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More Thoughts on the International War Crimes Tribunal. The Case of Ukraine

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As we approach the official convening of the International Tribunal for the (are we now allowed to say: Former?) Ukraine, or perhaps initially it will just be a Donetsk/Lugansk tribunal, we are still largely in the dark about some fundamental issues. Clarity on those issues would be helpful because the convening of this tribunal is a singular opportunity not just for justice to be done but also to be seen by almost the entire world to be done. It is a brilliant opportunity to lay bare collective West's moral turpitude before the remaining 85% of the world that is happily situated outside its autistic confines and not susceptible to its distortions of reality. Morally and politically, this is a unique opportunity that must not be forfeited.

It is the prosecutors, of course, who will select the legal framework under which they will act in presenting their case. They alone will ultimately determine what Ukrainian or foreign individuals and entities will be put in the dock, and based on what legal theories. Nevertheless, some useful suggestions can perhaps still be made to assist the tribunal in fulfilling its important task.

[1] **Ground rules**. This is basic and refers to the tribunal's fundamental charter, or Statute, and its Rules of procedure and evidence. These documents define the tribunal's mission and prescribe how it goes about it. It is the general road map for the proceedings, governing their scope and operational methodology. For credibility that is indispensable.

A political decision may have been taken to conduct the first phase of the proceedings under the aegis of the judicial systems of the two Donbass republics, presumably for reasons of territorial jurisdiction to handle locally captured suspects from Nazi and foreign mercenary outfits. A plausible argument to that effect could be ventured, but that is the extent and no further that local courts should be involved.

The international tribunal that is being set up is a major legal undertaking. It has much larger issues to deal with and bigger fish to fry than local outrages committed by pathological misfits. There are vital and complex legal issues that require adjudication, including the planning of aggressive war, genocide, and grave crimes against humanity, to name just a few, which local, provincial courts clearly lack the capacity to deal with. The catalogue of potential high value culprits encompasses officials and institutions greatly superior hierarchically to mere foot soldiers and field executioners, disgusting as their atrocities may be. A tribunal seen to be endowed with competence and professional distinction is expected to hear evidence and pass judgment on the overarching crimes and on their suspected perpetrators. It is primarily high value suspects, in person or in absentia, Ukrainian or foreign, that must be identified and indicted. They should be brought to answer charges before an institutionally and professionally credible body with precise ground rules and impeccable international credentials.

[2] **Establishing context**. Context is a key dimension of the contemplated proceedings. Its importance cannot be overestimated but could easily be overlooked by tribunal organisers with a parochial perspective and scant experience. Their natural inclination, especially if they come from pre-modern, non-Western legal systems, is to focus narrowly on individual guilt, disregarding a broader analysis of the origin and rationale of the criminal conduct under review. However, in dealing with the Ukrainian conflict, legal and political considerations intersect. The criminal behaviour the court will deal with is not merely individual but also institutional and systemic. Properly presented contextual background is therefore decisive for the correct judicial assessment of the evidence.

The creators of the Hague Tribunal were keenly aware of their project's political implications; they consequently laid great stress on the elaboration of contextual issues. But like practically everything in that failed tribunal, that also was done with disregard for sound judicial practice. ICTY chambers allowed much allegedly contextual evidence to be introduced primarily for its propaganda effect but with little regard to whether it was genuinely probative or relevant.

The prosecution of the Ukrainian tribunal has no need to resort to skulduggery in order to make its case. The context of the Kiev regime's criminality can be easily and compellingly demonstrated by voluminous and unimpeachable evidence of its Nazi affiliations and of the hospitality extended by its foreign sponsors to hard-core World War II Nazi collaborators whose ideological progeny now constitute the regime's backbone. There is abundant evidence that over a decades long period descendants of wartime Nazi helpers were groomed and kept in reserve to be subsequently sent *en masse* to Ukraine and installed in key positions after the 2014 Maidan coup. Absent the presentation of this incriminating contextual background of long-term preparation and planning, each separate crime committed by tattooed Nazi thugs, no matter how appalling and thoroughly documented, will be swept under the rug by Western narrative spinners as just the solitary act of deranged individuals.

[3] **Expert witnesses**. For the crimes which are the subject of these proceedings to be treated as more than just incidents perpetrated by individuals the prosecution must connect the dots and provide a comprehensive overview of the criminal design. Skilled and experienced expert witnesses are required for that purpose. A competent expert witness interprets and gives coherence to disparate ground-level facts. He assists the chamber and the public to better understand how the crimes came to be committed. ICTY practice in this

area is instructive, but only as a negative example not to be followed.

ICTY prosecutors were in the habit of bringing "experts" with dubious qualifications to elaborate tendentious narratives. Many of them were destroyed on the witness stand. These and other debacles, however, had little impact on the outcome of ICTY's staged trials, though they did bring great discredit upon the court and its proceedings. Precautions can and should therefore be taken to ensure that the Hague Tribunal's foolish blunders are not repeated by the Ukraine tribunal.

Qualified experts are opinion as opposed to fact witnesses. In a criminal trial they offer important assistance to the court by presenting an independent technical interpretation of the factual evidence. They should be used where appropriate in the Ukrainian criminal trials. Their input would benefit both the judges and international public opinion by shedding light on the many technical and forensic issues that will arise in the course of the proceedings.

[4] **Genocide**. It has been suggested that the charge of genocide would feature prominently in the Ukraine indictments. The opportunity to apply the Genocide Convention to the factual matrix of the Ukrainian conflict and to develop case law in that important legal area should not be passed over. However, the genocide argument must be thought through carefully to avoid pitfalls, such as basing the contention of genocide mainly on numbers. Genocide indictments, if issued, must be aligned closely with the conceptual scheme of the Convention, bearing in mind also that this area of international law is still largely uncharted territory. There is presently little case law on the subject to assist prosecutors in framing a genocide case, if we disregard (as we should) the politically corrupted and intellectually dishonest practice and pronouncements of the Hague Tribunal.

The key point to remember is that the Convention emphasises deliberate infliction on the targeted group of conditions of life calculated to bring about its physical destruction, in whole or in part. It nowhere mentions a specific number of victims as a threshold for proving genocide. The 14,000 civilian shelling victims in the Donbas since 2014 certainly are a factor that should be cited in support of the prosecution's genocide case, but this allegation must be complemented with additional evidence to flesh out the legal argument and to keep it from becoming a numbers game. In addition to the large number of civilian victims, other *prima facie* elements consistent with the Convention's conceptual scheme should also be highlighted. Suppression of Russian language and culture, widespread intimidation of Russian speakers and social and economic discrimination designed to encourage their "voluntary" departure, forced re-education of Russian children with the clear objective of changing their identity, open appeals by Ukrainian officials and regime connected public figures for the extermination of Russian speakers – these are some of the elements in thecampaign conducted by Kiev authorities and aimed against a protected group, namely those who consider themselves ethnically and culturally Russians. There is thus a strong presumptive case that the provisions of the Genocide convention have been systematically violated by Ukraine. For the case to be successfully made, the evidence must be properly assembled, presented to the court and made accessible to world public opinion.

The forthcoming Ukrainian War Crimes Tribunal is an exciting experiment in dispassionate justice in a still ongoing conflict that from the beginning has been mired in deliberate lies and deceptive hyperbole. While many of the perpetrators will undoubtedly be identified and punished, it is likely that many more will slip through the cracks if for no other reason than because they are so numerous. That unavoidable fact should not discourage anyone. If the Tribunal manages to calmly and methodically document the horrors inflicted on the people

of Ukraine of all persuasions it will have done its job, and with honour.

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