

Accountability for War Crimes: Discussions on the War in Ukraine and Its Meaning for the West – International Conference “Russia’s War of Aggression Against Ukraine: Challenges of Documenting and Prosecuting War Crimes”

In February 2023 the Pilecki Institute and Zentrum Liberale Moderne jointly hosted the three-day conference “Russia’s War of Aggression Against Ukraine: Challenges of Documenting and Prosecuting War Crimes.” Held in Berlin, the conference tackled many pressing issues regarding the steps that can and should be taken by Ukraine’s allies and by the international legal community to hold Russia and its leaders accountable for the multitude of crimes being committed in its aggression against Ukraine. Taking place in the midst of the very war that is its subject, a war which at present has no clear end or resolution in sight, one cannot expect such a conference to have definitive answers. Bereft of the advantages of hindsight on a situation that is developing in real time, we can only raise questions and outline problems for the path ahead – yet such questions are of immense importance, and the problems revealed are ones that have lain too long under the surface of our geopolitical reality, always present but too easily disregarded. Two discussion panels that rounded off the first and last days of the conference underlined that while many questions will remain open regarding what actions to take, legal and otherwise, the way forward must begin with a much deeper understanding of the global and historical contexts which have shaped the current conflict and which continue to shape the world we live in.¹

The two discussions brought together international panels that included historians, legal scholars, political scientists, policy experts, and renowned commentators. The first of these discussions, titled “Accounta-

¹ The panel discussions on which this summary article is based took place on February 1 & 3, 2023, in the course of the conference “Russia’s War of Aggression Against Ukraine” held by the Pilecki Institute and the Zentrum Liberale Moderne in Berlin. They can be viewed online at: <https://youtube.com/playlist?list=PL-hpbAC2R-053PaFfAcmKej9lIH-XlTy6&si=MFyYwV58AtxpWPly>.

bility for War Crimes: Political and Practical Approaches,” included Marieluise Beck, Senior Fellow at Zentrum Liberale Moderne and a former German MP for the Green Party; Anton Korynevych, expert in international law and Ambassador-at-large in the Ministry of Foreign Affairs of Ukraine; David Schlaefler, Senior Advisor for War Crimes and Accountability in Ukraine in the Office for Global Criminal Justice at the US Department of State; and Jadwiga Rogoża, Expert on Ukraine and Senior fellow at the Centre for Eastern Studies in Warsaw.

The second discussion entitled “The War in Ukraine and Its Influence on Europe,” included Magdalena Gawin, historian with the Institute of History at the Polish Academy of Sciences and Director of the Pilecki Institute in Warsaw; Mark Kramer, Director of Cold War Studies and of the Sakharov Program on Human Rights at Harvard University; Ralf Fücks, Managing Director of Zentrum Liberale Moderne in Berlin and former president of the Heinrich-Böll-Stiftung foundation; Kseniya Yurtayeva, Associate Professor in the Department of Criminal Law and Criminology at Kharkiv National University and visiting scholar at the Weiser Diplomacy Center at the University of Michigan, Ann Arbor; and Iain Dale, visiting professor of politics and broadcasting at the University of East Anglia, presenter of LBC Radio’s evening show, and popular journalist and commentator in British media.

Panelists in both sessions were unanimous in stressing the global significance of the conflict: As Magdalena Gawin stated, Russian aggression against Ukraine is not an episode in history, but a turning point in the history of the 21st century. While answers may be mixed on the precise directions that might be followed, the overall goal of holding Russian leaders and actors from the top down accountable for their crimes is of supreme importance not only due to the horrific atrocities being perpetrated on the Ukrainian populace, but also because of the threat these actions pose to the very status of international law and justice as a global norm. David Schlaefler spoke of the difficulties, raised earlier by William Schabas, inherent in the legal, economic, and political dynamics of international courts, but underlined that whatever mechanisms might be brought into play, they must maximize the impact of transitional justice as a value in and of itself, as a means of reparatory action, and as a deterrent both for the current conflict and, most importantly, for the global community as a whole. This war, as Ralf Fücks declared, is not only about solidarity with Ukraine, but it is about us, the future of Europe, and the future of the international order. More fundamentally still, as Kseniya Yurtayeva argued, it is a war of the civilized world dedicated to democratic values against an aggressor state that is discarding international law and order.

The issue of accountability, as panelists in both sessions underlined, has deep historical roots. Jadwiga Rogoża pointed to the lack of accountability for the Katyń massacres of 1940, an issue which remained unresolved, thereby giving Soviet perpetrators a sense of impunity and

encouraging their successors in the present to feel the same. There has been, as Magdalena Gawin stressed, a vicious cycle of Russian aggression, impunity, and further aggression repeated constantly in modern history, made possible by the lack of political will to end it on the part of the Western powers. Iain Dale spoke more broadly of the historical tendency to appease dictators in an attempt to avoid conflict, a point touched on by Gawin as well; this has been noticeable in the post-Cold War period with the West's treatment of Putin. Dale pointed to the examples of Syria in 2013 and Crimea in 2014, while Mark Kramer was quick to point out that this trend extends back at least to 1992-3 when Russia was allowed free hand in South Ossetia, and then in Moldova and soon after in Tajikistan. And the historical tendency of European nations and the U.S. toward appeasement and avoidance of conflict – redolent of 1938 – is not restricted to Russia, of course, but has undermined European and American attempts to uphold international law and broker peace in multiple regions, notably in Bosnia which Marieluise Beck described as a watershed moment for Western inaction through lack of political will and the disastrous consequences thereof. We must remind ourselves every few generations, Iain Dale underlined, that we must stand up to dictators or our failures to act will merely encourage the next.

The Western powers must act, and all panelists took some comfort in the firm resolve which European States and the U.S. have so far shown in support of Ukraine – with the strong example of Poland being pointed to several times – although much more could be done. But in terms of pursuing justice for Russia's many crimes committed in the course of the conflict – and for its criminal aggression in launching the invasion to begin with, going back to 2014 – panelists stressed the imperative need to garner worldwide support for and recognition of whatever form this pursuit might take. Anton Korynevych spoke of the difficulties inherent in following the model of a hybrid tribunal, especially on the question whether it could cover the crime of aggression and reach persons with functional immunity such as Putin and his cabinet. Using the ICC alone would not be enough in this case, as it cannot exercise jurisdiction over the crime of aggression. Despite the challenges (including the need to enact changes in Ukrainian law and its constitution to broaden its reach beyond Ukrainian nationals) Korynevych emphasized that all possible variations of hybrid tribunal are on the table, and that in the end we must find legitimate, credible solutions, thus the more international the solution the better. In some vital practical ways, this broad international cooperation in pursuing justice for Ukraine is already taking place. David Schlaefer outlined numerous initiatives that have been undertaken by the U.S. State and Justice departments to deploy mobile teams of subject matter experts working with the office of the Prosecutor General in Kyiv and other Ukrainian teams to give advice in forming international cases and to provide aid on the ground in investigations where atrocities have

taken place. The widespread involvement within Ukraine itself, often on the front lines, of international experts and governmental groups in the collection of forensic evidence, of testimonies, in providing outside expertise is going a long way to ensuring that the pursuit of justice for Russian crimes in Ukraine is a multilateral, international effort.

Gaining worldwide support for Ukraine and for a full reckoning of Russian crimes in the conflict – War Crimes, aggression, crimes against humanity and genocide – is of paramount importance, as these two panels have repeatedly stressed, not just for the sake of Ukraine as a sovereign, independent state, but for the sake of international peace and the post-Second World War order. A key part in building support has been the ability of Ukraine's own government and its people to present a solid image to the world of unity, strength, determination and success in the face of overwhelming odds and brutal violence, something which Iain Dale underlined pointing to the highly successful PR campaign carried out in Britain and other Western nations by Ukrainian MPs. You don't just win wars on the battlefield, as he said, but in hearts and minds as well. The gathering of evidence and especially witness testimonies has been not only key in preparing the ground for future judicial proceedings – which may take years to reach fruition – but equally importantly right now in making known throughout the world precisely what is happening to the victims of this war of aggression. The storytelling is very important, as Kseniya Yurtayeva agreed, and social media certainly does its part in bringing the horrific experiences of Ukrainian victims closer to publics far from the region, but she warned as well that people must not get used to such violence, that it cannot become something banal in our lives. More constructive perhaps are the number of projects, as Yurtayeva mentioned, being carried out by various centers to collect evidence and testimonies, presenting them to publics worldwide to ensure that victims' voices are heard now and remembered in the future, projects such as the Raphael Lemkin Center at the Pilecki Institute in Warsaw and the Reckoning Project.

Here again the close cooperation of European and American organizations with Ukrainian officials, lawyers, journalists and NGOs helps to bring more worldwide attention to the atrocities being committed against Ukrainian civilians and underlines the universal impact of the conflict. The presence of foreign observers within Ukraine should also serve to show that Ukrainian forces themselves are responsible for abiding by the standards of conduct in combat which are being so systematically and violently breached by the Russians, something which Mark Kramer stressed as being crucial to maintaining worldwide sympathy and support for the Ukrainian cause. It is extremely important, he cautioned, for the Ukrainian Government to be clearly seen as being eager to conform to the Geneva Conventions, and to underline the sharp contrast with the behavior of Russian troops and their leaders. There is an imperative

here to maintain the moral high ground: The expectations being placed on Ukraine by Western nations in terms of conducting its own defensive operations in a way that fully maintains international norms and standards are high, the more so that the outcome of this conflict, if it is to secure Ukraine's integrity and full sovereignty, must be eventual EU and NATO membership. This end goal, of bringing Ukraine fully into the sphere of European liberal democracies as a strong and sovereign state must be kept in the foreground. It is vital for us to help Ukraine win the war, but also, as Magdalena Gawin stressed, to win the peace, to ensure a good program of recovery for Ukraine after the conflict and to help it to rebuild a strong infrastructure, material and social. How the war is won will certainly have an effect on how the nation is rebuilt afterwards. For its part, as Jadwiga Rogoża pointed out, Ukraine has proven in this year of war that it has a huge potential for development and remarkable human capital, a point that was emphatically underscored by Kseniya Yurtayeva as well.

A strong post-war Ukraine, fully integrated with Western democratic nations and enjoying the same social and political standards, will be vital to regional stability and to the security of Europe, as all panelists stressed. This is all the more important as the future of Russia and its geopolitical role in coming years are most difficult to predict. Opinions among the panelists as to how best to approach Russia or what chances the Russian people might have to rejoin a peaceful world order were noticeably divided between outright pessimism and cautious hope. Expressing the latter view, Marieluise Beck argued that while a majority of Russians may appear to be in favor of the war, there are still those who are not, and it is not in our interest to give up on a people totally. If the 1990s was a period of chaos for Russia following the collapse of the Soviet Union, it was nevertheless a time when many, she held, gained experience in setting up a civil society, and so while the current state of totalitarian rule in Russia may have forced democratic and liberal currents far underground, the possibility of their renewal and resurgence cannot be ignored or discounted by the West. They should be given a chance, as were the Germans after 1945. Mark Kramer too argued against viewing the Russian people as universally submissive or passive, recalling significant movements of popular protest throughout its history (such as in March 1917), notably in 1991 and 2011. Russia, he pointed out, will always be a neighbor to Ukraine (as well as to the Baltic states, Poland, and Finland, it might be added), so it would be better to try and rekindle a democratic spirit than to simply dismiss it altogether.

A more pessimistic position was taken by Jadwiga Rogoża, who argued that Putin's rise to power was not a mistake but a logical reaction to the chaos of the 1990s. Russians, mired in poverty and despondent over the loss of their nation's power and prestige, sought to recreate what they knew and longed for from Soviet times – this, Rogoża argued, is the

norm for Russia and not a deviation. Indeed the invasion itself can be seen as merely the most recent manifestation of a fundamental imperialist, expansionist and militaristic system that has been formed over centuries. Society in such a state, Rogoża argued, becomes a mute participant in the system, perhaps a victim or a hostage, but nevertheless unlikely and perhaps unwilling to change. Other panelists were reluctant to make such a pessimistic appraisal of the Russian people – as Ralf Fücks said, we should not write off Russia forever. At the same time it was generally agreed that there is likely little that can be done by Western powers to change the attitudes or outlook of Russian society from without, it is only something that can happen from within. And this is something that will happen only through a decisive collapse of Russia's forces in the current conflict. We cannot, as Fücks declared, spare Russia a defeat in Ukraine because it is only after the shock that this kind of neo-imperialist mania has failed – or, as Rogoża termed it, that the bankruptcy of this model becomes clear – that there is any chance for positive change. For this to happen we must firmly reject the argument that Putin cannot lose face and that Russia must be humored as a 'great power' lest the regime's imminent collapse bring further escalation of the conflict. Both Fücks and Rogoża strongly emphasized that we cannot give in to Russia's threats of escalation or the introduction of nuclear weapons, as this would simply be following Russian interests and acting against our own. We may hold out cautious hope for the future of the Russian people, but we cannot hold illusions about cooperating in any way with Putin or expecting any future peace and stability with the current regime in place. War, as Mark Kramer put it, is a commitment problem, stemming from the inability of one state to trust another to hold to its commitments, and Russia has shown repeatedly that it places no value in keeping such commitments. Kramer also offered the opinion that the further fracturing of the Russian Federation into smaller political units – once feared by political analysts in the wake of the Soviet Union's collapse – could in fact prove a more workable outcome with easier neighbors to live with, a view echoed as well by Jadwiga Rogoża. In emphasizing that we cannot hope to – and should not try to – work with Putin's regime to deescalate and resolve the conflict in Ukraine, and in avoiding falling in to the trap of heeding Russian propaganda, it becomes easier as well to envision a more robust and unified approach to pursuing justice. The argument that bringing charges of war crimes or genocide against Russian leadership will slam the door for any kind of diplomatic arrangements needs to be firmly rejected, as Ralf Fücks pointed out, and the confiscation of Russian assets for the rebuilding of Ukraine's infrastructure should also be part of a unified solution on the part of the West. There is no point in holding back when Putin is himself fundamentally uninterested in diplomatic solutions.

While the current war in Ukraine can be seen in many ways as a continuation of many underlying conflicts and contradictions that have

plagued the history of Eastern and Central Europe – most particularly of Russian imperialist aggression and expansionism unpunished or ignored – it also poses many new and unprecedented challenges that lead us into an uncertain future. A part of this uncertainty is due to the fact that Putin has effectively upended the international order, as David Schläfer pointed out, and is seeking to destroy or undermine the international rules and norms that have shaped our post-Second World War vision of world peace and stability. While the invasion of Ukraine can be regarded as a continuation of Russia's aggressive expansionist campaigns in the region, going back to the 1990s and indeed further (as described above), the degree to which the current war blatantly and violently defies all conventions and standards of warfare, beginning with Russia's unprovoked and unjustified aggression against Ukraine (starting in 2014) and continuing with acts of genocide and crimes against humanity, brings us face to face with a new and unsettling reality. It is something that has caught Western observers off guard, as Iain Dale observed sharply, revealing the unpreparedness or unwillingness of many in the West to deal realistically with the true nature of Putin's regime and of Russia's imperialist character.

Another part of our uncertainty for the future lies in the nature of the conflict itself, which despite its historical roots displays many new and disturbing dimensions, as described by Kseniya Yurtayeva. The brutal treatment of Ukrainian citizens by Russian troops has deeply shocked Western publics, and with good reason, but what has perhaps been more unprecedented is the way in which the Russian leadership has been deliberately and mercilessly targeting civilians as a strategy in and of itself. This has not only a psychological effect, as Yurtayeva pointed out, but importantly an economic and existential effect as well, as the relentless bombing of civilian infrastructure deprives Ukrainian citizens of their vital utilities and their very means of survival. Such attacks could amount to the implicit use of starvation as a method of warfare, something which is prohibited in humanitarian law and should therefore be addressed in discussions about Russian war crimes. As she argued, these tactics can cause the deaths of millions of people without killing them directly. Bombing is not, moreover, the only threat to civilian infrastructure in Ukraine: cyberattacks are also being used extensively by Russia to cripple the Ukrainian power grid and other targets, as Yurtayeva explained. Cyber aggression as a prominent feature of this war, going back to 2013-14, has brought completely new challenges and perils that are similarly taking us into unfamiliar and uncertain terrain. Cyber warfare can range from attacks directly on infrastructure, civilian or military, using viruses or other means, to campaigns of disinformation and propaganda through social media and other online sources. In all such cases, the range of attack goes far beyond conventional fronts and can reach anyone anywhere: It is a war without barriers, Yurtayeva emphasized, and has implications not only for Europe but for the world at large.

While questions of how to pursue justice against Russian war criminals large and small arose importantly during these two discussions, they were also largely framed within contexts of broader historical and political problems. What seems most pressing for the present perhaps are the political challenges of maintaining completely unified and committed support for Ukraine amongst the Western powers now and in the future: For, as Marieluse Beck noted in reference to the failure of the West to act in Bosnia, the lack of political will and reliance on short-term expedients leads only to dysfunctional solutions that resolve nothing in the end. The historical experience has been the absolute reliance of international justice and indeed the maintenance of international norms and standards upon the political will of the major powers to see that these are followed through, and it is this that has been a critical weak point up to now, even in the case of Nuremberg where Soviet war crimes went unmentioned and unpunished, as Jadwiga Rogoża pointed out. If we are left with uncertainty – with ‘no conclusions’ – as to where the pursuit of justice for all the crimes being committed right now against Ukrainian citizens by Russian troops and by the Russian leadership will lead us, it is not because we are in any doubt as to the nature of these crimes, their severity, and the imperative need to address them promptly and fully. It is rather the uncertainty of how committed we are now and will remain in the future politically to uphold the standards of international justice that we have ourselves set, and this requires seeing the conflict through to the end and ensuring the peace, sovereignty, strength and integrity of the Ukrainian nation. The principal challenge perhaps lies, at least in the immediate present, with persuading Western leaders and peoples of the utmost urgency of this goal. Here, as our panelists have all underlined, our message must be to emphasize that this is not just a fight for Ukraine, but a much larger struggle for the core values that we ourselves live by. As Magdalena Gawin argued, European values of democracy and justice are not just a privilege but a duty, they must be upheld and fought for together. If we need confirmation of this, and inspiration to hold fast to such principles, we need look no further than to Ukraine itself, whose people are fighting and dying in the name of these liberal democratic values every day and night.

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