

Exploring the International Criminal Court's Role in Investigating Russia's Aggression in Ukraine: A Comprehensive Review

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Abstract - This critical analysis delves into the practical implications of incorporating the aggressive crime into the International Criminal Court's Statute, emphasizing its role in putting an end to impunity. Notwithstanding the jurisdictional issues mentioned in Art. 15 bis (5) of the Statute, the study explores solutions to overcome this legal hurdle, particularly in the context of Russia's justifications for its actions. Taking a doctrinal approach rooted in positivism, the paper thoroughly considers Russia's invasion as an aggressive move and assesses the ICC's competence to address it. Through meticulous data analysis, scrutiny of legal instruments, and challenging prevailing views, the study seeks to identify opportunities within the ICC's rules and judgments to investigate crime in Ukraine. The paper sets itself apart by proposing recommendations to curb Russia's transgressions, contributing to the preservation of international law and Ukrainian territory. Despite Russia and Ukraine not being ICC members and the lack of a reference to the Security Council, the study contends that Court, despite Ukraine's limited declaration, may play a role in addressing the violent deed. Drawing on the Court's interpretations of statements as well as the Trial Chamber's stance on the term "occurrence of crime in the territory of the State Party," the favorable interpretation of Art. 15 bis (5) is highlighted. The study suggests the Court's potential to explore the involvement of separatists from Ukraine in the choice to launch an attack, creating avenues for engaging with the question of aggression.

Key-words: International Criminal Court; Russia's Aggression; Ukraine Conflict; War Crimes; ICC Investigation; Human Rights Violations; International Law; International Justice; ICC Jurisdiction

I. INTRODUCTION

2014 saw significant political upheaval in Crimea and the Eastern Republics of Ukraine, with the contentious referendum that took place on March 16 in a part of Ukrainian territory being the highlight (Bertrand & Schauder, 2016). The people living on the peninsula voted in support of the annexation of Crimea into Russia in this referendum. The Crimean local parliament approved the referendum's results. Despite the censure of the world community of the vote and its conclusions, which allowed Russian armed forces to enter the area (David, 2022). As individuals of Russian heritage seized control of government buildings in the Donbas region, aided by the Russian military, Eastern Ukraine experienced heightened tensions. Following a referendum, the Donetsk and Luhansk Republics proclaimed their independence on May 11, 2014, triggering further conflict. Russian support for separatists and the Ukrainian government's military operations to regain control escalated the war (Dutton & Sterio, 2022).

Efforts to resolve the conflict through the September 2014 Minsk deal and the February 2015 13-article deal proved ineffective, leading to ongoing tensions. In response, Russia began a war campaign against Ukraine on February 24, 2022, to Ukraine's pursuit of NATO and EU membership, as well as conflicts with the Republics (Salari & Hosseini, 2023). President Vladimir Putin's declaration of acknowledging the Donetsk and Luhansk Republics' independence preceded this action, conveyed through a speech and a statement to the ICJ (Green et al., 2022).

Reports from Human Rights Watch and Amnesty International during this period highlighted attacks on civilians, protected areas, and the use of cluster munitions in Kharkiv (Haque, 2022). In response to 43 state parties bringing the case to the Prosecutor, investigations for violations and genocide were initiated by the ICC on March 2, 2022 (Lanza, 2022).

Several legal and political measures were taken against the attack by international groups, such as the Council of Europe and the European Parliament (Marika, 2022). After examining Russia's intentions, promises, and defenses, academics concluded that the ICC was not a suitable court to hear a case involving aggression (Khater, 2022).

The urgent necessity to confront this horrific international crime, taking into account any possible ramifications and the ICC's responsibility in holding offenders accountable, is what drives this study (Marchuk & Wanigasuriya, 2022). Academic pursuits can increase Russia's cost of war, hence reducing conflicts against civilians and non-military goals, notwithstanding certain obstacles and constraints (Nuotio, 2022). At this critical point, the ICC must effectively preserve legitimacy, stop impunity, and guarantee fair action beyond crimes committed by particular state parties. The study attempts to teleologically explore the criminal

component of the Russian war on Ukraine by looking at the occurrence of the crime of aggression and assessing the ICC's power and capacity to address this serious incident (Salari & Hosseini, 2023).

II. THE JURISDICTION RATIONE PERSONAE OF THE COURT WITH RESPECT TO THE ACTIONS OF RUSSIA

Jus ad bellum is closely related to the crime of aggressiveness, which is separate from other offenses listed in the Statute's Article 5. The offense was officially named at the Statute's Review Conference, even though there were academic arguments about the Court's ability to handle jus ad bellum cases and the fairness of a Court deciding on violent cases (McDougall, 2021). On July 17, 2018, the Court could evaluate cases of this type. A thorough description of aggression that includes organization, incitement, and acts that violate the United Nations Charter is given in the first paragraph of Article 8bis of the Statute (Jia, 2015). It clarifies that any use of force violating the UN Charter that jeopardizes another state's political independence, territorial integrity, or sovereignty is considered an act of aggression. The Court uses this precise phrase sparingly, although it only affects less extensive international law (Kreß, 2018).

Furthermore, there is no requirement under the amended statute to bring charges of aggression in national courts. Individual reviews of aggression at the ICC are subject to verification that a state committed the aggression and has a particular nature, intensity, and scope that violates the UN Charter (Schabas, 2010). According to the Vienna Convention on the Law of Treaties Article 46(2), a state must present objective proof that it has recognized through good faith and regular practice. This criterion is known as the "manifest" requirement. This provision eliminates suspect cases, and meeting only one requirement is insufficient (Binder, 2013).

Additionally, the circumstances allow for a limited interpretation of armed attacks as aggression. The offender's intention determines the "character" of the act while examining the duration, scope, and tools utilized determines the gravity and scale of the crime. Mens rea does not require understanding that an act violates the UN Charter; it only requires knowledge of the facts (Clark, 2010).

Analyzing the armed attack that Russia conducted during the examined war shows that it was notably serious and spread across a significant area of Ukrainian territory over several months (Blanke & Abdulrahim, 2014). Actions such as invasion, occupation, bombardment, blockade, and the deployment of armed units must meet criteria related to scale, gravity, and character. The main goal is to determine if this attack complies with or transgresses the rights protected by the UN Charter, including the ban on the use of force- a task outlined by Salari and Hosseini (2023). The primary challenge does not stem from definitional uncertainties but rather from the ambiguities associated with jus ad bellum. Consequently, a meticulous examination of Russia's justifications for the attack is essential within the framework of international law, aiming to ascertain whether these actions constitute aggression, as highlighted by Jansen and Zimmermann (2018).

III. JUSTIFICATION OF RUSSIA

Russia keeps attempting to contrast its actions with the illegal wars against Iraq, Libya, and Syria that some Western states have waged in the name of human rights and self-defence. However, past transgressions do not excuse or negate present violations (Yakovenko, 2021). As previously highlighted, both Putin's statement and the document submitted to the ICJ by the Russian representative carry implications regarding Russia's actions under Article 51 of the UN Charter, asserting self-defense and the notion of humanitarian intervention in response to an alleged genocide (Green et al., 2022).

The notion of "Intervention by Invitation" must be thoroughly examined, particularly in view of the Russian president's use of the word "invitation." It is clear that the claims to independence of the two republics must be taken into account when talking about collective self-defense and intervention by invitation (Stahn et al., 2020). The characterization of the incident as hostility hinges on the verification of these allegations. Only after confirming their validity can, it be asserted that there was no apparent breach of the Charter. In such a scenario, the Court would lack jurisdiction *ratione personae* to entertain the case (Khater, 2022).

3.1 Self-defence

The primary contention put forth by Putin and the Russian representative revolves around the assertion of self-defense for Russia and the self-proclaimed governments, citing Article 51 of the Charter. Within this framework, Russia claims anticipatory self-defense, while the Republics assert collective self-defense (Orakhelashvili, 2004).

3.1.1 Self-defence of Anticipatory

The UN Charter explicitly prohibits the use of force, allowing exceptions only for self-defense and Security Council authorization within the framework of collective security (Monono, 2021). The ICJ generally interprets Article 51 restrictively, requiring a significant and extensive armed attack for justification under this article. This approach is necessary to assess factors like necessity and proportionality (Papastavridis, 2016).

Putin mentions in part that military activities are necessary to counter possible threats to Russia's existence and interests from NATO members and Ukraine. Putin's use of the word "possible aggressors" implies that NATO members or Ukraine have not invaded Russia (Dugard & Raic, 2006). This terminology suggests an argument based on anticipatory self-defense, similar to George W. Bush's doctrine. This philosophy, which dates back to the Caroline incident, entails a state taking action to neutralize another state's capabilities and infrastructure that could become a threat in the future (Shuhe, 2022).

Anticipatory self-defense is not sanctioned by the Charter due to the principle of expression *unius est exclusio alterius*. Despite arguments positing subtle changes to the Charter's requirements through subsequent state actions, the likelihood of such alterations remains doubtful (Crawford, 2001). The ICJ has underscored the importance of Article 2(4) and the limitation on employing force in self-defense, as evidenced in decisions like *Armed Activities on the Territory of the Congo* (Salari & Hosseini, 2023).

In response to criticism directed towards the Secretary General's 2005 report, state practice only partially recognizes the right to pre-emptive self-defense against an impending and definitive attack, but anticipatory self-defense is not recognized similarly (Chayes, 1985). Usually, the Security Council is against anticipatory self-defense. Since NATO had minimal military assets stationed along its eastern boundaries and there was no imminent threat of armed attack, Russia's argument that NATO's actions constituted a threat of impending armed attack is unfounded (Zimmermann, 2002).

Putin's reliance on anticipatory self-defense stems from the questionable actions of states in previous cases, such as the invasion of Iraq based on unverified claims. Such actions serve as a pretext for other powers to engage in illegitimate acts in subsequent years (International Court of Justice, 1971).

3.1.2 Collective self-defence

Russia asserts its actions in Ukraine as a Defense of self-proclaimed governments in the Donbas region, citing a recent treaty and recognition of these entities as independent states (Evans & Kristos, 2001). However, the ICJ emphasizes that collective self-defense is only acceptable when a victim state faces aggression and requests Defense, adhering to established rules (Jansen & Zimmermann, 2018).

To legitimize their status as states, it is crucial to establish that the two Republics declared independence with legal grounds (Gray, 2012). While some argue for conditional secession based on a 'safeguard clause' in international law, others dispute this interpretation, emphasizing that secession without the central government's consent is generally deemed illegal (Crawford & Brownlie, 2019).

The concept of 'Remedial Secession,' rooted in the right to self-determination, gained prominence after the ICJ's Kosovo ruling (Lapidot & Hirsch, 1992). This theory asserts that under specific circumstances of severe human rights violations, a subset of inhabitants can resort to secession as a last and necessary solution. The African Commission on Human and People Rights' decisions support this right under special circumstances (Green et al., 2022).

Despite debates on the existence of this right, the situation in the Donbas region might not warrant such extreme measures, especially considering the provisions for autonomy in the Second Minsk Agreement. Russia's criteria for recognizing secession as a last resort in Kosovo are also cited (Srihari et al., 2002).

The priority is placed on international peace and security over concerns for human rights. While atrocities in Kosovo differ from the Donbas situation, the recognition of unilateral declarations of independence by nearly 100 states sets a precedent for potential secessionist movements (Jack & Busvine, 2022).

Even if the two Republics are considered states, their claim of being subjected to an 'armed attack' by Ukraine needs scrutiny (Gattini, 2009). Questions arise about the proportionality and necessity of Russia's prolonged military intervention under the principles of self-defense (Schabas, 2018). Additionally, the absence of distinct borders and reliance on Russia challenges the legitimacy of these entities as independent states (Arcari, 2023). The limited recognition by a few states further questions the validity of their proclaimed independence (Paz, 2017).

3.2 Humanitarian intervention of responsibility to protect

About the ongoing situation involving genocide in Ukraine and Russia's actions over the past eight years, Russia has cited humanitarian intervention as a justification for its attacks (Brando & Morales-Gálvez, 2019). This reasoning is consistent with the idea of the 'responsibility to protect,' according to which military action is acceptable to defend a populace in situations where a state either breaches human rights or cannot stop such abuses. Nonetheless, the ICJ has underlined that using force to defend human rights is inappropriate (Christie, 2010).

Such interventions have been rebranded under the phrase "responsibility to protect," which permits military operations and the violation of a state's sovereignty if it is unable to stop or respond to violations and ethnic cleansing (Banana et al., 2020). This strategy requires other governments to act quickly in coordination with regional organizations when peaceful procedures fail, and the state in issue cannot safeguard its population with agreement from the Security Council (Crawford & Brownlie, 2019).

It's important to note that the Security Council must approve this action to be considered legal; it cannot constitute a new exception to the use of force ban (Highet, 1987). In this particular situation, the claim of

humanitarian intervention is also rejected due to the need for more definitive information regarding the occurrence of the listed crimes and the lack of authorization from the Security Council (Davtyan, 2017).

3.3 *Intervention by invitation*

The president of Russia and their envoy both refer to an invitation that the leaders of the self-proclaimed republics have extended in their speeches to the ICJ (Harris, 1967). This phrase may allude to the legal notion of an "invitation to intervention," which denotes military assistance with prior approval in situations that don't involve direct war (ICJ, 2022).

Though historical viewpoints have changed, the UN Charter, which governs the use of force, does not explicitly include a request to intervene (Shaw et al., 1990). No matter how high the tension was and how much it benefited either side of the fight, the Institut de Droit International initially declared any invitation unlawful. Nonetheless, a 2009 resolution marked a change, suggesting that invitation-only action is legal under international law (Salari & Hosseini, 2023).

Even though it is recognized, legal experts disagree on what makes it legal (Distain, 2017). For example, they do not agree on whether it meets the requirements of state sovereignty and territorial integrity, follows the law of international responsibility, or is a standard exception to the rule that force is illegal because it only applies to a particular state's territory (Hafner, 2009).

A state's sovereignty and authority within international legal restrictions serve as the foundation for the legitimacy of such invitations (Chayes, 1985). As a result, authorized officials may neutralize rebel organizations, endangering the stability of the sovereign by acting with lawful consent. Treaties or case-by-case transfers of this permission are both possible (Sellars, 2016).

According to most scholars, a legitimate invitation necessitates a representation with true sovereignty (Dooley et al., 2021). Yet, the ICJ ruling on the military and paramilitary activities in and against Nicaragua emphasizes the state's latitude in requesting involvement from another state (Dinstein, 2017). The legality of the invitations extended to foreign powers by the self-proclaimed republics is called into doubt due to their non-state status and lack of authority (Nolte, 2010).

Additionally, requests for intervention should generally be made to non-state actors operating on the territory of the state providing them rather than to another state working on its territory (Visser, 2019). Therefore, international law rules consider Russia's claim improper in the current setting (Padded, 2020). According to Art. 8bis of the ICC Statute, the invasion of Ukraine is regarded as an act of aggression and a flagrant violation of the UN Charter. Scholars and 141 UN General Assembly members agree with this assessment (International Law Commission, 2001).

IV. EXERCISE OF JURISDICTION IN ICC

After jurisdiction *ratione personae* are established, the next step is to examine the jurisdictional competence of the ICC. Article 12 of the Statute states that for the Court to have jurisdiction, it must receive a referral from a member state, a request from the Security Council, or a declaration from a non-member state (Arlovski, 2014). Although the suggestion focuses on crimes committed by citizens of member states or their territory, Article 15 bis, paragraph 5 expressly forbids the Court from exercising jurisdiction over crimes committed by citizens of non-member nations or on their territory (Ford, 2015).

Russia and Ukraine are not now members of the International Criminal Court (ICC), and the Security Council has not asked the Court to intervene. According to Akande and Tzanakopoulos (2018), Article 12(3) restricts the Court's authority to disclosures made by Ukraine. The statements that Ukraine made on April 9, 2014, and then further elaborated on appear to establish a foundation for looking into war crimes and crimes against humanity that occurred starting in 2014, including during Russian strikes. In contrast to the Prosecutor's and Court's viewpoints, there are concerns regarding the need for an apparent reference to the crime of aggressiveness (Ochs, 2020).

According to Article 44 of the Court's Rules of Procedure and Evidence, the Registrar must inform the relevant state that the declaration contains acceptance of jurisdiction for crimes under Article 5 and Part 9 provisions (Castillo & Ruiz, 2021). This implies that the jurisdiction the Court's authority goes beyond the offenses listed in the declaration, prohibiting governments from abusing it (Barriga & Blokker, 2017). Article 121(5), applicable to member states, is not violated by extending the Crime of Aggression falls under the jurisdiction of the Court, according to Ukraine's 2015 proclamation. The 2017 amendment protects member states' sovereignty and obligations but does not apply to non-member countries like Ukraine (Jansen & Zimmermann, 2018). Despite the Trial Chamber's reliance on Ukraine's declaration in the Myanmar case, it remains a viable basis for examining the Russian attack (Giuliani, 2015).

Interpreting Article 12(2)(a) broadly allows jurisdiction over cross-border crimes affecting member states, even when committed in a non-member state's territory (Dias, 2022). Article 15 bis, paragraph 5, poses a potential obstacle, but a positive interpretation aligns with the language, enabling the jurisdiction of the Court in matters affecting member states (Høj, 2023).

Proponents of a negative interpretation cite the Monetary Gold principle and Vienna Convention, but a thorough study supports a positive interpretation, affirming the Court's competence as warranted by Ukraine's declaration (International Military Tribunal, 1947).

While objections to the fifth paragraph of Article 15 bis, exist, justifying the Court's competence based on Ukraine's declaration allows investigations to proceed under Court precedent (Dutton and Stereo, 2022). The broadened interpretation of the jurisdiction of the Court aims to increase international pressure upon the aggressor, offering a unique avenue to safeguard humanity and the global community (Butchart, 2022).

In presenting these arguments, referencing Court precedent seeks to defend standards and contribute meaningfully to jurisdiction-related discussions (Luedeman, 2022). This presentation does not intend to establish jurisdiction beyond a reasonable doubt but offers insights and analogies to support the Court's involvement in reviewing the aggressive actions of Russia.

V. RECOMMENDATIONS

Despite jurisdictional challenges outlined in the Statute's Article 15 bis (5), there is a need for diplomatic efforts to encourage Russia and Ukraine both to become participants in the ICC. Advocacy for their membership would enhance the ICC's jurisdiction and facilitate a more comprehensive approach to addressing crimes of aggression. Make changes to the ICC Statute in order to give a stronger and more precise framework for dealing with acts of violence. This may include revisiting and refining the language in Art. 15 bis (5) to ensure clarity and effectiveness in dealing with situations involving non-member states. Advocate for increased international cooperation and diplomatic pressure on Russia to acknowledge and address the allegations of aggression in Ukraine. This could involve engaging with diplomatic channels, multilateral organizations, and the United Nations to bring attention to the situation and encourage compliance with international norms.

Encourage diplomatic dialogue between involved parties to explore peaceful resolutions and address the legal impasse. Facilitate discussions that aim to clarify and resolve differences in legal interpretations, fostering an environment conducive to accountability and justice.

Provide increased support, both politically and financially, to the ICC to strengthen its capacity to handle complex cases of aggression. This includes ensuring that the Court has the resources and expertise necessary to navigate jurisdictional challenges and effectively prosecute crimes.

Foster global awareness about the importance of holding individuals accountable for crimes of aggression. Encourage advocacy efforts to rally international support for addressing such crimes, emphasizing the role of the ICC in ending impunity and preserving international peace and security.

Support ongoing research and analysis into the evolving landscape of international law, especially in relation to acts of aggression. Foster academic and policy discussions to continually refine legal frameworks, taking into account emerging challenges and opportunities for accountability.

By implementing these recommendations, there is a potential to strengthen the International Criminal Court's (ICC) function in prosecuting aggressive crimes and supporting the general upholding of international law thereby fostering a more just and accountable global community.

5.1 Conclusion

The ongoing confrontation between Russia and Ukraine has rekindled debates about how well international law handles violations of the ban on using force. Due to Russia's activities, the ICC was reviewed and the aggression resolution was implemented, which initially gave peace and justice activists hope. This has prompted an investigation into a possible judicial procedure to evaluate the Russian strike in light of the aggressive crime. Because Russia's explanations—which include humanitarian intervention, collective and anticipatory self-defense, and invitation-based involvement—do not hold up to scrutiny in light of established international legal norms, the attack violates the fundamentals of the UN Charter.

The topic has not been brought before the Security Council, neither Russia nor Ukraine are members of the ICC, and thus Ukraine has only made a limited declaration accepting the Court's authority over war crimes and crimes against humanity further complicates matters. In light of this, taking jurisdiction over the case takes work. It is, therefore, essential to closely review the Court's prior rulings on these defenses and how the Trial Chamber interpreted the phrase "occurrence of crime in the territory of the State Party."

They uphold a favourable interpretation of paragraph 5 of Art. 15bis and acknowledge the likely effect of Ukrainian secessionists on decision-making, which confers jurisdiction upon the Court. Even in the unusual event that the ICC's efforts do not result in a conviction for aggression in which they are involved, they exert considerable international pressure on Russian aggressors. Furthermore, it is also noteworthy that the Court has confirmed the occurrence of an act of hostility.

This analysis reveals that nations themselves are the primary source of unbridled violence that violates international law. States that defend themselves violate international law rules because of differing political stances and subjective assessments. States, as primary objects of international law, impose several unjustifiable limitations on the jurisdiction of the Court, such as designating aggression by the adjective "manifest" adjacent

to the Charter infringement. These acts weaken the ability of the Court to identify and prosecute individuals who violate this law.

Suppose the prosecutor and the Court take a limited approach to handling this complex case. In that case, the criminal investigations into the incident might only look into war crimes as well as crimes against humanity. This restricted viewpoint might overlook Russia's transgressions of its duties under many accords, such as the Second Minsk Agreement, the Budapest Agreement, and the UN Charter. Beyond mere symbolism, the definition of aggression in the Statute has significant limitations, as demonstrated by Russia's recent aggression against Ukraine.

A diverse approach is necessary to meet this challenge. I am reevaluating the prosecutor's application of the articles of the Statute and promoting efforts within the Member States Assembly to remove the obstacles preventing the Court from dealing with aggression crimes.

They are investigating the potential for an agreement between Ukraine and the UN to create an ad hoc or hybrid tribunal as a different way to deal with the situation's complexity and maintain long-standing international relations norms by upholding the custom of states refusing to recognize the self-proclaimed administrations in Luhansk and Donetsk. Identifying The civil liability of Russia and realizing that the correct reparations are paid while realising that the issues extend beyond criminal prosecution. To ensure accountability under international law and to fully address the complex issues posed by Russia's activities, it becomes imperative to use these different methods.

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