

# Transitional Justice Options for Postwar Russia

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**Abstract:** We consider the question of accountability for the atrocities committed by Putin's regime in Ukraine during the war of 2022 and for violating the human rights of Russia's citizens. Transitional justice comprises the set of mechanisms employed for holding accountable heads of state, their agents of repression, and collaborators for such crimes. We consider two alternative sets of circumstances under which transitional justice may play out in Russia. Under the "Korean option," there is no or little regime change in Russia and we observe a cease-fire and truce along a zone of demarcation. Under the "German option," Putin is succeeded by a regime that transforms the country's political, social, and economic arrangements. Whereas under the Korean option, the burden of transitional justice falls on the international community, the German option prioritizes domestic and personnel forms of transitional justice. We discuss possibilities for international accountability using existing organizations, but conclude they would be discounted as "victor's Justice." After examining domestically-administered transitional justice, including personnel mechanisms such as purges and lustration, we argue that to have an effect they would need to be part of a political culture shift that recognizes the agency of individual Russians and their responsibility for war crimes.

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On February 24, 2022, Russian president Vladimir Putin, under the pretext of conducting a “special operation” to defend Russians residing in the Donetsk and Luhansk regions, launched an all-out attack against the sovereign state of Ukraine. The blitzkrieg-style offensive did not go according to Putin’s plan, and as the war has continued, the Russian army has violated one principle of just warfare after another.

According to the Geneva convention, it is a war crime to conduct military operations targeted against civilians. Yet the United Nations High Commission for Human Rights has recorded more than eighteen thousand civilian casualties in Ukraine over the last twelve months, including more than seven thousand people killed.

The first figure includes casualties in the Donetsk and Luhansk regions (over ten thousand casualties) but also other regions of Ukraine (most notably Kyiv, Cherkasy, Chernihiv, Ivano-Frankivsk, Kharkiv, Kherson, Kirovohrad, Kyiv, Mykolaiv, Odesa, Sumy, Zaporizhzhia, Dnipropetrovsk, Khmelnytskyi, Poltava, Rivne, Lviv, Ternopil, Vinnytsia, Volyn, and Zhytomyr). These last regions were firmly under the control of the Ukrainian government at the time civilian deaths and injuries occurred, meaning that they resulted from bombings and air raids.

In total, almost 500 children have been killed and more than 500 injured. Another 14,000 children have been abducted and deported to Russia (McDonald 2023).<sup>3</sup>

The estimates of civilians killed vary widely, however, with some sources reporting 87,000 civilians killed in Mariupol alone (Shandra 2022). Moreover, retreating Russian

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<sup>3</sup> Estimate by Ukraine's presidential advisor for children in January 2023

forces left behind evidence of torturing civilians in places like Bucsa, where they did little to cover their traces (“Ukraine: civilian casualty update” 2023).

Extensive use of sexual violence against Ukrainian women by Russian soldiers has also been documented. A UN report found evidence of rape of females, ranging in age from 4 to 80, in the provinces Russia occupied (Independent Commission, 2022). Ukrainian prosecutors have found evidence of sexual violence in every place that had been occupied by Russia (Gall 2023). On March 7, 2023, the European Union issued personal sanctions against two Russian commanders; of one, it declared that "members of his unit systematically participated in sexual violence and rape in March/ April 2022" (Reuters 2023).\*

Is it possible to hold Putin and all the agents of repression who have contributed to such widespread suffering to account?

In this paper, we consider the question of accountability for these crimes as well as transitional justice for human rights violations committed against Russia’s own citizens by the increasingly authoritarian Putin regime. Such processes might play out under two alternative sets of circumstances: Under the first, there is no change of regime in Russia. Under the second, the Putin regime is succeeded by a regime that undertakes a sweeping transformation of the country's political, social, and economic arrangements. In the first scenario, we might observe a cease-fire and truce along a zone of demarcation, with little to no change in regime; this we might call the Korean option. The second-- a more remote possibility--would be closer to the remaking of Germany's political system following World War II. Christoph Heusgen--Chancellor Merkel's former national security advisor, former German ambassador to the United Nations, and current chair of the Munich Security

Conference--has termed this scenario "deputinization." In his view, only a process as comprehensive as this would allow Russia to coexist peacefully with its neighbors (2023).

We discuss the avenues for accountability that fall under the broad term of *transitional justice*, comprising a set of mechanisms widely employed in the 20<sup>th</sup> century for holding accountable heads of states, their agents of repression, and collaborators for crimes committed against their own citizens and citizens in neighboring states. We begin the first section by noting that although it gained popularity over the course of the last century, transitional justice is an ancient practice dating back to 5<sup>th</sup> century BC Athens. The second section explores the possibilities for international accountability using existing organizations and institutions created over the last decades. The third and fourth sections apply under a "deputinization" scenario. First, we examine forms of domestically-administered transitional justice, including extrajudicial and personnel mechanisms such as purges and lustration. The fourth and concluding section considers the broader implications for accountability as part of a process of a transformation of a political culture shift that recognizes the agency of individual Russians and their responsibility for war crimes.

### **1. Transitional Justice: a Practice as Old as Democracy Itself**

The first known case of a deliberate transitional justice strategy comes from Ancient Athens (Lanni 2014; Nagy 1998). Following the Athenians' defeat in the Peloponnesian War when the Spartans forced Athens to deal leniently with the oligarchs (and Spartan collaborators), these same oligarchs overthrew the fragile democracy and came to be known as the Thirty Tyrants.

Ultimately, they too were defeated, but this time the new democratic government wrestled with the question of balancing justice against amnesty. The rule of the Thirty had been brutal. As many Athenians were killed under the Thirty as had died during the previous decade of war: some 5-10% of the populace were killed, and over half were exiled. Keen to prevent any further repetition of the cycles of regime breakdown and retribution against the former government that plagued other Greek city-states, the Athenians developed an innovative solution based on adapting existing legal procedures. Their procedure combined trials for a relatively small number of the oligarchs and their immediate subordinates for violations of the law, amnesty for the rest, and a requirement that all citizens refrain from pursuing private vengeance against their former persecutors. Those officials of the Thirty who were tried and convicted were given a choice. They could accept exile to a neighboring island under Athenian control, or, if they chose to remain in Athens, they were required to go through a procedure, called "*euthuna*," under which they were required to account for their actions during the period of the Thirty's rule and accept any punishment for them that the court meted out.<sup>4</sup>

Moreover, all members of the Assembly swore an oath "not to remember their misfortunes/ grievances" and were banned from doing so in the public sphere. The Athenian term used for this commitment—not to remember past misfortunes-- alludes to the idea that one could not use past grievances to attack or punish someone, i.e. in pursuit of vengeance (Nagy 1998). On the other hand, Athenians could cite abuses by members of the regime of the Thirty as evidence of bad character in unrelated private lawsuits against

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<sup>4</sup> This procedure resembles what we later refer to as "lustration" in section 3.

other citizens, in a legal system that made wide use of testimony about the character of litigants. This did permit some measure of individual redress of grievances.

The transitional justice consensus endured long after Sparta's dominance over Athens had ended. One reason was that it allowed Athenians to nurture a convenient illusion that most of them had been victims of the rule of the Thirty rather than active or passive collaborators. Athenians promoted their way of handling transitional justice as a shining reflection of their democratic values (Heusgen 2023, 204). Note, however, that the Athenian solution was administered by Athens itself, although under pressure from Sparta.

## **2. Holding Russia Criminally Responsible**

### *International Tribunals*

Since the beginning of Russia's invasion, multiple international bodies have demanded that Russia be held accountable under international law for the conduct of its war in Ukraine. Shortly after the invasion, 43 countries referred allegations of war crimes under the Rome Statute (which covers genocide, crimes against humanity, war crimes, and crimes of aggression) to the International Criminal Court (ICC) ("Ukraine: Jurisdiction" 2022). The Rome Statute, adopted in 1999, provides precise definitions of these crimes.

The crime of genocide is defined as acts committed against national, ethnic, racial, or religious groups with the goal of killing, causing severe harm to, depriving of the means of surviving, preventing births among, or transferring children of, members of an entire group.

Crimes against humanity had not been codified before the Rome Statute in 1999. They cover a wide range of acts that constitute deliberate "widespread or systematic

attacks against any civilian population," including murder, incarceration, torture, rape, and other forms of violence ("Rome Statute" 1998).

War crimes are the oldest category of the four. The term dates to 1899 and was developed further in 1907 to eliminate certain methods of warfare, presumably those that result in collateral damage in the form of civilian casualties. The Rome Statute defines them as "grave breaches" of the Geneva Convention, and include crimes against persons as well as property ("Rome Statute" 1998).

Finally, aggression is the crime of carrying a sufficiently large military operation without provocation or clear reason by a state in violation of the United Nations Charter against the "sovereignty, territorial integrity or political independence" of another state.

Russia will likely be accused under all four sets of charges over its war against Ukraine. The ICC initiated an investigation of Russian actions on March 2, 2022, shortly after the invasion began.

The ICC's jurisdiction faces significant limitations, however. Although Ukraine is a member of the ICC, Russia is not. Moreover, the ICC cannot try anyone whom it does not have in custody. Conceivably, a post-Putin regime might accept the ICC's jurisdiction to hold the leaders of the Putin regime accountable for their actions, but as long as Vladimir Putin is president, his regime is not likely to turn over anyone to the ICC. Moreover, so long as Russia has not acceded to ICC membership, the ICC cannot try it for committing the crime of aggression.

Other bodies have acted as well. On March 16, 2022, the International Court of Justice (ICJ) ruled in favor of Ukraine against the accusation by Russia that Ukraine had committed "genocide" ("Allegations of Genocide" 2022). The United Nation's Independent

International Commission of Inquiry on Ukraine confirmed to the UN General Assembly on October 18, 2022, that Russia had committed numerous war crimes, violations of human rights, and violations of international humanitarian laws (“UN Commission has found” 2022; “Independent International Commission” 2022). The European Court of Human Rights (ECHR), an arm of the Council of Europe, is another legal body with partial jurisdiction. Although Russia was expelled from the Council of Europe in September 2022, the ECHR maintains legal jurisdiction to investigate war crimes committed before September 16.

The European Union has also initiated steps to hold Russia accountable for war crimes. On November 30, 2022, the European Commission proposed several alternative procedures. Among them was using frozen Russian assets to create a fund that would be used to help rebuild Ukraine after the war. The Commission also outlined a plan to create a dedicated international body to investigate and prosecute Russia for the crime of aggression. The proposal would partially compensate for the fact that the ICC cannot prosecute Russia for aggression because Russia is not a member of the ICC. The tribunal could be either a specialized ad hoc tribunal established under a multilateral treaty or a hybrid court in one country’s jurisdiction with judges from multiple countries. The EC Commissioner, Ursula von der Leyen, tweeted that “Russia must pay for its horrific crimes. We will work with the ICC and help set up a specialized court to try Russia’s crimes. With our partners, we will make sure that Russia pays for the devastation it caused, with the frozen funds of oligarchs and assets of its central bank” (“Ukraine: Commission presents” 2022). In early February 2023, von der Leyen announced that the Commission would form

an international center in the Hague to investigate Russian war crimes, including the crime of aggression.

### *Doctrine of Universal Jurisdiction*

Beyond the use of international organizations, such as the ICC, the EC, or the ECHR, Russia could be held accountable through yet another mechanism. Under the *doctrine of universal jurisdiction*, a prosecutor or other public authority in any country can prosecute an individual from another country for crimes against international law, including war crimes and torture. This doctrine is codified in the law of numerous countries, which specify how the law is to be incorporated into their criminal codes. Depending on the country's national law, therefore, the conditions applying to the use of the doctrine vary. Generally, however, the crimes must be violations of the law both in the country where they were committed and constitute violations of international law. There is strong evidence that Russia has committed crimes against humanity, war crimes, and aggression, as the ICC defines them, and a case that some of Russia's actions constitute genocide may be made as well.<sup>5</sup> An important provision concerns whether a country may try a defendant in absentia or whether the court must have the defendant in custody. While Germany, Spain, and Belgium permit a trial in absentia, the UK, the Netherlands, Austria, and Australia do not. As a practical matter, enforcing a judgment requires that the court have custody.

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<sup>5</sup> In particular, the forced removal of children from their Ukrainian families and resettlement in Russia.

These limitations notwithstanding, in November 2022, the justice ministers of the G-7 countries agreed to coordinate their efforts to investigate and punish crimes committed by Russian forces in Ukraine during the war (“G7 justice ministers” 2022). In the presence of several prosecutors of the ICC, Germany's federal prosecutor, and Ukraine's justice minister they agreed to create a central national contact point in each member state to prosecute those guilty.

Among West European countries that have accepted Ukrainian refugees, Germany stands out, having accepted over a million of them.<sup>6</sup> Johns et. al, in a recent article, show that countries populated by migrants who have fled widespread atrocities face more pressure to initiate proceedings under the universal jurisdiction doctrine (2022). Indeed, the German Justice Minister, declared that he intends to follow Germany's course of action during the Syrian conflict, when a German court, invoking universal jurisdiction, convicted two Syrian intelligence officers of the notorious *mukhabarat* for torturing civilians (“Germany: Conviction” 2022).<sup>7</sup> Already two former German government ministers have filed documents with Germany's federal prosecutor to request opening an investigation of President Putin, all members of the Russian Security Council, and many senior military officers on war crimes charges (“G7 Condemns” 2022). Hence it is highly likely that Germany will take the lead among the G-7 countries in pursuing cases against the Putin regime for war crimes (Johns, Langer, and Peters 2022; “Number of Ukrainian refugees”

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<sup>6</sup> Although over 9 million Ukrainians have crossed the Polish border, only a little over a million have registered for the equivalent of a social security number giving them access to public healthcare and education and indicating an intention of permanent residence.

<sup>7</sup> However the use of the universal jurisdiction doctrine was less successful in France, see “Fighting Impunity for Crimes in Syria: Victory in Germany, Setback in France,” January 27, 2022

2023). Such an outcome would constitute a remarkable historical reversal since in 1945 Soviet judges sat in judgment of high-ranking Nazis in the Nuremberg trials, which heralded the modern era of accountability in the spirit of transitional justice against heads of states and military leaders.

### *Ukrainian Courts*

Beyond the involvement of international actors and domestic courts in countries that are third parties to the conflict, the most natural site for criminal investigations and the prosecution of war crimes committed by Russians is Ukraine itself.

In May 2022, 14 Russian soldiers were tried and convicted by Ukrainian courts, and mobile teams of investigators have been collecting evidence of Russian war crimes in multiple locations in Ukraine. More than 43,000 crimes have been registered so far with the Ukrainian prosecutor.

The dilemma here, however, is how to avoid the specter of victors' justice or simple revenge parading in the guise of transitional justice. Russian media commentators have already been warning that if Russia loses the war, "the Hague" will even come "for the janitor who sweeps the paving stones behind the Kremlin....the scale of the catastrophe that our country will fall into if we manage to do this [ie to lose] is unimaginable" ("Bulletin No. 21" 2022).

Holding trials in Ukrainian courts will require a pool of well-trained, efficient judges, prosecutors, and defense attorneys. Since at least until 2014 (the Euromaidan revolution), Ukraine was riddled with corruption and repeatedly beset by authoritarian backsliding (particularly during periods ruled by Moscow sympathizers). most of the state's judges

have been trained under sub-democratic conditions. Even apart from the suspicion of meting out victor's justice, prosecuting such a high volume of agents of repression is challenging.

To minimize the appearance of victors' justice and to ensure that war crimes trials are conducted in accordance with international standards, the Ukrainian government is working with Great Britain on training its judges in order to ensure that they are thoroughly familiar with international legal standards. Under an agreement with Britain, some 90 Ukrainian judges were undergoing training at a secret location by a group of British judges in December 2022, and more were to be trained in the coming months. The course is led by Howard Morrison, who served as a judge in the International Criminal Tribunal for Yugoslavia (ICTY) and Rwanda and oversaw the prosecution of Radovan Karadzic, leader of the Bosnian Serb forces (Cohen 2022). Indeed, holding accountable perpetrators of war crimes during the Balkan Wars offers a template of sorts for Ukraine. The Bosnian War Crimes Chamber Court created as part of the State Court in Bosnia was the direct result of an agreement reached in January 2003 between the Office of High Representative in Bosnia and Herzegovina and the ICTY, as ICTY was nearing the end of its mandate.

The case of Germany after World War I suggests how toxic politically manipulated resentment over a country's treatment following a war can be. The myth that Germany had been "stabbed in the back" by nefarious internal forces, and forced to stop fighting short of victory was widely believed. In contrast to World War II, Germany had not been forced to surrender unconditionally. Due to the confluence of political and social crises (weak Weimar parliamentary government, territorial losses, heavy reparations demands,

hyperinflation followed by worldwide depression) deep political polarization ensued. Moreover, the communists pressured by the Comintern refused to collaborate with the social democrats against the Nazis. Consequently, Hitler succeeded in winning sufficient support for a political movement bent on redressing Germans' grievances and restoring their national pride. The interwar failure of democracy in Germany, and in multiple other European countries, compels us to consider ways of constructing transitional justice mechanisms that enable Russia to rebuild as a viable state without succumbing to renewed authoritarian and imperial impulses. The prospect that any externally-imposed accountability procedures will engender deep-seated resentment against the West is highly likely in the case of Russia. The sentiment of *obida*, that is, the inextinguishable sense of grievance at being injured and offended by an unfair world order, has been a potent component of the social-psychological base of Putin's support almost from the inception of his rule.<sup>8</sup> Hence, we consider a second approach to transitional justice and one that eschews international *and* criminal approaches to accountability altogether. We focus instead on personnel transitional justice administered by Russia itself. We turn to this in the next section.

### **3. Administering Transitional Justice in a Postwar Russia**

Relative to the scale of Russia's war campaign, international tribunals will only be able to deal with a limited number of perpetrators. Much of the political leadership, the

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<sup>8</sup> Russian sociologist Grigorii Yudin has eloquently described this sentiment and observed that feelings like it--resentment--are widely shared in many parts of the world where resentment against Western domination, and especially American domination, fuel sympathy for Putin (2023).

military, semi-private armed forces, such as Kadyrov's forces or the Wagner Group, and a variety of Russian security services, will escape judgment. Are the ministers of government working to keep the country's economy afloat guilty of war crimes? Or the firms producing weapons?

And how will a postwar Russia deal with the crimes and injustices committed by the Putin regime with respect to its own citizens? For example, there is no doubt that Russian agents used a chemical agent, Novichok, to poison the opposition activist Aleksei Naval'ny in 2020. He survived only by being able to receive treatment in a German hospital ("Poisoning of Putin Opponent" 2020). Novichok was also used in the attempted assassination of a former Russian espionage agent, Sergei Skripal', in the United Kingdom in 2018, resulting in the death of one person and the poisonings of three others. At least a dozen opposition figures have been poisoned in the last decade, according to the Human Rights Committee of the United Nations ("Human Rights Committee Considers" 2022).

Beyond political assassinations, beginning in 2012, and growing much more intense after the 2022 invasion, Putin's regime has substantially increased political repression. Numerous opposition activists and journalists have been subjected to arrests, beatings, and harassment for their activities (Sebastian 2022; Kim 2021). The regime gives these prosecutions the trappings of legality: in December 2022, the Duma expanded the infamous "foreign agent" and "anti-gay propaganda" laws allowing authorities to wield them for political repression. The law on foreign agents now extends to any person or organization deemed to be "under foreign influence." Under the anti-LGBT propaganda law, it is now criminal to suggest that "non-traditional" sexual orientations can be "normal."

In a similar vein, the laws against “extremism” and the law on “peaceful assembly” have been both tightened and their application extended further. According to an independent Russian rights organization, OVD-Info, some 210,000 websites have been blocked, over 20,000 people detained, and hundreds of prosecutions opened against individuals on such charges as “discrediting” the army, spreading misinformation, collaborating with foreign governments, and other political offenses (Ivanova 2023).

According to a Human Rights Committee of the United Nations report, prior to the September 2022 regional legislative elections, prosecutions were opened against more than 130 candidates, which effectively removed them from the ballot. Nearly half of the charges invoked the anti-extremism law (“Human Rights Committee Considers” 2022).

Repression in Chechnya and the North Caucasus generally has been especially savage, as the UN Human Rights Committee report indicated. There, the use of arrests, detentions, beatings, and torture has become widespread, both against individuals protesting the war and the conscription of youth into the army and against people suspected of having a “non-traditional” sexual orientation (ibid).

For example, a Russian journalist who had covered military affairs for the newspaper *Kommersant* was accused and convicted of espionage on charges that he had given classified documents to Czech intelligence. In September 2022, he was sentenced to imprisonment for 22 years, and the sentence was upheld by an Appeals Court in December. The charges were fabricated; all the documents that he was accused of passing on were from open, published sources (Arenina 2022).

Given the extent of political repression and the violence used to carry it out, how might a postwar, post-Putin government deal with the imperative of holding the Putin regime accountable? Can transitional justice help to consolidate a post-authoritarian regime?

Beyond serving the function of accountability, domestic transitional justice has consequences for regime stability. According to a recent book by Nalepa, new democracies do have extrajudicial and personnel-management options that can significantly influence the polity's prospects for consolidation (Nalepa 2022).

When it comes to dealing with personnel of the former authoritarian regime—from leaders and their agents of repression to secret informers and collaborators—new democracies have a range of transitional justice mechanisms to use.

Broadly, they fall into two categories: *transparency regimes* and *purges*. Transparency regimes, such as lustrations and truth commissions reveal the truth about acts supporting the regime (some criminal, others, such as spying on friends, coworkers, and family members, simply morally deplorable). Purges do not reveal new information but simply relieve of their public positions persons whose role in the former regime was known.

Lustrations may have a sanction attached to the revelation of collaboration, but often, the mere revelation of the fact that someone had worked as an informer of the secret police is enough to dissuade them from pursuing a political career. The greatest benefit of transparency regimes is that they make blackmail with the threat of revealing compromising information about someone's collaboration with the secret police ineffective.

Former secret police officers with access to information compromising their former informers who decide to go into politics can use the threat of releasing kompromat to pressure those ex-informers turned politicians to follow their wishes. Nalepa and Sonin show that the sheer possibility of such blackmail may distort political representation when lustration is not present because voters are afraid to cast their votes on anyone who even could have been a collaborator (Nalepa and Sonin 2020). Hence lustrations always improve democratic representation.

Russia had no lustration following the dissolution of the Soviet Union. In fact, parliament passed laws in 1992 making it a crime to publish KGB files. A legislative proposal by two parliamentary deputies in 1993 to enact a limited lustration law for former high-ranking CPSU and KGB officers quickly died.<sup>9</sup> In light of the fact that Russia's authoritarian reversal took place under the leadership of a former KGB agent, the opening of secret police archives to disable the potential for *kompromat* to influence politics will be useful if Russia should ever pursue deputinization.

What about purging the Russian state of Putin's bureaucrats? What is to become of the army of administrators who helped establish Putin's centralized dominance?

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<sup>9</sup> The human rights activist Galina Starovoitova--who was assassinated in 1998--proposed the law with the support of the party Democratic Russia. It would have restricted certain categories of top-level CPSU and KGB officials from engaging in professional or political activity for ten years (unless they were elected to office in a free election). The bill was widely criticized, including from among members of the democratic movement. Opponents of the proposal argued that responsibility for the crimes of the Soviet era was universal among the population. As human rights activist Sergei Kovalev wrote, "every one of us, without exception, is guilty for what happened to us." Others pointed to the possibility of misuse of the law for personal revenge, observed that there were no judges who were not themselves part of the old system, and predicted that the law would launch a destructive witch-hunt in society. In the event, the bill quickly died. See the articles in *Moskovskie novosti*, no. 5, January 31, 1993, and no. 15, May 15, 1993; also Yasmann (1995)

The key contrast between lustrations and purges is that the latter reveal no new information. Nalepa argues that although it may appear that the just thing to do is to fire those who had openly supported the authoritarian regime, this may come at the practical cost of depriving the new polity of agents equipped in expertise. So-called thorough purges—acts of closing entire bureaucratic and enforcement agencies—can have even more perilous consequences. Shuttering security services and firing secret police officers and other agents may lead to an increase in crime as experts in violence and repression are deprived of a legal way of putting their skills to use. Anecdotally, this phenomenon is well-documented in the case of Russia and Eastern Europe (Volkov 1999; Varese 2001; Bates et al. 2023).

This implies that even though public opinion may support purges, strategically, it is not always the best option. In the case of Russia, purges of Soviet agencies would have involved the KGB and related agencies, broadly known as the “*siloviki*.” According to the Global Transitional Justice Dataset, Russia did engage in quite extensive purges, although most occurred, as Bates et. al. note, through cutting funding of agencies and letting the former *siloviki* quit. This, as Varese and Volkov point out, contributed to the spike in crime and later, organized crime. In a similar vein, one of US’s most disastrous mistakes was to back Iraq’s policy to purge new democratic institutions of former Ba’athists to promote societal reconciliation. In one instance of such purges, De-Ba’athification prevented 185 members of Saddam Hussein’s party, mostly Sunnis, from running for the legislature in 2003 (David 2006). In another more thorough purge, attributed specifically to Paul Bremer, Saddam Hussein's army was disbanded in its entirety. While experts and

journalists argued at the time that such harsh policies alienating a formerly privileged class would weaken democratic stability in Iraq, the US administration defined the alternative as “doing nothing.” While “doing nothing” may not produce immediate negative consequences, it may strengthen the power of authoritarian networks. In worst-case scenarios, such reproduced networks may pave the way for an authoritarian return.

Not all purges are equal, however. As Nalepa notes, formerly institutionalized regimes that trained agents of enforcement and bureaucrats and equipped them with usable skills are the ones whose successors may want to pull their transitional justice punches and refrain from purges.

There are historical cases of transitional justice reflecting this approach. For instance, Konrad Adenauer’s position on how to deal with the senior leadership of Germany in the mid-1940s reflected a combination of calculation and principle. Adenauer benefitted from the moral authority gained from the fact that he had been—very briefly—detained by the Nazis. Among ordinary Germans, the sense of victimhood--at the hands of Hitler, then the war, and then the occupying powers--was widespread, along with the belief that the Nuremberg Trials were "victors' justice." Adenauer took a pragmatic middle line. Asserting that “the division of the German people into the just and the unjust must finally end,” he argued that Nazi “fellow travelers” be left in peace. In line with Nalepa’s argument, Adenauer also observed that Germany could not do without the expertise of officials who had served in the previous regime. By the standards of the German political elite of the day, Adenauer was a moderate. He rejected the notion of collective guilt, but, if only for practical reasons, accepted Germany’s obligation to pay compensation to Jews and to the

state of Israel (Rensmann 2004). Of course, one consequence of Adenauer's approach was to postpone Germany's reckoning with its past by many years.

#### **4. Outlook on Transitional Justice Procedures for Postwar Russia**

The case of how the ancient Athenians handled their post-authoritarian experience with transitional justice might seem to suggest a “let bygones be bygones” approach. We would argue that such an approach would produce harmful results, much in the same way that a punitive policy discussed in section 2 would invite cycles of retribution and vengeance.

Regarding the former approach, we have illustrative examples from Poland, where many at the time of transition were advocating for drawing a “thick line” between the communist past and the democratic future. The argument was that the communists and their collaborators should be forgiven for all the violations of human rights that they had committed (Nalepa 2022). But in a communist regime such as Poland's, much as in Nazi Germany, the regime employed the services of a large network of informers and collaborators who were capable of subverting a new, post-totalitarian regime or being blackmailed by others with knowledge of their past. Russia most likely resembles these two cases.

We propose, therefore, for Russia a combination of transparency mechanisms, such as lustration or the Athenian *euthuna*, with mechanisms for purging officials of the former regime and ensuring, to the extent possible, their willingness to serve the new one honorably. Such a mechanism might serve a first-generation post-Putin regime, before a larger-scale reconstruction of the political culture occurs.

For those officials who have not been tried by international tribunals, and who bear direct responsibility for war crimes in Ukraine and human rights abuses in Russia, trials and truth-finding processes will be important. It is critical that such processes take place with full adherence to rule of law and according to international law standards that are recognized by the new democratic Russia. For the great majority of officials, however, personnel policies based in transitional justice will be appropriate. We do not believe that a large-scale amnesty should be used, because that is likely to foster the accumulation of grievances on the part of the victims of Russia's actions both in Russia and in Ukraine.

Complicating the question of transitional justice is the fact that it is very likely that if the Russian leadership is in fact ever held accountable for the multiple crimes committed in Ukraine and within its borders, thousands of Russian fellow travelers will also consider themselves victims of Putin's regime. One can imagine their arguments: we were just following orders; we had no knowledge of any war crimes; we were powerless; we were simply doing our jobs and had nothing to do with the war.

At what point can it be said that a comforting myth does greater good than harm in establishing a viable balance between the imperative of justice for those who have been wronged and that of rebuilding a political community?

The gifted Athenian rhetorician Isocrates, whose profession was to compose eloquent orations for litigants in court, wrote: "But after we came together and exchanged the solemn pledges, we have lived so uprightly and so like citizens of one country that it seemed as if no misfortune had ever befallen us. At that time all looked upon us as the most foolish and ill-fated of mankind; now, however, we are regarded as the happiest and wisest

of the Greeks. We practice politics well and in the common interest, just as if no misfortune had befallen us” (Isocrates 1945, 281). The Athenian process allowed Athenians to comfort themselves with the illusion that very few of them had collaborated with the Thirty, and that their transitional justice process was a shining reflection of their democratic form of government.

Similar convenient myths have flourished in a number of European countries as well after 1945. During World War II, the allies declared that Austria had been Hitler’s “first victim” despite the fact that Austrians were heavily represented in the Nazi party, the German army, the SS, and the administration of concentration camps (Judt 2006, 52). Most French citizens happily accepted the myth that few of them had collaborated with the Nazis (only the Klaus Barbie trial in 1987 began to shatter that illusion. As to the Netherlands, after the war, the head of German security claimed that in Amsterdam, the Dutch police had been the main support of the German police (ibid, 39). Similar points can be made about a number of other countries that Germany invaded or that collaborated with Germany.<sup>10</sup>

We do not endorse the convenient myth that most Russians were against the war or have become victims of the regime. If the history of Eastern Europe has taught us anything it is that resistance to dictatorship is possible against all odds. From the Uprising in the Warsaw Ghetto during WWII to the Warsaw and Budapest Uprisings in 1944 and 1956, respectively dissidents against authoritarian rule have drawn a line in the sand between

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<sup>10</sup> Among them Russia itself. The Soviet Union actively enabled Germany's post-World War I illegal rearmament. Following the Rapallo Treaty, Germany and the Soviet Union signed a series of agreements that allowed Germany to use Soviet research, development, and production facilities to manufacture weapons that had been forbidden under the Versailles Treaty. See Johnson (2021).

victims and enablers. Alexei Naval'ny and his organization as well as Roman Protasevich in Belarus have been doing just that.

Stopping the spread of the myth of victimhood will require a shift in Russian public opinion in the direction of full recognition of what the country has done in Ukraine. We know how extremely painful this will be. Yet there are actors within Russia's borders well equipped to accomplish this. Consider the efforts by members of Memorial and other human rights figures to push the government to do more than "rehabilitate" victims of Stalin's terror (Stan 2010; Roginskii 2011).

Sadly, as Nanci Adler points out, rehabilitation was the only official transitional justice mechanism that the government allowed from 1991 on (Adler 2012). Starting with the new 2009 presidential commission on "countering attempts to falsify history to the detriment of Russian Federation interests" and becoming more and more egregious after 2011, Putin's regime first suppressed and then completely reversed efforts at de-Stalinization. Finally, in December 2021, the regime shut down Memorial altogether. Clearly, Putin fears the political implications of acknowledging state complicity in mass repression. These strategic considerations will remain salient for any post-Putin regime unless it commits itself to a fundamental reeducation effort in the spirit of transitional justice.

In sum, there are three parts to postwar accountability in Russia: (1) the international war crimes tribunals; (2) transitional justice at home with respect to purges, truth-finding and screening personnel; and (3) the remaking of political culture.

The first will be complicated and require a concerted effort on part of the international community, including individual states housing Ukrainian refugees. The second will primarily be the responsibility of leaders of the new democratic Russian state. Yet even the most effective personnel transitional justice mechanisms, including the ideal combination of purges and lustrations, cannot make up for a political culture of eschewing responsibility for Russia's crimes by fellow-traveling Russian citizens. Without a remaking of political culture, war crimes tribunals will provoke widespread resentment and the officials who have undergone truth-finding processes will go on to behave as loyal servants of the "*derzhava*" (i.e. the conception of Russia as a great world power). Limited purges, that is, purges that do not far enough, will allow former agents of repression to revert to the familiar forms of behavior for *siloviki*, judges, prosecutors, teachers, etc., claiming loyalty to the current regime, but acting in such a way as to rebuild the authoritarian state. We have seen that story play out often enough in the past; Khrushchev's destalinization was always partial, as was Yeltsin's decommunization project. Under Putin the regime has reverted to the old patterns of state control and legitimation, both by default and by design.

For these reasons postwar Germany serves better as a comparison case than the Athenian democracy or more recently, post-communist democracies of Poland or Czech Republic; in the latter cases, public opinion was far less broadly supportive of the old regime than is Russian public opinion of Putin's regime. One cannot count on lustration being sufficient to shame its collaborators. Most of Putin's people are only too proud of what they are doing and are not doing anything furtively. They resemble Adolf Eichmann,

who, far from seeing himself as a dull bureaucrat merely following orders, took pride in his deep and philosophically-grounded consciousness of his actions.<sup>11</sup>

In Germany, only a concerted effort at rebuilding the political culture through civics education in the schools, and the turnover of generations, allowed a broad public acceptance of Germany's responsibility for the horrors that the country had inflicted on the world. The work is far from complete.<sup>12</sup> The German case does suggest, however, that it is feasible. Is it possible in Russia? Russia has produced not only Ivan Ilyin, Stalin and Putin, but also figures such as Tolstoy, Sakharov, and Solzhenitsyn. It is not beyond the realm of possibility that Russians will eventually come to recognize that nurturing a self-perpetuating sense of resentment and victimhood ultimately works to harm Russians themselves.<sup>13</sup>

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<sup>11</sup> His attorneys persuaded him to keep those convictions to himself and instead to project the image of the faceless order-compliant bureaucrat. In the event, that strategy failed. See Stangneth (2014).

<sup>12</sup> A searching comparison of German efforts to come to terms with the crimes it had committed with the much less thorough-going efforts by Americans to acknowledge our history of slavery, Jim Crow, and continuing racial injustice is Neiman (2019).

<sup>13</sup> Yudin cites the old Russian saying, "*na obizhennykh vodu voziat*" (they make the offended haul water). The saying dates from Peter the Great's reign. The idea is that those who carry around a sense of grievance in the end harm themselves (2023).

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\* Systematic use of rape would not be new for Russian soldiers. The practice was routine as the Soviet army retook lands in Eastern Europe and occupied Germany in the late stages of the Second World War, as documented by Timothy Snyder; it was in fact actively encouraged by Stalin (Snyder 2012, pp. 316-19).