

# Crimes against Humanity Committed by Kiev Regime: The Case for an Independent Ukrainian War Crimes Tribunal

By [Dr. Jonathan Levy](#)

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## The Case for an Independent Ukrainian War Crimes Tribunal on the 4 Month Anniversary of the Odessa Massacre

*The situation in Ukraine today is heart breaking. Ordinary people, women, children, and pensioners, are on the receiving end of deadly rocket and artillery barrages daily, they are gunned down at checkpoints, summarily arrested and put under siege. Refugees have been streaming across the border into Russia with genuine fear of murder and mayhem by Ukrainian punitive brigades and National Guard units out for the blood of the "enemies of Ukrainian unity." Even if the situation was politically and militarily rectified today; the guilty parties must be held accountable for their crimes.*

*There are well documented crimes and ones yet to be discovered, with allegations flowing on both sides of the conflict that require an impartial and immediate investigation. As a member of the International Criminal Bar, the organization which represents lawyers who practice before the International Criminal Court (ICC), I called for an investigation of the Maidan sniper attacks and Odessa massacre by the ICC. For my efforts I received a form letter. There is no ICC investigation; witnesses are not being interviewed nor is evidence being preserved. The Russian government has collected some evidence; the same cannot be said of Ukraine. But in either case, the partiality of the party will be questioned.*

The ICC is supposedly tasked with investigation and prosecution of war crimes, genocide, and crimes against humanity, I naively assumed the ICC would seize the initiative or at least warn the combatants that war crimes would be prosecuted. What has happened instead is legal maneuvering by Ukraine and the ICC to avoid opening any investigation at all while the crimes are still fresh and ongoing.

The Maidan snipers, the Odessa massacre, and the shoot down of Malaysian Flight MH17 are subject to speculation and counter accusations. Key evidence has been deliberately destroyed and witnesses intimidated. Black boxes have seemingly disappeared. YouTube™ videos may now be the best remaining evidence. A sad state of affairs in 21<sup>st</sup> Century Europe.

Part of the problem is jurisdictional and the other part is what can be called a disgraceful scam by the major powers and the UN. The ICC studiously avoids getting involved in investigations involving non-parties to its enabling treaty, the Rome Statute. This has the effect of limiting ICC investigations to Africa because African countries were strong armed

into ratifying the Rome Statute by their donor nations while the United States, Russia, China, Ukraine, India, Syria, Pakistan, Iraq, Israel and other places where war crimes occur or are planned have avoided ratifying the Rome Statute.

Of course, the UN Security Council can refer a case to the ICC regardless but that requires unanimity, something lacking altogether where Syria, Iran, Afghanistan, North Korea, Palestine and especially Ukraine are involved. National interests trump war crimes very time. In the case of the United States, the fear of the ICC's reach is pathological and the USA has signed numerous bilateral treaties nullifying the ICC's ability to prosecute US citizens, soldiers and CIA operatives.

Ukraine is not a signatory to the Rome Statute. Nonetheless at first she seemingly welcomed the ICC to investigate certain matters deemed beneficial to its claim that the heroes of the Maidan were the victims of Russian strong arm tactics. Counter evidence however quickly emerged that some sniper bullets came from behind the protestors. Ukraine's ardour to investigate quickly cooled.

According to the ICC, On 17 April 2014, the Government of Ukraine lodged a declaration under Article 12(3) of the Rome Statute accepting the jurisdiction of the International Criminal Court (ICC) over alleged crimes committed on its territory from 21 November 2013 to 22 February 2014.

The reasoning was the war crimes could be linked to Russia or its proxies. However, once the current Ukrainian regime became ensconced in Kiev, it lost interest and did not include the May 2014 massacre in Odessa or the "Anti-terrorist Operation" (ATO) in southeast Ukraine in the scope of its request. Indeed most civilian casualties in Odessa, Donetsk and Lugansk according to Kiev are improbably caused by the "terrorists" bombing themselves so there is no need to investigate.

Nonetheless, the ICC allegedly is supposedly hard at work, albeit sluggishly:

"Upon receipt of a referral or a declaration made by a state pursuant to Article 12(3) of the Rome Statute, the Office of the Prosecutor, as a matter of policy, opens a preliminary examination of the situation at hand. Accordingly, the Prosecutor of the ICC, Fatou Bensouda, has decided to open a preliminary examination into the situation in Ukraine in order to establish whether the Rome Statute criteria for opening an investigation are met. Specifically, under Article 53(1) of the Rome Statute, the Prosecutor shall consider issues of jurisdiction, admissibility and the interests of justice."

But therein lies the hoax, ICC Prosecutor, Ms. Fatou Bensouda, is not actually investigating crimes but looking into whether there is jurisdiction to investigate. The ICC was invited in by Ukraine but Bensouda is so fastidious that she must first investigate the invitation, the envelope it came in and the postage. The last time the ICC was invited to investigate under similar circumstances was in 2009 when the Palestinian Authority requested the ICC's help in Palestine. This was something that might have helped restrain the parties in the current Gaza campaign which like Ukraine has whipsawed civilians between defenders and a punitive expedition by the Israeli army. After a mere three years and thousands of lives lost, in 2012, the ICC finally announced it had made a decision. The ICC decided it could not get involved because the Palestine Authority was not a full UN member. So much for ICC

jurisdictional investigations, three years to state the obvious. Does anyone doubt a similar outcome in Ukraine? Three or four years from now the ICC will reach a decision that it will not investigate.

The ICC seems content to chase Africans who have no powerful friends and allies, yet even then it has only completed prosecuting two cases in over ten years. Incompetent does not adequately describe the ICC; it seems to operate in reckless disregard of the very victims it is supposed to protect.

The other option that no doubt will emerge for consideration in Ukraine is a United Nations ad hoc tribunal such as ones established for former Yugoslavia, Cambodia, and Rwanda. UN Tribunals are what can only be described as victor's justice. The winners get a slap on the wrist and the losers usually get the shaft. Procedural irregularities and long delays are the norm. Lawyers for the accused are threatened, defendants die in custody and trials take forever. Does anyone even remember what Dr. Vojislav Seselj, the former Vice President of Yugoslavia, was charged with even though his detention and trial has been going on for over a decade?

If there is a UN Tribunal for Ukraine, it is a sure bet that the defenders of the Donbas will make up the majority of defendants and that Ukrainian nationalists will be notably absent. Ukraine is sponsored by the US, NATO and the EU while Donetsk and Lugansk can look to only Russia for moral support.

Then there is the related issue of human rights violations. Numerous claims against Ukraine have already been filed with the European Court of Human Rights or ECHR. The ECHR while facing an enormous backlog does indeed take care of its business. Ukraine can expect to be on the losing end much of time; the only problem is that enforcement of ECHR judgments is difficult at best. The ECHR is part of the Council of Europe not the EU; thus cannot readily enforce its judgments by threatening sanctions or withholding aid or credits.

Finally, there is the UN Human Rights regime, which is a Kafkaesque labyrinth of procedures, commission, and committees safely meeting in Geneva. My advice to potential claimants is do not even waste your time on this nonsense. In my experience, assuming the UN does not lose or outright throw out your claim out of spite, it will take many years before a non-enforceable ruling emerges, if ever. Converting that claim to a damage settlement will take even longer and usually is not successful. As for victims of the ATO in southeast Ukraine they stand about as much chance with the UN as Serbs who were damaged by the 1999 NATO bombing campaign.

The desirable solution is a competent independent tribunal to handle war crimes and human rights cases for Ukraine. Of course such a tribunal cannot be created from thin air. The Council of Europe (COE) includes both Russia and Ukraine and includes 47 countries and over 800 million citizens. The COE's European Court of Human Rights court actually disposes of cases and that is a good thing. Assuming the Council of Europe would be willing to undertake such an assignment and empowered accordingly, it is just the place for an independent tribunal to be situated.

The Council of Europe Secretary General Jagland has consistently called for human rights to be respected in Ukraine in a nonpartisan manner. It is now up to the major parties involved in the Ukrainian proxy war to roll up their sleeves and get to work fixing the mess caused by the Maidan coup and its aftermath - Russia, United States, Poland and Germany are you

listening?

***Dr. Jonathan Levy** is an attorney member of the International Criminal Bar and holds a PhD in Political Science. He may be reached at [info@brimstoneandcompany.com](mailto:info@brimstoneandcompany.com)*

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