



RUSSIA'S INVASION OF UKRAINE AND THE QUESTION OF ACCOUNTABILITY (PART 1)

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Transcript

All are equal, but some are more equal than others. Russia's invasion of Ukraine and the question of accountability, part one.

George Orwell's famous, perhaps infamous line from his classic novel *Animal Farm* sums up a well known problem in international human rights law. How to ensure accountability when those perpetrating abuses are the powerful. There are a number of dimensions to this question, and these need to be unpacked in turn.

First, as we all know, international human rights law is based on the premise that the state, an abstract legal entity, agrees to hold itself accountable and subject to scrutiny for its behaviours within its own territory. All states are equal and shall not interfere in each other's internal affairs as article two of the United Nations Charter stipulates. International human rights law carves out limitations to this provision, whether by treaty or by custom, with the former, that's treaties normally having supervisory mechanisms of some sort. Holding states accountable, while hugely important, also misses a key point in that states do not make decisions or perpetrate atrocities, individuals do. Thus, individual accountability is critical, but individual accountability is not the role of international human rights law. Rather, usually that of domestic criminal law. Atrocities encroach upon the supposedly inviolable space and rights of individuals. When we think of atrocities, what we relate to are egregious acts which relate to the physical inviolability of individuals we as individuals generally do not think about and the law does not conceptualise atrocities to be about the right to housing, healthcare, or free expression. No matter how systematic the violations may be, we consider atrocities to be physical acts, be it tortured, death or other direct physical harms. The criminal law, to the extent it intersects with international human rights law, primarily relates to violations of the physical inviolability of individuals. It is those human rights violations which will also be criminal acts and thus entail individual responsibility, that we are concerned with here.

Second, because all states are equal and are states are abstract entities, even with legal personality under international law, some individuals must have official roles which they need to undertake on behalf of the state, and that consequently entails personal immunity under international law from the jurisdiction of other states. That immunity is not perpetual, and it is now widely agreed that it lasts only when a state official carries out this substantive role, and while the acts in question are within the remit of what the role should properly entail. There is a significant debate to be had as to who can determine these matters and their scope, but that need not detain us. The key issue is that the state can withdraw the immunity it grants to its officials if it so decides. Immunity is a shield granted to or withdrawn from its officials at the sole discretion of the state.

The third and final dimension here is that where powerful states commit atrocities, the so-called international community of states do not have the mechanisms, the political will and often the economic resilience to hold those states accountable due to the consequences that they may suffer. This is worth unpacking. The US-led invasion of Iraq in 2003 with the support of military assistance of, inter alia the United Kingdom, did not lead to any formal or legal accountability for

either of those states. It was simply not possible to do so through the United Nations Security Council, for example. That invasion can credibly be argued to be an act of aggression. China's mistreatment of the Uighurs in Xiangjiang is by all verifiable and objective accounts of gross and systematic breach of the rights of members of that community, and it is credible to argue it amounts to genocide. But the economic and political consequences for many other states of seeking to hold China accountable are so serious that many state leaders are understandably reticent to speak out. Formal mechanisms or measures such as those that need to be set up by the United Nations Security Council, are simply not plausible regarding such states or their close allies.

Having provided the context above, this neatly brings us to the situation between Russia and Ukraine. And whether there's any chance of accountability for Russia's invasions both of 2014 and also 2022. But before doing so is key to provide some brief context as to relations and the history between those countries, and here we go back to some legal fictions.

Russia and Ukraine were, of course, both part of the Soviet Union up until the dissolution of that Union in the early 1990s. Russia is legally accepted and universally regarded as the successor state to the Soviet Union. But Ukraine, alongside Belarus, is not a new state carved out from the former Soviet Union in the way that Kazakhstan or Uzbekistan for example are. Ukraine was one of the founder states of the United Nations, and also one of those states that abstained when the Universal Declaration of Human Rights in 1948 was adopted. It was, of course, a legal fiction. Ukraine was under the complete control of the Soviet Union, but for political reasons it existed as a Member State of the UN. And was party to the UN human rights treaties and other treaties prior to the dissolution of the Soviet Union. Just to note that fiction is not unique. The United Kingdom insisted upon and secured India status as an original member of the League of Nations in the 1920s and subsequently the United Nations in the 1940s. Even though India only secured independence from British rule in August 1947.

Finally, back to the context between Russia and Ukraine. The hundreds of years from relationships and the proximity between these states has ensured intricate and complex population, cultural and economic interactions between them. Complex histories lead to competing narratives, and those narratives in turn lead to legal justifications and arguments. So this brings us back to the original question. How can we try and ensure accountability for those atrocities that clearly have been committed in this conflict in the case of such a powerful state as Russia? Having understood the context, we will pick that up in the second part of this blog.