

THE GOOD, THE BAD & THE UGLY...

PROSECUTIONS IN UKRAINE



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NEW reports indicate that three more Britons, John Harding, Andrew Hill and Dylan Healy, are being tried as mercenaries by an internationally unrecognised tribunal in rebel-controlled Donetsk, Ukraine. This follows news in June that Britons Aiden Aslin and Shaun Pinner were convicted and sentenced to death, alongside Moroccan Brahim Sauddun, on identical charges.

The prosecutions raise several related questions. What is a mercenary and how do you prove someone is a mercenary? Should Aslin, Pinner, Sauddun, Hill and Healy be treated as prisoners of war (POWs) instead? When are prosecutions for war-time activities appropriate and legally required? Finally, can this rebel-established tribunal really prosecute Britons for participating in the war? In this report, I will explore each of these questions in turn and consider what the situation in Ukraine

should tell us about the future of justice in war. The answer to many of these questions, however, turn on how we define the conflict between the Ukrainian government and the so-called 'Donetsk People's Republic.'

The prosecutions by the Donetsk People's Republic are so concerning that barrister Sadaka Kadri has warned that they could undermine the entire system of international justice. While the prosecutions of Aslin, Pinner, Sauddun, Hill and Healy are grave, I also explain in this piece that we are seeing positive developments for international justice in Ukraine as well. As I conclude here, what we are seeing in Ukraine should strengthen international commitment to justice rather than undermine it.

DEFINING THE CONFLICT

The types of protections available to people who are fighting in an armed conflict depend on the

nature of that conflict.

In an international armed conflict – a conflict between two states, like Russia and Ukraine – members of the states' militaries who are captured by the opposing side are entitled to protection as POWs. They cannot be prosecuted for participating in the conflict, only for breaching the laws of armed conflict (i.e., committing war crimes). They are protected from torture and inhuman treatment, and enjoy a number of other rights, like the right to communicate with their family and receive cards and letters. Concern over the protection of POWs from unjust or retaliatory treatment prompted the drafters of the Third Geneva Convention to include an article (art. 7) to clarify that POWs cannot renounce their rights.

In a non-international conflict – a conflict between a state and a non-state entity, like the conflict between the Ukrainian government and the 'Donetsk People's Republic' – individuals who participate in the conflict

are not protected as POWs under international law. The asymmetrical nature of power in a non-international armed conflict also leads to asymmetrical protections in international law. The rights owed to members of the state's military are (principally) defined as a matter of national law (although they will still be bound by the laws of armed conflict and human rights law). Similarly, states are allowed to adopt laws prohibiting insurrection or violence against the state. This means individuals captured by the state can be tried and punished for their participation in the armed conflict. They do, however, enjoy the protections owed to civilians who directly participate in hostilities. As such, they can be prosecuted for violations of the laws of armed conflict or of domestic law – including for fighting in the conflict – but they are owed central protections around their treatment in the trial: they [cannot be tortured or subjected to inhuman treatment](#); they are entitled to a [fair and independent trial](#); and, they [cannot be prosecuted](#) for conduct that was lawful at the time they undertook that action.

Scholars are now debating whether non-state armed groups can also prosecute individuals, but the traditional (and still dominant) view is that these non-state armed groups do not have the legitimacy to pass or enforce laws. I'll return to that issue shortly.

It is not uncommon to have multiple armed conflicts, including multiple types of armed conflicts, in a single territory at a single time. For example, in 2001 when the United States was fighting against both the Taliban government of Afghanistan and al Qaeda, the US was simultaneously involved in two armed conflicts: an international armed conflict with the Taliban, and a non-international armed



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conflict with al Qaeda. The rights owed by the United States differed between the two types of actors: Taliban soldiers were owed POW status; al Qaeda fighters were not.

It was Russia that first captured Aslin, Pinner, and Sauddun. As such, these three (at least) are entitled to POW status and cannot be prosecuted by anyone for merely participating in the hostilities. Under the Third Geneva Conventions, Russia is also obligated to not transfer the POWs to a third party without guarantees that the POWs will be treated appropriately. By turning soldiers over to the Donetsk People's Republic, Russia breached its obligations. This is why the European Court of Human Rights [has issued](#) preliminary orders against Russia to ensure Aslin, Pinner, and Sauddun are not executed; this is Russia's responsibility, not just the responsibility of Donetsk People's Republic. But, even if the three had been captured directly by the Donetsk People's Republic, their convictions as

mercenaries are inappropriate under international law.

MERCENARIES

While POWs cannot be prosecuted for participating in a conflict, mercenaries can be. But, [the definition of a mercenary](#) is quite narrow under international law. The person must be:

- specifically recruited to fight in an armed conflict; and
- is motivated to do so 'essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess' of that paid to similarly ranked or responsible members of the state's armed forces.

They must not be:

- a national or resident of a party to the conflict;
- a member of the armed forces of a party to the conflict;
- sent by another state as part of their official duties in that state's armed forces.

A person can also be a mercenary if they are involved in the

overthrow of a government or undermining the territorial integrity of a state, with similar tests around motivation, nationality or residence, and status on official duty.

The requirement to be 'motivated... by the desire for private personal gain' is generally the biggest hurdle to prosecuting someone for being a mercenary. Receiving the payment alone is not sufficient; you need evidence that the payment is what personally motivated the person to participate in the hostilities. If the person is motivated by any other purpose – family relations, a belief in the purpose of the conflict, a desire to see another part of the world, or even a sense of boredom in their life – they are not a mercenary.

In the cases of Aslin, Pinner, and Sauddun, however, we do not even need to get to their motivation. According to the European Court of Human Rights, [Sauddun](#) moved to Ukraine in 2019 and was living there when the conflict broke out.



People who are resident in the territory of a state party are not mercenaries under international law. [Aslin and Pinner](#), meanwhile, both joined the Ukrainian armed forces in 2018, are married or live with Ukrainians, and consider Ukraine their home. Residents of Ukraine and members of the Ukrainian armed forces cannot be mercenaries in this conflict. The charges against Hill and Healy have been reported in the news but have not yet been addressed by the European Court of Human Rights so their circumstances are less clear to me. Yet, [news reports](#) indicate that Healy was a humanitarian volunteer; since participating in the hostilities is a necessary element to be a mercenary, he does not appear to be one.

Hill's case is the only one that could arguably rise to the level of being a mercenary. He was [reportedly](#) a 'military volunteer,' but there are few details of his involvement or motivation beyond that. Given the high level of evidence required to prove a mercenary's motivation,

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it is unlikely that Hill could be convicted legitimately absent a free (uncoerced) confession. The lack of adequate legal protections for Hill, however, taints any confession he may or may not have made.

The prosecutions of these men for mercenary activities therefore seems illegitimate and unlawful. That is even before we address the problems with the prosecutions themselves.

CAN THE DONETSK REBELS PROSECUTE?

As I noted earlier in this piece, the traditional (and still dominant) view is that non-state groups like the Donetsk People's Republic are not entitled to prosecute a state's soldiers for participating in the conflict. Yet, states including France have explicitly and implicitly

accepted the prosecution of some of their citizens by non-state actors in Syria ([p. 6](#)). The French government indicated that the People's Protection Units, a militia primarily formed of Kurdish fighters, could prosecute French citizens who had joined the Islamic State. By refusing the repatriation of the state's citizens, other states have also left it to the Syrian Democratic Forces and the People's Protection Units to prosecute those accused of participating in war crimes in Syria.

This naturally raises the question: setting aside the legal definition of mercenaries, can the Donetsk People's Republic ever prosecute someone for their participation in the conflict? A scholar based in Sweden, Mark Klampberg, has argued that some prosecutions are acceptable, notably (1)

where judges appointed by the state pre-conflict resume their responsibilities and apply the state's pre-existing laws, or (2) where a non-state armed group is disciplining its own members.

The actions in Donetsk not only fail to meet this standard; they are actually war crimes.

Under the [Rome Statute](#) of the International Criminal Court (ICC), it is a war crime to pass a sentence or execute someone who is hors de combat – meaning they are not actively participating in conflict because they are civilians, are injured, or have surrendered – unless they have been convicted by a 'regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable' ([art. 8\(2\)\(c\) \(iv\)](#)). According to the ICC's [Elements of Crimes](#), a 'regularly constituted' court is one that guarantees independence and impartiality as well as essential protections of due process.

The need for an independent and impartial judiciary is sacrosanct

within international law. Yet, what we saw out of Donetsk does not meet that standard. Video of Aslin – the distribution of which itself is [considered inhuman treatment](#) given Aslin’s POW status – appears to show he was injured. It is unclear if they received any legal representations; they were only shown on television pleading guilty, which raises concerns that they may have faced the kinds of coercion and abuse that can lead to false confessions; and they were sentenced away from the public. All of this undermines the due process they are entitled to.

While the prosecutions against Aslin, Pinner, Sauddun, Hill and Healy are inappropriate and unlawful, we are seeing glimmers of real efforts to secure justice in Ukraine.

THE OBLIGATION TO PROSECUTE WAR CRIMES

POWs cannot be prosecuted merely for fighting in an armed conflict. Yet, States have a [legal obligation](#) to investigate, and where evidence allows to prosecute and punish, war crimes committed during the Russian war of aggression in Ukraine. There is a long list of potential war crimes in Ukraine, some of which I outlined in an [earlier briefing](#). The obligation to prosecute extends to Russia and Ukraine but also to any other state party with jurisdiction over an individual who has been credibly accused of committing war crimes in Ukraine or as part of the war of aggression.

Prosecutions for war crimes can also be undertaken by the ICC, which is investigating the [situation in Ukraine](#). When the ICC assumes jurisdiction over an investigation, it does so as a jurisdiction of last resort. The crimes prosecuted by the ICC are those that other states are unwilling or unable to prosecute – because they do not have the resources to adequately



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support the investigation and prosecution or because the situation is so politically fraught that it would be impossible to secure an independent and safe prosecution – or where the state ‘purport[s] to act but in reality [is] unwilling to unable to genuinely carry out proceedings’ ([para 1](#)).

Actually prosecuting war crimes, however, can be quite difficult. It requires gathering, transporting, and preserving credible evidence that can be appropriately used in regularly constituted courts. This can be costly financially and it requires an extensive body of personnel who know how to gather and evaluate relevant evidence.

Investigating war crimes during an armed conflict can be particularly tricky. My colleague at the University of [Essex Armed Conflict and Crisis Hub](#), Professor Noam Lubell and Dr Claire Simmons together with Jelena Pejic, a Senior Legal Advisor with the International Committee of the Red Cross, have authored [guidelines](#) for states and others involved in these investigations. They acknowledge that the

barriers to good investigations and prosecutions within an armed conflict include problems with ‘accessing, preserving and transporting evidence’ and the danger to the personal safety of investigators ([para 138](#)). As they explain, however, these difficulties can sometimes be overcome with adequate preparation in advance of the conflict, including in the training of investigators and the use of technology.

The Ukrainians seem to be following these good practices. The Ukrainian government is [using technology](#) to document war crimes and are sending investigators into areas where war crimes appear to have taken place to gather evidence. They are [also facilitating](#) the involvement of other investigators, including those from the ICC, the United Nations, the European Agency for Criminal Justice Cooperation, and civil society.

[Other states](#) are also supporting Ukraine by interviewing refugees about what they witnessed during the conflict. The London Metropolitan Police has a war crimes team [gathering evidence](#) from UK sources as well.

The efforts at gathering and preserving credible evidence is significant. It demonstrates an ongoing commitment by wide sectors of the international community to international justice.

JUSTICE IN WAR

The combined efforts to gather and evaluate evidence of war crimes within Ukraine gives hope that there will be some accountability for at least some of the atrocities we are seeing in Ukraine. It is difficult to suggest this will lead to true ‘justice.’ The likes of Putin may never be prosecuted for individual war crimes as it is often much more difficult to prosecute those who order the commission of war crimes as opposed to those who directly carry those orders out. Yet, the commitment to pursue justice in this situation is still important.

The laws of armed conflict – and the designation of war crimes – were designed to allow states to fight wars effectively while limiting the damage imposed on civilians and society. Accountability for war crimes is a statement of our values and of what we are willing to accept in an armed conflict. By investigating and prosecuting those crimes, states recommit themselves to the promise of a more humane war.

The Russian war of aggression in Ukraine is, as conflicts do, revealing both the worst and best humanity can offer. The prosecutions by the ‘Donetsk People’s Republic’ are the former, undermining the international commitments necessary to ensure that the awfulness of war is limited to only that which is necessary.

We find the latter, however, in the Ukrainian and international community’s commitment to diligently and thoroughly investigate allegations of war crimes.