LEGAL CONTEXT ON THE WAR IN UKRAINE

AN ANALYSIS PREPARED BY THE Public International Law & Policy Group

FEBRUARY 2022
I. Contextual Background

At the start of the events that are the subject of the ICC’s preliminary examination, the Government of Ukraine was controlled by the Party of Regions, led by former President Viktor Yanukovych. Mass protests began on 21 November 2013 in the area of Independence Square (Maidan Nezalezhnosti) in Kyiv, prompted by the decision of the Ukrainian Government not to sign an Association Agreement with the European Union (“EU”).

Violence over the following weeks, in the context of the demonstrations, resulted in injuries both to protesters and members of the security forces, as well as deaths of some protesters. From 18-20 February violence escalated sharply and scores of people were killed and hundreds injured, mostly on the side of the protesters. On 21 February 2014, under EU mediation, President Yanukovych and opposition representatives agreed on a new government and scheduled the presidential election for May 2014. On 22 February 2014, the Ukrainian Parliament voted to remove President Yanukovych.

From late February 2014 onwards, protests against the new Ukrainian Government began to grow, notably in the eastern regions of the country and in Simferopol, the capital of the Autonomous Republic of Crimea. From the night of 26-27 February 2014, armed and mostly uniformed individuals, whom the Russian Federation later acknowledged to be its military personnel together with locally-resident militia members, progressively took control of the Crimean peninsula. On 18 March 2014 the Russian Federation announced the formal incorporation of Crimea into Russian territory. Russia has continued to exercise effective control over the territory since that time.

In parallel to the events in Crimea, over the course of March and early April 2014, armed persons took control of key government buildings in several eastern provinces. The situation deteriorated rapidly into violence: on 15 April 2014, the Ukrainian Government announced the start of an “anti-terror operation” in the east and by the end of April, the acting Ukrainian President announced that the
Government was no longer in full control of the eastern provinces of Donetsk and Luhansk, declared that the country was on “full combat alert”, and reinstated conscription to the armed forces. On 2 May 2014, 40 people were killed in Odessa when a fire started inside a building in which pro-federalism (anti-government) protesters had taken refuge from counter protesters.

Armed conflict, involving the persistent use of heavy military weaponry by both sides, including in built-up areas, has since persisted in eastern Ukraine for more than six years, killing at least 3,000 civilians and wounding thousands more. The highest numbers of casualties were recorded in the first year of the conflict, prior to the implementation of the February 2015 Minsk II ceasefire agreement, though casualties, including of civilians, have continued to occur as a result of both shelling and light-arms fire.¹

In 2021, Russia began amassing troops on the Ukraine border raising alarm of an invasion. In February 2022, the Russian military invasion in Ukraine started leading to heavy casualties on both sides, significant destruction of Ukraine’s infrastructure, and thousands of Ukraine refugees fleeing to Europe.

In response to the invasion, the international community has imposed severe sanctions against Russia. These sanctions include asset freezes of prominent Russian officials, including Russian president Vladimir Putin and Foreign Affairs Minister Sergey Lavrov, measures preventing transfer of money from and to the Russian Central Bank, removing certain Russian banks from the SWIFT system, and many other measures aimed at pressuring Russia to end the war.

II. Jurisdiction of the ICC on the crimes committed in Ukraine

Ukraine is not a State Party to the Statute. However, pursuant to the two article 12(3) declarations lodged by the Government of Ukraine on 17 April 2014 and 8 September 2015 respectively, the Court may exercise jurisdiction over Rome Statute crimes committed on the territory of Ukraine from 21 November 2013 onwards.

¹ https://www.icc-cpi.int/itemsDocuments/2020-PF/2020-pe-report-eng.pdf page 68
III. Timeline Jurisdiction of the ICC on the crimes committed in Ukraine

09 April 2014
The Government of Ukraine lodged an ad hoc declaration accepting the jurisdiction of the ICC in conformity with article 12 (3) of the Rome Statute.\(^2\) The jurisdiction was limited to acts committed in the territory of Ukraine within the period 21 November 2013 - 22 February 2014. Ukraine accepted the ICC jurisdiction based on a declaration issued by the Ukrainian parliament that came into force on 25 February 2014.\(^3\)

08 September 2015
The Government of Ukraine lodged a new declaration which extends the jurisdiction of the ICC beyond 22 February 2014.\(^4\) This declaration was lodged following the adoption of a new resolution by the Ukrainian Parliament in February 2015 on the recognition of jurisdiction of the ICC over crimes against humanity and war crimes committed by senior officials of the Russian Federation and leaders of organizations “DNR” and “LNR”.\(^5\)

Current status
The ICC has jurisdiction over crimes committed in Ukrainian territory since 21 November 2013.

\(^2\) Article 12
Preconditions to the exercise of jurisdiction:
1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
   (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
   (b) The State of which the person accused of the crime is a national.
3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

\(^3\) [https://www.icc-cpi.int/itemsDocuments/997/declarationRecognitionJurisdiction09-04-2014.pdf](https://www.icc-cpi.int/itemsDocuments/997/declarationRecognitionJurisdiction09-04-2014.pdf)
\(^4\) [https://www.icc-cpi.int/Pages/item.aspx?name=pr1156](https://www.icc-cpi.int/Pages/item.aspx?name=pr1156)
\(^5\) [https://www.icc-cpi.int/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf](https://www.icc-cpi.int/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf)
IV. Timeline Ukraine Situation before the ICC

24 April 2014
The preliminary examination of the situation in Ukraine was opened on 24 April 2014 on the basis of an initial ad hoc declaration lodged by the Government of Ukraine accepting the jurisdiction of the Court, which was subsequently extended by a second declaration by Ukraine, lodged in 2015, to encompass ongoing alleged crimes committed on the territory of Ukraine from 20 February 2014 onwards.

11 December 2020
The Prosecutor announced the completion of her preliminary examination of the situation in Ukraine, having concluded that there was a reasonable basis to believe that war crimes and crimes against humanity were committed.

Currently, 2021
The next step in the judicial process is to request authorisation from the Pre-Trial Chamber to open an investigation into the situation in Ukraine. In the interim, the Office continues to take measures to preserve the integrity of any future investigation into the situation in Ukraine.

V. Excerpts from the Prosecutor’s statement on the conclusion of the preliminary examination:

Prosecutor Fatou Bensouda on crimes against humanity and war crimes in Ukraine:

“My Office has concluded that there is a reasonable basis at this time to believe that a broad range of conduct constituting war crimes and crimes against humanity within the jurisdiction of the Court have been committed in the context of the situation in Ukraine. These findings, which will be spelled out in more detail in our annual Report on Preliminary Examination Activities, include three broad clusters of victimisation: (i) crimes committed in the context of the conduct of hostilities; (ii) crimes committed during detentions; and (iii) crimes committed in Crimea. My Office furthermore found that these crimes, committed by the different parties to
the conflict, were also sufficiently grave to warrant investigation by my Office, both in quantitative and qualitative terms”.⁶

_Prosecutor Fatou Bensouda on admissibility and complementarity issues:_

“Having examined the information available, despite the existence of information on domestic proceedings, my Office has concluded that the potential cases that would likely arise from an investigation into the situation in Ukraine would be admissible. This is because the competent authorities in Ukraine and/or the Russian Federation are either inactive in relation to the categories of persons and conduct that the Office has identified, or because the national judicial system is 'unavailable' in territory under the control of the opposing party, rendering the competent authorities unable genuinely to obtain the accused or the necessary evidence and testimony or otherwise to carry out their proceedings.”⁷

_Prosecutor Fatou Bensouda on current situation and next steps:_

“Moving forward, the next step will be to request authorisation from the Judges of the Pre-Trial Chamber of the Court to open investigations. The Office faces a situation where several preliminary examinations have reached or are approaching the same stage, at a time when we remain gripped by operational challenges brought on by the COVID-19 pandemic, on the one hand, and by the limitations of our operational capacity due to thin and overextended resources, on the other. This is also occurring in the context of the pressures the pandemic is placing on the global economy. Against this backdrop, in the immediate period ahead, we will need to take several strategic and operational decisions on the prioritization of the Office's workload, which also duly take into account the legitimate expectations of victims and affected communities as well as other stakeholders. This is a matter that I will also discuss with the incoming Prosecutor, once elected, as part of the transition discussions I intend to have. In the interim, my Office will continue to take the necessary measures to ensure the integrity of future investigations in relation to the situation in Ukraine.”⁸

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⁶ [https://www.icc-cpi.int/Pages/item.aspx?name=201211-otp-statement-ukraine](https://www.icc-cpi.int/Pages/item.aspx?name=201211-otp-statement-ukraine)
⁷ [https://www.icc-cpi.int/Pages/item.aspx?name=201211-otp-statement-ukraine](https://www.icc-cpi.int/Pages/item.aspx?name=201211-otp-statement-ukraine)
⁸ [https://www.icc-cpi.int/Pages/item.aspx?name=201211-otp-statement-ukraine](https://www.icc-cpi.int/Pages/item.aspx?name=201211-otp-statement-ukraine)
VI. Preliminary Examination Analysis

Substantive Analysis

“In conducting this analysis, the Office examined several forms of alleged conduct and considered both the context of international armed conflict and occupation in Crimea, and the different possible classifications of the armed conflict in eastern Ukraine.

More specifically the Office found a reasonable basis to believe that, from 26 February 2014 onwards, in the period leading up to, and/or in the context of the occupation of the territory of Crimea, the following [war] crimes were committed: wilful killing, pursuant to article 8(2)(a)(i); torture, pursuant to article 8(2)(a)(ii); outrages upon personal dignity, pursuant to article 8(2)(b)(xxi); unlawful confinement, pursuant to article 8(2)(a)(vii); compelling protected persons to serve in the forces of a hostile Power, pursuant to article 8(2)(a)(v); wilfully depriving protected persons of the rights of fair and regular trial, pursuant to article 8(2)(a)(vi); the transfer of parts of the population of the occupied territory outside this territory (with regard to the transfer of detainees in criminal proceedings and prisoners), pursuant to article 8(2)(b)(viii); seizing the enemy’s property that is not imperatively demanded by the necessities of war, with regard to private and cultural property, pursuant to article 8(2)(b)(xiii) of the Statute.

In addition, the Office considered the information available with regard to alleged offenses under article 7 of the Statute, and found a reasonable basis to believe that acts amounting to crimes [against humanity] had occurred in the context of the period leading up to and during the (ongoing) occupation of Crimea: murder, pursuant to article 7(1)(a); deportation or forcible transfer of population (with regard to the transfer of detainees in criminal proceedings and prisoners), pursuant to article 7(1)(d); imprisonment or other severe deprivation of physical liberty, pursuant to article 7(1)(e); torture, pursuant to article 7(1)(f); persecution against any identifiable group or collectivity on political grounds, pursuant to article 7(1)(h); and enforced disappearance of persons, pursuant to article 7(1)(j) of the Statute.
In addition, the Office concluded in 2019 that the information available provides a reasonable basis to believe that, in the period from 30 April 2014 onwards, at least the following war crimes were committed in the context of the armed conflict in eastern Ukraine: intentionally directing attacks against civilians and civilian objects, pursuant to article 8(2)(b)(i)-(ii) or 8(2)(e)(i); intentionally directing attacks against protected buildings, pursuant to article 8(2)(b)(ix) or 8(2)(iv); wilful killing/murder, pursuant to article 8(2)(a)(i) or article 8(2)(c)(i); torture and inhuman/cruel treatment, pursuant to article 8(2)(a)(ii) or article 8(2)(c)(ii); outrages upon personal dignity, pursuant to article 8(2)(b)(xxi) or article 8(2)(c)(ii); rape and other forms of sexual violence, pursuant to article 8(2)(b)(xxii) or article 8(2)(e)(vi) of the Statute.

In addition, if the conflict was international in character, there is a reasonable basis to believe that the following war crimes were committed: intentionally launching attacks that resulted in harm to civilians and civilian objects that was clearly excessive in relation to the military advantage anticipated (disproportionate attacks), pursuant to article 8(2)(b)(iv); and unlawful confinement, pursuant to article 8(2)(a)(vii) of the Statute”.9

Procedural Analysis

“The Office completed its admissibility assessment, in terms of complementarity and gravity, and determined that the potential cases likely to arise from an investigation into the situation would be admissible.

The Office’s determination on complementarity falls into two categories with respect to both the level of domestic activity by the competent Ukrainian authorities and the competent Russian authorities: (i) potential cases where the relevant competent authorities are inactive, in the sense of an absence of “tangible, concrete and progressive investigative steps” to identify the criminal responsibility of those alleged to have committed the crimes; or (ii) potential cases where the national judicial system was deemed unavailable within

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9 https://www.icc-cpi.int/itemsDocuments/2020-PE/2020-pe-report-eng.pdf page 70
the meaning of article 17(3), resulting in the inability of the authorities to obtain the accused or the necessary evidence and testimony or otherwise their inability to carry out their proceedings.

With respect to gravity, the Office found that the potential cases it identified were of sufficient gravity with due regard to their scale, nature, manner of commission, and impact, considering both quantitative and/or qualitative factors.”

VII. The crime of Aggression: historical development

The first international trial for the crime of aggression was before the Nuremberg International Military Tribunal in the aftermath of WWII. At that time, the crime of aggression was commonly referred to as “crimes against peace”. Crimes against peace were defined in the London Charter setting up the Nuremberg IMT as “the planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements, or reassurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing”. In the trials, the Tribunal clarified that the London Charter did not make a new law by giving jurisdiction of the Nuremberg IMT to prosecute crimes against peace as aggression had long been a crime under international law. Also the Tokyo Tribunal remained consistent with this reasoning. Thus, since WWII, it is widely accepted that there is a crime of aggression under international law.

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10 Article 17 Issues of admissibility 1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3; (d) The case is not of sufficient gravity to justify further action by the Court. 2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable: (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5; (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice. 3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

11 https://www.icc-cpi.int/itemsDocuments/2020-PE/2020-pe-report-eng.pdf page 71
VIII. The Crime of Aggression before the ICC

In theory, the ICC has had jurisdiction on the crime of aggression since the Rome Statute entered into force pursuant to art. 5 (1)(d). In practice, the ICC has not been able to exercise jurisdiction on the crime of aggression until July 17, 2018 pursuant to art. 5 (2).

What happened? The delay in activating the jurisdiction by the ICC on the crime of aggression is due to the disagreement between the States Parties negotiating the Rome Statute on two main issues:

1) the definition of aggression and;
2) the role of the Security Council.

Only once the States reached agreement on these two points, the ICC was enabled to exercise jurisdiction. As it was clear that this would take many years, the State Parties allowed the Rome Statute to enter into force in 2002 with a provision that grants jurisdiction to the ICC (art. 5 (1)) and another provision (art. 5 (2)) that postpones the effective exercise of jurisdiction on this crime to later “once a provision is adopted… defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime”.

States reached agreement on the definition of the crime of aggression at the Kampala Review Conference of the ICC Statute in 2010. On this occasion, States Parties adopted by consensus amendments to the Statute:

1. Art. 5 (2) was deleted;
2. Art. 8bis setting out the definition of the crime of aggression was added.

12 Article 5(1) Crimes within the jurisdiction of the Court The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.

13 Article 5(2) deleted later by the Kampala amendments: (“The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.”) was deleted in accordance with RC/Res.6, annex I, of 11 June 2010.

14 Article 8 bis3

Crime of aggression

1. For the purpose of this Statute, “crime of aggression” means 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, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.
3. Art. 15bis and 15ter setting out the conditions for the exercise of jurisdiction were added.\footnote{2}

2. For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
(b) 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;
(c) The blockade of the ports or coasts of a State by the armed forces of another State;
(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

\footnote{2} Article 15 bis5 Exercise of jurisdiction over the crime of aggression (State referral, proprio motu) 1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), subject to the provisions of this article. 2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties. 3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute. 4. The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.

5. In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State’s nationals or on its territory.

6. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.

7. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

8. Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article 16.

9. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court’s own findings under this Statute.

10. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

Article 15 ter6
Exercise of jurisdiction over the crime of aggression (Security Council referral)
1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraph (b), subject to the provisions of this article.
4. Art. 25 (3bis) was added which included new elements of the crime.

This development was not sufficient to enable the ICC to exercise jurisdiction. In fact, art. 15 bis (3) reads that the Court shall exercise jurisdiction subject to a decision taken after 1 January 2017 by the majority of States Parties and, in any case, one year must pass after the first 30 States Parties have ratified the aggression amendments. The decision to activate the jurisdiction of the ICC came in late 2017.

IX. Timeline on the jurisdiction of the ICC on the Crime of Aggression

02 July 2002
The Rome Statute enters into force with a provision on the jurisdiction of the ICC on the crime of aggression, art. 5 (1) and a provision postponing the exercise of jurisdiction, art 5 (2).

Kampala, 2010
The States Parties adopted amendments to the Rome Statute:
   1. Art. 5 (2) was deleted;
   2. Art. 8bis setting out the definition of the crime of aggression was added;
   3. Art. 15bis and 15ter setting out the conditions for the exercise of jurisdiction were added;
   4. Art. 25 (3bis) was added which included new elements of the crime.

1 January 2017
Since this date, States can take a decision on when to activate the jurisdiction of the ICC.

December 2017

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2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.
3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.
4. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court’s own findings under this Statute.
5. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.
The decision to activate the jurisdiction starting from July 17, 2018 was taken.

17 July 2018
The ICC jurisdiction on the crime of aggression is activated.

X. Jurisdiction of the ICC on the crime of aggression - ratification and opt-out system

The jurisdiction of the ICC on the crime of aggression is different from the other crimes, as it depends on whether the state concerned has ratified and/or opted out. This is clear from the wording of art. 15 bis and 15ter.

There are two scenarios to consider:
1) The crime is referred to the ICC by the Security Council:
   In such cases, whether or not the states have accepted the amendments in art. 15ter does not matter. The ICC will have jurisdiction in that situation.
2) In all other cases (when there is no SC referral), one must consider the ratification and opt out of the aggressor and victim states. The general rule is that the ICC will have jurisdiction if:
   a. The aggressor state has ratified and not opted out;
   b. The aggressor state has neither ratified nor opted out but the victim state has ratified; or
   c. The aggressor state has ratified and not opted out but the victim state has ratified.

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XI. Definition of the crime of aggression in art. 8bis Rome Statute

“The provision that defines the crime is Article 8bis of the Rome Statute. This Article defines the overall crime of aggression as the planning, preparation, initiation, or execution of an act of aggression by an individual in a leadership position who is able to “effectively” “exercise control” “or to direct the political or military action of a State.” Therefore, while the “crime of aggression” is an offense committed by an individual as opposed to the “act of aggression” committed by a State, an individual may only be shown to be guilty of the offense if it is proved that there has been an “act of aggression” committed by a State. An “act” of aggression is defined as the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the UN. It must be noted that the
offense must have been committed and that threats are not sufficient pursuant to Article 8bis of the Statute.”

The crime and the Court’s jurisdiction are narrowly defined. **First,** the crime only applies to “manifest” violations of the U.N. Charter, measured by character, gravity and scale. **Second,** the crime targets only persons in senior leadership, defined as those “in a position effectively to exercise control over or to direct the political or military action of a State.” **Third,** absent a Security Council referral, the Court will have jurisdiction only when a State Party commits the crime of aggression against another State Party. **Fourth,** as the result of a last-minute compromise last week, the Court’s jurisdiction is further narrowed to only those States Parties that have ratified the aggression amendment, presently just 35 of the 123 States Parties. Finally, even those States Parties that ratify the aggression amendment can elect at any time to opt out of the aggression jurisdictional regime.

At the same time, as noted above, the aggression amendment also allows for the UN Security Council to refer non-States Parties for prosecution to the ICC, and of course there is no possibility of an opt out in this circumstance.”

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16 Article 8 bis3 Crime of aggression 1. For the purpose of this Statute, “crime of aggression” means 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, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.
2. For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:
(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
(b) 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;
(c) The blockade of the ports or coasts of a State by the armed forces of another State;
(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement; (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

should be noted that this requires that all five security council members agree on the referral.

XII. The crime of aggression, the ICC and Ukraine

Whether the ICC would have jurisdiction over the crime of aggression allegedly committed by the Russian officials against Ukraine depends on the following points:

1) Subject-matter jurisdiction: whether the crime actually occurred
2) Temporal jurisdiction:
   a. whether prosecuting a State such as Russia before the crime is adopted by the ICC would contravene retro-activity
   b. Whether it would be possible to prosecute for the crime of aggression when this started before the jurisdiction of the ICC was activated but continued after the activation of the crime of aggression.
3) Other jurisdictional matters
The subject matter jurisdiction requires a thorough analysis of the facts and the requirements of the crime of aggression.

With regards to temporal jurisdiction, the first issue to analyze is retroactivity. Can the crime of aggression be prosecuted when it occurred before the ICC jurisdiction on the crime was activated?

No, the Court may not prosecute aggressive conduct that occurred before the crime was within the jurisdiction of the ICC. This is known as applying jurisdiction “retroactively” and is prohibited at the ICC.19 To clarify this even further, the Special Working Group on the Crime of Aggression (which is a group set up by the ASP) has indicated the following:

a. The crime of aggression’s provisions should only apply prospectively. There was no objection to spelling this out in the Rome Statute.
b. The Special Working group advanced a suggestion to facilitate deeper discussion with the following amendments to Article 11 of the Rome Statute: i. It is

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19 Rome Statute, art. 24: Article 24 Non-retroactivity ratione personae 1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute. 2. In the event of a change in the law applicable to a given case prior to a final judgment, the law more favorable to the person being investigated, prosecuted or convicted shall apply.
understood that the Court has jurisdiction only with respect to crimes of aggression committed after the amendment [has been adopted by the Review Conference/has entered into force]. ii. It is understood that (for a State referral or when the Prosecutor initiates an investigation) the Court may exercise its jurisdiction only with respect to crimes of aggression committed after the entry into force of the amendment for that State, unless that State has made a declaration under article 12, paragraph 3.1.

Accordingly, pursuant to the decision of the ASP of December 2017 on the activation of the crime of aggression, the Court may only exercise its jurisdiction over acts of aggression committed after 17 July 2018.

The second issue is whether there is any exception to this rule when the crime of aggression started when the ICC jurisdiction on the crime was not activated and but continues after the jurisdiction is activated. This is relevant to the occupation of Crimea by the Russian Federation which is ongoing! It appears that there is no such exception to the non-retroactivity principle to prosecute the offense because the focus is on the initial act of aggression that forms the crime meaning the initial activity and not the on-going activity is the focus of the crime. The Rome Statute provisions reflect this view when defining the crime of aggression: “[t]he perpetrator planned, prepared, initiated or executed an act of aggression”. These phrases, particularly “executed an act” suggests that the definition does not include a continuing course of conduct of aggression. It appears that the scope of the crime was intended to be limited to the initial execution of the aggressive act.

There is, however, an ongoing debate about whether the offense of “occupation”, which is considered an act of aggression, is an ongoing act and each day of occupation is a crime. While some suggest that the act of aggression is an ongoing offense, the Rome Statute seems to suggest that occupation relates more to the initial invasion or attack as being the act of aggression.20

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20 Article 8bis(2)(a) includes “the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof [emphasis added]” as qualifying as an act of aggression
It follows that any alleged crime of aggression that has already taken place prior to the time that the crime is prosecutable at the ICC, is unlikely to be able to be used to prosecute Russian nationals.

Even if that was the case, one must consider the remaining jurisdictional issues. The crime of aggression does not fall under the personal and territorial jurisdiction rules laid out in art. 12. In fact, the States must consent to proceed in most cases.

Being a non-State party, Russia would need to give consent to trigger the jurisdiction of the ICC to adjudicate an act of aggression committed by the individuals of that State or on its territory pursuant to art. 15bis (5). Although a UNSC referral would give the Court jurisdiction whether or not the State was a State Party, for Ukraine there has been no UNSC referral in relation to the situation and Russia has a veto power in any event. Therefore, it seems there is difficulty in suggesting the ICC would have jurisdiction in terms of Ukraine and Russia as a non-State Party committing an act of aggression against a State that has accepted the jurisdiction of the Court.21

XIII. Domestic prosecution of International Crimes - Ukrainian legislation

In September 2020, the parliament of Ukraine adopted a bill “On Amendments to Certain Legislative Acts on the Enforcement of International Criminal and Humanitarian Law”, which includes provisions for command responsibility, the statute of limitations for international crimes, and universal jurisdiction for international crimes. This bill is expected to fill critical gaps in Ukrainian legislation and facilitate the prosecution of war crimes and crimes against humanity domestically.

“Crimes committed in the context of the armed conflict in Ukraine are currently classified under separate articles of Ukraine’s criminal code and are subject to statutes of limitations. In other words, acts that in international law qualify as international crimes would be prosecuted as domestic crimes in Ukraine. Such characterization fails to account for the special nature of these crimes and

contributes to a sense of impunity for perpetrators of international crimes committed on Ukrainian territory. Under international law, countries have the primary responsibility to investigate, prosecute, and punish those responsible for these crimes and provide redress to victims. The absence of domestic legislation has been one of the key barriers in domestic accountability efforts. Further revisions to the Criminal Procedural Code are most likely needed to permit the effective application of the new law.

Previously, in 2019, Ukraine had already taken an important step towards the prosecution of international crimes by establishing the Department for Supervision in Criminal Proceedings of the Crimes Committed in Armed Conflict. This Department is placed within the Public Prosecutor’s Office and oversees criminal proceedings in crimes committed in the context of the armed conflict in Ukraine.

How would potential domestic prosecutions affect the jurisdiction of the ICC on the Ukraine situation? Because of the principle of complementarity, genuine and effective domestic prosecutions of international crimes may halt the proceedings before the ICC or complement them.

XIV. Domestic Prosecution of the Crime of Aggression

The trial of Russian military servicemen Alexander Alexandrov and Yevgeny Yerofeyev, which took place from 2015 until 2016 in Ukraine and concerned charges, among other things, of waging a war of aggression, has been overlooked in the discourse on international criminal law. Despite the contentious nature of the verdict with respect to its interpretation of the crime of aggression, the judgment should be recorded in the history of international criminal law for reviving the crime from decades-long dormancy. It is likely this is the first domestic criminal trial on charges of aggression to result in a conviction. The article analyses the key conclusions of the judgment, from the points of view of domestic criminal law in Ukraine and international criminal law, and makes a number of policy recommendations.

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22 https://www.asser.nl/matra-ukraine/ukraine-and-international-crimes/background/international-crimes/
23 https://www.hrw.org/news/2021/05/21/ukraine-international-crimes-bill-adopted
Art. 437(2) Criminal Code (Ukraine), which states that: 'Waging a war of aggression or [the conduct] of aggressive hostilities shall be punished by deprivation of liberty for a term between ten and fifteen years'.

XV. Ukraine v. Russia cases before the International Court of Justice


In November 2017, Ukraine initiated a case before the International Court of Justice against Russia. In the application, Ukraine based its claims on provisions from the Terrorist Financing Convention (ICSFT) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). Ukraine had alleged that Russia supplied funds, weapons, and training to illegal armed groups that engage in acts of terrorism in its territory. Relatedly, that Russia also allegedly caused or supported the July 2014 downing of Malaysia Airlines Flight MH17, among other violent acts. Particularly, the application refers to Article 24, paragraph 1, of the ICSFT and Article 22 of CERD, on the basis of Article 36, paragraph 1, of the Statute of the Court. Ukraine’s claims under the ICSFT relate to the events in Eastern Ukraine, whereas the claims under CERD relate solely to the situation in Crimea.25

Russia responded with preliminary objections with respect to the Court’s jurisdiction to examine these claims. Russia’s objections related to the alleged lack of ratione materiae of the ICJ to examine claims under Article 23, para 1, of the ICFT, and Article 22 of CERD. Russia also contested that Ukraine did not meet the procedural preconditions set out in these provisions before raising the issue with the ICJ. Additionally, Russia alleged that Ukraine’s claims were inadmissible because it did not exhaust local remedies as required by CERD.

In November 2019, the ICJ issued its decision on these preliminary objections. In its judgment, the Court dismissed Russia’s objections and decided to move the case to the merits stage.26

Proceedings instituted by Ukraine against the Russian Federation on 26 February 2022

In February 2022, Ukraine submitted an application against Russia to the ICJ, to hold Russia accountable for manipulation of the notion of genocide to justify aggression and to request an urgent decision ordering Russia to cease military activity.27 Ukraine relies on the 1948 Convention on the Prevention and Punishment of the Crime of Genocide for its application. The ICJ is yet to examine it.

XVI. Ukraine v. Russia cases before the European Court on Human Rights

In total, there are currently four cases filed by Ukraine against Russia for human rights violations committed in Eastern Ukraine and Crimea. One of the cases relates to the downing of the MH17 flight over Eastern Ukraine in 2014, which ECtHR combined with a similar application brought by the Netherlands for the same violation.28 Another case relates to violations committed by Russia during the conflict in Eastern Europe.29 Another case, which recently received a decision from the Court regarding its admissibility, relates to the systematic human rights violations allegedly committed by Russia in Crimea.30 In its judgment for this case, issued just at the beginning of 2021, the Court ruled the case partly admissible and moved it to the merits stage.31 In February of 2021, Ukraine lodged

28 Ukraine and the Netherlands v. Russian Federation (nos. 8019/16, 43800/14 and 28525/20)
29 Ukraine v. Russian Federation (VIII) (no. 55855/18)
30 Ukraine v. Russian Federation (re Crimea) (no. 20958/14)
31 Analysis of the case is available here: Marko Milanovic, ECtHR Grand Chamber Declares Admissible the Case of Ukraine v. Russia re Crimea, EJIL: Talk! (2021), available here: https://www.ejiltalk.org/ecthr-grand-chamber-declares-admissible-the-case-of-ukraine-v-russia-re-crimea/;
another application against Russia for an alleged ongoing administrative practice by the Russian Federation consisting of targeted assassination operations against perceived opponents of the Russian Federation, in Russia and on the territory of other states. There are also thousands of individual applications regarding various aspects of the conflict in Ukraine.

Most recently, however, in July 2021, Russia lodged an application against Ukraine before the ECtHR alleging Ukraine’s administrative practice of, among other things, killings, abductions, forced displacement, interference with the right to vote, restrictions on the use of the Russian language and attacks on Russian embassies and consulates. Russia also claims that Ukraine is switching off water supply to Crimea and alleges that Ukraine is responsible for the downing of the flight MH17 because it failed to close its airspace.

XVII. Documentation missions active in Ukraine

There have been several monitoring, documentation, and investigation missions operating in Ukraine. Particularly, since 2015, the UN Human Rights Monitoring Mission in Ukraine (HRMMU), among other activities, reports and documents on the human rights violations committed in Eastern Ukraine and Crimea region. The HRMMU has documented and contributed to the opening of investigations in cases of torture and ill-treatment.

Part of the mandate of the OSCE Special Monitoring Mission in Ukraine is also to monitor and support respect for human rights in Ukraine, while aiming to facilitate conflict resolution.

Judgment of the Court: UKRAINE v. RUSSIA (RE CRIMEA), Applications nos. 20958/14 and 38334/18 (2021), available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%222001-207622%22]}.

32 ECtHR, Press release, New inter-State application brought by Ukraine against Russia (2021), available at https://hudoc.echr.coe.int/fre-press#{%7B%22fulltext%22:%5B%22210691%22%5D,%.%5B%22languageiso%22:%5B%22ENG%22%5D%7D

33 Russia v. Ukraine (no. 36958/21)

34 ECtHR, Press release, Inter-State application brought by Russia against Ukraine (2021), available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%222003-7085775-9583164%22]}


Following the crash of the MH17 flight, the International Civil Aviation Organization (ICAO) deployed experts to Ukraine to assist their Ukrainian counterparts with the investigation of the crash. The ICAO provided guidance on the Convention on International Civil Aviation and Annex 13 to the Convention (Aircraft Accident and Incident Investigation), as well as supported fact finding and accurate processing of evidence. Additionally, in August of 2014, the Netherlands, Australia, Malaysia, Belgium, and Ukraine (called the Joint Investigation Team (JIT)) initiated a criminal investigation to collect information on the MH17 crash. The JIT’s aim is to use the information collected for the determination of those responsible for the downing of the MH17 flight and to collect evidence for the prosecution of the perpetrators.

XVIII. Lustration laws in Ukraine: Comments from the Vienna Commission

On 16 October 2014 the Government Cleansing (Lustration) Act of 2014 (“GCA”) came into force. It provided for the dismissal of individuals who: (i) had occupied certain positions in the civil service in the period from 25 February 2010 to 22 February 2014 (“the one-year rule”) or in the Communist Party of the Ukrainian SSR prior to 1991 or (ii) failed to file lustration statements (declarations) as required by the GCA, and banned them from the civil service and certain other jobs for ten years.

In response to this law, the President of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe requested an opinion of the Venice Commission of the GCA. In 2015, the European Commission for Democracy Through Law (Venice Commission) issued its opinion on the GCA law in Ukraine. “The Venice Commission criticized a number of the law’s provisions,
which it argued jeopardized human rights standards and the principles of judicial independence and irremovability. The Venice Commission recommended reconsidering the criteria for the vetting process, as well as reevaluating which government positions and individuals should be subject to lustration. The recommendations stated that the law should outline a timeframe to complete the lustration and vetting processes, and required the creation of an independent body for conducting lustration — all while strengthening the role of civil society in the process. For vetting judges, the law does not provide procedures to safeguard judicial independence, and duplicates the Law on Restoring Trust in the Judiciary. Following the Commission’s conclusions, numerous draft laws recommending changes to the lustration procedures were registered with Parliament.”

The law was amended several times, the latest amendments being issued in March of 2020.

Moreover, in 2017 and 2018, five applicants brought a case against Ukraine before the ECtHR for alleged human rights violations under the GCA. In February of 2020, the ECtHR issued its ruling declaring that the government of Ukraine breached its obligations under Articles 6 and 8 of the European Convention on Human Rights with respect to the applicant’s right to fair trial and private life.

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42 Case of Polyakh and Others v. Ukraine, App nos. 58812/15, 53217/16, 59099/16, 23231/18, 47749/18 (2020), available at https://hudoc.echr.coe.int/eng#{%22itemid%22:%22001-196607%22}