

# Document the War Crimes in Ukraine

By The Editorial Board

The apocalyptic images of bodies sprawled in the mud among twisted tanks, charred walls and splintered trees in Bucha and other Ukrainian cities speak to the brutality of the war that Vladimir Putin started. The knowledge that more such horrors, many more, will be revealed as Russian troops retreat cries out for a reckoning.

President Biden called for a war crime trial, and President Emmanuel Macron of France declared there were “clear” indications of war crimes. Human Rights Watch reported documented cases of rape and summary executions. Ukrainian and international investigators have already begun collecting evidence and interviewing witnesses. It is imperative that this work be done promptly and scrupulously.

It may appear unduly legalistic to parse evidence or to question witnesses as countless civilians cower in their homes hoping against hope that Russian shells don’t hit their apartment buildings. The very notion that warfare can have rules, suggesting that there are correct ways to inflict death and destruction on an enemy, is difficult to grasp, and prosecuting commanders carries the risk of appearing as victor’s justice.

For at least 75 years, the international community has undertaken a real but incomplete effort to define wars of unprovoked aggression as crimes in and of themselves. In the words of the Nuremberg tribunal, “To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.”

In Ukraine, there is no question that Russia is the aggressor, that Bucha, the Ukrainian town that had been occupied by Russian forces for five weeks — and Mariupol and Kharkiv and Chernihiv and Kyiv and scores of other cities and towns — would be peacefully greeting spring had Mr. Putin not ordered an unprovoked war to satisfy his ambitions of empire and the destruction of a neighboring nation. Ukraine’s resistance is unquestionably self-defense, and the nations of the world are within their rights to impose sanctions on Mr. Putin and his country. Concerned nations are also right to help arm the Ukrainian military, if only to make the price of aggression so high that he, or at least those around him, might come to their senses.

Yet the world has also identified crimes that are unacceptable even in the fog of battle. Objectively gathering and documenting evidence is a powerful way to cut through the muck and preserve the possibility that someone might someday be held accountable. It holds out the possibility, however slim, that someday a judge will declare the orders to fire on a village or hospital illegal and that that legal judgment might one day serve as a deterrent in the next war. War crime investigations are a powerful political tool that can be used to underscore the dignity of victims and the lawlessness of the invaders.

An array of international criminal laws emerged after World War II, most famously the Geneva Convention of 1949, which aims to hold combatants personally responsible for war crimes — such as intentionally slaughtering civilians, torture, wanton destruction of property, sexual violence, pillaging, conscripting children. Other measures included the Genocide Convention and laws prohibiting crimes against humanity.

The Russian Army's actions give every appearance of violating these rules, and investigations have already begun in the International Criminal Court and some other courts. The indiscriminate shelling of cities and towns, the killings evidenced by the mass graves discovered in Bucha and the bombing of a Mariupol theater are among the many actions that could be deemed war crimes. The entire invasion would appear to be a crime of aggression, which would presumably reach Mr. Putin. If these crimes are determined to be part of a widespread or systematic attack on the civilian population based on a state policy, they could also amount to crimes against humanity.

Russia, for the record, says the atrocities in Bucha are all staged. And it may well be that investigators will find evidence of atrocities committed by Ukrainian troops against Russians or collaborators. All the more reason to conduct a thorough accounting.

Delivering justice — collecting the evidence, securing an indictment, holding a fair trial — is hard, time-consuming and expensive. As such, few instances of war crimes lead to punishment. Though the I.C.C. can initiate prosecution on any act of genocide, crime against humanity or war crime on its own, a charge of the crime of aggression — the one most applicable to Mr. Putin and his lieutenants — would have to be initiated by the United Nations Security Council, where it would face a certain Russian veto. In addition, Russia does not recognize the I.C.C. and would not surrender suspects.

Ukraine also is not party to the treaty that established the court but has allowed it jurisdiction over crimes committed on Ukrainian soil. The United States, for its part, has its own history of hostility to the I.C.C., and when accusing Mr. Putin of war crimes, Mr. Biden did not make clear what forum should be responsible for prosecution.

Yet none of these hurdles should preclude a search for justice. Even if the process is difficult and stretches into months and years, it is important that history be left a forensic, credible, verified and judicially processed record of the specific crimes in Ukraine. Those responsible should be named, their actions specified, and if at all possible, the guilty should be locked away. The very fact that Russia is arguing that the atrocities were all concocted requires a detailed and incontrovertible judicial response.

The Biden administration and its allies have done an admirable job of puncturing the Kremlin's propaganda with accurate intelligence. An authoritative record of war crimes would serve the same purpose for the future.

It would be good for the Biden administration to find a way to cooperate with the I.C.C. in collecting evidence, even if it is precluded by law from helping to finance the effort. **There are other options: A special tribunal could be established without a U.N. endorsement, and several nations, including the United States, could claim universal jurisdiction and hold their own trials. But too many investigations would dilute the public impact of the legal process, and no tribunal carries the authority or mandate of the I.C.C.**

However it is done, seeking justice against Mr. Putin and others responsible for war crimes in Ukraine is a goal for the longer term. Russia is not retreating. It is repositioning its forces for an assault in the east. And Russia's participation in sputtering peace talks is looking increasingly like a ploy. The horrors of Bucha have prompted talk of offering Ukraine deadlier weapons and imposing yet more sanctions. These must be the focus of the West's efforts to help Ukraine.

But it is also imperative to make sure that the horrific evidence of criminal atrocities on display in Bucha and so many other places is promptly collected while it is still there and that witnesses are questioned while their memories are still raw. Posterity must know what really happened. Justice must be given a chance.