

Opinion – Holding Russia Accountable?

Written by Cecilia Ducci

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CECILIA DUCCI, MAR 21 2022

The Russian invasion of Ukraine, which was launched on 24 February 2022, has raised international condemnation all over the world. On 2 March, at the United Nations General Assembly 141 states unprecedentedly voted in favor of a resolution that requests Russia to withdraw its military forces from Ukraine. At the same time, in addition to strongly condemning Russia's unlawful invasion of Ukraine, the European Union (EU) went even further as to impose sanctions on Russia. Besides these actions, calls for accountability have been exceptionally strong at the international level, leading 40 State Parties to the Rome Statute of the International Criminal Court (ICC) to sign a petition on 2 March to bring the case before the ICC. According to the Rome Statute, which formally established the ICC in 2002, the Court is responsible for ensuring individual criminal accountability for grave international crimes including genocide, crimes against humanity, war crimes, and the crime of aggression. In this case, it would therefore investigate whether single individuals like Vladimir Putin, his inner circle of advisors, and major military officials are guilty of having committed the aforementioned crimes in the Ukrainian territory.

Since Ukraine is not a State Party to the Rome Statute, it had to grant ICC Prosecutor Kharim Khan direct jurisdiction, which allows him to investigate allegations of war crimes, crimes against humanity, or even genocide committed in Ukraine not only since 20 February 2014, but also from 21 November 2013 to 22 February 2014. In an unusually short time, on 2 March, the ICC Prosecutor opened investigations into the case of Ukraine. Although the ICC's working has often been hindered by its inherent limitations, ranging from its over-reliance on states for cooperation and funding, to the many obstacles concerning the pursuit of an investigation into a state that is not a party to the Rome Statute, and the length of the judicial process, this unprecedented move to open investigations in such a short time demonstrates the Court's pressing concern with the current situation. Nonetheless, given its record of taking years to provide decisions, it is open to question as to whether it will achieve any concrete results in the short term. Furthermore, since Russia is not a State Party to the ICC, and therefore has no legal duty to turn in any Russian individual found to be guilty by the ICC, any arrest warrants would need the cooperation of other states to lead to actual prosecutions.

In addition to the case before the ICC, Ukraine has resorted to a second avenue for accountability, that of the International Court of Justice (ICJ). The ICJ is a United Nations (UN) international tribunal which is responsible not only for giving advisory opinions at the request of the UN but, most importantly, for settling disputes between states. Following this latter avenue for accountability, on 27 February, Ukraine filed an application against Russia before the ICJ accusing it of illegally justifying its war by falsely accusing Ukraine of genocide in Luhansk and Donetsk and alleging that Russia itself is planning acts of genocide in Ukraine. Ukraine has also requested the Court to impose provisional measures aimed at ending Russia's military invasion. Given the two states' mutual accusations of genocide, Ukraine based its application to the ICJ on Article IX of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (hereafter referred to as the Genocide Convention or the Convention), according to which disputes regarding the interpretation, application, or fulfilment of the Genocide Convention can be raised before the ICJ. While it usually takes several years before the ICJ rules on a dispute, the Court announced that it will use a fast-track procedure to provide a ruling as soon as possible. Although it is up for discussion how long this process will actually take, the ICJ has shown to be determined to proceed quickly, holding its first round of hearings on 7 March, only a week after Ukraine filed its application. However, demonstrating its strong rejection not only of Ukraine's accusations but, even more importantly, of the ICJ's international role in ensuring respect for international law, Russia refused to show up at the first round of hearings and explained this through a letter sent to the ICJ on 7

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March arguing that the ICJ lacks jurisdiction over the matter. Despite the absence of Russia, on 16 March, the ICJ declared to have jurisdiction over the case on the grounds that there is a dispute between the two countries over whether there was an ongoing genocide in Luhansk and Donetsk regions and whether the use of force of Russia amounts to a genocide. Furthermore, it ruled for a provisional order that 'the Russian Federation must, pending the final decision in the case, suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine'. It also stated that it did not see any evidence that would support the Russian claim that Ukraine was committing genocide against Russians in eastern Ukraine.

Although many are focusing on what the Russian invasion of Ukraine will mean for the international system or order, the use of force, and the protection of national sovereignty, it is equally important to focus on its implications for the international law on genocide. The case of Ukraine v. Russia at the ICJ is particularly relevant today also in light of another recent case involving allegations of violations of the Genocide Convention, namely The Gambia v. Myanmar, whereby the former accused the latter of breaching the Convention. Although, differently from the ICC which concerns individual responsibility, the ICJ looks into state responsibility for the violation of international treaties, such as the Genocide Convention, these cases demonstrate that the ICJ is increasingly being used to decide on the crime of genocide. Consequently, if the ICJ succeeds at settling the dispute between Ukraine and Russia in such a short period of time as it claims, it will effectively prove to be a viable option when it comes to accountability for the crime of genocide. However, at the same time, one must bear in mind that for an application to be filed before the ICJ, this must be based on a dispute over an international treaty. This raises important implications. On the one hand, it limits the scope of jurisdiction of the ICJ, which cannot decide on crimes that are not officially acknowledged under an international treaty, such as ethnic cleansing, unless this amounts to a genocide. On the other hand, it may lead to an ever-increasing manipulation of the concept of 'genocide' which can be easily leveraged on in a state's narrative to justify its own actions. Indeed, being an incredibly politically contested concept, genocide has often been used to foster political will to intervene in case of mass violations but, as Russia's pretext for invasion demonstrates, it can also be used to justify violations of international law.

An even more important implication of the current cases on Ukraine before the ICC and the ICJ concerns the interpretation of the crime of genocide. Coined in 1943 by lawyer Raphael Lemkin and later officially recognized through the Genocide Convention in 1948, the definition of the so-called 'crime of crimes' is indeed highly contested. Key debates revolve around the limitation of the definition of genocide to four specific groups only, namely national, racial, ethnic, and religious groups, but also the interpretation of a partial destruction of a group and, most importantly, the proof of a *dolus specialis*, that is to say a specific intent to destroy one of the aforementioned groups. Given the legal specificities of this crime, it is hard to tell what the position of the ICC and the ICJ will be on the Ukrainian case. At the end of their judicial processes, will any of these courts rule that the crimes committed by Russia or by some Russian individuals amount to a full-fledged genocide and, therefore, that these had an intent to exterminate the Ukrainian people? Will both discredit Russia's allegations regarding Ukraine's actions in Luhansk and Donetsk? Will the two courts converge on a shared interpretation of the crime of genocide and of the Genocide Convention? Hence, will their interpretation broaden the scope of 'genocide', or will it stick to a narrower interpretation?

Given that it has attracted the world's attention, the Ukraine v. Russia case may represent either a turning point for international law or a further confirmation of the narrow conceptualization of the crime of genocide. Undoubtedly, it will leave its mark on the jurisprudence surrounding the crime of genocide, providing yet another interpretation of this ever-contested, oft-ambiguous and politically charged crime, or consolidating the Genocide Convention's relevance and possibly strengthening its implementation.

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include IR theory, genocide, human rights, norm contestation, international law, transitional justice. Her recent publications include: Ducci, C. & Lee, P.K. 'The Military Coup in Myanmar: Back to the 'Normality' of Autocracy?' and Lee, P.K. & Ducci, C. 'No Humanitarian Intervention in Asian Genocides: How Possible and Legitimate?' *Third World Quarterly* 41 (2020): 1575–94.