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Ukraine takes Russia to court, but Moscow's representatives are a no-show

By Rick Noack, Karen DeYoung and Michael Birnbaum



PARIS — Russia did not show up for a hearing Monday at the United Nations' top court, effectively boycotting Ukrainian efforts to seek an immediate end to the fighting.

The proceedings at the International Court of Justice (ICJ) in The Hague went ahead, but Russia's absence cast doubts over the extent to which established international legal mechanisms can be effective tools in efforts to stop the war in Ukraine, or could pose serious risks for Russian President Vladimir Putin.

"When confronted by such open illegality, is this court utterly powerless to stop it?" asked Harold Hongju Koh, one of the attorneys representing Ukraine, in court Monday. A Yale University professor of international law, Koh served as State Department legal adviser during the Obama administration.

"The answer must be no," he said, urging the court to quickly issue an order for Russia to withdraw from Ukraine.

The case centers on Russia's official explanation for its invasion of Ukraine, which President Vladimir Putin has said is intended to end a "genocide" against pro-Russian separatists in the country's east. There is no evidence to support Russia's claims.

"Ukraine comes to this court because of a grotesque lie, and to seek protection from the devastating consequences of that lie," said David Zions, one of the attorneys for Ukraine. "The lie is the Russian Federation's claim of genocide in Ukraine. The consequences are unprovoked aggression, cities under siege, civilians under fire."

A number of governments have accused Russia of war crimes in Ukraine. Citing “credible reports,” Secretary of State Antony Blinken said during several television interviews Sunday that the Biden administration was “documenting all of this, putting it all together,” to provide support for whatever cases are ultimately brought.

Experts and volunteers are working urgently to help supply Ukrainians on the ground with the equipment they might need to record the situation in real time — especially since cities such as Kyiv and Dnipro are accessible for now but may eventually become fully surrounded or occupied.

Other countries, international organizations and Ukrainians are undertaking the same task as Russia continues its offensive. But there are many different jurisdictions, and authorities, for charging violations of international and national law, many of which are unlikely to produce results in the near future, if at all.

Thirty-nine states have referred the situation in Ukraine to the International Criminal Court (ICC), a separate entity that has the power to investigate genocide, war crimes and crimes against humanity, and that court has opened an investigation. The ICC can charge individuals, but trying them requires their presence in court. That means Putin — or any other charged official — would either have to be handed over by his own government or arrested outside of Russia.

The ICC cannot charge a country with aggression unless it is a party to the treaty that created it or is referred by the United Nations Security Council. Russia is not a party (neither is the United States) to the treaty and can use its Council veto against any referral.

But even if someone cannot be immediately arrested, charges alone can “weaken the individual and make them damaged goods to their supporters,” said Stephen Rapp, head of the State Department’s office of global justice from 2009 to 2015. He cited the war crimes cases of Slobodan Milosevic, the former president of Serbia, and former Liberian president Charles Taylor. Milosevic died before his trial concluded. Taylor — the first former head of state ever convicted of a war crime, remains imprisoned in Britain.

Milosevic and Taylor were both tried by special tribunals convened under U.N. auspices. In a statement last week, a number of prominent former tribunal judges, prosecutors and international law experts called for establishment of a special tribunal “for punishment of the crime of aggression against Ukraine.” They argued that such an effort would be both quicker and more effective than existing international courts.

Some countries have claimed universal jurisdiction over war crimes or for abuse of their citizens as a basis for arrest. Former Chilean president Augusto Pinochet was indicted in Spain in 1998 for human rights abuses and corruption related to the treatment of Spanish citizens in Chile. He was arrested in Britain, but that country’s government ruled against extraditing him and eventually sent him home to Chile. In January, a German court, with testimony from Syrian refugees, convicted a Syrian colonel accused of torture in his own country and sentenced him to life in prison.

If the Ukrainian government survives, it could choose to carry out its own prosecutions for violations of Ukrainian criminal code on its soil. But war crimes laws and tribunals can give international prosecutors extra tools to target the chains of command that don't exist in **national legislation**, experts say.

A major part of the challenge for investigators is tracing the responsibility up the chain of command in a way that can stand up in court. Establishing facts on the ground for other than direct participants in military operations “doesn't take you to the higher-ranking individuals who are responsible for the criminal acts,” said Bill Wiley, who runs the Commission for International Justice and Accountability.

“The point of international humanitarian law is to go up the chain of command,” said Clint Williamson, a former U.S. war crimes envoy who is part of a State Department project to help build capacity on the ground to pursue prosecutions.

“What we have seen thus far in this conflict, most of the things fall into the category of **indiscriminate attacks that impact civilians**,” he said, one type of potential war crime. Things could get worse, he said. “We haven't seen the types of things yet where you have Russian troops rounding up people and executing them like you saw in Yugoslavia.”

In Poland, where the bulk of Ukrainian refugees have fled during the opening days of combat, civil society groups are already at work to assemble the documentation and interviews they hope could help in the future prosecution of war crimes.

At the Pilecki Institute, a Warsaw-based research and education organization that more typically deals with testimonials about atrocities of the past, an immediate goal is to collect signed testimonies that could eventually be used in court. But its leaders are also hoping to create a real-time archive of the crimes they say are being perpetrated in Ukraine for future historians and researchers.

In arguing Monday before the ICJ, Ukraine asked for immediate “provisional” relief, ordering Russia to cease its own military operations and withdraw, and to stop all support for any other armed groups, while the court considers whether Russia has any right to justify its actions on grounds of “protecting” Ukraine from genocide.

There is precedent for such a **provisional judgment, even if the defendant does not show up.** **In 1984, Nicaragua won a similar ruling before the ICJ against the United States** for its funding and support of the contra rebels seeking to overthrow the Nicaraguan government. The United States refused to participate in the proceedings, arguing the ICJ, one of the founding components of the United Nations system, lacked jurisdiction. It later blocked U.N. Security Council enforcement, refusing to pay Nicaragua ordered compensation.

As proceedings got underway in the imposing Great Hall of the ICJ in The Hague, court president Joan E. Donoghue said the Russian Embassy in the Netherlands had informed the court on Saturday that the Russian government did “not intend to participate in the oral proceedings.”