

**RUSSIA'S AGGRESSION AND GENOCIDE  
AGAINST THE UKRAINIAN PEOPLE**

**Mechanisms for Recognition and Justice**

**October 2022**

## **ABSTRACT**

- This paper focuses on legal mechanisms of accountability for Russia's invasion of Ukraine.
- In particular, it focuses on the international crimes of aggression and genocide, and thereby builds on CDS's analytical report of September 2022 "The Evolution of Russia's Genocide Against the Ukrainian People".
- The first part of the paper looks at Ukraine and its partners' efforts to advocate for political recognition of Russia's aggression and genocide, and describes the challenges and complementarity of doing so.
- The second part addresses the options for justice processes to ensure the accountability of the Russian leadership for both aggression and genocide, and gives an overview of Ukrainian and international efforts to date to achieve that.
- The paper also discusses how advocacy for recognition should include the way the Russian leadership appears to operate a parallel ethnic cleansing campaign against its own minorities, primarily by employing them in disproportionately large numbers and especially in the most futile military operations against Ukraine.
- Together with the September 2022 CDS paper "The Evolution of Russia's Genocide Against the Ukrainian People," this mechanisms paper is intended to form the basis of a series exploring and making recommendations in relation to the legal dimension of the fight against Russia, which will include further publications about genocide and other international crimes, and also about mechanisms for reparations and related topics.

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## **FOREWORD**

This paper is intended to build on CDS’s analytical report of September 2022 “The Evolution of Russia’s Genocide Against the Ukrainian People”<sup>1</sup> by focusing on mechanisms of accountability. Specifically, it describes Ukrainian and international efforts to date to recognise and ensure justice for the crime of genocide, and additionally describes efforts to recognise and ensure justice for the underlying crime of aggression. In doing so the paper clarifies some common misunderstandings about the two distinct international crimes.

Aggression is the use of armed force by a state against the sovereignty, independence or integrity of another state.<sup>2</sup> Genocide is the specific intent to destroy in whole or in part a national, ethnic, racial or religious group by killing its members or by other means,<sup>3</sup> as already set out in more detail in the earlier CDS report. Aggression, genocide, crimes against humanity and war crimes are the four recognised international crimes. Genocide, crimes against humanity and war crimes are the trio of international crimes collectively referred to as atrocity crimes.

The paper is divided into two parts, setting out the two tracks of advocacy CDS is pursuing to maintain focus on Russia’s aggression and genocide against Ukraine and ensure the accountability of the Russian leadership for them. The first part looks at Ukraine and its partners’ efforts to secure political recognition of Russia’s aggression and genocide, and describes the challenges and utility of doing so. The second addresses the options for justice processes to ensure the accountability of the Russian leadership for both aggression and genocide, and gives an overview of Ukrainian and international efforts to date to achieve that.

The record of impunity for the current Russian leadership covers 20 years and extends to crimes of aggression, war crimes and probably crimes against humanity in Chechnya, Georgia, Libya and Syria, in addition to Ukraine. Moreover, it is largely the same collection of individuals within the Russian leadership who have been and continue to be responsible for these international crimes, rather than

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<sup>1</sup> <https://defence.org.ua/wp-content/uploads/doslidzhennya/CDS-The-evolution-of-Russia-genocide-eng.pdf>

<sup>2</sup> <https://www.icc-cpi.int/about/how-the-court-works>, <https://crimeofaggression.info/role-of-the-icc/definition-of-the-crime-of-aggression/>

<sup>3</sup> [https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1\\_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf](https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf)

a series of different Russian administrations pursuing the same state policies. Therefore, discussion of how to ensure the accountability of these leaders is not the same as the broader discussion of the Russian state's long record of impunity for committing atrocities as described in the earlier CDS paper.

Moreover, to ensure accountability for these crimes it is not necessary to create new law, as was done during the creation of the International Military Tribunal at Nuremburg. All the relevant international law is well-established and Ukraine has already adopted several pieces of legislation allowing its national courts to deal with relevant matters and cooperate with international courts. The court apparatus for dealing with genocide is also well-established. Only for the crime of aggression is it necessary to establish an appropriate forum, which will be discussed in the paper. Justice for victims and no impunity for culprits are the imperatives underpinning international criminal law and for it to operate as intended only political will is required to follow the trail of evidence.

## **PART 1: RECOGNITION**

Victims groups established following the atrocities in the former Yugoslavia and Rwanda in the 1990s have sometimes been criticised for coveting the label of genocide when a proper application of the relevant law to the evidence in their cases established crimes against humanity and war crimes, but not genocide.<sup>4</sup> A desire for a particular label, no matter how emotive, is not a motivation of this research, rather, it is based on the increasing willingness of legal experts, historians and politicians from around the world to look at the growing body of evidence as regards Russia's actions and intentions in Ukraine and say that it appears to suggest genocide has and is being committed there. Even on 24 February 2022, and indeed in April 2014, many of the same people already felt able to say with confidence that Russia had committed the international crime of aggression against Ukraine.

Unlike in most past conflicts, in Ukraine criminal investigators and journalists have had rapid access to sites where atrocities are thought to have been committed, often collecting evidence and interviewing witnesses just hours after Russian occupying forces have left. Smartphones and commercial drones with increasingly sophisticated recording and transmission abilities have allowed for documentation of potential crimes in a way and on a scale not possible during the commission of those in even the late twentieth century. At the more sophisticated end of the spectrum are the Ukrainian and other governments' specialist surveillance capabilities, and those of investigative journalism platforms such as Bellingcat<sup>5</sup> and the Centre for Information Resilience<sup>6</sup>, which further enhance the store of potential evidence on which legal and political judgments about crimes can be based. Microsoft and other private companies are even providing the International Criminal Court (ICC) and other investigative bodies with machine learning and AI tools to enhance facial and other types of recognition, and otherwise significantly enhance evidence-gathering techniques.

Several historians, perhaps most prominently Timothy Snyder<sup>7</sup> and Eugene Finkel<sup>8</sup>, have argued that the term genocide might be understood differently as a strict legal definition and as a

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<sup>4</sup> <https://www.internationalaffairs.org.au/australianoutlook/the-ramifications-of-recognition-of-genocide/>

<sup>5</sup> See, for example, a recent investigation identifying the Russian team responsible for selecting critical civilian infrastructure targets for drone strikes <https://www.bellingcat.com/news/uk-and-europe/2022/10/24/the-remote-control-killers-behind-russias-cruise-missile-strikes-on-ukraine/>

<sup>6</sup> See, for example, CIR's investigation describing how Ukrainian civilians are illegally deported to Russia [https://s3.documentcloud.org/documents/22127129/forced-civilian-deportations-report\\_compressed-draft.pdf](https://s3.documentcloud.org/documents/22127129/forced-civilian-deportations-report_compressed-draft.pdf)

<sup>7</sup> <https://www.eurointegration.com.ua/eng/articles/2022/10/23/7149219/>

<sup>8</sup> <https://www.washingtonpost.com/opinions/2022/04/05/russia-is-committing-genocide-in-ukraine/>

political/historical concept. Destruction of a nation's culture, for example, is not enough to satisfy the existing legal definition contained in the 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide (the 1948 Convention),<sup>9</sup> yet Raphael Lemkin, who coined the term genocide, would probably have thought it enough in his understanding. The distinction is one that most international criminal law lawyers feel uncomfortable with, nevertheless, it builds on an established tradition and seems to have gained some traction in both academic and political circles in relation to several conflicts, including that in Ukraine. In particular, the political/historical approach focuses on the intent, rhetoric and incitement of leadership figures which lead to genocide. Ukraine also seems to be first example of genocide targeting a national rather than ethnic or religious group.

It is on this basis that several national parliaments and governmental organisations have already made statements recognising Russian aggression against Ukraine and the commission of genocide by Russia in Ukraine, calling for justice for Ukrainian and other victims and punishment for the individuals ultimately responsible.<sup>10</sup> In March the Polish parliament passed a resolution recognising acts of genocide committed by Russia against Ukraine.<sup>11</sup> In the following months the parliaments of Lithuania<sup>12</sup>, Latvia<sup>13</sup>, Estonia<sup>14</sup>, the Czech Republic<sup>15</sup>, Canada<sup>16</sup> and Ireland<sup>17</sup> issued similar statements or passed similar resolutions recognising apparent genocidal acts.

On a much more straightforward evidentiary basis a larger number of governments and parliaments have also made statements recognising that Russia has committed an act of aggression against the sovereignty and integrity of the Ukrainian state. These statements have no doubt been based on

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<sup>9</sup> [https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.1\\_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf](https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf)

<sup>10</sup> <https://defence.org.ua/wp-content/uploads/doslidzhennya/CDS-The-evolution-of-Russia-genocide-eng.pdf>

<sup>11</sup> <https://www.nato-pa.int/download-file?filename=/sites/default/files/2022-03/Resolution%20on%20committing%20war%20crimes%2C%20crimes%20against%20humanity%20and%20human%20rights%20violations%20by%20Russia%20in%20Ukraine.pdf>

<sup>12</sup> <https://www.rferl.org/a/lithuania-resolution-russia-genocide/31842970.html>

<sup>13</sup> <https://www.nato-pa.int/download-file?filename=/sites/default/files/2022-08/Latvia%20-%20Statement%20declaring%20Russia%20a%20state%20sponsor%20of%20terrorism%2C%2011%20August%202022.pdf>

<sup>14</sup> <https://www.riigikogu.ee/wpcms/wp-content/uploads/2022/10/Statement-of-the-Riigikogu-18.10.2022-eng.pdf>

<sup>15</sup> <https://twitter.com/YPerebyinis/status/152439682272224129?s=20&t=hDEQvx7ptMCf4H398Q6E0Q>

<sup>16</sup> [https://twitter.com/HMcPhersonMP/status/1519411558065086465?s=20&t=LMhSS5ZiPW0Rrav\\_HiVYYA](https://twitter.com/HMcPhersonMP/status/1519411558065086465?s=20&t=LMhSS5ZiPW0Rrav_HiVYYA)

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[https://twitter.com/SenatorMarkDaly/status/1532073563435724800?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetemb%7Ctwtterm%5E1532073563435724800%7Ctwgr%5E%7Ctwcon%5Es1\\_&ref\\_url=https%3A%2F%2Fwww.rbc.ua%2Fukr%2Fnews%2Firlandiya-priznala-voynu-rossii-protiv-ukrainy-1654166463.html](https://twitter.com/SenatorMarkDaly/status/1532073563435724800?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetemb%7Ctwtterm%5E1532073563435724800%7Ctwgr%5E%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fwww.rbc.ua%2Fukr%2Fnews%2Firlandiya-priznala-voynu-rossii-protiv-ukrainy-1654166463.html)

similar assertions by eminent legal scholars and practitioners, especially that by British lawyer Philippe Sands.<sup>18</sup> Aggression, once known as crimes against the peace, is important even in relation to genocide because it is the action without which there could have been no genocidal acts committed.

### **The meaning and utility of recognition before a justice process**

In relation to genocide, recognition by governments, parliaments and other organisations without being able to point to a judgment from a competent court can only amount to a political statement to the effect that it appears the term genocide can be applied. More specifically, it might represent a statement as to prima facie evidence of genocide and that, where possible, there must be a justice process to assess that evidence against legal standards and punish perpetrators as appropriate. In law, however, the implications of political recognition are more concrete. According to the 1948 Convention it triggers the obligation of all state parties to the convention to prevent the development and continuation of the genocide. Recognition also engages the Responsibility to Protect (R2P) commitment requiring all UN Charter states to protect the victim. It is one reason that so much consideration must go into a debate on recognition. Similar legal considerations are attendant on recognising Russia as a state sponsor of terrorism, or its leadership as a terrorist regime. Nevertheless, an increasing number of governments and now organisations are beginning to do so.<sup>19</sup>

In the case of the atrocities committed by the Ottoman Turks against Armenians between 1915-23, the Armenian government and diaspora groups which lobbied for international recognition of those events as genocide did so in the absence of any possibility to prosecute those responsible or any obligation on states recognising the acts as genocide to take any preventive action. To date more than 33 states and numerous other bodies, including the Catholic Church, the International Association of Genocide Scholars, the European Parliament and the Council of Europe, have recognised the events of 1915-23 as genocide.<sup>20</sup> Parliaments from those states, which form a dynamic part of the international community, have passed resolutions and motions recognising the genocide in the absence of any contemporaneous, or indeed later, judgment of a competent court.

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<sup>18</sup> <https://www.ft.com/content/cbbdd146-4e36-42fb-95e1-50128506652c>

<sup>19</sup> See, for example, the resolution by the Permanent Assembly of the Council of Europe (PACE) <https://pace.coe.int/en/files/31390/html>

<sup>20</sup> Full list available on Armenia's foreign ministry website <https://www.mfa.am/en/recognition/>



In contrast, some governments, including the British, have argued that they are unable to recognise the genocide in the absence of a court judgment addressing what is, fundamentally, a legal issue.<sup>21</sup>

On this basis pursuing recognition separately or in anticipation of a justice process in Ukraine's case might be thought inappropriate, not least because it undermines the presumption of innocence underpinning a fair trial. In circumstances where it is, in principle, feasible and desirable to have a justice process for the crimes of aggression and genocide, it might be thought preferable to await the outcome of those processes. In CDS's view, however, the apparent tension between recognising and advocating for recognition of aggression and genocide in advance of any justice processes can be mitigated by the utility of doing so, to the extent that the two approaches can be seen as complementary. Aside from maintaining the focus of the international community on the need for justice processes, recognition of aggression, and of the abundant evidence suggesting genocide, entails obligations to act. It also continues the delegitimization of Russian state behaviour and of the Russian leadership, further isolating the leadership and making it more likely that anyone eventually indicted will be apprehended, tried and brought to justice. It also makes it clear that the Russian leadership's actions have crossed a Rubicon, meaning that whatever diplomatic tracks are pursued to end the war, they cannot contemplate a return to the status quo ante in respect of Russia's place in the international system under Russia's wartime leadership.

Various US administrations have made statements recognising genocide in situations for which there have yet been no decisions issued by a court and before extant court processes have concluded, including in relation to acts committed in the Darfur region of Sudan, in relation to Islamic State activities against the Yazidi in Iraq and Syria, by the government against the Rohingya minority group in Myanmar and by the Chinese government against the Uyghur minority group in western China.<sup>22</sup>

### **Discrimination against ethnic minority groups in Russia**

In the Ukraine situation, CDS believes that advocating for more widespread recognition should also encompass the aspect of "double" or "parallel" genocide where, in addition to the evidence of

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<sup>21</sup> See, for example, British Foreign & Commonwealth Office memorandum publicly available following a Freedom of Information request

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/359566/FOI\\_ref\\_0298-14\\_Attachment\\_42.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/359566/FOI_ref_0298-14_Attachment_42.pdf)

<sup>22</sup> <https://www.reuters.com/world/how-prove-genocide-gravest-war-crimes-2022-04-13/>

genocide against the Ukrainian people, the Russian leadership appears to operate a parallel ethnic cleansing campaign against its own minorities, primarily by employing them in disproportionately large numbers and often in the most futile military operations against Ukraine.<sup>23</sup> Closely connected to this are the Russian practices of deporting Ukrainian women and forcibly transferring Ukrainian children (as amply described in the earlier CDS paper). Taken together these actions suggest a policy recognisable as race substitution. Rather than being another limb of genocide Russian state actions against its minorities may amount at least to a further crime against humanity.

The accommodating attitude of several Central Asian governments towards Russians fleeing mobilization and conscription, especially those of Kazakhstan and Mongolia, appears to recognise that a disproportionate number targeted are from Russia's Asian minority groups. The Mongolian relationship with the Russian republic of Buryatia is especially representative, and the Mongolian president has been outspoken against Russian policies. Also at particular risk of mobilisation and conscription in the east of the Russian Federation are Yakut, Bashkir, Tuvan, Kalmyk and Tatar minority groups. Indeed, the bogus Russian training exercises staged in Belarus in January and February involved soldiers from Russia's Eastern Military District who, on arrival it seems, were ordered with almost no notice to invade northern Ukraine. Men from the Caucasus are also likely to be targeted for military service in numbers disproportionate from those taken from more ethnically Russian parts of the federation. In particular, recruitment, mobilisation and conscription seems to have focused on Dagestan and Ingushetia. This pattern has emerged and can be extrapolated from analysis of the ethnic make-up of the very limited number of casualties admitted by the Russian government. All Russian citizens obliged to fight in Ukraine are at risk of being ordered or incited to commit atrocity crimes.

### **Political and diplomatic constraints on recognition**

There are potentially significant political and diplomatic ramifications for any state recognising aggression, genocide or prima facie evidence of genocide by Russia against the Ukrainian people. In particular, this may be the case with genocide recognition. Depending on the state recognising genocide, in addition to the 1948 Convention obligations which are triggered and described above, certain pieces of domestic legislation might also be engaged which would curtail that state's ability

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<sup>23</sup> <https://foreignpolicy.com/2022/09/23/russia-partial-military-mobilization-ethnic-minorities/>

to interact with the present Russian leadership or, for example, its private entities to interact with Russian entities, even taking into account existing sanctions. The Russian government might also choose to break off or significantly downgrade diplomatic relations with any states recognising its commission of genocide. As a general proposition, room for negotiation with the current leadership to end Russia's war against Ukraine could be further reduced. Some have argued that the existence of a functioning justice process investigating and prosecuting the Russian leadership for aggression against Ukraine could serve as leverage in future negotiations,<sup>24</sup> though this sentiment rather detracts from the essence of the justice process, which should remain uninfluenced by political considerations. Politically, extant investigations and, especially, indictments could well encourage disenchantment within the Russian leadership, in turn encouraging a palace coup and the emergence of a new leadership for more meaningful negotiations.

Ultimately, it should be remembered that political and diplomatic arguments against pursuing justice for international crimes have been raised ever since those crimes have existed, which arguments have, in most instances, been outweighed by the imperative of removing impunity.

### **Advocacy**

Ukraine already has substantial experience of advocating for recognition of genocide in relation to the Holodomor, which 17 states have already recognised as a genocide by the Soviet leadership in Moscow against the people of Ukraine.<sup>25</sup> The campaign of the Armenian government and Armenian diaspora groups provides further effective examples for advocacy regarding recognition of Russia's aggression and genocide. CDS supports advocacy focused on foreign governments and parliaments, especially those currently sanctioning Russia who are most likely to be amenable to recognising aggression and genocide, if they have not already done so. That said, engaging governments and parliaments from states which are not currently sanctioning Russia will be vitally important, especially when it comes to gaining the support of the wider UN General Assembly membership for a justice process to punish Russian aggression, as discussed in more detail below. Other bodies to be engaged might include UN bodies, national bar associations, the International Association of

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<sup>24</sup> <https://www.theguardian.com/law/2022/mar/30/vladimir-putin-ukraine-crime-aggression-philippe-sands>

<sup>25</sup> <https://holodomormuseum.org.ua/en/recognition-of-holodomor-as-genocide-in-the-world/>

Genocide Scholars, International Centre for Transitional Justice, think tanks and other opinion forming outlets.

Effective advocacy methods can include letter writing campaigns to influential legislators, the publication of scholarly papers, organising of conferences, round tables and university discussions, the production of high impact, concise visual explainers and mini-documentaries to demonstrate the strength of existing evidence to governments and other external partners, and outreach on social media.

Advocacy will also have to include anticipating and challenging counter-advocacy and disinformation from Russia and some of its allies.

## **PART 2: JUSTICE PROCESSES**

This question concerns primarily potential trials of key Russian leadership figures. War crimes committed by Russian and foreign soldiers and collaborators from the lower echelons of the Russian armed forces and occupation authorities can, in many cases, be dealt with by the Ukrainian courts, as indeed the Ukrainian courts have already been doing in limited numbers. While Ukrainian courts can also, in principle, deal with leadership cases, the gravity and potential scale of the three other crimes – aggression, genocide and crimes against humanity – seem to demand an international response. Indeed, the intention of the Ukrainian government seems to be to refer higher-echelon and more complex cases to the ICC in The Hague. In the case of the former Yugoslavia, the ad hoc international tribunal created by the UN Security Council remitted less serious or lower level leadership cases to the special war crimes department of the Bosnian State Court.

### **Aggression**

Aggression is the underlying crime from which the other three often flow. This is certainly the case with Russia's aggression against Ukraine. It is also often the international crime with the most clear-cut evidence, where the aggression has been launched not on the basis of self-defence (article 51 of the UN Charter<sup>26</sup>), not as intervention on humanitarian grounds, and has not been authorised by the UN Security Council. Russia did cite a form of humanitarian intervention in relation to accusations of genocide by the Ukrainian government in Donbas, but this argument has already been rejected by the International Court of Justice (ICJ), as discussed below. As such, a justice process for the Russian leadership's aggression against Ukraine would most likely be a much swifter process than that for genocide. It would also be a process which would give rise to individual criminal responsibility for convicted members of the leadership.

Since the 2017 Kampala agreements, the ICC has also had competence for the crime of aggression,<sup>27</sup> yet the ICC's jurisdiction for aggression can only be exercised over state parties to its statute - the Rome Statute - which Russia is not, or if the UN Security Council refers the matter to the ICC, which Russia, as a veto-wielding permanent member of the council, could and would prevent. In principle, the ICC could consider aggression at some future time if there were a radical change of Russian

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<sup>26</sup> <https://legal.un.org/repertory/art51.shtml>

<sup>27</sup> <https://www.icc-cpi.int/about/how-the-court-works>

government and Russia ratified the ICC's Rome Statute, though such may be years away or not happen at all. As such, there is little hope that the ICC can be the forum for trying the crime of aggression. Ukrainian courts would have direct jurisdiction, as aggression is an international crime on the Ukrainian statute books, but, again, the gravity of Russia's crime makes an international process more desirable.

Today the geopolitical landscape is very different from that in both 1945 and the 1990s, which allowed for sufficient political consensus, including in the 1990s in the UN Security Council, to establish ad hoc tribunals with broad international participation and therefore broad legitimacy. The establishment of the permanent ICC between 1998 and 2002 was in large part intended to circumvent the requirement for political alignment. The UN Security Council created the ad hoc International Criminal Tribunals for Yugoslavia and Rwanda (the ICTY and ICTR, respectively), but today would be unlikely to do so due to Russia, and probably China's, positions.

Given the ICC's jurisdictional limitation in respect of Russia and its aggression, a collection of eminent international lawyers and politicians has therefore called for the establishment of a special tribunal as the only viable means to hold Russia accountable, and has drafted a resolution for states to adopt to facilitate the tribunal's establishment.<sup>28</sup> There remains, however, the question of a mechanism for its creation, given the impotence of the UN Security Council. A regional body, such as the European Union, or a coalition of states, such as those currently sanctioning Russia, could potentially establish an ad hoc special tribunal, yet this would probably give rise to questions of legitimacy. Really, the tribunal would need broader support, especially from amongst the wider UN General Assembly membership, including influential states which are not permanent Security Council members, but often form part of the fuller 15 member Security Council.<sup>29</sup> On 2 March the General Assembly adopted a resolution condemning Russia's use of force against Ukraine, with 141 of the Assembly's 193 members voting in favour.<sup>30</sup> This powerful statement should form the basis on which to proceed with the establishment of a special tribunal for aggression.

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<sup>28</sup> <https://gordonandsarahbrown.com/wp-content/uploads/2022/03/Combined-Statement-and-Declaration.pdf>

<sup>29</sup> <https://www.un.org/securitycouncil/content/current-members>

<sup>30</sup> <https://press.un.org/en/2022/ga12407.doc.htm>

Indeed, according to the General Assembly's 1950 resolution 377A (V), widely known as the "Uniting for Peace" resolution, if the Security Council is unable to act because of the lack of unanimity among its five veto-wielding permanent members, the Assembly has the power to make recommendations to the wider UN membership for collective measures to maintain or restore international peace and security. In addition, the General Assembly may meet in Emergency Special Session if requested by nine members of the Security Council or by a majority of the Members of the Assembly.<sup>31</sup> Such discussions could facilitate the real mechanism for the creation of a special tribunal, which would most likely be a treaty between the General Assembly - represented by the UN Secretary General - and Ukraine.

The exact form and features of the special tribunal would be a subject for discussion and there are now many examples to draw on. The tribunal could, for example, be a hybrid, similar to the Special Court for Sierra Leone (SCSL), with both Ukrainian and international judges, prosecutors, investigators and support staff. The special tribunal could also have a complementary relationship with the ICC. In the broadest sense this would mean the special tribunal dealing with the *jus ad bellum* – the law of going to war, i.e. Russia's aggression - while the ICC deals with the *jus in bello* – the law in war, i.e. the atrocity crimes. The special tribunal could also be complementary in the sense of being able to rely on all the evidence gathered by the ICC in its investigation.

One reservation about the idea for a special tribunal for Russia's aggression against Ukraine is that it would be supported and facilitated by the coalition of states which invaded Iraq in 2003, which many international lawyers believe was also an example of unjustified aggression. That, however, should not preclude those and other General Assembly member states from taking the correct action now in relation to Russia, which the law requires, and, indeed, revisiting the legality of the Iraq invasion at the international level remains possible.

## **Genocide**

The referral by 39 states of the situation in Ukraine to the ICC was unprecedented.<sup>32</sup> The ICC has jurisdiction over the crime of genocide and over the situation in Ukraine, yet the court's chief

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<sup>31</sup> <https://unric.org/en/what-can-the-un-do-to-stop-war/>

<sup>32</sup> <https://www.icc-cpi.int/ukraine>

prosecutor has not indicated if the current investigation has found evidence of genocide. The ICC makes clear that the scope of the court's Ukraine investigation does extend to genocide, in addition to crimes against humanity and war crimes. A prosecutor without the unusual political pressure associated with the ICC would be inclined to follow the evidence and focus on which crimes could most easily be prosecuted, for which convictions could be secured and the defendants jailed. Given the seeming distinction between the legal and political/historical treatment of genocide described above, the ICC prosecution will have to be bold if it is to indict for genocide.

There is now a large body of case law and associated scholarly work from the ICTY, ICTR, ICC, SCSL and the Extraordinary Chambers in the Courts of Cambodia (ECCC), which have prosecuted atrocity crimes, which helps in understanding what type and quality of evidence can lead to convictions. In respect of genocide and crimes against humanity, the challenge will be to investigate and establish the pattern connecting the Russian leadership, propagandists and soldiers to show a plan to destroy the Ukrainian nation at least in part.

There is already a joint investigation team combining the resources of the ICC, Ukraine, Poland, Lithuania and Eurojust. The EU, UK and US have established the Atrocity Crimes Advisory Group<sup>33</sup> focused on best practise for investigations and prosecutions, and coordination and financial assistance to the Ukrainian Office of the Prosecutor-General (OPG). The support is mostly intended to facilitate war crimes investigations, but could extend to the investigations of other atrocity crimes. The Ukrainian OPG had already documented thousands of examples of Russia targeting civilian objects, of deliberate murders, illegal detentions, ill treatment and sexual crimes. More than 70 people have been charged and many more have been identified as suspects, though they are outside Ukraine. Even the internationally well-regarded National Anti-Corruption Bureau (NABU) is lending its resources to the investigations. It is essential that the Ukrainian OPG has already begun its work. This is in terms of the freshness of evidence, victim support and deterring further criminal acts. OPG investigators have been gathering evidence in line with ICC standards and are making their materials available for the ICC investigation.

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<sup>33</sup> <https://www.state.gov/creation-of-atrocity-crimes-advisory-group-for-ukraine/>



The ICC chief prosecutor has also made clear that he is open to new types of evidence and evidence gathering techniques. The Conflict Observatory<sup>34</sup> is a central hub established to capture, analyse and make widely available evidence of Russia-perpetrated war crimes and other atrocities in Ukraine, including studies into damage caused to Ukrainian cultural sites, mass graves, crop storage reduction, filtration, damage to health and educational facilities. As such, the ICC is now well-placed to move ahead with investigating and building its own cases for atrocity crimes.

The ICC's Ukraine investigation already faces a number of challenges, however, not least because it does not have enough investigators in Ukraine, and Ukraine does not have enough of its own specialists. The large number of disparate citizen fact finders enables but also presents significant problems for case-building. Interviewing the same witnesses multiple times degrades their testimony and may render it inadmissible, or at least more susceptible to attack by any future defence teams. And even if the ICC does proceed with indictments for genocide and manages to apprehend some suspects, it must be borne in mind that its work to date has been grindingly slow, with only four convictions in its twenty years of operation, at a cost of around \$1 billion. As such, it is worth setting out at least the alternative possible justice processes for genocide.

Just as a special tribunal has been recommended to try the crime of aggression, so a special tribunal could, in principle, be established to focus on genocide. This, however, would face several hurdles, the most significant of which would be the difficulty of justifying its establishment if the ICC itself chose not to proceed with indictments for genocide on the basis of insufficient evidence. The European Court of Human Rights could also have investigated, however, Russia was ejected from the Council of Europe shortly after its February 2022 invasion and subsequently left the jurisdiction of the court and ceased to be a party to its underlying convention. A dispute under the 1948 Convention can also be referred to the International Court of Justice, as indeed Ukraine did when Russia alleged genocide in the case of Donbas. Those allegations, which are now the subject of an ICJ case, Russia appears to have been made in anticipation of being accused of genocide by its invasion and planned actions in Ukraine. The ICJ has already delivered an interim judgment rejecting the Russian allegations and requiring Russia to cease its military activities (war) in Ukraine.<sup>35</sup> Ukraine could further refer to

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<sup>34</sup> <https://hub.conflictobservatory.org/portal/apps/sites/#/home>

<sup>35</sup> <https://www.icj-cij.org/en/case/182>

the ICJ in respect of its own allegations of genocide, which might anyway be considered within the context of the existing case. Decisions of the ICJ are binding, but Russia has already challenged the court's jurisdiction and ignored the preventive measures ordered by the interim judgment.

Under the concept of state responsibility Russia has obligations to prevent international crimes, yet this hardly seems likely when many of those committed have been planned by the Russian leadership itself, and indeed President Putin has actually decorated soldiers from the Eastern Military District unit which was stationed in Bucha.<sup>36</sup> The national courts of third countries can also prosecute international crimes, including genocide, under the concept of universal jurisdiction. Germany in recent years has prosecuted several cases of international crimes committed in Syria, which processes have been held up as a model for the application of universal jurisdiction. Ukraine could also investigate and indict for genocide, however, as with the crime of aggression, an international response, ideally in the form of the ICC, remains the most desirable process.

### **Detention of suspects**

It is the practice of international courts to issue arrest warrants at the investigation stage. Ukraine itself currently only has the ability to detain low to mid-level operators in the military and occupation administration leadership hierarchies. In practice, this means soldiers, junior officers and occupation administration functionaries, with senior commanding officers and key apparatchiks potentially being captured from time to time, either on the battlefield or through security service operations. Ukraine probably does not have the ability to detain key Russian ideologues, policy-makers and leaders. Other governments have greater abilities to detain these latter categories of suspects if they enter their jurisdictions or jurisdictions where their extradition requests will be entertained. Political recognition of genocide as discussed above could also, conceivably, form the legal basis for some detentions in future, in addition to the investigations and indictments by a special tribunal for aggression or by the ICC or Ukraine for genocide.

Slobodan Milosevic, the former Serbian president, was indicted by the ICTY in 1999, but not apprehended until 2001. That was similarly the case for many other ICTY, ICTR, ICC, SCSL and ECCC

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<sup>36</sup> <https://www.bloomberg.com/news/articles/2022-04-18/putin-decorates-army-unit-that-ukraine-blames-for-bucha-deaths>

suspects. Charles Taylor, the former president of Liberia, was indicted by the SCSL while still a sitting head of state and was apprehended while on a presidential visit to Ghana. He later lost his argument for immunity which he made to the SCSL. The former Ukrainian oligarch and coordinator of pro-Russian political groups in Ukraine, Viktor Medvedchuk, could potentially have been a suspect or witness, in particular in relation to the incitement of genocide, but was recently exchanged in a Ukraine-Russia prisoner swap. Ukraine has already swapped several other potential suspects, including in relation to atrocities committed during the 2014-2022 period, such as the shooting down of flight MH17. Trials in absentia are generally repugnant and are not possible according to many legal codes or in the ICC. This must be borne in mind when considering case-building, confidence-building and future exchanges.

### **Punishment and compensation**

The duties and penalties for genocide are more severe in international law than those for crimes against humanity and war crimes; up to 30 years or life imprisonment at the ICC.<sup>37</sup> As the justice processes described above envisage individual criminal responsibility for both aggression and genocide, the sums available from any individuals convicted are likely to be enough to compensate only some damage to some Ukrainian victims. Compensation or reparations on the scale necessary for Ukraine as a whole is likely to be the subject of a separate mechanism. Any judgments from a special tribunal for aggression, or from the ICC, could also be used in aid of seeking compensation in jurisdictions around the world according to the usual laws of judgment recognition and enforcement against traced assets.

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<sup>37</sup> <https://www.icc-cpi.int/about/how-the-court-works>

## **CONCLUSION**

In conclusion, it must first be remembered that international criminal justice is a slow process, or set of processes. The pedestrian record of the ICC has already been described above. The ICTY was created in 1993 and began operating in 1994 while the conflict in the former Yugoslavia was ongoing. It was not until the late 1990s, however, that many suspects had been apprehended and trials begun. The ICTY completed its final trial in 2017. The ICTR convicted 61 people between 1994 and 2016. The SCSL convicted ten people over eight years of operation. The alternatives to the slow process of international justice processes, however, are impunity or summary trials.

The key, then, is first to achieve widespread political recognition of both Russia's aggression and genocide. This will feed into garnering support amongst the wider UN General Assembly for establishing a special tribunal for aggression. Whether or not the ICC indicts suspects for genocide depends on the evidence and strict application of the legal standard. Ukraine and its partners can assist the ICC in evidence collection and by apprehending suspects. If key Russian leadership figures are indicted and apprehended it is conceivable that some of them could be tried in separate courts for both aggression and genocide. Some leadership figures might be convicted of aggression, but acquitted for genocide, while non-leadership figures who had no connection to the decision to invade Ukraine, might have been instrumental in relation to genocide. It is also possible that investigations and prosecutions for either of the crimes might proceed in more than one forum in the coming years. Ukraine itself might even choose to prosecute aggression and/or genocide.

Ultimately, to establish a special tribunal for aggression requires political will. That might come from an increasing understanding amongst politicians and diplomats that not only should action be taken, but that there are sound realist reasons for doing so. The announcement, and later creation, of the International Military Tribunal at Nuremberg spurred senior Nazis to approach their Allied counterparts to avoid prosecution and make deals. A similar approach now would isolate the core Russian war leadership within the larger Russian state apparatus, making it even clearer to Russian society and the business elite who is responsible for their travails, and that such travails can only be relieved by the side-lining of that particular group. Widespread political recognition of genocide would serve a similar purpose. A UN General-Assembly-sanctioned special tribunal for aggression would also most likely deter China from invading Taiwan and lesser autocratic rulers from realising their own aggressive designs against their weaker neighbours.