

War Crimes and Environmental Crimes in Ukraine and Gaza

Crímenes de guerra y ambientales en Ucrania y Gaza

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Abstract: In violation of current International Law and International Humanitarian Law in force, ongoing aggressions in Ukraine and Gaza endanger the entire international institutional and legal framework, to the extent that both deny the basic rule that the use of force does not create title over a given territory in present day international law.

Keywords: international law; international humanitarian law; genocide; war crimes; crimes against humanity; environmental crimes; Ukraine; Gaza.

Resumen: En violación del Derecho Internacional y del Derecho Internacional Humanitario vigentes, las agresiones en curso tanto en Ucrania como en Gaza, ponen en peligro todo el marco institucional y jurídico internacional, en la medida en que ambas niegan la norma básica de que el uso de la fuerza no crea título sobre un territorio determinado en el derecho internacional actual.

Palabras clave: derecho internacional; derecho internacional humanitario; genocidio; crímenes de guerra; crímenes contra la humanidad; crímenes medioambientales; Ucrania; Gaza.

Summary: I. *Introduction*. II. *Russia and Ukraine*. III. *Israel in Gaza*. IV. *Conclusions*. V. *References*.

I. Introduction

Among recent violations of international law, we must outline two cases: *a)* the aggression war waged by Russia against Ukraine, started in February 2022, and *b)* the massive destruction by Israel of the entire Gaza strip, ongoing since October 7th, 2023, in retaliation for the terrorist attack by Hamas. Both cases con-

stitute serious violations of international law regarding restrictions against the unilateral use of armed force;¹ of the UN Convention on the Prevention and Punishment of the Crime of Genocide (1948);² of the Rome Statute of the International Criminal Court–ICC (1998),³ as well as violations of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)⁴ and of the International Convention on the Suppression and Punishment of the Crime of Apartheid (1976).⁵

In addition to the abovementioned crimes, environmental damage during military actions may become a criminal liability for military personnel and/or their contractors before the International Criminal Court (ICC). As a global judicial institution with international jurisdiction complementing national legal systems, the scope of the ICC is to investigate and bring to justice individuals (not countries) who commit the most serious crimes, such as genocide, war crimes, and crimes against humanity (these include widespread murder of civilians, torture, and mass rape). Although crimes against the environment were given very little attention in the negotiations leading to the ICC Statute, the concept of “environmental crime”, which had not been given high priority in the first years of the ICC, is increasingly being brought up.

There are two definitions of environmental crime. The first one establishes that it is “an act committed with the intent to harm or with the potential to cause harm to ecological and/or biological systems”,⁶ for the purpose of political gain, military strategy, or securing business or personal advantage. In legal frameworks, according to the Oxford Handbook of Crime and Public Policy, the definition is: “any act that violates an environmental protection statute, such as conventions, protocols and related international instruments”.⁷ The Rome Statute of the ICC states:

Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.⁸

¹ U.N. Charter art. 51.

² Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948, U.N.G.A. Res. 180 (II).

³ Rome Statute of the International Criminal Court, July 17, 1998.

⁴ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984. U.N.G.A. Res. 39/46.

⁵ U. N. General Assembly Official Records (GAOR) res. 3068, July 18, 1976.

⁶ MARY CLIFFORD, ENVIRONMENTAL CRIME: ENFORCEMENT, POLICY AND SOCIAL RESPONSIBILITY (Aspen Publishers, 1998).

⁷ Peter Cleary Yeager & Sally S. Simpson, 13. *Environmental Crime*, in THE OXFORD HANDBOOK OF CRIME AND PUBLIC POLICY 325 (Michael Tonry ed., 2012).

⁸ See Rome Statute of the International Criminal Court, *supra* note 3, art. 8, (2)(b)(iv).

Accordingly, environmental crimes should be addressed on the basis of the Rome Statute and other regulatory instruments of the ICC, as well as on applicable environmental treaties, rules of customary international law, and the jurisprudence of other international and national courts.

There are three ways a case may come before the ICC: *a)* referral by a State Party to the Statute; *b)* referral by the UN Security Council; or *c)* initiation of an investigation by the Prosecutor of the ICC.

While there is increasing international awareness that some military actions should be considered environmental crimes, the doctrine on their prosecution during war is still evolving. When the State originating the military action is not a Party to the Rome Statute, the question arises as to whether the ICC has jurisdiction over it. This has been a subject for debate, since the ICC should complement, rather than replace, or substitute, the criminal jurisdiction of states.

Article 17(1) of the ICC Statute, “Issues of Admissibility”, states that the Court shall determine that a case is inadmissible when “the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution”,⁹ or when “the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute”¹⁰ or “the case is not of sufficient gravity to justify further action by the Court”.¹¹

Environmental crimes are among the war crimes listed in Article 8 of the Rome Statute of the ICC; but it is important to say that the Court’s jurisdiction is “limited to the most serious crimes of concern to the international community as a whole”,¹² and whereas it would be unfair to describe the listing of environmental crimes as an afterthought, it is clear that they aren’t considered serious crimes.¹³

II. Russia and Ukraine

Without going too far back in the past, we can distinguish a series of recent Russian aggressions against independence attempts either by ex-soviet states or by Russian regions proper: Chechnya, in the late 90s; Georgia, in 2008, and the illegal annexation of Crimea, in 2014. Since February 24, 2022, Russia has been waging an illegal war of aggression against Ukraine.

⁹ See Rome Statute of the International Criminal Court, *supra* note 3, art. 17(1).

¹⁰ *Id.*

¹¹ *Id.*

¹² See Rome Statute of the International Criminal Court, *supra* note 3.

¹³ *Id.*

In a contradictory way, Russia quotes the unilateral Declaration of Independence by Kosovo, in 2008, as a precedent for the recognition of South Ossetia and Abkhazia, in 2008; of Crimea, in 2014, and of the hastily formed “Republics” of Donetsk and Luhansk, since 2022. Nevertheless, Russia opposes the recognition of Kosovo’s independence.

Two days after the beginning of the Russian invasion of Ukraine, a request for interim measures was submitted by Ukraine to the International Court of Justice (ICJ) at the Hague (NL), concerning alleged practice of genocide under the Convention for Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation, Order March 16, 2022).

There is a controversy between the parties about whether a genocide is under way in Ukraine. Russia claims that the reason to adopt military measures against Ukraine was to prevent and punish genocide against ethnic Russian population in the east of the country; Ukraine, in turn, considers that Russia has outright lied, which has resulted in severe violations of fundamental rights of millions of Ukrainians, extensive destruction and environmental damages in the eastern European country.

In our opinion, instead of taking military measures, Russia should have addressed the United Nations organs, in accordance with art. VIII of the Genocide Convention;¹⁴ or addressed a claim to the International Court of Justice, according to art. IX of the same convention.¹⁵

In connection with Russian allegations of genocide, Ukraine requested to the ICJ to determine whether there are ongoing acts of genocide by Ukraine in the regions of Donetsk and Luhansk. Ukraine also requested the ICJ to evaluate whether there are any basis for declarations by Russian president Vladimir Putin, such as the ones of February 21, 2022, describing the situation in Donbass as “horror and genocide, faced by almost four million people”.¹⁶

In the past, Russia presented itself as the “guardian” of Slavic peoples against atrocities committed by the Ottoman empire. But this claim cannot be maintained today, as Russia systematically oppressed, among others, two Slavic countries along the past centuries: Ukraine and Poland.

In the specific case of Ukraine, several international acts can be listed in the last 100 years, whereby Russia recognized the existence of the Ukrainian State and its boundaries. After the end of the Russian empire and the civil war, on December 30, 1922, the new federated Union of Soviet Socialist Republics emerged in accordance with the Treaty for the establishment of the U.S.S.R.¹⁷

¹⁴ Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 2, art. VIII.

¹⁵ Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 2, art. IX.

¹⁶ *Address by the President of the Russian Federation*, PRESIDENT OF RUSSIA, (Feb. 21, 2022), <http://en.kremlin.ru/events/president/news/67828>

¹⁷ Treaty on the Creation of the Union of Soviet Socialist Republics, First Congress of Soviets of the USSR, 1922.

The 1922 treaty not only remained in force, but was incorporated into the 1924 Constitution of the U.S.S.R. as well.¹⁸ In addition to this, Ukraine and Belarus signed, as founding members, the Charter of the United Nations Organization, in San Francisco, in 1945.

After the collapse of the U.S.S.R., based on the *uti possidetis* principle, the borders between the Russian Federation and Ukraine, as well as with Belarus and the other former U.S.S.R. republics, were restated—and confirmed—by the Minsk Agreement, dated December 8, 1991.¹⁹ This agreement guaranteed the respective territorial integrity and borders of these States.

Special attention deserves the Budapest Memorandum, signed on December 5, 1994, by Russia, Ukraine, the United Kingdom and the United States, providing security guarantees to Ukraine as it adhered to the treaty for non-proliferation of nuclear weapons.²⁰ But although Ukraine eliminated all nuclear weapons from its territory within the agreed due date, and Russia, the U.K. and the U.S. reaffirmed their commitment regarding Ukraine’s territorial integrity, sovereignty and Independence, it clearly didn’t serve at all.

We ought to draw parallels of Russian aggressions with other global powers’ actions. There have been several equally illegal and unjustified crimes committed by the United States of America against Cuba, Nicaragua, Panama and several other countries in the Americas. The USA has also invaded and occupied Afghanistan and Iraq for long periods of time. Such kind of “special military operations” (as Russia calls its incursion in Ukraine) were also illegal and abusive, with catastrophic consequences, including severe environmental damages. But such precedent violations cannot provide any justification for what Russia is now doing in Ukraine, nor for what Israel has been doing in Gaza.

III. Israel in Gaza

In accordance with current international law, the unilateral use of force does not create legal title to occupy territories, as stated by the ICJ in the Advisory Opinions on the legal consequences of the construction of a wall in occupied Palestinian territory in 2004,²¹ and on the policies and practices of Israel in the West Bank in 2024. Both deserve careful consideration.

Israel has the right to exist. Few countries have had its creation approved by vote at the UN. But its creation also considered the creation of a Palestinian state within its borders, between the sea and the Jordan river. Of course, Israel

¹⁸ Constitution of the Union of Soviet Socialist Republics, Congress of People’s Deputies, January 31, 1924.

¹⁹ Agreements Establishing the Commonwealth of Independent States, December 8, 1991.

²⁰ U.N.G.A., Memorandum on Security Assurances in Connection with Ukraine’s Accession to the Treaty on the Non-Proliferation of Nuclear Weapons, December 5, 1994.

²¹ I.C.J. General Assembly, res. ES-10/14, December 8, 2003.

has the right to defend itself. But even in a war there are limits to what can be done or not. In cases of self-defense,²² there must be a proportion between the attack and the reaction. All excess is to be condemned, and all such practices are to be investigated and punished. For example, targeting civilian population has long been an international crime,²³ as well as targeting staff from International Organizations working for Humanitarian aid and relief.

The ICJ Advisory Opinion on the construction of a wall in occupied Palestinian territory²⁴ is to be read in conjunction with the ICJ Advisory Opinion on the Legal consequences arising from the Policies and Practices of Israel in the occupied Palestinian territory, including Jerusalem, dated 19 July 2024.²⁵

It is worth remembering the main aspects of the first of those ICJ Advisory Opinions: as stated by the Court, Israel may not invoke the necessity of self-defense — such as building the wall — because such need would not exist without the previous occupation of Palestinian territory.²⁶ From the Advisory Opinion on the construction of a wall in occupied Palestinian territory of 2004 we can draw the line to the present situation. An occupying power may not claim legitimacy and may not exercise sovereignty over such territory. The Court also stresses that the wall goes forward over Palestinian territory and creates hindrances to the normal life and circulation of the Palestinian population. Fundamental rights are thus being abused.

There are recent additional substantial violations of several rights for the entire Palestinian civilian population — more than 2.3 million people, piled up in the fringe of Gaza territory — subject to forced displacement, systematic bombing, starvation as a war strategy and lack of water, in addition to other international crimes (as presented to the ICJ, in the South Africa v. Israel case on potential breaches of the Genocide Convention, started in 2023).

The situation of the Palestinian civilian population is frightening: There are no ways out, as the territory has been completely isolated by Israeli forces, be it by land, by sea or airway; the border with Egypt remains blocked, except for the supply of scant humanitarian aid, at levels substantially below the needs of such population, and allowing the exit of very few people under strict Israeli military control.

All evidences of war crimes, crimes against humanity, apartheid, genocide and environmental crime, are to be examined, in accordance with International law conventions previously mentioned. In addition, Several Israeli government officers have made alarming statements. The prime minister even declared the scope of “turning Gaza into a deserted island”;²⁷ while the minister of de-

²² U.N. Charter, article 51(VII).

²³ See Rome Statute of the International Criminal Court, *supra* note 4, art. 8.

²⁴ I.C.J. Advisory Opinion, July 9, 2004.

²⁵ I.C.J. Advisory Opinion, July 19, 2024.

²⁶ I.C.J. Advisory Opinion, July 9, 2004, *supra* note 23.

²⁷ Fears of a ground invasion of Gaza grow as Israel vows ‘mighty vengeance’, Al Jazeera, October 7, 2023.

fense declared that Israel fights against “human animals, and are to be treated accordingly,”²⁸ entailing a dangerous dehumanization of the opposite side. This situation has similarities with the genocide in Rwanda in 1994, specifically with the infamous speech about “killing the cockroaches”.²⁹

In order to determine whether and to what extent genocide, war crimes and crimes against humanity are being committed, South Africa presented a submission to the ICJ.³⁰ All crimes should be carefully subject to investigation. It is relevant to point out that the ICJ did not a priori dismissed the presentation of this case. There is no reason to reject it, since the evidence collected shows the necessity to have the case examined and judged by the ICJ.

More than two million people —the civilian population— cannot be treated as war targets. There seem to be signs of war crimes, such as: bombing civilian targets and infra-structure, bombing of hospitals, intentionally and systematically blocking all access to food and water —for drinking and cleaning— as well as for the much needed medical, energy and fuel supplies. It seems evident that such war strategy, inflicted upon the Palestinian civilian population, features cruel, inhuman or degrading treatment or punishment (according to the definitions of the Torture Convention, 1984, in force since 1989).³¹ To these crimes, it can be added racial discrimination (according to the UN International Convention for the Elimination of All Forms of Racial Discrimination)³² and the practice of apartheid.³³

Regarding genocide, it is not a matter of instrumentalizing international law. The substantial humanitarian issues in Gaza and Ukraine extend beyond any war measure or strategy. Both are not only humanly unacceptable, but also criminal under International Law in force.

Submitting a request to the ICJ, as the main judicial organ of the UN, in order to assess if such crimes are being committed and the rendering of a judgment thereon is legitimate for Ukrainian and Palestinian population, as well as for the entire international community. No country can claim to be above International Law, nor can it seek to block investigations concerning State actions; collective interest must be placed above and should prevail over any such claim.

²⁸ “Israel paints Palestinians as ‘animals’ to legitimize war crimes: Israeli scholar”, Anadolu Ajansi, October 23, 2023.

²⁹ *Rwanda jails man who preached genocide of Tutsi ‘cockroaches’*, BBC, (April 15, 2016).

³⁰ I.C.J., South Africa v. Israel, December 29, 2023.

³¹ U.N.G.A., res. 39/46, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984.

³² U.N.G.A. res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination, December 21, 1965.

³³ U. N. General Assembly Official Records (GAOR) res. 3068, *supra* note 6.

IV. Conclusions

War has been present in human history since its very beginning. Classics such as Sima Qian³⁴ or Kautilya in the Arthashastra³⁵ are valuable testimonies. The challenge remains on how to put limits to the use of force.

Along history, diplomats and politicians have striven to curb the most primitive and brutal side of human nature. During an armed conflict, there are rules that must be followed—there is a long and relevant tradition regarding “just war”—bellum iustum. Imposing limits on war has been a long-awaited end, although it has been difficult to achieve.³⁶

On the one side, there has been progress on this domain in the last 150 years—as built in International Humanitarian Law; whereas, on the other, technological improvements rendered arms more destructive, to extents never imagined before.

Genocide is the worst international crime; it is the crime of crimes, since it concerns the whole humankind, and should not be tolerated in any armed conflict, be it national or international. All States should make efforts to ensure the capacity of their armed forces to maintain observance and strict application of the Geneva Conventions of 1949, of their Additional Protocols of 1977, and of the Rome Statute of 1998, in order to eliminate the practice of genocide, crimes of war, crimes against humanity, and environmental crimes.

The current international legal regime is an important advance: its effective application should not suffer any external constraints, as it aims to limit and avoid the observance of the legal regime.

Finally, environmental crimes committed within an armed conflict are encompassed among the scope of the ICC Rome Statute, although, so far, both the doctrine and the practice in connection with the prosecution of environmental crimes during military actions remain to be developed at its full capacity.

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³⁴ JACQUES PIMPANEAU, INITIATION À LA LANGUE CLASSIQUE CHINOISE À PARTIR D’EXTRAITS DES MÉMOIRES HISTORIQUES DE SIMA QIAN (Editions You Feng, 2000).

³⁵ KAUTILYA, THE ARTHASHASTRA (Penguin Random House, 2017).

³⁶ Peter Haggemacher, *Just War and Regular War in Sixteenth Century Spanish Doctrine*, 42 INTERNATIONAL REVIEW OF THE RED CROSS, Oct. 1992, at 434.

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