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International Law and Accountability in Relation to the Protracted Conflicts in Eastern Europe

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Executive Summary

International law draws a clear distinction between rules for peace and rules for war, but reality has not always corresponded to this clear distinction. In the case of the protracted conflicts in Eastern Europe, classic military use of force has been combined with other antagonistic measures. An additional complicating factor in relation to these protracted conflicts is the difficulty in identifying the parties, partly due to the use of proxies and covert operations, which in turn clouds which legal framework is applicable.

This lack of clarity causes further issues in relation to accountability for violations of International Law. Nonetheless, International Law – including International Humanitarian Law (IHL) and International Human Rights Law – is applicable, subject to the facts on the ground, and provides various avenues for accountability.

A fairly unsurprising finding is that if a permanent member of the UN Security Council commits acts that constitute a threat to international peace and security, the Security Council is unable to react due to the existence of the permanent members' veto. However, international – and to some extent national – courts can be used to hold an aggressive neighbour accountable for violations of International Law.

In relation to Ukraine, a number of judicial proceedings have been, and could potentially be, initiated in the European Court of Human Rights, the International Criminal Court, the International Court of Justice, the Permanent Court of Arbitration and the International Tribunal for the Law of the Sea.

While these processes of accountability take time, and there are many hurdles that need to be overcome, such processes are ongoing and most will in time reach a conclusion.

Introduction[1]

When Russia began its military intervention in Crimea in 2014 and the situation in eastern Ukraine escalated, international law quickly became part of the debate. What kind of conflict or conflicts is Ukraine involved in? How can, or should, international law ensure accountability and mitigate further hostilities? Which legal forums are available to a state such as Ukraine to take legal action against an aggressive neighbor? A rather unsurprising lesson learned is that a permanent member of the United Nations Security Council, acting with aggression against another state, was able to forestall any effective response by the UN. Supranational organizations like the EU, and its individual member states, have imposed sanctions—but is that enough?

International law draws a clear distinction between rules for peace and rules for war. Peace is the state of normality where all regular rules apply in the relations between states. War, on the other hand, is the exception to the rule; in this case, special rules apply to the parties to the conflict, and in the relationships between other states and the parties to a conflict. Despite the fact that the law draws a clear distinction between peace and war, reality has never entirely corresponded to that clear distinction. The ongoing armed conflict situations involving Ukraine are a clear example of how modern conflicts combine other types of antagonistic measures alongside the classic military-type use of force or military operations.

Throughout history, states have often used the term "war" in a political setting, rather than as the legal category of an ongoing conflict.[2] States may have strategic and political reasons for not openly stating that they are parties to an ongoing armed conflict. Today, however, the legal frameworks are largely dependent on the facts on the ground rather than the subjective views of states. As is shown below, they are formulated in such a way that they apply regardless of how states categorize their ongoing dispute with another state.

In the case of the conflicts in Eastern Europe, multiple complicating features are highly conspicuous. The narratives framing, and the available information about, the conflicts are markedly different on the opposing sides, and some news outlets provide propaganda rather than news. The conflicts contain cyber-elements and disinformation, and there are clear elements of "lawfare", that is, to put it briefly, the use of law as a weapon of war.[3] In the case of Russia, this is visible, for instance, in its engagement in the debate in the UN about a global convention on cybercrime,[4] and also in its quite successful promotion of its narrative of the conflict in Ukraine. This, together with Russia's veto power in the UN Security Council, has made working for accountability difficult.[5]

Several aspects are notable in relation to Ukraine and the other conflicts in Eastern Europe.

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1 The authors are grateful for the valuable comments and input received while working on this report from Professor Jann Kleffner, Swedish Defence University.

2 For several examples see e.g., Jessup, P. C., *"Intermediacy",* 23 Nordisk Tidsskrift Int'l Ret 16-26.

3 For a more in-depth definition and examples see e.g. Kittrie, O. F., *"Lawfare"*, Oxford: Oxford University Press, 2016.

4 United Nations, General Assembly, Countering the use of information and communications technologies for criminal purposes. A/RES/75/282, 26 May 2021.

5 Bachmann, S. D. & Mosquera, A. B., "Lawfare and hybrid warfare: how Russia is using the law as a weapon". *Amicus Curiae: Journal of the Society for Advanced Legal Studies*, no. 102 (Summer 2015), updated 2016.

In both the cyber and the physical domains, the use of proxies and of covert operations causes problems regarding accountability in accordance with International Law. Its use of such methods has been a standing accusation against Russia in the conflicts being played out in Georgia, Moldova and Ukraine.[6]

This paper begins by introducing International Law, International Human Rights Law and International Humanitarian Law (IHL), and specifically the applicability of IHL, which is also known as the law of armed conflict, in different situations—including in relation to the conflicts in Eastern Europe. Further, this paper discusses different avenues for establishing accountability for violations of International Law in conflict situations, including violations of IHL, and highlights how some of these avenues are being used in relation to Ukraine.

International Law

International Law mainly regulates the relations between states, covering areas such as trade, diplomacy, the use of force and human rights. International Human Rights Law specifies the obligations states have to protect and respect the rights inherent to all human beings. Human Rights apply in times of both peace and armed conflict, but they can be limited to some extent during armed conflicts.

In armed conflicts, the lex specialis of IHL provides rules on the methods and means of warfare as well as rules to protect civilians and combatants. IHL has a long pedigree. Contemporary IHL is codified in a number of treaties, most notably the Four Geneva conventions of 1949 and their Additional Protocols of 1977 and 2005. In addition, Customary International Law is an important source of current IHL. Customary International Law is created when states, through general practice (usus) accepted as law (opinio iuris), create new rules that are applicable to all states.

Different Types of Conflicts

Even though IHL is often discussed as a single cohesive framework, it distinguishes between International Armed Conflicts (IACs), which include belligerent occupation, and Non-International Armed Conflicts (NIACs). IACs are conflicts that are fought between two or more states,[7] while NIACs are fought between a state and an organized armed group or between two organized armed groups.[8] An IAC and an NIAC can exist in parallel; however, if a situation cannot be classified as either an IAC or an NIAC, IHL is inapplicable and the peacetime rules of International Law apply.

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6 See e.g. Lucas, G. in Gross, M. L. & Meisels, T, *"Soft war": The ethics of Unarmed Conflict*, Cambridge: Cambridge University Press, 2017, p. 81ff.

7 As regards the constitution of a state, the dominant view is that a state is defined as a person in international law. It has a permanent population, a defined territory, a government and the ability to enter into relations with the other states. See the Montevideo Convention on the Rights and Duties of States, 26 December 1933, article 1.

8 International Committee of the Red Cross (ICRC), Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31, art 2 and 3.

The distinction between IACs and NIACs is important for many reasons, not least because the Geneva conventions of 1949 only contain a single article that is applicable to NIAC:s the third article of the conventions, often referred to as "Common Article 3". Common Article 3 establishes basic protection for those not participating in hostilities, for those who have put down their weapons and for those who are injured, sick or deprived of their liberty. Since the inception of Common Article 3 in 1949, other IHL rules have evolved that also apply to NIACs, and there has been a certain degree of congruence between the law that applies to IACs and that which applies to NIACs.[9] Nevertheless, there remain key differences in the applicable law in the two types of conflict, such as when the law begins to apply,[10] as well as the rules regulating the treatment of prisoners of war,[11] and the law on belligerent occupation,[12] which is only applicable to IACs. Since the legal framework differs between the types of conflict, it is important from a legal perspective to identify the actors in an armed conflict. This not only establishes which rules apply to a given situation, but also helps to ensure accountability for acts that breach applicable rules. This can prove legally challenging, especially in instances where multiple armed conflicts occur in parallel, since different norms might be applicable to different actors.

From an International Law perspective, it is possible to argue that, in addition to the IAC between Ukraine and Russia linked to the occupation of Crimea, there are one or two NIACs between the government of Ukraine and the so-called Donetsk People's Republic and Lugansk People's Republic in eastern Ukraine. From a legal point of view, such conflicts are considered parallel to the IAC between Russia and Ukraine, and governed by a partly different legal framework. If it were possible to clearly establish that Russia were exerting overall control over rebel forces in this armed conflict, they would be reclassified as international in character.

In this context, it should be noted that the government of Ukraine considers the non-government-controlled parts of its territory to be occupied by Russia. Russia, for its part, claims that it is not a party to any international armed conflict with Ukraine.[13]

International Armed Conflicts

An IAC exists whenever there is a resort to armed force between states.[14] IHL applies from that moment. There is no requirement for the armed force to last for an extended period of

9 Importantly, the ICRC Customary International Humanitarian Law study has a list of 161 rules, 149 of which are applicable to NIACs. Henckaerts, Jean-Marie. "Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict". *International Review of the Red Cross* vol. 87, no. 857 (2005): 198–212.

10 The Prosecutor v. Dusko Tadić, (IT-94-1-A), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

11 Sivakumaran, S., *The Law of Non-international Armed Conflict*. Oxford: Oxford University Press, 2012, p. 521.

12 Sivakumaran, S., *The Law of Non-international Armed Conflict*. Oxford: Oxford University Press, 2012, p. 529.

13 See e.g. Letter dated 14 September 2016 from the Permanent Representative of Ukraine to the United Nations addressed to the Secretary-General, A/71/379–S/2016/788, 15 September 2016; and Council on Foreign Relations, Global Conflict Tracker, Conflict in Ukraine | Global Conflict Tracker (cfr.org), accessed 30 November 2021.

14 The Prosecutor v. Dusko Tadić, (IT-94-1-A), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

time or for it to attain a certain level of intensity. In this sense, regardless of how Ukraine and/or Russia have categorized the situation, an IAC began the moment Russia initiated its military intervention in Crimea; from that moment, IHL formally applied to Russia and Ukraine. For IHL to apply, neither a declaration of war nor an acknowledgement by the parties to the armed conflict that an armed conflict exists is required. The factual circumstances determine whether IHL applies.[15] In addition, IHL applies to all cases of a declared war between states, even if there is no resort to armed force.[16]

Conflicts between states and non-state armed groups are discussed in more detail below. However, there are certain situations where these types of conflict are classified as IACs and not as NIACs. When a state has a certain amount of control over an organized armed group, the conflict is classified as an IAC instead of an NIAC. The International Criminal Tribunal for the former Yugoslavia (ICTY) established that partial state control or influence is not enough to lead to change the classification of an armed conflict; the respective state must have "overall control" over the organized armed group.[17] According to the ICTY, a state has overall control when it "has a role in organising, co-ordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group".[18] The involvement of the state must therefore go beyond mere logistical support or aid; however, the state does not have to be involved in every action that the group takes.

IHL applies in relation to IACs until a general peaceful conclusion is reached between the belligerent states, usually in the form of some type of peace agreement. During an ongoing IAC, IHL applies throughout the whole territory (including the territorial waters and airspace) of the belligerent parties, even if there are no active hostilities in an area. In addition, IHL applies on the high seas, or in international waters beyond states' internal or territorial waters.[19] Certain rules continue to apply even after the end of an IAC, such as those relating to individuals who have been deprived of their liberty and who are protected until they have been released.[20]

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15 International Committee of the Red Cross (ICRC), Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31, art 2 and The Prosecutor v. Dusko Tadić, (IT-94-1-A), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

16 International Committee of the Red Cross (ICRC), Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31, art. 2.

17 International courts such as the ICTY constitute recognized sources of international law according to article 38 of the ICJ Statute. This means that the formulations about a case processed by the ICTY can be used as future references regarding how a specific aspect, in this case the classification of armed conflict, is to be interpreted.

18 Prosecutor v. Dusko Tadic (Appeal Judgement), IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 July 1999, para 137.

19 The Prosecutor v. Dusko Tadić, (IT-94-1-A), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

20 International Committee of the Red Cross (ICRC), Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3, 3(b).

The Law of Belligerent Occupation

A belligerent occupation is a special form of IAC case that triggers a subset of rules specifically designed to regulate situations in which one state takes control of another state's territory without permission. The general IHL idea underlying the legal regulation of belligerent occupation is that such an occupation is temporary, lasting only until the *status quo ante* is reinstated.[21] As a matter of international law, occupied territory cannot be annexed by the occupying state. Furthermore, in line with the principle of "no fruit of aggression", no state shall recognize the acquisition of territory resulting from an act of aggression.[22] Similarly, the assumed allegiance of the civilian population in the occupied territory does not change.

Belligerent occupations are often the result of an invasion that coincides with fighting between two states. However, belligerent occupations also include situations where a state takes control of part of another state without armed resistance. As long as such control is non-consensual, the law of belligerent occupation applies. This may also result from the withdrawal of consent to the presence of foreign armed forces on the territory of a state.

The mere fact that a foreign state's troops are present on another state's territory is not sufficient for the territory to be considered occupied. According to the law of belligerent occupation, a territory is only occupied when it is actually placed under the effective control of a hostile army.[23] Effective control has traditionally been characterized by two features: the physical presence of the occupying power and the ability of the occupying power to exercise authority over the territory concerned. Areas in which hostilities between the parties to an armed conflict are taking place, areas under unclear control, and areas close to being but not under the effective control of the occupying power are not considered occupied.

The belligerent parties' opinions concerning whether or not an area is occupied do not affect the legal status of a territory. It is the factual circumstances that dictate whether an area is occupied or not. By the same token, a belligerent occupation ends in principle when the factual circumstances cease to exist, that is, when a state ceases to exercise effective control over another state's territory in accordance with the criteria presented above. However, some controversy surrounds the question of whether a belligerent occupation can continue, as a matter of law, if and when an occupying power opts not to exercise its effective control despite its ability to do so.[24]

Non-international Armed Conflicts

In contrast to IACs, IHL's application to NIACs depends on two important factors. The conflict has to reach a certain level of intensity and the non-state actor, or actors, must have a certain

21 UN General Assembly, Definition of Aggression, A/RES/3314, art 5(3), 14 December 1974.

22 United Nations, General Assembly, Definition of Aggression, 14 December 1974, A/RES/3314, art 5(3).

23 Convention (IV) respecting the Laws and Customs of War on Land and its annex, Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907, art. 42.

24 On this topic, see e.g. Dinstein, Y, *The International Law of Belligerent Occupation*, Cambridge: Cambridge University Press, 2009, p. 44.

degree of organization.[25] Other violent situations that do not display these two requirements, such as internal disturbances and tensions, riots and isolated or sporadic acts of violence, fall below the threshold for the application of IHL.[26]

The threshold for the intensity criterion is not specified in any treaty but guidance can be found in jurisprudence, in particular from the decisions of the ICTY. The ICTY has specified multiple factors that are indicative of the requisite level of intensity, such as:

- the number, duration and intensity of confrontations;
- the type of weapons and other military equipment used;
- the number and calibre of munitions fired;
- the number of persons and types of forces participating in the fighting;
- the number of casualties;
- the extent of material destruction;
- the number of civilians fleeing combat zones;
- the involvement of the UN Security Council.[27]

Similarly, the ICTY has identified factors that indicate when an armed group has met the threshold of organization:

- the group has a command structure;
- the group can carry out operations in an organized manner;
- the group has a certain level of logistics;
- the group has a level of discipline and the ability to implement the basic obligations of Common Article 3;
- the armed group speaks with one voice.[28]

Thus, an organized armed group does not need to have the same level of organization as the armed forces of a state, but must be organized to a given degree. The armed forces of states are generally presumed to fulfil the organization criterion, but it is possible to imagine situations where the armed forces of a failing state would disintegrate and eventually fall below the threshold of the organization criterion.[29] Importantly, the IHL applicable to NIACs binds states and organized armed groups alike, and applies from the point that both threshold criteria are met until a peaceful

25 The Prosecutor v. Dusko Tadić, (IT-94-1-A), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

26 See e.g. International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609, art 1.

27 The Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj, (IT-04-84-T), Judgment, 3 April 2008, para 49.

28 The Prosecutor v. Ljube Boškoski and Johan Tarčulovski, (IT-04-82-T), Judgment, 10 July 2008, paras 199-203.

29 See e.g. Kleffner, Jann K. "The legal fog of an illusion: three reflections on 'organization' and 'intensity' as criteria for the temporal scope of the law of non-international armed conflict". *International Law Studies* vol. 95, no. 1 (2019): pp 170-172.

settlement is reached;[30] or, in other words, until the conflict no longer meets the classification of a non-international armed conflict. As noted above, persons deprived of their liberty remain protected by IHL for as long as they remain in that state, even if that situation extends beyond the end of the armed conflict. In addition, the IHL of NIACs applies throughout the territory of a state that is a party to the armed conflict as well as to the territory controlled by an organized armed group that is a party to the armed conflict.

The Difference Between the Law on War and the Law on Waging War

International law distinguishes between the law that regulates when states can legitimately use force and IHL, which regulates the conduct during an armed conflict. The laws regulating when states can use force against other states is called *jus ad bellum*. It is regulated chiefly by the UN Charter's prohibition of the use of force against other states and the two exceptions to that prohibition: self-defense and authorization by the UN Security Council.[31] It should be noted, especially in relation to Russia's "passportization"[32] strategy, that self-defense as stipulated in the UN Charter should not be interpreted as allowing the use of force to protect nationals abroad. International law does not provide a regulation of when recourse to force may be lawful in relation to non-state actors, although there is a right to use force to maintain order and security within a state and to suppress insurrections, which stems from the principle of sovereignty.

IHL and *jus ad bellum* exist independently of, and separate from, one another. This means that acts that are unlawful under *jus ad bellum* may still be lawful under IHL and vice versa. For example, a state can act in lawful self-defense but still violate IHL; or a state could be an unlawful aggressor while still adhering to IHL. This separation also means that IHL applies equally to all parties to an armed conflict regardless of the lawfulness or unlawfulness of the use of force under *jus ad bellum*.

Human Rights

In addition to IHL, International Human Rights Law continues to apply during both IACs and NIACs, even though human rights are primarily focused on regulating the relationship between a state and the individuals under its jurisdiction in peacetime.[33] In this case, jurisdiction should be understood as applying as though the individual were on the state's territory, or in a territory over which the state has effective control, or as though the state had effective control over an individual, for example, in a situation where an individual is being detained.

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30 The Prosecutor v. Dusko Tadić, (IT-94-1-A), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

31 United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, art 2(4), 42 and 51.

32 Passportization is the mass distribution of Russian citizenship to individuals living outside of Russia.

33 Greenwood, C., "Historical development and legal basis". *The Handbook of International Humanitarian Law* 2 (2008): 1-44, pp. 12.

There is some room for the derogation of human rights in times of armed conflict, but no derogation is allowed of certain fundamental human rights such as the right to life, protection against inhumane treatment and torture, the prohibition on slavery and the prohibition against being punished for an act that was not criminalized when committed.[34] Limitations on other human rights must be proportionate and necessary in a democratic society, and are only permissible in pursuit of legitimate interests such as national security or public safety.[35]

Human rights regulate the relationship between the state and individuals. Whether and to what extent organized armed groups have any human rights obligations is controversial. Arguments have been made that under certain circumstances, such as when they take over state functions in a territory which they control, organized armed groups assume limited obligations under International Human Rights Law.[36]

Possible Avenues for Accountability for Violations of International Law

There are a number of possible avenues for holding states and individuals accountable for violations of international law, some of which are also available in cases of violations of IHL and International Human Rights Law in conflict situations. Some of these avenues are discussed below in relation to the conflicts in Ukraine.

The United Nations Security Council

The UN Charter states that the UN Security Council has primary responsibility for international peace and security.[37] Whenever a threat to international peace and security arises, the Security Council is mandated to take appropriate action to re-establish international peace and security. The Security Council's actions in response to situations that it deems to be threats to international peace and security have ranged from military intervention to peace operations, economic or military sanctions and the establishment of international criminal tribunals.

However, the Security Council is a political body and its binding resolutions are subject to veto by one or more of its five permanent members. The power of veto creates obvious challenges where one of the five veto powers has a political interest that is not in line with the will of the rest of the Council.

International Courts and Judicial Proceedings

A second possible avenue for accountability can be found in international courts and judicial proceedings. There have been, and continue to be, a number of international processes relating to the situation in Ukraine. Ukraine has made multiple interstate applications to the European Court of Human Rights in relation to alleged human rights violations by Russia

34 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14, 4 November 1950, ETS 5.

35 See e.g. Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, art 6, 8-11.

36 See e.g. Clapham, Andrew. "Human rights obligations of non-state actors in conflict situations". *International Review of the Red Cross* 88.863 (2006): 491-523; and Ronen, Yaël. "Human rights obligations of territorial non-state actors". *Cornell Int'l LJ* 46 (2013): 21.

37 Charter of the United Nations, 24 October 1945, 1 UNTS XVI, art 24(1).

(nine as of September 2021), and Russia has made one such interstate application in relation to Ukraine.[38]

By virtue of a so-called "12(3) declaration", Ukraine has given the International Criminal Court (ICC) jurisdiction over potential war crimes and crimes against humanity within its borders since February 20, 2014.[39] According to this declaration, even though Ukraine is not a party to the Court, the ICC's jurisdiction covers any actions taken on the territory of Ukraine, including any Russian violations in eastern Ukraine or Crimea.[40]

Ukraine has also filed claims against Russia, and requested provisional measures of protection, at the International Court of Justice (ICJ).[41] These claims relate to possible Russian financing of terrorism in violation of the International Convention for the Suppression of the Financing of Terrorism,[42] and possible Russian racial discrimination, violating the International Convention on the Elimination of All Forms of Racial Discrimination.[43] The ICJ has found that it has jurisdiction in both instances and, as of autumn 2021, is moving forward with them.[44]

Interstate arbitration between Ukraine and Russia is also ongoing at the Permanent Court of Arbitration relating to navigational rights, marine resources and the marine environment in the Black Sea and the Sea of Azov (the sea between Crimea and Russia);[45] an Award on Preliminary Objections was issued in February 2020.[46] Further, there have been arbitral proceedings linked to the International Tribunal for the Law of the Sea concerning the detention of three Ukrainian naval vessels and 24 Ukrainian seamen.[47] In this case, the Tribunal ordered the release of the vessels and seamen on May 25, 2019.[48]

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38 ECHR, Inter-state applications by date of introduction of the applications, 23 July 2021, https://www.echr.coe.int/Documents/InterState_applications_ENG.pdf

39 There was an earlier declaration made by Ukraine but with much more limited scope, see https://www.icc-cpi.int/ukraine

40 Office of the Prosecutor, "ICC Prosecutor extends preliminary examination of the situation in Ukraine following second article 12(3) declaration", 29 September 2015, https://www.icc-cpi.int/Pages/item.aspx?name=pr1156

41 ICJ, Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), https://www.icj-cij.org/en/case/166

42 UN General Assembly, International Convention for the Suppression of the Financing of Terrorism, 9 December 1999, no. 38349.

43 United Nations, General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195.

44 Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Preliminary Objections, Judgment, 8 November 2019, para. 134.

45 In the matter of a dispute concerning costal state rights in the Black Sea, Sea of Azov and Kerch Strait before an arbitral tribunal constituted under ANNEX VII to the 1982 United Nations Convention on the Law of the Sea between Ukraine and the Russian Federation, the Permanent Court of Arbitration, Written observations and submissions of Ukraine on jurisdiction, PCA Case No. 2017-06, 27 November 2018, para 9–10.

46 Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation), Permanent Court of Arbitration, https://pca-cpa.org/en/cases/149/

47 Case concerning the detention of three Ukrainian naval vessels (Ukraine v. Russian Federation), Provisional Measures, International Tribunal for the Law of the Sea, https://www.itlos.org/en/main/cases/list-of-cases/case-concerning-the-detention-of-three-ukrainian-naval-vessels-ukraine-v-russian-federation-provisional-measures/

48 Case concerning the detention of three Ukrainian naval vessels, Ukraine v Russian Federation, Provisional measures, ITLOS Case No 26, ICGJ 542 (ITLOS 2019), 25th May 2019.

In addition to interstate proceedings, a number of individuals have made applications to the European Court of Human Rights. As of July 2021, there had been over 7,000 individual applications in relation to the situation in eastern Ukraine and Crimea since 2014.[49]

National Courts

Another possible avenue for accountability for violations of International Law, and of IHL in particular, would be national courts—whether Ukrainian, Russian or those of third states. This avenue is possible given that national courts have jurisdiction over alleged violations, especially when they amount to war crimes or other international crimes, such as crimes against humanity, and possibly in some instances the crime of aggression.[50] However, a number of difficulties arise with such national proceedings. For instance, there may be concerns regarding the independence and/or impartiality of domestic court proceedings in the states most directly involved. Furthermore, it has proved to be a long and difficult process to secure evidence, witnesses and suspects in uncooperative states, and in territory controlled by uncooperative entities as with, for instance, Crimea and eastern Ukraine. Thus, only a few domestic proceedings have been initiated, such as the ongoing procedures relating to the downing of flight MH17 on July 17, 2014 in Donets'kaia Oblast, Ukraine;[51] and some national proceedings based on international agreements,[52] such as the case of Aeroport Belbek LLC and Igor Valerievich Kolomoisky vs the Russian Federation.[53]

Moreover, a trend can be observed in relation to alleged cybercrime, hacking and espionage where, for instance, the United States has indicted the citizens of another state for allegedly acting on behalf of that state. These cases may be pursued not to achieve a swift trial, at least not principally, but to send a message about possible accountability and demonstrate that legal attributions can be made.[54] Pursuing accountability by indicting individuals may become a future avenue in cases beyond the issue of cyberspace, such as issues involving proxy actors or covert operations.

Challenges

As demonstrated above, while some international procedures deal specifically with violations of IHL, many ongoing judicial processes are related to other areas of international law. Some

49 Press country profile Russia, ECHR, Updated July 2021, https://www.echr.coe.int/Documents/CP_Russia_ENG.pdf, p.32

50 See e.g. the Swedish law Lag (2014:406) om straff för folkmord, brott mot mänskligheten och krigsförbrytelser and Regeringens proposition 2020/21:204, Aggressionsbrottet i svensk rätt och svensk straffrättslig domsrätt.

51 For more information see https://www.courtmh17.com/en/about-the-case.html

52 Examples include the Agreement between the Government of the Russian Federation and the Cabinet of the Ministers of Ukraine on the Encouragement and Mutual Protection of Investments, 27 November 1998, https://www.italaw.com/sites/default/files/laws/italaw11854.pdf

53 Aeroport Belbek LLC and Igor Valerievich Kolomoisky v. The Russian Federation, Permanent Court of Arbitration (PCA), https://pca-cpa.org/en/cases/123/

54 See e.g. United States of America v. Borisovich Netyksho, Alekseyevich Antonov, Sergeyevich Badin, Sergeyevich Yermakov, Viktorovich Lukashev, Aleksandrovich Morgachev, Yurevich Kozachek, Vyacheslavovich Yeshov, Andreyevich Malyshev, Vladimirovich Osadchuk, Aleksandrovich Potemkin and Sergeyevich Kovalev, Indictment, Case 1:18-cr-00215-ABJ, 13 July 2018 (The United States District Court for the District of Columbia I). Cases have also been initiated against North Korean and Chinese citizens.

of the international courts that have prosecuted war crimes, such as the ICTY and the International Criminal Tribunal for Rwanda, were established by United Nations Security Council resolutions. This would in all likelihood not be feasible with regard to the conflict areas of Eastern Europe, as Russia would almost certainly veto any such resolution. Moreover, the ICC was established to make it unnecessary to create ad hoc international courts. However, international recognition of or accession to the ICC has been relatively limited. In relation to the conflicts in Eastern Europe, Armenia, Azerbaijan, Russia and Ukraine have all failed to ratify the Rome Statute. States could, however, make a 12(3) declaration, as Ukraine has done, to give the ICC temporary jurisdiction.

In addition, many of the international courts and tribunals, including the ICC and the European Court of Human Rights, are based on the idea that cases are only admissible if and when national court proceedings have been exhausted and/or proved inadequate. In the case of the ICC, this means that it only handles cases that national courts cannot or will not adjudicate in a free and fair manner. In relation to individual plaintiffs at the European Court of Human Rights, the respective state's domestic remedies must have been exhausted, or have proved unavailable or ineffective.

Furthermore, in contrast to national courts, international courts lack the support of an executive branch, which means that the courts need the support of state parties whenever there is a potential case, or an indicted individual. This can create difficult situations when potential violations are state-orchestrated or state-supported, and makes it difficult for international courts to get access to the relevant evidence, witnesses and suspects. This issue is further complicated by the fact that many of the potential violations take place far away from the courts, often in areas that are not—or not fully—controlled by a state.

Jurisdiction is an issue that has been discussed in relation to many procedures.[55] In some instances, in order to be able to decide which law is applicable, the courts have had to determine which state has had effective control over or jurisdiction in a certain area at a certain time. International courts have been cautious about dealing with this in relation to the conflict situation in Ukraine.[56] For instance, for the European Court of Human Rights to determine whether Russia has committed human rights violations in the non-government-controlled parts of eastern Ukraine, it would have to determine whether Russia had effective control over or extraterritorial jurisdiction in those areas, which in turn might be indicative of whether the areas were occupied at the time. In these and other highly politically sensitive cases, international courts can display a certain degree of reluctance to engage, employing a number of avoidance doctrines. In the case of proceedings before the European Court of Human Rights, for instance, an ever-evolving jurisprudence regarding what it takes for a state to exercise its "jurisdiction", and the ensuing obligations under the European Convention, is illustrative.

55 See e.g. Milanovic, M. "ECtHR Grand Chamber declares admissible the case of Ukraine v. Russia re. Crimea", EJIL: Talk!, 15 January 2021, https://www.ejiltalk.org/ecthr-grand-chamber-declares-admissible-the-case-of-ukraine-v-russia-re-crimea/; and Nuridzhanian, G., "Ukraine vs. Russia in International Courts and Tribunals", EJIL: Talk!, 9 March 2016, https://www.ejiltalk.org/ukraine-versus-russia-in-international-courts-and-tribunals/.

56 They have, however, made statements in relation to other situations, such as Russian control over parts of Georgia.

Concluding Thoughts

While it may seem that little is happening on the legal front in relation to potential violations of International Law in Eastern Europe, the above examples show how, where and when International Humanitarian Law is applicable in relation to potential violations, and that there are avenues for accountability in relation to various violations of International Law. The process of accountability in the international community takes time and there are many obstacles that must be overcome. Nonetheless, the process of accountability is ongoing and while the results of adjudications might not be the desired ones, most processes will in time reach a conclusion.

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