RUSSIA'S THEFT OF GEORGIAN TERRITORY IS BAD. IT IS WRONG. IT IS IMMORAL. IS IT ALSO ILLEGAL? DOES IT MATTER?

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I am very grateful to Tinatin Oboladze, President of the Fordham International Law Association, for inviting me to offer some remarks at this panel discussion; to Naomi Briercliffe, for moderating it; and to Beka Dzamashvili, Payam Akhavan, and Andy Lowenstein for their thoughtful contributions. Unlike them, I have followed Georgia's strategic litigation from afar, not from a ringside seat. I confess that I am a student of Georgia, not an expert. But I do want to raise a question that bears not only on what that courageous country is doing in the international judicial space, but on the role of such efforts in the broader context of international law.

The question is: what is the point of all this? Is it worthwhile to seek judicial recourse for wrongs committed with impunity, when it is obvious that the perpetrators of those wrongs have no intention of complying with orders to stop?

The International Court of Justice, the International Criminal Court, and various regional human rights tribunals have increasingly been tasked with some of the most significant geopolitical issues of our times. But the rulings of those courts, however robust, have done little to abate the violations.

In 2020, the ICJ unanimously ordered Myanmar to "take all measures within its power to prevent the commission of all acts within the scope of Article II" of the Genocide Convention. But the abuses have not stopped.

The Court ordered Russia, one month after its invasion of Ukraine began, to "immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine." Two years later, the Russian war machine is intensifying its carnage.

And just two months ago, the Court ordered the State of Israel, among other things, to "take immediate and effective measures to enable the provision of urgently needed basic services and humanitarian assistance to address the adverse conditions of life faced by Palestinians in the Gaza Strip." This morning's newspapers remind us that it has not meaningfully done so.

A year ago last week, the International Criminal Court issued an arrest warrant for Vladimir Putin, charged with "the war crime of unlawful deportation [and] unlawful transfer of children from occupied areas of Ukraine to the Russian Federation." I doubt there is a single person on Earth who believes that such a warrant will ever be executed, or that Putin will ever stand in the dock in a court of law.

The European Court of Human Rights, as we have heard, in 2021 declared that the behavior of Russia's puppet regimes in the Georgian provinces of Abkhazia and South Ossetia violated the European Convention. The situation has not fundamentally changed.

And although the International Court of Justice did order preliminary measures in 2008 – which, of course, were ignored – to restrain human rights abuses by the Russian occupiers of sovereign Georgian territory, three years later Georgia – despite the best efforts of my friends on this panel – was unable to persuade a majority of the judges that those abuses breached the Convention on the Elimination of All Forms of Racial Discrimination.

Of course, the tribunals issuing these opinions have no effective instruments available to ensure compliance in any event. In many matters that come before international courts outcomes **are** respected, even if unhappily, by the losing side. But those instances fall into two broad categories: (a) where the government of that country is committed, for reasons transcending any individual case, to the treaty regime or ad hoc agreement requiring judicial dispute resolution; and (b) where the respondent state sees unacceptable economic, political, or reputational risk in flouting the decision of a respected international tribunal.

But states powerful enough to ignore rules that may get in the way of their leaders' personal or political objectives, or those that do not respond to shame, have no fear of disregarding court orders. Russia, I need hardly say to this assembly, qualifies on both scores.

Given, then, that efforts to hale Russia into court on allegations of international wrongdoing are not producing fundamental change, why keep doing it? And I should interject here that I am focusing on Russia because of the geographic orientation of this panel. Surely the same question could be asked regarding China, which refused to accept the arbitral award over the South China Sea, Iran, which regularly ignores foreign courts holding it responsible for sponsorship of terrorism, and Venezuela, which thumbs its nose at adverse decisions concerning the border with Guyana. Like Russia, China is strong enough to get away with it, and like the one in Moscow, the governing regimes in Tehran and Caracas are unfamiliar with the concept of shame.

If the goal of strategic litigation is scoring victories in court, the report card is mixed at best. If it is forcing changes in Russian behavior, it is even worse. But if we know that, say, the invasion of Ukraine, or the forcible occupation of portions of Georgia, is wrong, inconsistent with the UN Charter, disruptive to the peace and security of the region and the world, brutal, inhumane, unjustifiable, … insert your favorite condemnatory adjectives here … what is to be gained by adding to that string the word "illegal"?

My thesis is that there **is** something important to gain, and something important that has already been gained. The declaration that bad behavior is illegal has consequences, and in a world in which sovereign states are still the atomic units of international law, those consequences may do far more to curtail bad behavior than the words of an unenforceable judicial decree.

Not surprisingly, the point I am making may be seen also on the municipal level. It has been well understood by Donald Trump. We know that he publicly told over 32,000 lies during his four years of

disgracing the presidency, according to The Washington Post. We have all heard him announce with pride what he feels entitled to do to women, because "when you're famous they let you do it." We know that he instigated the most serious attack on American democracy in our nation's history. And yet all of that, and more, has been and is being tolerated by his diehard acolytes, constituting a shockingly large number of our fellow citizens.

But now he is charged with crimes: 88 felonies at last count. He has responded primarily not by offering evidence or argument to contend that he is not guilty. Rather, he has attacked the process: claiming that the courts and judges themselves are corrupt. Trump knows that a criminal conviction handed down by a respected tribunal, having heard both sides and ruling on the law and the facts, would be a game-changer. With a judicial conviction, a bridge is crossed. And the polls confirm that for many of his supporters, it is a bridge too far.

Something is different not just in degree but in kind, when conduct has been found by an authoritative court to be illegal, even if everyone knows that it is wrong, or even, to use a word that is rarely heard coming from the mouth of a lawyer, immoral. Let me speculate for a moment on why that is so.

The difference between a moral failing and a legal one does not lie in the objectivity or subjectivity with which we define the offense. Obviously, people of goodwill can and do disagree, sometimes quite vehemently, about the precise meaning and reach of moral precepts. But we as lawyers know well that the same is true of the law: no matter how clear a rule may seem to be – be it statutory in the domestic setting, or conventional or customary in the international space – there is room for divergence over interpretation and application. So the answer does not lie here.

Yet the law provides for definitive adjudication by human arbiters in real time, while morality does not. And in a fair and open tribunal, the judge is required to lay out for all to see the reasons motivating her decisions. So long as judges are seen as responding to evidence and argument, so long as the rules from which they start their analysis are transparent in content and adopted pursuant to processes open to input from affected parties, people can and generally do have confidence in judicial outcomes, even when they do not agree with them.

This is why it was so important for **a court** to hold that the surviving architects of the Third Reich were not just aggressors, not just killers, but criminals, convicted and condemned in a court of law in which they had a chance to have their say. One of the great achievements begun in the second half of the last century, starting at Nuremberg and continuing today, has been the global recognition that violators of fundamental principles of international law are, in a word, outlaws, to be broadly condemned, and certainly not to be trusted or excused.

In other words, the determination that Russia's invasion of Ukraine, or that Myanmar's treatment of the Rohingya, must stop, changes the dialogue: the world stands informed not just that these things are inherently wrong, but that they are illegal, according to a body of law to which virtually all states have voluntarily acceded, and according to the dispassionate application of that law to the facts.

Of course, it is frustrating to watch as the ICJ issues orders that are ignored, and that people continue to die as a result, as in Ukraine or in Gaza. It is frustrating to see that the Court can dismiss a case because of a crabbed application of treaty language, as it did in the CERD case brought by Georgia.

But in the international sphere, change ultimately depends on the reactions and influence of people and nations not directly involved in the specific dispute at issue, but with vested interests in the bigger picture. They must have confidence in the international judicial process, which must be seen to be the impartial administration of justice characteristic of the ICJ, the ICC, and the European Court of Human Rights.

The success of Georgia's strategic litigation lies in the elusive sphere of public opinion. As international lawyers, we are charged with broadening the understanding of and trust in the international legal system, lest it be too easy to disregard court rulings and their implications. The way to achieve that goal, I think, is to be bold and creative in inviting courts to apply the law, to obtain judgments based on that law, and then to deploy those judgments globally, inviting the recognition that the violation of international law can, and must, bring consequences.

That, in my view, is what Beka, Payam, and Andy, and many others like them, have tried to do. And that, in my view, is what makes them heroes and role models to whom we are all indebted.

Thank you for your attention.