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‘Ukraine’s pursuit of justice hinders peace’

Many believe that for Ukraine to insist on judicial redress is unrealistic and should not be a precondition of a peace settlement. However, quite apart from the moral imperative, the reality is that peace will not hold unless justice – in the form of trials and reparations – is served.

Kateryna Busol

Fallacy

Some experts are advocating setting aside the issue of justice for Ukraine – at least for now and in the immediate post-war period – in order to find a quicker path to peace. They argue that Ukraine’s proactivity in seeking accountability in international and domestic courts in respect of the Russian state, its political and military leadership, propaganda figures and soldiers might act as a deterrent to ending the war.⁷⁶ At the heart of this misconception is the idea that Russian officials might be less willing to end hostilities if they perceive a viable possibility of incarceration for the crime of aggression and related atrocities that are alleged to have been committed by the regime.

Analysis

Russia is pursuing the neo-imperial subjugation of Ukraine.⁷⁷ Atrocities are a central part of the Kremlin’s tactics, as was also the case in Chechnya and Syria.⁷⁸

⁷⁶ Corder, M. (2023), ‘War-crime warrant for Putin could complicate Ukraine peace’, Associated Press, 2 April 2023, <https://apnews.com/article/putin-arrest-warrant-ukraine-war-crimes-court-93bfa0eb81dd2abe5edb008b78df568d>; Ministry of Foreign Affairs of the People’s Republic of China (2023), ‘China’s Position on the Political Settlement of the Ukraine Crisis’, 24 February 2023, https://www.fmprc.gov.cn/eng/zxxx_662805/202302/t20230224_11030713.html; Krastev, I. and Leonard, M. (2022), ‘Peace versus Justice: The coming European split over the war in Ukraine’, European Council on Foreign Relations, 15 June 2022, <https://ecfr.eu/publication/peace-versus-justice-the-coming-european-split-over-the-war-in-ukraine>.

⁷⁷ Zabrodskyi, M., Watling, J., Danylyuk, O. and Reynolds, N. (2022), *Preliminary Lessons in Conventional Warfighting from Russia’s Invasion of Ukraine: February–July 2022*, Royal United Services Institute for Defence and Security Studies, pp. 10–11, <https://static.rusi.org/359-SR-Ukraine-Preliminary-Lessons-Feb-July-2022-web-final.pdf>; and Jordash, W. (2023), ‘Геноцид в Україні’ [Genocide in Ukraine], *Ukrainska Pravda*, 28 March 2023, <https://www.pravda.com.ua/columns/2023/03/28/7395377>.

⁷⁸ Wilson Center (2022), ‘The Echo of Chechnya in Russia’s War with Ukraine’, 1 June 2022, <https://5g.wilsoncenter.org/event/echo-chechnya-russias-war-ukraine>.

Constraining Ukraine's pursuit of justice contravenes the requirement under international law that the perpetrators of atrocities be prosecuted, and would send a discouraging message to civil societies opposing oppressive regimes globally.

Unless the pattern of impunity is broken, Russia will continue to perpetrate direct and proxy violence globally.

As emphasized by Oleksandra Matviichuk, a Ukrainian lawyer and head of the Center for Civil Liberties, a Nobel Peace Prize-winning non-governmental organization (NGO): 'Justice should not depend on the durability of authoritarian regimes.'⁷⁹ War crimes, crimes against humanity, genocide and aggression pose a threat to the international rules-based order and must be prosecuted. The 1949 Geneva Conventions and their Additional Protocol I, binding upon both Ukraine and Russia, envisage the prosecution of grave breaches of their provisions; such breaches include killing, torture, deportation and the holding of sham trials.⁸⁰ The UN rejects amnesties for atrocity crimes in peace agreements and in proceedings before UN-affiliated courts.⁸¹ Constraining Ukraine's pursuit of justice contravenes the requirement under international law that the perpetrators of atrocities be prosecuted, and would send a discouraging message to civil societies opposing oppressive regimes globally.

Russia's weaponization of torture, sexual violence, deportations, summary executions and attacks on civilian objects in Ukraine plausibly meets definitions of war crimes, crimes against humanity and, perhaps, genocide.⁸² The scale of Russia's recent crimes is such that in 2023, after a period of relative inactivity concerning Ukraine in 2014–21, the International Criminal Court (ICC) issued arrest warrants for two high-profile Russian figures, including President Vladimir Putin. Parallel investigations are under way in Ukraine and numerous other countries⁸³ with the aim of securing prosecutions for possible atrocities committed during the conflict. Ongoing processes include efforts to prosecute the crime of 'aggression' – considered the 'supreme international crime' by the 1945–46 Nuremberg International Military Tribunal⁸⁴ – to reinforce the message that neocolonial war and the perpetration of atrocities in the attempted subjugation of another nation are impermissible.

⁷⁹ Matviichuk, O. (2023), 'A Speech to Europe 2023: Read the Full Text or Watch the Recording', 9 May 2023, <https://www.iwm.at/news/a-speech-to-europe-2023-read-the-full-text>.

⁸⁰ International Committee of the Red Cross (2004), 'How "grave breaches" are defined in the Geneva Conventions and Additional Protocols', 4 June 2004, <https://www.icrc.org/en/doc/resources/documents/faq/5zmgf9.htm>.

⁸¹ United Nations (2004), *The rule of law and transitional justice in conflict and post-conflict societies*, Report of the Secretary-General, S/2004/616*, 23 August 2004, paras 10, 32, 64(c), <https://www.securitycouncilreport.org/un-documents/document/pcs-s-2004-616.php>.

⁸² Office of the High Commissioner for Human Rights (OHCHR) (2023), 'Summary', *Report of the Independent International Commission of Inquiry on Ukraine*, Human Rights Council, A/HRC/52/62, 15 March 2023, https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coiukraine/A_HRC_52_62_AUV_EN.pdf. Specifically on genocide allegations, see Jordash (2023), 'Геноцид в Україні' [Genocide in Ukraine]; Marchuk, I. and Wanigasuriya, A. (2022), 'Beyond the False Claim of Genocide: Preliminary Reflections on Ukraine's Prospects in Its Pursuit of Justice at the ICJ', *Journal of Genocide Research*, 9 November 2022, <https://www.tandfonline.com/doi/abs/10.1080/14623528.2022.2143528>; Global Rights Compliance (2023), 'New Torture Chamber evidence uncovered from liberated Kherson', 2 March 2023, <https://globalrightscpliance.com/2023/03/02/new-torture-chamber-evidence-uncovered-from-liberated-kherson/>; Azarov, D., Koval, D., Nuridzhanian, G. and Venher, V. (2022), 'Genocide committed by the Russian Federation in Ukraine: Legal Reasoning And Historical Context', SSRN, 15 September 2022, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4217444.

⁸³ Crawford, J. and Cruvellier, T. (2022), 'Ukraine Responds to Warfare with "Lawfare"', Justice Info, 25 March 2022, <https://www.justiceinfo.net/en/89266-ukraine-responds-to-warfare-with-lawfare.html>.

⁸⁴ International Military Tribunal (Nuremberg), Judgment of 1 October 1946, p. 25, <https://www.legal-tools.org/doc/45f18e/pdf>.

Justice is crucial to Ukrainians' vision of victory. Ukraine has investigated conflict-related crimes since 2014, established a specialized war crimes unit in 2019 and further expanded prosecutions in 2022.⁸⁵ Ukrainian atrocity survivors and members of civil society have consistently demanded that the Russian leadership and direct perpetrators of conflict-related crimes be held accountable.⁸⁶ Survivors expect prosecutions and wider individual reparations, including medical, psychological and housing support.⁸⁷ Human rights NGOs have submitted numerous communications about documented atrocities to the ICC. They have advised domestic investigators, backed the enhancement of Ukraine's criminal legislation on conflict-related proceedings and advocated for prosecution of the Russian leadership for the crime of aggression.⁸⁸ Human rights NGOs have also consistently called for Kyiv to ratify the ICC Rome Statute – which would allow Ukraine to nominate ICC judges, elect the court's prosecutor and participate in the deliberations of the ICC Assembly of States Parties, including on reforming the ICC's jurisdiction over the crime of aggression.

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Thus, beyond the moral and strictly legal dimensions, Ukrainians' deep desire for justice and the extensive efforts committed thus far to its pursuit suggest that any peace deal that mitigated accountability for Russian perpetrators would likely activate acute social discontent. Ukrainians also remain strongly opposed to bargaining in exchange for peace.⁸⁹ For these reasons, the notion that legal action and reparations should be subordinated to the imperative of ending the war does not seem viable.

Finally, compromising justice for Russia's atrocities in Ukraine would undermine civic transformations more broadly in the post-Soviet region, especially in Russia and Belarus. Impunity for the Russian and Belarusian leaderships would devalue the efforts of citizens in both countries who have opposed the war on principle and have been persecuted as a result.⁹⁰ Deprioritizing fair examination of the Kremlin's crimes would also deprive the Russian and Belarusian peoples of an impartial assessment of their own direct or indirect complicity in supporting

⁸⁵ Busol, K. (2022), 'If Ukraine's Fate Is not a Menu à La Carte, then Ukrainian Voices Must Be Heard', EJIL:Talk!, 20 June 2022, <https://www.ejiltalk.org/if-ukraines-fate-is-not-a-menu-a-la-carte-then-ukrainian-voices-must-be-heard>.

⁸⁶ ZMINA (2021), 'Як українці ставляться до перехідного правосуддя – соціологічне дослідження' [The Attitudes of Ukrainians to Transitional Justice – a Sociological Survey], 17 March 2021, <https://zmina.info/articles/doslidnyky-rozpovily-pro-stavlennya-ukrayincziv-do-perehidnogo-pravosuddya>.

⁸⁷ Nassar, A., Busol, K. and Sydor-Czartorysky, A. (2022), *Ukraine Study on the Status of and Opportunities for Reparations for Survivors of Conflict-Related Sexual Violence*, Global Survivors Fund, pp. 47–51, https://static1.squarespace.com/static/5ff7d9f4dd4cdc650b24f9a4/t/62c3d1610bf4cc740f73fb56/1657000313991/GSFReporUkraine_ENG.pdf.

⁸⁸ 'Memorandum of Civil Society Organizations of Ukraine: Shared Guiding Principles on Accountability for Grave Crimes Committed in Ukraine', <https://rights-justice-peace.in.ua/en-us>.

⁸⁹ 84 per cent of Ukrainians oppose any territorial bargaining with Russia in exchange for peace. Kyiv International Institute of Sociology (2022), 'Dynamics of Readiness for Territorial Concessions for the Earliest Possible End to the War: Results of a Telephone Survey Conducted on July 6-20, 2022', 27 July 2022, <https://www.kiis.com.ua/?lang=eng&cat=reports&id=1124&page=1>.

⁹⁰ *Novaya Gazeta Europe* (2023), 'Not only do I not repent, but I am also proud', 10 April 2023, <https://novayagazeta.eu/articles/2023/04/10/not-only-do-i-not-repent-but-i-am-also-proud-en-news>; Human Rights in Ukraine (2022), 'International Memorial: we are against the war with Ukraine', 25 February 2022, <https://khpg.org/en/1608810139>.

the war or acquiescing to it.⁹¹ Without a profound reckoning of society's role in these events, and its contribution to the creation of the environment that enabled them, an eventual democratic transition in Russia and Belarus is impossible.

The way forward

An immediate practical task is to help Ukraine process its huge backlog of criminal prosecutions. There are currently 89,000 war-related proceedings under way in the country.

An immediate practical task is to help Ukraine process its huge backlog of criminal prosecutions. There are currently 89,000 war-related proceedings under way in the country.⁹² Ukraine needs permanent on-the-ground expert advice in handling these, particularly in investigating and prosecuting more challenging atrocities such as conflict-related sexual violence, indiscriminate shelling and genocide. Any allegations of misconduct by Ukrainian military personnel should also be impartially investigated to ensure equal treatment of all victims. There remains a need to step up engagement with vulnerable survivors, such as children and victims of sexual violence; processes will need to be carefully crafted to avoid the retraumatization of victims. Kyiv needs to develop a comprehensive transitional justice framework covering criminal proceedings, truth-telling, reparations for victims and non-repetition guarantees.⁹³ Steps such as these will normalize Ukraine's application of international law domestically, strengthen the expertise of national criminal justice professionals, enhance conflict-related proceedings and increase overall compliance with the rule of law – in visible contrast with Russia.

By backing comprehensive justice for Ukraine, the international community will strengthen access to justice for atrocity victims globally. States should launch more universal jurisdiction proceedings for atrocities committed in Ukraine and elsewhere through their domestic courts, to narrow impunity for geographically distant crimes and to assist countries such as Ukraine that are overwhelmed with cases.⁹⁴ States should execute all ICC arrest warrants, including for President Putin, and ensure that the court has resources for effective investigation of international crimes in all situations, including Ukraine.⁹⁵

⁹¹ As of early 2023, around 75 per cent of Russians and 33 per cent of urban Belarusians supported the war against Ukraine. Bne IntelliNews (2023), 'Levada poll finds 75% of Russians supporting war', 24 February 2023, <https://www.intellinews.com/levada-poll-finds-75-of-russians-supporting-war-271068>. See also Belarus Initiative (2023), 'Fifteenth Survey Wave: Belarusians' views on the war and value orientations (poll conducted March 15-27, 2023)', 12 April 2023, <https://en.belaruspolls.org/wave-15>.

⁹² As of 26 May 2023, Prosecutor General's Office of Ukraine, official Twitter account, https://twitter.com/gp_ukraine?fbclid=IwAR3bax_gy5dASd1k4-GYNUFdcC_E6lhVT-7H0OxDTH-Qc3YoxL12Xasl514.

⁹³ OHCHR (2023), *Report of the Independent International Commission of Inquiry on Ukraine*, A/HRC/52/62, 15 March 2023, para 105, https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coiukraine/A_HRC_52_62_AUV_EN.pdf.

⁹⁴ Crawford, J. and Cruvellier, T. (2022), 'Philip Grant: "Ukraine is Accelerating a Revival of Universal Jurisdiction"', Justice Info, 29 November 2022, <https://www.justiceinfo.net/en/109532-philip-grant-ukraine-revival-universal-jurisdiction.html>. On different modalities of universal jurisdiction proceedings, see the country-specific research at 'Justice Beyond Borders': <https://justicebeyondborders.com>.

⁹⁵ International Criminal Court (2023), 'Situations under investigations' [as of 1 June 2023], <https://www.icc-cpi.int/situations-under-investigations>.

Finally, given the ICC's limited jurisdiction in respect of the crime of aggression,⁹⁶ states should support proposals for the establishment of a special tribunal for Russia's aggression. In addition, Ukraine should ratify the ICC Rome Statute and catalyse reform of the ICC to enable it to prosecute future cases of aggression free from the current jurisdictional constraints around political consent.⁹⁷ This will allow Ukraine to hold Russia's leadership accountable and to become an agent of change for atrocity victims worldwide.

⁹⁶ International Criminal Court (2011), *Rome Statute of the International Criminal Court*, arts. 15bis, 15ter, <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>. See also the following definition as cited by the European Commission: 'The International Criminal Court (ICC) is competent to prosecute the most serious international crimes such as genocide, crimes against humanity and war crimes. It is also competent to prosecute the crime of aggression but only in relation to those countries that have accepted its jurisdiction in relation to this crime.' European Commission (2023), 'Statement by President von der Leyen on the establishment of the International Centre for the Prosecution of Crimes of Aggression against Ukraine', 4 March 2023, https://ec.europa.eu/commission/presscorner/detail/en/statement_23_1363.

⁹⁷ This two-pronged approach is already supported by the Parliamentary Assembly of the Council of Europe (PACE) and the UN Commission of Inquiry on Ukraine. PACE (2023), Resolution 2482 (2023): 'Legal and human rights aspects of Russia's aggression against Ukraine', 26 January 2023, para 9, <https://pace.coe.int/en/files/31620/html>; OHCHR (2023), *Report of the Independent International Commission of Inquiry on Ukraine*, A/HRC/52/62, 15 March 2023, para 104.