

Talking about War Crimes: War Crimes Discourse and Strategy

Madoka Futamura

Keywords—*war crimes, legitimacy, ICC, Ukraine, international humanitarian law, accountability, strategic communication, strategic communications*

About the Author

Madoka Futamura is a Professor at Hosei University, Japan. She is also a Senior Visiting Research Fellow at King's College London. Her works include *War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg Legacy* and *The Politics of the Death Penalty in Countries in Transition* (co-edited with Nadia Belnatz).

Abstract

One of the characteristics of the current war in Ukraine is the intensity of talks and practices regarding war crimes and accountability. Since Russia's invasion in February 2022, both Ukraine and Russia have consistently claimed that the other side has been conducting inhumane war crimes while seeking accountability, domestically and internationally. Meanwhile, the International Criminal Court (ICC) has opened investigations into the situation in Ukraine. Various international and civil society actors have been actively investigating alleged war crimes, pursuing accountability mechanisms. At the same time, concerns that war crimes prosecution during conflicts may hinder the peace are persistent. And the prospect of prosecution and actual trial of Russia's 'big fish' is full of uncertainty.

Yet, the level of intensity of war crimes discourse in the current situation is worth highlighting. What do people expect from war crimes accusations? Why and in what ways does talk of war crimes matter?

Introduction

This article explores the role and impact of war crimes discourse and its strategic implications. It first looks into war crimes discourse and attempted prosecution in the ongoing war in Ukraine, and argues that war crimes accusations may not directly lead to actual trial but that their significance is importantly normative, as well as strategic. It then examines the background of the proliferation of war crimes discourse by exploring the historical development of international humanitarian and human rights norms and laws. It also highlights the intricate relationship between law, war, and legitimacy, proposing that in contemporary armed conflicts war crimes discourse does shape the landscape of war politically and morally. This has serious implications for fighting and winning. Because of its strategic importance, war crimes discourse has come to be promoted by various stakeholders; each pursues its own ends. Accordingly, the discourse carries different and sometimes conflicting messages—justice, peace, and pragmatic strategy. Here I examine diverse messages and argue that plurality in war crimes discourse creates ambiguity. That in turn produces opportunities for strategic communications to prevail. The paper will then analyse the utility of war crimes discourse.

1. War Crimes Discourse and the Situation in Ukraine since 2022

Since Russia invaded Ukraine in February 2022, the situation in Ukraine has been accompanied by a war crimes discourse. It alleges that war crimes are being committed by combatants. Such discourse is promoted not only by the belligerent states which accuse their opponents but also by third parties such as the United Nations and NGOs which

aspire to restrict violence on the ground. War crimes here are broadly understood as wartime conducts which are prohibited under international humanitarian law. But a continuing discourse accompanies terms such as ‘genocide’ or ‘crimes against humanity’, which, together with war crimes, are regarded as the ‘core crimes of international criminal law’. Many accusations of war crimes are accompanied by investigations of these allegations with future prosecution in mind. However, whether war crimes are actually prosecuted and war criminals eventually appear in court remains uncertain.

War Crimes Accusations and Legal Movements

On 24 February 2022, justifying its ‘special military operation’ against Ukraine on that same day, Russian president Vladimir Putin claimed that the Ukraine government was committing genocide in Luhansk and Donetsk, and that ‘it was necessary to immediately stop this nightmare: the genocide against the millions of people living there, who rely only on Russia, hope only on us’.¹ Observers were caught by surprise when President Putin used the term ‘genocide’ to justify the invasion. Ukraine was quick to respond. On 26 February it turned to the International Court of Justice (ICJ) and instituted proceedings against Russia, claiming that Russia is misinterpreting and misapplying the 1948 Genocide Convention, and accused Russia of planning acts of genocide in Ukraine.² Ukraine’s legal battle did not end there. It requested the European Court of Human Rights on 28 February to grant urgent interim measures ‘in relation to “massive human rights violations being committed by the Russian troops in the course of the military aggression”’.³

-
- 1 ‘Full Text: Putin’s Declaration of War on Ukraine’, *The Spectator*, 24 February 2022 [accessed 5 January 2023].
 - 2 International Court of Justice, *Press Release*, № 2022/4, 27 February 2022 [accessed 5 January 2023]. The ICJ responded with provisional measures on 16 March ordering Russia to immediately suspend its military operations in Ukraine.
 - 3 The Court responded immediately on 1 March with its indication to the government of Russia ‘to refrain from military attacks against civilians and civilian objects’. European Court of Human Rights, ‘The European Court Grants Urgent Interim Measures in Application concerning Russian Military Operations on Ukrainian Territory’, press release, ECHR 068 (2022), 1 March 2022.

It was also on 28 February that the prosecutor of the International Criminal Court (ICC), Karim Khan, issued a statement saying that he would proceed with opening an investigation of ‘alleged war crimes and crimes against humanity [which] have been committed in Ukraine’, building on a preliminary examination of events in Ukraine since 2014.⁴ Responding to his statement, initially thirty-nine—which later increased to forty-one—state parties promptly referred the situation in Ukraine to the ICC, which allowed the prosecutor to open an investigation immediately.⁵ On 5 March the UN Human Rights Council also decided to establish an independent international commission of inquiry mandated to ‘investigate all alleged violations and abuses of human rights and violations of international humanitarian law and related crimes in the context of the aggression against Ukraine by the Russian Federation’ and ‘to make recommendations with a view to ending impunity and ensuring criminal responsibility, and access to justice for victims’.⁶

Ukraine was also quick to launch its own investigation of alleged war crimes. On 23 May it conducted the first war crimes trial since the invasion and sentenced a Russian tank commander to life in prison for killing a civilian. As some expected this to be the start of ‘a legal tit-for-tat while the conflict rages on’,⁷ Russia also opened a war crimes trial at a court in the self-proclaimed Donetsk People’s Republic (DPR) before sentencing three foreign servicemen to death, guilty of ‘mercenary activities and committing actions aimed at seizing power and overthrowing the constitutional order of the DPR’. This court was criticised by the UN Human Rights Office, concerned that ‘such trials against prisoners of war [with the death sentence] amount to a war crime’.⁸

4 International Criminal Court, ‘[Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine](#)’, 28 February 2022 [accessed 5 January 2023].

5 International Criminal Court, ‘[Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine](#)’, 2 March 2022 [accessed 5 January 2023].

6 United Nations, ‘[Norwegian Judge Appointed Chair of the Commission of Inquiry on Ukraine](#)’, 31 March 2022 [accessed 1 May 2022].

7 ‘[Ukraine War: Russian Soldier Vadim Shishimarin Jailed for Life over War Crime](#)’, BBC News, 23 May 2022 [accessed 11 February 2023].

8 ‘[Death Sentence for Ukraine Foreign Fighters Is a War Crime: UN Rights Office](#)’, *UN News*, 10 June 2022 [accessed 15 June 2022].

Individual states have pursued a criminal accountability process through their domestic legal processes. As early as 3 March, the prosecutor general of Ukraine appealed to the international community to consider the possibility of commencing investigations into alleged war crimes ‘to the extent possible under national legal frameworks’.⁹ Lithuania was quick to respond; so, too, Poland. On 25 March, Ukraine, together with the two countries, set up a joint investigation team, which was supported by the EU Agency for Criminal Justice Cooperation (Eurojust). Germany and France have also begun their own investigations.¹⁰

War crimes discourse and global movement of investigation intensified along with the widely reported atrocities committed by Russian forces in Bucha, north-west of Ukraine’s capital, Kyiv. Human Rights Watch first published a graphic article on 30 March, reporting the devastating situation of civilians in Bucha who had suffered terribly under Russian occupation from 4 March.¹¹ In April the NGO investigated the situation on the ground and ‘found extensive evidence of summary executions, other unlawful killings, enforced disappearances, and torture’. A Human Rights Watch researcher reported: ‘The evidence indicates that Russian forces occupying Bucha showed contempt and disregard for civilian life and the most fundamental principles of the laws of war.’ He claimed: ‘The victims of apparent war crimes in Bucha deserve justice.’¹² The situation in Bucha shocked the world and intensified investigations on the ground conducted by state and non-state actors. It was symbolic that ICC chief prosecutor Karim Khan visited Bucha in April and stated: ‘Ukraine is a crime scene. We’re here because we have reasonable grounds to believe that crimes within the jurisdiction of the ICC are being committed.

-
- 9 Ofis Heneral'noho prokurora, ‘[Prosecutor General of Ukraine: Inaction or Delayed Action Today Equals Being an Accomplice to Aggressor’s Actions](#)’ [accessed 11 February 2023].
 - 10 Kristen E. Eichensehr (ed.), ‘Contemporary Practice of the United States Relating to International Law: International Organizations, International Institutions Mobilize to Impose Accountability on Russia and Individual Perpetrators of War Crimes and Other Abuses’, *American Journal of International Law* 116 № 3 (2022): 637–38.
 - 11 Yulia Gorbunova, ‘[Devastation and Loss in Bucha, Ukraine: Life for Civilians in a Town Encircled by Russian Forces](#)’, Human Rights Watch, 30 March 2022 [accessed 10 November 2022].
 - 12 ‘[Ukraine: Russian Forces’ Trail of Death in Bucha; Preserving Evidence Critical for War Crimes Prosecutions](#)’, Human Rights Watch, 21 April 2022 [accessed 14 February 2023].

We have to pierce the fog of war to get to the truth.¹³ Human Rights Watch and Amnesty International have reported the forcible transfer and deportation of civilians, including unaccompanied children, from Ukraine, which constitute war crimes and potential crimes against humanity.¹⁴

The role of NGOs has been important, reporting situations on the ground in detail and appealing to the international community to pursue justice. What is even more striking is the ‘relatively new practice of open-source investigations by civil society actors’.¹⁵ Publicly available digital information and new technological tools allow anyone to investigate war crimes and independently check and verify the accuracy and authenticity of claims of the belligerents. Organisations such as Bellingcat checked Russia’s dubious justification and provided counter-narratives. According to Henning Lahmann, these civil society actors ‘became part of the wider public discourse on the war in Ukraine’.¹⁶ As he argues, this is ‘potentially transformative for international legal discourse’.¹⁷

Ukrainian president Volodymyr Zelenskyy has been actively engaging in war crimes discourse. On 5 April 2022, during a meeting of the UN Security Council, he called for Russia’s leaders to be ‘brought to justice’ for committing ‘the most terrible war crimes’ since the Second World War.¹⁸ From time to time he has expressed his determination to prosecute Russian war crimes, and he has appealed to the international community to create a special tribunal.¹⁹ On 22 November he announced that more than 400 war crimes had been uncovered in Kherson, which had been abandoned by Russian forces, and stated: ‘We will find and

13 Niamh Forgie, ‘[ICC Chief Prosecutor Visits Bucha as Court Investigates Alleged War Crimes in Ukraine](#)’, JURIST, 15 April 2022 [accessed 14 February 2023].

14 Amnesty International, ‘[“Like a Prison Convoy”: Russia’s Unlawful Transfer and Abuse of Civilians in Ukraine during “Filtration”](#)’, 10 November 2022.

15 Henning Lahmann, ‘Ukraine, Open-Source Investigations, and the Future of International Legal Discourse’, *American Journal of International Law* 116 No 4 (2022): 810.

16 *Ibid.*, p. 817.

17 *Ibid.*, p. 816.

18 ‘Zelensky Tells UN that Russia Must Be ‘Brought to Justice’ over Atrocities’, *Financial Times*, 6 April 2022.

19 See ‘[Ukrainian President Outlines Peace Formula That Punishes Aggression, Restores Security](#)’, *UN News*, 21 September 2022 [accessed 23 February 2023].

bring to justice every murderer.²⁰ Interestingly, it was on the same day that Vyacheslav Volodin, the speaker of Russia's State Duma and ally of Putin, called for Zelenskyy to face a trial for war crimes.²¹

Meanwhile, the discourse of war crimes and accountability started to expand into the 'crime of aggression', that is, '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'.²² However, as the ICC's jurisdiction for this specific crime is very narrowly set, and neither Russia nor Ukraine is a state party, the ICC cannot deal with the crime of aggression. Accordingly, there have been various moves to seek accountability mechanisms for this specific crime. Along the way, the term 'Nuremberg' has been used symbolically. For example, Zelenskyy demanded proceedings akin to the Nuremberg trials under which Nazi leaders were tried.²³ Former British prime minister Gordon Brown, together with a group of experts and former international court officers, also put forward the idea of a special tribunal modelled on Nuremberg to punish 'Putin's heinous attempts to destroy peace in Europe'.²⁴ On facing an intensive process of documenting alleged war crimes committed by Russian forces, Beth Van Schaack, the US ambassador-at-large for global criminal justice, stated: 'This is 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.'²⁵

And one year on from Russia's invasion, international organisations took further steps on war crimes issues. On 16 February 2023 the UN General Assembly passed a resolution which, for the first time since the

20 'Ukraine War: Russia Guilty of War Crimes in Kherson, Says Zelensky', BBC News, 14 November 2022.

21 Ben Zion Gad, "'Nazi' Zelensky Should Be Tried for War Crimes, Says Putin Ally', *Jerusalem Post*, 22 November 2022 [accessed 21 February 2023].

22 Article 8 bis of the Rome Statute of the ICC.

23 'Zelensky Tells UN', *Financial Times*.

24 Gordon Brown et al., 'Statement: Calling for the Creation of a Special Tribunal for the Punishment of the Crimes of Aggression against Ukraine', March 2022 [accessed 22 February 2023].

25 Quoted in Robbie Gramer and Amy MacKinnon, 'Ukraine's "Nuremberg Moment" amid Flood of Alleged Russian War Crimes', *Foreign Policy*, 10 June 2022 [accessed 22 February 2023].

invasion, referred to the necessity of accountability for war crimes ‘through appropriate, fair and independent investigations and prosecutions at the national or international level, and [to] ensure justice for all victims and the prevention of future crimes’.²⁶ The resolution was supported by 141 states.

On 16 March the UN Commission of Inquiry on Ukraine released its first report, concluding ‘that Russian authorities have committed numerous violations of international humanitarian law and violations of international human rights law, in addition to a wide range of war crimes’. The report also concluded that, in a limited number of cases, ‘Ukrainian armed forces were likely responsible for violations of international humanitarian law and human rights law, and for some incidents which qualify as war crimes’.²⁷ And, on 17 March, the ICC issued arrest warrants against President Putin and Maria Lvova-Belova, commissioner for children’s rights in the Office of the President of Russia, ‘responsible 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’.²⁸

Uncertainty in the Actual Prosecution Process

Accusations of war crimes and moves to seek accountability emerged almost simultaneously with the Russian invasion and have been spread by the media with an intensity and speed that had not been seen in previous armed conflicts. However, the prospect of actually prosecuting individuals, let alone bringing them to court, especially those in leadership positions, remains uncertain. This is partly because war crimes, while strictly defined by existing international law, are subject to the interpretation of law based on the context.

26 UN GA Resolution, A/ES-11/L.7, 16 February 2023.

27 Report of the Independent International Commission of Inquiry on Ukraine, A/HRC/52/62, 15 March 2023, paras 109–10.

28 International Criminal Court, ‘[Situation in Ukraine: ICC Judges Issue Arrest Warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova](#)’, press release, 17 March 2023.

The ICC statute provides comprehensive definitions of core crimes. While the term ‘war crimes’ is often used rather casually, it points to specific crimes, that is, grave breaches of the Geneva Conventions of 12 August 1949 and other serious violations of the laws and customs applicable in international armed conflict, including wilful killing, torture or inhuman treatment, unlawful deportation, and taking hostages.²⁹ Yet, to decide whether appalling conducts are crimes or tragic ‘collateral damage’ depends on context, which requires experts’ assessment of military necessity and proportionality.³⁰ As to crimes against humanity—which include murder, extermination, enslavement, deportation or forcible transfer of population, and rape—these must have been committed ‘as part of a widespread or systematic attack directed against civilian populations with knowledge of the attack’.³¹ Even stricter is the definition of genocide, whose most vital feature is intention: that is, killing and causing serious bodily and mental harms ‘committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group’.³² It is because of the existence of intention of annihilation that genocide is perceived as ‘the crime of crimes’ and shoulders a strong symbolic power. Yet, proof of intent is normally not easy to secure. In addition, identifying specific individuals responsible for those crimes, especially those at a leadership level, is a complicated process of documenting and establishing the chain of command—which is necessary to prove accountability of leaders in the Russian government.

Even if we can legally prove the existence of war crimes and responsible individuals, there is another issue: the availability of an effective accountability mechanism. International criminal prosecution is not at all straightforward under the ‘anarchical society’ of states, because there is no centralised authority beyond states, and prosecution of any national is primarily a function of state sovereignty. This becomes a problem when it comes to targeting high-ranking official figures, such

29 Article 8 of the Rome Statute of the ICC.

30 James Gow, *War and War Crimes: The Military, Legitimacy and Success in Armed Conflict* (Hurst, 2013), p. 90.

31 Article 7 of the Rome Statute of the ICC.

32 Article 6 of the Rome Statute of the ICC.

as Russian political and military leaders, including President Putin, who are normally protected under state sovereignty. Ukraine and Russia not being state parties to the Rome Statute, in principle the ICC has no jurisdiction for crimes committed by Russian nationals within the territory of Ukraine. In the ongoing case, however, the ICC could open an investigation because Ukraine consented to the Court's jurisdiction. Yet, Russia has no obligation to cooperate with the ICC, which means that prosecuted individuals are unlikely to be sent to The Hague and face trial. On the ICC's arrest warrants against President Putin, a Kremlin spokesperson immediately responded by claiming that they 'do not recognize the jurisdiction of this court and, accordingly, any decisions of this kind are null and void for Russia in terms of law'.³³

Because of the limitation of the ICC's jurisdiction and function, setting up a special tribunal with a stronger jurisdiction has been debated. In addition to Gordon Brown's proposal seen above, some have proposed the Council of Europe establish the Extraordinary Ukrainian Chamber for Aggression.³⁴ However, unless it is established by the UN Security Council with its enforcement measures, no tribunal may have sufficient power to force states to cooperate with it—and with Russia being a permanent member of the Security Council, it is very unlikely that such a tribunal would be set up in the near future. Even if it were to be established by the Council, it could not guarantee the arrest of war criminals. Antonio Cassese, former president of the International Criminal Tribunal for the former Yugoslavia (ICTY), famously indicated the limitation of international courts:

the ICTY remains very much like a giant without arms and legs—it needs artificial limbs to walk and work. And these artificial limbs are state authorities. If the cooperation of states is not forthcoming, the ICTY cannot fulfil its functions. It has no means

33 'Russia Slams ICC's Warrant for Putin's Arrest "Null and Void"—Kremlin', Russian News Agency TASS, 18 March 2023 [accessed 20 March 2023].

34 See Oona A. Hathaway, 'Russia's Crime and Punishment: How to Prosecute the Illegal War in Ukraine', *Foreign Affairs*, 17 January 2023 [accessed 3 February 2023].

at its disposal to force states to cooperate with it. This is to be contrasted with the International Military Tribunals at Nuremberg and Tokyo, which investigated and prosecuted war crimes committed in states held under military occupation by the Allied forces.³⁵

Therefore, despite the intensity of war crimes accusations and accompanying active investigations on the ground, the prospect of prosecuting and punishing criminal individuals, especially at the level of leadership, is full of uncertainty. At the least, it is going to be a complex and time-consuming process. The history of international criminal justice shows that some prosecuted leaders, such as Serbia's Slobodan Milošević or Liberian leader Charles Taylor, were caught and put on trial *eventually*. However, this was not a speedy process: many of them were caught by their own people during gradual political and social changes within society. Thus, at this stage, no immediate trials of Russian leaders would be expected.

Still, the very fact that war crimes discourse and investigations are carried out by various actors with such intensity, in parallel with military operations on the ground, is intriguing. If the prospect for actual trials remains uncertain, why are war crimes talked about so intensely? It is worth examining whether and in what ways war crimes discourse matters.

2. Contemporary Warfare and Implications of War Crimes Discourse

War is not mere wild violence; it is subject to rules regulating what can and cannot be done even in wartime. Such rules have been compiled and amount to what is known as the law of war, or international humanitarian law. This body of law allows us talk about war crimes. But it is a relatively

35 Antonio Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law', *European Journal of International Law* 9 N° 1 (1998), p. 13.

new phenomenon that war crimes are talked about not only by military and legal professionals but also by the wider public. This section briefly explains the background to the current intense discourse around war crimes and explains why and in what ways war crimes discourse matters to fighting and winning war.

The Development of Norms and Practice of International War Crimes Trials

Although the law of war has a long history and the concept of war crimes had been widely shared among states, the Nuremberg and Tokyo trials after the Second World War were the first public international war crimes trials, having prosecuted and punished wartime German and Japanese leaders for conducting ‘crimes against peace’ (the crime of aggression), war crimes, and ‘crimes against humanity’. From the viewpoint of the history of international criminal justice, both trials are exceptional as they were conducted under the unconditional surrender of Germany and Japan, which made the whole legal process relatively easy, as Cassese’s statement implies. But this in turn led to their own shortcomings, that is, victor’s justice. They were *ex post facto* trials imposed only on the side of the vanquished, which left ambiguous legacies.³⁶ In that sense, it is unlikely that a Nuremberg trial will be repeated.

Still, the Nuremberg trial contributed immensely to the development of international humanitarian law thereafter. Principles set out in the Charter of the Nuremberg Tribunal were unanimously affirmed on 11 December 1946 through the UN General Assembly Resolution 95 (I), and they, together with the judgement of Nuremberg, were formulated into several principles by the International Law Commission, setting out individual criminal responsibility under international law.³⁷ The concept of individual criminal responsibility was reflected in the four Geneva Conventions of 1949 and their two protocols of 1977. The

36 Madoka Futamura, *War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg Legacy* (Routledge, 2008).

37 *Yearbook of the International Law Commission*, vol. 2 (1950), pp. 374–78.

contribution of the concept of ‘crimes against humanity’—one of the crimes tried at Nuremberg and Tokyo—to the post-Second World War international human rights regime is crucial. It was developed into various international laws regarding genocide, the crime of apartheid, and torture. It also endorsed the adoption of the Universal Declaration of Human Rights in 1948, which was followed by the two covenants on economic, social, and cultural rights and on civil and political rights, which entered into force in 1976.

By the 1980s, war crimes came to be codified; the concept of individual criminal responsibility penetrated international law, and the set of international human rights laws was ready to be referred to. In other words, Nuremberg had set out ‘a common vocabulary’ to speak morally about war crimes and human rights issues,³⁸ which cultivated a field for discourse of war crimes and gross violations of human rights. Such vocabulary had come to be used by peace and human rights activists in the 1970s. In the context of the Vietnam War, anti-war activists referred to Nuremberg and criticised the US for being guilty of war crimes, crimes against peace, and crimes against humanity.³⁹ In the context of the democratisation process in Latin America, human rights activists were trying to resort to the ‘Nuremberg model of justice’ to seek accountability for gross violations of human rights conducted under previous authoritarian regimes.⁴⁰ The impact of these discourses, however, was still partial and local at the time. Moreover, the contexts of the Vietnam War and, especially, the democratisation process in Latin America in domestic human rights settings were different from those in which German leaders were prosecuted and punished. Nevertheless, the discourse of war crimes and human rights abuses was promoted with heavy use of the term ‘Nuremberg’, which became a powerful keyword in war crimes discourse, instantly conveying the scale of atrocities and pressing needs for punishment.

38 Barrie Paskins, ‘Prohibitions, Restraints and Scientists’, in *Explorations in Ethics and International Relations: Essays in Honour of Sydney D. Bailey*, N.A. Sims (ed.), (London: Croom Helm, 1981), p. 76.

39 See Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (New York: Bantam Books, 1971), p. 96.

40 Ruti G. Teitel, *Transitional Justice* (New York: Oxford University Press, 2000), p. 31.

The impact of war crimes discourse increased in the 1990s when laws and norms of war crimes and human rights abuses had further permeated the international community through a series of atrocities that challenged the international conscience. As a result of the war in the former Yugoslavia, and the associated immense scale of war crimes and mass killings, taking action for war crimes and gross violations of human rights became a pressing issue. On 22 February 1993 the UN Security Council specifically determined ‘widespread violations of international humanitarian law occurring within the territory’ as constituting a threat to international peace and security.⁴¹ It is for such a ‘threat’ that the Security Council established the ICTY, as an enforcement measure to prosecute individuals responsible for serious violations of international humanitarian law.⁴² The establishment of the International Criminal Tribunals for Rwanda (ICTR) followed in 1994 in order to prosecute and punish those responsible for genocide in Rwanda.⁴³ These tribunals did create a momentum for the creation of the ICC, as well as several hybrid courts for the armed conflicts in Cambodia, Sierra Leone, Timor Leste, and Kosovo. They also heightened international interest in seeking justice for victims of war crimes, and stimulated the search for various non-legal mechanisms, cultivating the field of so-called transitional justice. In sum, humanising armed conflicts by minimising the damage to non-combatants while seeking justice for victims of war crimes came to attract international interest.⁴⁴

There are several important elements behind this trend which also play a crucial role in war crimes discourse. First is the role of human rights NGOs which have been actively investigating and reporting atrocities and alleged war crimes. In the case of the Yugoslav Wars, it was the Helsinki Watch Committee of Human Rights Watch that first called on the UN to establish a tribunal and to prosecute and punish those

41 UN Doc. S/RES/808 (1993), 22 February 1993.

42 UN Doc. S/RES/827 (1993), 25 May 1993.

43 UN Doc. S/RES/955 (1994), 8 November 1994.

44 See *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies: Report of the Secretary-General*, 23 August 2004, UN Doc. S/2004/616.

responsible for war crimes.⁴⁵ This call gradually paved the way to the creation of the ICTY. It is worth noting that NGOs and media reports again effectively used the term Nuremberg and the Holocaust analogy to illustrate war crimes atrocities committed.⁴⁶

The impact of NGO activities is fostered by the second element, the increasing influence of various media platforms: from twenty-four-hour news broadcasting in the 1990s, the so-called CNN effect, to the social media of the twenty-first century through which individuals can send and receive information anytime and anywhere within a second. People around the world are now highly sensitive to war crimes and damage inflicted on civilians, while being able to observe events on the battlefield through the flow of information. Such information with appalling images of atrocities makes the public even more concerned about war crimes.

With these political, social, and moral changes as the backdrop, international law and norms have further permeated the international community as a 'common vocabulary' with which to talk about war and peace. And the more widely this vocabulary is shared, the greater its power to influence becomes, because it further expands a discursive space in which people around the world can actively and casually judge the legality and legitimacy of ongoing armed conflicts. Unlike in the 1970s when talk of war crimes emerged within an interested, limited circle, war crimes discourse is now heard and used by a much wider audience to discuss the rights and wrongs of war. This is an emerging trend in contemporary armed conflicts. Accordingly, the vocabulary has ceased to be merely legal and technical but has become highly political. Discourse of war crimes not only raises moral questions but also directly connects to the issue of legitimacy.

45 Human Rights Watch, *War Crimes in Bosnia-Herzegovina*, Helsinki Watch Report (New York: Human Rights Watch, 1992), p. 5.

46 See Roy Gutman, *A Witness to Genocide: The 1993 Pulitzer Prize-Winning Dispatches on the 'Ethnic Cleansing' of Bosnia* (Shaftesbury: Element Books, 1993).

Strategic Implications and Ambiguity in War Crimes Discourse

Contemporary armed conflicts have come to depend on legitimacy. War needs to be seen as right both in means and ends in order to receive public support. This is especially important for democratic countries where public opinion matters to state policy. It is here that war crimes discourse has crucial importance in contemporary armed conflicts, because ‘it shapes narrative of legitimacy’.⁴⁷ War crimes discourse acquires significant political, normative, and strategic implications for contemporary warfare.

What is interesting here is that the vocabulary, although highly political, has come to be used not only by NGOs and international organisations criticising the war and violence, but also by belligerents to stigmatise their opponents and justify their own conducts. As David Kennedy argues, it is the vocabulary of international humanitarian law that enhanced ‘the dramatic ability of all participants in modern combat to speak about their means and ends to the same global audience’.⁴⁸ Such participants include illiberal states, authoritarian regimes, and terrorist groups that may not necessarily share the same normative and moral basis of the vocabulary. Diversity of participants means accusations of war crimes carry different messages and implications depending on who is promoting the discourse, and for what purposes. Kennedy agrees:

Once the law in war becomes a strategic asset, able to be spoken in multiple voices ... we can anticipate that it will be used differently by those with divergent strategic objectives.⁴⁹

All this means that war crimes are talked about more intensively but in different ways by diverse actors. What is more, the discourse is heard by wider global audiences consisting not only of military and legal

47 Gow, *War and War Crimes*, p. 42.

48 David Kennedy, *Of War and Law* (Princeton University, 2007), p. 25.

49 *Ibid.*, p. 116.

professionals but also of the general public. And such global audiences are not a monolithic collective either, as they involve both the liberal and the illiberal. What are the implications of such plurality in war crimes discourses? According to Kennedy, ‘The resulting legal pluralism itself offers new strategic challenges and opportunities.’⁵⁰

The following section examines divergent strategic objectives and analyses accompanying strategic challenges and opportunities, with some reference to the ongoing war crimes discourse in Ukraine.

3. War Crimes Discourse and Different Strategic Opportunities

Diverse actors participate on platforms of war crimes discourse with plural claims and messages in mind. Some of the messages are normative, supporting war crimes prosecution, but others are critical to such attempts. These plural and conflicting views on war crimes prosecution create ambiguity in the prospect of cases coming to court but, in turn, yield a strategic space for belligerents to use war crimes discourse opportunistically and pragmatically. From the point of view of strategic communications, war crimes discourse becomes a crucial battlefield.

Implications for Justice

Common and normative messages accompanied by accusations of war crimes represent a strong desire to prevent crimes and pursue criminal accountability. As the ICC delineates its mission as ‘ending a culture of impunity’, the clear message here is that those responsible for war crimes should be tried and punished.

Prosecuting war crimes has been justified in different ways. First is the consolidation of the rule of law which is the foundation of the

50 Ibid.

contemporary international order. The UN Charter, international humanitarian law, and the international human rights regime clearly set out the rules of the international society of states. Russia's invasion of Ukraine challenged this order. Reflecting on the crime of aggression, Oona Hathaway observes:

Creating a court that has jurisdiction to try this crime is an essential step in the global effort to reject Russia's blatantly illegal war and, with it, Putin's willingness to destroy the modern international legal order in pursuit of a new Russian empire.⁵¹

Related to this, deterrence is an important, anticipated outcome of criminal justice, deterring not necessarily current crimes but those in future.

Second, criminal accountability is claimed to be necessary to meet victims' demands for justice. As in the Yugoslav Wars and Rwandan genocide, where the scale and gravity of war crimes were immense, impunity ceases to be an option. Even when the fighting stops, peace without (or seen to be without) justice leaves the possibility for future violence and private revenge. Richard Goldstone, the first chief prosecutor of the ICTY and ICTR, claimed:

If you have peace without justice in countries where millions of people have suffered, where hundreds of thousands of people have been murdered and tens of thousands of women have been raped, do you really expect that by brushing the atrocities committed under the carpet and allowing collective guilt to take hold one will achieve lasting peace? I do not believe so.⁵²

51 Hathaway, 'Russia's Crime and Punishment'.

52 Richard J. Goldstone, *Prosecuting War Criminals*, Occasional Paper N° 10 (London: David Davies Memorial Institute of International Studies, 1996), p. 19.

Thirst for justice for victimisation perpetrated by Russia is a clear message sent out from Ukraine. On 15 November 2022 Zelenskyy published a statement requiring justice to be one of the key conditions for peace, and called for ‘the establishment of the Special Tribunal for the crime of Russia’s aggression against Ukraine and the creation of an international mechanism to compensate for all the damages caused by this war’. Justice, Zelenskyy suggests, ‘is what stokes the greatest emotions’.⁵³

The power of accusations of war crimes is consolidated through the record of actually carrying out investigations and prosecutions built up since the 1990s, including those in Ukraine today. On analysing the first war crimes trial at a Ukrainian court, Sergey Vasiliev ventured: ‘They set the tone and chart the way for future prosecutions of atrocity crimes in Ukraine, giving a sense of what to expect and watch out for in the wartime and postwar accountability processes.’⁵⁴ The fact that several accountability mechanisms exist, that some political and military leaders were actually indicted through those mechanisms and brought to court in the past, and that several investigations are in progress strengthens the credibility and possibility that future war crimes will come to trial, which forces stakeholders to take accusations of war crimes into account.

Some actors believe that even without criminal accountability, war crimes accusation itself can achieve the aim. Human Rights Watch claims that ‘naming and shaming’ is one of the tools ‘by which we seek to expose wrongdoers to the opprobrium their crimes deserve, and ensure accountability’.⁵⁵ Indeed, mere accusation would still damage the belligerents and provide them an incentive to restrict their use of violence.

Whether it is for the international justice-based order or victim’s justice, the message that criminal accountability needs to be sought will receive

53 ‘Ukraine Has Always Been a Leader in Peacemaking Efforts; If Russia Wants to End This War, Let It Prove It with Actions: Speech by the President of Ukraine at the G20 Summit’, 15 November 2022 [accessed 25 February 2023].

54 Sergey Vasiliev, ‘[The Reckoning for War Crimes in Ukraine Has Begun](#)’, *Foreign Policy*, 17 June 2022 [accessed 5 January 2023].

55 Bill Frelick, ‘[Why ISIS Immune to “Naming and Shaming”](#)’, *Human Rights Watch*, 28 August 2014 [accessed 5 January 2023].

great sympathy within the international community, which is becoming increasingly sensitive to inhumane conduct in armed conflicts.

Implications for Peace

In contrast to the voice for justice emphasising criminal accountability, there are persistent views expressed against or sceptical of war crimes prosecution, especially when the idea is raised while fighting is still going on and a peace agreement is yet to be sought. The 'peace versus justice' conundrum has been a topic of fierce debate and conveys ambiguous messages for the prospect of war crimes prosecution.

The negative impact on peace of a war crimes trial was intensively discussed in the case of the Yugoslav Wars. The ICTY was established in the midst of the conflict. It was seen as unrealistic to pursue prosecution and peace negotiations at the same time. The former might prolong the war by making alleged war criminals unwilling to stop fighting. Consequently, the ICTY was criticised as harmful to the peace.⁵⁶ The same kind of arguments persisted in cases that followed. When in 2009 the ICC indicted the then Sudanese president, Omar Hassan al-Bashir, for alleged war crimes and genocide in Darfur, the overriding concern raised was that the peace process would be hindered and peacekeeping operations on the ground would be distracted.⁵⁷ In the case of Libya's civil war in 2011, some thought the ICC's issue of an arrest warrant for President Gaddafi would hinder a ceasefire since negotiating his exile was considered key to securing the peace.

Concern was also raised in the case of Ukraine in March 2022, when US president Joe Biden condemned Russian leader Vladimir Putin by labelling him a 'war criminal'. Such a label was seen to have made it harder

56 Anthony D'Amato, 'Peace vs. Accountability in Bosnia', *American Journal of International Law* 88 (1994): 500; Anonymous, 'Human Rights in Peace Negotiations', *Human Rights Quarterly* 18 (1996): 258.

57 See Allard Duursma and Tanja Müller, 'The ICC Indictment against Al-Bashir and Its Repercussions for Peacekeeping and Humanitarian Operations in Darfur', *Third World Quarterly* 40 No 5 (2019): 890–907.

for the Biden administration to work with Russia towards a ceasefire. The BBC's Anthony Zurcher reported: 'Every concession or negotiated agreement, on whatever topic, will invite the rejoinder: How can you associate with a criminal?'⁵⁸ Indeed, moral talks do risk a 'boomerang effect': the moral standard used against the opponent will always come back to you and check your own deeds.

These concerns are valid as peace negotiations are traditionally promoted or accompanied by some kind of amnesty for past wrongdoings. Impunity is seen to be necessary to guarantee a stable and peaceful transition from war to peace.⁵⁹ What is more, those most responsible for war and war crimes tend to be those who are also in charge of negotiating the ceasefire. All in all, objections, especially from those who are involved in a peace process, together with difficult and complex processes of war crimes trials, make war crimes accusation rather ambiguous.

Implications for War Strategy

The pros and cons of war crimes trials, or peace versus justice debates, are a classic and crucial element when talking about war crimes. However, since the 1990s the war crimes discourse has become even more normative as it has come to centre on public disgust at war crimes, voices for justice, and thus strong accusations of impunity. 'War crimes give war a bad name.' This is much more so than in the past, and it strongly damages the legitimacy of war. In contemporary armed conflict placed under intense public scrutiny and attention, war crimes discourse, as James Gow argues, shapes people's perception and judgement of war: framing the legality and legitimacy of war.⁶⁰ It does so surprisingly effectively because images of war crimes are almost always very disturbing and stir up people's emotions. In the twenty-first century such images have come to be more easily, quickly, and globally shared due to the technological

58 'Ukraine Conflict: Biden Brands Putin a "War Criminal"', BBC News, 16 March 2022 [accessed 5 January 2022].

59 See Jack Snyder and Leslie Vinjamuri, 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice', *International Security* 28 № 3 (2003/04): 18.

60 See Gow, *War and War Crimes*, pp. 40–41.

revolutions, especially the role of social media. This has strategic connotations. Gow argues: ‘the perception of wrongdoing can fatally undermine a mission and result in failure’ because it crucially damages legitimacy.⁶¹ That is why the means as well as ends of war need to be seen to be right. It is here that talk of war crimes becomes a tool of war strategy, strongly influencing success and failure of military operations. From the strategic point of view, talk of war crimes has the potential to manoeuvre the situation in war in various ways. In other words, there is a strong relevance to strategic communications, defined as ‘the use of words, actions, images or symbols to influence the attitudes and opinions of target audiences to shape their behaviour in order to advance interests or policies, or to achieve objectives’.⁶² Resorting to the vocabulary of law and justice, direct target audiences here are inevitably the ‘liberal’ community; however, as shown below, illiberal actors do acknowledge the power of norms and thus can be impacted some way or other.

(1) Legitimation and Delegitimation

First, the strategic utility of war crimes discourse is legitimation and delegitimation. States can either legitimise their own conduct by claiming legality in their means and ends, or by delegitimising that of their opponents by accusing them of fighting the wrong war, and/or in the wrong manner. This can be seen in Ukraine but has been a common phenomenon since the Gulf War in 1991. Here, mechanisms of international criminal justice are seen as a powerful tool to delegitimise one’s enemy. Controversial self-referrals by the Democratic Republic of Congo, Uganda, and the Central African Republic in the early years of the ICC were based on such strategic calculations on the part of governments. All three of these governments were fighting civil wars, and expected the ICC to prosecute anti-government groups and label them war criminals. Their expectations were shattered when the ICC started

61 Ibid.

62 James Farwell, quoted in Chiyuki Aoi, ‘The Significance of Strategic Communications: Implications for the Free and Open Indo-Pacific Initiative’, *EU-Asia Project Policy Brief*, N° 2021/31 July 2021, p. 2.

to investigate war crimes allegedly conducted also by the government side. In Ukraine, too, war crimes prosecution is seen as a powerful tool ‘to label Putin’s war not just wrong but also criminal’.⁶³ Such a label in turn legitimises Ukraine’s fightback as well as European support for it. Here, legitimisation and delegitimation both embrace the same strategic goal. Furthermore, they frame the war itself. Oona Hathaway points out:

Zelensky and his team understood that to win the public support at home and abroad that Ukraine needs to win the war, ... [they] needed to show that the war was not just an assault on Ukraine but also an assault on every country’s right to sovereignty ... that Ukraine is not fighting only for its own survival but for the survival of the rules-based international order.⁶⁴

In addition, delegitimising the other side is a strategy to directly reduce public support for opponents. However, loss of public support is less damaging for autocratic and illiberal regimes and non-state actors like terrorist groups that care less about public support. This leads to asymmetry in complying with the law of war, regarded as a worrying aspect of contemporary warfare.⁶⁵ In the Balkans war the Serbs intentionally broke international laws and captured and used peacekeepers as human shields or conducted attacks from civilian areas, in order not only to deter NATO strikes but also to induce their unintended war crimes. Observing such phenomena, Charles Dunlap warned that what the American military experienced there, and will experience in future, is ‘lawfare’—‘the use of law as a weapon of war’. Dunlap argues:

There are many dimensions to lawfare, but the one ever more frequently embraced by U.S. opponents

63 Hathaway, ‘Russia’s Crime and Punishment’.

64 Ibid.

65 See International Committee of the Red Cross, ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts’, Document prepared by the International Committee of the Red Cross for the 30th International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 26–30 November 2007.

is a cynical manipulation of the rule of law and the humanitarian values it represents. Rather [than] seeking battlefield victories, *per se*, challengers try to destroy the *will* to fight by undermining the public support that is indispensable when democracies like the U.S. conduct military interventions. A principle [*sic*] way of bringing about that end is to make it appear that the U.S. is waging war in violation of the letter or spirit of LOAC [the law of armed conflicts].⁶⁶

Dunlap's 2001 paper highlighted the concept of lawfare which was widely spread afterwards and heavily used within the context of the American war on terror. Indeed, al-Qaeda in Afghanistan and ISIS in Iraq resorted to the same kind of 'lawfare'.

Although highly controversial because of the way it has been used and abused,⁶⁷ 'lawfare' describes well why talk around war crimes is an important component of contemporary warfighting. In parallel with the battlefield fight, belligerents also face a battle with legal discourse. As Gow argues: 'The competition for legitimacy is a competition for a dominant narrative,' because 'it is issues of lawfulness and ethics—right and wrong—that shape narratives of legitimacy'.⁶⁸

Legitimation and delegitimation through war crimes discourse have become the norm in contemporary armed conflicts. However, this may carry the risk of a backlash. Maltreating inmates in Abu Ghraib prison hurt the fragile legitimacy of the Iraq War because the US and the UK had been trying to legitimise the war on humanitarian and ethical grounds. Because of its moral and ethical message, war crimes discourse

66 Charles J. Dunlap, 'Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts Prepared for the Humanitarian Challenges', at Military Intervention Conference, Carr Center for Human Rights Policy, Kennedy School of Government, Harvard University, 29 November 2001, p. 4.

67 See David Luban, 'Lawfare and Legal Ethics in Guantánamo', *Stanford Law Review* 60 N° 6 (April 2008): 1981–2026.

68 Gow, *War and War Crimes*, p. 42.

does expect of those who resort to it the same level of ethical behaviour that they impose on opponents.

(2) Bargaining Chip for Peace Negotiations

The persistence of views opposing prosecuting war crimes during war can give the impression that war crimes accusation does not necessarily lead to actual prosecutions and trials. This creates some ambiguity in the discourse, which brings about opportunities to use war crimes prosecutions as a bargaining chip in peace negotiations. An example is to use a threat of indictment to pressure the opponent to accept the peace. In the Yugoslav Wars, bringing the tribunal into play as an explicit bargaining chip in the peace negotiations was suggested by some as a way to solve theoretically the dilemma of peace versus justice.⁶⁹

The fine balance between peace negotiations and war crimes prosecutions, or peace and justice, is a recurring theme and has prompted various speculations whenever the Security Council has referred situations to the ICC. Article 16 of the Rome Statute of the ICC is key, as it allows the Council to defer cases, in other words to suspend an investigation or prosecution by the Court for a renewable one-year period if the Court's work is deemed to be a threat to international peace and security. On referring the situation in Libya to the ICC in 2011, Security Council Resolution 1970 included a reference to Article 16.⁷⁰ Indeed, this was necessary for such a resolution to be adopted, to 'assuage the concerns of states that the ICC could complicate attempts to negotiate a political settlement to the conflict'.⁷¹ However, a reference to Article 16 led to speculation that the Security Council was using the ICC and 'the threat of punishment' as a tool for putting pressure on Gaddafi and

69 See D'Amato, 'Peace vs. Accountability in Bosnia', pp. 503–04.

70 UN Doc. S/RES/1970 (2011), 26 February 2011.

71 Mark Kersten, 'Between Justice and Politics: The ICC's Intervention in Libya', in *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, Christian De Vos, Sara Kendall, and Carsten Stahn (eds.) (Cambridge University Press, 2015), p. 461.

thus promoting negotiation on the ground.⁷² Mark Kersten points out that there was significant doublespeak by NATO countries, which were also intervening militarily in Libya: ‘They invoked and supported the ICC while exploring possible states for Gaddafi to permanently or temporarily evade prosecution.’⁷³ Indeed, it was pointed out that Western states were seeking out non-ICC member states as possible destinations for Gaddafi’s exile.

Whether prosecuting war crimes can be an effective negotiating tool has not been proven. However, at the least using justice as a tool for political negotiation is legally problematic once an arrest warrant has been issued. Above all, it is morally controversial and thus may not be seen as legitimate in the eyes of the global audience. It runs directly counter to the ICC’s role to fight against impunity, and may fuel the concern that the Security Council manipulates the ICC in the interests of great powers. In that sense, it may run the risk of delegitimising one’s own causes.

(3) A Cheaper Alternative to Military Intervention

When the ICTY and ICTR were established, prosecuting war crimes was seen as a cheaper alternative to costly military commitment. Many diplomats and international political theorists viewed the tribunals cynically as no more than a ‘fig leaf’ to cover up failure to take immediate and decisive action for atrocities in both regions.⁷⁴ The United States was especially reluctant to intervene militarily in the situations in Yugoslavia and Rwanda. According to Aryeh Neier, the ICTY was built in the vacuum between public pressure to intervene and state leaders’ reluctance.⁷⁵ On the establishment of the ICC, some raised concerns

72 David Bosco, ‘The Libya Resolution: Prosecution as Bargaining Chip?’, *Foreign Policy*, 27 February 2011.

73 Mark Kersten, ‘Between Justice and Politics’, p. 467.

74 David P. Forsythe, ‘International Criminal Courts: A Political View’, *Netherlands Quarterly of Human Rights* 15 (1997): 5–19.

75 Aryeh Neier, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice* (New York: Times Books, 1998), p. 112.

that states might resort to the ICC as a substitute for much-needed humanitarian intervention. Thomas Smith pointed out: 'By viably and visibly punishing the worst human rights criminals, the ICC may become a virtuous excuse for states to turn a blind eye to atrocities, a moral free ride on the coattails of humanitarian law.'⁷⁶ In the case of Darfur, the Security Council's referral was widely seen as 'a fig leaf for inaction' because the Council neither took vigorous action nor supported the actual work of the ICC.⁷⁷

As this article has pointed out, the level of intensity and speed of discourse and movement regarding war crimes prosecution in Ukraine are noteworthy. This reflects the development of humanitarian and human rights norms in the international community. At the same time, bearing in mind that US and European intervention in Ukraine is associated with the high risk of a Third World War, engaging in war crimes discourse and supporting war crimes prosecution are far cheaper and more viable options. What is more, they would rarely be criticised because of their strong normative stance which is shared by the international community.

From this perspective, US talk around war crimes and its stance towards war crimes prosecution require a nuanced analysis. The US is not an ICC member state and has adopted a confrontational stance to the ICC. However, in December 2022 Congress modified legal restrictions so that the US could assist the ICC's investigation related to the war in Ukraine. In February 2023 the US Department of State announced that 'Justice and human rights accountability are central pillars of the United States' policy on Russia's war of aggression against Ukraine, and the United States is focused on supporting those efforts most likely to bring perpetrators to justice.'⁷⁸ The Biden administration has actively engaged in talks and movement towards war crimes prosecution. Still, the administration itself is not monolithic. It was reported just before

76 Thomas W. Smith, 'Moral Hazard and Humanitarian Law: The International Criminal Court and the Limits of Legalism', *International Politics*, 39 (2002): 178.

77 Benjamin N. Schiff, *Building the International Criminal Court* (Cambridge University Press, 2008), p. 232.

78 US Department of State, Office of the Spokesperson, [*Supporting Justice and Accountability in Ukraine*](#), 18 February 2023 [accessed 1 March 2023].

the ICC issued arrest warrants against President Putin that the US Department of Defense is blocking the government from sharing evidence with the ICC ‘because [it] fear[s] setting a precedent that might help pave the way for it to prosecute Americans.’⁷⁹ This has been the long-standing US stance towards the ICC, and to what extent the US will actually collaborate with the ICC to prosecute Russian war criminals remains uncertain. Meanwhile, the US will surely continue to engage in war crimes discourse, showing both domestic audiences and the international community that it is committed to supporting Ukraine, morally, politically, and financially.

Conclusion

Along with fierce fighting on the ground, the war in Ukraine has been fought also on the platform of a war crimes discourse which is followed often by investigations and occasionally by actual prosecution. This phenomenon is a result of the gradual development of international humanitarian and human rights laws and norms which provided the international community with a common vocabulary to talk about war morality. There is also the increasing role of the media and NGOs which have used and further spread such language. War crimes discourse does reflect an evolving trend of contemporary armed conflicts which are now put under intense public scrutiny and consistently judged legally, morally, and politically. It is here that war crimes discourse directly connects to the issue of legitimacy, which is key for success in war. Accordingly, war crimes discourse has come to be used by various actors with different strategic objectives in mind. On the one hand, there are voices that war crimes have to be investigated and those responsible should be prosecuted and punished. On the other, there are honest concerns that prosecuting war crimes while fighting is going on may hinder a ceasefire, and thus peace. These plural and conflicting voices make the prospect of actual prosecutions and trials uncertain. However, such uncertainty creates a space for war crimes discourse to be used in order to pursue one’s own

79 Charlie Savage, ‘Pentagon Blocks Sharing Evidence of Possible Russian War Crimes with Hague Court’, *New York Times*, 8 March 2023 [accessed 24 March 2023].

strategic interest. War crimes discourse is a powerful tool to legitimise one's own means and ends, as well as to delegitimise one's opponent's. Uncertainty in war crimes prosecution can be used as a bargaining chip for negotiating peace. And support for prosecution can be a cheaper and viable substitute for much costly military intervention.

The tone of war crimes discourse is now even more normative than in the past, centred on public interest in humanising war and pursuing justice. Accordingly, it may not always be a good idea to use discourse in pragmatic and strategic ways. Indeed, using the prosecution of war crimes as a bargaining chip will surely raise legal as well as moral questions and risk a backlash. Yet, international criminal justice by its nature is accompanied by ambiguity brought about by the dynamism between politics and law, peace and justice. This allows each actor to use, abuse, and manipulate the talk of war crimes in order to win not only the war but also the peace. The ongoing war in Ukraine shows that stakeholders are all too aware of the crucial role war crimes discourse plays.

Bibliography

Anonymous, 'Human Rights in Peace Negotiations', *Human Rights Quarterly* 18 (1996).

Aoi, Chiyuki, 'The Significance of Strategic Communications: Implications for the Free and Open Indo-Pacific Initiative', *EU-Asia Project Policy Brief*, N° 2021/31 July 2021.

Bosco, David, 'The Libya Resolution: Prosecution as Bargaining Chip?', *Foreign Policy*, 27 February 2011.

Cassese, Antonio, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law', *European Journal of International Law* 9 N° 1 (1998).

D'Amato, A., 'Peace vs. Accountability in Bosnia', *American Journal of International Law* 88 (1994): 500-06.

Dunlap, Charles J., 'Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts Prepared for the Humanitarian Challenges', at Military Intervention Conference, Carr Center for Human Rights Policy, Kennedy School of Government, Harvard University, 29 November 2001.

Duursma, Allard and Tanja Müller, 'The ICC Indictment against al-Bashir and Its Repercussions for Peacekeeping and Humanitarian Operations in Darfur', *Third World Quarterly* 40 N° 5 (2019): 890-907.

Eichensehr, Kristen E. (ed.), 'Contemporary Practice of the United States Relating to International Law: International Organizations, International Institutions Mobilize to Impose Accountability on Russia and Individual Perpetrators of War Crimes and Other Abuses', *American Journal of International Law* 116 N° 3 (2022).

Forsythe, D.P., 'International Criminal Courts: A Political View', *Netherlands Quarterly of Human Rights* 15 (1997).

Futamura, Madoka, *War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg Legacy* (Routledge, 2008).

- Goldstone, Richard J., *Prosecuting War Criminals*, Occasional Paper N° 10 (London: David Davies Memorial Institute of International Studies, 1996).
- Gow, James, *War and War Crimes: The Military, Legitimacy and Success in Armed Conflict* (Hurst, 2013).
- Gramer, Robbie and Amy MacKinnon, '[Ukraine's "Nuremberg Moment" amid Flood of Alleged Russian War Crimes](#)', *Foreign Policy*, 10 June 2022 [accessed 22 February 2023].
- Gutman, Roy, *A Witness to Genocide: The 1993 Pulitzer Prize-Winning Dispatches on the 'Ethnic Cleansing' of Bosnia* (Shaftesbury: Element Books, 1993).
- Hathaway, Oona A., '[Russia's Crime and Punishment: How to Prosecute the Illegal War in Ukraine](#)', *Foreign Affairs*, 17 January 2023.
- Human Rights Watch, *War Crimes in Bosnia-Herzegovina*, Helsinki Watch Report (New York: Human Rights Watch, 1992).
- International Committee of the Red Cross, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts', Document prepared by the International Committee of the Red Cross for the 30th International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 26–30 November 2007.
- Kennedy, David, *Of War and Law* (Princeton University, 2007).
- Kersten, Mark, 'Between Justice and Politics: The ICC's Intervention in Libya', in *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, Christian De Vos, Sara Kendall, and Carsten Stahn (eds.), (Cambridge University Press, 2015).
- Lahmann, Henning, 'Ukraine, Open-Source Investigations, and the Future of International Legal Discourse', *American Journal of International Law* 116 N° 4 (2022).
- Luban, David, 'Lawfare and Legal Ethics in Guantánamo', *Stanford Law Review* 60 N° 6 (April 2008): 1981–2026.
- Neier, Aryeh, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice* (New York: Times Books, 1998).
- Paskins, Barrie, 'Prohibitions, Restraints and Scientists', in *Explorations in Ethics and International Relations: Essays in Honour of Sydney D. Bailey*, N.A. Sims (ed.), (London: Croom Helm, 1981).
- Schiff, Benjamin N., *Building the International Criminal Court* (Cambridge University Press, 2008).
- Smith, Thomas W., 'Moral Hazard and Humanitarian Law: The International Criminal Court and the Limits of Legalism', *International Politics* 39 (2002): 175–92.
- Snyder, Jack and Leslie Vinjamuri, 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice', *International Security* 28 N° 3 (2003/04).
- Taylor, Telford, *Nuremberg and Vietnam: An American Tragedy* (New York: Bantam Books, 1971).
- Teitel, Ruti G., *Transitional Justice* (New York: Oxford University Press, 2000).
- Vasiliev, Sergey, '[The Reckoning for War Crimes in Ukraine Has Begun](#)', *Foreign Policy*, 17 June 2022.