

NOTES AND REFLEXIONS

ADDRESSING RUSSIAN AGGRESSION AGAINST UKRAINE: THE IMPERATIVE FOR A SPECIAL TRIBUNAL UNDER INTERNATIONAL AND UKRAINIAN LEGAL FRAMEWORK

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1. Introduction

Historically, the principle of individual criminal responsibility was shaped under international law in the aftermath of the Second World War by the Nuremberg International Military Tribunal. For the municipal systems governed by the member states, the incentive to support the principle of international criminal responsibility was to end the impunity for the most severe crimes of common concern committed on the territories of the member states.

In this context, the ongoing Russia-Ukraine war and the illegal invasion on the pretext of genocide have resulted in a violation of the UN Charter system on the use of force under Article 2 (4) of the UN Charter (Schrijver, 2015). However, different justifications are being cited that are either against or supporting the Russian invasion. On the one hand, the alleged violation by the US and NATO of the Russia-NATO Foundation Act, signed in 1997 that limits the NATO expansion to Germany, is being cited as the reason that has triggered the current invasion by Russia. (Reis and Grzybowski, 2023:1-23) On the other hand, the countries in the West believe that it is a Russian attempt to establish a new sphere of influence in their neighbour (Kuzio, 2018:462-473).

The history of this invasion has its roots between the period of 2014 and 2021, wherein the Donbas region had seen a large number of conflicts resulting from the Russian occupation of Crimea since 2014. At the same time, Russian involvement in instigating an armed conflict between the Ukrainian government and the separatist groups was found (Bassiouni, 2008). The Russian government was accused of supplying weapons and arms in the Donbas region to escalate the tensions between the Ukrainian government and the separatist groups.

Amidst all these developments and the severe violations of human rights of the Ukrainian citizens more than two years after the 2022 invasion, this article argues the need to establish a special tribunal (McDougall, 2003: 203-230) to adjudicate Russia's government's violations of crimes of common concern in nature of war crimes, crimes against humanity, genocide, and crimes of aggression and hold the individuals responsible for the same (Furuya, Takemura and Ozaki, 2023).



2. International Organisations' responses to the Russian aggression

After Russia invaded Ukraine in February, the international community imposed a plethora of economic sanctions against the Russian Federation as the UNSC resolution condemning Russia's aggression against Ukraine was vetoed. Consequently, the states then took recourse to the Uniting for Peace Resolution, which was adopted on 2 March 2022 that condemned Russia's attack on Ukraine (UNGA, 2022). It called on all parties to respect international humanitarian and human rights law provisions.

However, since the Uniting for Peace Resolution is a non-binding resolution, 39 member states of the UNGA who are party to the Rome Statute approached the ICC Chief Prosecutor, led the Prosecutor to open an investigation on 2 March 2022 into the Russian-Ukraine war (ICC, 2022). These referrals mandate the Prosecutor to investigate and collect evidence without Pre-Trial Chamber approval. Simultaneously, resolution 49/1 was adopted on 4 March 2022, where the Human Rights Council established an Independent International Commission of Inquiry. This Commission of Inquiry was empowered to build upon the work of the UN Human Rights Monitoring Mission in Ukraine (HRMMU) and the UN High Commissioner for Human Rights (UN, 2022).

3. ICJ proceedings in Russia Ukraine crisis

Amidst these actions taken by the international community, Ukraine, on 26 February 2022, filed an application instituting proceedings against the Russian Federation relating to the interpretation, application, and fulfillment of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide before the ICJ. The Court ordered the Russian Federation to suspend the military operations that began on February 24, 2022, in Ukraine (ICJ, 2022).

Recently, the ICJ concluded that it has jurisdiction, based on Article IX of the Genocide Convention, to adjudge and declare that there is no credible evidence that Ukraine is responsible for committing genocide in violation of the Genocide Convention in the Donbas region, and the so-called independence of the Donbas region by the Russian Federation violates Articles I and IV of the Genocide Convention. Further, the ICJ held that the use of force cannot justify the obligation to punish and prevent genocide from a merit perspective. Instead, the responsibility to punish and prevent genocide should be governed by international law. However, the issue of justice remains for the victims whose rights have been and are being violated in the ongoing conflict.

4. Russian aggression and war crimes and the International Criminal Court

Despite the several efforts made to ensure accountability for the crimes being committed by the Russian Federation on Ukrainian territory, the war continues to take place. From an international criminal law perspective, the question that arises is whether the International Criminal Court can play a role in recognising responsibility for the crimes committed during the invasion of Ukraine that have already resulted in the deaths of thousands of civilians, including children (UNSC, 2022).



Amongst the crimes that the International Criminal Court has jurisdiction over, the crime of aggression is the quintessential crime against peace, and it is the basis upon which the International Criminal Court was established under the Rome Statute (Kreß And Barriga, 2016). However, to enforce the jurisdiction of the ICC vis a vis the crimes of aggression, a large number of procedural hurdles exist that will be reflected upon in this article. However, it is clear that Russian bombings hit residential areas far from military targets, public buildings, and hospitals (Polgase, Mezzofiore and Doherty, 2022). Consequently, the prerequisites for initiating a criminal inquiry into war crimes and crimes against humanity are present.

Coming back to the referral to the prosecutor of the International Criminal Court, the Prosecutor launched an investigation into suspected war crimes and crimes against humanity perpetrated on Ukrainian soil. However, Russia's denial of the Court's legitimacy raises an essential question of jurisdiction, and the practicality of the Court looking into the issue comes to light, which also puts at stake the credibility of the ICC (Vasiliev, 2022).

It must be clarified that Ukraine and Russia are not State parties to the Rome Statute. As a result, the Office of the Prosecutor ('OTP') has relied on two *ad hoc* statements made by the Ukrainian authorities in 2014 and 2015 under Article 12(3) of the Statute (Szpak, 2023: 1012-1026). The ICC has to keep in mind that the current invasion of Ukraine continues to take place amidst a divided geopolitical background between the group of various countries and coalitions, including the EU, NATO members and their allies backing Ukraine, on the one hand, and Russia backed, in one way or another, by Belarus, Eritrea, Iran, Nicaragua, North Korea, and Syria, on the other hand.

The core issue that the ICC will have to look into is that Ukraine is defending its sovereignty and territorial integrity against a powerful permanent member of the Security Council (Pinzauti and Pizzuti, 2022 : 1061-1083) that bestows it with additional responsibility to take on Russia's illegal invasion of Ukraine (Sloss and Dickinson, 2022: 798-809).

A. An inquiry involving a multitude of participants

Given the sensitivity of the issue at hand and the magnitude of violations that have occurred in the ongoing Russia-Ukraine War, a thorough investigation is the need of the hour. The quality of the investigation will depend upon the support that the ICC receives in collecting the evidence for which the role of the Prosecutor assumes significance. In addition to the work of the ICC, the Commission of Inquiry established by the United Nations Human Rights Council would always have an essential role in substantiating the findings of the ICC as the obstacles that exist need effective international and national collaboration, especially with the asylum authorities.

B. The Interpretation of the Facts

Since 2014, military actions have been part of a constant conflict between Russia and Ukraine (Mamlyuk, 2015: 479, 490-512). Several instances during the ongoing war, such



as the mass abduction of Ukrainian citizens and the participation of foreign combatants, provide sufficient evidence of crimes against humanity being committed. To investigate the same, the Office of the Prosecutor must establish that the crimes were part of a widespread or systematic onslaught against the civilian population in furtherance of or under a state policy. The Prosecutor needs to overcome the challenge of defining the invasion of the Russian State and whether to categorise this assault as part of a more extensive program aimed at the former Soviet regions or confine the same to Ukraine. The ongoing investigation in the Georgia case and the recent step to issue arrest warrants suggest that the Office of the Prosecutor may choose the first alternative (ICC, 2022).

The next phase is identifying the persons the Prosecutor wants to charge for crimes committed in Ukraine. Under Article 28 of the Rome Statute, Russian President Vladimir Putin, Defence Minister Sergei Shuygou, and Chief of Staff Valeri Gerasimov have been implicated, and an arrest warrant for their arrest has been issued. Nonetheless, an important issue remains: What Role will the Crime Of Aggression play in the response of International Criminal Justice? Recent developments seem to provide a classic example for qualifying this fourth international crime established in the Rome Statute. As this article will illustrate, the prosecution of the crime of aggression is far more complicated than is often believed, especially in the ongoing Ukrainian crisis, as a lack of political motive exists on the part of Russia. There exist several obstacles in prosecuting the crime of aggression. First, such prosecutions are politically sensitive and ensuring a fair trial poses challenges. Further, claims of sovereignty and non-intervention may be put forth.

A referral to article 8 *bis* is required to define this offence and paragraphs 15 *bis* and 15 *ter* for its execution. The offence of Aggression consists of five Components. Three include the person's actions, while two involve the state's actions. An act of aggression must have been planned, prepared, initiated, or committed by an individual who was 'controlling the political and military activities of the state committing the violence' (Schieke, 2001: 409-430), which in this case is evident. Article 8 bis-2 defines it as a state's use of military force against another State's sovereignty, territorial integrity, or political independence or incompatible with the United Nations Charter.

The ICC exercises its authority over the crime of aggression in three ways. Either a State Party, The Prosecutor, Or The United Nations Security Council may refer a situation to the International Criminal Court. However, non-state Parties are barred from the Court's jurisdiction (Babaian, 2018), regardless of whether they are the 'aggressor' or 'victim' as far as the crime of aggression is concerned.

Under the Rome Statute, the crime of aggression does not permit the prosecution of an accused whose nationality is attached to a State that has not ratified the Rome Statute, even if the aggression occurs on the territory of a State Party. Russia is not a party to the Statute. Despite the fact that the situation in Ukraine is unquestionably an act of aggression, it is evident that the prosecutor will have to focus more on the war crimes. Additionally, the traditional concerns regarding the legitimacy and selectivity of such an exceptional jurisdiction (why Russia's aggression in Ukraine and not the United States in Iraq? Why Ukraine's crimes and not those in Syria, Yemen, or Palestine?), other practical and legal considerations continue to cause issues. One may thus question the use of a court that is incapable of conducting any action (investigation or arrest) on Russian Territory or Occupied Ukraine.



5. Hybrid or special Criminal Court for the Russian crime of aggression

The ongoing conflict between Russia and Ukraine has prompted calls from various segments of society that call for the establishment of an Extraordinary International Court to address the crime of aggression committed by the Russian Federation either through an international treaty or by the United Nations General Assembly resolution. However, the legal basis of such a tribunal remains unclear.

Such a tribunal will aim to prosecute and judge the principal perpetrators of the crime of aggression and all those who contributed to its execution, including those who provided the funds, legal advice, and operational support to carry it out. According to them, the only option to overcome the hostile regime of Article 15 *bis* of the Rome Statute regarding the crime of aggression and the logistical, political, and legal problems of national prosecutions under universal jurisdiction would be to establish such a jurisdiction, especially to counter the functional immunities of Russian rulers and diplomats before foreign jurisdictions which is a must be given the violation of the non-use of force provisions under the UN Charter.

In this light, it needs to be reiterated again and again that Russia's invasion of Ukraine could be construed as a criminal act of aggression as it meets the two criteria, first being the use of force violating Art. 2(4) of the UN Charter and the second, that gives rise to Individual Criminal Liability which strengthens liability which strengthens the demand for such a Special Tribunal Or Hybrid Tribunal to be established, despite Russia's argument of self-defence as required by Art. 51 of the UN Charter (Heller, 2022). This argument fails to hold ground as Ukraine did not launch an armed attack against Russia prior to the invasion, nor was such an armed attack imminent for self-defence. Russia also tried to justify its actions under the supposed collective self-defence to defend the rights of the people of the Donetsk People's Republic (DPR) and the Lugansk People's Republic (LPR); however, Russia's argument is baseless as the first and most important aspect of self-defence, whether individual or collective, is that only states have a right to self-defence. Neither the DPR nor LPR satisfies the legal requirements for statehood. Consequently, Russia's premature recognition of the Ukrainian territories of DPR and LPR as states was a violation of international law, as noted by the General Assembly in its Resolution ES11/1.13 (Malksoo, 2023 : 601-604).

A. Hybrid Tribunal

In this context, it needs to be investigated how to hold those responsible for atrocities in Ukraine guilty of their Crimes, especially Crimes Of Aggression. One of the first options may be to establish a hybrid tribunal. The Extraordinary Chambers in the Courts of Cambodia Offers a potential model for addressing Russian aggression against Ukraine as it was based in Cambodia's judicial system, prosecuted international crimes, and had international judges and prosecutors (Dittrich, 2016).

In the context of Russian aggression against Ukraine, the possible option may be for Ukraine to enter into an agreement with the Council of Europe to create a High Ukrainian Chamber for Aggression (HUCA), a specialised Chamber in the Ukrainian judicial system with jurisdiction over aggression. Ukraine should be primarily responsible for such a



tribunal, and the Chamber would consist of Ukrainian and non-Ukrainian judges to ensure impartiality and fairness.

However, constitutional challenges and issues of personal immunity pose significant obstacles to the creation and functioning of such a tribunal. To illustrate, under Art. 125 of the Ukrainian Constitution provides that the "establishment of extraordinary and special courts shall not be permitted". Nonetheless, in the past, the High Anti-Corruption Court of Ukraine (HACC) was established as a specialised court in Ukraine's judicial system in 2019 that possessed the power to seize the property of particular individuals and legal entities associated with the military aggression against Ukraine by Russia without offering any compensation. Another issue that the HUCA may face than the one highlighted above is that of personal immunity because it seems improbable that a hybrid tribunal like a HUCA would set aside personal immunity, given that the fact that the statute upon which it is based would not be binding on individuals like Lavrov and Putin for their criminal actions as held by the ICJ in the Arrest Warrant case (Orakhelashvili, 2002) that "certain holders of high-ranking office in a State, such as the Head of State, Head of Government, and Minister for Foreign Affairs, enjoy immunities from the jurisdiction in other States, both civil and criminal". The reason is that the authorisation has not been given by the Security Council, as Russia has vetoed the same.

B. Special Tribunal

Given the limitations of a hybrid tribunal, creating a Special Tribunal dedicated to investigating and prosecuting the Crime Of Aggression in Ukraine may be a more viable option. This tribunal, potentially named "A Special Tribunal for the Punishment of the Crime of Aggression Against Ukraine", would address the legal and political challenges of prosecuting High-Ranking Russian Officials.

Amidst the discussion on the feasibility of a Hybrid or Special Tribunal, the need for change in the approach to International Criminal Prosecution is felt, certainly in relation to the specific situation in Ukraine, but also generally to ensure a future in which the international community is governed equitably under the rule of Law. While ensuring that the ongoing war comes to an end and Ukraine's sovereignty and territorial integrity are restored, it is of equal significance that accountability for the criminal acts that have been committed in Ukraine is ensured, especially the crime of aggression along with war crimes, crimes against humanity and genocide. At the same time, it would be ideal for the existing international criminal institution to prove its value here by bridging the accountability gap through the ICC system by establishing a special tribunal as an effective, accountable, and inclusive institution that ensures peace and security.

Furthermore, by setting an example of such a special tribunal that prosecutes individuals coming from Russia that has misused its position under the garb of falsely claiming self-defence under the UN Charter, an example would be set to simplify and ensure an accountable and responsive international criminal justice system. In the past, Russia violated the sovereignty of Georgia in 2008 and then in 2014 and 2022, the territorial integrity of Ukraine continues to be violated. In 2008, Russian troops supported the pro-Russian militias in South Ossetia and Abkhazia, within the territory of Georgia, which, despite being autonomous, are under the de facto control of Russia (Evans, 2009). Such



defiant behaviour of Russia undermines the international law framework, which has become one of the foremost concerns of the international community.

The UN as an organisation is dealing with the unique challenge posed by Russia's defiant behaviour, including the acts of claiming exclusive rights and privileges, the need to claim a higher position in the international social hierarchy due to diminished reputation and importance relative to other nations; and a belief that all these actions are necessary for national prestige, security and wealth. This has been coupled with the inaction by the UNSC as Russia abused its veto power as a permanent member by restricting the UNSC from taking any steps to prevent the humanitarian crisis that has unfolded in Ukraine. All this reflects that the international community is facing an accountability crisis, and the need to prosecute the individuals responsible for the heinous crimes is of paramount significance.

Situations like Ukraine clearly illustrate the dangers of a system dependent upon the willingness of a few powerful nations to take the necessary steps to ensure the peace and security of the international community.

6. International justice in the Post-Putin world

Faced with circumstances as complicated as the conflict in Ukraine, it is imperative to have substantial international justice first enacted domestically. Although it is evident that international jurisdictions, including the ICC, may occasionally be disappointing, it is also undeniable that this is primarily because these jurisdictions are founded without the resources necessary for their effective functioning.

The pursuit of international justice in the context of the Ukraine conflict requires substantial resources and state cooperation. The International Criminal Court (ICC) and other international jurisdictions must be adequately funded and supported to investigate and prosecute crimes effectively. The article emphasises the importance of robust international cooperation, particularly in facing challenges posed by Russia's non-cooperation.

In addition, as the ICC lacks its own police force, it will be crucial to acquire the complete participation of States at all levels of the proceedings. Without such state cooperation, we can anticipate that it will be conflictual or non-existent in the case of Russia. In addition to financial resources, acquiring the complete cooperation of States, particularly conflict-affected States, NGOs, and civil society, is crucial to establishing individual criminal responsibility to ensure non-recurrence of such events and maintain and restore international peace and security by establishing effective, accountable, and inclusive institution at both international and national levels.

7. Ukrainian Criminal Law and criminal procedure code

Coming to the municipal laws prevailing in Ukraine, even if the investigation takes place at the international level and those guilty of committing the crimes are prosecuted and punished, the question of restoring the rights of those who have suffered in Ukraine remains to be answered, i.e., how to remedy the mass violations at the domestic level?



This question assumes greater significance as the victim's right to compensation is of paramount importance (Martin and Fowle, 2020: 1015-1037). In Ukraine, the legal regulation of the victim's right to compensation is not in line with constitutional guarantees. Thus, there is a need for the state to ensure that the victim's compensation is provided and respected.

One possible approach for Ukraine is to look into the experience of other countries that have recovered from a conflict of such a nature faced by Ukraine. This mechanism can be implemented by creating a State Victim Assistance Fund and similar institutions to the one already existing at the ICC that can act as an essential benchmark for Ukraine. The composition of the ICC vis-a-vis the victim assumes significance as it places victims at the core of justice dispensation. Under the Rome Statute, the role of victims has been elaborately explained by not only giving them the right to participate in the proceedings but also putting in place a Victims and Witness Unit, Trust Fund for Victims, and Office of Public Counsel for Victims (McGonigle, 2012: 375-408).

Further, the need for Ukraine to establish such institutions can also be seen under the current Criminal Procedure Code (CPC) of Ukraine, where the right of the victim to repair (compensation) of harm caused by a criminal offence is recognised as an inalienable right of a citizen where the victim is entitled to compensation of moral and physical damage in accordance with the provisions of Chapter 9 of the CPC.

However, at the domestic level, Ukraine faces challenges in restoring the rights of victims of aggression and ensuring adequate compensation, which necessitates the need for institutions similar to those within the ICC, such as a State Victim Assistance Fund, to address the rights of victims under Ukrainian law.

From an international law perspective, the leading international legal acts in this area from which Ukraine could incorporate certain provisions are the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which sets out specific provisions on access to justice, fair treatment, restitution, social assistance, etc. and, the European Convention on the Compensation of Victims of Violent Crimes which has been ratified by more than 25 states of the world. Still, Ukraine has not yet ratified the Convention (CoE, 1983: 1021-1024).

8. Universal jurisdiction over war crimes during Russian aggression

Since the road to the International Criminal Court seems impenetrable for the crime of aggression and riddled with traps for other crimes, there is a need to explore the potential for national courts to exercise universal jurisdiction over war crimes committed during the Russian aggression against Ukraine as well as their legal framework for such prosecutions and the challenges posed by issues of immunity and state sovereignty.

Under territorial jurisdiction, Ukrainian courts can prosecute suspected international crimes committed on Ukrainian soil, as discussed above. Under personal jurisdiction, the same rules apply to the courts of the States of the nationality of the suspects on both sides (active personal jurisdiction) or of the nationality of the victims (passive personal jurisdiction), provided that the suspected perpetrators can be arrested and tried in their presence and that they are not protected by immunity from criminal jurisdiction based



on their responsibilities. As the ICJ has noted, regardless of the nature of the alleged crimes, the immunities established by customary international law are intended to protect the senior officials of a State "against any act of authority on the part of another State that would impede the exercise of [their] functions". In addition, domestic courts recognising universal jurisdiction might trial anybody for crimes committed beyond the forum state's territory and against victims who do not have the forum state's nationality. However, the requirements for its application vary from country to country and often involve not only the defendant's presence on the national territory of the competent courts but also the absence of immunity.

These parameters may be made more flexible concerning international offences. On the one hand, certain national courts might trial individuals not on national territory but accused of committing a crime overseas. In that case, some national courts might put aside their immunity *ratione materiae* for actions committed during the execution of their powers after they have ended their functions. They are distinct from their functions, such as war crimes and crimes against humanity, since they do not fall within the typical operations of a state government.

All of these issues need a rethinking of the insufficient framework of the crime of aggression to make it more readily justiciable after the convictions for crimes against peace by the International Military Tribunals at Nuremberg and Tokyo in 1946 and 1948 that had laid the foundation of establishing individual criminal liability. Globally, the struggle against impunity necessitates continued consideration of the efficacy and validity of international criminal justice, which has a global mission concerning imprescriptible crimes and relies heavily on improving justice standards internally.

9. Conclusion

Since the beginning of the conflict, Ukraine has used substantial military, diplomatic, and political methods in response to the Russian army's invasion of its territory. Alongside these manoeuvres, it used international law mechanisms to further seek aid against Russia on the world stage to halt its military actions. Ukraine is fighting a legal war, or lawfare, against its Russian neighbour in addition to a military war. This approach is crucial to the International Criminal Court and the International Court of Justice. Ukraine may depend on the backing of many nations, especially Western nations, who, for the first time in the history of the International Criminal Court, massively backed a 'complaint' against another state and showed commitment to provide more resources to the Office of the Prosecutor. These activities also position the Office of the Prosecutor of the ICC as a central figure in the dispute. This unexpected interest in the Court and its investigations is encouraging. It signals a new chapter in the history of the ICC, allowing it to engage with investigations more openly and transparently on the ground alongside other actors. It strengthens its validity and influence on the world stage. It must also be viewed with care since it indicates the potential for the Court to be used for political purposes.

The legitimacy of the Office of the Prosecutor and the ICC relies on the fact of punishing the perpetrators of the crimes committed against Ukraine by Russia. To achieve the said aim, other UN organs, like the ICJ and UNGA, need to play their part along with the ICC.



International recognition would provide further legitimacy to the ongoing investigations and prosecutions carried out by Ukraine. Prosecuting such war crimes may be a long-term process requiring sustained efforts and resources. Thus, the establishment of a special or hybrid tribunal, alongside robust support for the ICC and other international mechanisms, offers a potential pathway to accountability for the crime of aggression and other international crimes committed in Ukraine.

Despite all the obstacles, the ICC investigation in Ukraine holds significant promise as powerful aggressor states such as Russia cannot escape justice, and victims of such war crimes will be vindicated in the future, however distant that may be.

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How to cite this note

Upadhyay, Amit, Mehrotra, Abhinav & Upadhyay, Anuradha (2025). Uso de Geotecnologias (Sig) para Mapeamento de Áreas Inundáveis em Zonas Urbanas: Estudo de Caso Bairro de Bunhiça. *Janus.net, e-journal of international relations*. VOL. 16, Nº. 1, May-October 2025, pp. 497-509. DOI <https://doi.org/10.26619/1647-7251.16.1.02>.

