

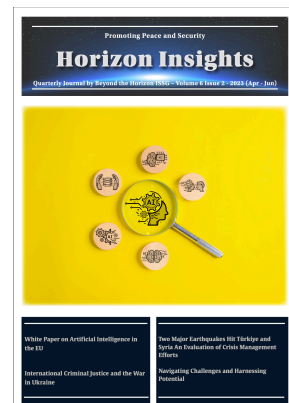
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International Criminal Justice and the War in Ukraine

by Jannis Figura*

Abstract

The international crimes committed during Russian invasion of Ukraine can be prosecuted under the current international law framework except for the crime of aggression. Prosecution of the latter is the only judicial way to prosecute the Russian leadership. The International Criminal Court does not have jurisdiction over the crime of aggression in Ukraine. Furthermore, the International Court of Justice ruled that third countries cannot prosecute other senior government officials. This only leaves Russian and Ukrainian courts as potentially legitimate entities that can prosecute Russian leadership, as both countries are directly involved in the conflict. There is also the idea of establishing a new special international tribunal for the crime of aggression in Ukraine. However, this court brings huge problems for international criminal justice, such as selectivity criticism and resource problems. This paper favours a prosecution of Russian leadership in Ukrainian courts. Even though it is unlikely that Russian leadership will actually be in court, their prosecution will marginalise their political reputation if many countries accept this ruling. This is far from ideal but the most realistic option. The effect depends on the support of the international community.

1. Introduction

"I have decided to conduct a special military operation", these were the words Vladimir Putin used when he announced on the 24th of February 2022 that Russia's army would launch an attack against Ukrainian forces to demilitarise the country and replace the government in Kyiv (Osborn & Nikolskaya, 2022). Several intelligence services, especially from the United States, have sent early warnings of Russian troop concentration close to Ukraine since April 2021. Beyond the Horizon ISSG researchers Coban et al. (2022) already warned a month before the invasion of the high risk that Russia was preparing for a full-scale war against Ukraine. After the invasion date on the 24th of February, the UN quickly adopted a resolution on the 2nd of March 2022, rejecting Russia's invasion and calling for an immediate troop withdrawal with an overwhelming 141 to 5 vote in the UN General Assembly (UN, 2022a).

For the majority of national governments around the world, it was clear that Russia's attack was a direct violation of Article 2(4) of the UN Charter, which states that: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations" (UN, 1945). The gravity of the attack and its illegal nature caused many national governments, NGOs, and international institutions to demand legal investigations into the invasion. The goal is to hold the perpetrators and planners of the attack accountable. This call was further amplified over the past months when it became clear that Russian forces purposefully targeted civilian infrastructure and non-combatants, including children and women (Speri, 2022). The following sections outline the legal options to investigate the Russian invasion and committed crimes. These options are also assessed on their effectiveness and implications for international criminal justice.

2. International criminal law and justice

International criminal law (ICL) is a complex legal discipline. Unlike, for instance, national tax or family law, it is not enshrined in a singular codification system. Instead, it consists of several components, such as international law, comparative criminal law, national criminal law and human rights law. Arguably the Rome Statute of 1998 is the most extensive form of international criminal law codification (Bassiouni, 2014, p.1).

In general, ICL prescribes particular categories of conduct, such as war crimes or crimes against humanity, and holds persons "who engage in such conduct criminally liable" (Cassese & Gaeta, 2013, p.3). Initially, ICL only consisted of war crimes, based on the Hague Conventions of 1899 and 1907, focusing on the conduct of war, and the Geneva Conventions between 1864 and 1949, concerning the humanitarian treatment in war (Fruchterman Jr., 1983). After World War II, the Nuremberg and Tokyo trials recognised new classes of international criminality, namely the crimes against humanity and crimes against peace. Recognition and codification of genocide followed as a distinct crime in 1948 and torture during the 1980s (Cassese & Gaeta, 2013).

The end of the Cold War marked a new era in international criminal law when the UN Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) in 1993 and 1994. Then, in 2002 the International Criminal Court (ICC) was established in the Hague, while its founding treaty, the Rome Statute, was already signed in 1998. The ICC is the world's first permanent treaty-based court that can investigate and prosecute individuals for the gravest crimes of concern to the international community (Ellis, 2002). As of December 2022, 123 of the 193 UN member states are State Parties to the Rome Statute (ICC, n.d.-a).

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Generally, the ICC's jurisdiction is bound to three trigger mechanisms that can activate investigations by the court. Firstly, signatory states of the Rome Statute can refer situations to the court. Secondly, the UN Security Council can refer situations to the court to extend its jurisdiction to non-signatory states. Lastly, the ICC's prosecutor may initiate an investigation – *proprio motu* – on his own initiative (ICC, 2011, Article 13(a-c)). The ICC can prosecute individuals for crimes against humanity, war crimes, genocide, and since 2018, the crime of aggression (Akande & Tzanakopoulos, 2018).

With the establishment of the court came high expectations for international criminal justice. International criminal justice refers to the desire to hold perpetrators of severe international crimes accountable through the application of international criminal law. Throughout history, perpetrators of these grave crimes frequently escaped punishment, either because they enjoyed immunity or because national borders limited the jurisdiction of courts to hold these individuals accountable. Consequently, the overall goal of international criminal justice is ending impunity (Rodman, 2021).

Another entity besides the ICC and special tribunals can pursue international criminal justice, namely national courts. Especially after the establishment of the ICC, several countries adopted aspects of international criminal law in their national legislation. This allows them to prosecute perpetrators of severe international crimes in national courts. In the most extreme forms, some countries adopted universal jurisdiction (UJ) for certain crimes. Universal jurisdiction provides national courts with jurisdiction over crimes against international law, even when the crimes did not occur on the host state's territory, and neither the victim nor perpetrator are nationals of that host state. Therefore, this principle enables national courts to address grave crimes without personal or territorial connection to the host state (ECCHR, n.d.). The concept gained international attention again when several national courts, such as those in France, Germany, or Sweden, prosecuted perpetrators for core international crimes during the War in Syria in the mid-2010s (Triscone, 2021). The following section outlines the options to pursue international criminal justice in Ukraine.

3. International criminal justice options to investigate the Russian invasion of Ukraine

a. The International Criminal Court (ICC)

Soon after the invasion on the 24th of February, ICC Prosecutor Karim A.A. Khan announced that he would seek authorisation to open investigations into the situation in Ukraine. The fastest approach is State Party referral, as this simplifies the authorisation process of the ICC, compared to *proprio motu* investigations by the prosecutor. Already on the 2nd of March 2022, 40 countries referred the situation in Ukraine to the court. On the same day, Khan announced that he would open investigations into possible war crimes, crimes against humanity, and genocide on the territory of Ukraine committed by any individual since the 21st of November 2013. The Ukrainian government has already accepted ICC jurisdiction during the Russian annexation of Crimea. This makes the ICC's jurisdiction over the three previously mentioned crimes legitimate, even though Ukraine is no signatory of the Rome Statute (ICC, n.d.-b).

Nonetheless, the ICC cannot prosecute individuals for the crime of aggression in the Ukraine War. This crime is distinct from the other three crimes, as it exclusively applies to political or military leaders and not, for example, lower-ranked soldiers committing war crimes. It is strictly tied to "a person in a position effectively to exercise control over or to direct the political or military action of a State" (ICC, 2011, Article 8 bis (1)). Contrary to the other three core crimes, the ICC's jurisdiction over the crime of aggression is bound to the territory of State Parties to the Rome Statute accepting ICC jurisdiction over this crime or UN Security Council referral. Ukraine and Russia are not ICC members, and Russia has veto power in the Security Council. Consequently, the ICC will not be able to prosecute Russian senior government officials such as President Putin, Foreign Minister Sergey Lavrov, or high-ranking military officials for the crime of aggression.



ICC Prosecutor Karim A.A. Khan announces investigation into the invasion on the 2nd of March 2022. Retrieved from Beeri & Baruch (2022).

The ICC will not gain jurisdiction over this crime for the Ukraine War in the future as it is inapplicable retrospectively. This is hugely problematic as the crime of aggression is considered "the mother crime" that enabled the following potential war crimes, genocide, or crimes against humanity later during the Ukraine War (Speri, 2022, para. 9). Its non-prosecution would be a grave blow to international criminal justice. As international law specialist Philippe Sands said: "My feeling is that if this is not prosecuted as a crime of aggression, then the crime of aggression is basically dead" (Speri, 2022, para. 18). Thus, an examination of alternatives to the ICC is required to unfold the full potential of international criminal justice.

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- ◇ The ICC investigates crimes against humanity, war crimes, and genocide in Ukraine
- ◇ The court does not have jurisdiction over the crime of aggression in Ukraine, which is bound to ICC member states or UN Security Council referral
- ◇ The crime of aggression is the core crime that enabled the following crimes
- ◇ It is the only crime that can be realistically linked to the Russian leadership and used to hold senior government officials accountable

b. Joint Investigation Team (Eurojust)

In April 2022, the ICC also decided to become a member of the Joint Investigation Team (JIT) that Eurojust established to investigate potential international crimes in Ukraine. This is the first time that the court joined a JIT in its history. Ukraine, Lithuania, Poland, Estonia, Latvia, Slovakia, and Romania are also members of the JIT. Joint Investigation Teams under the Eurojust framework enable national judicial systems, law enforcement units, and intelligence services to work together directly. This close coordination of national agencies is a unique mechanism that simplifies communication between those services. Concerning Ukraine, the JIT is crucial to manage the enormous amounts of war crime evidence and storing this data safely outside Ukraine. The national agencies are the primary prosecutors of these crimes, but the ICC directly contributes to the investigations and will resume control over prosecutions where necessary via the complementarity principle (Crawford, 2022). Ukraine's Prosecutor General's Office alone would be overloaded without foreign help as it cannot prosecute all crimes on its own due to limited resources. As of the 6th of December 2022, the Office registered 50.448 war crimes by Russian military and political representatives (Justice Info, 2022). The Joint Investigation Team will probably focus on crimes against humanity, war crimes, and genocide, but not the crime of aggression. The following section will explain the problems that national courts prosecuting these crimes have.

c. National courts and universal jurisdiction

National courts are the third option to prosecute grave crimes during the Ukraine War – also those that did not join the JIT. Previous sections already explained the concept of universal jurisdiction. It is noteworthy that “166 States have defined at least one of the four crimes upon which universal jurisdiction can be exercised – war crimes, crimes against humanity, genocide, and torture – as crimes in their national law” (International Justice Resource Center, n.d., para. 5). Significantly, the crime of aggression is not included. Furthermore, only a few countries established specialised units capable of prosecuting these crimes. Thus, even though many countries can investigate these crimes theoretically, it does not mean that they do so in reality. The application of the concept is still under debate (UN, 2022b).

This paper has shown so far that the imposition of international criminal law concerning war crimes, crimes against humanity, and genocide is not the main problem of investigations in the Ukraine War. There are large amounts of evidence, Russian prisoners of war, witnesses to identify them, and entities to conduct the prosecutions, which are the ICC and national courts. Consequently, it is expectable that many more Russians will be convicted for these crimes in the upcoming months and years (Polityuk & Balmforth, 2022). However, these are only the lower ranks of possible perpetrators.

The main problem from an international criminal justice perspective is the crime of aggression to hold the Russian government officials accountable, who started this war in the first place. It is unlikely that the other three crimes can be linked to these senior officials to hold them accountable. Such orders are secret and difficult to obtain. The crime of aggression is the only mechanism that can create a link, as publicly available information is utilisable to build a case and create accountability (Colangelo, 2022). For instance, President Putin publicly ordered the attack and Russia's general staff planned it. These actions are known and constitute the crime of aggression themselves, thereby automatically creating accountability. Therefore, the evidence for this crime is not the problem, but rather finding an entity that can legally conduct such an investigation. The ICC is not allowed to prosecute the crime of aggression in Ukraine as explained before.

The crime of aggression is by definition a leadership crime, and national court's jurisdiction over this crime is questionable. The International Court of Justice (ICJ) has ruled in its *Yerodia* decision that the immunity of senior government officials protects them from war crimes or crimes against humanity prosecutions by other countries (Trahan, 2022). In 2002, the ICJ ruled with a 10 to 6 vote that a Belgium



Rulings and opinions of the International Court of Justice (ICJ) serve as primary sources of international law. Retrieved from Foley Hoag (n.d.).

arrest warrant based on universal jurisdiction for a Congolese politician involved in core international crimes was unlawful. The ICJ's Yerodia decision was based on customary international law and strictly tight to the scope of the case (ICJ, n.d.). Thus, verdicts on the crime of aggression by Russian or Ukrainian courts, which are directly involved in the conflict, would require a new ICJ ruling due to the different jurisdictional circumstances and nature of the crime compared to the Yerodia case. Both countries include the crime of aggression in their national criminal code. In Russia, it is punishable by up to 20 years in prison (Federation Council, 1996, Article 353). In Ukraine, the same crime is punishable by up to 12 years imprisonment (Parliament of Ukraine, 2001, Article 437).

So far, it is unknown whether national courts' ruling over the crime of aggression is lawful when the host state is involved in the conflict. It did not happen in history so far. Since the Nuremberg and Tokyo trials, which were international courts, the crime of aggression has not been prosecuted. This leads to the assumption that international courts are the only entities possessing legitimate jurisdiction over the crime of aggression (Trahan, 2022). It is further supported by the *par in parem non habet imperium* principle in international law, "an equal has no power over an equal (Van Schaak, 2012, p.149). The principle stipulates that sovereign states cannot exercise jurisdiction over other sovereign states. Therefore, scholars such as Van Schaak (2012) advocated that the ICC should have the sole privilege of exercising *de facto* primacy over the crime of aggression *vis-à-vis* domestic courts (p.133). Consequently, several international lawyers proposed the establishment of a special international tribunal focusing on the crime of aggression in the Ukraine War since the ICC does not have jurisdiction over this crime in Ukraine's territory (Scheffer, 2022; Hathaway, 2022). This would help circumvent the difficulties, as explained in this section of the paper. However, the idea of a special tribunal also brings new problems that will be analysed in the next and final part of the analysis.

- ◇ Universal Jurisdiction enables third countries to prosecute Russians for war crimes, crimes against humanity, and genocide
- ◇ The crime of aggression cannot be enforced by a third country over Russian leadership due to an ICJ ruling
- ◇ Potentially, Russian and Ukrainian courts are the only existing entities that can prosecute Russian leadership since both countries are directly involved in the conflict
- ◇ Arguably, only international courts have jurisdiction over the crime of aggression
- ◇ Russian and Ukrainian courts' ruling over the crime of aggression would require a new ICJ ruling to confirm their legality

d. A new international tribunal for the crime of aggression in Ukraine

The idea to establish a special international tribunal for the Ukraine War re-emerged when the Ukrainian Army partially pushed back Russian forces in September 2022. Proponents of the special tribunal suggest that the government of Ukraine and the United Nations should work together to create this court. This would combine the benefits of using the Ukrainian criminal code as the legal basis while using the international aspect of the UN to promote the court's legitimacy since it is not a national court ruling over the crime of aggression but an international court (Hathaway, 2022). This design addresses the previously mentioned problems of the crime of aggression. Additionally, widespread support among UN member states would counter potential Western-interest-criticism. Consequently, establishing this new special tribunal seems a natural path to follow.

Nevertheless, the court would also come with mainly two issues. Firstly, it will directly compete with existing judicial systems for resources, especially the ICC due to their similarities. This will be the case even when the new court will solely focus on prosecuting the Russian leadership for the crime of aggression, which the ICC cannot do. ICC Prosecutor Khan already indicated that the ICC would need more resources in 2023 to deal with the high number of cases. Furthermore, a new special tribunal may reduce international support for legitimising the ICC because it might be perceived as ineffective since it cannot deal with the situation in Ukraine. It is questionable whether donors will provide the ICC with enough money if they finance a new costly tribunal as well. Additionally, the court would require new judges, investigators, facilities, and prosecutors. In other words, it is an expensive enterprise (Heller, 2022).

Secondly, and most importantly, besides the monetary and personnel problems, the special tribunal would send a wrong message of selectivity in international criminal justice. Some non-Western countries already complained that they are often disproportionately the target of international criminal justice investigations. They argue that it is often used as a new tool of Western power politics and only applied when it is in the interest of Western states (Vilmer, 2016). For instance, it raises the question of why a special tribunal is established for the Ukraine War but not the Iraq invasion in 2003 to hold the British and American governments accountable who undeniably committed the crime of aggression then (Hagan et al., 2015). It would also suggest that following crimes of aggression in the future would require the establishment of new tribunals. Generally, some observers believe that European

countries seem to excessively focus on Russian aggression and forget about other ongoing conflicts in the world that would require their support for international criminal justice. A new international court would support this criticism (Dworkin, 2022).

Instead, it would be much easier if countries use existing structures to prosecute the crime of aggression. In other words, signing the Rome Statute and accepting ICC jurisdiction over the crime of aggression in their territory. As Heller (2022, para. 18) said, “If certain powerful states had not insisted on excluding non-state parties from the crime of aggression – the US, UK, and France foremost among them – [...] there would be no need now to create a brand-new ad hoc tribunal for one type of international crime and one specific invasion.” Consequently, the difficult situation now is also the fault of Western countries as they feared being held accountable for potential misconduct themselves by the ICC. The war in Ukraine should serve as a lesson that strengthening the ICC is in the interest of the entire world community to increase stability. A new special court for Ukraine would probably never get rid of Western interest criticism. As Dworkin (2022) stated, “Ultimately, international courts tend to reflect the political dynamics of the world rather than alter it. [...] Many countries may disapprove of Russia’s actions, but none outside the West and its closest Asian allies are prepared to make this the central reference point of their foreign policy (para.10).

- ◇ A new international court would overcome the *par in parem non habet imperium* principle in international law and have jurisdiction over the crime of aggression
- ◇ The court would compete with existing international criminal law systems for resources and personnel
- ◇ It could inflame criticism that international criminal law is a tool of Western-oriented power politics
- ◇ The establishment is costly and would suggest that new tribunals are necessary for future conflicts
- ◇ The ICC can already prosecute the crime of aggression
- ◇ Major Western countries denied the ICC jurisdiction over the crime on their territory because they feared being prosecuted themselves
- ◇ If more countries had granted the court jurisdiction over the crime, then this dilemma would not exist in the first place

4. Implications for international criminal justice and the war in Ukraine

Crimes against humanity, genocide, and war crimes are well covered under the current international law framework. National courts, such as those in Ukraine or others applying universal jurisdiction, can lawfully prosecute them. Additionally, the ICC can support these efforts via the principle of complementarity. Thus, there are sufficient indicators that international criminal justice will be achieved to some extent for these three crimes. However, all three are only realistically practicable for prosecutions of lower-ranked soldiers, not senior Russian government officials and military officers. Yet, they are prosecutable for the crime of aggression based on publicly available evidence, such as President Putin’s order to invade Ukraine. Nonetheless, it is unapparent which entity can lawfully conduct these trials. The crime of aggression was only prosecuted during the Nuremberg and Tokyo trials, but not since then. Hence, there are well-reasoned debates on how to manage this dilemma.

Ideally, the ICC prosecutes the crime of aggression as it has legitimate jurisdiction over the crime due to its international nature. However, since it has no jurisdiction over this crime in Ukraine, it is indispensable to examine alternatives. This paper has outlined that some national legislations include the crime of aggression and could theoretically prosecute it, including Russia and Ukraine. It is unresolved yet, whether involved countries can do it since they are potentially legitimate stakeholders, but such a scenario has not happened yet. Thus, the situation in Ukraine is unique in this regard, and it will show how the crime of aggression is managed in the future. This paper favours an ICJ ruling that confirms that defending countries (victims) against the crime of aggression and the ICC are the only legitimate entities to rule over this crime in a conflict and can lawfully issue arrest warrants for perpetrators. The ICJ has already ruled the Russian attack unlawful.

The situation at the moment only leaves Russian and Ukrainian courts as existing and potential legitimate entities. It is unlikely that Russian courts will conduct these prosecutions if there is no regime change in the country. This only leaves Ukrainian courts as possible venues to prosecute Russian senior officials for the crime of aggression as legitimate entities. It is questionable whether the International Court of Justice will accept their ruling. The court has the final say in this regard, as its rulings and opinion serve as primary sources of international law. This can only be ascertained when the time has come.

The only other possibility is the establishment of a new international tribunal, based on Ukrainian law, focusing solely on the crime of aggression in the Ukraine War and supported by the international community. However, among resource problems and competition with the ICC, this court would also bring severe political complications. Mainly Western-oriented governments would likely support such an institution but not more. There is already widespread criticism that international criminal justice is a selective tool of the West whenever its interests are at stake. This is also partially because Western countries and their allies are the major promoters and donors of the international criminal justice system. Whether this criticism is true or false is subject to its own debate. Nonetheless, the new tribunal would inflame this perception and may damage the support for international criminal justice in the long run.

In contrast, it is far more likely that there is widespread acceptance among the international community that Ukraine has legitimate jurisdiction over the crime of aggression as the defender in this war. Therefore, this paper favours prosecuting the crime of aggression in Ukrainian courts. Whether it is actually possible to bring Russian senior officials to court is a different discussion. Potentially, accepting Ukraine as an EU member could enhance the gravity of Ukrainian court decisions. If the country issues European Arrest Warrants (EAWs) for Russian officials, they could not enter EU territory anymore, where the crime of aggression is punishable. EU countries are required to obey EAWs. This would marginalise the efficiency of Russian leadership in the future and promote international criminal justice without sentencing these officials in court. This outcome is not ideal, but perhaps more realistic. The legitimacy of the Ukrainian courts' ruling would still depend on the International Court of Justice's decision.

Lastly, the situation has shown that if more countries had supported the ICC, such discussions would have been unnecessary. More countries should become parties to the Rome Statute to increase the court's jurisdictional area, which brings the mutual benefit of promoting international stability. Furthermore, especially Western countries can counter the criticism of double standards by promoting the court's jurisdiction over the crime of aggression within their territory. This requires specific acceptance, even by ICC member states. The Ukraine War will either have a positive or negative impact on international criminal justice. No matter the outcome of the war or the management of international crimes in the conflict, the Ukraine War will have an extensive impact and shape the development of international criminal justice for the foreseeable future.

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