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EUROPEAN INSTITUTIONS AND WAR CRIMES: THE (UN)ACCOUNTABLE ONES

EUROPEAN DISCIPLINE, COMPREHENSIVE INVESTIGATION OF THE RUSSO-UKRAINIAN CONFLICT, AND FUTURE SCENARIOS OF EUROPEAN WARFARE

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To those who have taught me kindness and ambition: my parents.

You are my favourite human beings, vi amo.

And to you, my sweet Lara:

I am working to make this world live up to your dreams.

Be kind, have fun, and stay human. My forever motto.

Global Campus Europe

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Abstract

This research aims to find other – and innovative – solutions to improve the responsibility and the controlling mechanisms of European Institutions dealing with war crimes. Particularly, we present a new scenario in which they will have more power in order to create a deterrent for wars to begin. We will deal with the problem of war crimes while explaining the fundamental role, for the international community, of International Humanitarian Law and Human Rights Law. Also, we analyse the war crimes that were committed nowadays in the European arena, and we examine the role of the European Institutions and the means and methods at their disposal to prosecute those who have committed international violations. Therefore, we investigate the Russia-Ukraine conflict as the case study of this dissertation, showing the involvement of the European Community and the bilateral relations that occur between the most powerful states in Europe and the countries involved in the conflict. The purpose of this master's thesis is to stimulate a critical approach in the readers and let them question if creating a stronger, independent 'European block' could represent a new strategy for preventing war crimes in an international system where wars are different from the past. Finally, we will consider how much the Rule of Law and the Democracies are threatened by these new frontiers of warfare in the European scenario.

LIST OF ABBREVIATIONS

CCW	Certain Conventional Weapons
CFSP	Common foreign and security policy
CIA	Central Intelligence Agency
CJEU	Court of Justice of the European Union
CoE	Council of Europe
COM	Commission
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
EUCO	European Council
ICC	International Criminal Court
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IL	International Law
ILC	International Law Commission
IMT	International Military Tribunals
NATO	North Atlantic Treaty Organisation
OHCHR	Office of the High Commissioner for Human Rights
RSP	Resolutions on topical subjects
SSR	Soviet Socialistic Republic
SU	Soviet Union

TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UN	United Nations
UNWCC	United Nations War Crimes Commission
US	United States
USA	United States of America
WEU	Western European Union
WWI	World War I
WWII	World War II

Acknowledgements

Here I am again. This time it's different, though. I read the acknowledgements of my thesis at Law School and I smile to think how much I've changed.

Today I am proud, proud and aware of the woman I am and the progress I have made. I have finally begun to live the life I have dreamed of since I was a child, surrounded by people from all over the world. I have finally become the woman I have always imagined myself to be, and I would not know how to describe this feeling except by saying "I am happy".

These months have been hard, very hard, but they have enriched me in a way I didn't think possible.

I would like to thank first my supervisor, Professor Hans-Joachim Heintze, whose discussions, and conversations made me realise that I was not a fool and that my ideas were good. Confronting an expert of this caliber and agreeing with him filled my heart.

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A special thank you to Germany, which made me breathe again, and made me feel free. You, Germany, with your people and the humanitarians I have met over these months, have been a blessing.

To my family, without whom I would not be here now: mum, dad, my love for you is boundless. Thank you once again, I know you are proud of me for this small achievement, but I am working to do even bigger things!

And, again, to myself. With courage I never gave up, despite the illness, despite the fatigue, I never thought it wasn't worth the pain even for a second. Brava, Ilaria, you were more than good!

And to all that will come, I am ready, I know it for sure. Whether it will speak to me in English, French, Spanish, German, or Italian I will embrace my future, never forgetting that my roots always take me to Naples, my cradle and my true home.

INTRODUCTION

The motivation for this investigation comes from an intrinsic interest in the international events that are happening in our society, combined with our greatest passions for European Union Law and International Criminal Law. Hence, we had no choice but to follow our natural inclination for the event that has mainly affected our lives in recent years: the Russia-Ukraine conflict. We, therefore, have decided to develop this research from our empathetic and human side, which inevitably led us to question ourselves as to why war crimes are being committed around the world and why those involved are unable, in the event of war, to remember their human side.

With this as a starting point, we present a research analysis on war crimes that have recently been committed on European soil. Thus, considering this, we ask ourselves who are the perpetrators of these crimes and, at the same time, whether there are possibilities to hinder their commission by utilizing greater control and security mechanisms.

We started wondering who the political bodies with the greatest powers in the Community Panorama are, and the answer is easy to guess: the European Institutions. On this matter, considering their strength and mandates, and in light of the events that have unfolded in recent years, particularly when it comes to Russia-Ukraine conflict, and a looming ever closer war in the West, we wondered how the European institutions could do "more".

In this regard, aware of the enormous amount of work to be done, we decided to develop our project around the elaboration and drafting of three fundamental pillars: (i) analysing the history and nature of war crimes; (ii) studying and explaining the institutions present on European territory and their connection with war crimes and, lastly; (iii) a case study recounting the Russia-Ukraine conflict and its geopolitical implications and the consequent international balances. All intending to find an answer to our research question: what can European Institutions increase to prevent the commission of war crimes in the European territory?

We will attempt to answer our research question through an analysis developed on three parts, utilizing a qualitative methodology, that includes both desk research and literature review, using the Russia-Ukraine conflict as a compelling case study. Also, our is primarily doctrinal research with the aim of describing and examining the topic deeply. When needed, the reader will find other methods of research, such as secondary sources and polls that will help in finding answers. Moreover, we want to

underline that, because we have decided to analyse an ongoing war and because of the continuous developments that evolve suddenly, we have adopted a precise methodological line.

Because of that, we investigate the period from the outbreak of the war in 2022 to the 2024 European Parliament elections. We do not presume to predict future changes and, if we dare to lengthen the period of analysis, we would be certain not to develop an investigation of good academic quality.

In the First Chapter, we deal with the evolution of war crimes. From the earliest roots, following the First World War, tracing a historical and legal excursus starting from the Treaty of Versailles (1919). In the first part of this thesis, we felt the need to develop the history of the protagonists of this examination, considering necessary that a careful analysis of their role in the international panorama must, in any case, pass through a prior authorization by the international community. For this reason, in this part, the methodology used was to understand the reasons behind such a difficult development of the recognition of war crimes as an international crime. In doing so, we felt the need to analyse the Nuremberg and Tokyo Trials, identified as the cradle of the affirmation of crimes committed during the Second World War. Culminating in the fundamental role of the Statute of Rome (1998), the current guardian of Human Rights when core crimes occur. The collaboration of the world States has, thus, made it possible to regulate a matter in which the decision-making and jurisdictional power is attributed to a *super partes* Court, international in scope, aimed at protecting humanitarian and human rights violations from the commission of the four core crimes: genocide, crimes against humanity, war crimes and the crime of aggression. In addition, we discuss the role of the Geneva Conventions and why they are so important when it comes to the functions of the ICC. We also take an in-depth look at the four types of core crimes recognised by the Rome Statute, mentioned before, and the relationship between international crimes and war crimes. We explain why it is so crucial to focus on war crimes and why we have chosen this crime over the others.

For this first chapter, the methodological choice was based on the analysis of specific legal and regulatory texts that are interesting to mention and analyse, as well as the texts of specific scholars in the field and well-known experts who have published manuals of doctrine. These turn out to be very descriptive and elaborate and, for this reason, completely suited to the line of analysis we have chosen. For example, in carrying out this historical examination we have chosen to use fundamental legal resources such as the Treaty of Versailles, the Potsdam Declaration, the Rome Statute, and others. Concerning academic research, we opted for academics and researchers whose writings have had an impact on this field of research. Examples are Judge Cassese, King, Meron, Kelsen, Brower, Miller and Schwarz, and many others.

The Second Chapter, which is also the second pillar on which our analysis is based, is concerned with a specific examination of the European landscape on which we have decided to locate this research. We set out why we, as European community, intend to prosecute those who committed war crimes. We analyse the Rule of Law in the community system, and we argue why we believe that thanks to this and to the aims of the EU as such, we cannot leave the perpetrators unpunished and/or unaccountable (not responsible) to their crimes.

Next, we will study the different figures represented by the EU and examine their role in fighting the commission of war crimes. Along with the EU institutions, we will also discuss the role of the Council of Europe (CoE), which exercises the power of the guardian of human rights in the EU landscape. However, this analysis cannot be separated from evaluating another major figure found on European territory: the North Atlantic Treaty Organization (NATO). We explain the relationship between the EU and NATO and the role that this one has in the promotion of human rights and the prevention of their violations. In doing so, we also address to new challenges that Europe has to face in the near future.

In this part of the investigation, we have used a purely legal framework, mentioning documents that underlie the existence of entities such as the EU and NATO, along with other legal documents that explain the nature and mandate of specific institutions. This type of analysis could not be separated, therefore, from a strong legal examination of desk research involving the analysis of Agreements, Decisions, Conclusions, etc. This methodological choice includes also the consultation of articles and books of academics and Law professors, whose reflections have supported our presented study.

The Third and final Chapter of this thesis is developed around the case of study we have decided to analyse: the Russia-Ukrainian conflict. This is part of the final pillar around which our theory is based, which will be described in the Conclusions Chapter. In detail, after having carried out a careful analysis of the conflicts that could best represent a threat to the human rights of European citizens, we finally agreed that the Russia-Ukraine one could sum up all the threats to democracy and human rights that we address in this investigation. We explain the roots of the conflict and the reasons behind Russia's invasion of Ukraine in February 2022. Subsequently, the study moves in a direction of analysis and comparison: more precisely, we have decided to consider three of the most powerful European Countries to apprehend where they politically stand in the conflict. Moreover, we are very interested in studying their policies and understanding what strategic choices lie behind their geopolitical decisions. Specifically, we have analysed the choices made by Germany, France, and Italy. The case of Germany allowed us to explain in greater depth the extent to which the history of bilateral relations affects future ones. It is no coincidence that Germany initially opted for a non-interventionist policy, choosing not to authorise the

sending of arms to Ukraine. Only with the passage of time and the development of events the German position change and, with it, so did the rest of the balance. In this chapter we have made a methodological choice based on various secondary resources, also introducing the use of surveys from official national agencies, such as Istituto per gli Studi di Politica Internazionale (ISPI) and Deutsche Press Agentur (DPA).

Furthermore, to narrate the development of daily facts and official decisions, we used resources published on the official websites of the Nations and, simultaneously, analysed what scholars of geopolitical theories have said about the case study. A collection of direct quotations from Heads of State is among the most widely used methodology techniques in this chapter. Only through the use of various resources, such as newspaper articles, manuals, direct quotes, official EU and NATO documents, and legal sources, we could answer our research question.

We have chosen to use the three pillars, presented as three complementary chapters, because they provide the clearest and most coherent path to answering our research question. These three pillars form the foundation of our inquiry and guide us towards a solution to the research problem, thereby contributing meaningfully to the discussion on the topic.

I CHAPTER – WAR CRIMES

1. Introduction

To provide a clear roadmap for the following analysis, it is important to make the reader aware of the main subjects that this paper will focus on. This dissertation will explore the fields of International Criminal Law, European Union Law, International Humanitarian Law, and Human Rights Law, with a specific focus on War Crimes occurring within the European region. Throughout this analysis, we will better describe how War Crimes will take center stage while explaining their interconnection with the above-mentioned subjects.

In this part of the thesis we will analyze, through a historical *excursus*, the development and the process that led to the elaboration of the so-called 'war crime', together with the recognition of what – in the future – will be defined as core crimes. Moreover, a passage that we consider fundamental for the purposes of our examination, concerns the slow affirmation, by the international community, of crimes that are not only national in scope. The question that would arise would be: why did it take so long to reach a coherent and unequivocal consensus on the part of the world's most powerful countries? Why was it only after so much effort that behavior involving the violation of the most basic human rights was recognized as a crime? Therefore, taking into consideration the historical moments and eras experienced, we have outlined an analysis and attempted to explain these questions in the following paragraphs.

1.1 Historical Context and Overview

It is widely accepted that the beginning of modern international criminal jurisprudence can be traced back to the outcome of World War I, particularly with the signing of the Treaty of Versailles. Also, is well known that War Crimes Law was created, or even began to be considered as a fundamental legal necessity, right after the end of World War I.

This could be considered as an assumption, but if we are capable enough to argue why this statement is correct, then we can easily set the beginning of the international criminal jurisprudence in the period that goes from 1916 onwards. In fact, in a law conference in London in 1916 was affirmed that "*the public opinion of the civilized world will not rest satisfied unless, upon the termination of the conflict, not only the instigators but also the actual perpetrators of the more heinous offences against the usages of war are brought to trial before some impartial tribunal*" (Bellot, 1916, p. 37).

Thus, with this new Treaty, we had – for the first time – the idea of prosecuting individuals for their crimes, not just considering them as part of the State that they were representing. In doing so, people were considered capable of being processed also for their personal responsibility behind the commands or commitments of crimes (Manner, 1943). And, shortly, we will understand why.

The Geneva Convention on Prisoners of War (1929) reveals a document stating that individuals cannot be held internationally responsible for their acts contrary to the law of war. The objective of this Treaty was to foster a time for peace and security in post-war Europe but, paradoxically, it contributed to the outbreak of the Second World War.

In truth, the reaction from the other side of the world, who wanted stability and desired to ensure a safe environment for the future of the European Continent and the World, was no longer in coming: in January 1919 the Paris Peace Conference established a Commission that had the purpose of investigating the origins and ramifications of the war. The British Prime Minister Lloyd George was the one who wanted to form a specific Commission that would have dealt with the international crimes that took place during the Big War. However, even if the idea was innovative and quite shared among the influential politicians of the time, not all Heads of the Countries were on the same page. Not only those who were directly involved in the war, but even those who simply experienced the consequences of the World War were concerned about this innovation. For example, US President Woodrow Wilson was against the creation of a specific Commission, but the idea of Lloyd, supported by the Belgians, Italians, and French, prevailed, thus the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties was established (Manner, 1943).

During the Preliminary Peace Conference (1919) at the plenary session on January 25, it was decided to create a Commission composed of fifteen members: two per every Great Power (USA, UK, France, Italy, and Japan) and five elected from among the Powers "with special interests". Under Chapter I "Responsibility of the Authors of the War" it was literally written: "*On the question of the responsibility of the authors of the war, the Commission, after having examined a number of official documents relation to the origin of the World War, […] has determined that the responsibility for it lies wholly upon the Powers which declared war in pursuance of a policy of aggression… This responsibility rests first on Germany and Austria, secondly on Turkey and Bulgaria.*". It is also very interesting to refer to the "*Conclusion*" of this document, where in Chapter II, it states a list of thirty-two crimes that the guilty States have committed; a precise sentence anticipates the creation of a Commission to collect and analyse the information that were already obtained so that the crimes on land, on the sea and in the air would be prosecuted (Commission of Responsibilities, 1919).

Several months later, following the submission of the Commission's report, the Treaty of Versailles was ratified, and it was indicated, within the legal panorama, as the first document that tried to give legal legitimacy to crimes perpetrated during the War. In talking about the importance of this revolutionary document, we also should consider that the Treaty of Versailles was the first treaty to address (also) directly the individual responsibility of specific persons; in this case, the Treaty of Versailles recognized the personal responsibility for Heads of States in initiating and committing crimes that were then named as crime of aggression and crime against peace.

Moreover, Meron (2006) affirmed that some parts of the Treaty, such as Articles 228 and 229, were very similar to the American memorandum of reservations presented to the Commission's report in 1919, leading to the idea that they would not deal with a proper international criminal court, but rather with a military tribunal. As a consequence of the ratification, it was clear that Germany would have had several repercussions and that, unfortunately, she would never be able to rise from the devastating effects of the declaration of culpability. Even if the number of the people trailed was reduced from 895 to 45 individuals, that still wasn't enough for Germany, since only twelve military officials were prosecuted. In sum, although significant progresses were made in International Humanitarian Law in the period antecedent of the Nuremberg trials, many nations were ratifying treaties and embracing the ideologies behind them looking forward to the recognition of concepts such as crimes against humanity and command responsibility. With this though what we can easily affirm is that the practical enforcement of law should be considered far behind the doctrinal development. (Meron, 2006).

Delving deeper into the legal aspect, it seems also essential to mention that the Treaty of Versailles is a document that can be considered as a legal result and reaction to what Germany did in the Great War. It aimed to declare worldwide the accountability of the country for the crimes committed in the past. In fact, the Section IVV of the Treaty stated as it follows: "*The Allied and Associated Governments affirm, and Germany accepts, the responsibility of herself and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and other allies*" (The Treaty of Peace with Germany, 1919, p. 15). The main topics that this Treaty wanted to focus on were not only related to the establishment of an enduring peace by the world leaders after years of war. Persons and the Allies seemed to seek a "*peace of justice*" (Treaty of Versailles, 1919, p. 39).

It was evident that Germany was deemed accountable for the massacre of Belgium and France and, while we can peacefully affirm that it did not receive the same treatment as the other "guilty" countries, the head of the German delegation admitted that Germany had a responsibility for the war. Thus, it

accepted the war guilt clause that caused it the lose lots of territory and millions of money, leading the country to the worst economic crisis that it has ever experienced (Oziah, 2019). French premier Georges Clemenceau opened the Versailles peace negotiation in May 1919 by saying: "*The treaty assigned blame for the war to Germany called for trials to punish transgressions against the laws of war by defeated powers, and set up a commission to determine the extent of reparations*" (German Observations, 1919, n.d.). For this and other reasons it has been said that, despite its good initial intentions, "*The Treaty of Versailles seems more vengeful than just*" (Lu, 2002, p. 12). And in fact, the Treaty appeared to produce neither peace nor justice but rather served to pave the path to a second and more devastating, world war (Lu, 2002).

Even if the intentions of this document were noble, the consequences that followed were not anticipated by those who signed it: what in reality the Treaty accomplished was to incite anger and frustration in the German people, which led to the rise of "*their savior*" Adolf Hitler (Oziah, 2019). It is for this reason that the Treaty of Versailles was severely criticized by the doctrine. As Martel (1998) has written, "*it seemed even more apparent that Versailles had been fundamentally flawed, that it led to Nazism, the war, and the Holocaust*" (p. 624) and Kennan (1989) affirmed that the Versailles Treaty was "*a very silly humiliating and punitive peace imposed on Germany after World War I*" (p. 16).

Conversely, some other scholars now tend to look at the Treaty as the best option in terms of deal that negotiators could have gotten under those conditions (Sharp, 1991; Boemeke, et al., 1998); they affirmed that the failure of the Treaty was caused by the way States wanted to fulfil justice and peace, that was, according to them, not done properly: using the item of the mortification towards Germany was not appropriate and useful. Indeed, it has caused several collateral damages, if we just think of the will of Germany to reaffirmation its power within the European arena. It is also very enriching to our research to mention what some scholars (Lu, 2002), indeed, have written about the importance of this Treaty within the World War panorama in the first half of the 20th century, affirming that "*Yet peace was not the only aim; both Germany and the Allies claimed to seek a 'peace of justice*'" (German Observations, 1919, p. 39).

Furthermore, because of the large American and Japanese objections to this Treaty, the recommendation regarding personal criminal liability for crimes that were against the principles of international law and regarding the penal sanction about them never became law (Manner, 1943).

That said, it seems quite clear to us that this quest for vengeance, disguised as a universally accepted document implying legal repercussions, has simply served to exclude even worse events than those that have previously occurred. The question therefore arises: is it worthwhile to draw up a treaty – involving

several states – that demeans and humiliates the guilty party and leads its citizens to unprecedented economic catastrophes? The lesson we have learned from these precedents is clear: no accusatory act or violent reaction does justice to previously committed crimes. In this regard, Germany knows.

1.2 Nuremberg and Tokyo Trials

The atrocities and the pain caused by the Second World War were so many that both influential persons and those who were not directly involved in the human rights' field tried to stress the powerful identities to not repeat the same mistakes made after WWI. The failure to prosecute German military leaders for their war crimes can be considered as an example. This line of thought culminated in the establishment of the Nuremberg and Tokyo tribunals, built with the main purpose of prosecuting parties responsible for gross human rights violations committed during WWII.

Today, the creation of a specific Military Trial, as a response to the Nazi aggression, might be assumed as an obvious reaction to the atrocities committed by Germany, but, going back to the days, this was considered such an innovative idea.

The International Military Tribunal is a political agreement among the most important Allies (United States, Great Britain, and the Soviet Union). Since the beginning, their leaders, Roosevelt, Churchill, and Stalin grappled with the issue of war crimes. States had also different positions towards Germany: for example, the British government initially was reluctant because of the fear of retaliation against British prisoners of war. Also the United States kept a low profile on the issue. It was just in June 1942 that Churchill suggested to Roosevelt the idea of creating a specific Commission on Atrocities. Thus, in London in October 1943, the United Nations War Crimes Commission had its first meeting. However, this institution was not so powerful in deciding immediately and was considered to have limited and inadequate resources because of the lack of power to investigate on its own, due to the war information that it received by the States (Reydams & Wouters, 2011). It seems clear that each State decided to what extent to provide information to the Commission, because of the fear of being persecuted by it.

However, shortly after the first meeting of the UNWCC, the Foreign Ministers of the main Allies plus China issued the "Declaration of the Four Nations on General Security", the so-called Moscow Declaration. It stated that German officers and members of the Nazi party "*will be sent back to the countries in which their abominable deeds were done so that they may be judged and punished according to the laws of these liberated countries and of free governments which will be erected therein*" (Moscow Declaration, 1943, n.d.). At the end of the paragraph of the Declaration (1943), it was specified also that

what was affirmed by the Allies in fighting the major criminals was without prejudice, almost as to emphasize the difference between this statement and those made in the past, such as the Treaty of Versailles which aimed to undermine Germany's reputation with disparaging and vindictive intent.
It is noteworthy that the concept of prosecuting and processing war crimes was unprecedented; the idea was completely innovative for that era.

During the Malta and Yalta Conference in 1945, Allies leaders found themselves at odds regarding the appropriate strategy to take concerning the criminals: Stalin, for example, suggested the capital death for around fifty thousand people, while Churchill approached the problem with a more diplomatic line, proposing to prepare a list of the Hitler and Mussolini gangs and the Japanese warlords (Silber & Miller, 1993). This list was examined and approved by a group of jurists and the punishment was to immediately follow arraignment: "*As and when any of these persons fall in the hands of any of the troops or armed forces of the United Nations, the nearest officer of the rank or equivalent rank of Major-General will forthwith convene a Court of Inquiry, not for the purpose of determining the guilt of the accused but merely to establish the fact of identification. Once defined, the said officer will have the outlaw or outlaws shot to death within six hours and without reference to higher authority*" (Minister of Defence's Proposal, 1943, n.d.).

Meanwhile, the US government was experiencing several tensions due to the internal division among the administration and Secretary of War Henry Stimson was formulating a proposal that involved the punishment of major war criminals based on legal process before an international tribunal (Reydams & Wouters, 2011). In December 1944, with the Big Three yet to reach a consensus on how to address criminals, the mentioned Stimson, the new Secretary of State Edward Stettinius, and Francis Biddle submitted to President Roosevelt a "Nine-point memorandum, Trial and Punishment of Nazi War Criminals" (International Conference on Military Trials, 1945).

The proposal contained some elements that were part of the UWCC draft Convention for the Establishment of a United Nations War Crimes Court; the only differences could have been found in the legal basis of the formation of the International Court. Unfortunately, President Roosevelt couldn't guide anymore his country that is why his successor, Harry Truman, was in charge of continuing the policy of the United States also within this field. On 26 June 1945, after signing the United Nations Charter at the San Francisco Conference, the Big Three and France started negotiations in London on the guiding principles for processing war criminals, and on 8 August, 1945 the leaders signed the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, also known as the London Agreement and the Charter of the International Military Tribunal. This tribunal had its opening

session in the Palace of Justice in Nuremberg. Within a year, more than twenty major war criminals were tried and sentenced (Reydams & Wouters, 2011).

Undoubtedly, while customary law existed even before the creation of the Nuremberg Trial, it had never been applied in an international criminal court. When the London Charter, was enacted, it was also created for the so-called "International Military Trials", a tribunal that, for the first time, had to deal with specific crimes. Moreover, under Article 5, Part I, the Charter explicitly affirms the principle – for those in need of a trial – to have the right to be processed before other Tribunals that "*shall be identical and shall be governed by this Charter*" (London Charter, 1945).

In the International Criminal Law panorama, this Charter is also important because it set the roots for the affirmation of the principle of "personal accountability" in the sense that it explicitly states that those who are charged with criminal crimes and, at the same time, have been recognized as alleged war criminals of the European Axis countries, shall have the opportunity to be prosecuted both for crimes committed as a member of an organization and as an individual. The Charter (1945) affirms that: "*At the trial of any individual member of any group or organization the Tribunal may declare … that the group or organization of which the individual was a member was a criminal organization*" and Article 10 continues: "*In cases where a group or organization is declared criminal by the Tribunal the competent national authority of any Signatory shall gave the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature or the group or organisation is considered proved and shall not be questioned*". This can be considered as one of the most innovative parts of the Agreement: the right of those who have been already declared guilty to proceed the process before their national courts. What has been named by Simpson (2009) as "*The Tokyoberg*" found ground for crimes that have been identified as crimes against peace, war crimes, and crimes against humanity.

In the meantime, as early as 1944, there was finally set the Far Eastern and Pacific Sub-Commission for War Crimes. Even though from, the outside's perspective, someone could argue that the Nuremberg and the Tokyo Trials are similar to one another and have the same characteristics in terms of scope, composition, and legal positions, some scholars have affirmed that the legal basis of both Trials were different. The Nuremberg tribunal was established based on an international agreement of which Germany never became a party. Initially, the agreement was signed by Great Britain, the Soviet Union, France, and the United States, and only later it was adhered to by nineteen member States of the United Nations. As Walkinshaw has written, it was "*the first of its kind ever to be established. It was a stark assertion of the international will*" (Walkinshaw, 1949, pp. 299-300).

The Tokyo tribunal, instead, was approved by Japan. The rationale behind creating this tribunal becomes apparent upon reviewing what is written in the Potsdam Declaration, when at point 10 it states as follows: "*We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners*" (Potsdam Declaration, Section X, 1945).

Finally, in 1946 General MacArthur set up the Military Tribunal in Tokyo. One significant challenge faced by this Tribunal concerned the individuals accused of war crimes: they, according to modern warfare, were considered allegedly guilty of committing crimes that were not related to specific countries during a specific period. Of course, they needed to be processed but, at the same time, this issue showed the imperfection of the Tribunal structure, while dealing with other contemporaneous issues. For example, another typical trait of the Tokyo Trial concerned the chosen judges: to ensure an impartial judgment and to fulfill the principle of impartiality, judges were chosen not because of their neutrality in war, but because they were known all over the world as a respectful and just men (Walkinshaw, 1949).

The Nuremberg tribunal was composed of just four judges, one for each of the Allies and the Tokyo one was constituted of eleven judges from all signatories of the Japanese Declaration of Surrender and Guiltiness. The persecuted crimes under the Nuremberg Tribunal were identified in Conspiracy, Crimes against Peace, War Crimes, and Crimes against Humanity. On the opposite, the crimes identified by the Tokyo Tribunal were Crimes Against Peace, Murder, Other Conventional War Crimes, and Crimes Against Humanity. Although the crimes are categorized under different names, they all arise from the common allegation of conspiracy, as it was it that generated the other charged offenses (Walkinshaw, 1949). Both tribunals were called IMT, meaning "International Military Tribunals": judges and prosecutors were military, mostly officials in the General Secretariat (Reydams & Wouters, 2011). In Nuremberg, the proceedings were held in English, French, German, and Russian, and in Tokyo, in English and Japanese.

In sum, the International Military Tribunals was the only trial that dealt with Nazi criminals in history. Probably, the greatest contribution that these trials have made to the progress of International Criminal Law is the affirmance that there existed a common or unwritten law against aggressive wars. As it has been said, originally law arose from custom, from a shared deal within states that continued to use it as a common law. That's why, given the absence of a centralized law-making entity, but only treaties among states, international law predominantly consists of customary laws, international law created by treaties between states, in contrast with national norms, much more than the national system (Walkinshaw, 1949).

What – to us – results very fascinating in analysing this part of the establishment of International Criminal Law, is that following the persuasion of Americans for the necessity of an international court to prosecute criminals, despite many governments being convicted, a significant portion of defendants were ultimately acquitted.

What we have just examined in this section of the analysis, shows that the main purpose of the Treaty is to induce a (hopefully) long-lasting peace between the actors of the conflict and all others involved in it. this could include policies on the use of weapons of war, alliance strategies, or even common covenants obliging different states to apply the same legislation. Examples can be the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on their Destruction, or the CCW, regarding the use of Certain Conventional Weapons. In fact, in this case, the signatory parties (which correspond to the different countries) join forces to reach the same solution that has a compulsory character.

Concerning the final sanction arrived at by the signatories of the treaty, it is now apparent, following what has been said above, that the solutions envisaged by the international community can be identified in several areas. First, in (military) international criminal tribunals. Secondly, it is possible to say that in the past the solution has also fallen to the formation of ad hoc tribunals, as in the case of the tribunal against crimes for the former Yugoslavia and for crimes in Rwanda. In detail, it is possible to argue that leaning toward a national court represents a choice that some scholars have supported and others less so. For example, Brower affirmed that in its opinion international courts and tribunals and their judges were "*more independent of nationality concerns to the extent that their jurisdiction is a limited one and their structure is accordingly denationalized*" (Brower, 2009, p.179).

The *ad hoc* tribunals were established by the UN Security Council, being considered subsidiary organs of it. These, as we know, are not subject to the authority or control of the Council and are defined as civilian tribunals, in contrast to those instituted at Nuremberg and Tokyo, which, by definition, are military tribunals. The rationale for their creation is therefore exceptional in nature, having established the maintenance of international peace and security, as stated in Chapter VII of the UN Charter (1945), Resolution 827. In fact, the scope of these tribunals lies in their nature, being a hybrid between national and international courts. As it is written in the Report of the Independent Commission, "*States may choose to combine their jurisdictions under the universality principle and vest this combined jurisdiction in an international tribunal. The Nuremberg International Military Tribunal may be said to have derived its jurisdiction from such a combination of the national jurisdiction of the States parties to the London Agreement setting up that Tribunal*" (Security Council Resolution, 1992).

Hence, as some scholars have hypnotized, we also can argue that the ad hoc tribunals' jurisdiction derives from a territoriality and nationality delegacy of States Members (Skander, 2019). Furthermore, the formation of these courts was considered necessary to make up for the impunity of war crimes committed in specific situations, perhaps justified by 'reasons of state' or 'necessity of war' (Canestrini, 2008).

1.3 The Evolution of International Law on War Crimes

As we have already affirmed, the evolution of the International Law on War Crimes should be considered as a sum of several norms that have developed during the time into a unique subject that is called International Criminal Law. This is not something trivial, if we consider that this discipline is crucial – within the international arena – for the recognition of individual criminal liability when it comes of breaching the fundamental roles of the international law. Regarding this research, we will focus on the explanation of those that have been identified, from the International Criminal Law, as "core crimes" which represent the vital part of the rules that settle the common ground for the respect and protection of shared values and rights.

As mentioned earlier, determining a specific date for the founding of International Criminal Law is elusive; it is considered the result of different goals achieved by the international community. Its origins cross the path with the construction of an entire international criminal justice system. In this process, it is extremely important to underline how important the role the recognition of personal criminal liability has played when the rule of law was affirming his central position in the creation of the modern world. As we have affirmed before, the achievements of the Military Tribunals were crucial in setting the foundations for the international legal world that we know now.

In the past, there have been several attempts to declare personal accountability for crimes committed during warfare as several were the failures of the international community to reach a common and – most important – accepted legislation of the Law of War and its Crimes. Until the Treaty of Versailles, there was no relevant document or specific reform that had a real impact in the process of the International Criminal Law-making.

Some tracks of an attempt a change of this mindset can be found in the articles that I have previously mentioned; in fact, art. 227 and 228 of the Treaty of Versailles stated that all persons who were charged of having committed acts against the law should be prosecuted in the Allies military tribunals. However, even if the purpose was to reach peace and establish an international balance among the European powers,

the practical outcome was not as promising as the expectations were. The 440 articles of the Treaty did not bring, even with coercion, the peaceful environment that Europe expected (Frulli, 2019). In fact, although there was an entire part of the Treaty dedicated to the punishment of the Kaiser and of those who were considered responsible for "*transgressing the laws of war*", we can affirm that, in reality, no one was sentenced as guilty (Lu, 2002, p. 14). As we have stated before and as some scholars have affirmed, it is undeniable that even if the Treaty of Versailles was a failure in several aspects, "*it provides the first contemporary experiment in international justice*" (Schabas, 1998, p. 21). While the Treaty of Versailles was signed, and the world had to deal with some articles that turned out to be disappointing and in favor of high offices (such as art. 227, par I), the first institution that is nowadays identified as the pioneer of the United Nations was established: the League of Nations. It was the first intergovernmental organization that had the purpose of promoting and protecting human rights in general, with special protection towards children, colonized populations, exportation, and indigenous people. There were some articles of the Covenant, precisely from Art. 8 to 12, that dealt with the "*disarmament and settlement of international disputed that threatened to escalate into war*" (Welch & Waktinks, 2022, p. 936). In fact, under Art. 11 it is explicitly written that: "*Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations*" (The Covenant of the League of Nations, 1919, n.d.).

What is important to mention is that the League of Nations was crucial in stressing the international community in affirming the necessity of creating an International Criminal Court (Walkinshaw, 1949). In the 1930s, despite the imminent rise of Nazism and Fascism, the idea of an independent institution that could process and decide over international criminal crimes was always present. For example, in 1937 was a treaty signed by thirteen states whose aim was to establish an international criminal court (King, 2002). Unfortunately, it never entered into force, but it can be mentioned as an attempt to create a supranational court.

This is why at this stage of history, we cannot properly talk about "International Criminal Law"; in fact, to start having a new definition or a new mindset of the Leaders of the modern world where crimes against humanity and crimes of war are considered universal, we have to wait until the creation of the London Charter in 1945. Since we have demonstrated that the Treaty of Versailles was not efficient in the terms and conditions that they all expected, the most important path towards the creation of the International Criminal Law started right after the end of the Second World War when some of the World Leaders decided to create a specific trial of all the major Nazi war criminals (King, 2002).

Robert H. Jackson, a U.S. Supreme Court justice, asserted that the world needed to advance in terms of jurisprudence and legal reforms. He advocated that the execution should be based on the presumption of innocence until proof of guilt was established by the evidence. Thus, following his theories on the three basic crimes, negotiations for an international trial of the major Nazi war criminals started with the outcome of the London Charter of August 8, 1945, "*which was the basis of the primary Nuremberg trial before the international military tribunal*" (King, 2002, p. 337).

The most innovative approach that Jackson brought to the international community was his stance on the imperative to abolish the "superior orders" as a defence in criminal trials. Therefore, it seems fair to affirm that, in this precise moment, the community started thinking of a new approach towards this shared issue: that is also written into the London Charter: "*individuals should be held accountable for what they have done*" (King, 2002, p. 338). In fact, together with the London Charter and the creation of the already mentioned Nuremberg and Tokyo Tribunals, crimes committed within the criminal field were considered universal. In detail, during the Nuremberg Trial, there were several Nazis criminals that, in order to defend themselves, stated that they did not commit any crime but just orders held by the Head of Germany Government itself, Adolf Hitler. In saying so, it is fundamental to highlight Art. 6 of the *Agreement for the prosecution and punishment of the major war criminals in the European Axis*, that gives, for the first time, the definition of what for years scholars and jurists have tried to create: the legal and binding value to war crimes. However, the document was not merely limited to claiming so, but it also conferred to the Tribunal the power to decide over crimes against peace and crimes against humanity (Charter of the International Military Tribunal, 1945).

Furthermore, regarding the achievements of the Military Tribunals, even though the Court found guilty of crimes against peace a specific number of defendants, there was no clarity in the words used for condemning those for crimes of aggression. Also, regarding the crime of invasion, there was considering no invasion since there was no military conflict, but rather there were threats of force used by Nazis, used as intimidation weapons in order to let the other States surrender (King, 2002).

We have had ample opportunity to demonstrate that Jackson's theories – that brought to the creation of the Military Tribunals – together with the outcome of the Trials were vital to the establishment and the affirmation of a universal jurisdiction. Now, it seems enriching for the purposes of this analysis, to report Jackson's words regarding this new document, this new "pact", among states. This is capable of showing how the Charter - and the affirmation of the universal jurisdiction - was perceived at that time (Jackson, 1945).

Furthermore, in the London Agreement of August 8, 1945, to which was attached the Charter of the Nuremberg Tribunal, it is clear that, for the first time in history, was created a common international law and a shared concept of "international crimes" (Walkinshaw, 1949). As we all know and as we have mentioned in the previous paragraph, the outcome of trials of the crimes committed during the First World War was disappointing because of the low number of individuals that appeared before the court and because of the low rate of individuals that were condemned guilty. So, even if States recognized the necessity for a comprehensive framework of several international criminal laws that were mutually shared and respected by States, they were also aware that all the collateral consequences of recognizing this tribunal, might not be well accepted by the national leaders. This is the reason why we have to wait until the final month before the conclusion of the War in order to develop a new perspective on how to approach international criminal crimes.

1.4 The fundamental role of the Rome Statute and the Geneva Conventions

An important step towards the affirmation of international criminal war crimes was made right after WWII when the failures of the job of the League of Nations became visible to the world. Finally, in 1945, at the San Francisco Conference, the Official Charter of the United Nations was approved. This conference had a real impact on modern warfare, also because of the participation of delegates from Auschwitz that sponsored the motto "*Never Again*", reassuming the atrocities of the war.

In the San Francisco Conference's context, Latin American activism was a key for the incorporation of economic and social rights; there were some proposals like the one pointed out by Panama that proposed to incorporate, into the Charter, a document that was considered legally binding to the States. This project was initially rejected, because of the fear of the Big Powers that that could represent a limitation to their decision power. However, in 1945 the UN Charter was adopted and, right after, it was followed by the opening of trials in Nuremberg and Tokyo that, according to some scholars, "*resulted in numerous transformations in the international justice system and become a significant precedent for future steps in global human rights law*" (Walkinshaw, 1949, p. 942).

As we have mentioned, the crimes recognized by the Charter were four, but the crime of aggression was not included even if before this Charter it was declared that "*the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished*" (IMT, 1945, n.d.). At the same time, war crimes covered several aspects of warfare; for

example, some treaties mentioned the type of weapons that were allowed in war (Geneva Protocol, 1925), and others regulated the treatment of prisoners of war (Geneva Convention on Prisoners of War, 1929). Crimes against humanity represented an innovation within International Criminal Law and, finally, the crime of genocide was well explained by all the documentation and the profs that the community had collected because of the atrocities of the Holocaust.

Thus, because of the opposition of most governments in accepting a sovereign court that had jurisdiction over the States, the solution was found in the power given to the International Law Commission to draft an international criminal code and a treaty that should have had the purpose of creating a permanent court (Welch & Waktinks, 2022). Finally, in 1951, the ILC managed to draft proposals for an International Criminal Court. Unfortunately, the events of the time didn't help in facilitating the process of accepting and delivering a shared document that had power over the national courts. In fact, the large-scale conflicts in Algeria and other countries, the Cold War, and other political issues that damaged the international political balance and shook the stability of the international community delayed the creation of the official document.

In 1993 the Security Council of the United Nations – within Chapter VII of the Charter of the United Nations – created an *ad hoc* tribunal for the crimes committed in former Yugoslavia and in 1994 it created another one for those committed in Rwanda. This is considered a crucial event in modern international law history: it helped in recognizing and accepting the role of the ICC worldwide.

Finally, the completed work was presented in 1998, where all the ideas to fight issues that were discussed for years were presented. By July 16 most of them were solved by a shared Statute document and on July 17, the proposal met with general agreement, and in the final plenary session, after voting, the Statute was voted in favor by 120 States, with 21 abstentions and no contrary vote (Rome Statute, 1998).

In analyzing the legal aspects and their critics, we think it is important to underline that one of the main principles that characterize the Court is "complementarity", which assigns to the ICC the power to act only when the domestic courts can't, for examples in cases of refuses or for unwillingness to proceed against their nationals because of political reasons (Schabas, 1998). Furthermore, it has been decided that the Court has jurisdiction over four different categories of crime: genocide, crimes against humanity, war crimes, and aggression (Rome Statute, 1998). For each of those crimes, there is a rationale behind their identification and officialization. The core principle of these four crimes is that they align with human rights violations, although it is debatable whether the Court and its Statute are involved in human rights law (Schabas, 1998).

First, after the Holocaust and all the atrocities committed during WWII, it was considered necessary to define in legal terms the recognition of murders or any other act with the intent of destroying, in whole or in part, a racial, ethnic, national, or religious group. Second, crimes against humanity represent an evolution in the law because, since its recognition in the Statute, such act was linked to the context of armed conflict. With the identification in the Rome Statute, this precondition has been eliminated. Now, crimes against humanity are "*a widespread or systematic attack direct against any civilian population, with knowledge of the attack*" (Art. 7, Rome Statute, 1998).

Also, on war crimes, it has been affirmed that "*the court shall have jurisdiction in respect of war crimes in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes*" (Rome Statute, 1998). They are now considered subjects to punishment as individual actions and do not require any specific intent element or proof of their widespread or systematic nature (Schabas, 1998). Finally, the crime of aggression was the most difficult of all of them to define because of the continuous requests from States to change its definition, which was never considered satisfactory. The main problem was to clarify the role of the UN in determining when this aggression occurs.
However, it remains clear that in ratifying the Statute, each State recognizes and accepts the jurisdiction of the Court over theirs on these crimes.

When discussing war crimes falling under the protection provided by the Rome Statute, it is evident that the ICC provides the most comprehensive list and detailed descriptions of war crimes accepted by the international community (Elsea, 2024). Moreover, the International Humanitarian Law also functions as a deterrent for people and countries to put in place violent acts, considering that they can fall under the documents (treaties and customary international laws) that compose the subject itself.
For example, the Geneva Conventions and Additional Protocol to the Geneva Conventions of 1949, address prisoners of war in an international armed conflict. Also, non-international armed conflicts are governed by Article 3 Common to Protocol 2.

For the purposes of our analysis, it seems important to underline the relationship that occurs between the ICC, the Rome Statute, and the Geneva Protocols. As we have already affirmed, since the Rome Statute represents the achieved goal for the international community to reach a common legal framework in the recognition of some crimes that are universally recognized, the Geneva Conventions are part of the big field and subject called International Humanitarian Law. Combining these two entities could help in better understanding the importance of fighting actions and behaviors that are condemned under several fields. In fact, the Geneva Conventions are considered as a whole of rules that give legal standards for humanitarian action in warfare. The ICC and the Rome Statute have the role of prosecuting and

condemning those who have committed specific crimes: this means that they have the power to also prosecute people who have committed war crimes during a precise period of time.

One of the main topics that we can argue resides in the reason for collaboration. If the Geneva Conventions set obligations and duties that States must follow during a war, the ICC – through its body – gives the material enforcement to prosecute those who acted unlawfully. For example, the Geneva Convention of 1949 lists diverse acts that are recognized by the document as grave breaches of the Conventions and thus it gives the duty to all the signatory States to act in a sense to provide penal sanctions within the national legislation (Pictet, 1949). Moreover, these types of grave breaches are explicitly designed and at Art. 85 par.5 of the Additional Protocol I it is codified that the grave breaches of the Geneva Conventions and of the Protocols "*should be regarded as war crimes*" (AP I, 1977).

According to the *Tadić Jurisdiction Decision*, the Appeals Chamber of the ICTY has affirmed that war crimes are based on a violation of an international humanitarian law which can also be considered as a costumery law or a treaty (Henckaerts & Beck, 2005). Thus, as Schabas affirmed, it is not all about the obligations that the International Humanitarian Law and the Rome Statue put on each State, rather "*the history of human rights and humanitarian instruments demonstrated that narrow self-interests has little to do with why States decide to participate in such regimes rather than stay aloof*" (Schabas, 1998, p. 27). Furthermore, if we look at the history of the creation of war crimes, we would be able to find that the Charter of the International Military Tribunals in Article 6 defines war crimes as "*violations of the laws or customs of war*", the Tribunal itself also recognized that the Hague Regulations of 1907 and the Geneva Convention of 1929 "*were already recognized as war crimes under international law*" (IMT, 1945).

Regarding the relationship between war crimes and other crimes included in the Rome Statute, it seems important to note that the significance of war crimes has divided the judges of the International Criminal Tribunal for the Former Yugoslavia on several occasions (Frulli, 2001). This is why – in this case – Judge Antonio Cassese affirmed that "*all international crimes are serious offenses and no hierarchy of gravity may a priori be established between them*" (Cassese, 2002).

Classifying the gravity of the crime put in place is fundamental under the legislative implications because of the application of penalties. Also, if we consider one of the main criminal law principles existing, the *mens rea*, we could argue that a man, with his behavior, can both commit war crimes and crimes against humanity. Several scholars have distinguished between crimes against humanity and war crimes. For example, the crime of genocide falls under the category of crimes against humanity but can also be regarded as a distinct one due to its specific intent (Frulli, 2001). The *actus reus* is the element

that allows us to differentiate between these two types of crimes. The mental element is more specific: the will to kill implies the intent to destroy in whole or in part a group on discriminatory grounds, that is what characterizes genocide, thus a crime against humanity.

From a more substantive perspective, war crimes could be divided into war crimes against persons under some particular protection; war crimes against those who need humanitarian aid; war crimes against property and other rights, and prohibited methods of warfare and means of warfare (UN, 2024).

Moreover, to illustrate why war crimes are specifically important to our analysis, it seems fair also to mention that, contrarily to crimes against humanity and genocide which are established as independent crimes under international law, war crimes are a mix of primary rules related to prohibited acts under international humanitarian law and secondary rules concerning the punishment of war crimes (Cassese, 2002). Also, war crimes can be prosecuted by the International Criminal Court or by domestic courts, depending on the application of the principle of complementary to national courts (Schwarz, 2014).

Anyways, before moving on, to us it appears important to mention another important topic that is directly linked to the recognition of the International Criminal Courts and that helps us better understand the feelings of the people from the outside, during the period of the establishment of a sopra-national jurisdiction. A conception that spread right after the creation of the Tribunal for the Crimes committed in Former Yugoslavia was the so-called "victor's justice", a concept that has been long discussed among the most important personalities of the post-war. This is qualified as the way of punishment put in place by the victories parties against those who have caused harm to them, once the war is over. As Kennedy (2016) affirmed, is a sort of mechanism with which "*law consolidates winnings, translating victory into right*" (p. 11). This can be considered as a way of obliging the loser countries to surrender at the conditions established by the winners.

Moreover, as Kelsen (1944) declared, the idea of the creation of a permanent international criminal court is the basis for the usage of double standards. Moreover, according to him it is not fair that only the vanquished states should allow international jurisdiction over their subjects, but also the victorious states should transfer theirs to the same tribunal (Kelsen, 1944). For what concerns the critics that scholars and experts have moved towards the establishment of these international criminal tribunals, it seems that several persons have criticized the work of the courts, arguing that the tribunal prioritized condemnation and punishment over justice and fairness due to pressure from high authorities (Creta, 1998 in Meernik, 2003).

II CHAPTER – WAR CRIMES WITHIN THE EUROPEAN ARENA

2. Introduction

In the previous chapter, we have given an in-depth explanation of the concept of war crime and its evolution through history, dwelling on its origins up to the drafting of an International Law that identifies its characteristics and regulates its criminal traits and consequences. We have expressed the various stages in history that led to the assertion of the crimes we now call 'war crimes', along with the identification of the other three: crimes against humanity, genocide, and crime of aggression. We started with the aftermath of the Great War and then came to the milestone of this subject, the Treaty of Rome, while explaining the main points and problems behind the international community's decisions when it came to crimes of international significance.

Now, we are left to wonder about the importance of the current regional system in which we are embedded, the European Union and the European Continent in general. At this stage of the paper, we are questioning whether the influence of the great world powers plays (actually) an important role in combating war crimes and, at the same time, preventing human rights violations.

We strongly believe that, for the analysis of this dissertation, we should concentrate on the war crimes that have developed in Europe since the enactment of the Rome Statute and the recognition of these as universally prosecuted crimes in the international arena.

Since analyzing the concept of war crime in detail seemed to us to be too unassuming and highly generic a project, we thought to steer this analysis in a specific direction, combining the subject matter of International Criminal Law with that of European Union Law and beyond. The European chapter, therefore, involves both the entity of the Council of Europe, as the representative of Human Rights on the European Continent, and the European Union, a purely economic organization which in its evolution has also developed a marked interest in the protection and respect of Human Rights. This chapter, moreover, sets itself the ambitious objective of developing a thorough examination of the institutions that make up the European Union and the Council of Europe. In detail, those bodies that, in carrying out their duties, are also tasked with fighting war crimes scenarios. However, it is fundamental to underline and give importance to the vital role of NATO within the European panorama, while talking about Human Rights' violations and the obligations derived by binding rules. Furthermore, we will focus on the importance of these institutions in diving instructions to the Member States on how to behave in the

case of war but, above all, in the event war crimes occur in the territories covered by the assistance and the action of institutions aimed at safeguarding and protecting human rights.

The following paragraphs will aim to answer specific questions: how does the activity of the European institutions affect the prevention and promotion of Human Rights? Even though they do not have jurisdiction in war crimes trials, why is their role considered crucial? Is there a political matrix that acts as a glue between all the various types of EU institutions and CoE ones? Below, the explanations that might lead us to find answers to our questions.

2.1 The Importance of the Rule of Law in the European Region

As we had the chance to mention in the previous paragraph, there is a brief-though important-evidence that we need to remember before moving toward the continuation of our analysis. As is well known, the European institutions (that we currently recognize and entrust with specific burdens and honors) are tasked with protecting and monitoring a part of the law that is referred to as "Human Rights Law," specifically aimed at the promotion and protection of human rights.

It would seem, therefore, difficult to imagine these institutions as actors, albeit secondary to the fight against war crimes, belonging – by definition – to the subject of International Humanitarian Law. Yet, though seemingly distant, these two subjects would end up being united, the moment the institutions of law of the European Union are protected and governed by what is referred to as the "Rule of Law." It seems fundamental to us to dwell on the weight that, in the legal pyramid, 'The Rule of Law' occupies in the European landscape and its institutions. To better define why mentioning and describing the existence of the rule of law is vital to this analysis, we should briefly retrace the steps that led to the establishment of the Rule of Law as a founding principle of the European Union.

It is known that both the Rule of Law and the general principles initially were not considered in the written declarations or constitutional frameworks of the EU, indeed they were both seen as "*technically invisible*". (Groussot & Zemskova, 2022, p. 94). Specifically, as we can see in the treaties, the rule of law was never mentioned, because it was initially perceived as an element of the new *sui generis*, rather than a proper and independent principle (Groussot & Zemskova, 2022).

However, the European community started to give him legal dignity with the Treaty on Coal and Steal, which, describing the CJEU as "*the interpretation and application of this Treaty, and of rules laid down for the implementation thereof, the law is observed*" (Treaty of Paris, 1951), laid the foundations

for a new interpretation of the rule of law. (Scheingold, 1967). Moreover, it was thanks to the Treaty of Maastricht that the rule of law was recognized – together with democracy and general principles – as "principles" and after, with the Treaty of Amsterdam (1997), the rule of law shifted to a fundamental principle with the identification of its mechanism in Article 7 TUE. Finally, the adoption of the non-binding Charter of Fundamental Rights the European Union declared both the principles of the rule of law and democracy as "*essentials to the European project*" (Groussot & Zemskova, 2022, p. 95). Still, what is important to mention is that its specific legal formalization happened in the Treaty of Nice when, in Article 2, it was declared as the heart of the whole European Union organization.

At this point, someone might wonder why the institutions representing the European Union should take an interest in war crimes and, in general, in what has been named "core crimes". The answer is to be found, first of all, in the publication of the Treaty on European Union (1992) which, at the beginning of the list of its articles, mentions the importance of the above. Article 2, in fact, states as follows: "*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights […]*" (TEU, 1992). Furthermore, it seems of fundamental importance to mention that recently, precisely on February 16, 2022, in cases *Hungary v. Parliament and Council* (Case C-156/21) and *Poland v. Parliament and Council* (C-157/21), the Court of Justice of the European Union made a remarkable statement concerning Article 2 of TUE: the rule of law in the EU constitutes a fundamental principle of its law, based on the principle of solidarity.

We can argue that this Article can be considered one of the most important recognitions of the rights of EU citizens to be part of this community since it provides common standards for the Member States to respect the Constitution (Delledonne, 2016). By affirming this principle, the so-called community has evolved beyond an organization focused merely on economic purposes. It is now definitely recognized as an entity dedicated to protecting its specific laws and values. In fact, if we take a look at the Declaration on European Identity (1973), Member Countries specifically affirmed to "*share as they do the same attitudes to life, based on determination to build a society which measures up to the needs of the individual, they are determined to defend the principles of representative democracy, of the rule of law, of social justice […] and of respect for human rights*".

Having said that, it is now clear that, for the analysis of the rule of law within the European Union and the role that it has in this dissertation, it seems fundamental also to remark on some of the main sentences that constitute the building blocks for the construction of this supranational identity recognized and respected across the globe. Some decades ago, with the historical decision *Van Gen den Loos,* the Court of Justice established that the provisions of the treaties have a direct effect; also, they do not limit

themselves to imposing obligations on States, but they attribute rights to individuals, who can avail themselves against the public authorities. In sum, this allows the judicial protection of EU rights from a double perspective: from the national system and the communitarian one (Case 26/62). This means that individuals can rely also on national courts, apart from the Court of Justice, while asking for the recognition of their rights. Thus, this principle has been sealed in Article 19 TEU, 2007.

National courts have, therefore, been fundamental in maintaining the rule of law within the EU system. According to Lenarts (2020), in continuing this position, they have collaborated with the EU's executive institution using the European Union Law to offer effective remedies for the rights of individuals. This – to us – seems important because this principle (which is one of the keystones of the EU law, together with the principles of Primacy and Mutual Trust) lays the roots for mechanisms of dialogue and equality before national courts and the Court of Justice.

It guarantees equal protection under the EU law, regardless of the country of reference or the Court rendering a verdict. As Lenarts (2020) has mentioned, to better understand why the role of national courts improving and using the over-mentioned principle is necessary, it is important to cite the Portuguese Judge Case, in which something interesting was affirmed. The judgment stated that "*in the field covered by EU law*", the protection of it and, particularly, the rule of law lies in the establishment of the premise that national courts must maintain their independence. It states that "*Member States must ensure that national courts meet the requirements essential to effective judicial protection*" (C-64-16). This arises from the principle of judicial independence, which not only provides effective judicial protection, but also guarantees that the principle of nomophylachy of EU law is respected (Lenaerts, 2020).

That said, someone could question why the affirmance of the rule of law in the European Union is so important to the purposes of this analysis which aims to find the connection between the work of the European Institutions and war crimes committed on European soil. The answer, once again, can be found in the law, specifically in Article 3(5) of the TEU where it is affirmed that "*in its relations with the wider world, the European Union […] shall contribute to peace, security, […] the protection of human rights […] as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter*" (TEU, 1992). This provision, together with the collaboration of the European Court of Justice and the EU itself, "*must respect international law in the exercise of its powers*" (C-286/90). Therefore, as we have already mentioned before, the EU features are a collection of several purposes, including the principle of the direct effect, the primacy of EU Law, and the protection of fundamental rights, diverse from those principles enunciated by International Public Law (Lenarts, 2020).

Hence, this is one of the main scopes that this research aims to reach: the connection between International Law and European Union Law, when dealing with crimes that have their roots in the violation of both IL and EU law. As some affirmed, the incorporation of International Law into EU law must fulfill the recognition of fundamental rights as they are recognized in the Charter of Fundamental Rights of the European Union, the so-called "Nice Charter". This incorporation should include both the safeguarding of the EU's constitutional identity while ensuring that EU Law remains engaged with the international community rather than becoming adversarial (Lenarts, 2020).

In addition, we feel we should remark on a proposal put forward by the European Commission in 2014. In detail, it reported from the Commission to the Council and the European Parliament an "EU-Anti Corruption Report", that helped to fight the "*deep-rooted corruption that hampers economic development, undermines democracy, and damages social justice and the Rule of Law*" (COM/2014/038). The impact of this document was considered so broad that the Council of Europe, then, expressed its will to adopt a "*political dialogue among Member States to promote and safeguard the rule of law within the EU*" asking for an annual rule of law report, which could be useful in establishing the degree of relevance of this principle in member countries and, above all, serving to monitor the degree of its applicability in national courts. Moreover, we can consider this item a "*soft-power mechanisms which aim is to promote and safeguard the rule of law in the framework of the Treaties*" (Council of Europe, 16936/14).

As we can read on the official website of the European Commission, the European Rule of Law Mechanism provides an annual meeting between the Commission, the Council, and the European Parliament together with the Member States in order to contribute to the creation of a fruitful dialogue that would lead to a shared perspective among national Parliaments, civil society, and other stakeholders concerning the use of the Rule of Law in the European Arena. Furthermore, the Rule of Law Report "*covers four pillars: the justice system, the anti-corruption framework, media pluralism, and other institutional issues related to checks and balances*" (European Commission, 2024). At this point, we are wondering why such a wide-ranging project, involving so many actors, is important for the present investigation. The answer, although simple, is fundamental. If we retrace the history narrated above, it is easy to understand that the Rule of Law has struggled to become a pillar of the EU institutions and, in general, to be recognized as essential for the proper exercise of law at the community level. The fact of having demanded, therefore, an annual report that would bring transparency and clarity to Member States on the exercise of the law at the internal and European level is a clear signal of the affirmation of the importance of this cornerstone.

Therefore, this is no longer a principle that could redefine the terms and conditions under which the Member States interpret the law, but rather an essential ideology on which the entire essence of the entity known as the European Union is based. This 'glue' called the Rule of Law is fundamental to concrete collaboration and, above all, qualifies as the first step towards the annulment of discrimination. All are equal before the law and the law is equal for all: these are the consequences of the correct application of the Rule of Law.

The sub-mentioned reports on the Rule of Law thus mark an important step towards the (daily) affirmation of the importance of this principle by reminding States (and all other actors) that without equality and transparency, there can be no egalitarian Rule of Law, which the European Union system aims at from the outset. Furthermore, as some scholars have affirmed, there is a link between the Rule of Law Debate and Article 2 TEU, shared by EU and its Member States. In fact, this provision lists values that are on the foundation of the Union, the so-called "*founded on*", and other values that are shared by Members, and that are common to their Constitutions, referring to them as those "*common to Member States*" (Toggenburg & Grimheden, 2016).

It is clear, that the debate that ensued from the Rule of Law Debate was not always positive, although some authors have identified certain features that certainly give hope for a positive outcome. For instance, Toggenburg and Grimheden (2016) stated that the political debate that ensued rebounded from it had a positive effect by giving greater weight to values that can now, on a broader reading, also be found in the Nice Charter. Furthermore, it can be deduced from these political debates that the attitude of Member States is fundamental to the proper functioning of the entire EU system. Indeed, for an appropriate examination, the political impact of the Member States' choices on the EU as a whole must not be overlooked, given that "*the EU and its Member State are tied together in such a way that major changes to the political system in on Member State can easily have spill-over effects in other states and in the working of the EU as a whole*" (Toggenburg & Grimheden, 2016, p. 149).

As we have affirmed before, in 2014 the Commission felt the necessity of providing, for the very first time, that the rule of law is "*a constitutional principle with both formal and substantive components*" (COM 2014-158). As Groussot and Zemskova (2022) have reported in their historical and critical analysis of the development of the Rule of Law, it is noteworthy to mention other Communications that have, along the process of recognition, given the European community clarity on the significance of this principle. Apart from the one of 2014, the Communication from 2019 precisely stated that the principle of the rule of law "*is well-defined in its core meaning*" and needs the observance of Member States that should behave following the standards of the European Union (Groussot & Zemskova, 2022, p. 7).

Moreover, if we read this document, we will clearly understand its purpose since it is literally written that "*in spite of the different national identities and legal systems and traditions that the Union is bound to respect, is the same in all Member States*", a strong affirmation of the power and the position of the Rule of Law within the European Union system (COM/2019/343).

Continuing the analysis of this paper while giving an idea of the impact of this principle nowadays, it seems also fundamental to refer to the first act of secondary legislation that defined the Rule of Law: the Budget Conditionality Regulation, 2020. (Groussot & Zemskova, 2022). Now, having sufficiently analyzed the evolutionary process and affirmation of the Rule of Law in the history of the European Union and having mentioned the latest regulation issued by the Parliament, it seems understandable that this principle occupies a fundamental role in the European society in which we are embedded. It is, therefore, for this reason that we cannot refrain from analyzing the commission of war crimes on European territory. It is our task, duty, and right, as sealed in our Constitutions and in the Treaties we have signed and ratified, that the possible perpetrators of these crimes do not go unpunished. Thus, we can continue our analysis in the specific territory of the community, in search of war crimes and perpetrators to be identified.

2.2 European Institutions Dealing with War Crimes

In order to develop a respectable analysis and to give specific answers regarding the involvement of the European Union in war crimes, there needs to be a prior explanation of the current relationship between the EU and the ICC.

It is nothing new that the institution of European origin is particularly linked to the developments and powers of the International Criminal Court. The reason is simple: both entities aim to protect human rights, albeit with different instruments and means. Thus, to increase awareness of the importance of the interconnection that exists between these two institutions, it is central to first mention one of the cornerstones of the formation of this understanding: the Decision 2006/313/CFSP, an Agreement between ICC and the EU on cooperation and assistance. On April 10, 2006, the Council of the European Union decided to issue a decision concerning the agreement between the International Criminal Court and the European Union on cooperation and assistance, developing it in a text composed of six articles that assigned legal validity to the Agreement that they have previously signed. In detail, the ICC and the EU, represented by the Presidency of the Council of the EU, initialed an Agreement that defined the terms of this collaboration. What we feel is important to emphasize are the initial considerations where

it is clear the mutual respect that exists among different institutions that have the same purposes and scopes. In fact, it is mentioned the "*conformity with the United Nations Charter*" and the "*principles of the Rome Statute of the International Criminal Court, […] are fully in line with the principles and objectives of the European Union*" (Decision 2006/313/CFSP).

This bond that exists between the EU and the ICC seems to be strengthened even more by what is written in the Preface to the Articles that compose the Agreement. The document explicitly wants to stress its supporting role in the effective functioning of the ICC by "*promoting the widest possible participation in the Rome Statute*" first and foremost to "*the Rules of Procedure and Evidence*" (Decision 2006/313/CFSP). Furthermore, even though we have used several citations from this paper, it feels extremely important to quote the entire Article 4 "Obligation of cooperation and assistance", because it gives us the exact explanation of how strong this relation is: "*the EU and the Court agree that, with a view to facilitating the effective discharge of their respective responsibilities, they shall cooperate closely, as appropriate, with each other and consult each other on matters of mutual interest, pursuant to the provisions of this Agreement while fully respecting the respective provisions of the EU treaty and the Statute. In order to facilitate this obligation […] the Parties agree on the establishing of appropriate regular contacts between the Court and the EU Focal Point for the Court*" (Agreement between the ICC and EU on cooperation and assistance, 2006).

Continuing with the analysis that we are carrying out, and to confirm what we have previously stated about the theories of collaboration, it is also interesting to mention one more document that seals the alliance between the EU and the ICC. The Council Decision 168/2011 is crucial in advancing universal support to the Rome Statute, the Treaty that established the ICC. In detail, this Decision aims to assist the independence of the ICC and its efficient functioning. In fact, the Council of European Union, on behalf of the EU itself, wants to underline that, since the principles of the Rome Statute are "*fully in line with the principles and objectives of the Union*", its Member States are determined to put an end to the impunities of the perpetrators of the crimes "*by taking measures at national level and by enhancing international cooperation to ensure their effective prosecution*" (Decision 2011/168/CFSP on ICC). Moreover, it is extremely interesting to study the words and terms used by the EU in describing how the institution will contribute to the ICC's job.

After an analysis of the document, in our opinion, it almost seems as if the EU is keen to emphasize a technical "succumb" to the ICC, confirming that the Member States – when requested – will contribute with technical means and financial assistance to the Court's investigations, and relentlessly encouraging the implementation of the Rome Statute. It is not a case that Article 2 exposes this position using terms

like "*make every effort*" and "*this and other forms of support to that objective*" (Decision 2011/168/CFSP on ICC). To us, this is a clear signal of the will of the European Union to underline that it stands with the ICC in every type of investigation that has the purpose of not leaving those responsible unpunished and, at the same time, working towards the formation of a world in which the recognition of human rights is the basis of democracy in the Member countries and those signatories of the Rome Statute.

Now it's time to explain what this collaboration consists of, and Article 3 of the Decision (2011) gives us precise indications. Practically, Member States should: transfer their assessed contributions following the decisions made by the Assembly of States Parties; contribute rapidly to ratifying the Agreement on the Privileges and Immunities of the ICC; and support in training and assisting judges, officials, and counsels in works related to the ICC (Decision 2011/168/CFSP on ICC).

Hence, it is now clear how the Council of European Union is involved in the international criminal law system, devoted to helping and supporting the ICC's work. It appears very emblematic of how active its role is when fighting core crimes within the regional system. We all know the role that this institution occupies in the EU panorama: it has legislative power, it deals with international relations issues, and has power over foreign affairs, policies, and the common security of the European Union (Council of European Union, 2024).

Moreover, recently, in 2023 the Council issued a Conclusion aimed at celebrating the 25th anniversary of the adoption of the Rome Statute, but mainly to "*reaffirm*" the European Union's support to the ICC for its future. As we can read in the document, the EU considers itself a "*steadfast supporter of the Court*" and an ally in the "*fight against impunity for the most serious crimes of concern to the international community as a whole*" (Council of European Union, 11082/23). On account of this, we can firmly declare that this institution represents a main role in the international criminal field, because of its loyalty towards the ICC and because of the (effective and pragmatic) control that it exercises on its Member States.

Continuing the track of analyzing the institutions we should also remember the progress that has been made thanks to the active role of the European Parliament. Specifically, for the purposes of this thesis, we consider it important to mention the so-called "Magnitsky European Law".

This American law authorized the adoption of sanctions against serious human rights violations, extending them to extrajudicial executions, torture, slavery, enforced disappearances, and arbitrary detention (Zapatero, 2023). On this wave, in 2021, the European Parliament issued a Resolution on the EU Global Human Rights Sanctions Regime (European Parliament, 2021/2563) where it underlined once again the role of Article 21 TEU on the principles of international actions of the Union, since it stipulates

that "*the actions of the EU shall be guided by democracy, the rule of law and the universality and indivisibility of human rights and fundamental freedoms […]*"(Treaty on European Union, 2007). Moreover, it recalled the role of its Resolutions affirming that they call for the EU institutions to adopt sanctions against persons suspected of committing crimes against humanity or serious human rights violations, and, simultaneously, it encourages the Council to make full use of the measure of the Global Magnitsky Act (European Parliament, (2021/2563).

Furthermore, the Parliament asked the Commission, "*in its role as guardian of the Treaties*", to ensure that national penalties for violating EU sanctions on these topics are effective, proportionate, and deterrent (European Parliament, 2021/2563). In this regard, we feel we must justify the choice of mentioning this document: at the end of it, the intention to prosecute international crimes is once again expressly emphasized. Also, what particularly caught our attention on reading the text concerns a specific part that reaffirms the importance of the principle of universal jurisdiction, accentuating the approval of pursuing prosecutions (based on this principle) against member states. In summary, after quoting various documents from institutions, it seems obvious to us that EU collaboration with other non-EU bodies is now automatic.

2.3 The Role of EU Institutions and Their Measures

To give the reader a clear reading key for the following paragraph, we feel it is necessary to state a brief premise about the topic that we are going to talk about.

The European Union is not the only organization active in Europe; another one, that is not part of the European institutions, but which nevertheless wields power over EU policies, is recognized as having an important role. This entity, with its broader character, is the NATO, the North Atlantic Treaty Organization. Its mission is to provide political and military assistance to the Countries that are Member States of the organization. It promotes democratic values and, to pursue the road of international security, it put in place both diplomatic efforts and military strategies. As it is written in NATO's founding Treaty, if the peaceful approach does not serve anymore to ensure a safe environment, the organizations reserve the right to act using force by resorting to the use of militias (NATO, 1948). However, we want to underline the difference between NATO and the EU institutions. The first one is considered a defence organisation, active in training military personnel and it is identified as the sole international entity with a command structure and a standing military force (Van der Lijn et al., 2015).

The European institutions, indeed, are the organs of which the EU is composed, which is properly recognized as a regional organisation. In detail, the EU has a supranational system because it combines both inter-state and supra-state aspects and procedures (Belloni at al., 2013). In this way, the institutions that make up the entire structure of the EU have decision-making power over the matters that fall within its remit.

Given this specific co-existence of these entities, it is important to underline the interconnection that exists between their founding treaties. If we look at the Treaty on European Union, in article 42.7, "*Mutual defence clause*", we will find the confirmation of the subsistence of the link that connects NATO and EU. In fact, in talking about the possibility of a Member State being a victim of armed aggression on its territory, the article states the obligation of the other Member States to act. Moreover, on the following lines, it explicitly affirms "*in accordance with Article 51 of the United Nations Charter […] Commitments and cooperation in this area shall be consistent with commitments, under the North Atlantic Treaty Organisation, which for those States which are members of it remains the foundation of their collective defence and the forum for its implementation*" (Treaty on European Union, 1992).
This article is central to considering the strategy and the foreign policy that each State decides to put in place when responding to a call for intervention due to external aggression towards one of the Member States.

In truth, the discussion around this Article has been intense because of the different positions that EU Member States hold. This is why some scholars have divided the position of the Members into some specific categories. First, we have the NATO first adherents, composed of eastern European member states, the Baltic ones, and Poland. These countries interpret the content of Art. 42.7 as a possible threat to Art. 5 of the UN Charter because of the American security guarantee; for this reason, they push to minimize the applicability of this Article. Moreover, they cannot be considered as contrary to the application of this article, indeed they tend to interpret it as a hypothetical scenario that just gives other possibilities to react. Then, there are the neutral ones (Austria and Ireland, for example) who, for their historical backgrounds, read the article trying on each occasion to not include military means. Then, there are the legalists, composed of States like Germany, which give a lot of emphasis on the legal dimension of art. 42.7, concerning the definition of "*territory*" and level of "*armed aggression*". (Deen at al., 2022, p. 27).

They will focus on the legal arguments to decrease the usage of this article. There are also those defined as "the pragmatists" composed by the States that sustain art 47 (7) because it is seen as a potential tool that can help when facing an armed conflict. Greece and Cyprus against Turkey are an example of

the utility of this article when an EU Member State is under attack. Also, some scholars have affirmed that this Article, being part of the EU family, is the European alternative to NATO Article 5; it seems a good answer to face serious threats to the national security of a specific member of the European Union. One of those that sustains this article, is France which has interpreted the need of others to act with military means (Deen at al., 2022).

Since we are now talking about this important Article belonging to the Treaty on European Union, it seems fundamental – in order to fully explain the purpose of our analysis on intervention and protection of Member States – to mention another Article that is part of the NATO family, precisely Art. 5.
It states as it follows: "*The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all […] in exercise of the right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations, will assist the Party so attacked by taking […] such action as it deems necessary, including the use of armed force*".

Although at first glance these two articles may appear to be quite similar, and the objectives they aim to achieve would seem to be the same, it is important to emphasize that, when making a full analysis and comparing them, they turn out to be relatively different.

First, as we are (overall) developing a legal examination, it seems fair to start underlining the differences that we can find in the words used when formulating the articles. Regarding the EU one, it refers to "armed aggression", differently from Art. 5 which states "armed attack". As the members of the European Parliament have underlined in a clarification statement, "*not every act of armed aggression reaches the threshold of an armed attack triggering the right to self-defence under Article 51 of the UN Charter*" (Clapp & Verhelst, 2022, p.1).

Moreover (and this makes us very proud of being part of the European Union), it appears that – for its legal formulation – the Mutual Assistance Clause is stronger than NATO Art. 5 because in the EU Member States have the explicit obligation to act in defending the victim not all by "*the means that they think are necessary*" but rather "*by all means of their disposal and in their power*" (Rehrl, 2015, n.d.).

Additionally, regarding the legal obligations that arise from the signing of both Charters, it is evident that Member States are required to support the member that has been victimized. However, the fundamental difference that must be recognized is that each State has the right to decide how to act and react; nonetheless, this discretionary aspect does not negate the requirement for NATO Members to determine the proper action in good faith. Therefore, their response must not be evidently unreasonable, such as providing redundant information following an armed attack by Russia on NATO members (Clapp & Verhelst, 2022).

Also, continuing talking about the differences, it has been noted that while Art. 5 cannot be invoked in response to domestic terrorism (as it was in the Wake of 9/11), conversely, Article 42.7 was invoked in response to terrorism following the 2015 attack at the Bataclan in Paris in 2015. Although these distinctions that we have made might suggest a common ground among all these groups of countries, the reality is that one of the EU Member States wants to replace NATO Article 5 with EU Article 42.7 within a collective defence arrangement. It can be easily affirmed that the existence of this important Article serves to remind - the Member States - that the European Union as an independent entity provides help, or at least a legal measure, to face a hypothetical war case scenario affirming that EU collaborate and cooperate with the Country that has been affected by a threat of aggression (Clapp & Verhelst, 2022).

Furthermore, even if these two articles seem quite similar in terms of guarantees that they provide to the Member States of the two organizations, it is important to underline although they provide mutual assistance, Article 42.7 specifically affirms that NATO remains the accountable organization for the collective defence of the States that are part of both the organizations (Zandee & Dijkman, 2023).

Hence, we should continue analyzing why this article put the roots for an important principle composing the common area of the European Union Law. We can peacefully affirm that being conscious of disposing help from other Member States (in facing an urgent and unexpected problem) can be considered a milestone for the cooperation goals and support that the European Union aims to achieve. The knowledge that we feel protected or – at least – not alone in fighting a problem, is a straightness of the system in which we are embedded, knowing that we don't have to look further to ask and find some help.

It is clear now that these two organizations have already affirmed that they should collaborate in a wider sense so that cooperation on resilience issues can be reinforced (Zandee & Dijkman, 2023). At least, this is what they have decided in the Joint Declaration on EU-NATO Cooperation (Joint Declaration on EU-NATO Cooperation, 2023).

2.4 The Presence of NATO

As we discussed before, the presence of The North Atlantic Treaty Organization is a fundamental actor that plays a pivotal role in the security and in defending regional and national peace in Europe. Within the European territory, NATO and the European Union share several factors; starting from the members that are part of the organizations (considering that 23 members of the Alliance are also part of the European Union), to their scope and purposes (Simonet, 2023).

As Duke and Vahoonacker (2016) affirmed in the past, the relationship between these two entities was not always characterized by collaboration and cooperation, contrary they were affected by competition and ambiguity, "*suffering from a top-down strategic paralysis*" , a situation that changed after the signing of three EU-NATO Declarations, that helped in formulating a broader protection thank to the teamwork between them (Simonet, 2023, p.153).

Before the last Declaration was signed on the 10th of January, 2023, i.e. before the relationship between these two entities became solid and before their collaboration became official, several scholars wondered about the type of relationship that existed between NATO and the EU. These leaned mainly toward three scenarios: continuity, stagnation, or expansion (Giuglietti, 2022).

The first case scenario, the continuity that Giuglietti mentions, is the one that existed before the last Declaration. Despite their common characteristics in terms of social protection, NATO and the EU are not able to unite in a single strategy of action. As has been stated, the only agreement that these two institutions can find concerns the political set-up. Hence, we can share what the scholar affirmed, when he wrote that "*To make the best of this scenario, the Union should commit itself to cooperate just for seeking internal political objectives as long as the trade-off is suitable*" (Giuglietti, 2022, p.5). This attempt at cooperation and this strategy of collaboration therefore involves, according to the author, attempts at non-dialogue between the two institutions and the implementation of politically compatible programs without, however, aiming at a clear division of tasks and duties that would result in a true merger of the two entities and minimize costs and time. Then, professor Giuglietti continues describing what the "stagnation" scenario is. It is nothing more than a complete conflict between the priorities that institutions have on their agenda. This leads to no room for discussion or cooperation. This is the typical case of an *impasse* that cannot be surpassed.

Finally, the last scenario that is described is the "expansion" one, which represents the cooperation between NATO and EU. Both organizations agree on the actual threats to contemporary security, which helps in determining a strategic line in articulating common priorities. In this scenario, cooperation is promoted, and EU and non-EU Member States are involved in this process. Trust is increasingly branching out in the relationship and the European Union is pushing harder to create group work with NATO on matters of common interest. Moreover, it seems clear that the three Joint Declaration that have been signed are a clear signal of a strategy that both institutions wanted to put in place (Giuglietti, 2022).

In 2016 we had the first Declaration that was a way to express, once more, the primacy of NATO over the EU in European security. This effectively established boundaries that reinforced the position of the Alliance. As the scholar has affirmed, "*both NATO and the EU exploited the Joint Declarations as a*

political tool to achieve internal cohesiveness, nip any inter-organizational tensions in the bud and mutually reinforce each other. This pattern is likely to be replicated at present" (Giuglietti, 2022, p. 2).

Finally, in 2023 with the Third Joint Declaration, a strong political message was sent to the international community. It was not a coincidence that this agreement was also signed on the 330th day of the Russia-Ukraine conflict. It was literally said that, what this important milestone for international security wanted to mean, is that it was made in order to face the "*gravest threat to Euro-Atlantic security in decades*", since "*the EU and NATO condemn in the strongest possible terms Russia's aggression*" (Von der Leyen, 2023).

For what concerns the first two EU-NATO Joint Declarations, they reached a point of not well-done development in terms of achievements. For example, President Macron said that "*what are currently experiencing is the brain death of NATO*" (Macron, 2019). But, regarding the third and last Joint Declaration, the position of the international community and the Member States seems completely different from the past; the political environment that characterizes it seemed prominent (Simonet, 2023). Since the Atlantic Alliance represents the most important military agent in Europe, they now know how to structure the program so that a collaboration between them and EU is beneficial for all the countries involved in these organizations.

Contrary to the Declarations signed in 2016 and 2018, several things have changed, therefore the new partnership between these two organizations seems stronger than before. They have made significant efforts in ensuring a protected and secure environment, where both organizations and their members are facing similar threats (NATO, 2024). The range of subjects that are included in their challenges regarding some strategic issues posed by Russia and China, the security in the Western Balkans and the Middle East, strengthening resilience, cyber and hybrid threats, and fighting disinformation (NATO, 2024). Moreover, Russia's full-scale invasion in 2022 was also a considerable element that led to the creation of this other Declaration that reaffirm the value of this new document.

Also, the recent Joint Declaration was signed by the NATO Secretary General, the President of the European Council, and the President of the European Commission at NATO Headquarters, stating that "*The heads of the two organisations resolved to address growing geostrategic competition, resilience issues and the protection of critical infrastructure. Other priority areas of work include emerging and dispruptive technologies, space-related issues, the security implications of climate change, and countering foreign information manipulation and interference*". (NATO, 2024, n.d.).

What we have just described about this relationship between NATO and the EU serves us to understand the close connection between the two organizations.

This is fundamental to our analysis to explain the reason for the intervention of the European institutions in affairs that would seem to be outside the scope of the tasks entrusted to the organs of the European Union. As we have analyzed, the protection and security of the territory covered by the Member States is one of the essential goals on the list of objectives of the European organizations, which is why talking about protection against war crimes seems to be closely linked to the concerns that the various European agencies take on.

This special relationship and close cooperation that exists between these two different entities is one of the main cornerstones for the development of our analysis, aimed at examining the various European institutions that interface with war crimes. It is no coincidence, therefore, that there are similarities between the former article of the 42. 7 TEU and the NATO Article 5, and that is why it seemed essential to us to develop their features so that reader could have a clear and complete picture of the entire protection system on European territory, concerning the protection and the monitoring mechanisms of the institutions that operate in this panorama.

In sum, we can also affirm that any action in response to the invocation of Article 42.7 TEU and Article 5 NATO are both an expression of individual or collective defence against armed attack set in Article 51 NATO which declares the right to self-defence of the Member States (Deen, at al., 2022).

2.5 The Council of Europe and its influence within Europe

The Parliamentary Assembly of the Council of Europe "*considers that the impunity enjoyed by the perpetrators of the most serious crimes, such as genocide, crimes against humanity and war crimes, is an obstacle to reconciliation, fostering revisionism and depriving future generations of irrefutable evidence of such crimes*" (Council of Europe, 1999). This is the sentence that we find at the beginning of the presentation of the official website of the Council of Europe which illustrates the relationship between it and the International Criminal Court. In fact, since 2000, the CoE has organized several meetings that took the name of "consultations" to talk among Member States and Observer States about specific legal issues that the institution has faced during the implementation process (Council of Europe, 2024). The first one took part in May 2000, then in 2001, in Strasbourg for the third time in 2003 and the last multilateral consultation meeting was in Athens in 2006.

First, as we all know, the Council of Europe was founded in 1949 by the Treaty of London which was signed by ten states: Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, and the United Kingdom. This organization is considered Europe's oldest political one

(CVCE, 2016). In the Preamble of the Statute of the Council of Europe is written the scope of the organization itself; it states that the signatories parties are "*convinced that the pursuit of peace based upon justice and international cooperation is vital for the preservation of human society and civilization* […] *reaffirming the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy*" (Statute of The Council of Europe, Preamble, 1949).

This organization was the immediate regional response from some heads of State to the atrocities committed during WWII; some political leaders of European countries felt the necessity of solidifying amicable relations with neighboring countries, to establish the groundwork for enduring security not only on a national level (CVCE, 2016). The early forms of cooperation among Western Europe countries included the Euro-Atlantic cooperation organizations like the Organisation for European Economic Cooperation and the North Atlantic Treaty Organization. The European cooperation organizations began with the Treaty for collaboration in economic, social, and cultural matters and collective self-defence. Under the "pressure" of the Western Union, an organization created by the Brussels Treaty, the founding States together with others collaborated in creating the so-called Council of Europe.

Historically, it is a fact that the Council of Europe was representing a pivotal role in the political landscape of that period. In fact, European movements of that time were promoting cooperation between independent states and were stressing a supernational institution to whom to transfer some specific powers (CVCE, 2016). In the meantime, some specific other entities were created like the European Coal and Steel Community, the European Economic Community, and the European Atomic Energy Community. Furthermore, during the process of joining the community, also due to the collapse of the Communist block, some other countries from Central and Eastern Europe were included in the CoE project tracing the lines of these countries' transition to democracy. Ultimately, the process of cooperation and collaboration began in the post-war period and today we can peacefully affirm that the countries – that have now taken part in some multilateral Treaty – have become subjects of international law, and thus have instituted specific organizations (with legal personality) (CVCE, 2016).

Now, having explained how the CoE has begun one of the most important European Institutions, it is fundamental to be more precise by analyzing its necessary tasks and its primary challenges in the implementation of its mandate. If the current aim is to develop an analysis of the tasks attributed to the CoE, we find that the first page appearing when searching "Council of Europe" is a website which states literarily: '*Council of Europe, Guardian of Human Rights'*, redirecting us directly to the official website of the institution. However, its mission is to promote democracy, human rights and the rule of law across Europe (CoE, 2024). In fact, as it is written in Article 1 of its Statute, the aim of the CoE "*is to achieve*

a greater unity between its members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress" (Statute of the CoE, 1949).

In putting a spotlight on the impact of the Council of Europe monitoring mechanisms in the sphere of human rights and the rule of law (Council of Europe, 2014), we should also consider that the Council of Europe is formed by several institutions which all share the same principles: respect the rule of law and the principles of good democratic governance, "*even in times of war or public emergencies*" (CoE, 2023, p. 66). And this is the crux of our analysis.

Once we have identified this institution as the guarantor of the promotion and protection of human rights within the European territory, it seems logical to emphasize its role in day-to-day practice as the protector of these rights and, at the same time, as the promoter of the development of democracy. Therefore, the powers conferred on the Council of Europe are perfectly described in its Statute, not least thanks to the explicit and exhaustive division of the mandates and powers attributed to each of the organs of which the entire entity is composed. Moreover, because of the impact of the work of the CoE, the Secretary-General has decided to publish a Report that illustrates the specific challenges that the institution had to face during the year of reference, together with an explanation of the function of the democratic institutions. Its purposes are to report strengths and weaknesses in the "*functioning of democratic institutions in Council of Europe Member States*" and "*to assess the quality of the democratic environment in which those institutions function*" (CoE, 2023, p. 13). In fact, if we examine the Report of 2023, we will be able to see several times the usage of the word "war", when talking about the implementation of the power of the CoE over the episodes and developments related to the aggression by the Russian Federation against Ukraine in 2022.

Also, in the Preface statement made by the Secretary-General, the 4th Summit of Heads of State and Government of the CoE is an opportunity for the Member States to renew the values that this organization promotes within the legal and shared framework (CoE, 2023). There leaders would have the opportunity to modify some behaviors that could lead to an improvement in the lifestyle of the people belonging to their country.

To us, this seems an important topic to underline at this level of our analysis because, as it is literally written, this conclusion comes timely: it is not a coincidence, that the brutal, illegal, and ongoing aggression by Russia against Ukraine and its citizens has had a significative impact on the European and worldwide geopolitics. The CoE took a precise side on this topic, affirming in its Report that: "*every international organisation must be clear about how it will adapt its action in order to take account of the*

new realities and to ensure the success of multilateralism in line with its mandate. The Council of Europe is no exception" (CoE, 2023, p. 5). Again, it affirms that CoE "*was established to ensure peace based on unity, underpinned by human rights, democracy and the rule of law. Democratic security of this kind, however, relies on political will. The Russian Federation lost that will over the course of many years. It began a process of democratic backsliding that can be charted in previous annual reports and, ultimately, led up to the appalling violence that necessitated Russia's swift exclusion from this Organisation last year*" (CoE, 2023, p.5).

Moreover, it can be firmly stated that the report leaves no room for interpretation about the mandate of the CoE and, at the same time, the application of its rules and purposes within Member Countries. It is explicitly affirmed that this future gathering is seen as an opportunity to remind members to demonstrate their willingness to affirm that Russia's action is only an isolated case and that the "*standards are applied across every aspect of European's lives, both existing challenges and those that emerge*" (CoE, 2023, p.5).

It is clear the position that this institution has taken in the conflict that has shocked the entire European community and the one overseas. What is important to this analysis though, is to set a line on the connection that exists between the political choices of this democratic organization and the illegal actions that have been now recognized as war crimes. Having said that, someone could question if the role of the Council of Europe, a pioneer in the development and protection of human rights across the European Regional system, is involved in affairs that are inevitably part of its scope. Also, we could be asked to explain the link between the jurisdiction of crimes committed in the territory of Member States and the ones that can be prosecuted just from the ICC. Thus, how can the CoE react to a topic on which it has no power to act but that, at the same time, fits perfectly into the main concerns of the institution itself?

In trying to answer we should first examine the events that manifested once this problem has actually occurred. In fact, if we analyze the facts, we must affirm that on 15 March, 2022 the Parliamentary Assembly unanimously adopted an Opinion that stated the immediate expulsion of Russia from the Organization because of the invasion of Ukraine, in accordance with Article 8 of the Statute that gives power to the Committee of CoE of deciding to cease a member state to being such because its acts do not align with the policy of the institute (Statute of the CoE, 1949).

After having posed these questions, it feels our duty to give some answers. Although the Council of Europe does not have a direct mandate to prosecute war crimes, we can also affirm that it plays a significant role in supporting international accountability and justice bodies and mechanisms to find human rights' violations that, sometimes, may be linked to the commission of war crimes.

As we have discussed in the first Chapter of this Paper, Europe was destroyed after the two wars, and this feeling of devastation led to the creation of specific tribunals that would have judged the crimes committed during that period. For what concerns the European arena, the creation of the European Convention on Human Rights represented a massive signal for Europe that wanted to look forward to criminalizing specific behaviors that could harm human rights. In particular, when talking about the CoE's involvement in the recognition of war crimes, it is necessary to take a look at the ECHR; precisely, Article 7 can clarify several questions. Since the principle established in Article 7 regards the respect of *nullum crimen sine lege*, it is important to mention the development of the interpretation of this Article through time and Courts (ECHR, 1950).

Art. 7 has been interpreted over the years by Tribunals to cover the power of law in prescribing penalties, the retroactive application of criminal law, and the prohibition of extensive interpretation of criminal laws. Respecting these principles is also relevant in the context of international criminal laws, that were – sometimes – adopted after the crimes had already occurred (Eurojust, 2017). As we will see in a while, the topic of the retroactive application of criminal laws is crucial in our analysis of the connection of the Council of Europe with war crimes, because "*The principle of legality demands that criminal laws and penalties be accessible and foreseeable*" (Eurojust, 2017, p. 5).

In the case of *Kononov v. Latvia*, Mr. Vassili Kononov (36376/04), who was a war veteran praised by the Soviet Union for his fight against Nazi Germany, was convicted by Latvian Courts for executing nine persons in the territory occupied by Nazis in Latvia in 1944. The applicant argued that his judgment was based on a retroactive application of criminal law and, for this reason, contrary to Article 7 of the ECHR. The Court, initially, determined that he did not commit a war crime because of the nature of the villagers that he killed, considering that he did not violate the Hague Conventions of 1907 and that a broader interpretation of the criminal laws would mean breaching the principle of foreseeability.

However, the Grand Chamber of the Court overturned the sentence affirming that, even though the villagers were combatants, it was against the principle of *hors de combat* to kill them, qualifying this conduct as a war crime (Eurojust, 2017). The Court emphasized that, despite the Latvian Criminal Code's lack of referencing to international laws and customs of war and even though these laws were not established even in the USSR or in the Latvian SSR, the acts in question were of such a "*flagrantly unlawful nature of the ill-treatment and killing*" that the applicant should have considered the possibility of being prosecuted for war crimes (36376/04). Finally, the Court found that Latvia did not violate Art. 7 of the ECHR, and this case, examined for the last time in 2010, gives us an explanation of how intense the link between war crimes and CoE is (Eurojust, 2017).

Also, the case of *Janowiec and Others v. Russia* (55508/07 and 29520/09) is perfect to include another Article part of the ECHR which was, in the interpretation and development of the application of the laws, fundamental to underlining the participation of the CoE in the process making of the recognition of war crimes. Precisely, Art. 2 of the ECHR ensures the right to life, and in doing so, it stresses Member States to investigate the correct application of this right in their territories where, sometimes, the Court has recurred to international criminal law in monitoring and processing some crimes (Eurojust, 2017). In detail, fifteen applicants complained that the Russian authorities did not investigate sufficiently the death of their relatives, asking the Court to pronounce a sentence on it.

The Court stated that it was not competent to conduct a proper examination on the way the investigations were made, mostly because the events took place before the adoption of the ECHR in 1950. However, the Court decided that the mass murders of the Polish prisoners by the Soviet secret police qualified as war crimes, "*as defined by the Hague Convention IV of 1907, the Geneva Convention of 1929 and Art. 6 (b) of the Nuremberg Charter of 1945*" (55508/07 and 29520/09). Thus, as it is written in the Eurojust Paper (2017) that examines the topic, the Court reaffirmed its position and reiterated that denying crimes that were committed during WWII contradicts completely the values on which the ECHR is founded. Democracy, justice, and peace are on the basis of what CoE firmly believes, and condemning crimes such as genocide, crimes against humanity and war crimes is part of the process of making justice, also through the sentences of the Court of Human Rights (55508/07 and 29520/09).

Finally, we can affirm that the European Court of Human Rights, as part of the CoE, can decide over violations of human rights that may also involve war crimes. Moreover, even if the ECHR does not conduct criminal prosecutions, one of the most important powers that the Council has over the international community, is that its judgments can contribute to the broader international legal framework in addressing war crimes.

2.6 Challenges Faced by the EU in Addressing War Crimes

Although this analysis will focus on its roles and challenges and its link with facing war crimes, we are keen to point out that this Paper does not mean to be exhaustive, it should be considered as a mere instrument to further developments and research on this very interesting topic.

As we have seen in the previous paragraphs, the EU is committed to fighting war crimes and does so through various Recommendations, Decisions, and other documents that are at the forefront of this battle.

Now, in this final part of this chapter, we will briefly describe what are the main challenges that the EU is determined to tackle or, at least, hopes to help solve.

Undoubtedly, one of the most important priorities that the EU is now facing is the war in Ukraine, which will be our main focus in the next chapter. In fact, it is absolutely clear that the impact of the institutions belonging to the European Union is engaged – at this precise moment in history more than ever – in facing one of the most dramatic moments since the post-war period. What we have been able to analyze so far relates purely to the legislative and legal sphere, which, on paper, aims to cooperate with international institutions with the ultimate goal of moving forward toward resolving conflicts and issues affecting the security and peace of the international community.

If we broaden our perspective and analyze the political steps that the EU has taken in recent years, we can see various 'stances' that have led our regional community to assert itself rigidly on issues that are fundamental to this analysis. For example, we should take into consideration the various statements made by the heads of Parliament and the Commission, who have firmly declared themselves "against all forms of aggression against the European community".

According to what we learn from the daily international political developments, the EU has also spoken out regarding crimes that are not directly aimed at the Member States. The justification should in the will to protect at all costs the community's security, which is put at risk by external threats, such as – in this case – the advance of Russia and the various threats aimed at the European community.
In detail, the EU has moved in the field of financial support, military support, and legal new documents that could affect the ongoing crimes. The Conclusions of the European Council of 9th February, 2023 are a perfect example of what we have discussed so far.

In talking about the war in Ukraine, the EU has developed a document that provides different help coming from different fields. In this case, when "*holding an exchange of views with the President of Ukraine on Russia's war of aggression against Ukraine*" it separates the EU's spheres of operation into different modules: first, its "political position" is presented, which is explicitly manifested through its support for Ukraine; then there is the "economics" part of the paper, in which all the commitments the EU has made and the strategies it has adopted are listed; lastly, the paper develops the "migration" part, another challenge the EU has automatically chosen to tackle (European Council, EUCO 1/23).

On this page, we will start a new part of this dissertation, focusing more on the specific example that we have chosen to analyze: the Russia-Ukraine war and its collateral effects on the commission of war crimes.

III CHAPTER – ACCOUNTABILITY MECHANISMS

3. Introduction

We have now reached the final part of this analysis, in which we will focus on one specific case that we thought was perfect to better examine the incidents that occurred in European country lately, to understand how European Institutions are involved in this failure of the protection of human rights and how States that are not directly actors of the conflict might be considered accountable for those violations. First, we will discuss the model case of the Russia-Ukraine conflict, by expressing the alleged and/or certified war crimes that were committed during these two years of conflict. Moreover, we will analyze the roots that represent the motivation for the beginning of the war, as we bring to light the political and military meanings behind the choice of bloodshed and destruction.

Also, we will address the relationship between Russia and NATO, which seems the most important issue to solve when dealing with hypothetical solutions to the conflict. It goes without saying that the link between NATO and European Institutions is one of the main aspects that we face in this dissertation, due to the final statements and suggestions that we will try to give to the reader.

In fact, we will seek to understand how responsible the most powerful States in Europe for the outcomes of the ongoing conflict are, showing their position towards Russia and Ukraine. In detail, our goal is to find a gap in the connection that exists between International Criminal Law and European Union Law and present the cause of this problem, so that we – in the near future – can find a possible solution and reinforce the system. The main point of this last part revolves around the possible revision of the Treaties of the European Union, which, in our opinion, are not very contemporary and suitable for combating dangerous situations such as the one we are currently experiencing. Also, we are going into detail in analyzing the role of the European Union and its fundamental rules that are common to all the Member States and we will see the application of its rules into their national system. Finally, we will see how some of the most powerful states of Europe react to those norms.

The question we asked ourselves was: in times of contemporary warfare is the EU as an international actor really able to face threats such as the one now represented by Russia? Starting from this question is it then possible to develop new instruments for the protection of human rights and, in detail, to prevent the commission of war crimes?

We will finally analyze the war crimes committed in the Russian-Ukrainian conflict and then elaborate on our final thought, which calls for a strengthening of the EU to better guarantee citizens and their human rights.

3.1 The Case Study: the Russia-Ukraine Conflict

As Dakota Wood, a retired Marine lieutenant colonel, affirmed: "*In a violent refutation of aphorisms such as 'modern states don't make war on each other', and 'major countries are too economically interdependent to risk going to war', and 'the costs of becoming an international pariah state are too high, Putin decided to invade Ukraine anyway*" (Wood, 2023).

It is not a causality that, due to the purpose of this analysis, we have chosen – as our case study – the Russia-Ukraine conflict. The reason behind it is that we truly believe that this is the most accurate and recent example that can perfectly explain why we believe that giving more power to the EU, when facing an immediate and/or possible threat to the security of the community and the violation of human rights, could represent a possible implementation scenario. The motivation resides in the horrible move that Russia made towards Ukraine, which – to us – has a broader meaning and scope. As it now, unfortunately, has entered the public domain, on 21 February, 2022 Russian President Vladimir Putin gave a speech announcing a "special military operation" that would take place in the territory of Ukraine within the following days. In fact, on 24th February, the Russian invasion began, making this territory affected by criminal actions a war camp for – now – more than two years.

Practically, the invasion from Russia was nothing new, since we can set the first signs of Russian aggression against Ukraine dated back to 2014 when Putin decided to cross the border and appropriate Crimea, a Republic belonging *de jure* to Ukraine, but invaded and claimed by Russia (Andersson & Cramer, 2023). Conscious of having the support of the entire international community, the reasons for this choice, we dare say atrocious and killer, are to be found in politics. In fact, it is a well-known fact that the President of the Russian Federation has several times firmly declared his vision regarding the Semi-Presidential Republic. As reported by the NY Times, at the NATO Summit in 2008, Putin stated these specific words to President George Bush in Bucharest: "*George, you have to understand that Ukraine is not even a country. Part of its territory is in Eastern Europe and the greater part was given to us*" (New York Times, 2008).

Moreover, he also referred to "*Russians and Ukrainians are one people*" when talking about his plan (Koltsø, 2023). On this note, William Burns, the U.S. ambassador to Moscow at that time, now Head of

the CIA, wrote: "*Ukrainian entry into NATO is the brightest of all red lines for the Russian elite, not just Putin. In more than two and a half years of conversations with key Russian players, from knuckle-draggers in the dark recess of the Kremlin to Putin's sharpest liberal critics, I have yet to find anymore who views Ukraine in NATO as anything other than a direct challenge to Russian interests […] Today's Russia will respond. Russian-Ukrainian relations will go into a deep freeze… It will create fertile soil for Russian meddling in Crimea and eastern Ukraine*" (Burns, 2008). These words simplify what clearly happened next.

Putin's military action and his madness to reconquer territories that, according to him, belong to the Russian Federation, have ancient roots which can be traced back to the late 1990s. It would seem that the Russian President wants at all costs to avoid a NATO advance to the East, arguing that this desire is not just a whim of the leader to exert his dominance in the East, but rather the result of a bilateral will. He does refer to a hypothetical agreement made between Russia and NATO Allies that contained specific provisions in which the Alliance promised not to expand its borders eastward, thus ensuring that it would not interfere with Russian hegemony. Contrary, what NATO makes known is that "*the idea of NATO enlargement beyond a united Germany was not on the agenda in 1989*" also because the Warsaw Pact still existed at that time, until 1991 (NATO, 2024). This Treaty was "*a political-military alliance and mutual assistance organization between the Soviet Union and the People's Democracies of Eastern Europe, operating from 1955 to 1991. It was inspired by the USSR's desire to strengthen its control over satellite countries […] and to rearm the German Democratic Republic […] enabled by its inclusion in the WEU and NATO*" (Treccani, 2011).

Moreover, even though NATO was created to defend its States from Russian Adversary, during the years the relationship between NATO and Russia changed, arriving at the point of engaging in amicable relations (Fix & Keil, 2022). Although the conversations were difficult, it seemed that the edge of conflict was over. For example, in 1997 was signed the NATO-Russia Founding Treaty, with the intention of drawing a line of cooperation among ex-adversaries (NATO, 2008).

At that moment, Putin gave a public speech in which he affirmed the possibility for Russia to maybe join NATO one day: "*Why not? I do not rule out such a possibility […] in the case that Russia's interests will be reckoned with, if it will be an equal partner. Russia is a part of European culture, and I do not consider my own country in isolation from Europe […] Therefore, it is with difficulty that I imagine NATO as an enemy*"(Hoffman, 2000). Today, these words appear to us as a paradox.

Also, it is important to mention that NATO and Russia collaborated after 9/11 when Article 5 of the UN Charter was invoked and Russia supported the intervention in Afghanistan at the UN Security Council (McFaul & Person, 2022).

However, in "recent" times, Putin's view on NATO changed completely, to the extent that he started, over time, a wave of antagonism against the organization culminated in the Munich Security Conference in 2007 where – criticizing the existence of EU and NATO – he affirmed that "*The use of force can be considerate legitimate if the decision is sanctioned by the UN. We do not need to substitute NATO or the EU for the UN*" (Putin, 2007). In any case, considering all the political and strategic reasons that left Putin with the decision to violate International Criminal Law, what is beyond interesting to this analysis is to recognize and identify the commission of war crimes committed during this grueling conflict.

The Independent International Commission of Inquiry on Ukraine established by the Human Rights Council on 4th March 2022, under Resolution 49/1, had the purpose of investigating all alleged violations and abuses of human rights and violations of IHL, and it concluded that war crimes have been committed in Ukraine (OHCHR, 2022). Moreover, Human Rights Watch had documented several cases of Russian military forces committing human rights violations, including cases of rape, summary execution, threats against civilians, and looting of private properties, food, and clothing (Human Rights Watch, 2022).

Also, the Pre-Trial Chamber II of the ICC on 5th March 2024 issued warrants of arrest for Sergei Ivanovich Kobylash and Viktor Nikolayevich Sokolov for alleged crimes committed from 10t October 2022 until at least 9 March 2023. They are responsible for the war crime of directing attacks at civilian objectives (Article 8(2)(b)(iii) of the Rome Statute, the war crime of causing excessive incidental harm to civilians or damage to civilian objects (Article 8(2)(b)(iv)), and the crime against humanity on inhumane acts under Article 7(1)(k) (ICC, 2024). However, as scholars have written and as Putin himself confirmed in June 2024, everything turns around the hypothetical membership of Ukraine in NATO: this can be considered both the cause and the solution of the conflict (McFaul & Person, 2022). In fact, Putin has declared that he is ready to negotiate, only if Ukraine renounces to join NATO (ANSA, 2024).

At this point of our research, we ask ourselves the hidden truth behind this inhuman attack, contrary to every rule of International Criminal Law and Humanitarian Law. Our analysis humbly suggests to the reader to look beyond the practices carried out and the political strategies. What is the truth? Did Putin decide to invade Ukraine, with all the collateral consequences, to stop his eventual participation in NATO, to stop NATO expansion, or is there more to it than that?

We, having reached the end of this analysis, maintain, as others before us have stated, that Putin's main concern is not NATO expansion itself, but rather the expansion of democracy, the real obstacle to

the dictatorial regime he has imposed on his people. As was also mentioned by McFaul and Person (2022), what moves the Russian power play is to be found in the advancement of democracy, an unquestionable threat to Russian hegemony and its desire to rule in the Eurasian Region.

Furthermore, it should be remembered that Putin's impositions and his whims about NATO submitting to his will have no reason to exist since this organization is recognized as a defence organization. The use of force is not authorized in any NATO mandate, contrary to what the Russian President wants his citizens and the eastern audience to believe. There is no question that NATO represents a threat to Russian power as such, as NATO has never attacked arbitrarily (NATO, 2024). However, the right of self-decence is offered by the UN which, as an organization that aims at the protection and defence of its Member States, clearly offers securities. This is the case with article 51 of the UN Charter, which states that "*Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security*" (UN Charter, 1945).

After all that has been said about the bond between NATO and Russia, and the atrocities committed in Ukrainian territory, it is now clear that, even if we are on the edge of the new modern world, nothing can stop the cruel minds of men from acting in a repugnant manner. The motivation that led Putin to start the war are purely political and ego-related; they left us a draft of the image of the President as the one who wants at any cost to fight democracy, to sacrifice human lives for his scope, wanting to be reminded as the man that gave glory again to the Great Power.

3.2 Germany, France, and Italy: A Comparison among the Most Powerful States

Following the explanation of the conflict's development that has shocked the European and International community because of the cruelty with which it started and because of the aggression that was initiated to "conquest" a part of the territory, our analysis will now focus on the approach and on the strategies that different Member States have put in place in facing this enormous issue. Specifically, we will examine the political positions, including the economic, financial, and military tactics of three of the most powerful countries in Europe and the European Union: Germany, France, and Italy.

In saying this, however, a premise is necessary: given the wide impact and deep crisis that the EU is suffering from at the moment, this research cannot be defined as exhaustive but, rather, aims to develop

in the reader critical thinking about the events that have unfolded. At the same time, it wants to contribute to providing tools for critical analysis of the Heads of State and the decisions they have taken.
Moreover, since this is such an impactful topic in foreign policy and – as we will soon see – also within various European countries, we would like to remind that this issue is in daily evolution, and, therefore, our analysis will concern the decisions previously taken and the hypothetical changes of course of the countries that directly or indirectly affect the evolution of this sad affair.
We will first start to explore the German arena, taking into account its previous and actual points of view and strategies that have been established and justified by those in charge of responding of their accountability in this ongoing war in Europe.

First of all, it is noteworthy to mention that due to the consequences of the World Wars and because of the lessons that its citizens always affirmed to have learned, Germany has always maintained a low profile regarding international conflicts, and it has always declared to try to avoid at all costs the use of weapons and force. It is not a case that we want to start analyzing the position of the most powerful country in Europe, with the intent of underlining how, sometimes, influence and power do not follow the same line of the common trend, giving an idea of how Member States might have different opinions and positions towards the same problem.

The German case results interesting to analyse because of its decisions that were, from the beginning, considered "against the tide". While other States were opting for supporting Ukraine also with military measures, it is known that Germany affirmed that its position is rooted in history and, for this reason, it would have not taken sides using force and coercion. This is why it blocked the export of German-made weapons by third countries (like Estonia) to Ukraine (Dirsus, 2022). However, since the beginning of the war, German Chancellor Olaf Scholz has changed its international posture considerably.

To better understand why Germany had a different approach towards Ukraine, it is necessary to remind the reader about the relationship that existed from the 90s between Russia and Germany. In the past, they have signed a cooperation policy that took the name of *Ostpolitik.* This agreement was based on six key principles which are as follows: Russia first; Change through rapprochement; Interdepence and interweaving as a guarantee for Peace; Security in Europe is only possible with – not against – Russia; Economics before geopolitics and security policy; Historical responsibility prohibits criticism of Russia (Meister & Jilge, 2023).

After the disintegration of the Soviet Union together with the end of the Cold War, it appeared useful to Germany and Russia to support each other; to be more precise, Germany helped Russia to transform itself into a democracy with a cooperative approach while, simultaneously, Russia stipulated a deal with

Germany in using cheap Russian pipeline gas, fundamental for the German economy (Meister & Jilge, 2023). Clearly, this deal assumed that, after the dissolution of the SU, Russia would develop into a democracy. An illusion, that – at that time – included also the hypothetical and future annexation of Russia to NATO.

However, this economic deal lost its power during the developments of events in Europe, due to political changes in the international balances. Even though almost all of Europe benefited from the agreements with Russia, balances were close to change. Everything started with the attack on Crimea from Russia. If it is true that Germany played a pivotal role in negotiating the two Minsk Agreements that followed the Crimea issue, and even if Germany, together with France, operated a massive diplomatic intervention to prevent Russian forces from occupying other Ukrainian territories, it is a fact that the politics scenarios were changing. In fact, Germany started to become one of the best allies of Ukraine in providing financial support and assistance to give Ukraine a chance to resume the occupied territory of Donbas (Meister & Jilge, 2023).

Germany signed the Regulation of the Council of European Union No. 833/2014 concerning restrictive measures given Russia's actions destabilizing the situation in Ukraine; it contained a pack of economic and financial sanctions applied by the EU in certain sectors or for certain categories of goods. (Eurlex, Regulation No. 833/2014).

Now, having given this brief overview of the relationship between Russia and Germany in the past, it should come as no surprise that Germany supported Ukraine. It is a fact that, since the beginning of the war, the German government changed completely its attitude towards Russia, recognizing it as a possible threat to the peace and stability of Europe. Even though Russia has already behaved aggressively towards EU neighbors since the invasion of Georgia in 2008 and the Crimea annexation in 2014, it was in 2022 that Germany completely understood the intentions of Russia. And, linked to the security of the country, in 2022 Olaf Scholz gave a speech, in which he announced a fund of 100 billion Euros for the defence and the modernization of the German Army (Meister, 2024). In fact, during the first months of the war, Germany was very much indecisive about its position in sending weapons to Ukraine.

Initially, the Chancellor didn't approve of sending German-made Leopard battle tanks to Ukraine (Lucas, 2023). Also, he strongly opposed supplying Taurus cruise missiles to Ukraine, affirming in a session in Parliament that "*It's out of the question to deliver such long-range weapons system, the deployment of which could only be reasonable if it also involves the deployment of German soldiers for this mission, even outside of Ukraine. That's a line that I, as Chancellor, do not want to cross*" (Scholz, 2024).

Moreover, according to a YouGov survey commissioned by the DPA news agency, 60% of Germans polled opposed the idea of supplying *Taurus* long-range cruise missiles to Ukraine (YouGov, 2024). However, two years after the beginning of the war, the position of Germany in sending weapons and supporting Ukraine with financial methods changed, perhaps also due to the scandal of the interception between German officials talking about military strategies involving Russian affairs. In our opinion, this episode marked the beginning of another chapter of Germany's position in the Communitarian panorama. In detail, the conversation occurred among the commander Ingo Gerhartz and his collaborators regarding the amount of Taurus missiles needed to bring down the bridge connecting Crimea with Russia (Welt, Jungholt, 2024).

It is no coincidence that following the German OK to send weapons to Ukraine (Hallemann, Bild Zeitung, 2024), President Putin addressed Scholtz directly, stating that this represents 'a very dangerous step', adding that "*the attitude towards the Federal Republic in Russian society has always been very good"* and that this could cause a destruction of relations between Moscow and Berlin (Gigova, CNN, 2024). Words and attitudes, therefore, seem to go beyond those addressed to other European countries, which is precisely why we assume that this is due to the long history of mutual support that these two countries have had since the end of the Cold War.

Also, the Chancellor affirmed that: "*As the US president said, we are talking only about the possibility of protecting a large city, for example, Kharkiv*" (Scholz, Antenne Bayern Radio Station, 2024), while also reassuring the German citizens that he would not succumb to pressure to decide inappropriately, he ensured that this decision was aimed at increasing Russian's army attacks (Kyiv Post, 2024).
However, a survey conducted in January 2024 shows that 35% of persons interviewed considered Germany's previous armed support for Ukraine to be adequate as a response to the attack, while 43% of the respondents felt that the efforts made by Germany were not sufficient (Statista, 2024).

Up to 22 May, 2024 Germany has improved its involvement as one of the actors and supporters of Ukraine. The *Bundesregierung* (2024) affirms that the military assistance is delivered in two ways: "*there are the Federal Government funds for security capacity building, […] and there are deliveries from Federal Armed Forces stocks*". Nevertheless, it is a recent development that Germany has completely reversed its direction, allowing Ukraine to use German weapons to attack targets within Russia's borders (Reuters, 2024).

Now, moving forward to the analysis of another country, it seems appropriate to explore France's position in this war. From the very beginning, France supports Ukraine, in defending itself from the aggression, also with military equipment. In fact, on 30 September, 2022 France *"condemned President*

Putin's announcement of the illegal annexation of the Ukrainian regions of Donetsk, Luhansk and parts of the Kherson and Zaporizhzhia regions by the Russian Federation in the strongest terms" (Ministère de l'Europe et des Affaires Étrangères, 2022). From 24 February 2022 to 31 December 2023 its amount of money invested is 3.8 billion euro. Also, France has provided training to Ukrainian troops, with around 10 thousand Ukrainian soldiers trained by the French military in Poland and in France (Ministère Des Armées, 2024). Also, the Heads of States reunited in the European Council decided to grant "candidate status" to Ukraine for EU membership, a historic step regarding the trust-building between the EU and Ukraine. Therefore, it is absolute clear the position that France decided to occupy, showing complete support to the victim country.

Continuing to examine the last country that we decided to analyze, we are now going to talk about Italy and its role in Russia's act of aggression and invasion. As we can read on the official website of the Ministry of Foreign Affairs, "*Italy condemns in the strongest terms Russia's unprovoked and unjustified aggression against Ukraine, which constitutes a blatant violation of international law and humanitarian principles*" (Ministero degli Affari Esteri e della Cooperazione Internazionale, 2022). What seems very important to underline is the usage of the terms used by this country, that does not leave room for other interpretations apart from the one that Italy stands with Ukraine: "*Italy will continue to exert pressure on Russia, including through the proper application of the sanctioning measures in force, engaging in multilateral efforts to ensure Russia's isolation in light of its senseless disregard for the values, principles, and norms of the international order…*" (Ministero degli Affari Esteri e della Cooperazione Internazionale, 2022). In terms of financial help, in 2022 Italy issued the "Decreto-Legge Aiuti Ter" participating in the EU's exceptional Macro-financial Assistance to Ukraine.

Moreover, according to data, Italy has had an important role in receiving refugees from Ukraine, for an amount of 191.475 Ukrainians escaping their country (Gazzetta Ufficiale della Repubblica Italiana, Decreto-Legge 175/2022). The latest ISPI poll conducted by Ipsos shows that almost seven out of ten Italians (69%) think that no one between Russia and Ukraine is currently prevailing in the ongoing conflict. Also, when asked "*At which conditions Ukraine should accept to initiate peace negotiations with Russia?*", Italians reply that Ukraine should agree to negotiate even on significantly less favourable terms, while only 6% consider that Ukraine should not accept negotiations under any circumstances (ISPI, 2024).

For what concerns humanitarian assistance they seem to agree on a large scale, but when it comes to sending weapons to Kiev five out of ten Italians declare themselves contrary. Although Italy, as we have seen, has expressly affirmed to support Ukraine, also participating in economic plans to finance the

country with useful resources to defend itself against the Russian advance, Italian Prime Minister Meloni has been very clear about a broader involvement in the conflict. She has declared that "*Italy wants to avert an escalation because NATO is not in war with Moscow* (Il Sole 24, 2024). This shows, then, how Italy cares about supporting Ukraine while remaining relatively neutral toward a ruthless Russia.

3.3 Failure of States to Protect Human Rights

It is quite clear to us that what emerged from this Paper is the confirmation of a way of doing war, committing crimes, and acting completely different from the past. Indeed, we do not want to hide our strong opinion on how wars have developed over time; it is not a secret, as we have shown in the first chapter, that decades ago wars were conducted using specific weapons and strategies. They were made of two different sides and, maybe, allies that supported one side. Wars were initiated to win them, considering the consequences of all the collateral effects that they could bring with them. Moreover, they were fought by soldiers, people, and the common point was the battle camp, a very specific geographical point where the two parties met to fight.

We have to consider that times have changed, the world has developed, and the way of warfare has changed. We have now specific means of warfare that we can use, such as chemical and biological weapons, mines, cluster munitions, explosive weapons, etc. which give us the certainty that the oldest ways of preventing wars and combatting human rights violations are not suitable anymore. We highly invite to think about the fact that now even those who are not directly involved in the fight take advantage of the outcome of it or, anyway, from the development that war takes with it. There are economic implications and political benefits that Non-State Actors can gain from the change of balances in the international panorama and, as Kaldor (2022) affirmed, they can gain checkpoints, or political control over territories.

Unfortunately, nowadays, battles that result in violations of IHL and Human Rights Law are increasingly common, leading experts of the field to realize that perhaps it is civilians, victims of war crimes, and violations of any kind, who lose the most. This can be considered an absolute and complete failure of States that should protect their citizens with the means of the Rule of Law and Democracy. This is why we truly believe that, to fight this phenomenon of massive destruction, countries should all move in the same direction. As the scholar suggested, "*a human security approach would involve a differentiated policy towards authoritarian States*" (Kaldor, 2022, p. 4). And this is exactly the case that we are talking about: an authoritarian, dictatorship regime that wants to suppress any principle of

democracy by using expedients and excuses based on the possible threatening expansion of NATO. We should study a new strategy that will fit all the countries in a pragmatic cooperation in addressing crises so important as those in which we are living.

Secondly, it is crucial to hold accountable those who are violating human rights, raising legal concerns, while imposing sanctions that will be respected. Furthermore, we would all recognize NATO's work in preventing conflicts using all the means that it has in its power, without doubting its operations or its mandate (Kaldor, 2022).

When talking about the efforts made by the European community in protecting human rights, we feel it is fair to report some data listing the involvement of the EU and its countries in support of Ukraine, showing assistance to the protection and defence of human rights (in this case, of Ukrainian citizens). Regarding Humanitarian Aid, the EU until March 2024 has delivered around three billion in humanitarian assistance, of which 2.16 billion came directly from Member States and 0.84 billion from the EU itself. Also, around 796 million were spent on in-kind assistance and emergency operations via the EU Civil Protection Mechanism, including material assistance shipped, more than 3000 patients transferred to hospitals across Europe, and thousands of power generations and transformers sent to Ukraine (EU, 2024). Moreover, what is noteworthy is the amount of money invested to welcoming refugees: around 17 billion Euro has been made available for hosting refugees from Ukraine, incredible data that shows how much countries were committed to repairing the damages of the war.

Also, in "Standing with Ukraine", the EU has imposed sanctions against Russia, to create a deterrent for the State to continue the atrocities. As we can read in the EU factsheet (2024), they were designed to reduce the Kremlin's ability to finance its war, impose costs on Russia's political elite, and, obviously, diminish Russia's economic base. Precisely, it has sanctioned military professionals, oligarchs, political representatives, and all the persons involved in the illegal activities committed by Russia. Also, the EU has cut Russia's access to capital markets of the EU and has imposed asset freezes and financing bans on Russian banks. The import restriction affects 90% of the EU's current oil import from Russia, and the sanctions prohibit public financing or financial aid for trade with, or investment in Russia, including national export support (EU, 2024).

However, all these packs of sanctions and all the political and economic strategies put in place cannot be considered enough by us, considering the weight that the numerous human rights violations that have occurred. Someone could now pose a question, asking if the States, that were not directly involved in the conflict and are not actors in the war, can be considered accountable for the commission of war crimes and for all the violations that were committed during the war in Ukraine.

What has truly occupied our thoughts during all these months of writing this dissertation, was the possibility of getting an answer to the question: "Could EU Member States avoid the outbreak of this war and its subsequent catastrophic consequences in terms of human rights violations?".

In reply to this, we have to actually consider that it is universally recognized that States, in general, are accountable for the well-being of their citizens, thus every type of human rights violation is under their jurisdictions and normative system. Normatively, they act to ensure that rights are respected by abstaining from abuse and preventing others from committing abuses (Englehart, 2009). However, in this case, we are talking about States that have not failed to fulfill their duties within their borders, according to internal regulations and jurisdictions, but rather a failure due to the failed action externally, whether this be defense or attack. In detail, we ask whether the Member States involved in the Russia-Ukraine conflict, through EU policies, could have had the possibility – when exercising their foreign policy power – to avoid the commission of war crimes by Russia.

In this regard, it is important to mention that the sanctions imposed on Russia find their *raison d'être* in Article 29 TEU (ex. Article 15 TEU), which constitutes the mean of foreign policy. In detail, it states that "*The Council shall adopt decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the Union positions*" (Treaty on European Union, 1992). And it is here that we want to focus our attention and elaborate a deeper thought.

Starting from this provision, therefore for the Russia case, each Member Country has been asked to respect the decisions of the EU and to conform its internal policies (concerning economic and financial sanctions) to these. In this regard, somewhat provocatively, we reflect on whether this article could be supplemented and enriched by specific provisions concerning the subject of war. To us, this legislation seems slightly outdated, circumscribing it in today's world where wars and death alternate.

We wonder if, based on this article, it would be possible to introduce a new, more detailed provision that would uniformly decide the foreign policies of countries. Then the goal of the EU would be realized and the State would have to take a step back.

This could, in our opinion, affect the future of the EU itself and its relations with third states, and could, again hypothetically, function as an extra instrument to control the human rights of citizens, thus preventing their violations.

The failure of States should not, therefore, be interpreted as something that exists because of a failure to act in a specific way outwards, and in this case, towards Russia or directly towards the protection of Ukraine from Russian invasion. Rather, it is seen by us as the inability of States – due to internal politics

and political gamesmanship – to concede part of their power to the EU in specific fields, letting the nationalist ego predominate over the (very) future advantages of a perfectly common foreign policy.

3.4 Contradictions between Jurisdictions, States Policies, and National Priorities

Since we have previously analyzed the three State's positions, which, although generally aligned, suggest a potential divergence in overall strategy, in our opinion, it is now time to examine the motivations that drive the most powerful countries of the EU to act along different policy lines. How it is possible, then, that even if they are all part of the same supranational organization, the EU, countries decide to act in different ways, despite having the same guidelines in combating the same phenomenon, universally recognized as an issue? In this paragraph, we will try to develop an absolutely personal analysis, based on the individual interpretation of the facts previously exposed and on individual streams of critical thinking.

At this point, we are interested in exploring the links between the legal consequences of the behavior of certain Countries and the obligations and freedoms they have in self-determining their choices. Thus, our analysis cannot disregard the study of the law of the European Union, the subject on which this entire paragraph will be based. Indeed, it is through this topic that we can justify the relationships that develop within the European sphere and, simultaneously, explain the distribution of power among EU members in certain areas.

Therefore, it seems necessary to recall one of the principles on which the existence of the European Union, as a supra-national entity, is based: subsidiarity. It is explicitly enshrined in the Treaty of Maastricht, then rewritten in 2007 in the Treaty of Lisbon, and sealing it in Article 5, paragraph 3 TEU. This states that: "*Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level*" (Treaty of Lisbon, 2007). This article is considered essential for the distribution of powers between the EU and the Member States.

The Treaty of Lisbon clarifies some very important points that were previously regulated with slight confusion. First, it is important to underline that the competences attributed to the EU and the Member States are regulated by the two treaties: the Treaty on European Union (TEU) contains the provisions concerning the fundamental principles governing the competences, while the rules relating to the

categories of the Union's sole competence and the so-called flexibility clause are placed in the Treaty on the Functioning of European Union (TFEU) (Ziller, 2008).

The Treaty of Lisbon occupies a pivotal role in the definition of these treaties. For example, the new Article 5 TEU (2007), as amended by the Treaty of Lisbon, is essential to define the way these rules operate. It defines that "*Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States*", emphasizing, therefore, the will of the States to cede their power to the EU. Furthermore, the principle of residuality is contained in both Article 5 TEU and 4 TEU which "*enshrines the principle of state autonomy together with the principle of loyal cooperation*" (Porchia, 2008, p. 10).

Having given a preview of the sources that regulate the division of powers and the legal bases that impose their separation between the European Union and the Member States, it would seem appropriate to now examine in detail the matters that turn out to be of "exclusive competence" of the EU and of "concurrent competence". We should cite the specific articles that regulate this matter, allowing us to proceed and substantiate the basis of our criticism of a change in the community order. Article 3 TFEU explicitly defines a list, which – in our opinion – cannot be considered exhaustive, of the fields in which only the European Union can legislate. That includes customs union, competition rules, monetary policy, and others. In contrast, Article 4 TFEU, establishes the matters in which the EU and its members have shared competence; among others, they are identified in social policy, economic, social and territorial cohesion, [...] area of freedom, security, and justice (Treaty on the Functioning of the European Union, 2007).

In any case, it is not considered admissible the possibility for both actors to legislate on the same matter, in parallel. TFEU itself, then, explains how this phenomenon is immediately blocked and prevented by the provision contained in Art. 2(2). It explicitly states that: "*When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence*" (TFEU, 2007).

Since we consider it linked to the case that we have chosen to examine, a spontaneous question arises. "Defence and security matters" are subjects over which the EU has the power to legislate, why, then, in practice, each State decides to implement different and heterogeneous policies, as they did in the Russia-

Ukraine conflict? The answer would seem to lie in the attribution of power, to individual States, to decide how to apply their foreign policy, choosing modes of intervention and collaboration with other Member States. The choice of how to "collaborate" with Ukraine, in this case, is a purely personal choice of the Member States, falling within a policy no longer within the competence of the Union, but rather within the sovereignty principle, in the sphere of foreign affairs.

In this respect, we believe that the main junction of our analysis is based on a collaboration between CFSP powers and powers attributed to States by national foreign policy.

In fact, if we consider that specific institutions of the EU have the task of ensuring the unity, coherence, and effectiveness of the EU's external action, we could therefore argue that it might make sense to extend the competences of the EU in the field of common foreign and security policy. In detail, the European Commission and the Council, have distinct powers; one of these is that the Council is granted the possibility to initiate EU civilian and military crisis management actions "*in pursuit of the EU's objectives of peace and security*". Also, it is declared that most foreign and security policy decisions require the consent of all EU countries (Council of European Union, 2024). In light of what has been elaborated by the European regulations, and what has been established by the principle of separation of powers, together with the principle of subsidiarity and proportionality, the main problem we want to bring to light concerns a consistency of law enforcement in the countries that compose the European Union.

Thus, although Member Countries exercise absolute power in decisions concerning internal and external policy matters, in the light of what has been examined in the Russia-Ukraine case, it appears to us that the key to these different implementations of policy and strategies is to be found in the exercise of a power that is legitimately in the hands of the Member Countries.

While analyzing the sources, we have asked ourselves a question: how relevant would it be to reform the structure of the EU sources to grant more power to the EU about specific issues?

In detail, we want the reader to question himself: would it not be better to extend the scope of the EU's exclusive powers in the area of "management of conflicts that threaten the stability of the EU" so that the foreign policies of the countries compose the EU would be more homogeneous?

In support of this thesis, we could use the above-mentioned "flexibility clause", which states in Art. 352 (1) TFEU (2007) states that: "*If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate*

measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament".

Thus, if we consider it necessary for the achievement of the institution's objectives, in the case of an imminent threat, the EU can use the flexibility clause and choose to "impose" a certain plan of action that is common to all Member States, we could redefine the concept of foreign policy as a "Common foreign policy", in the case of Member States being threatened by imminent dangers, such as – in this case – a Russian advance towards EU territories. This would mean asking Member States to cede their foreign policy decision-making power in favour of the greater common good: European security. No different policies, but a single one based on communitarian power play that also imposes its power on foreign countries. A single policy choice could help to avoid decision-making fragmentation, characterized by those who decide to intervene more decisively, and those who, instead, remain downright neutral.

CONCLUSIONS

Since we have now reached the last part of this dissertation, we do think that it is fundamental to give the reader some specific conclusions in which we strongly believe. As we have already mentioned before, the main purpose of this investigation is to stimulate the lector a critical opinion on the rule of the European Institutions when responding to war crimes. This is why we are now giving our own opinion on what we have discovered during the study of this broad and interesting topic.

During this dissertation, we have started talking and examining the history and the nature of war crimes, beginning with the struggles in their international recognition, up to the Rome Statute and its fundamental role in the history of the international community. We have then investigated the ongoing cases of their commission in the European Region, and we have chosen the Russia-Ukraine conflict as the case study on which to base our final theory. As we have observed, we have interpreted facts and analyzed the flow of changes that have developed around this ongoing conflict.

As we truly believe that no one will ever stop Heads of State from declaring wars and from imposing their theories over citizens and countries, we want to bring to light a specific argument, that might represent – for the future – a new beginning for the establishment of the international peace and security.

We have started this analysis conscious that we would not be focusing on the topic in general, having the certainty that a subject like this would have deserved to be treated in a broader way. Still, fascinated by the recent development of their nature within our community, we thought it would have been interesting to focus our research on war crimes that are happening in the society that surrounds us. In this case, the European region.

This is why, due to the events that are now interesting our region, we thought to concentrate on the major event that took place in our contemporary history after World War II: the Russia-Ukraine conflict. Once we had identified the problem, it came naturally to us to ask how the institutions and organizations working in this region are responding to the commission of war crimes. And this is why we have produced this research.

We have interrogated ourselves wondering why the EU, which has no jurisdiction over war crimes, should be considered, as one of the main actors, in this topic. The answer came by itself, considering that, even though EU Institutions have no right to judge war crimes, they have – as one of the main scopes – the implementation of "*a common foreign and security policy including the progressive framing of a common defence policy, which might lead to a common defence in accordance with the provisions of*

Article 42, thereby reinforcing the European identity and its independence in order to promote peace, security and progress in Europe and in the world" (TEU, 2007).

We already know how European Institutions are dealing with war crimes, as we know why they are considered active in facing the problem: they, on behalf of the citizens that composed the EU itself, don't want to leave the perpetrators of crimes that are universally recognized as such unpunished. This is the reason behind the activism of the EU as a global actor, this is the *raison d'être* of the organization that wants to give guarantees to its people. However, even though we have recognized a positive attitude of this entity in mobilizing toward the protection of human rights, we feel that this is not enough.

To us, everything should begin with asking "how can EU institutions prevent the commission of war crimes within the European territory?" just in order to develop our own theory that is precise and firm on one hypothetical scenario that may develop over time.

We do believe that EU institutions should have more power when talking about wars, precisely, we think that the EU should have exclusive political decisional power when facing threats to the EU Member States' security. Attributing this power to the organisation, could be only possible if Member States abdicate part of their sovereignty and decide to hand it over into the hands of the EU.

Precisely, we would suggest Member States to let the EU decide over the warfare field, so that in cases of threats to the organization itself, the EU will have the possibility to act autonomously. In this scenario, there will not be several different political choices from the States, but the EU would be perceived as one unit, one block acting following specific rules.

However, we already have a similar policy inside the EU rules of establishment, considering that the European Council can make decisions on foreign policies just when having the consent of all the Member States. In fact, it can act with diplomacy and respect for international norms while collaborating with other international actors around the globe in order to fulfill the mission of peace and security (EU, 2024). We suggest improving this rule, adding in the TEU and TFEU a specific provision that explicitly describes how the decision power will be divided when a war scenario occurs. Of course, to do so, we need to reform the most important Treaties on which the EU is based and create an additional document that should be signed by all Members.

Article 4 TEU (2007) recognizes that States are the only ones responsible for their national security, and have also the duty to maintain law. However, Article 5 TEU, establishes that "*the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein*". Moreover, Article 2 TFEU (2007) states that the Union has the competence

to "*define and implement a common foreign and security policy, including the progressive framing of a common defence policy*".

On this point, we want to focus our attention on affirming that, since we already have an article that mentions the importance of the EU in legislating and deciding over common foreign and security policy, we believe that we should improve and strengthen this provision in specifying which are the cases that are included under this scenario. Precisely, we want the EU to declare that in case of a specific attack towards the Union, the organization itself has some specific norms and rules to follow mandatory, one of these includes the realization of a Union Common Defence. Article 4 TFEU, indeed, lists specific fields where the EU has exclusive competence, enumerating, among others, at point (j) also the "*area of freedom, security and justice*". We feel the need to add, in this specific list, also another case, the one of warfare, in which the EU is giving direct mandate from the Member States to act when needed.

Having studied the Russia-Ukraine conflict allowed us to understand that, even if there is a common policy and a precise guideline that all States must follow, bilateral relationships can always differ. This is the case of Germany, which took a while to decide to send weapons to Ukraine, because of the history behind it with Russia; the case of France, which from the very beginning appeared strict and willing to use a hard line against the Kremlin; and the case of Italy, supporting and financing Ukraine, remarking its will to not be involved in the armed conflict.

We now ask the reader: what would happen if the EU would not allow these countries to react (more or less) autonomously and if, instead, the EU would require all Members to act in the same way? Whether this is totally neutral or interventionist in nature, does not matter.

We wonder if the new vision of a European Union, as one block, would represent a deterrent to starting or continuing a war, knowing that the direct effects would lead to a homogenous and unequivocal response from the other side. This is directly linked with the prevention of the commission of war crimes. Our scope is to find a way to discourage the beginning of war to safeguard citizens from the consequences that the war can bring. In this case, with less room for States to act, their accountability and responsibility for the happening of war crimes will be smaller, and the strategy of acting towards threats would be just under the accountability of the EU itself.

This is why, we strongly believe that a common defence should finally be created, so that the EU could become a competitive global actor, also from the military point of view. This would mean having another method to face threats that would come directly from our force, without involving NATO. Of course, this would not directly prevent the commission of war crimes, but it would strengthen the power of the EU globally and, perhaps, could represent an additional limit for the State that decides to declare

war in Europe. This theory can also be confirmed by what is written on the official website of the European Union External Action of the EU, which affirms that "*there is a growing demand for the European Union to become more capable, more coherent and more strategic as a global actor*" (EU, 2022). In fact, already in 2017, French President, Emmanuel Macron gave a speech at the Sorbonne in which he mentioned specific forces recognized as threats to the EU: nationalism, identitarians, protectionism, isolationist sovereignty. What he states seems fundamental to support our argument and, for this reason, we want to report his words here: "*It is up to us, to you, to map out the route which ensures our future […] The route of rebuilding a sovereign, united and democratic Europe. […] The Europe of today is too weak, too slow, too inefficient, but Europe alone can enable us to take action in the world, in the face of the big contemporary challenges*" (Macron, 2017).

His words resonate like an echo in our heads and convince us even more of our theory, which is based on two foundations: Common Defense and more power to the European Union. Maybe, this can be summed up as a declaration of independence from NATO. However, although we honor and thank it for the work it has done, we believe that the EU should have a solid foundation on which to build its independence, under several aspects. Just as the President said "*We cannot blindly entrust what Europe represents, on the other side of the Atlantic or on the edges of Asia. It is our responsibility to defend it and build it within the context of globalization*" (Macron, 2017). Moreover, recently, in April 2024 Macron reiterated its theory, precisely based on the developments in the war in Ukraine, affirming that the EU should become a 'world leader' by 2030 (Macron, 2024).

In sum, it seems that both our two arguments, the exclusive power of the EU in warfare and the Common Defence, lead to answering our research question. We truly believe that, in order to find a way for European Institutions to fight war crimes within the European Region, we need to improve the power given to them, in the way we have previously explained.

We strongly support European sovereignty and its power to defend the human rights of its citizens. Furthermore, we completely agree with what the ex-UN Secretary-General Ban Ki-Moon stated when talking about new perspectives of ensuring the recognition of human rights to people. He mentioned the concept of sovereignty affirming that "*In today's world, the less sovereignty is viewed as a wall or a shield, the better our prospects will be for protecting people and solving our shared problems*" (UN, 2015).

In conclusion, we underline that at the basis of this analysis there is a firm conviction that times have changed, and, in our opinion, it is the moment that the positions of the Heads of State also evolve. It is no longer important to assert one's national supremacy to feel oneself the master of the world or to

participate in the game of hegemony. What should be at the center of all concern today is the lack of respect for International Criminal Law, International Humanitarian Law, and Human Rights Law. Only a lucid awareness of this new war we are fighting will allow the 'powerful' to understand that, perhaps, the time has come to surrender some of their power in favor of fighting a greater enemy: not Russia, China, or any country that wants to impose itself on the others, but the affront to democracy and the recognition of human rights as naturals.

BIBLIOGRAPHY

BOOKS

Belloni R., Moschella M., Sicurelli D. (2013). *Le organizzazioni internazionali. Struttura, funzioni, impatto*, il Mulino, Bologna.

Boemeke M. F. & Feldman G. D. & Glaser E. (1998). *The Treaty of Versailles: A Reassessment after 75 Years*. German Historical Institute, Cambridge University Press.

Cassese A. & Gaeta P. & Jones J. (2002). *The Rome Statute of the International Criminal Court: A Commentary*. *Vol. 1,2*, Oxford.

Henckaerts J.M. & Doswald-Beck L. (2005). *Customary International Humanitarian Law, Volume I: Rules, in ICRC*. Cambridge University Press.

Kelsen H. (1944). *Peace through Law*, The University of North Carolina Press.

Kennan G.F. (1989). *At a Century's Ending: Reflections 1982-1995*. W.W. Norton & Company, New York.

Kennedy D. (2018). *A World of Struggle: How Power, Law and Expertise Shape Global Political Economy*. Princeton University Press, Princenton and Oxford.

Martel G. (1998). *A Comment*, in Boemeke M. F., Feldman G. D., Glaser E., eds. *The Treaty of Versailles: A Reassessment after 75 Years*. Cambridge, UK: Cambridge University Press.

Myers D. P. & Schmitt B. E. (1947). *The Treaty of Versailles and after: annotations of the text of the treaty*. U.S., G. P. O., Waschington.

Porchia O. (2008). *Principi dell'ordinamento europeo. La cooperazione pluridirezionale*. Zannichelli, Bologna.

Scheingold S. A. (1976). *Rule of Law in European Integration: Path of the Schuman Plan*. Greenwood Press, London.

Sharp A., (1991). *The Versailles Settlement: Peacemaking in Paris*. Palgrave, New York.

Skander Galand A. (2019). *UN Security Council Referrals to the International Criminal Court: Legal Nature, Effects and Limits*. Brill, Cambridge University Press.

Toggenburg G. & Grimheden J. (2016). *The Rule of Law and the Role of Fundamental Rights. Seven Practical Pointers*, in Closa C. & Kochenov D. (2016) *Reinforcing Rule of Law Oversight in the European Union, from Part II – Proposing New Approaches*, Cambridge University Press.

Van Der Lijn J. & Briscoe I. & Drent M., Homan K. & Van Der Putten F.P. & Zandee D. (2015). *A Comparison of organizational links for peacekeeping operations*, in *Peacekeeping Operations in a changing world*. Clingendael Institute.

Ziller J. (2008). *Il nuovo Trattato Europeo: un viaggio a Lilliput?*, in Bassanini F., Tiberi G. (2008). *Le nuove istitutioni Europee. Commento al Trattato di Lisbona*. Il Mulino, Bologna.

ARTICLES

Andersson J. J. & Cramer C. S. (2023). *The Russian war of Aggression*, in *EUISS Yearbook of European Security*, *European Union Institute for Security Studies*, pp. 16-18.

Bellot H.L., (1916). *War Crimes: Their Prevention and Punishment*, in *Problems of the War, Papers before the Society in the Year 1916*, pp. 31-55.

Brower C. N. (2009). *The evolution of the International Judiciary: Denationalization Through Jurisdictional Fragmentation*, in *Proceedings of the Annual Meeting (American Society of International Law)*, Vol. 103. International Law as Law, pp. 171-186.

Creta V. M. (1998). *Comment: The search for justice in the former Yugoslavia and beyond*, in *Houston Journal of International Law*, in Meernik J. (2003). *Victor's Justice or the Law? Judging and punishing at the International Criminal Tribunal for the Former Yugoslavia*, Department of Political Science, University of North Texas, pp. 140-162.

Duke S. & Vanhoonacker S. (2016). *EU-NATO relations. Top-down strategic paralysis, bottom-up cooperation*, in Chappell L. & Mawdsley J., Petrov P. (2016). *The EU, Strategy and Security Policy*. Routledge, pp. 153-168.

Englehart N.A. (2009). *State Capacity, State Failure, and Human Rights*, in *Journal of Peace Research*. Department of Political Science, Bowling Green State University, pp. 163-180.

Fix L. & Keil S. (2022). *NATO and Russia after the Invasion of Ukraine*. Policy Brief, in *The German Marshall Fund of the United States, Strengthening Transatlantic Cooperation*, April, pp. 2-10.

Frulli M. (2001). *Are Crimes Against Humanity More Serious Than War Crimes?*, in *European Journal of International Law*, pp. 329-350.

Giuglietti L. (2022). *Beyond the Third Declaration: scenarios for EU-NATO cooperation*, in *College of Europe Policy Brief*, January, pp. 1-20.

Groussot X. & Zemskova A. (2022). *The Manifestations of the EU Role of Law and its Contestability: Historical and Constitutional Foundations*, in *Journal of Constitutional History*, pp. 1-21.

Kaldor M. (2022). *NATO and Human Security*, in *NATO Defence College, Policy Brief*, No. 01, January, pp. 1-5.

King Jr H. T. (2002). *The Legacy of Nuremberg*, in *Case Western Reserve Journal of International Law*, Vol. 34, pp. 335-356.

Kochavi A. (1943). *The Moscow Declaration, the Kharkov Trial, and the Question of Policy on Major War Criminals in the Second World War*, in *History*, October 1991, Vol. 76, No. 248, pp. 401-417.

Kochavi A. (1998). *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment, Working Paper No. 77*, in *Leuven Center for Global Governance Studies*, pp. 3-67.

Kolstø P. (2023). *Ukrainians and Russians as 'One People': An Ideologeme and its Genesis*, in Taylor & Francis, University of Oslo, Norway, August, pp. 2-21.

Lenaerts K. (2020). *New Horizons for the Rule of Law Within the EU*, in *German Law Journal, Volume 21, Special Issue1: 20 Challenges in the EU in 2020*, Cambridge University Press, pp. 25-63.

Lu C. (2002). *Justice and Moral Regeneration: Lessons from the Treaty of Versailles*, in *International Studies Review*, Autumn, Vol. 4, *No. 3*, pp. 3-25.

Manner G. (1943). *The Legal Nature and Punishment of Criminal Acts of Violence Contrary to the Laws of War*, in *The American Journal of International Law*, Vol. 37, *No. 3*, pp. 407-435.

McFaul M. & Person R. (2022). *What Putin Fears Most*, in *Horizons: Journal of International Relations and Sustainable Development, No. 21*, pp. 28-39.

Meernik J. (2003). *Victor's Justice or the Law? Judging and Punishing at the International Criminal Tribunal for the Former Yugoslavia*, in *Journal of Conflict Resolution, Vol. 47 No. 2*, pp. 140-162.

Meister S. & Jilge W. (2023). *After Ostpolitik: A New Russia and Eastern Europe Policy Based on Lessons from the Past*, in *DGAP Analysis, in German Council on Foreign Relations, No. 2, April*, pp. 2-34.

Meron T. (2006). *Reflection on the Prosecution of War Crimes by International Tribunals*, in *American Journal of International Law*, Cambridge University Press, Vol. 100, No. 3, pp. 551-579.

Oziah K. (2013). *Treaty of Versailles, The Road to Hitler*, American Military University, pp. 1-10.

Rehrl J. (2015). *Invoking the EU's Mutual Assistance Clause. What it says, what it means*. EU Strategy and foreign policy, European Defence/NATO, in *Royal Institute for International Relations* (Egmont Institute).

Reydams L. & Wouters J. (2011). *The Politics of Establishing International Criminal Tribunals, Working Paper No. 77*, in *Leuven Centre for Global Governance Studies*, pp. 3-69.

Schabas W. A. (1998). *The International Criminal Court: An Historic Step to Combat Impunity*, in *Refugee: Canada's Journal on Refugees, Vol. 17, No. 3*, in *Current Issues in Refugee and Human Rights Policy and Research, in Refuge: Canada's Journal on Refugees*, pp. 21-29.

Schwarz A. (2014). *War Crimes*, in *Oxford Public International Law*, Oxford University Press.

Silber N. & Miller G. (1993). *Toward 'Neutral Principles' in the Law: Selections from the Orla History of Herbert Wechsler*, in Meron T. (2006). *Reflections on the Prosecution of War Crimes by International Tribunals*, in *The American Journal of International Law, Jul., Vol. 100, No 3*, pp. 551-579.

Simonet L. (2023). *The third EU-NATO Joint Declaration: Was it Worth the delay?*, in *OIIP – Austrian Institute for International Affairs*, pp. 2-19.

Simpson G. (2009). *Revisiting the Tokyo War Crimes Trial*, in *Pacific Historical Review, Vol. 78, No. 4*, University of California Press, pp. 608-613.

Walkinshaw R. B. (1949). *The Nuremberg and Tokyo Trials: Another Step Torward International Justice*, in *American Bar Association Journal, Vol. 35, No. 4*, pp. 299-363.

Welch C. E. & Watkins A. F. (2022). *The Coalition for the International Criminal Court*, in *Human Rights Quarterly, Vol. 33, No. 4*, pp. 927-1031.

Wood D. (2023). *A Year After Russia Invaded Ukraine, What Does This War Teach Us?*, in *The Heritage Foundation*.

INTERNATIONAL AND EUROPEAN LAW INSTRUMENTS

Agreement between the International Criminal Court and the European Union on cooperation and assistance, 28.4.2006 in https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A22006A0428%2801%29.

Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, London Charter, 8 August 1945, in https://ihl-databases.icrc.org/en/ihl-treaties/nuremberg-tribunal-charter-1945.

Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 1919, in https://assets.cambridge.org/97811087/29086/excerpt/9781108729086_excerpt.pdf.

Communication From the Commission to the European Parliament and the Council – A New EU Framework to Strengthen the Rule of Law, COM/2014/0158, in https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52014DC0158.

Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Strengthening the Rule of Law

within the Union, A Blueprint for Action, COM/2019/343, in https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM%3A2019%3A343%3AFIN.

Convention for the Creation of an International Criminal Court, Geneva, 16 November 1937, in https://legal.un.org/avl/pdf/ls/RM/LoN_Convention_for_ICC.pdf.

Convention Relative to the Treatment of Prisoners of War, 27 July, 1929, in https://ihl-databases.icrc.org/en/ihl-treaties/gc-pow-1929.

Council Conclusions on the International Criminal Court on the occasion of the 25th anniversary of the adoption of the Rome Statute, 11082/23, in https://data.consilium.europa.eu/doc/document/ST-11082-2023-INIT/en/pdf#:~:text=THE%2025TH%20ANNIVERSARY%20OF%20THE%20ADOPTION%20OF%20THE%20ROME%20STATUTE,-1.&text=Today%2C%20the%20Council%20reiterates%20its,the%20Court%20since%20its%20inception.

Council Decision 2011/168/CFSP of 21 March 2011 on the International Criminal Court and repealing Common Position 2003/444/CFSP, in https://eur-lex.europa.eu/eli/dec/2011/168/oj.

Council of the European Union, 16936/14, Press Release, 3362nd Council Meeting, General Affairs, Brussels, 16 December 2014, in https://data.consilium.europa.eu/doc/document/ST-16936-2014-INIT/en/pdf.

Council Regulation (EU) No. 833/2014 of 13 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, in https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014R0833.

Declaration on European Identity, 15 December 1973, in https://www.cvce.eu/content/publication/1999/1/1/02798dc9-9c69-4b7d-b2c9-f03a8db7da32/publishable_en.pdf.

European Council, EUCO 1/23, Conclusions 9 February 2023, in https://www.consilium.europa.eu/en/press/press-releases/2023/02/09/european-council-conclusions-9-february-2023/.

European Council, EUCO1/23, 9 February 2023, in https://data.consilium.europa.eu/doc/document/ST-1-2023-INIT/en/pdf.

European Parliament Resolution of 8 July 2021 on the EU Global Human Rights Sanctions Regime (EU Magnitsky Act), 2021/2563(RSP)), in https://www.europarl.europa.eu/doceo/document/TA-9-2021-0349_EN.html.

Geneva Convention Additional Protocol I, 1977, in https://ihl-databases.icrc.org/en/ihl-treaties/api-1977.

Geneva Protocol on the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 1925.

Interim Report of the Independent Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UN Doc. S/25274 (1993), in https://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf.

International Conference on Military Trials: London, 1945. Memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General, January 22, 1945, in Yale Law School, Lillian Goldman Law Library, https://avalon.law.yale.edu/imt/jack01.asp.

International Military Tribunals For the Far East, Judgement 253, in https://crimeofaggression.info/documents/6/1948_Tokyo_Judgment.pdf.

Moscow Declaration, Statement on Atrocities, 1 November, 1943, in https://www.cvce.eu/en/obj/moscow_declaration_on_atrocities_1_november_1943-en-699fc03f-19a1-47f0-aec0-73220489efcd.html.

Potsdam Declaration, Potsdam, July 26, 1945, in https://www.legal-tools.org/doc/f8cae3/.

Recommendation 1408 (1999) of the Parliamentary Assembly of the Council of Europe on International Criminal Court in https://pace.coe.int/en/files/16709/html.

Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, in https://eur-lex.europa.eu/eli/reg/2020/2092/oj.

Report from the Commission to the Council and the European Parliament EU Anti-Corruption Report, COM/2014/038/ in https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A52014DC0038.

Rome Statute of the International Criminal Court, A/CONF. 183/9, 1998, in https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf.

Statute of the Council of Europe, London, 1949, in https://rm.coe.int/1680306052.

The Covenant of the League of Nations, 1919 in www.ungeneva.org.

Treaty of Lisbon, 2007, in https://www.europarl.europa.eu/about-parliament/en/in-the-past/the-parliament-and-the-treaties/treaty-of-lisbon.

Treaty of Paris, 1951, in https://www.europarl.europa.eu/about-parliament/en/in-the-past/the-parliament-and-the-treaties/treaty-of-paris.

Treaty of Versailles, 1919, in https://www.census.gov/history/pdf/treaty_of_versailles-112018.pdf.

Treaty on European Union, 1992, in https://eur-lex.europa.eu/EN/legal-content/summary/treaty-of-maastricht-on-european-union.html#:~:text=It%20was%20signed%20on%207,previous%20communities%20a%20political%20dimension.

United Nations Charter, 1945, in https://www.un.org/en/about-us/un-charter/full-text.

OTHER SOURCES

Cassese A., *Opinion, Prosecutor v. Tadic*, 27 January 2000, available in https://www.cambridge.org/core/journals/american-journal-of-international-law/article/abs/prosecutor-v-tadic/258FD10DB2479D4DD0BBF036EFBA8681.

Clapp S. & Verhelst A., (2022). *A Comparative analysis of Article 5 Washington Treaty (NATO) and Article 42(7) TEU (EU)*, European Parliament, Members' Research Service PE 739.250, December.

Council of Europe (2023). *Report of the Secretary General of the Council of Europe, State of Democracy, Human Rights and the Rule of Law, An Invitation to Recommit to the Values and Standards of the Council of Europe*.

Council of Europe, (2014). Directorate General Human Rights and Rule of Law, *Practical Impact of the Council of Europe monitoring mechanisms in improving respect for human rights and the rule of law in Member States*.

Deen B. & Zandee D. & Stoetman A. (2022). *Uncharted and uncomfortable in European defence. The EU's mutual assistance clause of Article 42(7)*, in *Clingendael Report, in Netherlands Institute of International Relations*, January.

Delledonne G. (2016). *Homogeneity and Constitutional Diversity in the EU: Protecting Fundamental Rights and the Rule of Law.*

Elsea J. K. (2024). *War Crimes: A primer*, in *Congressional Research Service*, Legal Sidebar, February 2, in https://crsreports.congress.gov/product/pdf/LSB/LSB10709.

EU factsheet, *EU action in support of Ukraine*, 19 March 2024.

EU factsheet, *EU sanctions against Russia following the invasion of Ukraine*, #StandWithUkraine, February 2024.

Eurlex, Regulation No. 833/2014 in https://eur-lex.europa.eu/IT/legal-content/summary/eu-restrictive-measures-in-view-of-russia-s-invasion-of-ukraine.html.

Eurojust (2017). *Digest of the European Court for Human Rights jurisprudence on core International Crimes*, The Hague, September.

European Council (2024). Council of the European Union, Council configurations, *Foreign Affairs Council Configuration FAC,* in https://www.consilium.europa.eu/en/council-eu/configurations/fac/.

Gazzetta Ufficiale della Repubblica Italiana, *Decreto-Legge 23 settembre 2022, n. 144*, in https://www.gazzettaufficiale.it/eli/id/2022/09/23/22G00154/sg.

German Observation on the Conditions of Peace, (1919), in the *Treaty of Versailles and After: Annotations of the Text of the Treaty* (Washington, D.C.: U.S. Department of State, 1947).

Jackson R. H. (1945). *Opening Statement before the International Military Tribunal*, Nov. 21, Palace of Justice at Nuremberg in *Robert H. Jackson Center.*

Joint Declaration on EU-NATO Cooperation by the President of the European Council, the President of the European Commission and the Secretary-General of the NATO, 10 January 2023.

Papers relating to the Foreign Relations of the United States, the Paris Peace Conference. (1919). Volume VI, 185.1/269 in https://history.state.gov/historicaldocuments/frus1919Parisv06/d93.

Pictet J. S. (1949). *Commentary on The Geneva Conventions, IV Geneva Convention relative to the Protection of Civilian Persons in Time of War,* August 12.

Reply of the Allied and Associated Powers, (1919), in *The Treaty of Versailles and After*.

The Council of Europe's member States (2016), in *Luxembourg Centre for Contemporary and Digital History*, in CVCE European Navigator, in Uni.Lu.

The treaty of peace with Germany; official summary of terms presented to German delegates at Versailles and special articles, League of Nations and Covenant for world labor, (1919). Vol. 34, Brooklyn NY: The Brooklyn Daily Eagle.

Trial of the Major War Crime Before the International Military Tribunal Judgment, 1945.

UN Office of Genocide Prevention and the Responsibility to Protect, Elements of the Crime, in https://www.un.org/en/genocideprevention/war-crimes.shtml.

Zandee D. & Dijkman M. (2023). *The EU and Ukraine Towards a new security and defence relationship*, in *Clingendael,* Netherlands Institute of International Relations, September.

ONLINE SOURCES

Anadolu Anjansi, *Germany's Scholz defends decision not to send Taurus missiles to Ukraine, Chancellor tells lawmakers he is against sending any weapon systems which necessitates involvement of German soldiers*, Q&A Parliament Session, March 2024, in https://www.aa.com.tr/en/europe/germany-s-scholz-defends-decision-not-to-send-taurus-missiles-to-ukraine/3163581.

ANSA Italia, *Putin, Negoziati se ritiro Kiev 4 regioni e rinuncia a NATO, Donetsk, Lugansk, Zaporizhzhia e Kherson*, in June 2024, in https://www.ansa.it/sito/notizie/topnews/2024/06/14/putin-negoziati-se-ritiro-kiev-4-regioni-e-rinuncia-a-nato_ce94fa5e-bb6a-4582-9fc6-3a5caad7e3c1.html.

Antenne Bayern, *Nachrichten, Deutschland, Kanzler Scholz zu Ukraine-Entscheidung: "Sicher, dass es nicht zur Eskalation beiträgt"*, June 2024, in https://www.antenne.de/nachrichten/deutschland/kanzler-scholz-zu-ukraine-entscheidung-sicher-dass-es-nicht-zur-eskalation-beitraegt.

BBC, *NATO alliance experiencing brain death*, says Macron, 7 November 2019, in https://www.bbc.com/news/world-europe-50335257.

Bundesregierung, *The Federal Government, Germany4Ukraine, War in Ukraine, The arms and military equipment Germany is sending to Ukraine*, 14 June 2024, in https://www.bundesregierung.de/breg-en/news/military-support-ukraine-2054992.

Burns's Memo to Secretary of State Condoleezza Rice, Congressional Record Volume 168, No. 27, February 10, 2022, in https://www.govinfo.gov/content/pkg/CREC-2022-02-10/html/CREC-2022-02-10-pt1-PgS632-2.htm.

Canestrini N., *Centro Studi per la Pace, Giurisdizioni Internazionali, CPI ed imparzialità della giustizia* in www.studiperlapace.it.

Caulcutt C., *Macron warns Europe 'can die' in alarmist speech on protectionism, geopolitical threats. Macron reiterated calls for a third way between the U.S. and China, saying Europe must show that "it's never going to be a vassal for the United States"*, in Politico EU, April 2024, in https://www.politico.eu/article/emmanuel-macron-europe-china-competition-protectionism-geopolitics/.

Committee of Legal Advisers on Public International Law, in Council of Europe, The CAHDI, in https://www.coe.int/en/web/cahdi.

Council of Europe, in www.coe.int.

Council of European Union, in European Institutions, in European Union Official Website, in www.europeanunion.europa.eu.

Dirsus M. (2022). *Why Germany Behaves the way it does*, in *Texas National Security Review*, https://warontherocks.com/2022/02/why-germany-behaves-the-way-it-does/.

Élysée, *President Macron gives speech on new initiative for Europe, Speech on new Initiative for Europe*, September 2017, in https://www.elysee.fr/en/emmanuel-macron/2017/09/26/president-macron-gives-speech-on-new-initiative-for-europe.

Encyclopaedia Treccani, Patto di Varsavia, 2011, in https://www.treccani.it/enciclopedia/patto-di-varsavia_(Dizionario-di-Storia)/.

European Commission, Rule of Law, Rule of Law Mechanism, in https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism_en#:~:text=The%20European%20Rule%20of%20Law%20Mechanism%20provides%20a%20process%20for,foundation%20of%20this%20new%20process.

European Council, Press release, *Joint Declaration on EU-NATO Cooperation*, 19 January 2023 in https://www.consilium.europa.eu/en/press/press-releases/2023/01/10/eu-nato-joint-declaration-10-january-2023/.

European Union External Action, The Diplomatic Service of the European Union, *EEAS, Military CSDP Capabilities*, Strategic Communications, March 2022, in https://www.eeas.europa.eu/eeas/military-csdp-capabilities_en.

European Union, Priorities and actions, Actions by topic, *Foreign and Security Policy*, 2024, in https://european-union.europa.eu/priorities-and-actions/actions-topic/foreign-and-security-policy_en.

Frulli M., *Diritto Internazionale Penale*, 2019, in *Treccani Enciclopedia*.

Gigova R., *Putin warns Russia could arm enemies of Western nations supplying weapons to Ukraine*, in CNN, June 2024, in https://edition.cnn.com/2024/06/05/europe/putin-russia-western-nations-ukraine-intl-hnk/index.html.

Hellemann A., *Ukraine darf mit deutschen Waffen auf Ziele in Russland feuern*, in Bild, May 2024, in https://www.bild.de/politik/krieg-in-der-ukraine-scholz-erlaubt-waffeneinsatz-auf-russische-gebiete-66598d39c78b1a7505f8e306.

Hill F., *Putin Has the U.S. Right Where He Wants It*, in The New York Times, January 2022, in https://www.nytimes.com/2022/01/24/opinion/russia-ukraine-putin-biden.html.

Hoffman D., *Putin Says 'Why Not?' to Russia Joining NATO*, Washington Post, 6 March 2000, in https://www.journalofdemocracy.org/articles/what-putin-fears-most/#f4.

Human Rights Watch, *Ukraine: Apparent War Crimes in Russia – Controlled Areas, Summary Executions, Other Grave Abuses by Russian Forces*, April 2022, in https://www.hrw.org/news/2022/04/03/ukraine-apparent-war-crimes-russia-controlled-areas#:~:text=(Warsaw)%20%E2%80%93%20Human%20Rights%20Watch,and%20Kyiv%20regions%20of%20Ukraine.

Il Sole 24 ore, *La guerra in Europa, Ucraina, la NATO e l'uso delle armi in Russia. Da Meloni a Salvini: ecco le posizioni del governo*, May 2024, in https://www.ilsole24ore.com/art/ucraina-nato-e-l-uso-armi-russia-meloni-salvini-ecco-posizioni-governo-AGMDuHH.

International Criminal Court, News, Press Release, *Situation in Ukraine: ICC judges issue arrest warrant against Sergei Ivanovich Kobylash and Viktor Nikolayevich Sokolov*, March 2024, in https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-sergei-ivanovich-kobylash-and.

ISPI 90, *Due anni di Guerra in Ucraina: cosa pensano gli italiani? La percezione del conflitto del nostro paese è molto cambiata dopo due anni di guerra: ecco cosa emerge dall'ultimo sondaggio ISPI realizzato da Ipsos*, February 2024, in https://www.ispionline.it/it/pubblicazione/due-anni-di-guerra-in-ucraina-cosa-pensano-gli-italiani-164345.

Jungholt T., *Militärischer Abschirmdienst ermittelt wegen möglicher russischer Spionage bei Luftwaffe*, in Welt, March 2024, in https://www.welt.de/politik/ausland/article250367898/Geleaktes-Gespraech-Ministerium-prueft-ob-Kommunikation-abgehoert-wurde.html.

Kyiv's Post, *Kyiv's Use of German weapons to Strike Targets Inside Russia "Won't Lead to Escalation", Scholz Says, The Chancellor mentioned that the decision to allow Kyiv to use German weapons was carefully considered in collaboration with Germany's "friends and allies"*, June 2024, in https://www.kyivpost.com/post/33746.

Lucas E., *Germany: Exporting Irresponsibility, Scholz's dithering harms Ukraine, Germany, and the West*, January 2023, in CEPA, Center for European Policy Analysis, in https://cepa.org/article/scholz-refusal-to-send-tanks-harms-ukraine-germany/.

Meister S., *Germany and Russia's War of Aggression against Ukraine: The Third Year*, in DGAP, in German Council of Foreign Relations, April 2024, in https://dgap.org/en/research/publications/germany-and-russias-war-aggression-against-ukraine-third-year.

Ministère de l'Europe et des affaires étrangères, Liberté, Égalité, Fraternité, France Diplomacy, Country Files, *War in Ukraine; France's diplomatic action*, 2022, in https://www.diplomatie.gouv.fr/en/country-files/ukraine/situation-in-ukraine-what-is/.

Ministère Des Armées, Liberté, Égalité, Fraternité, *French Military Equipment Delivered to Ukraine*, March 2024, in https://www.defense.gouv.fr/en/news/french-military-equipment-delivered-ukraine.

Ministero degli Affari Esteri e della Cooperazione Internazionale, Politica Estera e Cooperazione allo sviluppo, Focus geografici, Europea, *L'Italia a sostegno dell'Ucraina*, 2024, in https://www.esteri.it/it/politica-estera-e-cooperazione-allo-sviluppo/aree_geografiche/europa/litalia-a-sostegno-dellucraina/.

NATO official website, *Founding Treaty*, in www.nato.int.com.

NATO official website, in What we do, *De-bunking Russian disinformation on NATO*, 12 January 2024, in https://www.nato.int/cps/en/natohq/115204.htm.

NATO official website, in What we do, *Relations with the European Union*, June 2024, in https://www.nato.int/cps/en/natohq/topics_49217.htm.

NATO official website, Joint Declaration on EU-NATO Cooperation by the President of the European Council the President of the European Commission, and the Secretary General of the North Atlantic Treaty Organization, January 2023, in https://www.nato.int/cps/en/natohq/official_texts_210549.htm#:~:text=We%20recognise%20the%20value%20of,security%20in%20Europe%20and%20beyond.

OHCHR, UN Commission concludes that war crimes have been committed in Ukraine, express concern about suffering of civilians, in UN official website, September 2022, in https://www.ohchr.org/en/press-releases/2022/10/un-commission-concludes-war-crimes-have-been-committed-ukraine-expresses.

Reuters, *Ukraine can use German weapons against Russian border strikes, Berlin says*, May 2024, in https://www.reuters.com/world/europe/ukraine-can-use-german-weapons-defend-kharkiv-border-region-berlin-says-2024-05-31/.

Speech and the Following Discussion at the Munich Conference on Security Policy, in President of Russia, 2007, in http://en.kremlin.ru/events/president/transcripts/24034.

Statista, Wirtschaft & Politic, *Wie bewerten Sie folgenden Reaktionen der deutschen Politik auf den Krieg in der Ukraine?*, 2024 in https://de.statista.com/statistik/daten/studie/1312216/umfrage/umfrage-deutsche-ukraine-politik/.

United Nations, Meetings Coverage and Press Releases, Security Council, *Prospects for Protecting People Improve When Sovereignty Not Viewed as 'Wall or Shield', Secretary-General Tells Security Council in Ministerial Debate, Nearly 80 Speakers Consider Charter's Role in Peace, Security Maintenance*, February 2015, in https://press.un.org/en/2015/sc11793.doc.htm.

YouGov Deutschland, *Deutschland liefert derzeit keine "Taurus"-Marschflugkörper an die Ukraine. Bundeskanzler Olaf Scholz ist gegen die Taurus-Lieferung, da er eine Kriegverwicklung Deutschlands befürchtet. Teilen Sie die Einschätzung von Olaf Scholz oder tun Sie dies nicht?*, March 2024, in https://yougov.de/topics/society/survey-results/daily/2024/03/17/3beca/2.

Zapatero, L.A., *Criminology of War and Criminal Policy of the European Union*, in *RED Volume 5*, January 2023, in https://www.cairn-int.info/journal-red-2023-1-page-14.htm.

JUDGEMENTS

Case C-286/90, *Anklagemyndigheden v. Peter Michael Poulsen & Diva Navigation Corp.*, ECLI:EU:C:1992:453, in https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61990CJ0286.

Case C-64-16, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, in https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016CC0064.

Case C-156/21, *Hungary v. Parliament and Council*,

in https://curia.europa.eu/juris/documents.jsf?num=C-156/21.

Case C-55508/07 and 29520/09, *Janowiec and Others v. Russia*,

in https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-2123%22]}.

Case C-36376/04, *Konovov v. Latvia*, in https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-946%22]}.

Case C-157/21, *Poland v. Parliament and Council*,

in https://curia.europa.eu/juris/documents.jsf?num=C-157/21.

Case C-26/62, *Van Gend en Loos v. Netherlands*, ECLI:EU:C:1963:1,

in https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61962CJ0026.