

REPORT

Ukraine's 'Nuremberg Moment' Amid Flood of Alleged Russian War Crimes

So many crimes are being documented that they need a new court.

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As Russia continues its assault on Ukraine, top Biden administration officials are working behind the scenes with the Ukrainian government and European allies to document a tsunami of war crimes allegedly committed by Russian forces.

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But the sheer volume of the documented war crime cases could be too overwhelming for Ukraine's justice system as well as for the International Criminal Court (ICC), raising questions of how many cases will be brought to trial and how many accused Russian war criminals could ultimately face justice.

"This is a Nuremberg moment in terms of just the sheer scale of the breach of the rules-based international order that has been perpetrated by Russia in this invasion," said Beth Van Schaack, the U.S. ambassador-at-large for global criminal justice. "Even the most well-resourced prosecutorial office would have a hard time grappling with the sheer scale of the criminality that's been on display."

The United States joined a slew of other Western countries and international institutions in devoting resources to help Ukraine document and collect

evidence on as many alleged war crimes as possible, from Russian soldiers torturing, raping, and executing Ukrainian civilians to Russian armored units and air forces indiscriminately shelling civilian targets.

When Russian forces withdrew from the Kyiv region in early April, they left in their wake nightmarish scenes of bodies strewn along the roads of Bucha. The massacres came to symbolize Moscow's savage disregard for civilian life and raised fears about what awaits investigators in cities such as Mariupol, which endured months under siege by Russian forces.

The efforts to document and eventually prosecute these war crimes is largely without precedent, veteran human rights activists say, both because of the sheer amount of documented cases flooding into Ukraine's central government—the Ukrainian prosecutor's office has 15,000 possible cases to investigate by the latest tally—and the fact that the government managing these cases is still battling the Russian invasion.

“The national legal system, even with an effective prosecutor's office, couldn't cope with 15,000 cases,” Oleksandra Matviichuk, a leading Ukrainian human rights lawyer and the head of the Ukraine-based Center for Civil Liberties, told *Foreign Policy* during a recent visit to Washington. “And remember, we are a country still at war. We have limited resources.”

There are so many alleged Russian war crimes that the investigative response is also unprecedented. The ICC, the premier intergovernmental body tasked with prosecutions of war crimes, has dispatched 42 investigators to probe possible war crimes in Ukraine, its “largest-ever” team of experts to carry out such a task. Other European countries, including Estonia, Latvia, Lithuania, Slovakia, and Poland, joined Ukraine in setting up a so-called Joint Investigation Team to cooperate on war crimes investigations, while the U.S. government is funding complementary efforts to document war crimes and support Ukrainian organizations dedicated to doing so. The Organization for Security and Cooperation in Europe, a leading multilateral organization, has also established an expert mission to document human rights abuses. In Ukraine, meanwhile, the prosecutor general's office has brought forward several war crimes trials against captured Russian soldiers and is investigating thousands more, while civil society groups are training volunteers on how to properly document evidence of possible war crimes, effectively crowdsourcing the early stages of investigations for future cases.

There's a growing concern among some U.S. officials and Ukrainian activists that all these concurrent efforts could eventually trip over one another and may start doing more harm than good—that is, unless there's a central hub set up to coordinate all the work. “It's been a little bit chaotic,” conceded one U.S. official working on supporting efforts to document war crimes in Ukraine, who spoke on condition of anonymity as they were not authorized to speak to the media. (Van Schaack, for her part, insisted that these efforts are “decentralized,” but not chaotic, because each group is in constant contact with one another to coordinate their work.)

Matviichuk and other Ukrainian civil society groups are advocating for the international community to establish a special “hybrid” international tribunal court to centralize and absorb all the investigations into possible war crimes and human rights violations committed during the war.

The proposal is not without precedent. These types of so-called hybrid courts, backed by both international and domestic laws and staffed by a combination of local and international experts, have been established to handle war crimes cases in Cambodia, Sierra Leone, and Rwanda and could be modeled in part after the International Criminal Tribunal for the former Yugoslavia.

However, there's another major hurdle: Many of those international tribunals were established by (and gained their legitimacy through) the U.N. Security Council. Russia, as a permanent member of the Security Council, would undoubtedly veto any effort to set up a tribunal documenting war crimes against its own soldiers and leaders, meaning that Ukraine and its allies in the West would have to find a workaround for establishing an international court that doesn't require U.N. Security Council approval.

One option would be to gain backing from the U.N. General Assembly instead, but doing so would require a two-thirds majority vote of members, which is by no means guaranteed. Another challenge with a global forum such as the United Nations is that it could be open to allegations of selectivity, said Tom Dannenbaum, an assistant professor of international law at Tufts University's Fletcher School.

“The fact that the United Nations responds in some cases and not others can affect the politics around the tribunals it backs,” Dannenbaum said. One way

around that could be to have a European institution, such as the European Union or the Council of Europe, lend its backing to the tribunal, he said.

The idea of a special tribunal has already gained traction in the European Parliament, where a group of EU parliamentarians formally endorsed the idea in May. Washington has yet to back such a plan, but Van Schaack said the administration is actively reviewing a series of proposals on how to bring to justice accused Russian war criminals. “Our focus at the moment has been on maximizing the effectiveness of existing accountability mechanisms,” she said.

Another option is for other states to try accused Russian war criminals within their own domestic systems under the principle of universal jurisdiction. Offenses such as genocide, war crimes, and crimes against humanity are perceived to pose such a grave threat to the international system that they can be tried in any country regardless of whether they have a direct tie to the case. In an interview on Friday, Lithuanian Foreign Minister Gabrielius Landsbergis said his country was exploring the possibility of trying some of Ukraine’s war crimes cases in Lithuanian courts.

In Congress, meanwhile, U.S. lawmakers on both sides of the aisle are clamoring to help in the effort with new legislation and funding for documenting war crimes.

“As the United States keeps its focus on Ukraine and helping its population defend its land and protect its people today, we should also be prepared to work in the same synchronized manner so that the Kremlin is forced to face its own reckoning for this unprovoked, bloody war,” U.S. Sen. Jeanne Shaheen, a Democratic member of the Senate Foreign Relations Committee, told *Foreign Policy* in a statement.

Shaheen was one of 13 senators from both parties to sponsor a bill last month aimed at ensuring the U.S. government is allocating resources to documenting war crimes in Ukraine. Among the tens of billions of dollars that the Biden administration has requested to aid Ukraine in the war, some \$80 million is devoted to accountability on war crimes.

Still, documenting the war crimes is only part of the legal battle. There are also hurdles to preserve evidence and track down witnesses for cases that could be tried years down the road—a difficult task, let alone in an active war zone. Launching cases in international courts, including the ICC, can be a costly and

lengthy process. The ICC has historically only handled a select few cases, emblematic of wider human rights abuses in a specific conflict.

“I think it’s important to temper expectations. Not every perpetrator will have their day in court—it’s not realistic. We have not seen that historically in lots of other countries around the world,” said Kelebogile Zvobgo, an assistant professor of government at William & Mary and founder of the International Justice Lab.

Then there’s the matter of getting custody of the accused war criminals—another steep hurdle for the current war, beyond the limited number of cases where the accused Russian war criminals have been captured by Ukrainian forces during the war. The ICC has sought to avoid trying people in absentia.

“Most of the architects of violence remain in Russia,” Van Schaack said. “And of course, Russia will be unwilling to extradite or conduct their own process internally, which they are obliged to do under the laws of war.”

In many instances, it can be easier to prosecute the low-ranking soldiers who are responsible for committing the crime than the commanders who may have instructed them to do it. “Do we have communications, do we have evidence of that? Was there a letter, or was there a recording of the order?” Zvobgo said.

And then there’s the question of whether Russian President Vladimir Putin would ever see the inside of a courtroom. Russia’s most senior officials, such as Putin and Foreign Minister Sergey Lavrov, are offered immunity under international law, but even that has its limits.

“As soon as a head of state or foreign minister leaves office, their status immunity elapses. And these crimes don’t have any statute of limitations, so Putin or Lavrov could be prosecuted 30 years down the line, longevity permitting,” Dannenbaum said. There is also precedent for the ICC to indict a sitting head of state.

“I think that there would be a significant risk for Putin or Lavrov to travel to any state party to the ICC and any state that recognizes the international status of any hybrid tribunal that is created,” he said.

Despite all these hurdles, Matviichuk said she has confidence that Russians who committed war crimes will be brought to justice, eventually. “History has

shown that sooner or later authoritarian regimes collapse and war crime perpetrators face justice. War crimes have no limited deadline. If they are alive, they will be caught,” she said.

Ukraine has already begun prosecuting war crimes cases against Russian soldiers in its custody, sentencing 21-year-old Russian Army Sgt. Vadim Shishimarin to life imprisonment for shooting a civilian. It is highly unusual to try a war crimes case while the conflict still rages, but Zvobgo said it was in Ukraine’s interest to ensure the alleged war criminals received free and fair trials.

“I am optimistic about Russian personnel getting due process,” she said. “Ukraine has been juxtaposing itself against Russia as being lawful, law-abiding, and a respected member of the international community and doing things by the letter of the law.”

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