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Aggression against Ukraine: Avenues for Accountability for Core Crimes

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By Sergey Vasiliev

March 3, 2022

The unprovoked attack by Russia against Ukraine should be qualified as a crime against peace, or the crime of aggression, as defined in Article 6(a) of the IMT Charter and in Article 8*bis* of the ICC Statute. There are also allegations of war crimes as the Russian armed forces have targeted non-military objectives and civilians in urban and densely populated areas using imprecise weapons such as ballistic missiles and cluster munitions.



The end of the conflict is not yet in sight but questions of accountability of leaders for the international crimes committed in Ukraine loom large. The language of international criminal law has permeated commentary and served as the frame of reference from the outset. Putin himself weaponised ICL rhetoric. His botched claim that genocide of the population of the Donbas had been taking place, which was used as a pretext for the invasion, is the subject-matter of the case Ukraine filed against Russia before the ICJ on 26 February 2022.

Collecting, preserving, and analysing evidence of core crimes in Ukraine and bringing to justice those who orchestrated and enabled them will be a key task for the international community in the coming period. Below I briefly survey the main institutional options for pursuing accountability in the order they tend to be brought up in ICL discourse without implying prioritisation.

International Criminal Court

Neither of the states now engaged in the hostilities is the ICC State Party. By two Article 12(3) declarations, Ukraine granted the Court jurisdiction over the crimes in its territory going back to 21 November 2013. The second declaration has no cut-off date and covers crimes in connection with the February 2022 invasion. One exception though is the crime of aggression. The exercise of jurisdiction over this crime is precluded because, firstly, the Court has no jurisdiction over the crime when committed by the nationals or on the territory of a State not Party (Article 15 *bis* (5) ICC Statute); and, secondly, the UN Security Council has not referred this situation to the ICC Prosecutor (Article 15 *ter* ICC Statute).

In December 2020, Prosecutor Bensouda announced the completion of the preliminary examination in Ukraine, which had been ongoing since 24 April 2014. She found a reasonable basis to believe that a wide range of war crimes and crimes against humanity reaching the requisite level of gravity had been committed. Potential cases would be admissible either due to ‘inaction’ of the Ukrainian and Russian authorities in relation to categories of persons and conduct of interest to the Office of the Prosecutor or due to ‘unavailability’ of the Ukrainian judicial system in the parts of its territory occupied by Russia. Bensouda acknowledged that the situation warranted prioritisation but referred to significant operational challenges and capacity constraints faced by her Office and the intention to take this matter up with her successor during transition.

No authorisation for the investigation was sought from the Pre-Trial Chamber in the course of 2021. It is only on 28 February 2022, after Russia’s invasion, that Prosecutor Karim Khan announced his decision to proceed with opening an investigation in Ukraine. Khan concurred with the determination of the reasonable basis to investigate the conduct covered by the preliminary examination. He indicated that the investigation shall also encompass any new alleged crimes committed ‘by any party to the conflict on any part of the territory of Ukraine’.

To commence an investigation *proprio motu*, the Prosecutor should obtain judicial authorisation under Article 15(3) of the Statute but it takes time (normally up to 4 months). Alternatively, States Parties may refer the situation, including in a State not Party which accepted the ICC jurisdiction, thereby bypassing the need for judicial sanction – the option hinted at by Khan in his statement. Both avenues were pursued contemporaneously for Ukraine. On 1 March, the Prosecutor informed judges of an upcoming Article 15(3) request while Lithuania turned its initial Article 15(2) communication into an Article 14 referral in response to the Prosecutor’s invitation to States. The next day a further 38 States followed suit, making it the most widely-supported state referral to date (cf. Venezuela).

Given the ICC’s jurisdictional limitations in respect of the crime of aggression in Ukraine, the Prosecutors’ problematic inaction until most recently and cautious statements falling short of clearly denouncing the ongoing crime, and the ICC’s poor track record of engaging major powers more generally, commentators have asserted the ICC’s irrelevance. While these are good points and being even slightly optimistic is hard in the times like this, I dare hope that the jury is still out, and the ICC will regain relevance already in the near future.

The investigation, which has already started, will not be an immediate game-changer. It will not lead to prosecutions and trials any time soon. Nor is it likely to deter Russia’s top leadership from continuing the aggression and enabling other crimes – although this could be different for field commanders and troops who may be committing war crimes or crimes against humanity. However, the activation of the ICC in Ukraine is anything but insignificant.

Firstly, if ICC arrest warrants are ultimately issued against the political and military leadership of Russia, starting with the President and key government members, they will remain unenforced for as long as Putin remains President. That said, the examples of other dictatorships (e.g. Sudan under Omar Al Bashir) show that no regime, however autocratic and violent, is eternal or invulnerable. We might see cases against Russian leaders being brought before the ICC during our lifetime. In case of a regime change, which is admittedly a long shot at this point, the UNSC could refer the situation involving the crime of aggression in Ukraine – and, by extension, other core crimes committed in Russia and Belarus beyond that situation.

Secondly, more relevantly to the present day, should the information about the launch of the ICC investigation be circulated broadly and communicated to (and by) the field commanders and troops fighting in Ukraine, it could produce a dissuasive effect on the ground, preventing commission of war crimes and crimes against humanity.

Thirdly, the ICC investigation may further delegitimize the regime in Russia. Despite intensive propaganda and political violence, there is no popular support for this war. The anti-war protests continue unabated; 7,624 protesters have been arrested during the first week of the conflict. The ICC investigation in Ukraine resonates with anti-war sentiments and voices within Russia.

Fourth, when announcing his decision to proceed to investigation in view of its urgency, the Prosecutor set aside resource-related arguments (“The importance and urgency of our mission is too serious to be held hostage to lack of means.”) To work around this problem, Khan will request an additional budgetary support, voluntary contributions to support all situations, and the loan of gratis personnel from the States Parties. This is a notable change of attitude which should not be reserved to Ukraine but also apply to other situations.

The decisive and coordinated multilateral response to the aggression against Ukraine evinces a momentous policy shift in the EU and its member and partner states on defence and security issues, such as sanctions, weapon deliveries, neutrality, and NATO membership. Most States see more clearly than ever that the ICC is not only relevant but also necessary, and that it must receive adequate financial and political support. ICC States prioritising their obligations under the Statute and providing the Court with resources and cooperation may become one of the unforeseen consequences of Russia’s war.

Ad Hoc Tribunal

The ICC’s jurisdictional limitations led commentators to suggest that establishing a separate *ad hoc* international tribunal for the crime of aggression could present a suitable avenue for closing the present impunity gap. Alluding to Nuremberg, Sands queried: “Why not set up a dedicated international criminal court to investigate Putin and his friends for this crime?”

However warranted such an investigation might be, I am not convinced that a dedicated aggression court would add significant value to the institutional landscape in the current geopolitical and international legal context.

The Nuremberg and Tokyo Military Tribunals established after the Second World War were grounded in the (enforced and blanket) consent of the vanquished Axis states—Germany and Japan—in the wake of their unconditional surrender to, and occupation by, the victorious powers. As matters stand, consent by Russia or Belarus to the jurisdiction of the proposed Tribunal is not forthcoming.

Presumably, it is not meant as a mere symbolic, mythic court. If so, the Aggression Tribunal would be worth establishing only if its parent states or organisations and governing institutions are able to guarantee a solid basis for its proper functioning as a criminal justice institution – which now comes with too many ‘buts’ and ‘ifs’.

Unless it would conduct *in absentia* proceedings, which is a possibility with good arguments in favour and even better ones against, it must be able to acquire custody over eligible defendants, considering that the crime of aggression is a leadership crime. The Tribunal must be able to obtain full cooperation of states in gathering evidence and securing appearance of witnesses in court – many of which would be in the aggressor states. It must provide defendants with a fair trial in accordance with the highest standards of international criminal procedure. For that to be possible, the Tribunal must dispose of the legal and operational means of inducing and enforcing the *bona fide* cooperation of States involved in the conflict.

The territorial State (Ukraine) will presumably provide full cooperation if it succeeds in deflecting the ongoing assault. This is different for Russia and Belarus as the aggressor states and the states of nationality of those allegedly responsible for the respective crime. The cooperation by Russia with the Aggression Court—a *fortiori* as far-reaching as a surrender of its (former) President and members of government and Parliament—is inconceivable without a prior—complete and unreversible—regime change in the country, whether as a result of a popular revolution or a palace coup.

However, when such a sea change occurs, would a separate Aggression Court be necessary? Nothing then would preclude a renewed and free Russia from acceding to the Statute and ratifying the Kampala Amendments. Russia could grant the ICC jurisdiction under Article 12(3) going back to 17 July 2018 for the crime of aggression and 1 July 2002 in relation to other core crimes. It could also refer itself (or be referred) to the ICC Prosecutor and fully cooperate with the ICC in the situations in Georgia and in Ukraine, including by surrendering (former) high-ranking state officials.

Under the above scenario, if the Aggression Tribunal is nevertheless set up, the ICC would investigate crimes against humanity and war crimes in Ukraine while the Tribunal would deal with the crime of aggression arising from the same conflict, which could just as well have been dealt with by the ICC. While the creation of such a Tribunal may be a good expressivist gesture, it would make limited practical sense. The artificial fragmentation of the determination of responsibility of essentially the same persons would lead to a competition between the two courts in terms of the sequencing of trials. It would also be inefficient and likely increase the overall length of the proceedings significantly.

Somewhat differently, an Aggression Tribunal created by states pooling their universal jurisdiction over the crime of aggression could usefully complement the ICC where it lacks jurisdiction. However, its legal and operational reach in terms of disregarding personal immunities of eligible defendants and the ability to arrest them would be nil lacking cooperation by Russian and Belarusian authorities while trials *in absentia* in such high-profile cases would be of negligible value and legitimacy.

Investigative Mechanism

A different calculus applies to the proposed establishment of a dedicated investigative institution by, for example, the UN General Assembly or Human Rights Council. The international, impartial and independent mechanism for Ukraine could be modelled upon the IIM (Syria), the IIMM (Myanmar) and the UNITAD (Daesh/ISIL crimes in Iraq). Its mandate could encompass the collection, preservation, and analysis of the evidence of international and possibly other serious crimes committed in Ukraine since February 2014 (or earlier) and organising case files with a view to assisting domestic and international criminal courts.

Before the ICC Prosecutor started the investigation, he tasked his Office with exploring possibilities of preserving the evidence of crimes in Ukraine. Even if the OTP budget and staffing were substantially increased, it is unrealistic to expect the OTP to perform this gargantuan task comprehensively and proactively in order to prepare cases other than its own.

The Investigative Mechanism for Ukraine could play a crucial complementary role in that regard by gathering and preserving evidence to be shared not only with the ICC but also domestic courts across multiple jurisdictions. The Mechanism's unique value is that its evidentiary assistance could incentivise and enable national prosecutions which the ICC would be unable to do in a purposeful and systematic manner.

Domestic prosecution

Prosecution of core crimes at the domestic level is the standard and first go-to modality. But it has not yet been the primary focus of the discussions on accountability in Ukraine. The crimes allegedly committed there are caught by the similarly-worded provisions of the Ukrainian and Russian Criminal Codes on 'criminal offences against peace and security of

mankind'. The Codes proscribe planning, preparing and waging an aggressive war (Article 437 CCU; Article 353 CCR), and war crimes (Article 438 CCU; Article 356 CCR). The more elaborate international crimes section of the Criminal Code of Belarus provides for the crime of preparation or planning of aggressive war (Article 122 CCB), crimes against the security of humanity (Article 128 CCB) and war crimes (Articles 132-138 CCB).

Thus, the conduct which may be qualified as the crime of aggression and war crimes in Ukraine is clearly criminal under the legislation of the three states. The political and military leaders and the members of armed forces may be held responsible under the law of the territorial state and/or under that of the states of nationality of the perpetrators.

Ukraine's criminal justice system would normally be capable of taking on such cases, especially against mid- and low-level defendants, although the feasibility of holding trials depends on how the military situation will develop and on the ability of Ukrainian authorities to get hold of suspects (although Article 262 of the Code of Criminal Procedure allows trials *in absentia* in exceptional circumstances).

In the states of nationality of alleged perpetrators, the above-mentioned provisions will likely remain a dead letter. No prosecutions of top leaders or servicemen of Russia (or Belarus) for core crimes can be expected to take place in their national courts – certainly not before the current governments fall triggering tectonic shifts in their political systems. At present, any conflict-related offences are officially denied, condoned or justified.

Like with core crimes in Syria, Afghanistan, Liberia, and elsewhere, proceedings in the third countries based on the (qualified) universal jurisdiction will emerge as a key modality to prosecute and adjudicate crimes committed in the Ukraine conflict in the future. War crimes and crimes against humanity can be prosecuted under universal jurisdiction in many states – e.g. Lithuania (Article 7(1) Criminal Code), the Netherlands (s. 2(1) WIM) and Germany (ss 1, 6 to 12 VStGB). In a few countries—the Netherlands is one example—universal jurisdiction extends to the crime of aggression, which can be prosecuted regardless of where and by whom it is committed as long as the suspect is found on the Dutch territory (ss 2(1)(c) and 8b WIM). It is possible that some States will loosen up the existing limitations on the exercise of universal jurisdiction over core crimes, including the crime of aggression, in the future. This would enhance accountability options but possibly also invite their misuse.

Most universal jurisdiction cases with respect to Ukraine that are likely to materialise will concern the alleged war crimes and crimes against humanity of (former) mid- and low-level commanders and foot soldiers – *if and when* they are found within the territory of forum countries or wherever they can be arrested for extradition. Assistance to forum states by other countries and the (potential) Investigative Mechanism will prove essential in advancing such accountability efforts. However, universal jurisdiction trials hold but an illusory promise as an avenue for accountability of former high-ranking officials of Russia and Belarus so long

as they carefully plan their travel itineraries to avoid arrest. Such proceedings will be precluded altogether with respect to officials holding personal immunities for as long as they remain in their posts.

Final remarks

The road to accountability for the architects of the ongoing humanitarian disaster in Ukraine and paths towards justice for the victims of core crimes there will be tortuous. Despite the urgency in view of the gravity of the situation and the age and life expectancy of key suspects, mapping out and operationalising different options would take many years. The international community should brace itself for uphill challenges along the way. It must work in a sustained and coordinated manner to overcome them through all available forms of multilateral cooperation and rule-of-law institutions, both existing and yet to be set up. The famous quote of M.L. King Jr. rings in our minds every day with horrible news flowing in from Ukraine: “The arc of the moral universe is long but it bends toward justice”.

States, intergovernmental and non-governmental organisations, and citizens should strategise in deploying novel institutional solutions while capitalising on the existing ones. Accountability actors should join efforts aimed at collecting and processing evidence of core crimes in Ukraine while pursuing a carefully configured combination of avenues for ensuring criminal responsibility of their principal authors. Whichever avenues are taken, the hard reality is that the fullest scope of accountability, particularly for the top leadership of the aggressor states, will remain untapped until the (inevitable) regime collapse in those countries. The cogs of justice grind slow but they have already been set in motion – this is no consolation but a call to action.