

ARGUMENT

An expert's point of view on a current event.

How to Prosecute Russia's War Crimes

A new initiative centers justice in Ukraine itself.

By Justin Ling, a journalist based in Toronto.

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“It is not the right of the international community, which has stood by while these crimes are being committed, to forgive,” Aryeh Neier, co-founder of Human Rights Watch, wrote in 1993. “After being stripped of virtually all else, the victims are entitled to retain at least this right.”

Neier had just returned from Sarajevo, Bosnia and Herzegovina. In Brussels and New York, diplomats were wrangling with a difficult choice: pursue a planned war crimes tribunal, endorsed by the United Nations General Assembly, or forgo such a trial to cajole Serbia into a full peace plan with the European Union.

Dropping the trial, the residents of Bosnia and Herzegovina told Neier, would be a “betrayal,” he wrote in the *Washington Post*. Justice for war crimes, ethnic cleansing, and genocide cannot be a “bargaining chip,” he argued.

The International Criminal Tribunal for the Former Yugoslavia commenced a month later.

It seems nearly inconceivable now that those most responsible for the bloodshed and abuses would walk free. But even as the war wound down, it seemed quite possible that men like paramilitary leader Milan Lukic, military commander Ratko Mladic, or ex-Serbian President Slobodan Milosevic, all responsible for thousands of deaths, would walk free.

Today, the world has only just begun to grapple with what justice for Russia's war of aggression in Ukraine could look like.

Ukraine has already begun laying charges against captured Russian soldiers: Its first conviction, of a tank unit sergeant who executed an unarmed civilian, resulted in a conviction in May. That case was relatively straightforward: The sergeant admitted to shooting the Ukrainian man but

said he was merely following orders. (This so-called Nuremberg defense is generally not accepted under international law.)

Ukraine's legal system simply does not have the capacity to handle the sheer volume of cases that are expected: Then-Prosecutor General Iryna Venediktova told the BBC last month they have received reports of some 21,000 war crimes. Even a peacetime Ukraine would be stretched beyond capacity.

They are not entirely alone. The International Criminal Court has established a full investigative team in Ukraine and is actively collecting evidence for possible prosecutions. Kyiv has launched proceedings at the International Court of Justice, accusing Russia of genocide. Another case, albeit largely symbolic, was launched at the European Court of Human Rights. Ukraine's allies, including the United States and European Union, have offered support for these war crimes investigations.

But a cohort of international law experts say now is the time to lay out how, exactly, the world intends on investigating and prosecuting allegations of war crimes committed in Ukraine.

“As the conflict goes on, more and more Russian soldiers, colonels, and generals are going to fall into the custody of the Ukrainians,” Michael Scharf, co-dean of Case Western Reserve University's School of Law, told *Foreign Policy*. “And as that happens, there's going to be a lot of interest in starting the prosecutions. ... I cannot imagine that the current Ukrainian court system can handle that.”

Scharf, alongside the Public International Law & Policy Group as well as lawyers from Ukraine, is proposing a structure for how the West and Ukraine could effectively and quickly manage that deluge of cases.

A draft law written by Scharf and others contemplates a high war crimes court that is still located in Ukraine and staffed by Ukrainian judges. “What this draft piece of legislation does is internationalize the Ukrainian court,” he said.

That means having international observers, foreign advisors, a security guarantee provided by the West, and considerable funding.

At a Public International Law & Policy Group roundtable event last week, alongside other supporters of the project, Scharf pointed to a £2.5 million

(\$3.03 million) donation from the United Kingdom to fund some of the investigative work. “They really need 50 times that,” Scharf said.

This proposed tribunal isn't completely drawn from scratch: The proposal is modeled after the High Anti-Corruption Court of Ukraine. The anti-corruption court's judges are all Ukrainian but are vetted before their appointment—and aided and advised after being selected for the bench—by a team of international experts.

“Our proposal has only Ukrainian judges,” Scharf said. “There's a very good reason for that because their constitution says they can only use domestic judges.”

This internationalized Ukrainian court wouldn't replace the work of those other international bodies but would rather work in tandem with them.

Scharf points out that the International Court of Justice respects the immunity of heads of state and foreign ministers—in 2002, the court invalidated an arrest warrant for former Congolese Foreign Minister Abdoulaye Yerodia Ndombasi on the grounds that he was immune from prosecution. The International Criminal Court tends to pursue more high-ranking individuals: In its nearly 25-year history, the court has only indicted a few dozen individuals.

Scharf sees these various bodies operating in conjunction, not competition, with the Ukrainian court. Decisions on how to divvy up the cases will likely fall to the Ukrainian prosecutor general.

For example, Scharf said, “The ICC could pursue those who won't be extradited to Ukraine.”

“People want to see this internationalization to avoid the appearance of bias,” Stephen Rapp, the former U.S. ambassador-at-large for war crimes issues, said at the Public International Law & Policy Group roundtable event in July.

“If they're not done on a very high standard, if it's not shown under high international standards ... I think it will weaken the support Ukraine has,” Rapp said.

The Nuremberg trials, which prosecuted Nazi war criminals, remain the gold standard for these sorts of prosecutions. Although the early trials focused on senior leadership of the Nazi regime, subsequent tribunals

indicted hundreds of senior officials, corporate leaders, judges, physicians, and soldiers. The prosecutions held accountable those who made the machinery of the German state work. The Nuremberg trials, of course, were only made possible after Germany was routed and with the Soviet Union's cooperation.

Rapp pointed out how important it is for the Ukrainian court to fully understand the Russian command structure, the composition of its units, and the nature of each unit sent into the invasion. Given the murky nature of Russia's military—which is increasingly reliant on conscripts and quasi-private contractors—that will be no easy job. Some of those units could be tried together.

Scharf said there are tangible benefits to pursuing these charges now. “You really need the political will to sustain [a sanctions regime],” he said. “And in the past, indictments have been really successful at that.” He points to the political pressure placed on Milosevic: “They did indict him, and that led to him agreeing to the independence of Kosovo.”

Through that lens, the indictments themselves could have a strategic benefit—even if the accused won't appear before the court. “Just the indictment of leaders has eroded their power, their popularity, their positions of authority,” he said.

“The Russians are not going to surrender any of their indicted people,” he conceded. But an Interpol Red Notice means any of those indicted persons—politicians, military commanders, or soldiers—would risk arrest by leaving the country. “It'll make those people, including [Russian President Vladimir] Putin, prisoners in Russia,” Scharf said.

Russia knows all too well how effective these Red Notices are: It frequently uses Interpol to hound and harass dissidents abroad.

Although evidence of war crimes—the wanton execution of civilians, rape as a weapon of war, shelling of civilian infrastructure, and torture—is significant, that doesn't mean convictions are a given.

Russia has already worked to discredit international legal bodies and is using its own court system to begin trying Western fighters volunteering for Ukraine. An ad hoc tribunal is even using pro-Putin Western influencers to peddle dubious and outright conspiratorial allegations that Kyiv is the aggressor, including the idea that American-funded biolabs in Ukraine are developing biological weapons.

Although there is a clear strategic aim to beginning these investigations and prosecutions in short order, the process can be just as critical as the outcome. For more than a century, the international community has strived to install meaningful and binding accountability measures. With each deadly conflict, that infrastructure has started to take on a more consistent and predictable appearance.

Regardless of who Ukraine and the international community manages to arrest and prosecute, fulfilling the promise made at Nuremberg will be a meaningful contribution to international law.

Justin Ling is a journalist based in Toronto.

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