

Україна 2022

There are wars that have barely begun militarily when they already appear lost politically. By deciding to viciously attack at the heart of Ukraine, Vladimir Putin has conflated Russia's historic geopolitical concerns with his grotesque hubris concerning his place in Russian history. Nothing is definitively written, of course. Between black swans, serendipity, tactical moves, and strategic redefinitions, the time of the final judgment of "Operation Z" has not yet come. But winning "hearts and minds" in the asymmetric and irregular phase that this conflict will inevitably experience will not be easy. The United States of America [hereinafter U.S.A.] know this from their experience in Afghanistan, the longest war in its history. And everyone remembers how it ended. In the immediate future, the path of total warfare chosen by Russia in Ukraine weakens the internal authority of the Russian President, compromises the country's economy, wipes out years of investment in soft power, brings friends such as Venezuela closer to Washington, and may even unsettle the objective alliance with China. It also rehabilitates the Ukrainian President's reputation, whose virtue had been questioned and restores the backbone of yesterday's world security alliances - like the North Atlantic Treaty Organization [N.A.T.O.], which no one can say is brain-dead anymore, and the list goes on.

"Winter is coming!". Indeed, Putin's Russia has crystallized and mobilized the just resolve of the West. A resolve that had been confused and confounded, especially in the Trump years, but that has emerged invigorated and that contributes to the formation, albeit imperfectly, of a "liberal minilateralism" in combat. Who a few weeks ago still believed in a collective impetus likely to (re)launch the defence of Europe? Who foresaw the European Union ever activating the temporary protection mechanism that it had refused to grant to Syrian refugees? Even multilateralism seems partly reinvigorated. Who would have thought, for example, that the General Assembly would once again play a leading role, as in the heyday of the Cold War, by reactivating the "Acheson" resolution? Who would have imagined that so many international organizations, in fields as varied as sports, human rights, communications, and economic aid, would emerge from their lethargy to adopt disruptive measures against Putin's regime?



One is reminded of the famous warning from the Soviet diplomat Alexander Arbatov at the time of the fall of the Berlin Wall: “We are going to give you the worst of services, we are going to deprive you of an enemy!”. By renewing the Russian threat to Europe, the master of the Kremlin now personifies an antagonist that dwarfs personal and parochial national considerations and has left the free riders of collective security exposed.

There is no need to call for the military involvement of any coalition. At this stage, intervention is neither seriously conceivable nor desirable. The legitimacy of a major war against Russia cannot be decided in the absolutes of any deontological approach. Parallels with the first Gulf War, and its ideal of a “new world order”, do not really hold water. The parties are not the same, nor are their interests. Any military intervention requires putting one’s emotions at a distance, not allowing oneself to be carried away by passion, and involves analyzing *in concreto* the necessities, the possibilities and the probable effects of the intervention. In keeping with an Aronian vision, a consequentialist type of ethics must be imposed, a morality of responsibility. Of course, it cannot exclude the use of force. Indeed, some resolutely pacifist postures turn out to provoke rather than mitigate conflict. But the circumstances of each case must rule and that includes an understanding of how the issues are perceived from all sides. Ukraine has a profoundly different meaning for Russia than it has for Europe or for the U.S.A. Nor can one ignore the double dealing of some or the shadow cast of nuclear weapons. Which planes for a suicide operation to save Kiev? Who to compensate for Washington’s leading from behind? Finally, the risk that would be taken in terms of storytelling should not be overlooked, with Vladimir Putin finding the expected pretext to break his current impasse and play the “rally around the flag” narrative against what would be presented as a new Barbarossa operation. All in all, the situation should still be considered as one of restraint and certain measures that are too direct such as the establishment of a no-fly zone or the recruitment to Ukraine of various militias should be ruled out.

Does this mean that we should just let things happen? This could not be an option regarding what is currently at stake. So how can we win the war without waging war? There is in fact a whole range of possible measures between belligerence and indifference. In other words, it is necessary to defeat Russia without giving it cause to go to extremes. At the military level, it means exploiting the grey areas permitted by the status of “qualified neutrality” in public international law; by facilitating the access of the Ukrainian resistance to various weapons (portable air defence missile systems or combat drones), by sharing all human and electronic intelligence with the regime’s regular forces, by supporting cyber operations aimed at jamming the adversary’s communications, etc. These measures are not easy to implement, and they are not

without risk. Many old Cold War codes need to be redefined due to the significant evolution, and sometimes even replacement of the instruments of arms control used during that era. Similarly, the grammar of the Europe/Russia opposition needs to be reinvented. At the political level, required action include material support to a Ukrainian Government in exile, weakening the adversary's ability to rely on public opinion support as much as possible, and creative counter measures that include the right balance of effectiveness, efficiency, and acceptability. No nation has ever been so marginalized because of a war it has started. Who would have imagined this possible to Putin and his entourage? Nikita Khrushchev was ousted following the Cuban crisis, and it is hard to see Vladimir Putin resisting the political impact of this disastrous war until 2036 when his term in office is supposed to be up. Hopefully, he will choose to save face, and possibly his head, much before that, as diplomatic avenues will open. In this respect, the Franco-German alliance that has been re- invigorated by Moscow should not spare its efforts, in seizing even the slightest opportunity. Peace must not be abandoned.

Last but not least: accountability. One has to take international criminal justice seriously – both for what it promises on the judicial level and for what it brings on the political level. In the long run, this simply means that Vladimir Putin and Russia's main political and military leaders would be tried for their core international crimes committed in Ukraine. Impossible today, but not tomorrow. The trials of Charles Taylor, Slobodan Milosevic, Hissene Habré stand as precedents. *Hora fugit stat jus*. In fact, effects of international criminal justice can be heard, even before trials are opened. The impact of naming and shaming associated with an accusation of crimes of aggression, war crimes, crimes against humanity, crimes of genocide is considerable. As such it serves as an additional tool in strategic communication, that leads to further sanctions or restrictions, blacklisting in international relations, and generally representing an additional cost in the conduct of a criminal policy. The long-term exercise of international criminal justice will of course have to overcome a number of obstacles linked to the collection of evidence (even if from this point of view, original mechanisms have already been set up), the cooperation of Russia or Belarus, and the functional or personal immunities recognized in international law. But these entail different perspectives, whether local, specific, or universal.

At the local level, it is above all up to Ukraine to deal with the crimes committed against it. At the beginning of 2019, a national court found former president Viktor Yanukovich guilty due to his repression of the Maidan protests and his support for the Russian intervention in Crimea and Donbass. He was tried *in absentia* and sentenced to thirteen years in prison for treason and crimes against peace. Though instructive, this is

a limited case, and it remains to be seen whether the local authorities will have sufficient means and support to initiate all the necessary proceedings that result from the current war. A situation made more doubtful given the likely collapse of the regime. In the event that the Ukrainian courts are unable or unwilling to deal with the facts at issue today, other national courts could pursue criminals on the basis of universal jurisdiction. This jurisdiction, when provided for in domestic law, authorizes the prosecution of a person solely on the basis of the offence that he or she might have committed elsewhere. Universal jurisdiction remains optional in cases of genocide, crimes against humanity, or serious violations of international humanitarian law. But it is increasingly being used. However, national systems vary in the preconditions for the exercise of this jurisdiction by their criminal courts. Some states, such as Germany, have a relatively open regime for the prosecution of persons accused of crimes under international law - and in particular crimes that may fall within the jurisdiction of the International Criminal Court. This has been seen recently in the trials of Syrian nationals. Other states, such as France, appear to be more cautious and still integrate a number of safeguards (double criminality of the acts in question, “habitual residence” on the territory, for example). Nevertheless, the whole system may prove sufficiently threatening so that leaders who know they might be prosecuted will considerably reduce their travel abroad. Germany, Spain, and Poland have already announced that they are opening investigations and will be able to draw on the mass of refugees in Europe to gather evidence.

Secondly, there is nothing to prevent goodwill from creating a hybrid court for Ukraine. This term is traditionally used to describe any court created with the agreement of the State primarily concerned and whose statutes combine international and national elements in terms of the applicable procedure, the definition of the crimes that fall within their jurisdiction, the composition of the prosecuting or judging bodies, and the source of their funding. The ten models created so far (between 1999 and 2015) have little in common. But some, such as the Special Court for Sierra Leone, the Extraordinary African Chambers, or the Extraordinary Chambers in the Courts of Cambodia, have led to the conviction of former senior officials, if not leaders. And the last two hybrid courts that have been established, i.e., the Special Criminal Court in the Central African Republic and the Kosovo Specialist Chambers, appear to be very active. However, no new *ad hoc* tribunals have been set up in the last seven years, despite several proposals to do so in Liberia, Sri Lanka, or Syria. Today, the Ukrainian authorities themselves are calling for the establishment of such a court to prosecute the Russian leadership for the crime of aggression. This is necessary because the International Criminal Court has no jurisdiction there, since the Court can only deal with acts of

aggression committed between States parties to the Statute that have ratified the amendments relating to the crime of aggression (some forty States are in this situation, but neither Ukraine nor Russia). Many colleagues, around Philippe Sands, also supported this request. This could be an *ad hoc* tribunal established by an international treaty or a specialized domestic court sponsored by an international organization. Such a creation would undeniably send a strong message, but it would not be without practical obstacles (dealing with an ongoing conflict, obtaining and preserving evidence, secure funding, getting suspects, etc.). In addition, there is concern that creating an unprecedented structure, aimed above all at condemning the aggression of Ukraine, would inevitably re-launch accusations of “double standards”. No effort was ever seriously envisaged to hold George W. Bush and Tony Blair accountable for the aggression in Iraq nearly twenty years ago. Yet their successors - the same ones who argued for the International Criminal Court’s jurisdiction over the crime of aggression to be as restrictive as possible - would now make an example of Vladimir Putin?

Finally, at the universal level, neither Russia nor Ukraine are parties to the Rome Statute establishing the International Criminal Court (1998, entered into force in 2002). Nevertheless, as early as April 2014, a preliminary examination in the context of the situation in Ukraine was made public. Based on a provision of the Statute which allows a third State to consent to the exercise of jurisdiction by the Court in a situation that concerns it, it has allowed the Office to study for six years the numerous communications received on crimes committed in this situation. A first progress report by the Office (2016), moreover, found “an ongoing state of occupation” in Crimea and affirmed the existence of “an international armed conflict” in the context of hostilities in Eastern Ukraine since 14 July 2014 at the latest, in parallel with the non-international armed conflict. This was already a major setback for Moscow, which saw its involvement confirmed, particularly in the Donbass, and its narrative and strategy of “hybrid” warfare disavowed. The assertion that Russia controls the groups operating in Eastern Ukraine is also likely to have implications for international human rights law, and thus echo the procedures opened before the European Court of Human Rights. Russia’s reaction was all the stronger. It joined the very closed circle of States (United States, Israel, and Sudan) that chose to “unsign” the Rome Statute in order to mark their opposition to the Prosecutor’s strategy. This reaction seemed to paralyze the Court for a while. It was not until late 2020 that the Prosecutor finally announced the conclusion of the preliminary examination of the situation in Ukraine and affirmed the existence of a reasonable basis to believe that war crimes and crimes against humanity had been committed. However, an investigation was not immediately opened.

The Winter 2022 aggression eventually served as a catalyst. On February 28, the Court's new Prosecutor, Karim Khan of Britain, publicly asked the community of parties to the Rome Statute to agree to a formal referral of the situation in Ukraine, which would allow his Office to gain a few months without the need for authorization from the Pre-Trial Chamber. Lithuania promptly responded to this offer, followed by forty other parties (including the entire European Union). On March 2, the Prosecutor officially announced the opening of an investigation into crimes committed in Ukraine since 21 November 2013 (the start of the pro-European protests in Kyiv). Various arrest warrants could then quickly be issued and the parallel request for the first warrants against South Ossetian officials in the situation in Georgia under investigation since 2016 sounds like a first warning. It remains to be seen what resources the Court will actually be able to mobilize to make progress on this situation, as the "serious financial constraints" affecting this international organization does not allow it to open new cases without this being to the detriment of others.

What about criminal responsibility for Vladimir Putin and his highest military commanders within his first circle (including but not limited to Sergei Lavrov, the eternal Minister of Foreign Affairs, Sergei Sheygou, Minister of Defence, Valery Geryasimov, Chief of Staff) for the crimes committed today in Ukraine? The information currently available allows us to envisage the existence of facts constituting war crimes or even crimes against humanity, as a result of attacks intentionally directed against civilians who are not participating in the hostilities or due to the use of weapons and methods of warfare causing unnecessary harm and striking indiscriminately. But, and this is also the advantage of the latter perspective in terms of the perception of justice at work, International Criminal Court's jurisdiction is not one-sided but *in rem*. All those who order or commit crimes under international law are liable to be targeted, regardless of their nationality or which side they are on. Every prisoner has a right to respect and not to be used as a strategic tool. And the use of human shields is expressly prohibited in international armed conflicts. This is not a question of equivalence at all costs. But, without balance, the sword of Justice would never get the authority needed to acquire the deterrence force that international criminal justice still lacks. It is to be hoped, that this other revolution will also emerge from the chaos in Ukraine.

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