

Lawfare: Ukraine's War against Russia on the Legal Front

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RUSSIA'S MILITARY AGGRESSION since early 2014 against Ukraine has three fronts. The first is Crimea. In February and March of 2014, following the Euromaidan Revolution, in Kyiv, Russia occupied and annexed the Autonomous Republic of Crimea (ARC) and the city of Sevastopol.

The second front is Donbas. In April 2014, in the month following its move on Crimea, the Kremlin instigated a pro-Russian separatist war in the eastern regions of Donetsk and Luhansk, which together constitute Donbas (Donetsk basin). Since then, over 13,200 people have lost their lives in the war. More than 1.5 million people have left the war zone to live as internally displaced people (IDPs) in other parts of Ukraine, or as refugees abroad.

The third front in Russia's military aggression against Ukraine opened up in 2018, in the Black Sea. On 25 November of that year, Russian border guards under the Federal Security Service (FSB) shot at and captured three Ukrainian navy vessels attempting to pass through the Kerch Strait, between the Black Sea and the Sea of Azov, and placed their 24 servicemen in detention.

Russian aggression in the Black Sea against Ukraine also features the militarisation of Crimea and the Kerch Bridge connecting Russia to the occupied peninsula, the checking of commercial ships destined for Ukrainian ports in the Ukrainian territorial waters of the Sea of Azov, the demonstration of naval forces and the closing of significant areas of the Black Sea, under the pretext of holding military exercises.

Ukrainian and Western sanctions against Russia have not prevented it from continuing its aggression against Ukraine. The Minsk Accords on the war in Donbas, overseen since September 2014 by the presidents of Ukraine, Russia, Germany, France and the Organization for Security and Cooperation in Europe (OSCE), have prevented the conflict from escalating, but have not proven to be sufficient as a road map for peace. Since February 2021, the OSCE's Special Monitoring Mission to Ukraine (SMM) has noticed increased violations of the latest major ceasefire, which came into effect on 27 July 2020.

COUNTERING RUSSIAN MILITARY AGGRESSION THROUGH THE COURTS

In the absence of any possibility to reverse the situation in the occupied territories immediately, Kyiv is seeking alternative ways to raise the issue of Russian aggression on the international level. On 11 March 2021, the Ukrainian National Defence and Security Council approved a state strategy for de-occupation and reintegration of ARC and Sevastopol. One foreign policy instrument within this strategy is the Crimea Platform. This diplomatic initiative has the aim of consolidating international efforts on Crimea, with the ultimate goal of de-occupation and returning the peninsula to Ukraine by peaceful means. The Crimea Platform is planning to invite certain countries' representatives for its first summit in Kyiv on 23 August 2021.

Already since 2016, Ukraine has been challenging Russia's actions on occupied territories in several international courts and tribunals. An important decision in these processes came on 14 January 2021. The Grand Chamber of the European Court of Human Rights (ECHR), in Strasbourg, rendered its admissibility decision in the interstate claim brought by Ukraine against Russia, regarding systematic human rights violations allegedly committed by the latter in Crimea (ARC and Sevastopol). Since March 2014, international human rights organisations, such as the United Nations Human Rights Council, have documented human rights violations in Crimea, including arbitrary detention, enforced disappearances, torture and political persecution. Russia, meanwhile, continues to refuse the monitors unconditional access to the occupied peninsula.

Ukraine has lodged a total of nine applications connected to the conflict, three of which are included in the case "Ukraine v. Russia (re Crimea)", with the ECHR. Apart from Ukraine's applications, the ECHR has received over 7,000 applications lodged by individuals and one by the Netherlands for the shooting down of Malaysia Airlines flight MH17. The airplane was hit by a Russian Buk missile over the Donetsk region on 17 July 2014 and all 283 passengers and 15 crew were killed. For reasons of efficiency, the ECHR combined all the applications

connected to MH17, giving Ukraine a better chance of winning the legal battle. Firstly, the Netherlands has allocated substantial resources to investigating the incident, resulting in a strong body of evidence. Secondly, Ukraine's case gains legitimacy by having a non-warring party as co-complainant.

Besides the ECHR, Ukraine has also filed complaints regarding the incident with the International Tribunal for the Law of the Sea (ITLOS), the International Court of Justice (ICJ), and the Permanent Court of Arbitration (PCA). While the cases lodged with the ECHR, the ICJ and the PCA on MH17 are still pending, the ITLOS delivered its Order on another complaint, regarding the Kerch Strait Incident, on 25 May 2019: the three vessels were to be returned and the servicemen released within a month. Russia neither attended the court hearings, nor adhered to the time limits prescribed in the ITLOS order. The 24 seamen were at last returned to Ukraine in a prisoner exchange on 7 September 2019, and the vessels a little more than a month later.

Furthermore, the ICJ is handling allegations that Russia has violated the International Convention for the Suppression of the Financing of Terrorism, as well as the Convention on the Elimination of All Forms of Racial Discrimination (CERD). Ukraine accuses Russia of running a "campaign of cultural erasure" against Crimean Tatars and ethnic Ukrainians in Crimea. In a similar litigation, when Georgia accused Russia of having violated the CERD in 2008, the ICJ upheld Russia's objection to the court's jurisdiction and decided not to proceed with the case. Ukraine learned from the flaws in Georgia's application, with the result that this time around the ICJ overruled Russia's objection.

Finally, the International Criminal Court (ICC) has kept an eye on the conflict since 2014. The preliminary examination was completed on 11 December 2020, concluding that a formal investigation should be initialised.

IMPLICATIONS

These court processes are unlikely to change Russia's behaviour in Ukraine, and may not necessarily lead to the prosecution of Russian citizens fighting in the Donbas. So far, Russia's standard answer is that the international courts and tribunals lack the authority and competence to consider the issue of the occupation of Crimea. The Russian argument has worked in one case, so far: in the coastal rights dispute, the PCA Tribunal upheld the

objection concerning its own jurisdiction, acknowledging that the case would require the PCA "to decide, directly or implicitly, on the sovereignty of either Party over Crimea".

Nevertheless, lawfare presents one avenue for Ukraine to keep the conflict between the two states in the international limelight and persuade the Western states to maintain the sanctions on Russia. Ukraine cannot count on military support from its Western partners, but these countries also have their own experiences of Russian meddling in elections, cyber-attacks and the use of nerve agents banned by the chemical weapons treaty. As more states realise the need for countermeasures, Russia will also have to defend itself in even more courts and international fora.

Indeed, decisions from international courts are authoritative for all international organisations, so the future will most likely see references to their decisions.

For example, one Russian objection has been that its seizure and illegal annexation of Crimea merely implemented the wish of the Crimean people expressed in the so-called "referendum" on 16 March 2014. However, it has been clear since the beginning that not only had Russian special operations forces already landed on the peninsula on 20 February 2014, but that this was even the day before the departure of the ousted Ukrainian president, Viktor Yanukovich, from Kyiv. This date is minted on the medal "For the return of Crimea", which the Russian president awards soldiers who took part in the military operation.

With its decision of 14 January 2021, the ECHR put an end to the discussion of when Russia took control over Crimea, as it says that it was no later than 27 February, when Russian special operation forces seized the building of the Supreme Council of Crimea and the building of the Council of Ministers in Simferopol, and not on the basis of any wishes expressed on 16 March. This means that there was no "peaceful expression of will of the inhabitants of the peninsula" to justify Russia's moves. The ECHR thus debunked this myth of the Kremlin, which was one of Russia's key arguments in justifying the illegal annexation of Crimea.

Final judgments in most of these cases will take several years to pass. The already long processes of understaffed international courts are prolonged by the current pandemic restrictions, which have extended several time limits for memorials and counter-memorials of the involved parties. This makes these processes into not only an issue of lawfare, but also a war of attrition. ■

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