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RUSSIA: Prosecuting Russia's crime of aggression in Ukraine

A view of the exterior view of the International Criminal Court in The Hague, Netherlands, Wednesday, March 31, 2021.

The International Criminal Court's prosecutor has put combatants and their command

Image by picture alliance / ASSOCIATED PRESS | Peter Dejong ©

RUSSIA: Prosecuting Russia's crime of aggression in Ukraine: A

tribunal like no other

A special tribunal for the crime of aggression could help secure justice for Ukrainians harmed by Russia's invasion. Such a court would have three major implications

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European Council on Foreign Relations (23.02.2023) – One year into Russia's invasion of Ukraine, the pursuit of accountability for atrocities has emerged as a central tenet of the West's response. And not without reason – the Ukrainian prosecution has registered more than 70,000 cases of suspected war crimes, a number that rises by the hundreds every day.

Ukrainian law enforcement has already made prosecuting war crimes a top priority. The International Criminal Court (ICC) is investigating not only war crimes, but also crimes against humanity and possibly even genocide. The United States, European Union, and several European states, as well as Ukrainian and international NGOs, are also heavily involved in accountability efforts.

Despite all this, there is a gaping hole in accountability efforts: no mechanism yet exists to ensure the Russian leadership is held accountable for the crime of aggression. Russia's rulers are the masterminds and instigators of this war. Their decision to launch the war was the original act enabling all other crimes to be committed in Ukraine. But there is no international tribunal or court that has jurisdiction over the crime of aggression. There is an absurdity in that courts can hold foot soldiers and their commanders accountable for war crimes but not the leaders for the crime of aggression.

If this crime is not investigated and prosecuted in the

particular case of Ukraine, the crime risks becoming meaningless. Such an absence of action would water down the prohibition against the use of force in international relations, as set out in the UN Charter. It would strengthen the notion that 'might makes right' and that leaders enjoy impunity for the "supreme international crime." This would encourage other would-be aggressors around the world.

Since the invasion started, Ukraine has been pushing for the establishment of an international special tribunal for the crime of aggression. The prospect of such a tribunal coming into being seemed farfetched only six months ago, as support for the idea appeared lacklustre. Today, however, diplomatic efforts to set up some sort of court are moving forward. The EU, along with others such as the United Kingdom and Canada, are united in wanting to establish a judicial mechanism to try the crime of aggression. Even the US has made positive noise around establishing a mechanism. A first step has been taken by the EU in setting up an International Centre for the Prosecution of the Crime of Aggression in Ukraine in The Hague, which can help collect evidence for use in future prosecutions. Important details have still to be worked out by proponents of a mechanism. Will it be a tribunal endorsed by the UN General Assembly? Will it be established by a treaty between willing states and Ukraine? Or will it be a hybrid court under Ukrainian jurisdiction with international judges and prosecutors? ECFR's Anthony Dworkin has set out some of the issues here. Despite the challenges, the arguments to proceed with a tribunal are compelling. Beyond the central importance of achieving justice for those harmed by Russia's war, the creation of a tribunal could have three big implications.

Playing the long game

The magnitude of the war and the scale of the atrocities

committed in Ukraine means that accountability will be central to Western relations with Russia for years, if not decades. It will frame Western engagement with the country in a similar way that the International Criminal Tribunal for the former Yugoslavia (ICTY) has framed the West's engagement with the countries of the Western Balkans.

Seeking accountability is a way to play the long game with the Kremlin

Seeking accountability is a way to play the long game with the Kremlin and counter its strategy of holding out until Western unity and resolve collapse. Once the mechanisms of international justice kick into action, they take on a life of their own and are virtually unstoppable. They move ahead regardless of what may seem to be politically expedient in the moment.

In this sense, therefore, supporting the establishment of a special tribunal is a strategic policy towards Russia. A tribunal will contribute to maintaining international resolve over time and counteract calls to return to 'business as usual' with Russia. A tribunal will challenge the Kremlin's belief that it has time on its side. The pursuit of accountability will continue beyond any end of hostilities – and carry on regardless of how the war ends.

Peace and justice

A realpolitik argument against a special tribunal may be that it would undermine efforts to end the war through negotiations and a peace agreement or ceasefire – that a tribunal would disincentivise Russian leaders from making compromises if they believed that they would end up in The Hague regardless. The pursuit of justice, the argument could go, would come at the expense of peace.

However, there is nothing to indicate that Moscow is serious about good faith negotiations or is looking for a peace agreement. Russia has not given up on its strategic objective of subjugating all of Ukraine, an objective Moscow continues to pursue with military means. Russia's willingness to negotiate might, of course, change in the future. But the most important factor for determining whether Moscow pursues negotiations or war is what happens on the battlefield rather than in The Hague.

Justice does not have to stand in the way of peace. There are leaders who have negotiated peace agreements despite international indictments hanging over them. This was the case with President Omar al-Bashir, who had been indicted by the ICC for genocide when Sudan negotiated and reached several agreements with South Sudan in 2012. The pursuit of accountability can in fact help the cause of peace and reconciliation. This happened with President Hashim Thaci and the prime minister, Ramush Haradinaj, in Kosovo when they faced indictments. They become more constructive because of the prospect of an indictment.

In the end, the pursuit of accountability probably has a limited impact on a leader's willingness to negotiate. Nevertheless, it can play into domestic political dynamics, empowering political opponents: the ICTY's indictment against President Slobodan Milosevic contributed to international isolation and stigmatisation, accelerating his downfall.

That indictment also led to resentment in Serbian society. In the case of Ukraine too, a special tribunal will no doubt create more bitterness in Russia towards the West. But this is the necessary price for defending justice and the international order. At some point in the future, the tribunal's judgments might even play a part in helping Russians come to terms with the crimes committed in Ukraine.

The international community

Whatever mechanism is set up, there will be states that oppose it, even if it receives UN General Assembly endorsement. In practice, some states will recognise the tribunal's legitimacy and others will not. Many in the global south will decry double standards or fall back on supporting Russia because of Soviet backing for the Non-Aligned Movement during the cold war. Such opposition may well be inevitable but is not in itself an argument for not moving ahead with setting up a tribunal or court. The existence of parallel legal realities is nothing new in international relations. It exists, for instance, in relation to the ICC, whose Rome Statute has 123 state parties. Broad international support will nevertheless be important for the mechanism's legitimacy and international character.

Russia, of course, is neither Serbia, Kosovo, nor Sudan. Russia is a nuclear power with a permanent seat on the UN Security Council. Its leaders will scoff at a tribunal, try to discredit it to the best of their abilities, and continue to pursue what they believe is in Russia's – or, rather, their own – interest. But the tribunal will still be lurking out there, ready to pounce. And it could end up forming an essential component of Western support for Ukraine in the long war that Russia chose to start.

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