UKRAINE AND THE INTERNATIONAL RULES-BASED ORDER: ARE LEGAL AND HISTORICAL JUSTICE COMPATIBLE?

Following Russia's invasion of Ukraine, many academic and political commentators stated that the conduct of Putin and members of the Russian army 'broke the rules'.[1] The rules in question were the widely recognised principles of international law that are enshrined in the United Nations Charter (sovereignty, political independence, and territorial integrity), known as the international rules-based order (IRO).[2] Whilst the Russo-Ukrainian War has led to academic consideration as to whether an IRO has ever truly existed, the debate regarding what form of justice should be adopted when the war is over is gaining momentum.[3] The word 'justice' itself is problematic: what does justice actually mean and what version should be given prominence? Attention has primarily focused on the potential creation of another International Criminal Tribunal, and hence the implied IRO interpretation of 'legal justice' (prosecuting individuals for war crimes).

This essay contributes to this debate on justice and the IRO, arguing that a further *historical* dimension of justice should be considered. As the genocides in Rwanda and Yugoslavia have demonstrated, history provides an important foundation in understanding the atrocities that have been committed in Ukraine and cannot be removed from discussions of 'justice'.[4] As such, 'historical justice' could enter Russo-

[1] Simon Waxman, 'What Rule-Based International Order?' *Boston Review* (2 March 2022). Accessed: 13 October 2022. [https://www.bostonreview.net/articles/what-rule-based-international-order/]

[2] Jeff Neal, 'The War in Ukraine and International Law', *Harvard Law Today* (2 March 2022). Accessed: 13 October 2022. [https://hls.harvard.edu/today/the-ukraine-conflict-and-international-law/]

[3] Discussions of justice have been held within the context of a Ukrainian victory over Russia. If Russia wins, it will undoubtedly refuse to cooperate with any proposed International Criminal Tribunal. The powers of the Security Council would also be void due to Russia's permanent veto. See 'A Criminal Tribunal for Aggression in Ukraine', *Chatam House* (4 March 2022). Accessed: 15 October 2022. [https://www.chathamhouse.org/events/all/research-event/criminal-tribunal-aggression-ukraine]; Tom Dannenbaum, 'Mechanisms for Criminal Prosecution of Russia's Aggression Against Ukraine', *Just Security* (10 March 2022). Accessed: 14 October 2022. [https://www.justsecurity.org/80626/mechanisms-for-criminal-prosecution-of-russias-aggression-against-ukraine/]

[4] See the inclusion of historians as expert witnesses in the International Criminal Tribunal for the former Yugoslavia. Robert J. Donia, 'Encountering the Past: History at the Yugoslav War Crimes Tribunal', *The Journal of the International Institute*, Vol. 1, No. 2-3 (2004). Accessed: 10 October 2022. [https://quod.lib.umich.edu/j/jii/4750978.0011.201?view=text;rgn=main]; Robert J. Donia, 'The Witness Who Saw Nothing: The ICTY through the Eyes of an Expert Witness on History', Presentation at the Master Class *Law, History, Politics and Society in the Context of Mass Atrocities* (Inter-University Center, Dubrovnik, 2014). Unpublished.

Ukrainian post-war trials in three ways. Firstly, the history between Ukraine and Russia will be essential in establishing the context for the legal arguments being presented. Secondly, historical justice centres around the concept of victim narratives, which seek to satisfy the people of Ukraine rather than the advocates of the IRO. Thirdly, any form of 'justice' within the framework of the Russo-Ukrainian War will need to consider the historical context of previous crimes of aggression by Western powers that have gone unpunished.[5]

This essay examines the relationship between history and the IRO, Ukraine and the IRO, and the IRO beyond Ukraine. Whilst the different versions of justice put forward by history and law may seem anathema to one another, an effort has to be made to make them compatible. They are both equally important in influencing how future generations will understand the Russo-Ukrainian War, and the satisfaction and control that Ukrainian citizens will feel towards the eventual mode of justice chosen.

History and the International Rules-Based Order

The origin of the IRO can be traced to the early 1990s following the aftermath of the Cold War, the easing of geo-political tensions, and a recourse to international human law.[6] It is also reasonable to argue that the IRO stemmed from the International Military Tribunal (IMT, Nuremberg) and the International Military Tribunal for the Far East (IMTFE), also known as the Tokyo Trial, culminating in the signing of the UN Charter. The IMT, and the subsequent creation of the UN, generated a narrative that advocated against states acting in self-interest, and instead promoted the benefits of collectively agreed international rules governed by international institutions. However, there is also strength in the contradictory view of the IRO. Philip Cunliffe argues that the traditional view of the IRO is hollow and illusionary.[7] One only has to view events since the turn of the century such as the wars in Afghanistan, Iraq, and Russia's invasion of Georgia in 2008 to see that the alleged defenders of the IRO (United States, United Kingdom,

[5] For reasons as to why crimes of aggression have been focused on within the context of an International Criminal Tribunal for Ukraine see the below paragraph 'Ukraine and the International Rules-Based Order'.
[6] Philip Cunliffe, *Cosmopolitan Dystopia: International Intervention and The Failure of The West* (Manchester: Manchester University Press, 2020).
[7] Ibid.

and Russia) are in fact the ones who continually challenge the very narrative they created in 1945. As Cunliffe acutely contends, 'there is a tremendous discrepancy between [International Relation's] theoretical fecundity and its political uniformity'.[8]

History itself is key to addressing why this contradiction between the traditional IRO narrative and its reality exists. The IMT in 1945 is heralded as the origin of international criminal law, giving rise to the new terms of 'crimes against humanity' and 'genocide'. Whilst 'crimes against humanity' focused on the crime of killing an individual, Raphael Lemkin's concept of 'genocide' sought to provide legal protection for 'national, ethnical, racial or religious group[s]'.[9] However, the use of the term 'genocide' was omitted from the IMT proceedings, with the Allies choosing to emphasise the link between waging an aggressive war (the 'jurisdiction of the tribunal') and 'crimes against humanity'.[10] The relationship between these two war crimes therefore meant that 'crimes against humanity' did not extend to crimes committed during peacetime. By adopting such a narrative, the Allied powers countered the 'lingering concern' for the wider impact of 'crimes against humanity' and 'genocide' relating to their own arguable atrocities: Britain's relationship with imperialism; the U.S.'s controversial history with the Native Americans, and Soviet Russia's forced deportations of 'punished peoples'.[11] Indeed as Justice Robert Jackson (U.S. lead prosecutor) noted, '[w]e have some regrettable circumstances at times in our own country in which minorities are unfairly treated.'[12]

If the IRO is viewed in light of this historical foundation, the traditional view of the IRO appears fatally flawed. Rather than dissuading against self-interest, a desire to protect themselves from possible incrimination motivated the decision by prosecutors during the IMT. Critically, these attitudes were noted by Justice Radhabinod Pal, a member of the IMTFE bench in 1946. Justice Pal declared that the IMT evoked 'victors justice',

[8] Ibid, p.62.
[9] Convention on the Prevention and Punishment of the Crime of Genocide. United Nations General Assembly. 9 December 1948. Created: 16 August 1994. Last Edited: 27 January 1997. Accessed: 12 October 2022. [http://www.hrweb.org/legal/genocide.html]
[10] The concept of genocide was not officially adopted until 9 December 1948.
[11] Nicolas Werth, 'The Crimes of the Stalin Regime: Outline for an Inventory and Classification', in *The Historiography of Genocide*, ed. Dan Stone (Houndmills: Palgrave Macmillan, 2010), pp. 400-419; Nicolas Werth, 'Mass Deportations, Ethnic Cleansing, and Genocidal Politics in the Later Russian Empire and the USSR', in *The Oxford Handbook of Genocide Studies*, ed. Donald Bloxham and A. Dirk Moses (New York: Oxford University Press, 2010), pp. 386-406.
[12] William A. Schabas, 'The Law and Genocide', in *Oxford Handbook of Genocide Studies*, ed. Bloxham and Moses, p. 126.

going as far to argue that the notion of 'crimes against humanity' was only invented 'for the satisfaction of a thirst for revenge'.[13] Though Justice Pal's dissent was raised in the context of the British, French, and Dutch colonialism and exploitation of Asian-Pacific peoples, the dissent demonstrates that the proposed 'traditional' narrative of the IRO was already being challenged as early as 1946. From this perspective, the position taken by subsequent leaders of Allied states to events within the twenty-first century seems comparable with the attitude demonstrated in 1945.

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Yet for all of its limitations, the concept of the IRO stemming from the IMT has shaped attitudes towards the modern view of international justice. As M. Cherif Bassiouni contests, to admit to these weaknesses is the 'best testimony' that scholars can give to the validity of the IMT's legal ambition.[14]

This validity can be demonstrated through the creation of the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the former Yugoslavia (ICTY), and the fervent support for the creation of an International Criminal Tribunal for Ukraine. Both the ICTR and the ICTY were created within the original framework of the IMT (and hence the traditional IRO), with both having a positive legacy outside of their regions, although failing to address the grass roots justice that their citizens desired.[15] One notable reason for this dissonance is that whilst the tribunals generated what can be described as 'legal' justice, it did not engage with the historical impact and narrative that was required at a grass-roots level. In the instance of the ICTR, the failure of the international tribunal to promote the need for reconciliation resulted in *gacaca* courts ('justice on the grass') emerging throughout

[13] John Dawsey, 'Justice Radhabinod Pal and the Tokyo Tribunal', *National WWII Museum* (31 May 2021). Accessed: 13 October 2022. [https://www.nationalww2museum.org/war/articles/justice-radhabinod-pal-tokyo-war-crimes-trial]

[14] M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law,* Second Edition (The Hague: Kluwer Law International, 1999), p. 87.

[15] SENSE Transitional Justice Center. Accessed: 14 October 2022 [https://sensecentar.org/about]; Mirko Klarin, 'Building the ICTY Legacy for Local Communities,' in *Assessing the Legacy of the ICTY*, ed. Richard H. Steinberg (Leiden: Martinus Nijhoff Publishers, 2011), pp. 112-113; Mark S. Ellis, 'Coming to Terms with its Past – Serbia's New Court for the Prosecution of War Crimes', *Berkeley Journal of International Law*, Vol. 22 (2004): p. 165.

Rwanda to begin a process of reconstructing the damaged history within the region.[16] Whilst Gacaca Law advocated for reconciliation and restorative justice, further criticisms of the courts were raised due to their distinction between war crimes and genocide, and only trying those accused of genocide.[17] Similarly, the closure of the ICTY on 31 December 2017 saw an increased urgency to create not only a usable legal legacy, but also a historical legacy. The creation of the Tribunal's Legacy Project SENSE (South East News Service Europe) sought to focus on the victim narrative, descriptions of victim ordeals, and documentary footage.[18] Despite this, in 2010 a project titled 'Pillar of Shame' spelt out the letters 'UN' using 16,744 shoes, representing the numbers of the victims of Srebrenica, to highlight the UN's ineffectiveness in preventing the Srebrenica genocide. The fact that both the ICTR and ICTY saw the creation of domestic courts despite the existence of International Criminal Tribunals, demonstrates as Carla Del Ponte said in March 2005, that 'the public is only interested ... in politically, not judicially, defined truth' adding that 'international justice is cheap'.[19]

Given the limitations surrounding the legacies of the ICTR and ICTY, both part of a larger political international intervention, the proposition to create an International Criminal Tribunal for Ukraine must be critically examined. Whilst noting the range of crimes that have been committed in Ukraine since the Russian invasion (though importantly not genocide), it has been proposed that 'crimes of aggression' is the only crime that allows for the totality of crimes committed to be judged.[20] Critically, the International Criminal Court (ICC) cannot deal with crimes of aggression that are

[16] In 1994 violence peaked in Rwanda between the two main ethnic groups (the Hutu and Tutsi). The Hutu majority slaughtered 800,000 Tutsi and moderate Hutus. Following the genocide, over 120,000 individuals were accused and awaited trial. Christopher J. Le Mon, 'Rwanda's Troubled Gacaca Courts', *Human Rights Brief*, Vol. 14, No. 2 (2007): pp. 16-20.; Allison Corey and Sandra F. Joireman, 'Retributive Justice: The Gacaca Process in Rwanda', *African Affairs*, Vol. 103, Issue 410 (2004): p. 73; Phil Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice Without Lawyers* (New York: Cambridge University Press, 2010), p. 3.

[17] Clark, *The Gacaca Courts,* pp.345-355; Corey and Joireman, 'Retributive Justice', pp. 73-89.

[18] Klarin, 'Building the ICTY Legacy', p. 111.

[19] Robert M. Hayden, 'What's Reconciliation Got to do With It? The International Criminal Tribunal for the Former Yugoslavia (ICTY) as Antiwar Profiteer', *Journal of Intervention and Statebuilding*, Vol. 5, Issue 3 (2011): p. 314.

[20] Crime of Aggression: 'the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations'. Article 8 *bis*, Rome Statute of the International Criminal Court. Accessed: 13 October 2022. [https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf]

committed by states that are not party to the statute of the ICC, namely Russia. The ICC could deal with the crime of aggression if this was referred to the court by the UN Security Council, however, as Russia is a state within the Security Council it is inevitable that this proposal would be vetoed. Hence, the ICC can only focus on war crimes and crimes against humanity.

The suggestion for the creation of another International Criminal Tribunal has stemmed from the call for this gap in international justice to be addressed. The proposition for an International Criminal Tribunal has received ardent support from individuals such as Prof. Phillipe Sands KC, Gordon Brown, and Sir John Major.[21] Karim Khan KC, the prosecutor for the ICC, has also begun formal investigations into the crimes committed by Russia towards Ukraine. However, the fact that individuals like Gordon Brown are advocating for an International Criminal Tribunal given the involvement of the United Kingdom in the Iraq War, further raises the validity of the traditional position of the IRO. As Kevin Jon Heller has emphasised, it is not just about '*how* Russian officials are prosecuted [but] by *whom*'.[22] Not only does an International Criminal Tribunal for Ukraine suggest selective justice within the IRO, it again raises a question about the type of justice that will be pursued (historical or legal). To counter this point, Heller advocates for prosecuting Russian political and military officials in Ukrainian domestic courts. Undoubtedly, Ukraine would need the technical and financial support that would perhaps otherwise go towards a creation of an International Criminal Tribunal. Whilst this may not be within the traditional image of the IRO, as Heller asserts 'wouldn't Ukrainian prosecutions be better than international ones, in terms of both the message they would send and the positive effect they would have on Ukraine's judicial system?'[23]

Given the place of International Criminal Tribunal's within the IRO, it is probable that the idea of Ukrainian courts conducting post-war trials has not been fully explored

[21] Phillipe Sands, 'Putin's Use of Military Force Is a Crime of Aggression', *Financial Times* (28 February 2022). Accessed: 13 October 2022. [https://www.ft.com/content/cbbdd146-4e36-42fb-95e1-50128506652c]; 'War in Ukraine: Gordon Brown backs Nuremberg-style trial for Putin', *BBC News* (19 March 2022). Accessed: 13 October 2022 [https://www.bbc.co.uk/news/uk-60803155].
[22] Kevin John Heller, 'Creating a Special Tribunal for Aggression Against Ukraine Is a Bad Idea', *OpinioJuris* (7 March 2022). Accessed: 13 October 2022. [https://opiniojuris.org/2022/03/07/creating-a-special-tribunal-for-aggression-against-ukraine-is-a-bad-idea/]
[23] Ibid.

because it is not encompassed within the traditional view of the IRO. In fact, Ukrainian criminal courts have already begun to conduct trials against Russian soldiers who are charged with war crimes.[24] In conducting these trials, caution should be taken from the previous attempts following the ICTR and ICTY to not invoke 'vengeful' justice.[25] Yet if Ukraine continue to conduct these trails themselves, it is more likely that proceedings will be built upon a foundation of Ukraine's history that gives ownership to the Ukrainian people, rather than relying on historians appearing as expert witnesses (as in the case of the ICTY) to present histories that are then convoluted by legal narratives which seek to provide justice within the scope of the IRO.[26]

Beyond Ukraine and the International Rules-Based Order

Finally, as noted above, not only would the creation of an International Criminal Tribunal for Ukraine have to contend with generating a usable legal and historical narrative, it must also situate itself within the wider context of how the IRO has treated crimes of aggression across the whole international community. This is particularly acute when evaluating how crimes of aggression were treated during the Iraq War: 200,000 Iraqi civilians killed, nearly 5,000 coalition soldiers killed, and over 2,000,000 refugees displaced. [27] As Heller noted, '[a] Special Tribunal created and run by the same states that invaded Iraq would not be legitimate. The hands of those states … are simply too unclean.'[28] Putin himself has used the U.S. invasion of Iraq in 2003 as a pretext for a cross-border war.[29] A specific International Criminal Tribunal for Ukraine would thus distinguish the crimes committed by Russia in Ukraine above those that

[24] Daniel Boffey, 'First Russian Soldier to Go on Trial in Ukraine for War Crimes', *Guardian* (13 May 2022). Accessed: 13 October 2022. [https://www.theguardian.com/world/2022/may/12/first-russian-soldier-to-go-on-trial-in-ukraine-for-war-crimes]

[25] The discussion over vengeful trials links to wider considerations regarding how a fair trial could be achieved if the Ukrainians continue to prosecute Russian individuals on a mass scale. It may be achieved by having an independent international judge in the Ukrainian courts however this returns to issues of the type of justice that would dominate the trial – traditional IRO or justice for the Ukrainian citizens.

[26] Various texts have been written on the interdisciplinary relationship between historians as expert witnesses and the law. See: Henry Rousso, *The Haunting Past: History, Memory, and Justice in Contemporary France* (Philadelphia: University of Pennsylvania Press, 2002); Otto Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton: Princeton University Press, 1961); Richard Wilson, *Writing History in International Criminal Trials* (Cambridge: Cambridge University Press, 2011); Richard Evans, 'History, Memory, and the Law: The Historian as Expert Witness', *History and Theory*, Vol. 41, No. 3 (2002): pp. 326–45.

[27] Heller, 'Creating a Special Tribunal'.

[28] Ibid.

[29] Waxman, 'What Rule-Based International Order?'

have been committed elsewhere, in non-European countries. Arguably, the creation of an International Criminal Tribunal within the context of this history would have an adverse impact on how post-war justice is received. As Payam Akhavan argued within the context of the ICTR and ICTY, '[i]f the international community is to move beyond the currently fragmented assortment of jurisdictions to a coherent system of justice, a great burden falls on the shoulders of influential states to set a fitting moral example'.[30] This would lead to those states with a chequered history having to acknowledge their past injustices and take moves to address them.

Alternatively, if advocates of the IRO are insistent on forming an International Criminal Tribunal, then it is possible that a general International Criminal Tribunal for the Crimes of Aggression (not specific to Ukraine) could be established. Whilst this version of a Tribunal may be created too late to investigate the actions committed within Iraq, it would at least suggest a non-hierarchal approach to justice, and may deter future acts of aggression.[31] Akhavan's research into the impact of the ICC within Côte d'Ivoire, Uganda, and Darfur does suggest that judicial intervention 'is more likely to help prevent atrocities rather than impede peace'.[32] For Akhavan, the failure to act and be seen to be doing justice has more significant ramifications within the international community in the long term than the fear that tribunals hinder peace negotiations in the short term. However, Akhavan explicitly addresses the problem that underlines most international tribunals: it is the elites who often support the 'institution building processes' that are also the 'primary actors in the international law-making'.[33] Not only does this address why there is an underlying dichotomy between the legal and historical versions of justice, it also returns to the criticism of the 'victors justice' achieved in 1945 at the IMT.

[30] Payam Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?' *The American Journal of International Law*, Vol. 95, No. 1 (2001): p. 31.
[31] Heller, 'Creating a Special Tribunal'.
[32] Payam Akhavan, 'Are International Criminal Tribunals a Disincentive to Peace? Reconciling Judicial Romanticism with Political Realism', *Human Rights Quarterly*, Vol. 31, No. 3 (2009): pp. 624-625.
[33] Ibid, pp. 652-653.

Conclusion

When analysing the IRO within the historical context of the IMT and the Iraq War, besides other similar instances of Western crimes of aggression that have occurred yet gone unprosecuted, it may appear that legal and historical versions of justice are not compatible. Given the weight that the 'elites' hold within the IRO, it would be fair to conclude that legal justice will always prevail. Hedley Bull has contended that 'students of international politics, in recent years, have done a good deal to illuminate the norms or rules implicit in relationships of mutual deterrence, bargaining and the limitation of war, but they have neglected the study of legal and moral rules'.[34] This essay has demonstrated that this statement can, and should, be applied to the relationship between history and international law. The limitations with the ICTR and ICTY to achieve satisfactory justice to their respective regions is not a new phenomenon, it also occurred in the aftermath of the IMT in 1945.[35] In an attempt to bridge this gap, historians were included as expert witnesses in the ITCY. Whilst the involvement of historian expert witnesses in legal settings presents numerous interdisciplinary tensions that go beyond the scope of this essay, the arguments in favour of historical expert testimony can similarly be applied to this discussion. When justice occurs in a (legal) vacuum, very little is achieved for those who need justice the most: the victims. Comparatively, if historical justice can be incorporated then undoubtedly more people will benefit and justice will feel like it has been served. Whether this can be accepted within the traditional framework of the IRO remains to be seen, but it is something to be considered if the 'elites' wish to set a 'fitting moral example'.[36]

WORD COUNT: 2,615

[34] Hedley Bull, 'International Law and International Order', *International Organization*, Vol. 2, No. 3 (1972): p. 583.

[35] Whilst there were 4,419 convictions in total against Nazis between 1945 and 1949, this dropped from 2,495 in 1950, to 467 in 1952, and only 183 in 1957. The decline in the number of investigations correlated with the slow dissociation that the German public felt towards the IMT and the concept of 'victors justice'. Bernd Naumann, *Auschwitz: A Report on the Proceedings Against Robert Karl Ludwig Mulka and Others Before the Court at Frankfurt*, trans. Jean Steinberg (London: Pall Mall Press, 1966), pp. 6-7; Rebecca Wittmann, *Beyond Justice: The Auschwitz Trial* (Cambridge, Mass.: Harvard University Press, 2005), pp. 26-27.

[36] Akhavan, 'Beyond Impunity', p. 31.

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