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Using the Law in the Fight Against Violence – the War in Ukraine from an International Law Perspective

An Interview with Dr. Donald Riznik

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At a glance

Since February 24, 2022 at the latest, destruction and suffering have become a sad daily routine for many people in Ukraine. But war is not a legal vacuum. International (criminal) law provides rules and answers for times of war and crisis.

What are war crimes according to international law? What is the responsibility of the International Criminal Court? Do we need a special tribunal to deal with the crimes in Ukraine? What is the role of the individual organs of the United Nations? Dr. Donald Riznik from the Institute for Public Law and International Law at the University of the Bundeswehr in Munich explains the events in Ukraine from the perspective of international (criminal) law: How can law contribute to the fight against violence?

Dr. Riznik, February 24, 2022 marked the start of the Russian war of aggression against Ukraine. Since then, we have seen consistently shocking reports about the extent of the destruction and the suffering of the civil population. Terrifying images from cities under attack, such as Bucha, Irpin and Mariupol, continue to appall us. This has led to accusations of Russia committing war crimes in the region. My question therefore is, how are war crimes defined under international law?

Serious violations of international humanitarian law

International law defines war crimes as serious violations of international humanitarian law, which are punishable under criminal law. International humanitarian law, also known as the international law of war, establishes the rules of conduct for those involved in armed conflicts. The inhuman or degrading treatment of people in general has long been prohibited, even in wartime. Examples of war crimes include the deliberate killing of civilians, the deliberate bombardment of protected objects such as hospitals, forced resettlement and deportation, or the execution of prisoners of war. International law criminalizes serious violations of this kind. The Statute of the International Criminal Court now includes a relatively specific list of all acts, which are considered to be war crimes under customary law. If the shocking images and reports accurately reflect what is going on, Russia is committing war crimes in Ukraine that are directed primarily against the civilian population.

In mid-April, US President Joe Biden went so far as to accuse Vladimir Putin of genocide. When exactly does the law deem an act to be genocide?

Genocide is defined as specific acts committed with the intention of partially or wholly destroying a section of the population as such – be it national, ethnic, racial, or religious. However, the act as such is not considered to solely involve the killing of members of this group. In general, it also includes any act that may cause an extermination of this group. This includes measures intended to prevent births within the group – and thus any growth within its population. Looking at the origin of the offence is quite informative in this context. We owe the term "genocide" and its definition to Raphael Lemkin. His stated intention was to coin a single, comprehensive term for the crimes committed by Nazi Germany against the Jewish population throughout Europe. However, he also wanted to create a criminal offence that clearly expressed the very specific degree of unlawfulness of this heinous crime. Both the term and the offence were incorporated into international law for the first time as part of the 1948 Genocide Convention.

Is it fair to say that the crime of genocide has special status within the international legal system?

Peremptory norm of international law

The prohibition of genocide is one of the few norms that are recognized as peremptory in international law with absolute certainty. Its position at the top of the hierarchy of norms under international law is not merely symbolic. Rather, it mandates compliance with these norms under all circumstances. Derogations from this norm, or any exceptions to it whatsoever, are therefore impossible. All of this ultimately contributes to the vast majority of scholars identifying this crime as the "crime of the crimes", so it is consistently sanctioned by the international community of states with the utmost severity. However, prosecuting this crime through criminal proceedings is far from simple. Explicit evidence must be furnished to prove the perpetrator acted with the specific intention of partially or

wholly destroying a section of the population as such. Nonetheless, a number of proceedings before national and international criminal courts have successfully provided such evidence in the recent past. The most recent case dates from November 2021, when the Frankfurt Higher Regional Court delivered a ruling against a former member of the Islamic State for genocide against the Yazidis.

The International Criminal Court has already started an investigation into possible war crimes in Ukraine. What exactly is the International Criminal Court responsible for?

The International Criminal Court was established in July 2002 and is tasked with holding individuals to account for a particularly serious category of crimes. Its material jurisdiction covers both of the crimes mentioned above, namely genocide and war crimes, as well as crimes against humanity. More recently, the crime of aggression, or, in other words, war of aggression, has also been added. Here, however, there are clear limitations that impose strict requirements for the International Criminal Court when it comes to establishing its jurisdiction. The normative rationale for the inclusion of these crimes is as simple as it is obvious: it is assumed that serious crimes of this kind affect the international community as a whole and must therefore be punished at the international level.

Crimes affect the international community

Any country in the world can join the International Criminal Court, thus subjecting its territory and citizens to the Court's jurisdiction. Ukraine has not yet acceded to the Statute of the International Criminal Court. Nevertheless, the Court's jurisdiction also extends to Ukrainian state territory. This is due to two ad hoc submissions made by the Ukrainian government following the annexation of Crimea in 2014 and 2015. The International Criminal Court has therefore already dispatched an investigation team to Ukraine to prosecute the war crimes, crimes against humanity and the crime of genocide committed there. However, its investigations do not include the crime of aggression. The Court has no jurisdiction over this crime, as neither Ukraine nor Russia are parties to the Interna-

tional Criminal Court, and the Russian veto prevents the matter being referred to the Court by the United Nations Security Council.

Often, however, it is high-ranking state officials who are accused of such crimes. Yet, the concept of immunity exists specifically to protect such people from criminal prosecution. Does this principle not apply before the International Criminal Court?

Immunity under international law is one of the oldest norms in international legal relations. It ultimately serves to allow smooth diplomatic exchanges between sovereign states. For this reason, certain persons are granted very broad rights to immunity that prevent national criminal proceedings in foreign countries. For example, our Federal President, our Federal Chancellor and our Foreign Minister enjoy absolute immunity from foreign jurisdiction during their term of office, meaning they cannot be prosecuted in another country under any circumstances. This applies even if they are accused of the worst war crimes or genocide. Yet, it is precisely such highest-ranking state officials whose position allows them to commit particularly serious crimes under international law, and to evade national criminal proceedings against them. This situation has ultimately led to the community of states creating international institutions where such prosecutions can actually be held, one of which is the International Criminal Court in The Hague. The aim of international criminal law, therefore, is to end the impunity that is unfortunately still so prevalent among such people. The Statute of the International Criminal Court explicitly stipulates that immunities shall not bar the Court from exercising its jurisdiction over such persons. This applies indisputably to all 123 member states of the Court. However, since its establishment in 2002, it has been contested, whether the Court has the right to disregard international law immunities of the highest-ranking officials from non-member states. It was not until quite recently, in 2019, that the Court's Appeals Chamber took a position on the matter, explicitly stating that such immunities cannot have an effect on the Court's jurisdiction. Although there are many opinions in the literature challenging the decision to this day, I am firmly convinced that the International Criminal Court will maintain its position. Therefore, in good conscience, we can

definitively assert that the concept of immunity has no legal effect before the International Criminal Court, nor will it have in the future.

Is it possible to prosecute the above-mentioned crimes before national criminal courts?

Of course, these crimes can also be prosecuted at national level. The Ukrainian criminal courts in particular have specific powers under the principle of territoriality to exercise their jurisdiction over all crimes committed on their national territory. Only recently, a Kiev court sentenced a Russian tank commander to life imprisonment for war crimes. However, many other countries can now also engage in the criminal justice process.

The principle of universal jurisdiction

Since the German Code of Crimes against International Law was introduced in 2002, for example, we have also established the legal framework in Germany to prosecute such crimes. Specifically, this means that, under the principle of universal jurisdiction, the German courts now also have jurisdiction over crimes under international law that are in no way whatsoever connected to our state. Prior to that, this was only permitted for crimes committed on German soil, or in case of the perpetrator or the victim being German citizens.

Is criminal prosecution at a national level desirable, or should we rather leave it to the International Criminal Court?

Criminal prosecution at a national level is explicitly provided for in the Statute of the International Criminal Court. It is crucial in order to provide an adequate, comprehensive and global prosecution of crimes under international criminal law. Leaving prosecutions solely to the International Criminal Court or special tribunals cannot fill the existing gaps in criminal liability. For this reason, I consider it particularly important that Germany takes its commitments under the Statute of the International Criminal Court seriously. The German judicial system should continue to play an active role in prosecuting crimes under international law. I am quite cer-

Crucial part of comprehensive prosecution

tain that the Ukraine conflict will result in a great many trials before the German criminal courts. In fact, the Federal Prosecutor's Office is already involved, and has opened investigations.

As you have mentioned, special tribunals can also be set up alongside the International Criminal Court and national courts to punish crimes that have been committed. Do you think that is appropriate in the case of Ukraine?

Special tribunal only for crimes of aggression

A number of academics and practitioners have already voiced the idea of setting up a special tribunal. Meanwhile, this idea is also supported by some states. The suggestion is valid in principle, but it also raises further questions. The International Criminal Court was explicitly set up with the right to operate on a global level. Strictly speaking, this means that setting up special tribunals is only appropriate in places where the International Criminal Court has no jurisdiction. With regard to crimes that the Court in The Hague can try, as is the case for war crimes, crimes against humanity and genocide, there is no need for another tribunal. In the case of crimes of aggression, on the other hand, a special tribunal could be of great benefit – and that is exactly what this proposal is aiming at. Clearly, the invasion by Russian troops is a particularly blatant violation of the prohibition on the use of force, which simply cannot be justified. The same applies to the willingness demonstrated by Belarus in assisting the invasion. Here, as in Nuremberg before, the question is whether it should be mandatory to follow up on a violation of the prohibition of aggression by means of criminal prosecution. The aim here is to take advantage of the existing momentum. Establishing a special tribunal might give new, potentially critical clout to the criminal liability for crimes of aggression. However, it is difficult to judge whether such an initiative, with all its consequences, would be politically wise at the moment. There are a number of options for creating such a tribunal. These proposals must be studied closely, and assessed with regard to their legitimacy, the non-application of immunity regulations under international law, their practical feasibility, and how willing the international community of states is to accept

and comply with them. I have no doubt, however, that Germany should strive even harder to ensure the crime of aggression is punishable by appropriate means and in a constructive context.

The International Court of Justice in The Hague reached a decision in the case of Ukraine against Russia in March. How does the role of the International Court of Justice differ from that of the International Criminal Court, and what specifically did it rule in this case?

The International Court of Justice is responsible for resolving disputes between states by legal means. States can take action against other states before this court if they believe that the norms of international law have been violated. This is exactly what Ukraine has done with the proceedings it has brought against Russia and its petition for provisional measures. As part of the proceedings on provisional measures, the International Court of Justice immediately ordered Russia to cease military operations in Ukraine, among other things. It also called upon both sides to cease all activities potentially aggravating the conflict. This ruling was passed by a vote of 13 to 2: only the Russian and Chinese judges voted against it. Of course, this is only a preliminary order. The ruling in the main proceedings, where Ukraine has challenged the grounds for the Russian attack, will likely take several years. However, even this order by the Court is binding. After all, the International Court of Justice is the highest court and one of the principal organs of the United Nations. We must remember, however, that the Court has no means of enforcing this order. If a state fails to comply with the Court's order, the only option for the International Court of Justice would be to appeal to the United Nations Security Council, which may then determine specific enforcement measures. This is where the architecture of the international community reaches its self-imposed limits. The Security Council cannot determine any measures whatsoever in the face of Russia's veto. However, the fact that Russia is so obviously violating the international legal system comes at considerable diplomatic cost. This is clear from the conduct of most other countries towards Russian representatives in a number of United Nations bodies and committees.

Speaking of the United Nations, Article 1 (1) of the UN Charter states that one of the main objectives of the United Nations is the maintenance of international peace and security. What measures could other United Nations bodies take to achieve this objective in the present situation?

The UN Charter is now regarded by many international lawyers as the constitution of the international community of states. It places the responsibility for ensuring international peace and security in the hands of its executive body, the United Nations Security Council. The resolutions made by this executive body are binding for all members of the United Nations. The fact that the Security Council may also resort to military measures against a state in extreme cases shows that they can impose severe sanctions. However, as a permanent member of this executive body, Russia has the right to veto Security Council resolutions. In the Ukraine conflict, this is what – unsurprisingly – has happened. In the current conflict, a conceptual weakness in the United Nations Charter has clearly come to light: the scope of the United Nations in matters of war and peace is particularly limited when the five permanent members of the Security Council cannot reach agreement. We have seen this happen in many conflicts in the past, most recently during the Syrian conflict. However, as soon as a permanent member is directly involved in a conflict, including as a warring party, the most important and powerful body of the United Nations is inherently paralyzed. This is why the General Assembly addressed this scenario as early as 1950 through its "Uniting for Peace" resolution. A stalemate in the Security Council does not release the member states from their obligations. Nor does it release the United Nations as such from their responsibility to ensure international peace and security. In this case, power is transferred to the General Assembly, which may then recommend collective action to maintain or restore world peace.

What to do in case of a stalemate in the Security Council?

This is precisely what has happened in this specific case.

It is true that on March 2, 2022, the General Assembly adopted a resolution with an overwhelming majority, condemning the invasion of Ukraine by Russian forces. Against the backdrop of the steadily worsening humanitarian crisis in Ukraine, this resolution was reaffirmed on March 24, 2022. Further, mainly humanitarian demands were also added to it. These resolutions certainly demonstrate the relative strength of solidarity among the international community of states with regard to Russia's blatant violation of the prohibition on the use of force. However, unlike Security Council resolutions, they lack the necessary binding force and thus the means of imposing sanctions. Unfortunately, the measures taken to date have failed to have any discernible effect. They have not stopped Russian advances into Ukraine or prevented humanitarian disaster. However, the General Assembly sent another very clear message on April 26, 2022. In fact, it extended the "Uniting for Peace" resolution of 1950 mentioned above. The new resolution was put forward by Liechtenstein. It stipulates that any blockade of the Security Council through a veto cast by one of its five permanent members will be discussed by the General Assembly within ten working days. The state exercising the veto will be granted a privileged right to speak, where it will be given the opportunity to justify its veto before the General Assembly. The advantage of this mechanism is that it makes it unnecessary to convene a special session of the General Assembly by majority vote of the Security Council, thereby significantly reducing the reaction time of the General Assembly. This does not change the fact that the General Assembly cannot draft binding resolutions. However, it does significantly increase the political pressure to justify a veto. The General Assembly may still play its last trump card: In the case of an act of aggression, which is undoubtedly the case here, it may also recommend the use of armed force to its member states. Such a recommendation, with all the consequences it would entail, has so far not been an option commanding a majority.

Is there any other legitimate basis upon which the international community, or at least certain states, could help Ukraine, including through the use of armed force?

The UN Charter states just two exceptions in law to the general prohibition of the use of force. One involves the UN Security Council legitimizing the use of military force, which will obviously not happen in this case.

The right to self-defense

The other is the exception of the individual and collective right to self-defense, which undoubtedly applies to the Ukraine conflict. This right to self-defense allows a state under attack to defend itself in an appropriate manner. However, with the consent of the state concerned, other states may also participate in the name of collective self-defense. It is important to note that joining an existing alliance for defense or assistance, such as NATO or the EU, is not necessary for this to happen. In existing alliances like these, states would actually be obligated to act. To say it bluntly, under international law it is entirely legitimate for any world nation to rush to the aid of another nation under attack with its consent, as long as the nation providing the assistance is doing so voluntarily. This is how we should understand the Ukrainian President's calls to the community of states for assistance.

Dr. Donald Riznik

Dr. Donald Riznik was a research associate at the Chair of Public Law, European Law and International Law at the University of the Bundeswehr in Munich from 2008 to 2016. In 2013, he was seconded for several months to the Appeals Chamber of the International Criminal Court in The Hague as a visiting professional. Since 2017, he has been senior lecturer at the Institute for Public Law and International Law at the University of the Bundeswehr in Munich and guest lecturer at the University of St. Gallen. His research focuses on international law, international criminal law, and (international) legal theory.

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