

4 March 2022

Putin's revanchism and the threat to international law



As Executive Director of the International Bar Association (IBA) **Mark Ellis** leads the foremost international organization of bar associations, law firms and individual lawyers in the world. The IBA is comprised of more than 190 national bar associations, major international law firms and 80,000 individual members from around the world. A frequent speaker and media commentator on international legal issues, he has regularly appeared on *CNN International*, *Al Jazeera*, and *BBC*. Mark has published extensively in the areas of international humanitarian law, war crimes tribunals, and the development of the rule of law and his op-eds have appeared in *The New York Times*, *The International Herald Tribune*, *The Huffington Post* and *The London Times*. His latest publication – *Justice and Diplomacy: Resolving Contradictions in Diplomatic Practice and International Humanitarian Law* (with Doutriaux and Ryback) was published by Cambridge University Press.

The belligerent assault on its neighbour Ukraine by the monocracy of Russian President Vladimir Putin is another distressing signal that the values and ideas that have been the foundation of the international order since World War II, and certainly since the end of the Cold War, are in grave jeopardy. In this dark moment, we are reminded of the warnings conveyed in 1945 by the philosopher Karl Popper that totalitarian ideology would re-emerge. His concerns are now manifest, and they are revealed most strikingly in the disregard of international law.

Russia's attack on Ukraine violates the most sacred principle in international law – the territorial integrity and political independence of all states. International law is crystal clear and absolute on this issue. A state is prohibited from the use or threat of force against another state; every such use, regardless of gravity or aims, constitutes a violation. There are only two main exceptions to this principle: when the state acts in self-defence or acts pursuant to a United Nations Security Council resolution. Neither of these two exceptions applies to Russia's actions against Ukraine.

Russia's attempt to justify its military intervention through its need to liberate Ukrainians (and particularly Russophone Ukrainians) from a "fascist, genocidal regime" is ludicrous.

Genocide is defined as "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group." Historical examples include killings in Rwanda and Srebrenica and the industrial mass killing of Jews during the Holocaust. Russia's nonsensical claim of genocide in Ukraine is pure fabrication. German Chancellor Olaf Scholz rightfully dismissed it as "ridiculous."

The same self-righteousness imbues Putin's false and pestilent claim that a fascist regime leads Ukraine. Images of a Ukraine dominated by the extreme right have been peddled by Russian state

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media ad nauseam. They are part of Putin's heroic narrative of victory over national socialism during World War II, known in Russia as the "Great Patriotic War." It is true that Ukraine has had issues with far-right nationalism, such as the Azov movement. However, the current political landscape is hardly that of a Nazified regime. In fact, the Ukrainian far right sustained major losses in the 2019 elections and was crushed to only 2 % of the vote. Ukrainian President Volodymyr Zelenskyy is Jewish and a Russian speaker, and stems from a family nearly wiped out in the Holocaust.

Russia's brutal authoritarianism and its unabashed nationalistic movement have been dramatically enhanced under Mr. Putin's cult of personality. Plain facts that might undermine this cult are blatantly and systematically dismissed. Meanwhile, Russia has supported numerous radical right-wing and nationalist movements in Europe.

People are rightfully asking if Russia can be held accountable for its unlawful military attack against Ukraine. Recent history does not bode well. Russia's intervention into Georgia, its annexation of the Crimean Peninsula and its support of separatist movements in the self-declared "republics" of Donetsk and Luhansk were done with full impunity.

The international community has wrestled with this question before.

Following the armistice that ended WWI, the Allied victors debated bringing to trial the defeated German emperor, Kaiser Wilhelm II, who was viewed as the individual most responsible for the war. However, the "crime of aggression" was still an unsettled matter of international law, and the kaiser was never brought to justice. The crime of aggression would be prosecuted not until the Nuremberg and Tokyo trials.

Today, any attempt to hold Russia accountable for the crime of aggression must be assessed through the structure of the International Criminal Court (ICC). Under the court's founding treaty, the Rome Statute, the crime of aggression, which came into force in 2018, is defined as "the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity, and scale, constitutes a manifest violation of the Charter of the United Nations." Under this definition, there is no doubt that Vladimir Putin would be found guilty.

However, Russia has not acceded to the Rome Statute and, thus, can avoid the court's jurisdiction for the crime of aggression. That scenario could only change if the UN Security Council referred the Russian attacks to the court. However, Russia, a permanent member of the council, would veto any referral attempt.

There is still hope. It is still possible for the ICC to exert jurisdiction over the territory of Ukraine and, by extension, over acts by Russian troops and Putin, even though Russia is not a signatory to the Rome Statute. The reason is that in 2014 Ukraine accepted the ICC's jurisdiction. Consequently, although Ukraine is not a full state party to the Rome Statute, the court can exercise its jurisdiction over any nefarious acts such as genocide, crimes against humanity or war crimes committed within the territory of Ukraine from 2014 onwards. This would include the ICC's jurisdiction over Russia's forcible displacement of Ukrainian people to neighbouring countries. The ICC is already invoking this principle in the case of Myanmar. Putin himself can be held accountable under the principle of command responsibility, which allows superiors to be held criminally responsible for war crimes committed by their subordinates.

There is also irrefutable and compelling evidence of gross violations of international humanitarian law by Russian armed forces. Civilians are being targeted. The Geneva Conventions protect civilians. This is based on the law of distinction, which is the cardinal principle of international humanitarian law. The civilian population can never be the target of attacks in a conflict. Russia is violating this principle at a monstrous rate.

The ICC's prosecutor, Karim Khan, has announced that he will proceed with an investigation into Russia's military attack of Ukraine. He stated, "I am satisfied that there is a reasonable basis to believe that both alleged war crimes and crimes against humanity have been committed in Ukraine." This is good news.

An indictment against Mr. Putin for war crimes should give him concern. Putin undoubtedly sees himself as untouchable. However, there is no impunity nor statute of limitations for the types of crimes being committed in Ukraine. In the short-term, Putin may avoid the court's jurisdiction. But international justice plays the long game.

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