

Prosecuting the Russian Leadership for the Crime of Aggression at the International Criminal Court

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1. Introduction

The Russian invasion of Ukraine from 24 February 2022 onwards is a grave violation of international law for which the State of the Russian Federation is legally responsible. This responsibility may well encompass *reparations* in the form of compensation for the human and material harms in a later contentious case before the International Court of Justice ('ICJ').¹ The ICJ has already been approached by Ukraine in another setting, regarding the allegations by Russia that Ukraine was committing genocide in the Luhansk and Donetsk oblasts of Ukraine.² This case may lead to provisional measures against Russia to suspend its military operations. Furthermore, the European Court of Human Rights ('ECtHR') can also assess whether Russia has violated the European Convention on Human Rights. The ECtHR has already decided to indicate interim measures, including, that the Government of Russia should refrain from military attacks against civilians and civilian objects.³ The United Nations ('UN') Human Rights Council has decided to establish an independent international commission of inquiry to investigate alleged violations of human rights and humanitarian law "in the context of the Russian Federation's aggression against Ukraine".⁴

In this policy brief, we argue that it is possible and desirable to prosecute President Vladimir Putin and members of the Russian leadership individually for the crime of aggression at the International Criminal Court ('ICC'), despite the prevailing view that this crime cannot be investigated by the ICC.

On 3 March 2022, the ICC Prosecutor Karim A.A. Khan QC and his Office of the Prosecutor ('OTP') opened an investigation into the situation in Ukraine, based on referrals from 39 ICC States

¹ See, for example, ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 9 February 2022 (<https://www.legal-tools.org/doc/e5y6on/>).

² ICJ, "Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)", Press Release, No. 2022/8, 7 March 2022 (<https://www.legal-tools.org/doc/sonmfm/>).

³ ECtHR, "Decision of the Court on requests for interim measures in individual applications concerning Russian military operations on Ukrainian territory", Press Release, ECHR 073 (2022), 4 March 2022 (<https://www.legal-tools.org/doc/0unar0/>).

⁴ UN, Human Rights Council, "Human Rights Council establishes an Independent International Commission of Inquiry to investigate all alleged violations of human rights in the context of the Russian Federation's aggression against Ukraine", Press Release, 4 March 2022 (<https://www.legal-tools.org/doc/v7xkfh/>).

Parties.⁵ It is clear that war crimes, crimes against humanity, and, if relevant, genocide, can be investigated. The more difficult question is how the ICC or others can prosecute the Russian leadership for the crime of aggression.

It should be noted from the outset that *indictment* and *conviction* for this major crime under general international law is almost impossible at the ICC because of the special jurisdictional hurdles set up by the States Parties to the ICC Statute in Article 15*bis* ("Exercise of jurisdiction over the crime of aggression (State referral, *proprio motu*)").⁶ A referral by the Security Council in accordance with Article 15*ter* ("Exercise of jurisdiction over the crime of aggression (Security Council referral)") is ruled out in this case because of the Russian veto power.

How is it then still possible to prosecute Putin and the responsible Russian leadership for this crime? The short answer is that an indirect, somewhat hidden, but perfectly legal gateway to *de facto* prosecution of aggression already exists under the ICC Statute. This window of opportunity exists *if the ICC prosecutes the same persons for war crimes and crimes against humanity ('CAH') in a context where a crime of aggression is committed*. The ICC Prosecutor should now seriously consider this option.

2. The Crime of Aggression Committed against Ukraine

The ICC Statute provides a definition of aggression for the purpose of individual criminal liability in Article 8*bis*. The definition has in essence been the same since the Nuremberg Trial, and aggression is one of the crimes for which there is direct individual criminal responsibility under international law.

An *act of aggression* means "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State" according to Article 8*bis*, para. 2. Acts qualifying as an act of aggression include "the invasion or attack by the armed forces of a State of the territory of another State" and the "bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State". Both definitions appear to be directly

⁵ ICC, "Statement of the ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt from 39 States Parties and the Opening of an Investigation", 2 March 2022 (<https://www.legal-tools.org/doc/k9fys5/>). By 11 March 2022, two more referrals, from Japan and North Macedonia, had been received from States Parties.

⁶ Rome Statute of the International Criminal Court, 17 July 1997, Article 15*bis* ('ICC Statute') (<https://www.legal-tools.org/doc/9c9fd2/>). In the following, 'Article' refers only to provisions (articles) of the ICC Statute if not otherwise indicated.

applicable to what has been committed by Russia in Ukraine.

It is also straightforward to conclude that these acts, because of their “character, gravity and scale, constitute a manifest violation of the Charter of the United Nations” (Article 8*bis*, para. 1) and thus constitute a crime of aggression under the ICC Statute. By overwhelming majority, the UN General Assembly on 2 March 2022 condemned the Russian invasion⁷ and demanded that Russia “immediately, completely, and unconditionally” withdraw all of its military forces from the whole territory of Ukraine.⁸ The resolution supports the assessment that a manifest violation of the UN Charter Article 2, para. 4, the prohibition of the unlawful use of force against another State, has indeed been committed.

3. The Most Responsible Persons: Putin and the Russian Leadership

The crime of aggression is different from other crimes in the ICC Statute because the definition of aggression focuses clearly on the leadership of the aggressive State: “the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State” (Article 8*bis*, para. 1). Likewise, Article 25, para. 3*bis*, on individual criminal responsibility, states that the other provisions on responsibility of Article 25, para. 3, “shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State”. This means that the principal suspects of the crime of aggression will always be *the political and military leadership at the highest level*, typically the President or Prime Minister, the cabinet and key members of its government, the top military commanders, and the main legal, political and military advisors to the leadership.

The mental element required for most members of the Russian leadership and their advisors to be held criminally responsible is, as far as we can see, likely to be fulfilled. The invasion was executed with both the required intent and knowledge in plain sight, while the reasons for the attack provided by the Russian leadership are entirely inadequate as a legal justification. Accordingly, President Putin and others who have participated in the decision-making executing the invasion plan and aggression against Ukraine, or in the planning, preparation, or initiation of such (ongoing) acts, would be the prime suspects. The single-most responsible person would be President Putin. His personal criminal liability for the crime of aggression against Ukraine would seem to be beyond reasonable doubt.

4. Prosecuting the Crime of Aggression: What are the Options Apart from the ICC?

Apart from the ICC, there are in theory two other possible avenues to the prosecution of the Russian aggression. First, the international community, preferably the UN General Assembly, may create or support the creation of a special criminal tribunal for this purpose, as envisioned by Phillippe Sands and supported by others. Another possibility could be universal jurisdiction applied by single states. However, the prosecution of heads of states and members of their cabinets in domestic proceedings are unlawful, according to the ICJ in the Arrest Warrant Case,⁹ and this limitation may arguably also apply to a special (hybrid) criminal tribunal.¹⁰

⁷ UN, “General Assembly resolution demands end to Russian offensive to Ukraine”, *UN News*, 2 March 2022 (<https://www.legal-tools.org/doc/d1zbuz/>).

⁸ Aggression against Ukraine, UN Doc. A/ES-11/L.1, 1 March 2022 (<https://www.legal-tools.org/doc/x65cmr/>).

⁹ ICJ, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, 14 February 2002 (<https://www.legal-tools.org/doc/c6bb20/>).

¹⁰ See Kevin Jon Heller, “Creating a Special Tribunal for Aggression

5. Prosecuting the Crime of Aggression at the ICC: Preview

The best option for prosecuting the crime of aggression against Ukraine remains, in our view, the ICC.¹¹

The ICC Appeals Chamber has earlier indicated that assessment of gravity involves “a holistic evaluation of all relevant quantitative and qualitative criteria, including some of the factors relevant to the determination of the sentence of a convicted person”.¹² Some of these criteria are:

the extent of the damage caused, the nature of the unlawful behaviour, the means employed to execute the crime, the degree of participation of the accused person, the degree of intent, the circumstances of manner, time and location, the existence of particularly defenceless victims, the commission of crimes with particular cruelty or where there are multiple victims, and the commission of crimes for any motive involving discrimination.¹³

When investigating possible war crimes and crimes against humanity committed by Russian forces, the crime of aggression clearly forms part of the ‘gravity context’ for these other crimes. If they are committed as integral parts of the invasion, and initiated, ordered, or executed with the consent of the Russian leadership, personal responsibility for these other crimes is likely. If Ukrainian cities are exposed to terror bombing or sieges that result in various war crimes or crimes against humanity, these actions may well lead to responsibility and arrest warrants not only for the commanders on the ground, but also for the top Russian leadership.

6. Elaboration on the Legal Foundation of Possible ICC Prosecution

In the following, ‘prosecution’ is understood to encompass the work of the Prosecutor and the Court generally by including all the different stages in prosecutorial decision-making, in principle from the start of preliminary examination of situations, to the opening of investigations and charging of individual suspects, the confirmation of charges by a pre-trial chamber, and further on to trial-proceedings before the Court, including sentencing.¹⁴ At the core of the idea of *de facto* prosecution of the Russian crime of aggression at the ICC is the proposition that it is possible to develop prosecutorial strategies where the crime of aggression could be systematically incorporated into all stages of the prosecution of other crimes over which the ICC has jurisdiction to convict a guilty person, namely, war crimes, CAH and genocide.¹⁵

In developing the strategies for dealing with the crime of aggression, it is necessary to stress that the analysis must be undertaken in compliance with the principle of legality (*nullum crimen nulla poena sine lege*).¹⁶ While the strategies developed must be compatible with the existing legal framework in place at the present time, the object and purpose of the ICC Statute of enhancing “effective prosecution” of “the most serious crimes” – including the crime of

Against Ukraine Is a Bad Idea”, *Opinio Juris*, 7 March 2022.

¹¹ The theoretical part of this policy brief builds on the article by Terje Einarsen, “Prosecuting Aggression Through Other Universal Core Crimes at the International Criminal Court”, in Leila N. Sadat (ed.), *Seeking Accountability for the Unlawful Use of Force*, Cambridge University Press, 2018, pp. 337–385.

¹² ICC, Appeals Chamber, *Prosecutor v. Al Hassan*, Judgment on the appeal of Mr Al Hassan against the decision of Pre-Trial Chamber I entitled ‘Décision relative à l’exception d’irrecevabilité pour insuffisance de gravité de l’affaire soulevée par la défense’, 19 February 2022, ICC-01/12-01/18-601-Red, para. 94 (<https://www.legal-tools.org/doc/sywdid/>).

¹³ *Ibid.*, para. 89.

¹⁴ Einarsen, *supra* note 11, p. 337.

¹⁵ *Ibid.*, p. 352.

¹⁶ See ICC Statute, Article 22, *supra* note 6.

aggression – supports turning every stone within that framework “to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”.¹⁷ For the specific purposes of sentencing, it might in principle be possible to take into account even crimes other than the four core crimes as defined in Articles 6–8*bis*, as long as these crimes are considered crimes under international law and have also been proven and attributed to the defendant beyond a reasonable doubt at the main trial or sentencing stage.¹⁸ Since the crime of aggression was finally activated on 17 July 2018, it should be even more clear that the crime of aggression may in principle serve this function at the sentencing stage when a person is found guilty of war crimes, CAH or genocide.

Could Articles 15*bis* and *ter* still be construed as prohibiting the Prosecutor and eventually the Court from taking aggression into account in their decision-making, including at sentencing? Would any such step by the Prosecutor violate the legality principle, or the ICC Statute as a whole?

The first five paragraphs of Article 15*bis* are addressed to the Court while the following three are addressed to the Prosecutor. Paragraph 6 concerns the situation where “the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression”. If so, the Prosecutor must take certain steps and notify the Secretary-General of the UN “of the situation before the Court, including any relevant information and documents”. The provision presupposes that the Court may eventually exercise jurisdiction over the crime of aggression in accordance with Article 13(a) and (c), subject to the provisions of Article 15*bis*. These provisions, however, are concerned with the formal jurisdiction to investigate *with a view to a possible indictment and eventually conviction* of a person at the ICC for the crime of aggression, and only as such fall within the scope of Articles 15*bis* and *ter* and the legality principle of Article 22. Otherwise, prosecutorial and judicial powers of discretion to consider a completed crime of aggression as an aggravating factor at sentencing would be actually more limited after the Kampala Amendments were adopted in 2010 and the jurisdiction for this crime activated, since the crime of aggression was included in Article 5 of the 1998 version of the ICC Statute and was without doubt a crime under international law already then.

In the Ukrainian case, the OTP is at the time of writing investigating possible war crimes and CAH. Although the investigations are not limited to Russian personnel, it is natural in the context of Russian aggression to concentrate first on crimes committed by Russian forces and especially crimes for which the Russian leadership may incur responsibility. Consequently, the presence of aggression in the Ukrainian situation informs the gravity of the crime complex as a whole and the concrete war crimes and CAH committed by Russian forces. The bombardments of cities, other infrastructure and private houses, the death of and severe injury to many civilians, and the millions of displaced persons already during the first weeks of the invasion, were a foreseeable result of the conditions created by the aggression, and thus, arguably formed part of the wider criminal plan and organized policy. Furthermore, the military enterprise is provoking a state of terror in the general pub-

¹⁷ See *ibid.*, Preamble, paras. 4–5.

¹⁸ The OTP at the ICC has earlier expressed a strategic goal of developing coordinated international efforts to address other ‘ancillary crimes’ to the core crimes of genocide, CAH, and war crimes, namely other instances of criminality closely associated with atrocity crimes, such as organized crimes, transnational crimes, financial crimes, and terrorism, which the OTP can only address indirectly to the extent that the perpetrators also commit crimes falling within the ICC’s jurisdiction. See Office of the Prosecutor, ICC, “Strategic Plan 2016–2018”, 6 July 2015, pp. 31–32 (<https://www.legal-tools.org/doc/7ae957/>).

lic: persons acting in an official capacity, presumably to pressure Ukraine to give in to demands of a criminal nature, have performed acts of terror, such as the bombing or murder of civilians, taking of hostages, torture, destruction of infrastructure and significant buildings, and threats of employment of nuclear weapons.

For this reason, it would be appropriate that the initial cases selected for individual prosecution in the Ukraine situation focus on individuals who participated in the planning, preparation, initiation or execution of the initial acts of aggression *and* who also may have criminal responsibility for war crimes and CAH committed in the course of the events – in other words, the Russian political and military leadership and their advisors.

The crime of aggression constituted through the relevant underlying acts of aggression might be committed in ‘ideal concurrence’ with other crimes. In essence, this means that two or more crimes are committed in one act (for example systematic or large-scale bombardment as part of the invasion directed against a civilian population in a village or city). The act may at the same time be part of the crime of aggression and be a war crime or an underlying human rights violation and a crime against humanity.¹⁹ The act might also be committed in ‘real concurrence’ with other crimes, where the crime is separate from the concrete acts constituting war crimes or CAH. Just how closely related the crimes are in time and space, may however not be decisive from a prosecutorial point of view.

7. Attribution of Personal Criminal Responsibility for the Russian Leadership

Apart from using the requirement of gravity to show how intertwined an investigation into war crimes or crimes against humanity can be with the crime of aggression in the situation in Ukraine, another avenue with the same approach can be found in the provisions dealing with attribution of personal liability in the ICC Statute.²⁰

Especially the closely related concepts of *co-perpetration* and *indirect co-perpetration* in Article 25, para. 3(a) as well the notion of *common purpose* in Article 25, para. 3(d) are useful in this context.²¹ They all contain two sub-concepts, namely responsibility for preparatory acts as well as for executory acts. Particularly, the notion of preparatory responsibility including planning and initiation, considered in conjunction with the execution of the aggressive plan, resonates well with the linking of personal criminal responsibility for war crimes and CAH committed as integrated parts of the aggressive criminal enterprise commonly designed and condoned by the Russian leadership.

When examining ICC practice with respect to variations of co-perpetration and common purpose carried out by government officials²² relevant to the situation in Ukraine, six earlier situa-

¹⁹ For further details, see Einarsen, *supra* note 11, pp. 363–368 (“Utilizing Crimes against Humanity to Prosecute Aggression”); pp. 368–372 (“Utilizing War Crimes to Prosecute Aggression”).

²⁰ See ICC Statute, Article 25, para 3; Article 25, para. 3*bis*; Article 28, see *supra* note 6.

²¹ For an explanation and discussion of these three forms of liability, see Terje Einarsen and Joseph Rikhof, *A Theory of Punishable Participation in Universal Crimes*, Torkel Opsahl Academic EPublisher, 2018, pp. 382–384 (joint perpetration); 385–388 (perpetration through another), 398–400 (common purpose); 613–618 (as derivative forms of commission liability, including also ‘joint criminal enterprise’) (<http://www.toaep.org/ps-pdf/37-einarsen-rikhof>).

²² Common purpose in relation to government officials has only been utilized in two situations, namely that of Kenya and Sudan. For a judicial discussion of the criteria, see ICC, Pre-Trial Chamber II, *Prosecutor v. William Samoei Ruto et. al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-01/11-373, paras. 352–354 (*Ruto et al.*) (<https://www.legal-tools.org/doc/96c3c2/>).

tions provide some guidance, namely, Sudan,²³ Libya, Ivory Coast, Kenya, the Central African Republic and Georgia. The first three involved heads of state, all of which emphasize the necessity of a common plan as an ingredient for the linking of personal criminal responsibility. The Kenyan situation sets out some important, possible aspects of a common plan in advance of the execution of the plan, namely: (a) the appointment of commanders and divisional commanders responsible for the operations in the field; (b) the productions of maps to be used to determine the location of victims; (c) the purchase of weapons and material to produce weapons; (d) the transportation of perpetrators to and from target locations; and (e) the establishment of a stipendiary scheme and a rewarding mechanism to motivate the perpetrators to carry out crimes.²⁴

This list of elements in a common criminal plan is by no means exhaustive but rather indicative. Where the above situations involved war crimes, they always pertained to *non-international* armed conflicts. However, the factors identified are no less relevant in an international armed conflict resulting from acts of aggression. Organizing troops, preparing targets and establishing strategic objectives during preparatory meetings as part of a common plan for an invasion, and adjusting plans and orders during an ongoing aggression, are equally, if not more, important elements to establish (indirect) co-perpetration or common purpose in this kind of situation. In other words, the whole crime complex must be considered when the material and mental elements for attribution of personal criminal responsibility are being assessed by the ICC Prosecutor and the Court.

Significantly, possible crimes committed in an international armed conflict are already under investigation in another conflict involving Russia and Ukraine, namely the 2014 Russian invasion and occupation of Crimea. Although this armed conflict is not on the same scale as the present situation,²⁵ the same principles for attribution of leadership responsibility for war crimes and CAH within this aggressive criminal enterprise apply.

8. Conclusion

As the ICC is investigating possible war crimes and crimes against humanity committed by Russian forces in Ukraine, the crime of aggression forms part of the ‘gravity context’ for such crimes. For this reason, it is not correct to state that the crime of aggression cannot be investigated by the ICC Prosecutor in the Ukraine situation. It can and should definitely form part of the overall investigation, and likely prosecution, of the Russian leadership for war crimes and CAH. In our view, this modification of the scope of investigation before the ICC should be explicitly acknowledged by the ICC Prosecutor, the sooner the better. As discussed above, there is arguably not much investigative activity required in order to establish that a

²³ See, for example, the warrants for arrest for Al Bashir, ICC, Pre-Trial Chamber I, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Warrant of Arrest, 4 March 2009, ICC-02/05-01/09-1 (<https://www.legal-tools.org/doc/814cca/>).

²⁴ See *Ruto et. al.*, para. 303, *supra* note 22.

²⁵ See ICC, OTP, “Report on Preliminary Examination Activities 2020”, 14 December 2020, pp. 66–72 (<https://www.legal-tools.org/doc/fa25zp/>).

crime of aggression has already been committed by key members of the Russian leadership, while this crime is still ongoing at the time of writing this policy brief.

Importantly, if war crimes and CAH are found to have been committed as integral parts of the invasion, and initiated, ordered, or executed with the consent of the Russian leadership, individual responsibility for co-perpetration of war crimes and crimes against humanity under Article 25, para. 3(a), as well as common purpose liability under Article 25, para. 3(d), is highly likely. Command or superior responsibility (Article 28) may also be applicable under the ICC Statute. Thus, we repeat that if Ukrainian cities and villages are exposed to terror bombing or sieges that result in various war crimes, which already seems to be the case at the time of writing, such conduct may thus easily lead to personal criminal responsibility, not only for the commanders on the ground but also for the Russian leadership. The Prosecutor should not hesitate to file the first draft charges and request arrest warrants when this state of legal affairs becomes sufficiently clear.

The point is, if Putin and others in the Russian leadership are charged with war crimes and crimes against humanity, the context of aggression doubles-up the gravity of the crimes. The increased gravity can be considered by the ICC at all stages and may eventually serve as a substantially aggravating circumstance for sentencing purposes (possibly qualifying for life imprisonment). That could serve justice for the crime of aggression committed against Ukraine.

To borrow a phrase from Chief Prosecutor Robert H. Jackson in his opening statement at Nuremberg, the “ultimate step in avoiding wars, is to make statesmen responsible to law”, while the law universally “must condemn aggression”.²⁶ Justice must be seen to be done. The ICC Prosecutor may now take a vital step in the right direction to that end.

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²⁶ Robert H. Jackson, “Opening Statement Before the International Military Criminal Tribunal”, in *Trial of Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November – 1 October 1946*, Vol. 2, Proceedings, Nuremberg, 1947, p. 154 (<https://www.legal-tools.org/doc/3c08b1/>).