

Ukrainian War Crimes Tribunal: A Moral Imperative

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As [reports of atrocities and human rights violations in Ukraine mount](#), corroborated by [extensive witness testimony](#) and [much tangible evidence](#) (and [here](#)), it becomes paramount to consider ways and means of punishing instigators, enablers, and direct perpetrators of these outrages.

It is equally important to preserve the legal and historical record of these crimes and to administer suitable punishments in order to deter other potential war criminals in the Ukrainian theatre.

Finally, the purpose of such a Tribunal would be educational, to impress upon that segment of Ukrainian society which had become swayed by extremist Nazi propaganda the enormity of the misconduct perpetrated in their name and in furtherance of a criminal agenda that, actively or passively, deliberately or unwittingly, some of them may have supported. For, unless there is a sober confrontation with these crimes against humanity by Ukrainians vulnerable to the extremist narrative, and as soon as possible, stability and civility will continue to evade Ukraine for a long time to come.

The first step is to set the framework within which Ukrainian war crimes investigations and trials ought to be conducted. It is possible, of course, to entrust this task to the judicial authorities of Donetsk and Lugansk because obviously they have territorial and subject matter jurisdiction. However, for the impartiality and credibility of the proceedings to be preserved, it would be preferable for Ukrainian war crimes investigations and resultant trials to be conducted under the auspices of an international forum, removed as much as practicable from the parties on the ground.

Clearly, a replication of the founding of the International Criminal Tribunal for the Former Yugoslavia at the Hague (ICTY) in the 1990s is unlikely in the present case. Setting aside technical issues concerning the legitimacy of such a tribunal under the UN Charter, three out of five governments permanently represented on the Security Council are potential suspects for active collusion with and logistical support extended to direct perpetrators of war crimes in the Ukraine. That makes it extremely improbable that this time round they would agree to the establishment of a similar court. The solution, therefore, must be sought elsewhere.

Taking into account the ongoing decline of the global Western hegemonic system, a process which was greatly accelerated precisely by the political, military, economic, and financial fallout of the Ukraine conflict, it would be advisable to look for another way to elevate the Ukrainian war crimes inquiry to the international level. One possible approach would be to place the matter under the auspices of the Collective Security Treaty Organization. CSTO nations are now effectively the global counterpart to the moribund West-centered “international community” which, in the 1990s, was still able to manipulate the UN in furtherance of its political aims, and to a lesser extent is still able to do that today.

Assuming that CSTO could be a viable option to serve as the supranational patron for the Ukraine war crimes tribunal, the next step would be to carefully define the Tribunal’s remit and to devise its procedural rules to avoid ICTY’s errors. In order to blunt inevitable efforts from the West to discredit the new Tribunal, much of the general language found in corresponding ICTY foundational documents should be utilised, always taking great care to identify and discard those provisions of ICTY Statute and Rules of Evidence and Procedure which are not compatible with best legal practice, and substituting for those provisions universally accepted legal principles.

The next important issue that would have to be dealt with is the staffing of the Ukraine International Criminal Tribunal. Recruitment of judges, investigators, prosecutors, and support staff need not, and in fact should not, be confined to personnel from CSTO states. Persons who satisfy the criterion of professional integrity should be encouraged to participate regardless what country they are nationals of.

The Ukraine Tribunal will also have to select a conceptual framework, a set of main legal principles that it will apply in the conduct of its proceedings. Three major concepts or devices come immediately to mind that have been used by ICTY (the “Mechanism,” which is its successor, is included by reference) to secure often questionable convictions. Those concepts are: Joint Criminal Enterprise, Command Responsibility, and Plea Bargaining.

With the likely exception of the pernicious practices of accepting [uncorroborated confessions](#) and [plea bargaining](#), which in the form as applied at ICTY have radically undermined rather than promoted the administration of justice, JCE and Command Responsibility could conceivably be reconfigured and preserved in modified form, at least to the extent that they are not in conflict with the tasks of determining objective facts and administering politically neutral justice. For instance, JCE (detached from some of its more absurd variants invented by ICTY judges specifically to facilitate incrimination and conviction by any means) could be a useful tool not only for linking perpetrators acting with criminal intent and in concert, but also for establishing overarching connections between direct on-the-ground perpetrators and their instigators and supporters from beyond the borders of Ukraine.

Another conceptual issue that inevitably will have to be addressed is the scope of the investigations to be carried out beyond the factual matrix of the particular crimes being adjudicated. There is also the further and related question of the nature of broader historical and contextual evidence that should be considered probative and allowed to be presented in court. From the standpoint of securing justice, ICTY's performance in that regard has been most unsatisfactory, not to say dismal and flagrantly prejudicial to the accused parties.

That is the case because even when ICTY attempts to apply seemingly sound principles it regularly twists them to serve its politically compromised agenda. Background "evidence" presented by ICTY historical, military, media, and other "expert" witnesses had invariably been geared not to shed light on relevant and probative circumstances but to heap maximum discredit upon the targeted parties. The resulting hugely prejudicial reputational damage, that under normal conditions would be inadmissible in a trial court, was designed to impact not just the individual defendant but, even more importantly, the entire ethnic group (at ICTY, in practical terms that meant the Serbs) the defendant happened to belong to. A particularly obnoxious example were the attempts of ICTY "expert witnesses" to contextually portray verses of nineteenth century Serbian poet Njegoš as no less than the inspiration for the alleged genocide in Srebrenica.

Hopefully, the Ukrainian Tribunal will not have to resort to such pseudo-academic and pseudo-judicial skulduggery because it will operate scrupulously and above board, without fabricating or shaping facts to fit preconceived conclusions dictated by political controllers. That will be its huge moral and professional advantage.

There is no formal reason why the Ukrainian war crimes Tribunal should not be established within the ambit of the judicial systems of the Donbass republics, because such a court would be dealing primarily with criminal conduct in violation of international humanitarian law as it affected the population of those two entities. But it would carry greater weight and would thus be preferable for the task of investigating, apprehending, trying, convicting, and incarcerating offenders to be entrusted to an international body, backed by the legitimacy of recognised and indisputably sovereign nation-states.

Such an approach would make the Ukraine Tribunal's factual findings and verdicts unquestionably legitimate, which might not entirely be the case with verdicts issued by some local courts. It would serve also an additional important purpose. It would dovetail perfectly with the emergence of the Fair World Order, intended to replace its relatively short-lived "NWO" counterpart. Taking advantage of the convenient opportunity presented by the current crisis, the Ukraine Tribunal could lay the groundwork for a revitalised system of international criminal law, serving as an essential foundational component of a broadly acceptable, inclusive, and viable future global order.

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