

Some lessons on accountability for war crimes and other international crimes: from Bosnia and Herzegovina to Ukraine

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Introduction

Since the full-scale invasion of Ukraine by the Russian Federation on 24th February 2022, it has become clear that war crimes, crimes against humanity and possibly even genocide are being perpetrated against the Ukrainian population. There have been attacks on Ukrainian territory since 2014 – when Crimea was annexed – but the February escalation brought the war closer to millions of people who are now suffering the consequences. Russian forces attacked across vast territories and many civilians have been arbitrarily detained, tortured, raped, maimed, and killed.¹

The confirmed number of civilians who died, as reported by the Office of the High Commissioner for Human Rights, is over six thousand, including dozens of children. Importantly, “the OHCHR believes that the actual figures are considerably higher”, but communication difficulties and access to areas where intense fighting is ongoing create challenges for verifying information.² While not all civilian casualties are necessarily victims of war crimes, there have been numerous credible reports of them being targeted on the streets by Russian Forces, as in Bucha,³ or attacked as

¹ Masha Gessen, “The Prosecution of Russian War Crimes in Ukraine”, *The New Yorker*, August 1, 2022, www.newyorker.com/magazine/2022/08/08/the-prosecution-of-russian-war-crimes-in-ukraine.

² “Ukraine: Civilian Casualty Update 7 November 2022”, OHCHR, accessed December 8, 2022, www.ohchr.org/en/news/2022/11/ukraine-civilian-casualty-update-7-november-2022.

³ Lorenzo Tondo, “Dozens of Bucha Civilians Were Killed by Metal Darts from Russian Artillery,” *The Guardian*, April 24, 2022, sec. World news, www.theguardian.com/world/2022/apr/24/dozens-bucha-civilians-killed-flechettes-metal-darts-russian-artillery.

they were sheltering, as in the case of the theatre in Mariupol.⁴ These are merely the names of places that now everyone knows. There are many others that were destroyed.

This brazen February invasion and the civilian suffering it has produced has “re-vitalized the idea of international criminal justice” and reinvigorated global discussions about accountability which had become quieter since the atrocities of the war in Syria failed to result in a robust international response aimed at punishing perpetrators.⁵ The present article will take stock of some of the developments concerning accountability in Ukraine, and will approach the subject from an international perspective – as seen from The Hague. Furthermore, it will investigate lessons that can be learned from Bosnia and Herzegovina (hereinafter BiH, or Bosnia) which itself had been devastated by a brutal war in the early 1990s, much like Ukraine today. The focus of this brief intervention will be individual criminal responsibility and will leave proceedings between, and against States, aside.

While there are obviously significant differences between Bosnia and Ukraine, there are also important similarities which make the former’s experiences instructive when it comes to accountability for crimes in the latter. The most important similarity, and one that makes the comparison between the two countries meaningful, is that both are overwhelmed by the extent of the violations that were perpetrated against civilians on their territory, or in the case of Ukraine, are *still* being perpetrated. Another important fact is that the judiciaries of both countries seem to have comparable weaknesses.

Ukrainian domestic judicial authorities have “documented 34,000 alleged cases of war crimes since Russia invaded the country in February” according to the country’s Prosecutor General Andriy Kostin (as of September 2022).⁶ In December, that number exceeded 50,000.⁷

⁴ “AP Evidence Points to 600 Dead in Mariupol Theater Airstrike,” AP NEWS, May 4, 2022, <https://apnews.com/article/Russia-ukraine-war-mariupol-theater-c321a196fbd568899841b506afcac7a1>.

⁵ Julia Geneuss and Florian Jeßberger, “Russian Aggression and the War in Ukraine: An Introduction,” *Journal of International Criminal Justice*, November 24, 2022, mqac055, <https://doi.org/10.1093/jicj/mqac055>.

⁶ Madeline Halpert, “Ukraine Investigating Over 30,000 War Crimes Since Russian Invasion Began, Top Prosecutor Says”, *Forbes*, accessed December 8, 2022, www.forbes.com/sites/madelinehalpert/2022/09/18/ukraine-investigating-over-30000-war-crimes-since-russian-invasion-began-top-prosecutor-says/.

⁷ Tim Mak, “There Have Been 50,000 Alleged War Crimes in Ukraine. We Worked to Solve One”, *NPR*, December 10, 2022, sec. Investigations, www.npr.org/2022/12/10/1138710652/russian-war-crimes-ukraine-investigation.

Remarkably – given all the challenges the country is facing – domestic war crimes trials concerning recent violations have already started. These trials are taking place across Ukraine and garnering much media attention.⁸ These proceedings build on years of activity that followed violent attacks of 2014 in the eastern provinces and in Crimea, when the capacity of Ukraine to respond to challenges in fighting impunity began to be built and strengthened, with significant assistance from friendly States, donors, and civil society organizations.⁹ In this vital struggle for justice, there are crucial lessons to learn from previous experiences in obtaining a measure of satisfaction for victims in the aftermath of mass atrocity.

Snapshot of the current situation

The full-scale invasion of Ukraine has produced an unprecedented mobilization and deployment of resources beyond the Ukrainian State authorities in an effort to document and preserve potential evidence for future prosecutions.¹⁰ Numerous Ukrainian NGOs – many of them active since 2014 – were joined by non-governmental organizations from abroad. The Prosecutor of the International Criminal Court (ICC) has also become involved in investigating the recent attacks, just days after they began.¹¹ As the discussion that follows will show, other actors have been participating too, e.g., a number of European States, such as Poland, Germany, and Lithuania.

Ukrainian authorities, the Prosecutor of the ICC, domestic law enforcement from different States (many of them European neighbors to Ukraine) are all active, and Eurojust – the European Union’s Agency for Criminal Justice Cooperation (with its headquarters in The Hague) – has established a Joint Investigation Team trying to coordinate the different actors involved.¹² However, the number of those doing work in this space

⁸ “Map of War Crimes Trials in Ukraine”, JusticeInfo.Net (blog), December 6, 2022, www.justiceinfo.net/en/109654-map-of-war-crimes-trials-in-ukraine.html.

⁹ “ICL and IHL Reform in Ukraine”, Global Rights Compliance, accessed December 8, 2022, <https://globalrightscpliance.com/project/positive-complementarity-in-ukraine/>.

¹⁰ Geneuss and Jeßberger, “Russian Aggression and the War in Ukraine”, p. 1.

¹¹ “Ukraine”, International Criminal Court, accessed December 8, 2022, www.icc-cpi.int/ukraine.

¹² “Eurojust and the War in Ukraine | Eurojust | European Union Agency for Criminal Justice Cooperation”, accessed December 10, 2022, www.eurojust.europa.eu/eurojust-and-the-war-in-ukraine.

presents massive issues of coordination and potential overlap, posing challenges for effective deployment of the considerable resources.¹³

Most of this documentation and investigation work concerns potential cases of war crimes, crimes against humanity, and genocide, i.e., the numerous instances where credible reports seem to suggest that civilians, prisoners of war and civilian infrastructure have been attacked unlawfully. Crucially, the actual launching of the full-scale invasion – the act of aggression – is separate from investigations done by Ukrainian authorities, the ICC and other States and will be treated in this article only briefly, as it remains beyond the scope of this piece.¹⁴

Ukraine has been conducting a number of proceedings since the start of the full-scale invasion.¹⁵ It has the primary responsibility for events happening on its territory and, experts suggest, it is that State which will have to deal with “95 percent of what has happened.”¹⁶ So far, all the accused prosecuted in the domestic system have been lower-level direct perpetrators and some have even been tried *in absentia* as the defendants are not in custody of Ukrainian authorities.¹⁷

The permanent Hague-based ICC has also been actively involved. Neither Ukraine nor the Russian Federation are State Parties to the Rome Statute, but the former has accepted ICC jurisdiction for crimes committed on its territory from 21st November 2013 onwards. For the purpose of this discussion, details of the years-long preliminary examination are not crucial and will be left aside. However, one key development demands attention. On 1st March 2022, Lithuania referred the Ukraine situation to the ICC Prosecutor, as the Statute allows.¹⁸ Since then, 42 States Parties joined Lithuania.¹⁹ The bulk of the States are European, with New Zealand,

¹³ “As Ukraine War Crimes Probes Grow in Scope, Fears about Bureaucratic Struggles Rise”, NBC News, accessed December 10, 2022, www.nbcnews.com/news/world/coordination-struggles-hamper-ukraine-war-crimes-investigations-rcna27100.

¹⁴ The crime of aggression did not feature in the proceedings relating to Bosnia and Herzegovina, so it falls outside the scope of this article.

¹⁵ Iryna Marchuk, “Domestic Accountability Efforts in Response to the Russia–Ukraine War: An Appraisal of the First War Crimes Trials in Ukraine”, *Journal of International Criminal Justice*, November 24, 2022, <https://doi.org/10.1093/jicj/mqac051>.

¹⁶ “Maastricht Blog On Transitional Justice”, November 18, 2022, <https://transitionaljustice.net/ukraine-series-interview-with-wayne-jordash/>.

¹⁷ “First Sentence for Sexual Violence in the Ukraine War”, *JusticeInfo.Net* (blog), November 10, 2022, www.justiceinfo.net/en/108703-first-sentence-sexual-violence-ukraine-war.html.

¹⁸ ICC, *Lithuania Referral of Ukraine Situation to the Prosecutor of the ICC*, March 1, 2022, www.icc-cpi.int/sites/default/files/2022-04/1041.pdf.

¹⁹ “Ukraine”.

Australia, Colombia, also supporting the move. However, there are notable absences from this referral, and some parts of the world have decided to stay silent on the matter.

Finally, in the context of the fight against impunity for crimes in Ukraine, there is the crime of aggression for which there is a “huge accountability gap.”²⁰ The International Criminal Court has no jurisdiction on aggression in this case, and critics point out that the jurisdictional regime for this crime has been made too restrictive.²¹ There is currently no way to pursue judicial accountability for the crime of aggression internationally, and any domestic effort would face obstacles of immunities for high-level suspects and issues of (perceived or real) independence and legitimacy. There are lively debates and several options on the table for the possible establishment of a special tribunal for the crime of aggression, which would bypass the United Nations Security Council where Russia sits as a permanent member and would make sure any such effort is blocked.²²

Some similarities and differences between BiH and Ukraine

Due to the limitations of space, this short article cannot provide an in-depth analysis of the similarities and differences between the realities of the war, the victimization, the state of the legal system and the ways in which they resemble, and differ, between these two countries. Here, it is sufficient to note a few major characteristics, relevant in this context of justice and accountability, which make the experience of twenty plus years of investigations and trials concerning crimes in BiH relevant for Ukraine.

The similarities between what these two States and their populations experienced, and in the case of Ukraine, still experience on a daily basis, are the massive victimization of civilians. In both countries, cities were besieged, people taken away and shot, arbitrarily arrested, tortured, raped, beaten, and killed. The brutality that was unleashed in Bosnia and Herzegovina between 1992 and 1995 left over 100,000 people dead and missing. It also left the country with over 10,000 potential suspects to

²⁰ Geneuss and Jeßberger, “Russian Aggression and the War in Ukraine”, p. 2.

²¹ “The Need to Reexamine the Crime of Aggression’s Jurisdictional Regime”, Just Security, April 4, 2022, www.justsecurity.org/80951/the-need-to-reexamine-the-crime-of-aggressions-jurisdictional-regime/.

²² Patrick Wintour, “Russian War Crimes Draft Resolution Being Circulated at the UN”, The Guardian, December 4, 2022, www.theguardian.com/law/2022/dec/04/russian-war-crimes-draft-resolution-circulated-un-ukraine-zelenskiy.

investigate for credible allegations of perpetrating genocide, crimes against humanity and war crimes.²³ If the war in Ukraine continues with similar brutality for a while longer, it is likely the number of suspects there will be comparable.

As already stated, both judicial systems were (and are) overwhelmed by the thousands of potential international crimes that need to be investigated. That is no wonder, and bigger and wealthier States would struggle too, as no country can easily investigate and prosecute thousands of cases, while respecting international fair trial standards. That work would require resources and the technical, specialized expertise few States, if any, can provide.

In 2017, the Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation (OSCE) issued an Opinion assessing the judiciary in Ukraine, and identified challenges, such as corruption.²⁴ Bosnia and Herzegovina has had similar problems, and even thirty years after the start of the war, challenges remain, as will be shown later. Significant resources have been invested in building the needed capacity in Ukraine, and that process continues.²⁵ One area of expertise where support has been provided is the investigation and prosecution of cases of sexual violence.²⁶

As with similarities, only a few key differences can be highlighted here. The most important one is that, while Bosnia was also struggling under the weight of numerous crimes being committed on its territory, it – unlike Ukraine – had an international tribunal working on some of them. The International Criminal Tribunal for the former Yugoslavia (ICTY) was established in 1993, as the war in Bosnia was ongoing, by the UN Security Council. It was the first post-Cold War international tribunal and when it closed, in 2017, it left a complicated legacy behind.²⁷ It has, however,

²³ “Time Is Running out for War Crimes Prosecution in Bosnia,” *JusticeInfo.Net* (blog), November 14, 2022, www.justiceinfo.net/en/108796-time-running-out-war-crimes-prosecution-bosnia.html.

²⁴ OSCE, Opinion on the Law of Ukraine on the Judiciary and the Status of Judges, 30 June 2017, Warsaw, www.osce.org/files/f/documents/8/1/335406.pdf, p. 4.

²⁵ “EU supports ICC investigation Russian war crimes in Ukraine,” European Commission - European Commission, accessed December 10, 2022, https://ec.europa.eu/commission/presscorner/detail/es/ip_22_3543.

²⁶ Anthony Deutsch and Anna Voitenko, “Exclusive: International Legal Experts Assist Ukraine in Sexual Violence Investigation,” *Reuters*, December 12, 2022, sec. World, www.reuters.com/world/international-legal-experts-assist-ukraine-sexual-violence-investigation-2022-12-11/.

²⁷ Diane Orentlicher, *Some Kind of Justice: The ICTY’s Impact in Bosnia and Serbia* (New York: Oxford University Press, 2018, <https://doi.org/10.1093/oso/9780190882273.001.0001>).

indicted 161 individuals for genocide, war crimes and crimes against humanity, and convicted many of them for crimes in Bosnia and Herzegovina.²⁸ Among them were guards who beat and tortured civilians in camps in Western Bosnia, army officers in charge of constant sniper and mortar attacks on besieged Sarajevo, and executioners who massacred people after the fall of Srebrenica.

A UN *ad hoc* tribunal like the ICTY dealing with genocide, crimes against humanity and war crimes, is not a realistic option for Ukraine due to the Russian Security Council veto. A similar inability to form an *ad hoc* at the Security Council followed the mass violence in Syria, nearly a decade ago now. Therefore, alternative routes are currently being considered and passionately debated.

In 2005, the ICTY supported the establishment of an important body namely, the State Court of BiH and the Prosecutor's Office, both of which had dedicated staff specializing in international crimes. The State Court was supposed to deal with the bulk of the cases locally – those not taken by the ICTY – and those not falling within the jurisdiction of local courts across the country (that were meant to process the low-level perpetrators).²⁹ Importantly, the State Court and Prosecutor's Office had a period of hybridization lasting several years, when they received assistance in resources, training and support from donor States, and when international staff worked alongside Bosnian professionals. For the moment, as regular courts deal with the crimes in Ukraine, there is no such participation and formal inclusion of foreign staff to work as judges and prosecutors with their domestic counterparts.

Two final points need to be stressed regarding differences. One is access to potential suspects. Ukraine will, barring massive political changes in Russia and the collapse of the Putin regime, face serious issues in trying to arrest suspects. If, upon the commission of the crime(s), the suspects return to Russia, there is little opportunity for Ukraine (or any other State for that matter) to make arrests. As long as they stay in Russia, and Putin remains in power, it will be difficult to make any arrests.

The people who have committed the 50,000 alleged crimes are not going to stay in Ukraine, nor will they be tried in Russia or transferred for trial somewhere else. Bosnia and Herzegovina has, and continues to have,

²⁸ “Key Figures of the Cases | International Criminal Tribunal for the Former Yugoslavia,” accessed December 11, 2022, www.icty.org/en/cases/key-figures-cases.

²⁹ Claire Garbett, “Localising Criminal Justice: An Overview of National Prosecutions at the War Crimes Chamber of the Court of Bosnia and Herzegovina Recent Development”, *Human Rights Law Review* 10, no. 3 (2010): 558-68.

problems with access to some suspects (many of whom remain in Serbia, and Croatia, for example), but overall, this problem was not as pronounced as it could be in Ukraine. After all, many of the suspects were Bosnian citizens who remained in Bosnia after the war.

Finally, technological advancements and, in particular, the sheer amount of social media content which may be of relevance as potential evidence is another major point of difference. The incredible volume of video material coming from the conflict and being shared online was already a massive challenge for those trying to collect and analyze evidence for future judicial proceedings for crimes in Syria.³⁰ Arguably, in Ukraine the massive amount of digital evidence will be greater than ever before and will present challenges that will require both strategic decision-making on priorities and the assistance of artificial intelligence.³¹

Experiences from BiH and lessons to learn

Designing policies and approaches for transitional justice in post-war settings is anything but simple.³² The needs of victims and the broader society are immense, and there is a competition for resources: to house returning refugees, fix infrastructure, and provide healthcare, to name only a few. Fighting impunity is just one of the competing goals in a country that is, or has been, engulfed by violence and brutal attacks on civilians. Bosnia and Herzegovina has been somewhat of a laboratory for post-war justice and after thirty years, it has much to teach us.

As it was already stressed, a key aspect of war crimes prosecution in both countries is the issue of overwhelming numbers of cases to deal with. That requires careful planning, assessment of available resources, coordination between different actors (state authorities and civil society, domestic and international) and a plan based on on-the-ground needs. For successful prosecutions going forward, what is needed is a realistic strategy. Bosnia's experience is instructive here, as it struggled for years in

³⁰ "40 Years' Worth of Footage from Syria Alone: Global Documentation Requires Commensurate Global Justice", *Opinio Juris* (blog), May 26, 2021, <http://opiniojuris.org/2021/05/26/40-years-worth-of-footage-from-syria-alone-global-documentation-requires-commensurate-global-justice/>.

³¹ Alexa Koenig, "From 'Capture to Courtroom': Collaboration and the Digital Documentation of International Crimes in Ukraine", *Journal of International Criminal Justice*, November 8, 2022, <https://doi.org/10.1093/jicj/mqac046>.

³² Hakeem O. Yusuf and Hugo van der Merwe, eds., *Theories, Mechanisms and Debates* (London: Routledge, 2021, <https://doi.org/10.4324/9781315760568>).

drafting and adopting two different war crimes strategies. Both, in many ways, remain merely aspirational as the country is failing to reach its stated goals which were, it now seems clear, unrealistic to begin with.³³

These overwhelming numbers of cases to investigate and make decisions about, i.e., if they are solid enough to indict and take to court, force any authority to make difficult choices about which cases to prioritize and which to set aside. That case selection requires a clear set of criteria to guide prosecutors in making these decisions and defining these criteria will be complicated for Ukraine as well, as there will be clashing priorities and difficult choices to make. What is vital is that the criteria is made in consultation with victim representatives and that it attempts to secure their buy-in.

Of course, not all victims will have the same opinions or the same priorities, and many will be left disappointed as their own victimization will not be prioritized for investigation and prosecution. However, this step is key and there is no way to avoid it: create a set of clear criteria for case selection, ask victim communities about feedback and input, and communicate clearly about choices that need to be made in achieving at least a measure of justice for the crimes that were perpetrated. Without getting into the details of how the strategy was drafted and how criteria were defined in Bosnia, those working on Ukraine now would benefit from familiarizing themselves with that process.

What is abundantly clear when analyzing the Bosnian experiences, and that is echoed across other contexts where mass violence took place, is that all perpetrators will never be prosecuted. In fact, most perpetrators will not be prosecuted, at least not within the confines of a traditional courtroom, as no State has the capacity – the resources, expertise, funding – to conduct proceedings in thousands and thousands of cases.³⁴ Ukraine will be no different. Even with the assistance it has been receiving, and its competent and driven staff, there are limits to what a judicial system can offer. There is simply no way to prosecute everyone so pretending that there is becomes counterproductive and deeply damaging to survivors.

³³ “Bosnia Adopts Long-Delayed National War Crimes Strategy”, Balkan Insight (blog), September 24, 2020, <https://balkaninsight.com/2020/09/24/bosnian-adopts-long-delayed-national-war-crimes-strategy/>.

³⁴ There are examples of proceedings against great number of suspects, as in the case of the Gacaca in Rwanda, but those were conducted outside of the frameworks of the conventional courtroom and legal frameworks that are most commonly applied internationally. That is an example of community-driven justice, inspired by traditional conflict-resolution traditions.

That is why it becomes even more important to address prioritization and case selection, and making clear where the focus will be for investigations. Here, a useful lesson from BiH (and the broader region) is that it tends to be easier to prosecute lower-level perpetrators, with no political power and where evidence places a suspect at the crime scene. What is more difficult is investigating and prosecuting people up the chain of command. Those cases in particular are risky and require political support.

At the moment, over 4,000 suspects, and nearly 500 war crimes cases, remain before the prosecutor's offices in BiH. The OSCE, which has been supporting and monitoring war crimes prosecutions for two decades, states that "with each passing day, the likelihood of achieving justice for the remaining victims of the atrocities committed during the war diminishes."³⁵ The lesson for Ukraine, from Bosnia and Herzegovina, is to be aware that attention, funding and support wanes, and that ultimately, they will be left (mostly) on their own with this gigantic challenge. It is worth remembering that even if the ICC, for example, ends up prosecuting some cases from Ukraine, it is unlikely that those will be more than a handful and they will probably be suspects who had higher positions in military or civilian structures.

Another important lesson concerns the ICTY, and the effective way it dealt with ensuring the last fugitives – mainly Radovan Karadžić and Ratko Mladić – were arrested.³⁶ These two high-level accused were fugitives for almost fifteen years and their cases are an important example of the importance of having a long-term perspective in all the planning when it comes to accountability. Support (domestic and international) for prosecutions must be sustained over decades if major results are to be expected. The prosecution of War crimes prosecution is a long-term commitment.

This issue of time and how long investigations and prosecutions take, especially in complex cases with high-level people accused, is a constant point of critique of international mechanisms in particular. Investigations are slow because the number of cases are overwhelming; access to evidence is sometimes difficult due to security challenges; interviewing witnesses; seizing and then working through thousands of pages of documents; and

³⁵ "A RACE AGAINST TIME - Successes and Challenges in the Implementation of the National War Crimes Processing Strategy of Bosnia and Herzegovina," accessed December 10, 2022, www.osce.org/mission-to-bosnia-and-herzegovina/521149.

³⁶ Julian Borger, *The Butcher's Trail How the Search for Balkan War Criminals Became the World's Most Successful Manhunt* (London, Penguin Random House, 2017).

analyzing crime scenes, or conducting DNA analysis of human remains, are all time-consuming tasks. But this delay is not always a problem to overcome, and can in fact have positive consequences on the trials of those most responsible for the perpetration of international crimes.³⁷

A constant concern throughout the year-long process of investigations and prosecutions must be outreach and communication with survivors, the affected communities, as well as, and maybe in particular, with communities from which the perpetrators come. In past experiences, outreach has been a challenge, and there is much Ukraine can learn from past experience.³⁸ If the communities from which the perpetrators come are completely neglected, without creative and genuine efforts to reach them, any outcome of these proceedings will be minimized. Then, as in some other contexts, we will have communities who see courts and trials as enemies, and dismiss any findings as lies, conspiracies and attacks from abroad. Those attitudes are not conducive to peace, security, and stability in post-conflict situations.

One key element which can be used in communication with the public, but also more broadly, in presenting facts about what happened, are the archives – the documents collected and created, through the judicial process. These can be military and police reports, intelligence briefings, witness statements (and witnesses can be survivors, or observers, or “insiders”, i.e., those working on the same “side” as the accused), images, ballistic reports, forensic reports, death certificates, etc. Documents are presented in trial as evidence, and documents are created during the process, in the form of, for example, transcripts of courtroom testimony. All of that, to the extent possible, needs to be made accessible to the public and to researchers in particular. Another point is language: as much material as possible should be made available in the languages the affected communities speak. Ideally, it would also be made available in English, to enable broader engagement with the materials and research. All that can be done while respecting fair trial rights and while not compromising the judicial process. Therefore, the archives of future war crimes trials should

³⁷ Iva Vukušić, “Later Rather Than Sooner: Time and Its Effects on the Karadžić and Mladić Trials”, *International Criminal Law Review* 22, no. 1–2 (January 22, 2022): 189–208, <https://doi.org/10.1163/15718123-bja10086>.

³⁸ Janine Natalya Clark, “International War Crimes Tribunals and the Challenge of Outreach”, *International Criminal Law Review* 9, no. 1 (January 1, 2009): 99–116, <https://doi.org/10.1163/157181209X398835>.

not be an afterthought. They should be a central part of the accountability efforts from the start.³⁹

What all these efforts, even if successful, cannot guarantee, is reconciliation. While that was an admirable goal in the early efforts to fight impunity, at the beginning of the work of the ICTY and ICTR, by now the admirable goal has been understood as too ambitious for one mechanism – trials – to attempt to reach. Reconciliation is not always possible in ways that foreign observers expect it to be, and from the experience of the ICTY we know that it was too much to ask.⁴⁰ For any social repair to happen, what is needed are complementary mechanisms – measures to implement alongside any trials. These can and should include truth-finding, reparations, acknowledgment of harm, memorialization, finding and identifying missing persons, and psycho-social support for survivors, etc. Only a comprehensive approach based on needs and existing opportunities to maximize effect can assist in providing a measure of justice and a measure of hope in a society so deeply ravaged by war and violence. We know that much from Bosnia.

Conclusion

Ukraine now stands before a massive challenge: to bring some justice to the thousands of civilians whose lives have been ruined by this invasion. Spouses, siblings, family, friends, pets, property – some people lost everything, and many survivors will never fully recover from the trauma. Much about how pathways to justice will look and what they can hope to achieve remains unknown. Outcomes will depend on which measures are ultimately implemented, and how. They will also depend on the outcome of the war and closely related to that – the future of the Putin regime. It will also be affected by the long-term commitment of the vaguely-named “international community” to the cause of justice. As any other country

³⁹ Iva Vukušić, “Why We Should Open Archives from War Crimes Trials to the Public”, accessed December 11, 2022, www.ushmm.org/genocide-prevention/blog/why-we-should-open-archives-from-war-crimes-trials.

⁴⁰ Jennifer Trahan and Iva Vukušić, “The Legacy of the ICTY: The Three-Tiered Approach to Justice in Bosnia-Herzegovina and Benchmarks for Measuring Success”, in *Legacies of the International Criminal Tribunal for the Former Yugoslavia: A Multidisciplinary Approach*, ed. Carsten Stahn et al. (Oxford University Press, 2020), <https://doi.org/10.1093/oso/9780198862956.003.0025>.

would be in this set of circumstances, Ukraine needs help, and whoever is providing it must listen to the Ukrainians and recognize their leadership.

This effort, to achieve a measure of justice, will take years – decades – and it requires a serious discussion about goals and the strategies to achieve them. More than anything, those in charge of the effort must be transparent about their capacity to achieve these goals and manage expectations of survivors. Ideally, there would be a set of explicit, measurable goals that survivors, the broader public and outside observers can return to, in 2030, to see what has been done. For now, there is no clear notion about what would constitute success in the fight against impunity for crimes in Ukraine. That must change. Finally, complementary mechanisms need to be devised and adequately funded by Ukrainian partners and donors.

Ultimately, even if the fight against impunity “works” and punishes some perpetrators for some crimes, and provides a measure of justice to some survivors, what it can do on its own is relatively modest. The needs of a society that is being, or has been brutalized, like Ukraine and Bosnia, are simply too great. It is from this humility that all efforts to provide justice should begin.