

**SLAYING THE RABID LEVIATHAN:
UKRAINE'S QUEST FOR THE RULE OF LAW,
MUSCOVITE RECIDIVISM AND THE IMPACT
ON EUROPEAN VALUES**

*Keynote Speech by Serhiy Holovaty, Acting Chief Justice
of the Constitutional Court of Ukraine*

Your Honour Alexander Arabajiev, President of FIDE

Your Honour Koen Lenaerts, President of the Court of Justice of the European Union

Your Honour Marc van der Woude, President of the General Court of the European Union

Dear Congress participants,

Ladies and gentlemen,

I am deeply honoured to have been invited to participate in this gathering of eminent jurists. Your role in the preservation of democracy and the Rule of Law in Europe is a beacon for me and my fellow judges in Ukraine.

Let me start with today –1st of June 2023, or rather with today's news. The EU Ambassador to the Ukraine, Mr Matti Maasikas, has just *tweeted* the following: "... 'Children's day' started tragically in Kyiv, where Russian air attacks killed at least 2 children early this morning".

And now, I will continue with a reference to yesterday.

Yesterday, 31st of May 2023, marked precisely 800 years to the day in 1223, when the Mongol army destroyed the army of *Kyivan Rus'* along the *Kalka* River, in what is in contemporary terms, the Donets'k region of Ukraine. This battle demonstrated the superiority of Mongol military prowess over European martial forms and paved the way for a rapid conquest of Eastern and Central Europe by Genghis Khan. It was the precursor to the full Mongol invasion of *Kyivan Rus'* that took place 15 years later with the result that *Rus'*, as a European Grand Princedom, with Kyiv as its ancient capital, lost its political independence and completely disappeared from the world stage.

Moreover, exactly a century later, in May of 1323, another historic battle took place, this time along the *Irpin'* River on the outskirts of Kyiv. This battle marked the beginning of the actual liberation of Kyiv from the Mongols. When the contemporary descendants of the Golden Horde invaded Ukraine again, in February 2022, the *Irpin'* River, just as in the Middle Ages, thwarted the plans of the invaders "to seize Kyiv in three days".

The parallels between seven and eight hundred years ago with today's circumstances are striking. In both instances, ancient and present-day Ukraine were at the epicentre of the destruction of the prevailing world order by forces bent on the subjugation and colonisation of a European State. However, the slaughter of the residents of Kyiv by the Mongols paled in comparison to the massacres of Ukrainians by the Russian army in occupied Bucha, Mariupol, Chernihiv, Iziium, and Kherson.

The Muscovite State was constructed on the foundations of the Mongol Tatar yoke, and Russia's leaders became the heirs to the Mongol Khan.

This is not just my own conclusion. At the end of the XIX century Karl Marx observed:

"The bloody mire of Mongolian slavery, not the rude glory of the Norman epoch, forms the cradle of Muscovy, and modern Russia is but a metamorphosis of Muscovy¹...

The Tatar yoke lasted from 1237 to 1462 – more than two centuries; a yoke not only crushing, but dishonouring and withering the very sole of the people that fell to its prey. The Mongol Tatars established a rule of systemic terror, devastation and wholesale massacre forming its institutions²."

A century and a half before that, Jean Jacques Rousseau in *The Social Contract*, described the efforts of Peter the Great to *civilise* Russia. He wrote: "Russia will never be really civilised ..."³

Pre-Mongol *Kyivan Rus'*, and *Muscovy* differ not only in name. *Kyivan Rus'* formed an integral part of the European body politic from its inception in the VIII century, whereas *Muscovy* did not emerge as a State until the XIV century based on the foundations of Tatar Statehood.

¹ Secret Diplomatic History of the Eighteen Century by Karl Marx. Edited by his Daughter Eleanor Marx Aveling. – London: Swan Sonnenschein & Co., Limited, Paternoster Square, 1899. – P. 77.

² *Ibidem*. – P. 78.

³ *Jean Jacques Rousseau. The Social Contract and Discourses / translated with introduction by G.D.H. Cole. – New York: Dutton, 1950. – Book II, Chapter VIII, [5].*

Moreover, they are distinguished by different traditions for the forming of a State. The term “Russia” did not emerge until 1721 when Peter I appropriated the name and history of *Kyivan Rus*’, proclaiming that henceforth Muscovy will be renamed “*Russia*” and the Muscovites will be known as “*Russians*”.

This is not just an issue of nomenclature. By stealing the *Kyivan State*’s name, Peter I fundamentally challenged the identity and existence of the Ukrainian people. The policies of the Russian empire toward Ukrainians since then have culminated in the two main postulates of Putin’s genocidal war against Ukrainians today. First, that Ukraine is not a State, and that Ukrainians do not constitute a separate nation, but are actually Russians or proto-Russians (*pachti russkiye*). Second, that Ukrainians deserve to be exterminated if they consider themselves to be Ukrainians and not Russians.

I fully share the author Anne Applebaum’s view, that the Muscovite historic recidivism of occupation “belongs to the equally old, equally ugly traditions of Russian imperialism and Soviet genocide. Moscow wants to obliterate Ukraine as a separate country, and *Ukrainian* as a distinct identity”⁴

Historically and culturally, Muscovy was always more receptive to absolutism, which manifests itself in policies driven by brutality. In essence, the Muscovy State for centuries, was and still now is nothing but a brutal *Leviathan*. Today’s *Kremlin Leviathan* is a terrorist tyranny, aptly expressed as “*rushism*” – a specific modern form of fascism rooted in the brutality of *Bolshevik* totalitarianism.

The experience of Ukraine is quite different: like many colonised nations, the historical struggle of Ukrainians for freedom against oppressors has conditioned them to pursue a more liberal direction. Thus, there always existed fertile soil to sow the seeds of the Rule of Law.

One of the remarkable features of the ancient *Kyivan State*, as a major European civilisation, was the early direction of its laws towards justice and respect for human life. The death penalty, martyrdom, mutilation, or other similar types of punishment were all absent from the laws of the Land.

And, there is another feature.

⁴ See: “They didn’t understand anything, but just spoiled people’s lives”. By Anne Applebaum and Nataliya Gumenyuk. *The Atlantic*. February 14, 2023.

At the start of the XVIII century, the previously free Ukrainian *Cosaticam gentem* (the *Kozak people*), who had organised themselves into a *Kozak Republic*, were subjugated by Muscovy's absolute rule. In response, the *Kozaks* adopted a testament of freedom, which is unique in Ukrainian legal and political culture. It is widely known as *The Constitution of Pylyp Orlyk of 1710* and predates both the American Declaration of Independence (1776), the US Constitution (1787), as well as the French Declaration of the Rights of Man and Citizen (1789). Nevertheless, the philosophy and political goals set out in the Ukrainian document are closely related to and may have indeed informed those documents. By its origin and nature, it is akin to the *Magna Carta* (1215).

The preamble to the Ukrainian document clearly outlines its two main tasks and goals. On the one hand, Pylyp Orlyk, the newly elected Hetman (Leader) of the Zaporozhian Host, took upon himself the duty to liberate *gentem antiquamque Cosaticam* (the "ancient Kozak people") from the external despotic power, e.g. *iugo Moscorum* ("the Muscovite yoke"). Thus, the document became a constitutional programme for future generations and a magisterial act for all Ukrainian people, exhorting them to achieve an overriding goal unchanged to this day – "to liberate our Motherland from the yoke of Muscovite slavery".⁵

In this respect, the Ukrainian document is very close to the spirit and ideology of the American Declaration of Independence (1776).

Another task of singular importance was to free the *Kozak people* from domestic tyranny. Several previous Hetmans had attempted despotic rule and had usurped power acting under the principle: SIC VOLO, SIC IUBEO ("My wish is my command"). Thus, Pylyp Orlyk, developing the document, noted: "the *Kozak people* have always spoken out against autocracy"⁶. Since "the Rule of Man was not inherent in the Motherland and in the Zaporozhian Host"⁷ and the despotic way of ruling by some Hetmans in the past had led, in particular, "to violation of rights and liberties"⁸, the document was designed to prevent the abuse of power in the future.

⁵ See Chapter I of the *Pacta et Constitutiones of the Pacta et Constitutiones legum libertatumque Exercitus Zaporoviensis* ("Agreements and Resolutions on the Rights and Liberties of the Zaporozhian Host") ... 1710.

⁶ See Pritsak O. The Pylyp Orlyk Constitution: *The First Constitution of Ukraine by Pylyp Orlyk, 1710*. – Kyiv: Veselka, 1994. P. 4 (In Ukrainian).

⁷ See Chapter VI of the *Pacta et Constitutiones legum libertatumque Exercitus Zaporoviensis* ("Agreements and Resolutions on the Rights and Liberties of the Zaporozhian Host") ... 1710.

⁸ Ibidem.

This desire to curb the unfettered power of one-man rule makes the document similar to the French Declaration of the Rights of Man and of the Citizen (1789).

This document from 1710 is *the conceptual origin of the Ukrainian constitutional tradition*, providing the framework for the acceptance several centuries later by our national culture of Western values.

These values were not practised in colonial-ruled Ukraine, yet they were accepted without question when Ukraine became a member of the Council of Europe in 1996. Also, these values had not yet entered the European political consciousness, until they were enshrined in post-WWII statutory documents as values upon which the Council of Europe and the European Union were founded.

There was nothing deterministic or inevitable about the development and acceptance of these values in Europe. Indeed, the horrors of the XXth century militated against them. Instead of brining lasting peace to Europe, the Treaty of Versailles of 1919 proved to be only a temporary truce before the outbreak of WWII. The creation of the United Nations in 1945 renewed hope of achieving permanent global peace and guaranteed security. Again – failure. Indeed, by letting the fox in among the chickens, from its vantage point as a permanent member of the Security Council, Russia (in both its Soviet and current incarnations) weaponised the international rule-based order to mount a series of aggressions abroad and close to its borders, the most terrible of which is against Ukraine.

The United Nations and the Council of Europe were founded in response to the horrors of the second World War under the slogan “*Never Again!*”. However, it did happen again! And again! Unfortunately, international law did not prevent the war against Ukraine and it is incapable of controlling the consequences of the aggression. That is why the words of Winston Churchill – one of the Founding Fathers of the Council of Europe – are so relevant today. In a speech at the University of Zürich in 1946, he stated:

*“The League [of Nations] did not fail because of its principles or conceptions. It failed because those principles were deserted by those States which brought it into being, because the governments of those States feared to face the facts and act while time remained. This disaster must not be repeated”.*⁹

Unfortunately, that disaster has repeated itself.

⁹ Winston Churchill, speech delivered at the University of Zurich, 19 September 1946. Source URL: https://www.cvce.eu/obj/address_given_by_winston_churchill_zurich_19_september_1946-en-7dc5a4cc-4453-4c2a-b130-b534b7d76ebd.html

And it continues.

Ironically, both countries encountered the same possibility for democratic development after the fall of the Soviet Union. Both Ukraine (in 1995) and Russia (in 1996) became members of the Council of Europe, separately undertaking the *obligation* to adhere to its foundational values pursuant to Article 3 of the CE Statute. At that time, as post-Soviet entities, the state of democracy and the rule of law was almost identical in both countries.

There emerged in Europe a belief that the break with the totalitarian past in these countries was irreversible.

This proved to be a fatal illusion. The speed with which the paths of the two States radically diverged seemed to confirm an almost fundamental genetically determined historical and cultural Muscovite receptiveness to totalitarianism.

At the same time, Ukraine continues to struggle for freedom as a liberal democracy governed by the Rule of Law.

Inevitably, in 2022 Russia was expelled from the Council of Europe, while in the same year Ukraine was granted candidate-member status for accession to the EU.

Truly speaking, the advancement of Ukraine into the common space of European values was not a path covered in roses. Each President of the country since independence tried to arrogate maximum executive power to his position. This included, to varying degrees, attempts to subjugate the judiciary, especially the Constitutional Court, under his control. Ultimately, the Ukrainian people, being historically and culturally predisposed to the ideals of freedom and democracy, saved their country from the emergence of a domestic *Leviathan*.

The *2004 Orange Revolution* prevented President Leonid Kuchma from establishing an autocratic regime in Ukraine.

The *2014 Revolution of Dignity* or *EuroMaidan*, forced pro-Moscow President Viktor Yanukovich to flee the country. His rule between 2010–2014 was characterised by accelerated personalised rule (“the Rule of Man”), where power was concentrated in the hands of a leader who exercised virtually total control over the Parliament, the Cabinet, Judiciary, and the Constitutional Court. The massive protests claimed victims as well – more than 100 people, known as the “*Heavenly Hundred*”¹⁰ were killed during the *Revolution of Dignity*. Their sacrifice

¹⁰ “*Heavenly Hundred*” is a symbolic collective name of the dead protesters during the *Revolution of Dignity* which is also called *EuroMaidan*.

saved Ukraine's democratic prospects, preventing threats to democracy at the cost of human lives by forcing citizens to resolutely protest against tyranny.

Both Ukrainian revolutions proved that the mighty formula of the Preamble to the Universal Declaration of Human Rights (1948) formulates an essential postulate:

"[...] it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law"¹¹.

The attempts to undermine the constitutional structure of the State demonstrated that the authoritarian model of governing cannot work in Ukraine. The Ukrainian people see no other future for themselves other than in the community of European nations where they share common values.

Therefore, winning the war against Putin's attempts to subjugate the Ukrainian people¹² and "to destroy Ukraine as a nation"¹³ is the most immediate task.

What does it mean – "to win the war"? Most elementally, it means to restore Ukraine's sovereignty to its 1991 territorial borders. But, that will not stop Moscow from firing missiles and shells onto sovereign Ukrainian territory. Nor will it stop Russia's preparations for a new war.

The only guarantee of peace, stability, and security in the region is for all seven countries on Ukraine's borders to share common values upon which are based societies governed by the Rule of Law.¹⁴

Muscovy's war against Ukraine is a war of enforcing the past versus realising the prospects for the future. As such, Russia's war of aggression is doomed to defeat. Prof. Timothy Snyder of Yale University rightly notes that "Ukraine Holds the Future" and that "this war is about establishing principles for the twenty-first century". That "it is about policies of mass death and about the meaning of life in politics." That "it is about the possibility of a democratic future".¹⁵

¹¹ Universal Declaration of Human Rights (1948). Preamble.

¹² See "Preliminary Lessons in Conventional Warfighting from Russia's Invasion of Ukraine: February–July 2022" by Zabrodskyy et al. – London: RUSI (Royal United Services Institute for Defence and Security Studies), 2022. P. 7.

¹³ See Wayne Jordash. Genocide in Ukraine. *Ukrainska Pravda*. 28 March 2023 (In Ukrainian).

¹⁴ See Yuriy Khrystyzen. In the Russian law 'On veterans' the war against Ukraine is the "jubilee", the fortieth. *Glavkom*. 8 March 2023 (In Ukrainian).

¹⁵ See Timothy Snyder. Ukraine Holds the Future. The War between Democracy and Nihilism. In *Foreign Affairs*. September/October 2022. Source URL: <https://www.foregnaffairs.com/ukraine-war-democracy-nihilism-timothy-snyder>

Ukraine will win in any format of war – short-term, long-term, or an ultra-long one. This struggle for freedom gives Ukraine the opportunity to root European values in the fertile Ukrainian soil. And to remind European nations of the meaning and importance of these values. This struggle is not limited in time. The Ukrainian people will fight for as long as it takes to achieve their goal – victory. As Anne Applebaum observes, “this summer, this autumn, Ukraine gets a chance to alter geopolitics for a generation”¹⁶.

“To win the war” means not only restoration in Europe of peace and the rule-based international order.

“To win the war” means also to “not lose the peace”.

Today, the pressing task for Ukrainians is also to preserve our democracy. Victory for us should be a process – the process of winning. The Ukrainian word for ‘victory’ is *peremoha*. It has meanings that are not found in many other languages. *Peremoha* means defeating not only the external enemy, but also overcoming the challenges within us. It means to find a new ability within oneself, the capacity of each of us to root our democracy in the Rule of Law and to meet the Copenhagen criteria.

Since before the defeat of the Mongol Horde at *Kalka* 800 years ago, on May 31st, the Ukrainian State – when free to choose – has always chosen a European, not a Eurasian path. For this we have been attacked for centuries by a colonising recidivist neighbour. Having won our democracy and a clear path into the EU, we must avoid a scenario where liberal democracy morphs into a model of “Orban. ua”, where certain countries backslide on their commitment to democratic rule and the Rule of Law. We must ensure that our political classes will not be tempted by authoritarianism.

We must remain vigilant – so that after Ukraine defeats the external monster, a domestic *Leviathan* does not take up residence in the home of a Free and Independent Ukraine.

Thank you very much for your attention.

¹⁶ See Anne Applebaum and Jeffrey Goldberg. The Counteroffensive. In *The Atlantic*. May 1, 2023. .