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WAR CRIMES IN UKRAINE: IS PUTIN RESPONSIBLE?

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ABSTRACT: War crimes are being committed in Ukraine today, but who should be held responsible? By looking at the literature on responsibility and violence by Philippa Foot and John Harris, this article argues that there are grounds for holding Vladimir Putin responsible for war crimes in Ukraine, even if he did not give the command for these crimes and other atrocities to be carried out.

Keywords: Ukraine; Vladimir Putin; Philippa Foot; Crimes Against Humanity; Just War Theory

In the immediate aftermath of the atrocities in Bucha, Borodyanka and other towns near Kyiv, accusations of violence against Ukrainian civilians by Russian troops started emerging. More recent massacres in Mariupol and the Donbas region have added force to these charges.

So far one Russian soldier, 21-years-old tank commander Vadim Shishimarin, has been found guilty of war crimes for shooting a civilian, 62-year-old Oleksandr Shelipov, in the head. He has been given a life sentence, even though in his defence he argued that he was only following orders. Currently Ukraine is preparing cases of war crimes against 41 Russian soldiers for offences including rape, killing civilians, summary executions, bombing civilian infrastructure and looting.

In April 2022 Hugh Williamson, Europe and Central Asia director at Human Rights Watch, was already arguing that "rape, murder, and other violent acts against people in the Russian forces' custody should be investigated as war crimes".[1] Ursula von der Leyen in Europe and Joe Biden in the US have also called for Putin to be investigated for war crimes, and even crimes against humanity have been mooted.

Three months into this war, there appears to be evidence of Russia inciting genocide in Ukraine by committing atrocities intended to destroy the Ukrainian people. Such evidence includes examples of mass killings of civilians, forced deportations, dehumanising anti-Ukrainian rhetoric, and denying the existence of a Ukrainian identity. At the end of May 2022 more than 30 leading legal scholars and genocide experts have signed a report accusing the Russian state of violating several articles of the United Nations Genocide Convention.[2]

Beth Van Schaack, the U.S. ambassador-at-large for global criminal justice, has referred to war crimes in Ukraine as "a Nuremberg moment in terms of just the sheer scale of the breach of the rules-based international order that has been perpetrated by Russia in this invasion. Even the most well-resourced prosecutorial office would have a hard time grappling with the sheer scale of the criminality that's been on display".[3]

The aim of this article is to suggest that if not for crimes against humanity, at the very least Vladimir Putin should be considered responsible for war crimes in Ukraine. Part One will give a brief definition of war crimes, and crimes against humanity. Part Two will explore the concept of responsibility for violence committed during war; here it will be argued that Putin should be considered responsible for war crimes in Ukraine, even if he did not personally issue the command to target Ukrainian civilians during the war. Part Three will suggest that for the sake of defending the rule of law, and

international law in particular, Putin must be investigated and, if found guilty, charged with war crimes.

1. WAR CRIMES AND CRIMES AGAINST HUMANITY

The concept of 'war crimes' is not an oxymoron. Awful things are done in war, things that would be considered crimes in times of peace, yet there is a limit to what is lawful during war. Above all, war is not an excuse to be exempt from moral or legal conduct, which is why philosophers and law makers believe that the concept of 'war crimes' is meaningful. As Jeff McMahon (2013) explains, war crimes are grave violations of the legal principles of *jus in bello*, the principles governing the conduct of war. In international humanitarian law, these principles are found in the Hague Conventions (1899 and 1907), the Geneva Conventions (1864 and 1949, and two 1977 Additional Protocols), and international criminal law (Rome Statute of the International Criminal Court, 2002).

One particular feature of the legal definition of war crimes is the targeting of civilians by combatants. The Rome Statute of the International Criminal Court, Article 8 (2b), refers to intentionally directing attacks against the civilian population, intentionally directing attacks against civilian objects, intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission, and intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians. Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives, are also considered war crimes.[4]

Crimes Against Humanity are a special category of war crimes. Norman Geras (2011) takes issue with some aspects of the legal definition of Crimes Against Humanity we find in international law, in particular the restricted nature of such crimes due to the high threshold of scale. Instead Geras (2011, 63) suggests the following reconstructed pure conception of Crimes Against Humanity: crimes against humanity are offences against the human status or condition, which lie beyond a certain threshold of seriousness. They are inhuman acts. Being so, they shock the conscience of humankind, and humankind asserts itself as the sovereign authority criminalizing such human acts.

Time will tell whether Russia's conduct in their war in Ukraine falls under the current international law on Crimes Against Humanity. What needs to be established first is whether Putin can be held responsible for the alleged war crimes, in Ukraine, since the start of the war.

2. RESPONSIBILITY AND WAR CRIMES

It will take a while for the dust to settle when this conflict will eventually come to an end, which may take a lot longer than anticipated. Nevertheless, the evidence that is already coming out of Ukraine indicates that war crimes, and possibly crimes against humanity, have been (and are still being) committed by Russian troops in Ukraine.

There are two ways in which those being accused can respond to accusations of war crimes: to deny that these crimes were committed, or to wash their hands of any responsibility for brutalities being done by merely pointing the finger to rogue soldiers acting on their own volition and not following orders. The immediate response to the charges of alleged war crimes and crimes against humanity by Moscow was, predicably, to issue a denial. This strategy has bordered on the farcical, suggesting that

the photos and videos widely reported in the media coming out of Bucha and other cities in the conflict were fakes staged by the Kyiv regime for the Western media.[5] This is a disingenuous response born by delusional hubris, post-truth on overdrive, and does not merit to be taken seriously, or even entertained as a conceivable alternative account of historical facts.

There is however another possible line of defence for Putin that ought to be considered. Even if these atrocities were committed by Russian troops, Putin can still claim not to be responsible, since these were actions motivated by revenge by ill-disciplined, depraved soldiers not acting according to a chain of command that leads all the way back to the Kremlin. This begs the question: in what sense is one responsible for doing violence? And is Putin responsible for everything that is happening on the ground in Ukraine?

Responsibility for an act of violence can take different forms. As Philippa Foot (1978) pointed out, we are responsible for either doing or allowing an act that causes harm. More specifically, we 'do' an act of violence when either *initiating* violence by setting the harmful sequence going, or by *sustaining* violence by keeping the harmful sequence going when it would otherwise have stopped. Alternatively we 'allow' violence when we *enable* violence by removing some barrier which would have brought the harmful sequence to a halt, or when we *forbear to prevent* violence by failing to take some action which would have brought the sequence to a halt.

Based on these four criteria (initiating, sustaining, enabling, and forbearing to prevent) or doing or allowing harm, the Kremlin has a lot to answer for. Ukrainian blood is on their hands, and history will not forget. Putin will inevitably argue that this was a just war on his part, and that he had just cause to initiate, sustain, enable and forbear to prevent this conflict. But that is a weak argument: a just war does not justify

war crimes or other human rights atrocities. The pressing question is not the just or unjust nature of the conflict, but more specifically the allegations of war crimes and possible crimes against humanity committed by Russian troops.

On this specific issue, assuming that Putin will recognize the authenticity of illegal civilian massacres committed by his troops, he could still try to negate responsibility for any atrocity that may have occurred during the war on the grounds that he never gave the command for the executions, tortures and rapes that are occurring today in Ukraine. It is this line of defence that must be refuted.

In moral philosophy we attach responsibility not only to the intended consequences of our actions, but also to foreseeable (but not necessarily intended) consequences of our actions. In his book *Violence and Responsibility*, John Harris (1980) argues that one is responsible for an act of violence when expected injury or suffering is highly likely to be inflicted on others on the basis of what one knows, or ought reasonably to have known, will result.

If I sell a car knowing that the breaks are faulty, and the person who buys the car has an accident, I'm responsible for their injury. My intention was merely to sell the car, not to get anyone hurt, but I ought reasonably to have known that an accident was a likely consequence.[6] Similarly if I sell a product that I have reasons to believe will cause cancer to its consumers, withholding information of the risks involved, I'm responsible for the harm cause, even if it was not my intention to harm them, in the sense that I did not sell them the good with the intent to harm them.

That the Russian army has a long history of brutality will not come as a surprise to anyone.[7] If it is true that Putin unleashed 20,000 mercenaries and other dogs of war on the civilians of Ukraine, as has been suggested by various sources,[8] enlisting in the

Russian army rogue soldiers from Chechnya or Syria, including mere criminals, which he knows he cannot control, then he is responsible for their actions, even if he did not give the order to commit war crimes.[9]

Ignorance of what is being done by one's own troops is no defense against accusations of war crimes. Whether or not Putin gave the command for those atrocities to go ahead is immaterial. He is responsible for war crimes in Ukraine, and possibly crimes against humanity, because he knew, or is reasonable to assume that he should have known, what was likely to happen when he asked mercenaries and other criminals to fight his war.[10]

3. CONCLUSION: THE RULE OF LAW

"In times of war, the law falls silent". So said philosopher Marcus Tullius Cicero in 44BC. He was referring to Natural Law, or the Moral Law, but for us today there is another type of law that also falls silent: international law. The military aggression by Russia in Ukraine is a flagrant violation of international law. Putin is treating international law as if it were nothing more than a paltry nuisance, like a persistent fly to be ignored or thumped as one may wish. Russia's invasion of Ukraine is particularly worrying because it exposes the weak underbelly of international law.

The irrefutable reality is that international law is founded on goodwill, but as soon as goodwill is in short supply the feebleness of international law is exposed. In the Just War tradition, to the extent that war can be justified, moral principles operate within the logic of self-defence and territorial sovereignty. However, there is another way to think about war, and its justification. What is at stake here is not just a border, or a piece of land, but the rule of law itself, and the authority of international justice.

Unless Europe, the US, and the rest of the world take the strongest stand against Putin, the consequences for the international order could be devastating. In his definition of Crimes Against Humanity, Geras (2011, 63) claims that humanity *asserts itself* as the sovereign authority in the process of criminalizing such inhuman acts. It does so "through the mediation of states, the socio-political communities across which humankind is distributed, and the law of nations by which these are collectively bound". It also does so via the international criminal court, because humanity needs the rule of law.

Prosecuting war criminals, at all levels, is instrumentally necessary to assert, or reassert, the rule of law, and in particular international law. Of course, we are all aware that the current instruments of international criminal justice are far from perfect. As Daniele Archibugi and Alice Pease (2018) rightly point out, these legal instruments are activated only when the more powerful actors seek to incriminate the weakest. And while the aim of international courts is, in part, to signal to the powerful and belligerent that their behaviour is being monitored, these threats are often not credible.

For all the shortcomings of the global justice system, the world needs it, and we must find ways to make it work. Charging Putin with war crimes, and possibly crimes against humanity, could be a game-changer for international law, global peace, and perhaps even for humanity.

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NOTES

[1] Human Rights Watch, Ukraine: Apparent War Crimes in Russia-Controlled Areas, April 3, 2022: https://www.hrw.org/news/2022/04/03/ukraine-apparent-war-crimes-russia-controlled-areas

[2] https://edition.cnn.com/2022/05/27/europe/russia-ukraine-genocide-warning-intl/index.html

[3] Robbie Gramer and Amy MacKinnon, "Ukraine's 'Nuremberg Moment' Amid Flood of Alleged Russian War Crimes", *Foreign Policy*, 10 June 2022: https://foreignpolicy.com/2022/06/10/ukraines-nuremberg-moment-amid-flood-of-alleged-russian-war-crimes/

[4] The Rome Statute of the International Criminal Court: https://www.un.org/en/genocideprevention/war-crimes.shtml

[5] ' Kremlin says Bucha is 'monstrous forgery' aimed at smearing Russia', Reuters, April 5, 2022: https://www.reuters.com/world/europe/putin-ally-says-bucha-killings-are-fake-propaganda-2022-04-05/

[6] In my book *Violence and Social Justice*, I argue that violence can be both intentional and unintentional. This is important otherwise all non-intentional act that cause harm are too easily dismissed as accidental, see Bufacchi (2007), Ch.4, 'Violence and Intentionality'. Driving when inebriated by alcohol, and getting involved in an accident, is an act on unintentional violence.

[7] Tom Mockaitis, 'The Russian army has a long history of brutality — Ukraine is no exception', *The Hill*, 11 April 2022: https://thehill.com/opinion/international/3264042-the-russian-army-has-a-long-history-of-brutality-ukraine-is-no-exception/

[8] https://www.theguardian.com/world/2022/apr/19/russia-deployed-20000-mercenaries-ukraine-donbas-region

[9] https://www.theguardian.com/world/2022/mar/11/putin-approves-russian-use-of-middle-east-fighters-against-ukraine

[10] While Putin is probably responsible for war crimes in Ukraine, others also hold some responsibility for this war, even if not for war crimes or crimes against humanity. For example, one could argue that Europe's increasing reliance on gas and oil from Russia over the last few decades was unwise, to say the least, and it fuelled Putin's belligerent ideals. To that extent Europe is also indirectly responsible to some degree for what is happening in Ukraine today. Of course, we can safely assume that no one in the West really knew, or could have imagined, what Putin's true intentions were, so our

responsibility is minimal, at least prior to the invasion of Crimea in 2014. However, Europe's responsibility increased after 2014, and will increase further if it keeps buying Russian oil and gas for as long as Putin remains in power, since that would be a clear case of sustaining violence, to use Philippa Foot's terminology.