

The U.S. Should Assist Ukraine in Its Efforts to Prosecute Russian War Crimes

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KEY TAKEAWAYS

Despite its established skepticism with respect to the ICC, the U.S. should assist Ukraine in view of the mounting evidence of war crimes committed by Russia.

Any assistance provided to Ukraine in connection with the prosecution of Russian war crimes must be balanced against longstanding U.S. policy toward the ICC.

The Biden Administration should not abandon principle in its effort to aid Ukraine in the prosecution of war crimes committed by Russia.

According to recent press reports, the Biden Administration is “vigorously debating how much the United States can or should assist an investigation into Russian atrocities in Ukraine by the International Criminal Court.”¹ National Security Adviser Jake Sullivan has said that the crimes committed by Russian forces against Ukrainian civilians were “planned” and that the atrocities in Ukraine lie “at the feet of the Kremlin” and “at the feet of the Russian president.”² President Biden himself has referred to Russian President Vladimir Putin as a “war criminal” who should face a “war crime trial.”³

Ukraine has made clear that it hopes to pursue such war crimes trials at the International Criminal Court (ICC) in The Hague. Ukraine Prosecutor General Iryna Venediktova has asked for international help in gathering evidence of Russia’s war crimes.

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The Biden Administration should heed Ukraine’s call for assistance, but it should also acknowledge and act consistently with longstanding U.S. policy under multiple Administrations to oppose ICC assertions of jurisdiction over non-parties to the Rome Statute, the court’s founding treaty.⁴

Ukraine, Russia, and the ICC

Neither Ukraine nor Russia is party to the Rome Statute of the International Criminal Court. However, Ukraine formally accepted ICC jurisdiction in its territory after the Russian invasion of Crimea and has pledged to cooperate with the ICC for an indefinite duration. Ukraine’s first acceptance was time limited from November 21, 2013, to February 22, 2014.⁵ Its second acceptance of ICC jurisdiction was open-ended and requested for “the purpose of identifying, prosecuting and judging the perpetrators and accomplices of acts committed in the territory of Ukraine since 20 February 2014.”⁶

After a preliminary investigation, ICC Prosecutor Karim Khan announced in February 2022 that he would seek to open a full investigation, stating that “there is a reasonable basis to believe that both alleged war crimes and crimes against humanity have been committed in Ukraine.”⁷ If the court approves the investigation, its scope could encompass alleged crimes in Ukrainian territory—whether committed by Russia, Ukraine, or another party—dating back to the original request.⁸

There is considerable evidence that crimes have been committed by Russian forces in Ukraine. The U.S. has an interest in ensuring that those responsible are held to account. The Biden Administration should therefore assist Ukraine in collecting and preserving evidence of Russia’s crimes.

The U.S., however, must do so in a manner consistent with its views regarding the scope of the Rome Statute. The long-held bipartisan position of the U.S. is that the ICC does not have jurisdiction over any country unless that country has ratified the Rome Statute, has voluntarily submitted to the ICC’s jurisdiction, or is referred to the court through a U.N. Security Council resolution. The U.S. has maintained this position since the 1990s, when the Rome Statute was negotiated.

The U.S. adopted this position for several reasons.⁹ One prominent concern was that the ICC might pursue politicized investigations. This concern has been amply justified by the ICC’s investigations into alleged U.S. war crimes in Afghanistan and its investigation into Israel’s alleged war crimes in the Palestinian territories. In both instances, the ICC asserted jurisdiction over non-parties. Worse, in both instances, the court ignored

the complementarity standard outlined in the Rome Statute under which the ICC is supposed to be a court of last resort and yield to national authorities.¹⁰ Only if national authorities are unable or unwilling to carry out fair proceedings should the ICC assert jurisdiction. Both the U.S. and Israel thoroughly investigate all allegations using independent mechanisms and have demonstrated their willingness to hold individuals accountable if crimes are proved.¹¹

Nonetheless, the U.S. has taken actions in the past to support various ICC prosecutions, including abstaining on a U.N. Security Council referral of the situation in Sudan to the ICC and voting in favor of a resolution referring the situation in Libya to the ICC. In addition, the U.S. has turned individuals sought by the ICC over to the court and allowed the State Department's Rewards for Justice Program to be used for information leading to the arrest of individuals sought by the ICC. These efforts are well-intentioned and consistent with America's desire to assist ICC efforts "to bring to justice...foreign nationals accused of genocide, war crimes and crimes against humanity."¹²

Notably, these actions preceded the 2017 ICC decision to open an investigation into alleged crimes against humanity and war crimes committed in Afghanistan, including allegations against Americans, which led the U.S. to reassess its relationship with the court. The prosecutor's 2021 decision to "deprioritize" alleged crimes by U.S. forces in its investigation does not erase the potential for similar situations in the future.¹³

The Biden Administration should not abandon principle in its effort to aid Ukraine in the prosecution of heinous war crimes committed by Russia. Unlike the U.S. and Israel, there is very little chance that Russia will engage in a good-faith effort to investigate crimes allegedly committed by its forces in Ukraine and prosecute those responsible. Thus, if justice is to be had, it falls to Ukraine to pursue it. As is its sovereign right, Ukraine has accepted the jurisdiction of the ICC. The U.S. need not endorse ICC jurisdiction over Russia in supporting Ukrainian efforts to ensure justice and accountability. The U.S. should collect and preserve evidence of crimes and share that evidence with Ukraine. It is up to Ukraine to choose the mechanism of justice, whether it is domestic courts, the ICC, or some other arrangement.

What the U.S. Should Do

Any assistance provided to Ukraine in connection with the prosecution of Russian war crimes must be balanced against longstanding U.S. policy towards the ICC. With this caveat in mind, the U.S. should:

- **Assist Ukraine, not the ICC.** The Biden Administration must walk a fine line in providing assistance to Ukraine without giving support to an ICC prosecution against a non-party to the Rome Statute. Although some will consider that fine line a distinction without a difference, the U.S. must maintain its principled objections to ICC assertions of jurisdiction over non-parties such as itself and Israel. This may be achieved by providing intelligence, information, and other support directly to Ukraine through its prosecutor general. Ukraine may make its own sovereign decisions regarding how best to utilize U.S. information, whether in its own domestic courts; a “hybrid” tribunal (a court of mixed composition and jurisdiction, encompassing both national and international aspects and usually operating within the jurisdiction where the crimes occurred); or the ICC.
- **Reiterate that the U.S. will not ratify the Rome Statute and rejects ICC claims of jurisdiction over U.S. persons.** Providing information or intelligence for an ICC investigation of Russian war crimes could give the impression that the U.S. recognizes and consents to the court’s jurisdiction, the negative consequences of which could include increasing the legal vulnerability of U.S. persons in the future and undermining the principle of state consent in international law. As part of any assistance to Ukraine to prosecute war crimes against Russia, the Biden Administration should publicly reassert that the U.S. will not seek to ratify the Rome Statute, that it supports the Bush Administration’s “un-signing” of the Rome Statute, and that the U.S. will not recognize ICC claims of jurisdiction over U.S. persons.

Conclusion

Ideally, Ukraine (with the assistance of the U.S. and other allies) would bring war crimes cases in its own courts against Russia once current hostilities have ceased. Such an exercise of sovereignty by Ukrainians on Ukrainian soil carries more credibility than an international tribunal to which Russia is not a party. However, Ukraine has indicated through its acceptance of ICC jurisdiction that it believes the ICC will be more effective in holding Russia accountable. This is debatable, given the ICC’s dubious record, but it is also understandable.¹⁴ Russia is a powerful nation and has demonstrated disregard for Ukrainian sovereignty. Ukraine obviously believes that Russia will have a harder time dismissing the International Criminal Court than it would have dismissing Ukrainian courts.

Despite its established skepticism with respect to the ICC, the U.S. should assist Ukraine in view of the mounting evidence of shocking war crimes committed by Russia. By providing aid and intelligence directly to Ukraine, the Biden Administration would demonstrate its commitment to the rule of law and international security while remaining consistent with the U.S. position on the ICC.

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Endnotes

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4. International Criminal Court, *Rome Statute of the International Criminal Court*, <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf> (accessed April 22, 2022).
5. Note from Embassy of Ukraine to Registrar of the International Criminal Court, April 9, 2014, <https://www.icc-cpi.int/sites/default/files/itemsDocuments/997/declarationRecognitionJurisdiction09-04-2014.pdf> (accessed April 21, 2022).
6. Letter from Pavlo Klimkin, Minister of Foreign Affairs of Ukraine, to Herman von Hebel, Registrar, International Criminal Court, September 8, 2015, https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf (accessed April 21, 2022).
7. International Criminal Court, Office of the Prosecutor, "Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: 'I Have Decided to Proceed with Opening an Investigation.'" February 28, 2022, <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening> (accessed April 21, 2022).
8. As noted by the ICC prosecutor, Karim A.A. Khan, "The next step is to proceed with the process of seeking and obtaining authorisation from the Pre-Trial Chamber of the Court to open an investigation. An alternative route set out in the Statute that could further expedite matters would be for an ICC State Party to refer the situation to my Office, which would allow us to actively and immediately proceed with the Office's independent and objective investigations." Ibid.
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13. Anthony Deutsch and Stephanie van den Berg, "War Crimes Prosecutor Would Not Focus on U.S. Forces in New Afghanistan Probe," Reuters, September 27, 2021, <https://www.reuters.com/world/asia-pacific/icc-prosecutor-seeks-authorisation-resume-afghanistan-war-crimes-investigation-2021-09-27/> (accessed April 21, 2022).
14. The ICC has been operating since 2002 and has only 10 convictions on its record. Many individuals evade ICC warrants for years. This is particularly the case for government officials. Former Sudanese President Omar Hassan Ahmad Al Bashir visited many ICC states parties while sought by the court but was not arrested. In 2016, the ICC opened an investigation into alleged war crimes and crimes against humanity committed by Russian forces in Georgia. Those crimes were committed in 2008—hardly a speedy action by the ICC. Worse, the court has yet to open a case or issue a single arrest warrant in the six years since opening the Georgia investigation. See International Criminal Court, "About the Court," <https://www.icc-cpi.int/about/the-court> (accessed April 21, 2022), and International Criminal Court, "Situation in Georgia," <https://www.icc-cpi.int/georgia> (accessed April 21, 2022).