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The Russia/Ukraine conflict — developments in war crimes

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Introduction

The rather dry title of this paper should not obscure the fact we are discussing legal issues arising in an armed conflict which is an existential one for Ukraine. As Australian Chief of the Defence Force General Angus Campbell AO DSC recently said in a quote I will return to: "If Russia ceases to fight the war ends. If Ukraine ceases to fight Ukraine ends …". So when I say, as lawyers tend to, that a legal question is *interesting*, *difficult* or *fascinating*, I am not intending to downplay the terrible seriousness of the conflict in which the questions arise.

Thus, Prime Minister Albanese has described as "incalculable" the "costs of Russia's aggression,"[2] and they can be measured in different ways. Out of Ukraine's population of 36 million people: 8 million have fled the country and a further 6–8 million are displaced; hundreds of thousands[3] of civilians and combatants have been killed or wounded in the conflict, and the shocking damage to all aspects of life and the economy in Ukraine continues.

Given I had the privilege of assisting the IGADF Special Forces Inquiry,[4] it will not surprise you that I have chosen to express some personal legal views on the topic of war crimes arising out of the current armed conflict in Ukraine: in particular the recent indictment of Russian President Putin for war crimes and the possible revival of the war crime of aggression, last successfully prosecuted in the Nuremberg and Tokyo trials.

The current armed conflict in Ukraine has been described as Europe's greatest crisis since 1945. I suggest that, arising from the conflict in Ukraine, we are witnessing a recasting of law and practice relating to war crimes as it affects the "top table" of leaders.

Finally, I note that many other legal topics could have been chosen. And, beyond the law, one could ask whether the conflict has revolutionised modern warfare, revitalised NATO, allowed the United States to

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2 "This is a most sombre occasion for the people of Ukraine. One year on from Russia's unprovoked, unjustified and unlawful full-scale invasion, the costs of Russia's aggression are incalculable."

3 US and UK estimates are for Ukraine 40,000 civilian and over 100,000 military; for Russia about 200,000 military casualties of which about 50,000 have died.

4 The Inspector-General of the ADF (IGADF) Afghanistan Inquiry — (the "Brereton Report") see https://www.defence.gov.au/about/reviews-inquiries/afghanistan-inquiry

more fully pivot to our region, and given our adversaries pause for thought in relation to their stated aims in our region. Those are topics for another day, although we should not forget any of them.

Outlawing wars of aggression

The United Nations Charter which was drafted during World War 2, and adopted at its conclusion, begins with the stirring preamble, that:

> We, the peoples of the United Nations, determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow … to unite our strength, to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest.

The Charter then states in Article 2(4) that, save in the cases of self-defence in Article 51,[5] and action authorised by the Security Council:[6]

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.

Despite the claims by Mr Putin, it is clear that the Russian armed invasion of Ukraine, which *re*-commenced a year ago, is in breach of the United Nations Charter. The contrary is frankly unarguable.

To return to the quote I began with, on 3 March 2023 at the Raisina Dialogue, the Chief of the ADF said this:

> If Russia ceases to fight, the war ends. If Ukraine ceases to fight, Ukraine ends … War is a clash of wills: everything else is, and emerges, from that. What I see is a Ukrainian nation unified under extraordinary leadership, and with a will determined to resist. Equally I don't see any change yet in the intent to prosecute at whatever cost to his own forces, his own country, and the people of Ukraine, being shown by President Putin … This is an illegal, unjust violation of the integrity of a sovereign nation … My assessment is that this war will continue.[7]

War crimes

Before I come to the decision to indict President Putin, let me set the scene for a

5 Article 51: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

6 See: Article 41: "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."

Article 42: "Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."

7 General Angus Campbell AO DSC, CDF, Raisina Dialogue, 3 March 2023.

moment. Ukrainian President Zelensky has recently said that more than 70,000 Russian war crimes have been recorded over the past year since Russia's full-scale invasion began last February. He also said:

> it is clear how serious these crimes are. What the scale of the criminal manifestations of Russia's aggression is ... We remember everything.[8]

Following the 18 February 2023 announcement by US Vice President Harris in Munich that the United States had "formally determined" that Russia had committed crimes against humanity,[9] President Biden made this unambiguous statement:

> ... this has been an extraordinary year in every sense. Extraordinary brutality from Russian forces and mercenaries. They have committed depravities, crimes against humanity, without shame or compunction. They've targeted civilians with death and destruction. Used rape as a weapon of war. Stolen Ukrainian children in an attempt to ... steal Ukraine's future. Bombed train stations, maternity hospitals, schools, and orphanages ... We'll hold accountable those who are responsible for this war. And we will seek justice for the war crimes and crimes against humanity continuing to be committed by the Russians.[10]

In his 2022 book, *Veiled Valour*,[11] Professor Tom Frame AM wrote this:

> [war] crimes are odious because they usually point to a collapse of discipline and failure of leadership. They are collectively referred to as "atrocities" insinuating they are born of cowardice and cruelty.

But while that second sentence about *atrocities* is no doubt true of all war crimes, the first about *failure of leadership* may not be, in so far as the Russian perpetrators of war crimes on the battlefield appear to be carrying out their orders rather than defying them. In those circumstances, as in World War 2, our attention is naturally drawn to how to call to account the "top table" of leaders.

Plainly enough, crimes against humanity and war crimes as defined by the Rome Statute of the International Criminal Court (ICC) — but excluding aggression — fall within the current jurisdiction of that court, despite neither Ukraine nor Russia being State parties to the Rome Statute. That follows because Ukraine has made an indefinite declaration that it accepts the ICC's jurisdiction from 2014 (under Article 12 (3)) and must therefore fully cooperate with the court in its investigation and prosecution of crimes (under Part 9 of that Statute).[12]

8 https://www.yahoo.com/news/zelensky-says-more-70-000-144701330.html

9 https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/02/18/remarks-by-vice-president-harris-at-the-munich-security-conference-2/

10 https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/02/21/remarks-by-president-biden-ahead-of-the-one-year-anniversary-of-russias-brutal-and-unprovoked-invasion-of-ukraine/. Further: PM Albanese said https://www.pm.gov.au/media/australia-stands-ukraine-additional-military-support-and-sanctions: "This is a most sombre occasion for the people of Ukraine. One year on from Russia's unprovoked, unjustified and unlawful full-scale invasion, the costs of Russia's aggression are incalculable."

11 Frame, T. (2022) *Veiled Valour: Australian Special Forces in Afghanistan and War Crimes Allegations*, Sydney, UNSW Press.

12 And a year ago a group of 39 States including Australia supported a State Party referral to the ICC Prosecutor who then opened a formal investigation, which continues.

The recent indictment

On 17 March 2023, ICC Pre-Trial Chamber II issued warrants of arrest for President Putin and Maria Lvova-Belova, Commissioner for Children's Rights in the Office of the President of the Russian Federation. This was based on the applications by the ICC Prosecutor, Kareem Khan KC, on 22 February 2023. The Pre-Trial Chamber concluded that there are reasonable grounds to believe that each bears responsibility for the war crime of unlawful deportation of population (children) and that of unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation, to the prejudice of Ukrainian children.

The relevant Statute of Rome Provisions are in Article 8(2)(a):

> (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
>
> (viii) *Ordering the displacement of the civilian population for reasons related to the conflict*, unless the security of the civilians involved or imperative military reasons so demand;

The allegations are summarised by Mr Khan KC as follows:[13]

> Incidents identified by my Office include the deportation of at least hundreds of children taken from orphanages and children's care homes. Many of these children, we allege, have since been given for adoption in the Russian Federation. The law was changed in the Russian Federation, through Presidential decrees issued by President Putin, to expedite the conferral of Russian citizenship, making it easier for them to be adopted by Russian families.
>
> My Office alleges that these acts, amongst others, demonstrate an intention to permanently remove these children from their own country. At the time of these deportations, the Ukrainian children were protected persons under the Fourth Geneva Convention.

What happens next? Russia has denounced the indictments and arrest warrants, and would of course thwart any Security Council resolutions to enforce the indictments.[14] What does the ICC Statute say?

By Article 27, the ICC has jurisdiction even over heads of State. Thus:

> 1. *This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government*, a member of a Government or parliament, an elected representative or a government official *shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.*
>
> 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court

13 https://www.icc-cpi.int/news/statement-prosecutor-karim-khan-kc-issuance-arrest-warrants-against-president-vladimir-putin

14 Russian spokesman Dmitry Peskovsaid found the very questions raised by the ICC "outrageous and unacceptable," but noted that Russia, like many other countries, did not recognise the jurisdiction of the ICC. "And accordingly, any decisions of this kind are null and void for the Russian Federation from the point of view of law." Asked if Putin now feared travelling to countries that recognised the ICC and might therefore try to arrest him, Peskov told reporters: "I have nothing to add on this subject. That's all we want to say."

from exercising its jurisdiction over such a person.

By Article 59 it is provided that:

A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9.

By Article 89 it is provided that:

The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request … to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. *States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.*

While those provisions seem clear enough, the single ICC-era example is not encouraging. In 2015, South Africa declined to enforce an ICC warrant for the arrest of Sudanese head of state Omar al-Bashir[15] during a visit. Pretoria argued that it saw "no duty under international law nor the Rome statute to arrest a serving head of state of a [ICC] non-state-party such as Omar al-Bashir," and several other countries that he visited also declined to arrest him.

The ICC attempted to escalate this by referring these countries to the General Assembly of the UN, but the result was inconclusive.[16]

15 https://asp.icc-cpi.int/non-cooperation

16 Fatou Bensauda, Chief Prosecutor of the ICC, presented her latest report on the situation in Darfur, noting that the pre-trial chambers have issued multiple arrest warrants following their independent assessment of relevant evidence. Today, warrants remain outstanding for five people, all of whom occupied positions of responsibility as officials of the Government of Sudan at the time of their alleged crimes. Naming Omer al-Bashir, Ahmed Harun, Abdel Hussein, militia leader Ali Kusgayb and rebel leader Abdallah Banda, she pointed out that several of those individuals continue to hold senior positions within the Government. Their arrest warrants contain more than 60 counts of war crimes and 50 counts of crimes against humanity, including extermination, murder, rape, forcible transfer and torture, she said. She went on to outline the significant progress made by the Court during the reporting period, saying that its investigators remain dedicated to their mission despite facing many challenges. "The body of evidence is increasing and my prosecution team continued to prepare in anticipation of the future arrest and surrender of any of the Darfur suspects," she affirmed.

Over the period under review, she continued, levels of violence against civilians in Darfur decreased, but impunity — as well as the commission of serious crimes — regrettably persists. She cited attacks against personnel of the African Union-United Nations Hybrid Operation in Darfur (UNAMID); the ongoing conflict in the Jebel Marra area between Government forces and the Sudan Liberation Army (led by Abdul Wahid); the destruction of villages; the killing, injury and displacement of civilians; and reports of sexual and gender-based violence against women and girls. Recalling the Council's concern — expressed in resolution 2429 (2018) — that UNAMID is unable to access areas from which it has withdrawn, she called upon the Government to respond affirmatively to its request for the Operation's unfettered access throughout Darfur. She pledged to continue to monitor the situation and collect evidence — including by making use of reports from reliable entities and sources operating in Darfur — while pointing out that the Government continues its policy of antagonism and non-cooperation with the Office of the Prosecutor, in contravention of resolution 1593 (2005) and effectively obstructing its ability to conduct on-the-ground investigations.

Describing multiple impediments, she recalled the failure by the Government of Jordan to arrest Mr. Bashir when he visited that country in March 2017. Pre-trial Chamber II found that Jordan failed to comply with its obligations under the Rome Statute and decided to refer the country to the Assembly of States Parties and the Security Council. Noting that Jordan decided to appeal that decision, she said that the Court's Appeals Chamber

Croatia, Austria and Germany have all just announced they would arrest Putin if he entered their respective territory. We shall have to see what happens next, but it nevertheless seems true to say, as a CNN headline put it on 19 March 2023: "Putin's world just got a lot smaller with the ICC's arrest warrant."

Possible revival of the crime of aggression

There has also been much discussion whether the crime of aggression, prosecuted in the post-World War 2 Nuremberg and Tokyo War Crimes Trials, should be revived. Let me remind you briefly of what occurred then.

In 1942, the Allies started considering the possibility of war crimes trials. There was considerable debate about this: some Allied leaders simply wanted summary justice — execution without trials. But the argument which won the day was that a trial ensured there would be evidence of what had happened from living memory thus recorded in human history.

According to Neave (1978)[17] (by then Major Airey Neave) who, having escaped from Colditz, was employed by the International Military Tribunal to serve the indictments on the Nuremberg defendants and then observe the trials:

> At first there were two camps. The plan was made by the United States Secretary of the Treasury Henry Morgenthau Jr, who proposed that major war criminals should be identified and shot as allied soldiers advanced into Germany. Winston Churchill and Lord Simon, the Lord Chancellor, also advocated summary execution. Stalin and Roosevelt favoured a trial. Stalin, because he feared that he, Roosevelt, and Churchill would be accused of killing Hitler and the Nazi leaders out of personal revenge. In America, the Morgenthau plan was dropped. Although the question of summary execution was never finally decided by the cabinet, the British were opposed to a trial until 3 May 1945, but Anthony Eden, the foreign secretary,

heard a five-day hearing on the matter in September. Multiple legal submissions were made — including by Jordan, the African Union, the League of Arab States, professors of international law and the Office of the Prosecutor — and the parties are currently awaiting a final determination. However, Mr. Bashir continued to travel internationally, including to Djibouti and Uganda, she noted, recalling that both States were previously referred to the Assembly of States Parties and to the Council for their failure to arrest and surrender Mr. Bashir. The Council took no action in relation to those or any other referrals, she said.

"It is therefore not surprising that States parties to the Rome Statute … continue to host [ICC] suspects on their territory, in blatant violation of Court findings," she emphasized, citing the lack of any meaningful consequences for that inaction. Many Member States taking part in a related Arria-formula meeting in July also voiced concern over the Council's failure to act, she continued. The session offered an opportunity for an exchange of views and several participants proposed concrete, workable measures to enhance cooperation between the Court and the Council. "I remain hopeful that the constructive dialogue and proposals at that meeting will provide further momentum, resulting in concrete action taken by the Council on this issue," she said. Listing other instances of non-compliance by the Government of Sudan, she said that if the latter is in possession of evidence, it should come forward and share it with the Office of the Prosecutor. Pledging full respect for the due process rights of all suspects — including the right to a fair, independent and impartial trial — she reiterated her call for the Government to "open a new chapter of cooperation" with the Court and demonstrate its commitment to combating impunity. "Justice delayed is justice denied; the judgement of victims and the critical eyes of history are upon us," she stressed.

17 Neave, A. (1978) *Nuremberg: A Personal Record of the Trial of the Major Nazi War Criminals in 1945–6*, London, Hodder and Stoughton.

capitulated at the San Francisco conference in the face of Soviet and American pressure. It was some time before they could look upon plans for a major war crimes trial with any enthusiasm …

[Later, in London] after several weeks of tense negotiation, the Charter of the International Military Tribunal was signed by the United Kingdom, America, France and the Soviet Union on 8 August 1945. The charter laid down the crimes which the tribunal were to try under the heading: "crimes against peace," "war crimes" and "crimes against humanity." Three of those who formulated these laws in London later became members of the tribunal. This was a slightly indelicate position and, from the outset of trial, the judges found it necessary in various ways to make clear their independence of the prosecution. The International Military Tribunal was also set up in August 1945 and held its opening session in Berlin in October which, as a result of Russian insistence, became its seat. With the destruction of the city, there was no prison suitable to hold prominent war criminals in single cells. After much argument, Nuremberg, where the prison was intact, was chosen for the place of trial. Hitler was dead. Goebbels and Himmler too. Goering and Ribbentrop and many other prominent Nazis were in Allied hands. Further discussion produced a list of twenty-four defendants who were named in a lengthy indictment signed on 6 October by the chief prosecutors of the four Allied powers. What did the victorious Allies hope to gain by these proceedings? The Russians, with 20 million dead, undoubtedly wanted revenge. They wanted to see the Nazi ringleaders hanged, for their losses were more terrible than any other country's. The French, deeply embittered by the events of 1940, had suffered greatly from Nazi occupation. On the sidelines, urging vengeance, were the Dutch, the Belgians, the Norwegians, the Poles, the Yugoslavs, and smaller nations, ravaged by occupation. The Americans and British had not experienced the horrors of Nazi occupation. They often misunderstood the depth of feeling in liberated countries. At the heart of the Anglo-American case was a sincere but naïve attempt to apply the rule of law to those who had perpetrated untold acts of brutality against ordinary human beings. For many the trial presaged a new era of international law against tyranny and unprovoked aggression. Nuremberg sought to establish an ordered system of justice between nations. If that attempt has not yet succeeded, it was not the fault of the trial or the principles on which it was based. Those who seek to excuse or ignore Nazism as something best forgotten should look at the record. Nuremberg revealed to the world the terrible crimes committed by the followers of Hitler, unexampled in the history of the world … [as he later concluded in this book] Without Nuremberg, we should have had no complete record of the concentration camps and of the Final Solution. Without the trial, the scene of horror would have taken years to reproduce in all its dreadful detail.

The Charter of the International Military Tribunal (Nuremburg) stated in Article 6:

> The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

> *Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression* ...

Common count 2 of the Indictment alleged:

> All the defendants with divers other persons, during a period of years preceding 8th May, 1945, participated in the planning, preparation, initiation and waging of wars of aggression ... [being those declared against the allies.]

In dealing with the argument that the crime of aggression, never previously prosecuted, was unknown to the law, the Final judgment concerning the Nazi leaders at Nuremberg said this:[18]

> To initiate a war of aggression ... 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.
>
> ...
>
> The war against Poland did not come suddenly out of an otherwise clear sky; the evidence has made it plain that this war of aggression, as well as the seizure of Austria and Czechoslovakia, was pre-meditated and carefully prepared, and was not undertaken until the moment was thought opportune for it to be carried through as a definite part of the pre-ordained scheme and plan. For the aggressive designs of the Nazi Government were not accidents arising out of the immediate political situation in Europe and the world; they were a deliberate and essential part of Nazi foreign policy.
>
> ...
>
> The Tribunal is fully satisfied by the evidence that the war initiated by Germany against Poland on the 1st September, 1939, was most plainly an aggressive war, which was to develop in due course into a war which embraced almost the whole world, and resulted in the commission of countless crimes, both against the laws and customs of war, and against humanity.
>
> ...
>
> The Charter makes the planning or waging of a war of aggression or a war in violation of international treaties a crime, and it is therefore not strictly necessary to consider whether and to what extent aggressive war was a crime before the execution of the London Agreement. But in view of the great importance of the questions of law involved, the Tribunal has heard full argument from the Prosecution and the Defence, and will express its view on the matter.
>
> It was urged on behalf of the defendants that a fundamental principle of all law — international and domestic — is that there can be no punishment of crime without a pre-existing law. *Nullum crimen sine lege, nulla poena sine lege*. It was submitted that *ex post facto* punishment is abhorrent to the law of all civilised nations, that no sovereign power had made aggressive war a crime at the time the alleged criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders.

18 See Annex A below.

> In the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. Occupying the positions they did in the government of Germany, the defendants, or at least some of them, must have known of the treaties signed by Germany, outlawing recourse to war for the settlement of international disputes; they must have known that they were acting in defiance of all international law when in complete deliberation they carried out the designs of invasion and aggression. On this view of the case alone, it would appear that the maxim has no application to the present facts.
>
> This view is strongly reinforced by a consideration of the state of international law in 1939, so far as aggressive war is concerned. The General Treaty for the Renunciation of War of 27th August, 1928, more generally known as the Pact of Paris or the Kellogg-Briand Pact, was binding on sixty-three nations, including Germany, Italy and Japan at the outbreak of war in 1939 ...
>
> The first two Articles are as follows:
>
> Article I: The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations to one another.
>
> Article II: The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.
>
> The question is, what was the legal effect of this Pact? ... In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing.

In the result, 16 of the accused senior Nazi leadership were found guilty of this crime.

The crime has not been successfully prosecuted since the Nuremberg and Tokyo trials.

Looking beyond the constant charge of "victors' justice," what makes the crime of aggression so intriguing is that it really straddles the line between the *jus ad bellum*, the international law on resort to force, and the *jus in bello*, or international humanitarian law, as war crimes are usually independent of questions concerning the justification or reasons for an armed conflict.

Disputes about both the content and appropriateness of such a crime meant it was not included in the ICC's original jurisdiction. The Working Group on the Crime of Aggression in the framework of the Assembly of States Parties and at a conference in Kampala, came up with the "Kampala Compromise" which has the result in relation to Russia set out in Article 15 (bis) (5) namely: "In respect of a State that is not a party to this Statute, the Court shall

not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory." Expanding the ICC's jurisdiction insofar as that required the consent of the UN Security Council, would be vetoed by Russia.

In the ICC statute the crime of aggression is defined as:

> 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(1))[19]

It may be that the current indictment against Putin will take the focus away from the idea of a new court or tribunal trying him for the crime of aggression, although it remains an absorbing possibility.

Conclusion

One of the hardest tasks for observers of or participants in significant contemporary events — lacking as they do the hindsight advantage of historians — is for them to discern whether events such as the Ukraine conflict presage a genuinely new way of thinking and acting.

To return to where I began, we know that the "untold sorrow" of the first two World Wars led to a UN Charter which sought to outlaw the "scourge" of aggressive war. Still such wars continue.

If, as here, they involve a Permanent Member of the UN Security Council (a majority of whom are not State Parties to the ICC), that avenue of action for resolving the conflict is blocked.

Perhaps we are witnessing a tipping point. The dissolution of the former Yugoslavia and the current conflict in Ukraine are the most significant land wars in Europe since World War 2 ended. That conflict in the Balkans recast notions of external intervention in international law and relations. The two

19 For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

examples I have mentioned — one being utilised and one actively discussed — involve a genuinely new approach in prosecuting a head of State and "the top table" for war crimes from a P5 country.

While we will have to wait and see if it will it succeed, I suggest these are worthy topics for further study, publication and debate by the many countries which support Ukraine.

Annex A

To initiate a war of aggression … 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. The first acts of aggression referred to in the Indictment are the seizure of Austria and Czechoslovakia and the first war of aggression charged in the Indictment is the war against Poland begun on the 1st September, 1939.

…

The war against Poland did not come suddenly out of an otherwise clear sky; the evidence has made it plain that this war of aggression, as well as the seizure of Austria and Czechoslovakia, was pre-meditated and carefully prepared, and was not undertaken until the moment was thought opportune for it to be carried through as a definite part of the pre-ordained scheme and plan. For the aggressive designs of the Nazi Government were not accidents arising out of the immediate political situation in Europe and the world; they were a deliberate and essential part of Nazi foreign policy. From the beginning, the National Socialist movement claimed that its object was to unite the German people in the consciousness of their mission and destiny, based on inherent qualities of race, and under the guidance of the Führer.

For its achievement, two things were deemed to be essential: the disruption of the European order as it had existed since the Treaty of Versailles, and the creation of a Greater Germany beyond the frontiers of 1914. This necessarily involved the seizure of foreign territories. War was seen to be inevitable, or at the very least, highly probable, if these purposes were to be accomplished. The German people, therefore, with all their resources were to be organised as a great political-military army, schooled to obey without question any policy decreed by the State.

…

In the opinion of the Tribunal, the events of the days immediately preceding the 1st September, 1939, demonstrate the determination of Hitler and his associates to carry out the declared intention of invading Poland at all costs, despite appeals from every quarter. With the ever increasing evidence before him that this intention would lead to war with Great Britain and France as well, Hitler was resolved not to depart from the course he had set for himself. The Tribunal is fully satisfied by the evidence that the war initiated by Germany against Poland on the 1st September, 1939, was most plainly an aggressive war, which was to develop in due course into a war which embraced almost the whole world, and resulted in the commission of countless crimes, both against the laws and customs of war, and against humanity.

…

The jurisdiction of the Tribunal is defined in the Agreement and Charter, and the crimes coming within the jurisdiction of the Tribunal, for which there shall be individual

responsibility, are set out in Article 6. The law of the Charter is decisive, and binding upon the Tribunal.

The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognised by the civilised world. The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.

> The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law. With regard to the constitution of the court, all that the defendants are entitled to ask is to receive a fair trial on the facts and law.
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> The Charter makes the planning or waging of a war of aggression or a war in violation of international treaties a crime, and it is therefore not strictly necessary to consider whether and to what extent aggressive war was a crime before the execution of the London Agreement. But in view of the great importance of the questions of law involved, the Tribunal has heard full argument from the Prosecution and the Defence, and will express its view on the matter.
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> It was urged on behalf of the defendants that a fundamental principle of all law — international and domestic — is that there can be no punishment of crime without a pre-existing law. *Nullum crimen sine lege, nulla poena sine lege*. It was submitted that *ex post facto* punishment is abhorrent to the law of all civilised nations, that no sovereign power had made aggressive war a crime at the time the alleged criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders.

In the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and, so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. Occupying the positions they did in the government of Germany, the defendants, or at least some of them, must have known of the treaties signed by Germany, outlawing recourse to war for the settlement of international disputes; they must have known that they were acting in defiance of all international law when in complete deliberation they carried out the designs of invasion and aggression. On this view of the case alone, it would appear that the maxim has no application to the present facts.

This view is strongly reinforced by a consideration of the state of international law in 1939, so far as aggressive war is concerned.

The General Treaty for the Renunciation of War of 27th August, 1928, more generally known as the Pact of Paris or the Kellogg-Briand Pact, was binding on sixty-three nations, including Germany, Italy and Japan at the outbreak of war in 1939. In the preamble, the signatories declared that they were:

> Deeply sensible of their solemn duty to promote the welfare of mankind; persuaded that the time has come when a frank renunciation of war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples should be perpetuated ... all changes in their relations with one another should be sought only by pacific means ... thus uniting civilised nations of the world in a common renunciation of war as an instrument of their national policy ...

The first two Articles are as follows:

> Article I: The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations to one another.
>
> Article II: The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

The question is, what was the legal effect of this Pact? The nations who signed the Pact or adhered to it unconditionally condemned recourse to war for the future as an instrument of policy, and expressly renounced it. After the signing of the Pact, any nation resorting to war as an instrument of national policy breaks the Pact.

In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing. War for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression, and such a war is therefore outlawed by the Pact. As Mr. Henry L. Stimson, then Secretary of State of the United States, said in 1932:

> War between nations was renounced by the signatories of the Kellogg-Briand Treaty. This means that it has become throughout practically the entire world ... an illegal thing. Hereafter, when nations engage in armed conflict, either one or both of them must be termed violators of this general treaty law ... We denounce them as law breakers.

But it is argued that the Pact does not expressly enact that such wars are crimes, or set up courts to try those who make such wars. To that extent the same is true with regard to the laws of war contained in the Hague Convention. The Hague Convention of 1907 prohibited resort to certain methods of waging war. These included the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of flags of truce, and similar matters. Many of these prohibitions had been enforced long before the date of the Convention; but since 1907 they have certainly been crimes, punishable as offences against the laws of war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence

prescribed, nor any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention. In the opinion of the Tribunal, those who wage aggressive war are doing that which is equally illegal, and of much greater moment than a breach of one of the rules of the Hague Convention. In interpreting the words of the Pact, it must be remembered that international law is not the product of an international legislature, and that such international agreements as the Pact have to deal with general principles of law, and not with administrative matters of procedure. The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing.

The view which the Tribunal takes of the true interpretation of the Pact is supported by the international history which preceded it. In the year 1923 the draft of a Treaty of Mutual Assistance was sponsored by the League of Nations. In Article I the Treaty declared "that aggressive war is an international crime," and that the parties would "undertake that no one of them will be guilty of its commission." The draft treaty was submitted to twenty-nine States, about half of whom were in favour of accepting the text. The principal objection appeared to be in the difficulty of defining the acts which would constitute "aggression," rather than any doubt as to the criminality of aggressive war. The preamble to the League of Nations 1924 Protocol for the Pacific Settlement of International Disputes ("Geneva Protocol"), after "recognising the solidarity of the members of the international community," declared that "a war of aggression constitutes a violation of this solidarity and is an international crime." It went on to declare that the contracting parties were "desirous of facilitating the complete application of the system provided in the Covenant of the League of Nations for the pacific settlement of disputes between the states and of ensuring the repression of international crimes." The Protocol was recommended to the members of the League of Nations by a unanimous resolution in the Assembly of the forty-eight members of the League. These members included Italy and Japan, but Germany was not then a member of the League.

Although the Protocol was never ratified, it was signed by the leading statesmen of the world, representing the vast majority of the civilised states and peoples, and may be regarded as strong evidence of the intention to brand aggressive war as an international crime.

At the meeting of the Assembly of the League of Nations on the 24th September, 1927, all the delegations then present (including the German, the Italian and the Japanese), unanimously adopted a declaration concerning wars of aggression. The preamble to the declaration stated:

> The Assembly:
>
> Recognising the solidity which unites the community of nations; Being inspired by a firm desire for the maintenance of general peace;

> Being convinced that a war of aggression can never serve as a means of settling international disputes, and is in consequence an international crime ...

The unanimous resolution of the 18th February, 1928, of twenty-one American Republics of the Sixth (Havana) Pan-American Conference, declared that "war of aggression constitutes an international grime against the human species."

All these expressions of opinion, and others that could be cited, so solemnly made, reinforce the construction which the Tribunal placed upon the Pact of Paris, that resort to a war of aggression is not merely illegal, but is criminal. The prohibition of aggressive war demanded by the conscience of the world, finds its expression in the series of pacts and treaties to which the Tribunal has just referred.

It is also important to remember that Article 227 of the Treaty of Versailles provided for the constitution of a special Tribunal, composed of representatives of five of the Allied and Associated Powers which had been belligerents in the First World War opposed to Germany, to try the former German Emperor "for a supreme offence against international morality and the sanctity of treaties." The purpose of this trial was expressed to be "to vindicate the solemn obligations of international undertakings, and the validity of international morality." In Article 228 of the Treaty, the German Government expressly recognised the right of the Allied Powers "to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war."

It was submitted that international law is concerned with the action of sovereign States, and provides no punishment for individuals; and further, that, where the act in question is an act of state, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected. That international law imposes duties and liabilities upon individuals as well as upon States has long been recognised. In the recent case of Ex Parte Quirin (1942 317 US 1), before the Supreme Court of the United States, persons were charged during the war with landing in the United States for purposes of spying and sabotage. The late Justice Stone, speaking for the Court, said:

> From the very beginning of its history this Court has applied the law of war as including that part of the law of nations which prescribes for the conduct of war the status, rights and duties of enemy nations as well as enemy individuals.

He went on to give a list of cases tried by the Courts, where individual offenders were charged with offences against the laws of nations, and particularly the laws of war. Many other authorities could be quoted, but enough has been said to show that individuals can be punished for violations of international law. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.

The provisions of Article 228 of the Treaty of Versailles already referred to illustrate and enforce this view of individual responsibility.

The principle of international law, which under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these

facts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings. Article 7 of the Chanter expressly declares:

> The official position of defendants, whether as Heads of State, or responsible officials in government departments, shall not be considered as freeing them from responsibility, or mitigating punishment.

On the other hand the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorising action moves outside its competence under international law.

> It was also submitted on behalf of most of these defendants that in doing what they did they were acting under the orders of Hitler, and therefore cannot be held responsible for the acts committed by them in carrying out these orders. The Charter specially provides in Article 8:
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> The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may the considered in mitigation of punishment.
>
> The provisions of this Article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war this never been recognised as a defence to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.
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> ...
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> Judge PARKER:
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> *General*
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> The evidence relating to war crimes has been overwhelming, in its volume and its detail. It is impossible for this Judgment adequately to review it, or to record the mass of documentary and oral evidence that has been presented. The truth remains that war crimes were committed on a vast scale, never before seen in the history of war. They were perpetrated in all the countries occupied by Germany, and on the High Seas, and were attended by every conceivable circumstance of cruelty and horror. There can be no doubt that the majority of them arose from the Nazi conception of "total war," with which the aggressive wars were waged. For in this conception of "total war," the moral ideas underlying the conventions which seek to make war more humane are no longer regarded as having force or validity. Everything is made subordinate to the overmastering dictates of war. Rules, regulations, assurances and treaties all alike are of no moment, and so, freed from the restraining influence of international law, the aggressive war is conducted by the Nazi leaders in the most barbaric way. Accordingly, war crimes were committed when and wherever the Führer and his close associates thought them to be advantageous. They were for the most part the result of cold and criminal calculation.
>
> On some occasions, war crimes were deliberately planned long in advance. In the case of the Soviet Union, the plunder of the territories to be occupied, and the ill-treatment of the civilian population, were settled in minute detail before the attack

was begun. As early as the Autumn of 1940, the invasion of the territories of the Soviet Union was being considered. From that date onwards, the methods to be employed in destroying all possible opposition were continuously under discussion.

Similarly, when planning to exploit the inhabitants of the occupied countries for slave labour on the very greatest scale, the German Government conceived it as an integral part of the war economy, and planned and organised this particular war crime down to the last elaborate detail.

Other war crimes, such as the murder of prisoners of war who had escaped and been recaptured, or the murder of Commandos or captured airmen, or the destruction of the Soviet Commissars, were the result of direct orders circulated through the highest official channels.

The Tribunal proposes, therefore, to deal quite generally with the question of war crimes, and to refer to them later when examining the responsibility of the individual defendants in relation to them. Prisoners of war were ill-treated and tortured and murdered, not only in defiance of the well-established rules of international law, but in complete disregard of the elementary dictates of humanity. Civilian populations in occupied territories suffered the same fate. Whole populations were deported to Germany for the purposes of slave labour upon defence works, armament production and similar tasks connected with the war effort. Hostages were taken in very large numbers from the civilian populations in all the occupied countries, and were shot as suited the German purposes. Public and private property was systematically plundered and pillaged in order to enlarge the resources of Germany at the expense of the rest of Europe. Cities and towns and villages were wantonly destroyed without military justification or necessity.