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The Role and Impact of the OSCE Moscow Mechanism Reports Following the Russian Invasion of Ukraine

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SANCIN, Vasilka. The Role and Impact of the OSCE Moscow Mechanism Reports Following the Russian Invasion of Ukraine. *International and Comparative Law Review*, 2023, vol. 23, no. 1, pp. 210–227. DOI: 10.2478/iclr-2023-0009

Summary: The OSCE Moscow Mechanism is one of the generally little-known mechanisms, established in 1991 to facilitate resolution of a particular question or problem relating to the human dimension of the OSCE. This article aims to highlight its role and significant potential to identify relevant patterns of behaviour supported by collected information and evidence on violations of international humanitarian and human rights law in situations that need urgent attention by the international community. Its flexibility and short reactionary time serves to promptly document developments and make them publicly available to inform further actions. At the same time, the mechanism in practice encounters a number of challenges, such as lack of cooperation from the States "under investigation", very short missions' deadlines for submission of their findings and rather limited (technical) support by the designated OSCE Institution, the ODIHR. This article discusses the mechanism as such and then looks into the two of its reports from 2022 concerning the situation following the Russian invasion of Ukraine and their impact within the OSCE and beyond. It provides some general conclusions and suggestions on possible improvements of the mechanism going forward.

Keywords: Organization for Security and Cooperation in Europe (OSCE), Moscow Mechanism, international humanitarian law, international human rights law, war crimes, crimes against humanity, accountability, Ukraine, Russian Federation.

1 Introduction

The Organization for Security and Co-operation in Europe (OSCE) was created on January 1, 1995,[2] through the transformation of the Conference on Security and Co-operation in Europe (CSCE). However, the documents adopted at the CSCE summit in Budapest on December 5–6, 1994,[3] demonstrate that States did

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2 After the decision to this effect was adopted at the Budapest Summit of Heads of State or Government in December 1994. See OSCE History. [online]. Available at: <https://www.osce.org/who/87> Accessed: 26 March 2023.

3 The 1994 CSCE Budapest Document: Towards a Genuine Partnership in a New Era. Available at: <https://www.osce.org/files/f/documents/5/1/39554.pdf> Accessed: 26 March 2023.

Published by Palacký University Olomouc, Czech Republic, 2023.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

not intend to change the legal status of the entity or its institutions nor to conclude an agreement to create an international legal person – a full-fledged international organization.[4] Consequently, despite the formal designation as an organization the States are not 'Member States', but continue to be referred to as participating States (PS),[5] and the commitments they make bind them politically, not legally.

The international community is constantly faced with the need for dynamic adaptation in response to numerous challenges, exacerbated by sometimes competition and overlap between organs and institutions working in the area of, or connected to, human rights.[6] The United Nations (UN) is only one, although major, part of a much broader international human rights regime, which encompasses also a number of regional organizations, including the OSCE, which has established a set of tools to monitor the implementation of commitments undertaken in the field of human rights and democracy (*i.e.* the human dimension).[7] Among these, the so-called Human Dimension Mechanism can be invoked on an *ad hoc* basis by any individual PS or group of PS and is composed of two instruments:

- the Vienna Mechanism (established in the Vienna Concluding Document of 1989)[8] that allows PS, through an established set of procedures, to raise questions relating to the human dimension situation in other OSCE PS, and
- the Moscow Mechanism (MM), established at the last meeting of the Conference on the Human Dimension in Moscow in 1991,[9] to further elaborate the Vienna Mechanism,[10] in order to complement and strengthen it.[11] It provides for the additional possibility for PS to establish *ad hoc* missions of independent experts to assist in the resolution of

4 See the discussion on this transformation in: SAPIRO, Miriam. Changing the CSCE into the OSCE: Legal Aspects of a Political Transformation. *American Journal of International Law*, 1995, Vol. 89, No. 3, pp. 631–637.

5 The OSCE has 57 participating States from Europe, Central Asia and North America, including Russian Federation and Ukraine. *See* at: <https://www.osce.org/participating-states> Accessed: 26 March 2023.

6 MÉGRET, Frédéric and ALSTON, Philip (eds). The United Nations and Human Rights: A Critical Appraisal. Oxford, Oxford University Press, 2020, p. 4.

7 The OSCE's comprehensive concept of security covers the politico-military; the economic and environmental; and the human dimensions. See OSCE What we do. [online]. Available at: <https://www.osce.org/what-we-do> Accessed: 26 March 2023.

8 The Vienna Declaration is available at: <https://www.osce.org/files/f/documents/b/6/20064.pdf> Accessed: 26 March 2023.

9 The Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE is available at: <https://www.osce.org/files/f/documents/2/3/14310.pdf> Accessed: 26 March 2023.

10 OSCE Office for Democratic Institutions and Human Rights, Human dimension mechanisms. [online]. Available at: <https://www.osce.org/odihr/human-dimension-mechanisms> Accessed: 26 March 2023.

11 OSCE, Moscow Mechanism. [online]. Available at: <https://www.osce.org/odihr/20066> Accessed: 26 March 2023.

Published by Palacký University Olomouc, Czech Republic, 2023.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

a specific human dimension problem – either on their own territory or in other OSCE PS.

In the first three decades of its existence the MM was rarely applied in practice,[12] partly due to the development of the OSCE into a permanently functioning organization and partly due to political considerations involved in invoking such *ad hoc* mechanisms.[13] The MM so far received also fairly limited scholarly attention.[14]

12 Up until 2022 it has been applied only ten times. In the first two years, the mechanism was invoked four times: twice in 1992, first, by the 12 states of the European Community and the United States on the issue of reports of atrocities and attacks on unarmed civilians in Croatia and Bosnia-Herzegovina, and, second, by Estonia to study Estonian legislation and to compare it and its implementation with universally accepted human-rights norms; twice in 1993, first by Moldova to investigate current legislation, interethnic relations and the implementation of minorities' rights on the territory of Moldova, and second, by the CSCE Committee of Senior Officials vis-a-vis Serbia-Montenegro, to investigate reports of human rights violations (this mission was unable to fulfil its task because of the Federal Republic of Yugoslavia's lack of co-operation). It then took until 1999, when it was activated by the Russian Federation in relation to NATO's military operation in the former Federal Republic of Yugoslavia. Next it was activated by 10 OSCE PS (Germany, the United States, Austria, Canada, the United Kingdom, Greece, Ireland, Italy, Norway, Sweden), in relation to Turkmenistan, to examine concerns arising out of investigations resulting from the reported attack on 25 November 2002 on President Niyazov, and to investigate all matters relating to the conduct of the investigation (December 2002 – March 2003). In 2011, 14 OSCE PS (Germany, the United States, Canada, Denmark, Finland, the United Kingdom, Iceland, Norway, the Netherlands, Poland, Romania, Slovakia, Sweden, and the Czech Republic) activated it to investigate the situation in Belarus after the presidential election of 19 December 2010 and in 2018, 16 OSCE PS (Belgium, Canada, Denmark, Estonia, Finland, France, Germany, Iceland, Ireland, Latvia, Lithuania, the Netherlands, Norway, Sweden, the United Kingdom and the United States) activated it to look into alleged human rights violations in the Chechen Republic, Russian Federation. In 2020, 17 OSCE PS (Belgium, Canada, Czech Republic, Denmark, Estonia, Finland, France, Iceland, Latvia, Lithuania, the Netherlands, Norway, Poland, Romania, Slovakia, the United Kingdom and the United States) invoked it to examine alleged human rights violations in Belarus.

13 OSCE Human Dimension Commitments, Volume 1, Thematic Compilation, 3rd edition, OSCE Office for Democratic Institutions and Human Rights (ODIHR), 2011, p. xxi.

14 Usually in a brief section of contributions on a broader topic (e.g. BLOED, Arie. Monitoring the CSCE Human Dimension: In Search of its Effectiveness, in: BLOED, Arie, LEICHT, Liselotte, NOVAK, Manfred, and ROSAS Allan (eds.). *Monitoring Human Rights in Europe, Comparing International Procedures and Mechanisms*. Kluwer Academic Publishers, 1993, pp. 62–64) or mentioned only is passing (e.g. Jacob Blaustein Institute Urgent Appeal for a More Robust International Response to Russia's Invasion of and Human Rights Violations in Ukraine – Chapter 28, NGOs in Action for Protection, in: RAMCHARAN, Bertrand, BRETT, Rachel, CLARK, Ann Marie, and PARKERP, Penny (eds.). *The Protection Roles of Human Rights NGOs, Essays in Honour of Adrien-Claude Zoller*. Birll, 2023, p. 456). The few more detailed contributions were mainly written by the MM expert themselves (e.g. BENEDEK, Wolfgang. OSCE Moscow Mechanism: Situation of Human Rights in Chechnya. *European yearbook on human rights*, Intersentia, 2019, p. 419–437; BENEDEK, Wolfgang, BILKOVA Veronika and SASSÒLI Marco. Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity Committed in

Published by Palacký University Olomouc, Czech Republic, 2023.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

Nevertheless, in 2022 the MM was activated three times. Namely, the Russian invasion of Ukraine from February 2022 and related developments triggered two activations for reporting on violations of international humanitarian law (IHL) and international human rights law (IHRL), war crimes and crimes against humanity committed in Ukraine,[15] and one to examine alleged human rights violations in the Russian Federation.[16] Early 2023 suggests that the trend continues, as on March 23, 2023, 38 OSCE PS[17] activated the MM to examine alleged human rights violations and abuses in Belarus and on March 30, 2023, the same 45 PS as in case of previous two MM activations, invoked the third MM on Ukraine, to examine reports of the Russian Federation's forcible transfer and deportation of Ukraine's children.[18]

Ukraine since 24 February 2022: Summary of the Report by a Mission of Experts under the OSCE Moscow Mechanism. *EJIL: Talk!* Blog of the European Journal of International Law, available at: <https://www.ejiltalk.org/violations-of-international-humanitarian-and-human-rights-law-war-crimes-and-crimes-against-humanity-committed-in-ukraine-since-24-february-2022-summary-of-the-report-by-a-mission-of-experts-under-t/> Accessed: 26 March 2023). The present contribution belongs to the latter category.

15 On 3 March 2022, 45 OSCE PS (Albania, Andorra, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, the Netherlands, North Macedonia, Norway, Poland, Portugal, Romania, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States of America) following consultation with Ukraine activated it in order to "address the human rights and humanitarian impacts of the Russian Federation's invasion and acts of war, supported by Belarus, on the people of Ukraine, within Ukraine's internationally recognized borders and territorial waters." The second one was activated on 2 June 2022, by the same 45 OSCE PS following consultation with Ukraine in order to "consider, follow up and build upon the findings of the Moscow Mechanism report received by OSCE participating States on 12 April" addressing "the human rights and humanitarian impacts of the Russian Federation's invasion and acts of war, supported by Belarus, on the people of Ukraine, within Ukraine's internationally recognized borders and territorial waters".

16 On 28 July 2022, 38 OSCE PS (Albania, Andorra, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Greece, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, Montenegro, Netherlands, North Macedonia, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, Ukraine, the United Kingdom, and the United States) activated it to examine alleged human rights violations in the Russian Federation.

17 Albania, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Montenegro, Netherlands, North Macedonia, Norway, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Ukraine, the United Kingdom and the United States.

18 *See* Invocation of the OSCE Moscow Mechanism to Examine Reports of the Russian Federation's Forcible Transfer and Deportation of Ukraine's Children, Press Statement, U.S. Department of State, 30 March 2023. Available at: <https://www.state.gov/invocation-of-the-osce-moscow-mechanism-to-examine-reports-of-the-russian-federations-forcible-transfer-and-deportation-of-ukraines-children/ Accessed: 31 March 2023. At the time of submission of this article, the experts are yet to be appointed.

Published by Palacký University Olomouc, Czech Republic, 2023.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

The present article sheds some light on the nature, functioning and role of the MM with particular emphasis to its activation in relation to events following Russian invasion of Ukraine in 2022.[19] It claims that despite some challenges faced by independent experts appointed to serve on MM missions, the outcomes presented in MM reports serve as an important insight into detected violations of international law and OSCE commitments. They support further activities of States within and beyond the OSCE, as well as importantly complement relevant activities of other OSCE institutions and those of other international organisations (e.g. United Nations, Council of Europe, European Union etc.). It is argued that the MM and its reports to fully achieve their potential and produce even more impact need better visibility and greater recognition within existing international institutional human rights structures. Finally, in addition to conclusions, some suggestions for further improvements of the MM and enhancement of its effects in the broader international community are provided.

2 The Role of the OSCE Moscow Mechanism and its implementation in the situation in Ukraine

2.1 Establishment of the MM and its purpose

Just as the OSCE is not a typical international organisation, the MM possesses some unique futures which distinguishes it from other international fact-finding/inquiry/investigative mechanisms, as its missions are not in a position, nor do they have a mandate, to conduct criminal investigations and to identify specific individuals responsible for alleged crimes. These tasks remain within the powers of domestic and international prosecutorial offices and judicial bodies.

The MM was established in 1991 as »a method of furthering respect for human rights, fundamental freedoms, democracy and the rule of law through dialogue and co-operation and assisting in the resolution of specific relevant questions«.[20] The PS created it to »improve further the implementation of the CSCE commitments in the human dimension«.[21]

It was agreed that a resource list comprising up to six experts appointed by each PS at its discretion for a period of three to six years (no expert serving more than two consecutive terms)[22] be established without delay at the CSCE Institu-

19 The author of this article served as one of the three experts on a mission that prepared the second MM report on Ukraine in 2022.

20 See the declaration on the MM (MOSCOW 1991 (Par. 1 to 16) as amended by ROME 1993 (Chapter IV, par. 5)), para. 1. [online]. Available at: <https://www.osce.org/files/f/documents/5/e/20066.pdf> Accessed: 26 March 2023.

21 Ibid.

22 The List of experts appointed by OSCE participating States is available at: <https://www.osce.org/odihr/20062> Accessed: 26 March 2023. The author of this article was first appointed by Slovenia in 2017 and her appointment was renewed in 2023 for another 6-year term.

Published by Palacký University Olomouc, Czech Republic, 2023.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

tion.[23] The experts are expected to be eminent persons experienced in the field of the human dimension, who will impartially perform their functions. The list became operational in 1992 after first 45 experts had been appointed.[24]

The purpose of a mission of experts is to facilitate resolution of a particular question or problem relating to the human dimension of the OSCE through gathering of information and establishing of facts necessary for carrying out its tasks and, as appropriate, using its good offices and mediation services to promote dialogue and co-operation among interested parties.[25] In light of the foregoing, the MM can be described as a hybrid mechanism, combining information gathering and fact-finding tasks with, when appropriate, offering of good offices and mediation – the two diplomatic means for peaceful settlement of disputes. It would be interesting to see if and how the MM missions' outcomes would be used within other existing means of peaceful settlement of disputes, including within the OSCE Court of Conciliation and Arbitration, once it gets its first case.[26]

The MM can essentially be activated in three different scenarios.[27] First, it can be self-invoked as, for example, in cases of Estonia in 1992 and Moldova in 1993. Second, it can be invoked by PS in agreement with the territorial PS in focus of the mechanism, as was the case in two MM missions in the focus of this contribution. In both of these two instances, the PS concerned agrees with the mission on the precise terms of reference and may assign any further functions to the mission of experts, *inter alia*, fact-finding and advisory services, in order to suggest ways and means of facilitating the observance of OSCE commitments.[28] When one or more PS request that the designated OSCE Institution – which has become the OSCE Office for Democratic Institutions and Human Rights (ODIHR)[29] – inquires of another PS whether it would agree to invite a mission of

23 Ibid., para. 3.

24 This number is a minimum requirement under the Moscow Document (para. 3), and at times the number of appointed experts had fallen below this threshold, making the MM non-operational. *See* BENEDEK, supra note 12, p. 421.

25 Ibid., para. 5.

26 The General Bibliography on the OSCE Court of Conciliation and Arbitration, discussing also the challenge of its empty docket, is accessible at: <https://www.osce.org/files/f/documents/e/8/470877.pdf> Accessed: 26 March 2023.

27 Bloed argues that the MM encompasses five separate procedures that may be used independently from one another (the first two being linked to the Vienna mechanism). See BLOED, supra note x, p. 62.

28 Ibid.

29 ODIHR was originally established as the Office for Free Elections in 1991and is the main institution of the OSCE for the human dimension. The 1992 Helsinki Document set out the ODIHR's mandate to help OSCE participating States "ensure full respect for human rights and fundamental freedoms, to abide by the rule of law, to promote principles of democracy and ... to build, strengthen and protect democratic institutions, as well as promote tolerance throughout society." See OSCE Human Dimension Commitments, Volume 1, Thematic Compilation, 3rd edition, OSCE Office for Democratic Institutions and Human Rights (ODIHR), 2011, p. xxi.

Published by Palacký University Olomouc, Czech Republic, 2023.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

experts to address a particular, clearly defined question on its territory relating to the human dimension and that State agrees to invite a mission of experts for the purpose indicated, the regular procedure, as described, applies.[30] This possibility was employed in both MM missions in focus of this contribution.

However, in the third scenario, the MM can be invoked against the will of the territorial PS in focus of the mechanism, in which case, a special »rapporteurship procedure« is envisaged. These are the situations where one or more PS, through the ODHIR, request another PS to invite a mission of experts to address a particular, clearly defined question on its territory relating to the human dimension and that PS disagrees.[31]

In any case, the MM mission could be invoked without the consent of the PS whose activity gave ground to initiating it, subject to at least six PS initiating the procedure for its establishment. In order to make the MM missions operational, the PS that have requested the establishment of a mission of experts or rapporteurs will cover the expenses of that mission.[32]

2.2 Appointment of MM mission experts and the methods of work

The Moscow Document provides that a MM mission may consist of up to three experts – selected from the resource list – to address or contribute to the resolution of questions in its territory relating to the human dimension. The number of experts for each mission vary from one to three. Both missions on Ukraine in 2022 were composed of three experts.

The requesting PS may select one of the experts from the List as a member of the Mission. The PS concerned can also appoint a member. The two experts must identify, immediately and by mutual agreement, a third member of the mission. If no agreement is reached within eight days, the third expert is chosen by ODIHR.

Whenever necessary, ODIHR is to provide appropriate support to the MM mission.[33] In practice this amounts to the logistical organisation of field missions where implemented, and technical support in terms of sharing the contacts with relevant stakeholders if available, and the technical finalization of the reports (final formatting of the text). Contrary to what is the usual practice in cases of other mechanisms of similar nature (*e.g.* the UN fact-finding or investigative mechanisms), no "secretarial support" is provided for the experts, no language editing nor any other form of support usually available for the expert mechanisms mandated with similar tasks.

30 Ibid., para. 8.
31 Ibid., paras. 9–13.
32 Ibid., para. 14.
33 The Moscow Declaration, para. 4.

Published by Palacký University Olomouc, Czech Republic, 2023.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

Although the inviting PS shall co-operate fully with the mission of experts and facilitate its work, including by granting the mission all the facilities necessary for the independent exercise of its functions, allowing it, for the purpose of carrying out its tasks, to enter its territory without delay, to hold discussions and to travel freely therein, to meet freely with officials, nongovernmental organizations and any group or person from whom it wishes to receive information, and by complying with any request from a mission of experts to be accompanied by officials of that State if the mission considers this to be necessary to facilitate its work or guarantee its safety,[34] it is reasonable to expect (and accept) that in armed conflict situations and similarly disruptive environments, the relevant PS's authorities might be fully preoccupied with other essential tasks and consequently of limited assistance to the MM experts during their short-termed mission.

For the experts, perhaps the most striking feature of the MM, is the extremely short deadlines for the production of the report with concrete and documented findings and recommendations, as the report needs to be submitted to the inviting PS as soon as possible, preferably within three weeks after the mission has been established (sometimes even within two weeks[35]). This ideally requires experts' full-time commitment to the task – not easily achievable among the individuals who are in principle "eminent" experts in the field, in addition to extreme resourcefulness and constructive team work.

The missions may, and in practice increasingly do so, receive information in confidence from any individual, group or organization on questions it is addressing. In recent practice, the use of modern technologies and online platforms allows for efficient gathering of substantial amount of relevant information even without physically entering the PS's territory.

The MM mission members need to respect the confidential nature of their task(s) and the PS are expected to refrain from any action against persons, organizations or institutions on account of their contact with the mission of experts or of any publicly available information transmitted to it.[36]

The inviting PS then transmit the observations of the mission, together with a description of any action it has taken or intends to take upon it, to the other PS *via* ODIHR no later than two weeks after the submission of the report. The report and any comments by the inviting PS are discussed by the OSCE Permanent Council, which may consider any possible follow-up action. The report and comments remain confidential until brought to the attention of the Permanent Council, and until then no other mission of experts may be appointed for the same issue.[37]

34 Ibid., para. 6.
35 *See* e.g. the MM for Belarus in 2018. BENEDEK, supra note 12, p. 423.
36 The Moscow Declaration, para. 6.
37 Ibid., para. 7.

Published by Palacký University Olomouc, Czech Republic, 2023.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

2.4 The two MM missions on violations committed in Ukraine in 2022

2.4.1 Common features of MMI and MMII missions

The Russian invasion of Ukraine in 2022, accompanied by numerous accounts of violations of IHL and IHRL led the OSCE PS to activate the MM twice, each with a very broad mandate as described further below. Both missions invited all potential sources to contribute evidence and received support from many sides, in particular from NGOs on the ground and from those with particular investigative capacities. Unfortunately, in both instances the Russian Federation refused to cooperate. For the MMI, the Permanent Representation of the Russian Federation informed the Mission upon request that it considered the MM largely outdated and redundant and also declined to nominate a liaison person but referred the mission to the official statements and briefings of the Government of the Russian Federation. For the MMII there was simply no response to the invitation letter sent to the Russian Federation by the experts of the mission. In both cases, this non-cooperation made it impossible for the missions to take account of the Russian position on all pertinent incidents, except based on official open sources and websites.

Both reports are structured along the same main chapters. After presenting the executive summary, the mandate, methodology and applicable sources of law and OSCE commitments, they proceed along the three main substantive chapters: violations of IHL, violations of IHRL and issues of accountability. Given the mandate and role of the MM missions, it was impossible to provide a detailed assessment of most allegations of IHL and IHRL violations concerning particular incidents and the identification of individual perpetrators of war crimes and crimes against humanity. Although the two MM missions were invoked in the context of an ongoing international armed conflict with a large number of events occurring every day and the news (including disinformation) coming in on a daily basis, the missions could report on clear patterns of violations, mostly by the Russian forces and their proxies, resulting in deaths, injuries, damage and destruction.

Both, the first (MMI) and the second (MMII) report,[38] thus presented findings that informed and helped shape further actions of PS, individually and collectively, as well as those of the OSCE institutions and other international organisations' bodies,[39] aimed at establishing also political and legal accountability. While violations occurr on the Ukrainian as well as on the Russian side, the two missions established that violations committed by the Russian Federation, are by far larger in nature and scale. Both reports thus highlight the various relevant

38 The first report is available at: https://www.osce.org/files/f/documents/f/a/515868.pdf; and the second report is available at: <https://www.osce.org/files/f/documents/3/e/522616.pdf> Accessed: 26 March 2023.

39 This contribution presents only the core findings, but it aims to entice further in-depth reading and study of the two reports.

Published by Palacký University Olomouc, Czech Republic, 2023.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

accountability mechanisms, some of which are already at work and some perhaps yet to be seized or established, with a common goal, to prevent impunity for the identified violations and crimes.

2.4.2 The first MM mission and its main findings

The MMI was invoked on March 3, 2022 and the three experts were appointed 14 March 2022, with a task to on complete the work within three weeks and deliver the report to Ukraine as the inviting State on 5 April 2022.[40] In its report, submitted on time and made public on 13 April 2022, the MMI mission covered the period from 24 February until 1 April 2022.

The mandate of the MMI was to establish two sets of facts and circumstances. First, those surrounding possible contraventions of OSCE commitments, and violations and abuses of IHRL and IHL; and second, those of possible cases of war crimes and crimes against humanity, including due to deliberate and indiscriminate attacks against civilians and civilian infrastructure; and to collect, consolidate, and analyse this information with a view to presenting it to relevant accountability mechanisms, as well as national, regional, or international courts or tribunals that have, or may in future have, jurisdiction.

The MMI concluded that had the Russian forces in their conduct of hostilities respected their IHL obligations in terms of distinction, proportionality and precautions in attack and concerning specially protected objects such as hospitals, water stations and electricity systems, the number of civilians killed or injured and objects and infrastructures damaged or destroyed would have remained much lower. It also found that much of the conduct of Russian forces displayed in the parts of Ukraine it occupied before and after 24 February 2022, including through its proxies, the self-proclaimed "republics" of Donetsk and Luhansk, violates IHL of military occupation. Some violations and problems were also identified regarding practices attributable to Ukraine. The mission expressed particular concern about the treatment of prisoners of war, who originally were considered criminals, and treated in ways that are incompatible with 1949 Geneva Convention (III) on Prisoners of War. It also concluded that generally, allegations made by the Russian Federation that Ukraine and not Russian forces had caused some of the death, injury or destructions attributed to Russia by the media, Ukrainian authorities and NGOs, could not be confirmed. While the mission has not been able to verify all the reported incidents that involve violations of IHRL, it has found credible evidence suggesting that such violations concerning even the most fundamental human rights (right to life, prohibition of torture and other inhuman and degrading treatment and punishment) have been committed, mostly in the areas under the effective control of Russia or enti-

40 The ODIHR invited the experts of the MMI mission (Wofgang Benedek, Veronika Bilkova and Marco Sassòli) not to travel to Ukraine as it was impossible to provide safe access to places of potential violations. *See* report of the MMI, p. 2.

Published by Palacký University Olomouc, Czech Republic, 2023.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

ties under overall control of Russia. Importantly, the mission also concluded that the impact of the conflict on the enjoyment of human rights has gone beyond the direct violations of these rights and by causing a high level of destruction and by interfering with the provision of vital services (education, healthcare), the conflict started by the unlawful attack by Russia made it very difficult for Ukraine to effectively respect, protect and fulfil the human rights of its inhabitants. Furthermore, the mission has found that while the conflict has affected all the inhabitants of Ukraine, it has exerted and continues to exert particularly negative effects on individuals belonging to vulnerable groups, such as women, children, older persons or persons with disabilities.

The MMI was not able to conclude whether the Russian attack on Ukraine *per se* may qualify as a widespread or systematic attack directed against a civilian population. It however held that some patterns of violent acts, which have been repeatedly documented in the course of the conflict, are likely to meet this qualification and would likely constitute a crime against humanity. Similar finding was reconfirmed also by the MMII.

2.4.3 The second MM mission and its main findings

On June 2, 2022, the 45 PS, after consultations with Ukraine, invoked the MMII under paragraph 8 of the Moscow Document to *"consider, follow up and build upon the findings of the Moscow Mechanism report received by OSCE participating States on 12 April 2022"* addressing *"the human rights and humanitarian impacts of the Russian Federation's invasion and acts of war, supported by Belarus, on the people of Ukraine, within Ukraine's internationally recognized borders and territorial waters"*. The mission of experts[41] was officially established on 7 June 2022.

The MMII was able to build on the findings of the MMI, described above, in addition to establishing new ones. The period under scrutiny was 1 April – 25 June 2022, though occasionally, violations committed prior to 1 April 2022 but which were not reported in the MMI, as information about them only became available after this date, were also included in the second report.

Similarly, as for the MMI report, the experts used several main methods of fact-finding, relying on various sources of information and relied on reports, comments and statements produced by international organizations (UN, OSCE, Council of Europe, EU), States, civil society organisations, and media. The experts conducted also various interviews, both online and in person. On June 20–23, 2022, two members of the expert mission, Ms Bilkova and Ms Guercio, also travelled to Kyiv, where they met with the representatives of various Ukrainian authorities, and visited also the towns of Irpin, Bucha and Hostomel, which

41 In accordance with the Moscow Document, Ukraine subsequently selected three persons from the list of experts to be part of an expert mission. These three persons are: Ms Veronika Bílková (Czech Republic), Ms Laura Guercio (Italy) and Ms Vasilka Sancin (Slovenia).

Published by Palacký University Olomouc, Czech Republic, 2023.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

allowed the mission to collect essential direct information, vital for the drafting of the report, as well as confirmation of information learned from other sources. Through all the different methods of fact-finding, the mission was able to get access to a large amount and variety of information and evidence to gain a good oversight of the situation in general and of particular issues under scrutiny.

The MMII largely confirmed the conclusions reached by the MMI mission, discovered clear patterns of serious violations of IHL attributable mostly to Russian armed forces in numerous towns and villages, particularly exposing the events concerning the towns of Bucha and Irpin – the two emblematic examples of these grave violations. The magnitude and frequency of the indiscriminate attacks carried out against civilians and civilian objects, including in sites where no military facility was identified, represent credible evidence that hostilities conducted by Russian armed forces disregarded their fundamental obligation to comply with the basic principles of distinction, proportionality and precaution that constitute the fundamental basis of IHL.

The MMII further concluded that the signs of torture and ill-treatment on the corpses of killed civilians also show disregard of the principle of humanity that should guide the application of IHL in military operations. In particular the events concerning the towns of Bucha and Irpin, that were visited by the mission, are two emblematic examples of grave breaches of IHL under the Geneva Conventions and their Additional Protocols, which constitute war crimes. The mission also concluded that IHRL has been extensively violated, including through targeted killing of civilians, including journalists, human rights defenders, or local mayors; unlawful detentions, abductions and enforced disappearances of such persons; large-scale deportations of Ukrainian civilians to Russia; various forms of mistreatment, including torture, inflicted on detained civilians and prisoners of war; the failure to respect fair trial guarantees; and the imposition of the death penalty. Most, albeit not all, violations have been committed in the territories under the effective control of the Russian Federation, including the territories of the so-called Donetsk and Luhansk People's Republics, and largely attributable to the Russian Federation.

Moreover, the MMII identified two new alarming phenomena which were not included or paid sufficient attention to in the MMI report, namely the establishment and use of so-called filtration centres and the tendency by the Russian Federation to bypass its international obligations by handing detained persons over to the two so-called People's Republics and letting them engage in problematic practices, including the imposition of the death penalty.

The MMII further confirmed that the conflict in Ukraine very negatively impacted on the enjoyment of economic, social, and cultural rights, such as the right to education the right to health, the right to social security, the right to food and water and the right to a healthy environment and stressed that particular

Published by Palacký University Olomouc, Czech Republic, 2023.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

attention has to be paid to individuals belonging to vulnerable groups, such as women, children, older persons, or persons with disabilities.

Among others, the MMII mission experts also noted that Russia's invasion has impacted both on Ukraine's food security and global food security – exacerbated by the theft of Ukrainian grain and the suspension of movement of commercial vessels in the Sea of Azov. Consequently, as the report notes, millions of tons of grain remained trapped in the Ukrainian ports and on ships unable to move, which significantly affected the global food and agricultural supplies threatening to result in a global hunger crisis.

In the accountability part, the MMII emphasised that all documented violations of IHL and IHRL entail the responsibility of the relevant State, while the most serious among them, may give rise to individual criminal responsibility for war crimes and crimes against humanity.

In terms of recommendations for additional actions, the report expanded on the linkages between the MM reports and other accountability mechanisms, both at international and national levels.

3 The Impact of the OSCE Moscow Mechanism Reports

The MMI and MMII reports were presented to the OSCE Permanent Council. During the presentation of the MMII report, on July 14, 2022, Permanent Representative of Albania to the OSCE delivered a Joint Statement on the report on behalf of 46 PS,[42] stating the PS have also requested that ODIHR provide any relevant information or documentation derived from the mission to other appropriate accountability mechanisms, as well as national, regional, or international courts or tribunals that have, or may in future have, jurisdiction. The PS further stated that the report has shone a light on two new alarming trends, namely the "establishment and use of so-called filtration centres […] by the Russian armed forces" in which "civilians are detained for at least 30 days as part of a filtration process, with those deemed the most "untrustworthy" […] obliged to remain for two months," and the reported tendency of the "Russian Federation to bypass its international obligations by handing detained persons over to the so-called Donetsk and Luhansk People's Republics and letting these two *de facto* entities engage in problematic practices, including the imposition of the death penalty resulting from trials that fail to meet the basic standards of the fair trial," while these entities have no international or domestic legal authority. At the end they called on the PS and the international community to undertake the necessary actions, which includes making full use of the OSCE and its tools under the human dimension.

42 These 46 PS were those that invoked the MMII and Ukraine. The statement is available at: <https://osce.usmission.gov/russias-invasion-of-ukraine-joint-statement-on-the-second-osce-moscow-mechanism-report/> Accessed: 26 March 2023.

Similarly, the EU presented its Statement on "Moscow Mechanism invoked by 45 OSCE participating States following consultation with Ukraine", welcomed the MMII report and stated that the perpetrators of war crimes or crimes against humanity, as well as any responsible State officials and military leaders, must be and will be held accountable according to international law. It expressed its support to all measures to ensure accountability for human rights and IHL violations and called on all PS to do likewise; and commended the tireless efforts and contributions of civil society and human rights defenders to this end. It also emphasized that the OSCE MM reports are an essential contribution to an initial collection and analysis of facts with a view to present it to accountability mechanisms that have, or may have in the future, jurisdiction and welcomed that the reports' findings already feed into the work of the UN Commission of Inquiry.[43] It rests upon OSCE participating States and the wider international community to ensure that necessary follow-up actions are undertaken, including through the further use of OSCE tools and mechanisms.

The findings of the MM missions were presented by the experts also to the Group of Friends of Accountability following Aggression against Ukraine (GOFAAU), where, among others, particular concerns about crimes against children were expressed.[44]

A further presentation and discussion of MM reports took place during the OSCE Warsaw Human Dimension Conference, which on September 27, 2022, featured a panel event[45] focusing on accountability for Russia's violations of international law and atrocities – accountability through fact-finding and exposure of abuses, and legal accountability through investigations. One of the objectives of this panel was to explore key findings from the two MM reports.

In addition, media interviews and television appearances took place with members of the expert mission and academic events were organised to raise awareness about both reports.[46]

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43 EU Statement on "Moscow Mechanism invoked by 45 OSCE participating States following consultation with Ukraine", OSCE Permanent Council No. 1382 Vienna, 14 July 2022; available at: <https://www.eeas.europa.eu/delegations/vienna-international-organisations/osce-permanent-council-no-1382-vienna-14-july-2022-0_en?s=66> Accessed: 26 March 2023.

44 Notes from the online discussion on July 21, 2022, are on file with the author.

45 See <https://www.osce.org/files/f/documents/e/c/525864_8.pdf> Accessed 26: March 2023.

46 For example, a special round table titled *The role of the Organization for Security and Co-operation in Europe (OSCE) in reporting on violations of international humanitarian and human rights law, war crimes and crimes against humanity in ongoing armed conflicts, with specific focus on Ukraine*, programme is available at: <https://unesco.public.lu/content/dam/unesco/agenda/draft-programme-conference-22-november.pdf> Accessed: 26 March 2023.

Published by Palacký University Olomouc, Czech Republic, 2023.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

It is noteworthy, that also high-ranking State officials refer to the MM missions in their talks to the wider professional audience.[47]

Although no formalized international coordination mechanism exists to share relevant information obtained through MM missions among different international organisations working in relevant areas, the two MM reports were brought to the attention of various international mechanisms, in particular the UN human rights mechanisms, *inter alia*, the UN Human Rights Council (HRC) mandated Independent International Commission of Inquiry on Ukraine,[48] which produced its last report on March 16, 2023,[49] and the UN Human Rights Committee, established under the International Covenant on Civil and Political Rights, in the process of periodically reviewing the Russian Federation[50] *in absentia*, as the State party, after two postponements and official reminder that the review will proceed, failed to appear for constructive dialogue in Geneva.

4 Conclusions

The activations of the MMI and MMII missions speak to the fact that OSCE PS are not indifferent to the numerous and serious violations committed in situation following the Russian invasion of Ukraine. This is already an important achievement in itself, as Elie Wiesel warned in his 1999 talk titled *The Perils of Indifference*,

"Indifference is not a beginning; it is an end. And, therefore, indifference is always a friend to the enemy, for it benefits the aggressor – never his victim."[51]

The unprecedent series of invocations of the MM missions for establishing violations committed in Ukraine, signals that the MM has become an important tool of the international community to catalogue patterns of behaviour through a mission of independent experts to raise awareness about violations and crimes being committed and call for action, including towards preventing impunity by ensuring accountability. This trend suggests that PS see an important special

47 *See* for example remarks made by Beth Van Schaack, Ambassador-at-large for global criminal justice, to the Nuremberg Principles Meeting at the Catholic University of America on March 27, 2023, available at: <https://www.state.gov/ambassador-van-schaacks-remarks/> Accessed: 26 March 2023.

48 Resolution adopted by the HRC on 4 March 2022, Situation of human rights in Ukraine stemming from the Russian aggression (A/HRC/RES/49/1) and Resolution adopted by the HRC on 12 May 2022, The deteriorating human rights situation in Ukraine stemming from the Russian aggression (A/HRC/RES/S-34/1).

49 Report of the Independent International Commission of Inquiry on Ukraine (A/HRC/52/62).

50 *See* Concluding observations on the eighth periodic report of the Russian Federation (CCPR/C/RUS/CO/8) adopted during the 136th session in November 2022, para. 6 and 20.

51 WIESEL, Elie. The Perils of Indifference. Speech at the White House, USA, 1999. Available at: <http://www.historyplace.com/speeches/wiesel.htm> Accessed: 26 March 2023.

Published by Palacký University Olomouc, Czech Republic, 2023.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

added value in the mechanism, *on par* with other international means and methods of fact-finding, such as those established within the UN. Going forward, perhaps their invocation could be considered more also when early-warning actions are warranted to prevent violations of international law, especially IHL and IHRL, as given their nature, their findings and report can efficiently bring into light developments requiring timely and decisive actions that can save lives.

To paraphrase Benedek,[52] it is however not always realistic to expect an imminent impact from MM reports, in particular if they had been produced against the declared will of the requested or the implicated PS. The standard argument repeatedly put forward by the Russian Federation against the MM that it 'has become outdated redundant for the most part' and that there is enough opportunity to clarify the concerns of requesting PS in the OSCE bodies is obviously not convincing. The MM missions can and do provide valuable findings and recommendations on how to improve situations of concern and ensure accountability of responsible States and individuals.

MM missions can also be empowering for the local actors, particularly human rights defenders. Nevertheless, the multiplication of fact-finding and investigative international and domestic activities, with overlapping mandates and tasks, can also contribute to the fatigue of those most affected and could even lead to re-traumatization of individuals asked for cooperation, particularly victims of most serious violations of IHL and IHRL. Thus, particularly in situations of armed conflicts and cases of mass atrocities, it is important to ensure efficient coordination and data sharing, consider establishing inventories of collected data to be managed by a reliable domestic, or where possible, international institution, that would, while ensuring full respect for personal data and privacy, where needed, be able to share this data with all relevant mechanisms as appropriate.

The recent frequency of activations of MM missions confirms that, in spite of the opposition and lack of cooperation experienced from the PS under investigation the MM constitutes an important tool to prevent indifference and to expose or clarify allegations of serious human rights and humanitarian law violations. As the trend continues, the ODIHR could perhaps consider appointing a designated secretary of the MM missions, who would be able to assist the experts beyond the already invaluable, but limited technical support, and would be tasked also with, after their reports become public, sharing of these with relevant stakeholders, even beyond OSCE institutions, particularly with other international organisations to ensure meaningful cross-fertilization. Furthermore, even if the swiftness of producing the findings and recommendations can be of particular value, it might also be appropriate to consider if certain situations, particularly when the MM mission is tasked with a particularly broad mandate, as was the case for MMI and MMII, might warrant at least slightly prolonged timeframe for the preparation and submission of their reports.

52 BENEDEK, supra note 12, p. 437.

Published by Palacký University Olomouc, Czech Republic, 2023.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

The results of MM missions are generally available and as demonstrated they are increasingly being used by interested State actors, international organisations, the media and civil society. When necessary political backing for their findings exists, they can become an important tool for furthering their goals in line with their dual nature, to contribute to fact-finding and to conflict management, while at the same time serving as an important resource for further studies and projects on the important topics covered.

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ISSN (print): 1213-8770; ISSN (online): 2464-6601