

Putin in Court?

Horror has a new name: Bucha. It is the name of a quiet commuter suburb near Kyiv that was occupied by Russian forces for a month. Now the troops have gone. They left behind roads strewn with bodies – not soldiers in uniform but civilians, some with their hands tied, apparently executed. Calls for those responsible for these crimes to be brought to justice are growing louder. How would that work?

The legal language that deals with atrocities such as those committed in Bucha is the language of international criminal law. This holds that individuals who commit particularly serious crimes of concern to the international community as a whole are directly accountable under international law. Crimes under international law – genocide, crimes against humanity, war crimes and the crime of aggression – breach the protective shield of state sovereignty. These crimes cannot be justified by the argument that the accused was merely following orders or by invoking national law. They may be prosecuted in an international criminal tribunal or in any country's national courts; the immunity that otherwise protects high-level state officials from prosecution in a foreign court does not apply. This is the legacy of the Nuremberg trials, and it is now an established principle of the international order.

Crimes under international law in Ukraine

There can be no doubt that crimes under international law have been and continue to be committed in Ukraine. Which particular crimes are believed to have occurred?

Russia's invasion of Ukraine, the incursion into sovereign territory and the massive use of armed force violate fundamental norms of international law. That is uncontested and was confirmed, not least, by the United Nations General Assembly in an unusual display of unanimity in early March. The claims made by Russia by way of justification – that the action was necessary to prevent genocide and de-nazify Ukraine – lack any basis in fact. Any individual who plans or carries out this type of attack is culpable of the crime of aggression. The perpetrators are those who actually direct the political or military action by the aggressor state. This presumably applies to a small group of individuals close to the Russian President, Vladimir Putin, and to Putin himself. Anyone who allows their sovereign territory to be used by another state for an act of aggression in violation of international law is also culpable: this applies to the regime in Belarus.

The fact that there is war in Ukraine – jurists speak of “armed conflict” – dictates that the law of war applies. What this means, in essence, is that the use of lethal force – killing, in other words – is lawful. This does not apply to everyone: only combatants, i.e. fighters who are identifiable as such, may use lethal force. However, they may not use any means at their disposal; nor may the killing be indiscriminate. Generally speaking, only enemy combatants are legitimate military targets. Outside this sphere, the prohibitions under international humanitarian law apply. Anyone who intentionally violates the fundamental rules of *jus in bello* must expect to be held to account.

War crimes, which are punishable acts, include targeted attacks on non-military institutions such as hospitals, theatres and schools, as well as the intentional killing and mistreatment of civilians, prisoners of war and wounded enemy combatants. The perpetrators of such crimes may be ordinary soldiers, commanders or members of the government. Even members of militia and volunteer fighters (including foreign nationals) can be brought to justice for war crimes. And any conflict party may be found to have committed war crimes, regardless of who is to “blame” for the war.

Based on all the available knowledge, it is reasonable to conclude that crimes against humanity, as well as the crime of aggression and war crimes, have been committed in Ukraine. Crimes against humanity include murder, torture, expulsion and enforced disappearance when committed as part of a widespread or systematic attack directed against a civilian population. There are good grounds for assuming that this definition applies in Ukraine, whereas there is insufficient evidence – thus far, at least – to substantiate claims of genocide, although that term is already being used by some observers. “Genocide” would mean that those responsible on the Russian side had the intent to destroy the Ukrainian population, in whole or in part, as a national group. Whether the intent to destroy the group as a social unit suffices, or whether the perpetrator must aim to physically destroy the group – the position adopted in international jurisprudence – is a contentious issue among jurists. Certainly, an intent to destroy would be extremely difficult to prove.

Prosecution in The Hague – and in Germany?

What are the prospects of actually bringing the perpetrators to justice? A first port of call is the International Criminal Court (ICC) in The Hague. Established 20 years ago and recognised by more than 120 countries, the ICC has the power to investigate and prosecute crimes under international law. The ICC prosecutes individuals, not states. This contrasts with the procedure in the International Court of Justice (ICJ), a United Nations body, which has already issued an emergency ruling requiring Russia to immediately suspend military operations in Ukraine. There is a solid legal foundation for proceedings before the ICC as Ukraine has previously stated, in connection with the annexation of Crimea, that it accepts the ICC’s exercise of jurisdiction. The fact that neither Russia nor Ukraine has ratified the Rome Statute establishing the ICC is therefore irrelevant.

Indeed, the ICC Prosecutor has already opened an investigation into the situation in Ukraine. The scope of the investigation encompasses alleged war crimes, crimes against humanity and genocide. If there is sufficient evidence against any individual, the Court may issue an arrest warrant, which must then be executed in more than 120 countries. The ICC has no police force of its own; it is therefore reliant, in all cases, on support from national police services.

The crime of aggression does not form part of the ICC investigation, although there is no doubt that this crime has been committed as well. For any prosecution to go ahead, Russia would have to recognise the ICC’s jurisdiction, or the UN Security Council would have to adopt a corresponding resolution. Thus far, neither has occurred, nor can it be expected, given that Russia

has a right of veto in the Security Council. Jurists are therefore looking at various options for closing this particular gap – perhaps via a special tribunal, to be established on the basis of an agreement between the United Nations and Ukraine. The advantage of this proposal is that it would allow the road block caused by Russia’s veto in the Security Council to be circumvented.

Investigations are not only under way in The Hague. Germany’s Federal Public Prosecution Office in Karlsruhe has also opened an investigation. The initial aim is to collect and secure evidence which can be used later in proceedings in Germany or abroad. The legal basis for the investigation by the Federal Public Prosecution Office is the Code of Crimes against International Law. This allows war crimes and crimes against humanity – although not the crime of aggression – to be prosecuted even if they were committed abroad and a link to Germany is absent. However, unlike the ICC, national courts cannot prosecute the highest representatives of another state – such as President Putin; at least, they cannot do so while those persons remain in office.

Once sufficient evidence has been gathered to build a case, there is the prospect of bringing the individual(s) concerned to trial in Germany. This possibility cannot be ruled out entirely, although the large majority of alleged perpetrators are likely to be beyond the reach of the German law enforcement agencies. Many thousands of Ukrainians have found refuge in Germany, and potential witnesses may well be among them. In the past, the presence of witnesses in Germany has proved useful, opening the way for members of the Syrian security apparatus and IS, for example, to stand trial in Germany.

International criminal law therefore has mechanisms to deal with the atrocities in Ukraine. However, it is important not to overstate the capabilities of criminal law. Likewise, international criminal law is not a catch-all solution, although it has considerable symbolic power. And indeed, the possibility that the perpetrators may one day have to answer for their crimes in court – in Ukraine, in The Hague, in Germany or elsewhere – cannot be ruled out. There are several examples of supposedly unassailable leaders being brought to justice once they were out of power: Augusto Pinochet, Slobodan Milošević, Saddam Hussein, Hissène Habré and Omar al-Bashir are among them, and more will undoubtedly be added to the list.

Florian Jeßberger is Professor of Law at Humboldt-Universität zu Berlin.