstances – such as murders, tortures, rapes, but also crimes committed by the military in times of peace like desertion – were omitted and may become the object of another analysis in the future. In particular, it would require a different approach in case selection.
5. The collection of data thus focused on those provisions of the CCU that may be utilized to address:
  - a. the problem of separatism as a political idea;
  - b. the problem of the active engagement of individuals in antigovernmental activities inspired by separatist ideas.

The table below presents the overall structure of the database. More details can be provided upon request.

| Types of crimes   | Number of cases (not classified, relevant from the perspective of the topic of research) |
|---|--|
| Crimes against foundations of national security of Ukraine      | 276  |
| Terrorism-related crimes  | 418  |
| Creation of illegal paramilitary or armed units                 | 921  |
| Planning, preparing, starting, and conducting an aggressive war | 16   |

## **Annex 3. Contents of Minsk-1 and Minsk-2 protocols**

### **Points of Minsk-1 protocol (5 September 2014):**

1. immediate bilateral ceasefire;
2. the establishment of monitoring and verification regime of the ceasefire to be carried out by the OSCE;
3. the decentralization of powers in Ukraine, including the introduction of a special regime of self-governance in the districts occupied by DNR and LNR forces;
4. permanent monitoring of the Ukrainian-Russian border and verification by the OSCE;
5. immediate release of all hostages and illegally detained persons;
6. amnesty for DNR and LNR combatants;
7. continuation of an inclusive national dialogue;
8. measures to improve the humanitarian situation in Donbas;
9. early local elections in accordance with the law introducing the special regime of self-governance in the districts controlled by DNR and LNR forces;
10. withdrawal of illegally-armed groups and military equipment as well as fighters and mercenaries from Ukraine;
11. adoption of a program of economic recovery and reconstruction for the Donbas region;
12. personal security for participants of the consultations.

Source: Organisation for Security and Co-operation in Europe, <http://www.osce.org/ru/home/123258?download=true>.

### **Points of Minsk-2 protocol (12 February 2015):**

1. immediate and full ceasefire;
2. pull-out of all heavy weapons by both sides;
3. monitoring and verification of the implementation of points 1 and 2 by the OSCE;

4. start of dialogue on modalities of conducting local elections in the rebel-controlled territories in accordance with Ukrainian law;
5. amnesty;
6. release and exchange of all hostages and illegally detained persons;
7. access to humanitarian aid by the ones in need;
8. dialogue on the modalities of a full restoration of social and economic connections between the territories controlled by DNR and LNR and the rest of Ukraine;
9. restoration of control by Ukraine over the state border;
10. withdrawal of all foreign armed formations, military equipment, and also mercenaries groups from the territory of Ukraine;
11. local elections in the territories controlled by the DNR and LNR;
12. intensification of the work of the Trilateral Contact Group.

Source: Organisation for Security and Co-operation in Europe: <http://www.osce.org/cio/140156>.



## Index of names

Avakov, Arsen 104, 143

Boyko, Yuriy 82

Clinton, Bill 22

Hrytsenko, Anatoliy 78, 83

Yatseniuk, Arseniy 79

Liashko, Oleh 78

Poroshenko, Petro 15, 76–83,  
100, 137

Putin, Vladimir 53, 70, 71, 78,  
144, 148

Tymoshenko, Yulia 78, 83

Yanukovich, Viktor 47, 50, 52,  
69, 70, 79, 137, 144

Zelenskiy, Volodymyr 83



# Index of subjects

## A

- accountability 10, 33–36, 38, 57, 80, 83, 96–105, 107, 138
- aggression 10, 52, 55, 56, 71, 75–84, 89–92, 94, 104, 129, 139, 147
- amnesty 30–32, 80, 97, 100, 102–105, 116, 131, 140, 152, 161, 162

## C

- civil war 34, 37, 70, 79, 97, 143, 155
- collaborators 88, 104, 116, 135
- combatants 29, 54, 57, 73, 100, 103, 113, 115, 116, 121, 147, 155, 157, 161
- commemoration 23
- conflict 7, 9, 10, 13–17, 21, 23, 25–39, 41, 42, 45, 50–61, 63–69, 71–95, 97–117, 119–125, 127–132, 134, 135, 137–143, 146, 148–152, 157, 160
- Council of Europe 32, 75, 125, 152, 154
- counter-terrorist operation (ATO) 53, 73, 74, 99, 103, 114, 116, 134, 138, 139, 149, 152
- coup d'état 52, 70
- courts 27, 31, 46, 50, 56, 66, 85, 86, 89, 90, 106, 112–114, 135, 150, 159
- Crimea / Autonomous Republic of Crimea 15, 46, 52, 53, 56, 59, 70–75, 77, 90, 98, 99, 122, 123, 126, 153

- criminal code of Ukraine 73, 86, 98, 102, 153, 160

## D

- democracy 22, 23, 25, 31, 46, 48, 49, 95, 120, 145–149, 156
- development 11, 14, 22, 25, 30, 38, 39, 41–43, 45, 47, 48, 55, 59–61, 71, 72, 97, 116, 121, 124, 126, 128–130, 137, 139, 142, 145, 157, 159
- disarmament, demobilization, and reintegration (DDR) 29
- Donbas 7, 9, 10, 14–17, 32, 41, 42, 45, 50, 52, 53, 55–57, 59–61, 63, 68, 69, 71, 73–77, 79, 81–87, 89–94, 97, 101, 102, 104, 106, 108–111, 115–117, 121–129, 131–135, 137, 138, 143–146, 150, 151, 160, 161
- Donetsk people's republic (DNR) 73

## E

- Euromaidan 14, 47, 50–52, 69, 72, 77, 84, 116, 126, 148, 149
- European Convention on Human Rights 32, 125, 152
- European Court of Human Rights 31, 32, 90, 143, 146
- European Union 31, 53, 67, 128, 146
- extraordinary (situation, circumstances, measures, policy, politics) 23–25, 38, 41, 45, 50,

- 51, 58, 65–67, 69, 72, 96, 97,  
104–106, 113, 114, 117, 119,  
120, 124, 138, 140, 148
- F**  
France 53
- G**  
Germany 53  
globalization 22  
government / Cabinet of  
  Ministers of Ukraine 42, 46,  
  47, 49, 50, 53–55, 59, 69–74,  
  76, 77, 79, 82–84, 89, 93, 94,  
  100, 102, 103, 115, 122–124,  
  126–130, 133, 144
- H**  
hostility 13, 28  
human rights 19, 22, 23, 27, 31,  
  32, 46, 50, 54, 55, 67, 114,  
  116, 119, 146, 147  
hybridity / hybrid war / hybrid  
  warfare 16, 55, 84, 124,  
  138, 142
- I**  
impunity 28, 29, 36, 116  
infrastructure 11, 80, 124, 126,  
  127, 130, 136, 144  
injustice 14, 22–24, 27, 28, 39, 58,  
  63, 65, 75, 104, 117, 119, 122  
institutional reform 35  
internally displaced persons  
  (IDPs) 54, 122, 126, 154  
International Convention for the  
  Suppression of the Financing of  
  Terrorism 90  
International Convention on the  
  Elimination of All Forms of  
  Racial Discrimination 90, 147
- International Court of  
  Justice 90, 147  
International Criminal Court 31,  
  57, 90, 101, 155  
international criminal law 29,  
  34, 57, 66, 151  
international  
  humanitarian law 56
- J**  
Joint Forces Operation 74, 103  
judiciary discretion 113  
jus post bellum 26, 68, 119, 143,  
  147, 149  
justice (restorative, retributive,  
  transitional, post-conflict,  
  victor's) 9, 10, 14–17, 21–43,  
  45, 46, 48, 50–52, 54, 56–60,  
  62, 64–68, 77, 95, 96–98,  
  102–106, 108, 110, 112, 114,  
  116, 118–130, 132, 134–143,  
  145–148, 151, 155  
law enforcement agencies 85, 86,  
  89, 98, 101, 115, 117  
Luhansk people's republic  
  (LNR) 53, 54, 56, 59, 63,  
  90–93, 100, 101, 115, 117,  
  131, 133, 134, 136, 155,  
  161, 162
- M**  
Minsk-1 protocol 56, 74, 79,  
  102, 103, 127, 128, 163  
Minsk-2 protocol 56, 103, 105,  
  128, 163
- N**  
narrative 10, 42, 52, 68–71,  
  74–77, 79, 82, 84–94, 113,  
  138, 139, 157

National Security and Defense  
  Council of Ukraine 70, 97, 125  
Normandy Format 53, 54

## O

oligarchs / oligarchy / oligarchic  
  system 48–50, 62, 148  
Organisation for Security  
  and Co-operation in  
  Europe 161, 162

## P

parliament / Verkhovna Rada  
  45–47, 69, 71, 72, 74–77,  
  79, 80, 82, 90, 98, 100–103,  
  122–127, 129, 132, 134, 137,  
  152, 154, 155  
peace (positive, negative,  
  negotiations) 27–29, 31, 36,  
  37, 141  
peace vs. justice dilemma 29, 30,  
  34, 37, 38, 57, 85, 116, 142  
peacebuilding 22, 29, 32, 39, 58,  
  121, 127, 128, 141, 144, 147,  
  152, 155  
people's republics 53, 54, 59, 72,  
  73, 75, 84, 91, 99, 100, 103,  
  104, 118, 127  
post-conflict (situation,  
  circumstances, states, justice,  
  strategy) 23, 26–36, 38, 39, 67,  
  77, 143, 149, 151, 152  
power-sharing 36  
president 46, 47, 52, 69, 70, 71,  
  73, 76, 79, 81, 82, 99, 100,  
  132, 134, 137, 141, 150, 154  
prosecution 22–24, 27, 31, 61,  
  89, 102, 107, 112, 159  
Prosecutor General of  
  Ukraine 86, 99

punishment 10, 28, 29, 95–107,  
  109, 111, 112–117, 140, 145,  
  150, 153, 159

## R

reconciliation 23, 27–29, 35, 36,  
  38, 41, 56, 57, 65–68, 74, 80,  
  84, 85, 97, 104, 106, 115, 116,  
  118, 122, 139, 141, 145, 146,  
  148, 151  
referendum 52, 53, 112  
rehabilitation 105, 119, 120  
reparations 23, 27, 67, 80, 119,  
  120, 143, 145, 156  
restoration 10, 13, 17, 27, 28,  
  30, 35, 54, 80, 104, 124, 126,  
  127, 129–131, 133, 143, 144,  
  149, 166  
retribution 10, 17, 95–97, 99,  
  100, 103, 120, 145, 146  
Russia / Russian Federation 11,  
  15, 49, 50, 52–54, 56, 63, 70,  
  71, 74, 75, 78, 80, 81, 83,  
  90–93, 98, 99, 104, 129–131,  
  135, 139, 146, 147, 150, 155

## S

self-proclaimed republics 54, 60,  
  72, 79, 91, 100, 113, 124, 134,  
  136, 143  
separatism 10, 47, 48, 55, 72,  
  73, 75, 84, 86, 87, 89, 94, 97,  
  98, 105, 107, 148, 154, 160  
soft power 11, 126, 129, 130, 150

## T

terrorism 10, 55, 73–75, 79,  
  84–91, 94, 99, 100, 107, 109,  
  112, 114, 123, 134, 140, 147,  
  154, 160

- transition 24, 26, 32, 47, 48, 66, 95, 120, 126, 145, 148
- trials (Nuremberg, Tokyo) 22, 23, 36, 39, 58, 117
- Trilateral Contact Group 53, 162
- trust 35, 37, 65, 78, 93, 94, 120, 132, 133–136
- truth (official, microscopic, logical, experiential, dialogical) 10, 65, 67–69, 84–86, 89, 91, 94, 157
- truth commission 27, 35, 36, 39, 66, 68, 140, 145
- truth vs. justice dilemma 38, 85
- truth-seeking 9, 17, 28, 29, 35, 43, 65–68, 70, 72, 74, 76, 78, 80, 82, 84–86, 88, 90–92, 94, 107, 121, 130, 139
- truth-telling 68
- U**
- Ukraine 7, 14–16, 42
- United Nations 23, 27, 30, 31, 54, 67, 75, 128, 144, 150, 152
- United States of America 33, 53, 150
- V**
- vetting 23, 27, 32
- victims 23, 24, 29, 35, 54, 66, 67, 77, 78, 80–83, 94, 95, 119–121, 123, 132, 135, 138–140, 147, 155
- violence (past, direct, indirect, large-scale, small-scale, mass-scale) 13, 22–25, 39, 54, 66, 67, 75, 98, 99, 120
- W**
- World Bank 58, 128, 144, 152
- wrongdoer 13, 24, 67, 77, 78, 80, 81, 83, 95–97, 113–116, 135

## Studies in Political Transition

Edited by Klaus Bachmann

- Vol. 1 Klaus Bachmann: Vergeltung, Strafe Amnestie. Eine vergleichende Studie zu Kollaboration und ihrer Aufarbeitung in Belgien, Polen und den Niederlanden. 2011.
- Vol. 2 Klaus Bachmann / Thomas Sparrow-Botero / Peter Lambert: When Justice Meets Politics. Independence and Autonomy of *Ad Hoc* International Criminal Tribunals. 2013.
- Vol. 3 Kim Christiaens / Idesbald Goddeeris / Magaly Rodríguez García (eds.): European Solidarity with Chile 1970s-1980s. 2014.
- Vol. 4 Klaus Bachmann / Igor Lyubashenko (eds.): The Maidan Uprising, Separatism and Foreign Intervention. Ukraine's complex transition. 2014.
- Vol. 5 Klaus Bachmann / Dorota Heidrich (eds.): The Legacy of Crimes and Crises. Transitional Justice, Domestic Change and the Role of the International Community. 2016.
- Vol. 6 Klaus Bachmann: Der Bruch. Ursachen und Konsequenzen des Umsturzes der Verfassungsordnung Polens 2015-2016. 2016.
- Vol. 7 Igor Lyubashenko: Transitional Justice in Post-Euromaidan Ukraine. Swimming Upstream. 2017.
- Vol. 8 Krystyna Szafraniec / Jarosław Domalewski / Krzysztof Wasielewski / Paweł Szymborski / Marcin Wernerowicz. The Me-Generation in a Post-Collectivist Space. Dilemmas in a Time of Transition. 2018.
- Vol. 9 Klaus Bachmann / Gerhard Kemp / Irena Ristić (eds.): International Criminal Tribunals as Actors of Domestic Change. The Impact on Institutional Reform Vol 1. 2019.
- Vol. 10 Klaus Bachmann / Gerhard Kemp / Irena Ristić (eds.): International Criminal Tribunals as Actors of Domestic Change. The Impact on Institutional Reform Vol 2. 2019.
- Vol. 11 Klaus Bachmann / Irena Ristić / Gerhard Kemp (eds.): International Criminal Tribunals as Actors of Domestic Change. The Impact on Media Coverage. Volume 1. 2019.
- Vol. 12 Klaus Bachmann / Irena Ristić / Gerhard Kemp (eds.): International Criminal Tribunals as Actors of Domestic Change. The Impact on Media Coverage. Volume 2. 2019.
- Vol. 13 Ireneusz Krzemiński: Solidarity: The Unfulfilled Project of Polish Democracy. 2019.
- Vol. 14 Klaus Bachmann / Christian Garuka (eds.): Criminalizing History: Legal Restrictions on Statements and Interpretations of the Past in Germany, Poland, Rwanda, Turkey and Ukraine. 2020.
- Vol. 15 Igor Lyubashenko: Ukraine's Search for Justice in the Shadow of the Donbas Conflict: Ukraine's Search for Justice in the Shadow of the Donbas Conflict. 2020.

