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Taking Russia to Court: Prosecution of International Crimes

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Abstract

This article summarizes the discourse around the investigation and prosecution of the international crimes committed by Russian officials and the Russian military in the war of aggression against Ukraine. It digests the efforts of states and international institutions to achieve accountability for the crime of aggression, war crimes, crimes against humanity, and genocide allegedly committed in Ukraine. It highlights the investigation into the situation in Ukraine by the International Criminal Court and analyzes the ongoing debate over the establishment of a special international criminal tribunal for the crime of aggression against Ukraine.

Background

Russia's invasion of Ukraine on February 24, 2022, escalated the armed conflict that began in 2014 into a full-scale war of aggression. On March 2, 2022, the United Nations General Assembly adopted Resolution ES-11/1, which recognized that the military operations of the Russian Federation inside Ukraine's sovereign territory were on a scale that the international community had not seen in Europe in decades and deplored "in the strongest terms" the aggression by the Russian Federation against Ukraine in violation of the UN Charter. As of November 2023, Russia occupies about 16 percent of Ukraine's territory. In September 2022, Russia annexed four Ukrainian regions—Donetsk, Luhansk, Kherson, and Zaporizhzhia oblasts—and listed them in the Russian constitution as federal entities, despite only partially controlling them. Russian forces have continued their daily attacks on Ukrainian cities and towns, causing severe casualties. According to various estimates, hundreds of thousands of military personnel and civilians have lost their lives, and millions of people—up to 30 percent of the Ukrainian population—have been displaced.

Since its very start, Russia's war of aggression has been accompanied by mass violations of international humanitarian law and international crimes on a colossal scale. The overwhelming majority of these are attributed to Russian forces. In the words of the International Criminal Court (ICC) Prosecutor, Mr. Karim Khan, Ukraine has become "a crime scene." Based on international and national investigations and expert reports, there are reasonable grounds to suggest that Russian officials and military personnel have committed all four categories of crimes that carry individual criminal responsibility under international law ("core international crimes").

Crime of aggression. According to the Rome Statute of the International Criminal Court, as amended in the 2010 Kampala Review Conference, the crime of aggression "means the planning, preparation, initi-

ation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity, and scale, constitutes a manifest violation of the Charter of the United Nations." The act of aggression committed by Russia against Ukraine, in the absence of any plausible legal justification under international law, was manifestly illegal. The Parliamentary Assembly of the Council of Europe, the European Parliament, and the G7 all explicitly designated Russia's invasion as a crime of aggression. There is a clear scholarly consensus on the criminal character of Russia's aggression, at least since February 24, 2022 (Just Security 2022; Nuremberg Academy 2023), and the existence of a basis for the individual criminal responsibility of Vladimir Putin and other senior leaders of the Russian Federation for the crime of aggression.

War crimes. From day one, the war has been characterized by countless breaches of international humanitarian law (IHL), including violations criminalized by international law as war crimes, such as grave breaches of Geneva Conventions and Additional Protocol I, which carry individual criminal responsibility under international law (ICRC 2023). The Independent Commission on Inquiry in Ukraine (IICIU) has uncovered a pattern, among Russian forces, of shocking disregard for the core principles of IHL binding on Russia. Among the most appalling episodes are the deportation of Ukrainian children to Russia; the massacres of civilians in Bucha, Irpin, and Iziurm; the bombing and shelling of civil objects in Mariupol, Kramatorsk, and Kharkiv; the destruction of critical civil infrastructure; and ill-treatment of prisoners of war. Based on a substantial body of evidence, the IICIU has found that in areas that came under their control, Russian authorities committed willful killings, attacks on civilians, unlawful confinement, torture, rape, and unlawful transfers and deportations of protected persons, all of which are war crimes (IICIU 2023a). Other international organizations and

independent monitors overwhelmingly confirm those reports (OSCE ODIHR 2022; Amnesty International 2022; Human Rights Watch 2023).

Crimes against Humanity. Crimes against humanity refer to serious human rights violations (“inhuman acts”) that are committed as a part of widespread or systematic attacks on any civilian population in the pursuit of state policy. According to the IICIU, Russian authorities have used torture as a routine tool, which could be characterized as a crime against humanity. There is evidence to suggest that Ukrainian activists and civilians who have resisted Russia’s occupation have been subjected to persecution based on their allegiance to the Ukrainian state. The systematic nature of these acts indicates that they are not isolated incidents, but rather part of a clear pattern of actions in furtherance of the Russian Federation’s state policy as encapsulated in Vladimir Putin’s war goals of “demilitarization” and “denazification”—in other words, dismantling Ukrainian statehood. In February 2023, the U.S. Department of State determined that “members of Russia’s forces and other Russian officials have committed crimes against humanity in Ukraine” (Blinken 2023).

Genocide. Genocide is defined in Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) as any of five acts “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.” The mass commission of crimes against Ukrainian civilians—including killings, deportations, and transfers of children with unprecedented cruelty—combined with the eliminationist rhetoric spread by Russian state propaganda and denial of the existence of Ukrainian people, language, and culture, has given rise to allegations that the Russian forces are committing genocide against Ukrainians (New Lines Institute 2022). The national parliaments of Ukraine, Poland, Canada, Estonia, Latvia, Lithuania, and Ireland have all adopted declarations recognizing the genocide of Ukrainians.

International law experts, however, disagree on the merits of the claims of genocide, and many of them question the plausibility of special intent to destroy a protected group—in this case, the national group of Ukrainians (Schabas 2022; see also the response by Azarov et al. 2023). To date, the IICIU has not found sufficient evidence to suggest the existence of genocidal intent behind the crimes perpetrated, although it does

identify statements by Russian officials and propagandists that could credibly be alleged to represent incitement to commit genocide, an offense punishable under the Convention and the ICC Statute. In the proceedings before the International Court of Justice initiated by Ukraine under the Genocide Convention, Ukraine accused Russia of using false claims of genocide as a pretext for conducting its illegal military operation (Marchuk & Wanigasuriya 2022). Despite the jurisdictional possibility, Ukraine has not claimed before the ICJ that Russia is violating the Genocide Convention by actually committing genocide.

Investigations by International Organizations and Civil Society

Russia’s position as a permanent member of the Security Council prevents the UN from creating a proper investigative mechanism binding on the parties to the conflict. Three years before the full-scale invasion, Russia withdrew from Additional Protocol I to Geneva Conventions, which recognizes the competence of the Fact-Finding Commission.

Two other independent international bodies are investigating violations of human rights and of international humanitarian law in Ukraine: the Independent International Commission of Inquiry on Ukraine (IICIU), established by the United Nations Human Rights Council on March 4, 2022, and the UN Human Rights Monitoring Mission in Ukraine, deployed by the Office of the United Nations High Commissioner for Human Rights. Both bodies have provided valuable reports on the situation. The IICIU, in particular, studied a significant amount of evidence and made comprehensive recommendations on accountability. In the framework of the OSCE “Moscow Mechanism,” invoked by the participating states, two missions of experts presented reports on violations of international law (OSCE 2022). Russia refused to cooperate with the above-mentioned bodies and did not respond to their requests.

Many Ukrainian and international civil society organizations are documenting international crimes and preserving evidence for future trials before domestic and international criminal courts (Global Rights Compliance Foundation 2023; Clooney Foundation for Justice 2023). For reports by independent media and investigative journalists, see Al-Hlou et al. 2022; Meduza 2022). In 2022, the Centre for Civil Liberties, a Ukrainian NGO, was awarded the Nobel Peace Prize for its work to document Russia’s war crimes in Ukraine (Norwegian Nobel Committee 2022).

Criminal Investigations by Ukraine and Other States

Ukraine is primarily responsible for investigating and prosecuting international crimes committed on its terri-

tory. However, delivering justice in an ongoing conflict, especially given Ukraine's lack of control over a significant share of the crime sites and the unavailability of the key suspects, is an enormous task. It is also worth noting that Ukraine has yet to harmonize its legislation with the provisions of international criminal law, most notably concerning crimes against humanity and command responsibility. Furthermore, Ukraine's criminal justice system is facing a shortage of experienced judges and prosecutors trained in investigating and prosecuting complex cases related to international criminal law.

According to the Prosecutor General of Ukraine, as of November 2023, his Office has registered 109,618 incidents of war crimes committed since Russia's full-scale invasion and more than 3,000 other crimes related to Russia's aggression. Despite many logistical and staffing difficulties, Ukrainian courts are conducting trials on the charges of war crimes, even if most of them are held in absentia. As the number of such cases has the potential to balloon, there is more to be done to enhance transparency and dispel concerns over the fairness and impartiality of such proceedings (Marchuk 2022).

Several states have offered financial and technical aid to Ukraine and carried out their own investigations. A coalition of 47 states, known as the "Core Group" (Group of Friends of Accountability Following the Aggression against Ukraine), frequently holds consultations. Seven states (Estonia, Latvia, Lithuania, Poland, Romania, Slovakia, and Ukraine) created the Joint Investigation Team (JIT) under the auspices of the European Union Agency for Criminal Justice Cooperation (Eurojust). The International Criminal Court (ICC) joins the group as a participant. On May 25, 2022, the European Union, the United States, and the United Kingdom announced the establishment of the Atrocity Crimes Advisory Group. Its mission is to support the war crimes unit of the Office of the Prosecutor General in Ukraine. In 2023, Canada joined the group.

According to Eurojust, more than 20 countries, including 14 EU member states, are pursuing national investigations under the principle of universal jurisdiction, but no actual trials have yet taken place. The Federal Prosecutor's Office of Germany has initiated a "structural investigation" (*Strukturverfahren*) aimed at collecting evidence of those crimes potential perpetrators of which have not yet been identified; it focuses on structures related to the crime and groupings of alleged perpetrators (Spiegel 2022).

"Situation in Ukraine": Investigation by the International Criminal Court

The International Criminal Court (ICC) is the only international criminal tribunal that has jurisdiction over the crimes committed in the war in Ukraine. The ICC

is a treaty-based international court complementary to national jurisdictions. The Court may only proceed if the state with jurisdiction is not able or willing to investigate or prosecute the crime. While investigating, the ICC must look at the behavior of all parties to a conflict. Although neither Russia nor Ukraine is a State Party to the ICC, the Court has jurisdiction over persons suspected of committing genocide, crimes against humanity, and war crimes on the territory of Ukraine pursuant to ad hoc declarations submitted by Ukraine in 2014 and 2015 (<https://www.icc-cpi.int/situations/ukraine>). Back in 2014, Prosecutor Ms. Fatou Bensouda initiated a preliminary examination of the situation. In the fall of 2020, she concluded that there were reasonable grounds to proceed with the investigation. However, she left the decision to her successor.

Shortly after the full-scale invasion, on February 28, 2022, the ICC Prosecutor, Mr. Karim Khan, announced that he would seek authorization to investigate the Situation in Ukraine based on the Office's earlier conclusions. On March 1, 2022, the Court received State Party referrals from 39 states; the number of referrals subsequently increased to 43. On March 2, 2022, Mr. Khan announced that he had proceeded to open an investigation into the Situation in Ukraine. The investigation encompasses any allegations of war crimes, crimes against humanity, or genocide committed on any part of the territory of Ukraine by any person since November 21, 2013 (the date indicated in the first Ukrainian declaration of 2014).

The Prosecutor has actively launched an investigation, made several visits to Ukraine, and stated the priority of this investigation, which requires additional support from states. Several States Parties have made voluntary financial contributions, and the Netherlands has provided a group of investigators to the Court. In a presentation on February 9, 2023, hosted by the Council of Europe, the Office indicated that its investigative priorities included (i) deportation of civilians, including children; (ii) attacks on the civilian population and infrastructure, including power grids; and (iii) torture, executions, filtration camps, unlawful transfers, etc.

On March 17, 2023, the International Criminal Court announced warrants for the arrest of Russian President Vladimir Putin and Commissioner for Children's Rights Maria Lvova-Belova, issued under seal by the judges of the Pre-Trial Chamber. Both suspects are charged as the direct perpetrators of war crimes—specifically, the deportation and illegal transfer of children from the occupied territory of Ukraine to Russia. Putin is further charged as a superior for his failure to properly exercise control over civilian and military subordinates who committed the crimes (Bogush 2023).

The arrest warrant issued by the International Criminal Court (ICC) against a sitting head of state has

sparked a heated debate over his immunity. According to the ICC Statute, immunity does not exempt an individual from criminal responsibility or prevent the Court from exercising its jurisdiction. In the case of former Sudanese president Omar Al-Bashir, the Court had ruled that state parties are required to execute the warrant even if it is issued against a head of state who is not a party to the Statute.

Since the warrant was issued, Putin has not visited any ICC member country. Notably, he did not attend the BRICS summit in South Africa after consulting with the authorities there. Russia retaliated by opening criminal investigations against the Prosecutor and judges of the Court, who were put on the wanted list. Russia has also criminalized any assistance and cooperation with the ICC, creating additional legal grounds for the prosecution of Russian anti-war resistance.

According to the Court's annual report to the United Nations, submitted in October 2023, over 2,000 victims' application forms had been filed with the Registry since the launch of the investigation. In September 2023, the Court opened an outreach office in Kyiv. However, since the issuance of the sealed warrants in March 2023, there has been little information about the investigation undertaken by the OTP.

Prosecution of the Crime of Aggression

As regards the crime of aggression, there is a significant accountability gap, as the ICC cannot investigate and prosecute the crime of aggression against Ukraine. This is due to the compromise reached in Kampala during the Rome Statute Review Conference in 2010. Since July 17, 2018, the ICC has been able to exercise its jurisdiction over the crime of aggression, provided that both the aggressor and the victim of aggression are parties to the Rome Statute. The only exception to this rule is a referral of the situation to the Court by the UN Security Council. In the current situation, however, such a scenario is unrealistic, owing to the veto rights of the permanent members, including the Russian Federation. Domestic criminal proceedings on the crime of aggression, especially by the victim state, have questionable legitimacy and, moreover, face practical difficulties. For instance, Ukraine considers itself bound by the rules of personal immunity of the highest Russian officials (Perelman 2022; Rogerson 2023), who are the primary targets of any investigation into the leadership crime of aggression.

This noticeable accountability gap has led to ongoing debate over establishing a *special international tribunal* to prosecute Russia's leadership for unleashing its war of aggression. British law professor Philippe Sands proposed a special tribunal four days after the full-scale invasion (Sands 2022). His call was soon followed by a statement supported by a large group of politicians,

lawyers and legal scholars calling for establishing the tribunal (Brown et al. 2022). Ukraine's leadership, including President Volodymyr Zelensky, endorsed this initiative wholeheartedly, advocating for a special tribunal (DW 2023).

The idea of a special tribunal for the crime of aggression was supported by the resolution of the European Parliament and, in an even more straightforward form, by the Resolution of the Parliamentary Assembly of the Council of Europe (Council of Europe 2023). The Heads of State and Government of the Council of Europe, in their Reykjavík Declaration of May 17, 2023, welcomed the progress toward the establishment of a special tribunal for the crime of aggression as highlighted at the Summit of the Special Tribunal's Core Group, chaired by Zelensky.

The scenario that currently enjoys the support of Ukraine and some of its allies, mainly in Central and Eastern Europe (Grigaitė-Daugirdė 2023), is the establishment of a tribunal through a treaty between Ukraine and the UN that would be endorsed by a resolution of the General Assembly (international tribunal model). Such a tribunal would enjoy greater international legitimacy and would be able to bypass the issue of personal immunity of the head of state and other senior Russian officials.

At the same time, several scholars have criticized the initiative, questioning the legitimacy of the proposed special tribunal and maintaining that the resolution endorsing the tribunal would be unlikely to get significant support across the UN membership, as it would be unable to address the legitimate concerns of the "Global South" regarding the impunity with which past acts of aggression have been committed, most prominently the invasion of Iraq in 2003, and other instances of "double standards" (Heller 2022; Ambos 2022). Instead of an international tribunal, they have proposed an "internationalized" tribunal rooted in the Ukrainian judicial system (*internationalized tribunal model*) with some "international elements" (e.g., international judges, funding, and expert support).

On April 18, 2023, the G7 Foreign Ministers supported exploring the creation of an internationalized tribunal based in Ukraine's judicial system to prosecute the crime of aggression against Ukraine. This followed the announcement of U.S. Ambassador-at-Large for Global Criminal Justice Beth Van Schaack (2023) that the US supported the development of such a tribunal, as well as a similar statement by Minister of Foreign Affairs of Germany Annalena Baerbock (2023). This approach is embraced as supposedly "straightforward," in contrast to the difficulty of obtaining a convincing majority in the UN General Assembly. Notably, however, the creation of such an "internationalized" tribu-

nal is not permitted under the Ukrainian constitution, which prohibits both the creation of special courts and non-citizens serving as judges.

Many leading experts question the idea of an “internationalized tribunal model,” seeing it as a U.S.-led attempt to create a weaker institution instead of setting a real precedent for holding the leaders of powerful states accountable for the crime of aggression (Trahan 2023; Labuda 2023; Kress 2022).

Outlook

The debate is ongoing, but there are no clear signs that any initiatives can be implemented in the foreseeable future. However, some practical steps have been taken to prepare for future proceedings. On March 5, 2023, the seven States involved in the JIT amended their agreement to include, as a support structure, the newly created

International Centre for the Prosecution of the Crime of Aggression. Situated in The Hague, the Centre will focus on supporting and enhancing investigations into the crime of aggression by securing evidence and facilitating case-building. Its creation was first announced on February 2, 2023, by the President of the European Commission.

At the same time, the war of aggression against Ukraine has intensified the debate over the reform of those provisions of the Rome Statute that relate to the jurisdiction of the Court with respect to the crime of aggression. The essence of the proposed amendments is to harmonize these provisions with jurisdiction over other international crimes so that in the future the ICC will be able to act in such cases despite the inaction of the Security Council and the aggressor will not be able to benefit from their non-participation in the Court.

About the Author

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DOCUMENTATION

The Brussels Declaration

Russian lawyers, legal scholars, and human rights defenders are endorsing the creation of an international tribunal to investigate the crime of aggression against Ukraine.

In mid-March 2023, the International Criminal Court in The Hague issued an arrest warrant for Vladimir Putin on charges of ordering the illegal deportation of children in occupied parts of Ukraine to Russia. But the ICC operates on the basis of the Rome Statute, which Moscow has not ratified, meaning that Russia doesn't recognize the court's jurisdiction. More than once, Ukrainian President Volodymyr Zelensky has urged the creation of an international tribunal to investigate and prosecute the crime of aggression. Officials in the United States and the European Union have expressed support for this initiative, and the U.S. Senate is already considering a plan to form an international judicial body that could hold Russian officials responsible for crimes against humanity. Twenty-six Russian lawyers, legal scholars, and human rights defenders are joining in a declaration to endorse President Zelensky's proposal, denouncing Russia's invasion of Ukraine as an act of aggression and expressing their readiness to aid this investigation in any way possible. The group below signed the Brussels Declaration in early June, and Meduza and now the Russian Analytical Digest are publishing the text and list of endorsements below.

Brussels Declaration

The aggressive war launched by Russia's regime against Ukraine shattered international peace and security in Europe and undermines respect for human rights and international law. We strongly condemn this illegal war that the Kremlin continues to wage in defiance of decisions of the two principal organs of the United Nations: the General Assembly and the International Court of Justice. Furthermore, we note the findings of the International Independent Commission of Inquiry on Ukraine that the Russian side committed war crimes and crimes against humanity in the course of this armed conflict.

We consider it a moral obligation towards victims of those atrocious crimes that justice be a part of any sustainable peace. The perpetrators of those crimes must be held accountable using, in particular, appropriate international mechanisms. In this regard, we support the investigation by the Prosecutor of the International Criminal Court into the situation in Ukraine. We reject the threats by the Russian authorities against the Prosecutor and the Judges of the Court.

We emphasize the central role of the crime of aggression that made possible the large-scale commission of other international crimes. The prosecution of political and military leaders, who planned, initiated, and continue to wage this war of aggression, as well as their accomplices, is indispensable for bringing justice to a large number of victims.

We underscore that the planning, preparation, initiation, and execution of this war of aggression constitute a crime under general international law and the criminal laws of Ukraine and Russia.

Given that the crime of aggression is, by definition, committed by political and military leaders of the state, as well as the inability of the ICC to exercise jurisdiction over this crime in the situation in Ukraine, we support the initiative of Ukraine, other states, and international organizations to establish a special international tribunal for the crime of aggression. This initiative is firmly based in international law and the designation of Russia's invasion of Ukraine as an act of aggression by the overwhelming majority of U.N. member states. Such a tribunal will be able to exercise jurisdiction irrespective of the official position of defendants and immunities they might enjoy under international and national law.