

ARTICLES

INTERNATIONAL CRIMINAL LAW

Atrocities in Ukraine: crimes, accountability and the way forward

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Introduction

The international community looked on in shock as Russian forces invaded Ukraine, resulting in a bloody ongoing conflict. Despite nations coming together to announce in a clear and almost unanimous voice that this was entirely unacceptable under the law of nations, little progress has been made in either ending the violence or bringing those responsible to justice. The conflict has since raged on, with widespread and well-documented instances of ongoing international crimes committed by both sides. While there has been clear and consistent messaging from Ukraine, its allies and the UN that something needs to be done to ensure accountability, the avenues for achieving it are not clear. As a Permanent Member of the UN Security Council, the Russian Federation sits in a rare position of power within international law; one that allows it to remain isolated from existing systems of international criminal accountability. To overcome this, a change is required in the approach to international criminal prosecution, certainly in relation to the specific situation in Ukraine, but also more generally to ensure a future in which the international community is governed equitably under the rule of law.

Following the highly contested annexation of Crimea in 2014, the Russian Federation has continued to demonstrate its contempt for the principles of international law, via its determination to prevent former Soviet nations forging closer ties with Western States, and ongoing aggression against its neighbours.¹ In early 2022, these policies became more pronounced, with Russia commencing a full-scale invasion of Ukraine, sending forces across their shared borders and through the state of Belarus, in what it called a ‘special military operation’ intended to ‘demilitarize and de-Nazify’ the country.² While Russia may initially have expected a swift victory over its smaller neighbour, this was not to be, with fighting across the country continuing throughout the year, and likely to continue into 2023 and beyond. While finding a peaceful resolution to the conflict itself, together with restoring and maintaining Ukraine’s territorial integrity, are all of vital importance, so too is seeking accountability for those criminal acts that have been committed in Ukraine, as a demonstration of the international community’s commitment to justice. Seeking such accountability will be the focus of this brief article. As such, this article will leave aside any legal assessment of the military campaign as a whole, instead focussing on the potential for

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¹ Russia’s military action against both Ukraine in 2014 and 2022 and Georgia in 2008 have demonstrated its willingness to breach the fundamental principles of the UN Charter on the use of force to prevent neighbouring states joining organisations like NATO.

² Report of the Independent International Commission of Inquiry on Ukraine, A/77/533 (18 October 2022), para. 24.

prosecution for the core international crimes of aggression, war crimes, crimes against humanity and genocide.

Although from the very first Russian operations in Ukraine in 2014 the 2022 invasion gained significant international attention, the Prosecutor of the International Criminal Court (ICC) has been conducting preliminary examinations of the situation, initially focussing on the Crimean Crisis and the period that followed within the annexed region.³ Based on this, the Prosecutor has concluded that there is both jurisdiction for the ICC to investigate and potentially prosecute, and that crimes within the Court's remit had been committed.⁴ Following this, and coming just days after Russia's 2022 invasion began, the Prosecutor announced their intention to seek authorisation to open a full ICC investigation into the situation, proceeding to do so after an unprecedented number of States Parties to the ICC referred the situation to the Court.⁵ With that investigation now underway, there appears to be real prospects for individual criminal accountability brought against those most responsible for the atrocities that have seemingly been committed in Ukraine since 2014. However, as will be demonstrated in this article, genuine accountability could yet prove to be beyond the reach of an ICC, which remains heavily restricted by the provisions of its founding document. In fact, the Statute of the International Criminal Court (Rome Statute) is so restrictive that the leaders of well-placed nations like Russia - those most to blame for waging this war and thus for enabling the commission of atrocities within that context - are placed beyond its reach. Instead, the only individuals that will realistically face the prospect of ICC justice will be those much further down the chain of command. While those individuals would still be directly or otherwise responsible for the crimes committed, and certainly deserving of facing accountability, they would be far from the only, or indeed the most significant, targets for international justice.

This article will consider the extent of international criminality in Ukraine, using key UN reports to outline the crimes that have been committed during the ongoing conflict. It will then analyse the jurisdiction of the ICC, assessing the legal capacity of the Court to seek prosecutions for the reported atrocities. Based on these findings, and the determination that the ICC's jurisdiction places those most responsible for the crimes committed against Ukraine beyond its reach, the final section will discuss potential avenues for securing much needed accountability. This could include through changes in leadership at the state or UN level, through established powers of the UN General Assembly (UNGA), or through the establishment of a new internationalised aggression tribunal capable of bringing the Russian leadership to justice for the conflict that has unleashed untold misery upon the people of Ukraine.

Crimes in Ukraine

Russia's invasion of Ukraine in February 2022 set off a flurry of discussion and concern over what can be done, both to end the conflict and to bring those responsible to justice. There is little doubt that the invasion itself constitutes an act of aggression, confirmed in

³ Fatou Bensouda, Statement of the Prosecutor on the conclusion of the preliminary examination in the situation in Ukraine (11 December 2020) available at <<https://www.icc-cpi.int/news/statement-prosecutor-fatou-bensouda-conclusion-preliminary-examination-situation-ukraine>> accessed 21/11/2022.

⁴ *Ibid.*

⁵ Karim A.A. Khan, Statement of ICC Prosecutor on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation (2 March 2022) <<https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-39-states-ukraine-receipt-referrals-39-states>> accessed 21/11/2022.

numerous UNGA Resolutions on the issue.⁶ As is often the case, however, aggression does not come alone and instead gives rise to the commission of various other international crimes. Since the beginning of the invasion, numerous reports have emerged that indicate widespread commission of the world's most serious international crimes. Most recently, in October 2022, a report of the Independent International Commission of Inquiry on Ukraine was transmitted to the UNGA, detailed its findings in relation to events in the country during the first month of the conflict, including indications of numerous war crimes, crimes against humanity and other abuses in the country.⁷ Under its Human Rights Council mandate, the Commission's investigation focussed on the Ukrainian regions of Kyiv, Chernihiv, Kharkiv, and Sumy, describing the human rights situation stemming from the Russian aggression. The 17-page report delivered details a wide range of violations of both human rights and humanitarian law, primarily by Russian forces; although some elements highlighted that Ukrainian forces had also committed acts amounting to war crimes, including the torture and execution of persons *hors de combat* and prisoners of war.⁸ Of significant concern are the various instances of indiscriminate attack, including the use of cluster munitions, the intentional killing and endangering of civilians, as well as widespread executions, arbitrary detention, torture and sexual violence against the civilian population generally, and children specifically. This report highlights not only the extent of the violations being committed in the country from the very outset of the conflict, but also the absolute need for accountability. As noted in the concluding paragraphs, 'the impact of these violations on the people of Ukraine is immense', and those that have suffered want and expect accountability for the atrocities committed.⁹

Similar findings were reported from other UN sources, with the Office of the High Commissioner for Human Rights (OHCHR) detailing serious ongoing human rights and humanitarian law violations in the wider period February to July.¹⁰ As with the Commission's report, the OHCHR details various abuses committed by both Russian and Ukrainian forces, including the intentional targeting of civilians, torture, rape and other forms of sexual violence, extrajudicial executions and unlawful detention.¹¹ The report also describes cases involving the mistreatment and killing of prisoners of war and those rendered *hors de combat*.¹² Many of these incidents could amount to war crimes committed by both parties in the conflict. Other acts, such as the forced recruitment of Ukrainians into Russian-affiliated armed forces, could add to the growing list of international crimes perpetrated in the country.¹³ More than simply confirming and expanding on the findings of the Commission's report, however, the OHCHR report also documents troubling shortcomings and abuses in Ukraine's approach to prosecution of Russian forces. These include denial of several basic fair trial guarantees, including methods of inducing confessions, as well as violations of the presumption of innocence and the principle of equality of arms between the prosecution and defence.¹⁴ There are also suggestions that Russian forces have been prosecuted for their participation in the conflict, breaching their

⁶ G.A. Res. ES11/1 (18 March 2022); G.A. Res. ES11/4 (13 October 2022); G.A. Res. ES11/5 (15 November 2022).

⁷ Report of the Independent International Commission of Inquiry on Ukraine (n.1).

⁸ Ibid, 11, para. 61 and 14, paras. 86-87.

⁹ Ibid, 17, para. 110.

¹⁰ Office of the High Commissioner for Human Rights, 'Report on the Human Rights Situation in Ukraine: 1 February to 31 July 2022' (27 September 2022).

¹¹ Ibid, 15-22.

¹² Ibid, 22-25.

¹³ Ibid, 25-26, paras. 75-76.

¹⁴ Ibid, 32-33, paras. 98-100.

combatant privilege.¹⁵ Certainly, denying prisoners of war a fair trial is considered a war crime under the Rome Statute.¹⁶ However, in addition, the inability or unwillingness of a state to carry out genuine domestic prosecutions is also a requirement for the ICC to exercise jurisdiction over the case.¹⁷ As will be discussed in the next section, this rule of complementary jurisdiction ensures that domestic states have primary responsibility for prosecutions while enabling the Court to step in where necessary to ensure that justice is delivered.¹⁸ As a general rule, domestic prosecutions of at least low-level offenders should be the go-to method of securing accountability, with the ICC acting only in a complementary capacity.¹⁹ However, there are serious questions over whether Ukraine's institutions are in fact capable of carrying out that role. The OHCHR calls upon the international community to support international and national efforts to ensure accountability for all violations committed in Ukraine.²⁰ This relates not only to the willingness and ability of international institutions like the ICC to carry out prosecutions where necessary, but also to require international assistance in monitoring the situation and ensuring evidence is secured, as well as ensuring that the vital interests of justice are maintained.

In addition to potential war crimes and crimes against humanity, others have suggested that what is being carried out in Ukraine goes beyond the bounds of a mere armed conflict, being instead a far more sinister operation intended to destroy the very idea and existence of Ukraine and its people. In the International Court of Justice challenge of Russia's claims that its invasion was justified as a means to stop a genocide in the country, Ukraine's agent has suggested that Russia has used the Genocide Convention to justify 'abusing and violating that Convention in order to kill Ukrainians and destroy Ukraine.'²¹ While not explicit, the clear indication is that, contrary to Russia's claim that Ukraine was committing genocide in its eastern regions, it is in fact Russia that is responsible for genocide against the Ukrainian people. Others have been more explicit on this point, including US President Joe Biden, suggesting that President Putin was committing genocide and was 'trying to wipe out the idea of even being Ukrainian.'²² This is far from the only accusation, with others pointing towards the same or similar conclusions as the conflict draws on, recognising that Russia's actions could amount to both incitement to commit genocide and to acts intended to destroy the Ukrainian people.²³ These claims have drawn their conclusions from a report published in May 2022, which makes the case for Russia's culpability for genocide, referencing the legal duty of all states under the Genocide Convention to act to prevent it.²⁴

¹⁵ Ibid, 33, para. 101.

¹⁶ Rome Statute of the International Criminal Court (Rome, 17 July 1998) UN Doc. A/CONF.183/9 of 17 July 1998, entered into force 1 July 2002, Art. 8(2)(a)(vi).

¹⁷ Rome Statute, Art. 17.

¹⁸ Douglas Guilfoyle, *International Criminal Law* (OUP, 2016), 109-110.

¹⁹ Antonio Cassese *et al*, *Cassese's International Criminal Law*, 3rd ed. (OUP, 2013), 296-298

²⁰ Report on the Human Rights Situation in Ukraine (n.10), 48, para. 158

²¹ Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Public Sitting, ICJ Rep. 2022 (March 7), 15, para. 16.

²² Julian Borger, 'Joe Biden Accuses Vladimir Putin of Committing Genocide in Ukraine' *The Guardian* (Washington, 13 April 2022) <<https://www.theguardian.com/world/2022/apr/13/joe-biden-accuses-vladimir-putin-of-committing-genocide-in-ukraine>> accessed 20/11/2022.

²³ Vittorio Bufacchi, 'War crimes in Ukraine: Is Putin responsible?' (Published online 2022) *Journal of Political Power*, 1.

²⁴ Yonah Diamond, 'An Independent Legal Analysis of the Russian Federation's Breaches of the Genocide Convention in Ukraine and the Duty to Prevent' (New Lines Institute for Strategy and Policy/Raoul Wallenberg Centre for Human Rights, 2022) <<https://newlinesinstitute.org/wp-content/uploads/English-Report-1.pdf>> accessed 21/11/2022.

While the commission of atrocities in any form are of course to be prevented, condemned, and punished, the crimes discussed above are of particular note given that they are the focus of international criminal law, and more importantly, are capable of being the subject of prosecutions before the ICC.²⁵ This means that individuals guilty of perpetrating these horrific acts could face international criminal justice, being prosecuted for their actions and sentenced to prison terms in accordance with the Rome Statute. Moreover, international criminal law recognises that crimes of the nature and scale of those committed in situations such as this are not committed in isolation, with various other actors playing a significant role in the commission of the crime itself or in producing the situation that allows for it. It is here that we find the opportunity to seek prosecution of those at the highest levels of a state's command structures, something sought by Ukraine and its allies. As will be explored in the next section, however, the regime created by the Rome Statute places the ICC in a difficult position: being the supposed champion of accountability for these types of international crimes, yet not truly equipped with the authority and jurisdictional reach to be capable of delivering on that promise.

Prosecution at the ICC

The Rome Statute establishes a clear jurisdictional regime for the Court to adhere to, setting out the circumstances and crimes over which it is able to preside, as well as the three 'trigger mechanisms' through which cases can be brought before it.²⁶ Like many international institutions, the drafting of the Statute involved significant compromise, leaving the Court's jurisdiction necessarily narrow so as to better encourage its widest possible acceptance by states.²⁷ However, this compromise has also left the Court with a much more limited reach than would likely be expected from an institution charged with ending impunity for the commission of international crimes. These problems are well illustrated in the case of Ukraine, where the Court is being looked to by the world to respond to the atrocities taking place. The reality, however, is that the Court will in all likelihood struggle to live up to the expectations of the international community. Several aspects of the jurisdictional regime in particular can be highlighted in this situation as essentially nullifying the Court's ability to offer any real accountability for those most responsible for the conflict and resulting crimes.

Before considering the matter of wider prosecutions, it seems sensible to first deal with the matter of aggression as the initial crime and as one with its own system within the Rome Statute (as amended by the 2010 Kampala Amendments).²⁸ Under those amendments, the Court gained jurisdiction over the crime of aggression, a jurisdiction that was activated on 17 July 2018.²⁹ However, even more so than for other crimes, the ICC's jurisdiction over aggression is severely restricted, with Article 15 *bis* (5) clearly indicating that aggression committed by nationals of or on the territory of non-state parties is not covered. Thus, even if Ukraine were to become a member of the ICC and accept its jurisdiction over aggression, Russia and its nationals would still not be subject to prosecution for the crime since the amendments do not allow for the nationals of non-state parties to be prosecuted. As Akande and Tzanakopoulos explain, Article 15 *bis* (5) excludes aggression committed by a national

²⁵ Rome Statute, Art. 5.

²⁶ Rome Statute, Art. 13.

²⁷ Antonio Cassese *et al* (n.19), 263.

²⁸ Amendments on the crime of aggression to the Rome Statute of the International Criminal Court, Doc. RC/Res.6, 11 June 2010 (adopted by consensus at the Review Conference of the Rome Statute, held in Kampala, Uganda).

²⁹ Resolution on the Activation of the Jurisdiction of the Court over the Crime of Aggression, Doc. ICC-ASP/16/Res.5, 14 December 2017 (adopted by consensus at the ICC Assembly of States Parties).

of a non-party on the territory of a state party, meaning that ‘States parties cannot do anything that would allow the ICC to exercise jurisdiction over a crime of aggression allegedly committed by nationals of non-parties on the territory of states parties.’³⁰ As a result, Russia’s blatant crime of aggression would be left out of any future ICC prosecutions.

Beyond aggression, however, there remain prospects for the Court to seek prosecutions for instances of the three other core crimes. To begin establishing whether such prosecutions would be possible, the preconditions of ICC jurisdiction establish that the crimes in question must be committed by a national of a Member State, or on their territory.³¹ As noted, neither Ukraine nor the Russian Federation are Member States of the ICC, so there is an immediate impediment to the exercise of jurisdiction. However, the Statute does allow for states to provide *ad hoc* jurisdiction to the Court in specific circumstances.³² This is the case in Ukraine, with the country lodging two such declarations: the first providing jurisdiction over crimes committed in Ukraine between 21 November 2013 and 22 February 2014;³³ the second extending this time limit, with an open-ended allowance from 20 February 2014 onwards.³⁴ This *ad hoc* authorisation for the Court to act was taken up by the Prosecutor, exercising their *proprio motu* power to investigate.³⁵ As noted above, this in turn led to the determination that crimes appeared to have been committed, and that a full investigation was warranted. Generally, the Prosecutor would then have been required to gain authorisation to proceed from the Pre-Trial Chamber, but this was avoided through the referral of the situation to the Court by some 43 States Parties.³⁶ As such, the door is certainly open for prosecutions to take place, with significant international support for the Court to act.

Nonetheless, an obvious flaw remains in that the Russian Federation has not provided any such authority, nor, as things currently stand, is it likely to do so. This means that the Court’s jurisdiction over Russian nationals will be a hotly contested issue. As some have argued, the ICC cannot exercise its jurisdiction over the nationals of non-Parties, regardless of other considerations, relying on the customary principle that treaties cannot bind states that have not consented to them.³⁷ According to this line of thinking, a state’s nationals are an extension of the state itself, and so a lack of consent from that state leads to a lack of jurisdiction over its nationals, wherever they may be located.³⁸ As such, in the case of Ukraine, Russia’s nationals would be shielded from prosecution at the ICC, simply because Russia does not accept the Court’s jurisdiction. There are those, of course, that disagree with this reading of Article 12 of the Rome Statute. Instead, they assert that ‘non-party nationals are subject to ICC jurisdiction when they have committed a crime on the territory of a state

³⁰ Dapo Akande and Antonios Tzanakopoulos, ‘Treaty Law and ICC Jurisdiction over the Crime of Aggression’ (2018) 29(3) EJIL, 939-959, 954-955

³¹ Rome Statute, Art. 12(2)

³² Rome Statute, Art. 12(3)

³³ Declaration by the Government of Ukraine submitted to the Registrar of the ICC (9 April 2014) <<https://www.icc-cpi.int/sites/default/files/itemsDocuments/997/declarationRecognitionJurisdiction09-04-2014.pdf>> accessed 23/11/2022

³⁴ Second Declaration by the Government of Ukraine submitted to the Registrar of the ICC (8 September 2025) <https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf#search=ukraine> accessed 23/11/2022

³⁵ Rome Statute, Art. 13(3) and Art. 15

³⁶ ‘ICC Investigation: Ukraine’ <<https://www.icc-cpi.int/ukraine>> accessed 20/11/2022

³⁷ Jay Alan Sekulow and Robert Weston Ash, ‘The Issue of ICC Jurisdiction over Nationals of Non-Consenting, Non-Party States to the Rome Statute: Refuting Professor Dapo Akande’s Arguments’ (2020) 16(2) South Carolina Journal of International Law and Business, 1-65, 3

³⁸ *Ibid*, 28.

that is a party to the ICC Statute or has otherwise accepted the jurisdiction of the Court with respect to that crime.³⁹ This view of the legal position better reflects the reality of criminal justice and the purposes of the ICC, removing the prospect of nationals of states like Russia carrying out criminal acts on the territory of another nation with no prospect of criminal repercussions. Further, in answer to the US' primary argument that a treaty cannot create obligations for the non-party state, Professor Akande notes that:

...there is no provision in the ICC Statute that requires non-party states (as distinct from their nationals) to perform or to refrain from performing any actions. The Statute does not impose any obligations on or create any duties for non-party states. To be sure, the prosecution of non-party nationals might affect the interests of that non-party but this is not the same as saying that obligations are imposed on the non-party.⁴⁰

The result of this is that the ICC can, and indeed should, seek to prosecute individuals that commit offences on the ground in Ukraine, whether Russian or Ukrainian. However, in all likelihood, it means that those most responsible for the situation, both military and civilian leaders, would be out of reach since they would not have committed their offences on the territory of the consenting state. That said, there does remain the potential for seeking prosecution of such individuals for linked offences in the realm of complicity, although bringing those persons before the Court would be a highly problematic prospect.⁴¹

Of course, the drafters of the Rome Statute did not leave matters purely in the hands of the states themselves to dictate the fate of international criminals. The Rome Statute does leave room for a more complete means of placing non-members before the Court via the UN Security Council. The Council's referral power is in fact vested in Chapter VII of the UN Charter, under which it can declare any situation a threat to that international order and determine what measures are to be taken to resolve it.⁴² This power is effectively translated into the Rome Statute, confirming that the Court can exercise jurisdiction over a situation referred to it by the Council under its Chapter VII powers.⁴³ Were such a circumstance to arise, the country in question, member or not, would be bound to accept the Court's jurisdiction under international law, with the legal authority stemming from the UN Charter. This is effectively the only route through which wider accountability for non-States Parties is possible. Unfortunately, there is again the unsurmountable block to this avenue - the Russian Federation's Permanent Membership in the Security Council. Since the passing of any decision of the Council requires the absence of a negative vote from the five Permanent Members, Russia is able to block any such referral, nullifying the Security Council's capacity to refer the situation and preventing prosecutions.⁴⁴

Finally, as mentioned previously, the ICC's role is complementary to national jurisdictions, meaning that the Court can only prosecute where a State is unwilling or unable to genuinely do so itself.⁴⁵ This principle ensures that states maintain primary responsibility for criminal prosecutions, maintaining their sovereignty while also increasing the efficiency and

³⁹ Dapo Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' (2003) 1(3) *Journal of International Criminal Justice*, 618-650, 619.

⁴⁰ *Ibid.*, 620.

⁴¹ 'Territorial Jurisdiction of the International Criminal Court over the Russian Leadership: Locus Delicti in Complicity Cases' (*EJIL: Talk!*, 24 March 2022) <<https://www.ejiltalk.org/territorial-jurisdiction-of-the-international-criminal-court-over-the-russian-leadership-locus-delicti-in-complicity-cases/>> accessed 23/11/2022.

⁴² UN, *Charter of the United Nations* (24 October 1945) 1 UNTS XVI [UN Charter], arts. 39 & 41.

⁴³ Rome Statute, art. 13(b).

⁴⁴ UN Charter, Art. 27(3).

⁴⁵ Rome Statute, Art. 17(1)(a).

effectiveness of those proceedings that do come to the Court.⁴⁶ As such, for the Ukrainian situation to be within the remit of the ICC it would need to be assessed whether there are ongoing investigations or prosecutions of the crimes in Ukraine, and whether the state is genuinely unwilling or unable to carry those out.⁴⁷ Since prosecutions for war crimes have already begun in Ukraine, with thousands of investigations into allegations of atrocities being investigated, it seems on the surface that the domestic institutions are in fact available and capable of carrying out their role.⁴⁸ This effectively negates the need for the ICC to step in, and in accordance with the complementarity principle indeed prevents it from doing so. However, the question is really, whether those institutions are able to carry out that role *genuinely*.

As noted above, serious questions have already been raised in relation to the fairness and validity of prosecutions seen in Ukraine in the initial stages of the conflict. Further concerns have been raised, highlighting the growth in anti-Russian sentiment as a further impediment to fairness, as well as the understandable prioritisation of reconstruction after the war, leaving cases unheard.⁴⁹ Others highlight that it is unlikely that any prosecutions of Russian nationals, or even attempts of the same, would take place in Russia itself.⁵⁰ Meanwhile, the potential that captured Ukrainians will face show trials in Russia for their participation in the conflict is very real, with a number of individuals already charged.⁵¹ This leads to the conclusion that the ICC does have reasonable grounds to exercise its jurisdiction over the situation, though there will no doubt be challenges to that standing. Regardless, even with the ICC taking the situation on, it will still fall to Ukrainian courts to consider the vast majority of the minor cases, with the international court prioritising only those considered most responsible for any atrocities committed.

While there are undoubtedly other obstacles here, these fundamental gaps in the reach of the ICC and the substantial obstacles and challenges it would need to overcome, already leave the prospect of international prosecutions at best tenuous. Certainly, there are strong arguments to suggest that, in principle at least, the Court can and should act to bring prosecutions. However, without drifting beyond its own boundaries and ultimately undermining the already shaky legitimacy the Court has in the eyes of some of the world's most powerful nations, any prosecutions brought would be limited to those on the ground in Ukraine, leaving the most responsible individuals in the political and military leadership of the Russian state unconcerned. Meanwhile, the crime of aggression from which all of the other crimes have stemmed is left entirely beyond the ICC's grasp. Therefore, it is suggested that alternative means for securing accountability are needed, with various forms of the same already being suggested.

⁴⁶ Robert Cryer, Darryl Robinson, Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (CUP, 2019), 155.

⁴⁷ *Ibid*, 156-159.

⁴⁸ Gaiane Nuridzhanian, 'Prosecuting war crimes: are Ukrainian courts fit to do it?' (*EJIL:Talk!*, 11 August 2022) <<https://www.ejiltalk.org/prosecuting-war-crimes-are-ukrainian-courts-fit-to-do-it/>> accessed 25/11/2022.

⁴⁹ Giulia Lanza, 'The Fundamental Role of International (Criminal) Law in the War in Ukraine' (2022) 66(3) *Orbis*, 424-435, 434.

⁵⁰ *Ibid*, 434.

⁵¹ 'Ukraine war: Russian investigator says 92 Ukrainians charged' *BBC News* (25 July 2022) <<https://www.bbc.co.uk/news/world-europe-62287502>> accessed 23/11/2022; Robert Goldman, 'War crimes trial of Russian soldier was perfectly legal – but that doesn't make it wise' (*The Conversation*, 23 May 2022) <<https://theconversation.com/war-crimes-trial-of-russian-soldier-was-perfectly-legal-but-that-doesnt-make-it-wise-183586>> accessed 23/11/2022.

The way forward

With widespread calls for international criminal prosecutions to take place over Ukraine, which could realistically go unanswered, there is a clear need for options. While it would be ideal for the existing international criminal institution to prove its value here, the accountability gap inherent in the ICC system is all too clear and difficult to navigate around. Of course, although seemingly unlikely at present, one resolution to this would be for a complete change of leadership in the Russian state. As Vasiliev points out, ‘no regime, however autocratic and violent, is eternal or invulnerable.’⁵² There is, therefore, some chance, though admittedly small, that the current Russian leadership could face justice with the blessing of a future one. This would also bring with it the possibility of UNSC referral of the situation to the ICC, including the crime of aggression. However, any potential for this is obviously far off and unlikely, an extreme case of wishful thinking, despite remaining one of the simpler solutions to this issue.

In a similar vein, a potential solution to the frozen UN systems would be to take the drastic but, in the author’s opinion, much-needed step of reforming the structure and standing of States in the UNSC. There are several potential avenues for this, whether through the removal of Russia’s Permanent Membership,⁵³ the limiting or removal of the veto power, or the vesting of powers in the UNGA to act in the face of a frozen Council. Again, on the face of things none of these options seem particularly realistic given Russia’s current position within the organisation and the significant hurdles that would need to be overcome for real change to take place. Nonetheless, the final option is not only the most plausible, but is in fact one that already has already been addressed, with a procedure in place.

The initial step towards overcoming the hold of the Permanent Membership on the Security Council, and by extension the whole international community, was taken some time ago, with power shifting to the UNGA in the face of Council paralysis as the holder of the secondary responsibility for maintaining international peace and security. The ‘Uniting for Peace’ procedure was adopted in 1950 following the USSR’s vetoing of draft resolutions concerning the Korean War.⁵⁴ Under UNGA Resolution 377 (V), where there is a lack of unanimity among the Permanent Members, leading to a failure of the Council ‘to exercise its primary responsibility for the maintenance of international peace and security’, the Assembly is empowered to ‘consider the matter immediately with a view to making appropriate recommendations to members for collective measures...to maintain or restore international peace and security.’⁵⁵ While a significant power shift within the UN, offering both a way around a frozen UNSC and better recognition of the UNGA’s responsibility over peace and security, the Uniting for Peace process has only been used a handful of times

⁵² Sergey Vasiliev, ‘Aggression against Ukraine: Avenues for Accountability for Core Crimes’ (*EJIL: Talk!*, 3 March 2022) <<https://www.ejiltalk.org/aggression-against-ukraine-avenues-for-accountability-for-core-crimes/>> accessed 23/11/2022.

⁵³ An option being called for by Ukraine and by some within the US government; Jack Detsch and Amy Mackinnon, ‘Congress Wants to Boot Russia From U.N. Security Council’ *Foreign Policy* (14 December 2022) <<https://foreignpolicy.com/2022/12/14/congress-russia-un-security-council-putin-ukraine-war-biden-helsinki-commission/>> accessed 18/12/2022; As noted, however, under the UN Charter, there is no procedure for removing a Permanent Member other than to remove the state from the UN entirely, which would anyway require Russia’s agreement as a Permanent Member of the UNSC; UN Charter, Art. 6

⁵⁴ Ved P. Nanda, ‘The Security Council Veto in the Context of Atrocity Crimes, Uniting for Peace, and the Responsibility to Protect’ (2020) 52(1) *Case W Res J Int’l L*, 119-141, 135.

⁵⁵ G.A. Res. 377(V) (3 November 1950), 10.

since its inception, otherwise existing in relative obscurity.⁵⁶ As Carswell suggests, this is likely due to the realisation of the Permanent Membership that the resolution's impact on their veto power would threaten their individual sovereign interests, despite it being a valuable 'safety valve' in maintaining international peace and security.⁵⁷ It is situations like Ukraine that clearly illustrate this, starkly demonstrating the dangers of a system predicated on the willingness of a few powerful nations to take the necessary steps to ensure the safety and security of all.

The conflict in Ukraine has reignited debates on what can be done where the Security Council is frozen in the face of the actions of one of its own Permanent Members. It is therefore unsurprising that Uniting for Peace was almost immediately activated, leading to the adoption of several UNGA Resolutions with different effects. The first of note is Resolution ES-11/1, adopted 18 March 2022, which condemned the Russian invasion of Ukraine as a clear violation of Article 2(4) of the UN Charter and called for immediate cessation and withdrawal. The Resolution also reaffirmed the inviolability of Ukraine's territory and the illegality of the acquisition of territory through force, rejecting Russia's declarations in relation to the status of Ukraine's eastern regions and demanding they be reversed.⁵⁸

This strong rejection of both Russia's policies and its stranglehold over the UNSC demonstrated in no uncertain terms that the international community was not willing to allow a Permanent Member to be shielded by their veto power, something that has since been reasserted in Resolution ES-11/4.⁵⁹ Nonetheless, while these documents both provided strong condemnations neither went further to actually taking direct action to hold Russia accountable for its actions. That came in the final Resolution of the 11th Emergency Session, Resolution ES-11/5, under which the UNGA declared that Russia 'must be held to account for any violations of international law in or against Ukraine. This includes its aggression in violation of the Charter of the United Nations as well as any violations of international humanitarian law and international human rights law'.⁶⁰ The Resolution called for the establishment of an international mechanism for reparation, as well as an international register of damage to record evidence and claims' information on damage, loss or injury caused by Russia's wrongful actions.⁶¹ This has been welcomed as a positive step towards accountability for the Russian state, though is still far away from individual accountability for those responsible for the conflict and resulting atrocities.

In terms of more wide-reaching impacts, Russia's vetoing of UNSC draft resolutions has also led to a slight shift in the balance of power at the UN in the form of Resolution 76/262. A direct result of efforts by Lichtenstein, the Resolution recalls the Assembly's and the Council's roles in the maintenance of international peace and security, establishing a new system whereby a meeting of the General Assembly is to be called within 10 working days of the casting of a veto by one or more permanent members of the Security Council.⁶² This means that whenever a veto is cast, the UNGA will automatically meet to debate the issue and decide on necessary action, preventing the Permanent Member's from effectively

⁵⁶ Andrew J. Carswell, 'Unblocking the UN Security Council: The Uniting for Peace Resolution' (2013) 18(3) *Journal of Conflict and Security Law*, 453-480, 458-459.

⁵⁷ *Ibid*, 456.

⁵⁸ G.A. Res. ES11/1 (18 March 2022), 3.

⁵⁹ G.A. Res. ES11/4 (13 October 2022).

⁶⁰ G.A. Res. ES11/5 (15 November 2022), 2.

⁶¹ *Ibid*, 2.

⁶² G.A. Res. 76/262 (28 April 2022), 1.

ending conversations on serious international issues. While hardly a dramatic restructuring of the system, this new procedure is a step in the right direction, again demonstrating the need for reform that better enables the international community to respond to challenges such as that in Ukraine. Complete overhaul, however, is a much more remote possibility, meaning that true accountability over Ukraine will need to come from elsewhere.

Perhaps a far more realistic option could still come at the international level, even without significant changes to the current status quo. In the face of an inaccessible ICC, many, including Ukraine, have been proposing an alternative criminal justice institution, one that is empowered to prosecute the crime of aggression, which falls outside of the limited remit of the ICC described above.⁶³ This concept has been compared to the tribunals set up after WWII, and in response to atrocities committed in the former Yugoslavia and Rwanda in the 1990s, although the more apt comparison for such a tribunal may be the internationalised tribunals that have been established by agreement between states and UN institutions.⁶⁴

This proposed tribunal would be established for the sole purpose of investigating, prosecuting and punishing the international crime of aggression committed against Ukrainian, winding down and then closing once this role has been fulfilled. In their report prepared for the European Parliament, Corten and Koutroulis suggest that there are two possibilities for this: a tribunal established under the powers of the UN; or one established by agreement between Ukraine and either an international organisation or other states.⁶⁵ Both have their problems, with the primary lingering questions being how such institutions could be legally established, and how they would be granted jurisdiction over Russia. For the sake of this contribution, it is the former possibility that is considered as the most plausible and likely to succeed. While agreements with other institutions or states could foster the required result,⁶⁶ the need for a truly international approach lies not only in the practical matter that head of state immunity is avoided in international courts,⁶⁷ but also the symbolic need for justice to be done on behalf of an international community universally impacted by the invasion of Ukraine.⁶⁸ There is also the crucial advantage that a limited

⁶³ Patrick Wintour, 'Russian war crimes draft resolution being circulated at the UN' *The Guardian* (4 December 2022) <<https://www.theguardian.com/law/2022/dec/04/russian-war-crimes-draft-resolution-circulated-un-ukraine-zelenskiy>> accessed 18/12/2022.

⁶⁴ Particularly relevant examples being the Special Court for Sierra Leone; Extraordinary Chambers in the Courts of Cambodia; Special Tribunal for Lebanon, among others.

⁶⁵ Olivier Corten and Vaïos Koutroulis, 'Tribunal for the crime of aggression against Ukraine - a legal assessment' (*European Parliament*, 2022), 14; a third conceivable option posed in the report is that a case could be referred to the ICC through the Uniting for Peace system discussed above, but such a thing would require significant flexibility in the interpretation of established international law, 20-21.

⁶⁶ Corten and Koutroulis discuss the possibility of agreements with the Council of Europe, EU and other states as potential avenues.

⁶⁷ Claus Kreß, *Preliminary Observations on the ICC Appeals Chamber's Judgment of 6 May 2019 in the Jordan Referral re Al-Bashir Appeal* (Torkel Opsahl Academic EPublisher, 2019), 13.

⁶⁸ Oona Hathaway, 'The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part I)' (*Just Security*, 20 September 2022) <<https://www.justsecurity.org/83117/the-case-for-creating-an-international-tribunal-to-prosecute-the-crime-of-aggression-against-ukraine/#:~:text=The%20Case%20for%20Creating%20the%20Tribunal%20through%20an,Nations%2C%20on%20the%20recommendation%20of%20the%20General%20Assembly>> accessed 15/12/2022; Astrid Reisinger Coracini and Jennifer Trahan, 'Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine (Part VI): On the Non-Applicability of Personal Immunities' (*Just Security*, 8 November 2022) <<https://www.justsecurity.org/84017/the-case-for-creating-a-special-tribunal-to-prosecute-the-crime-of-aggression-committed-against-ukraine-part-vi-on-the-non-applicability-of-personal-immunities/>> accessed 15/12/2022.

institution of this kind might be more capable of gaining the support of vital states such as the USA, that are generally more hostile towards the role of the ICC.⁶⁹

As such, the suggestions put forward and supported here are for the UNGA to authorise the UN Secretary General to begin negotiating an agreement with Ukraine for the establishment of a new tribunal, a concept not without precedent.⁷⁰ This tribunal would be entirely focussed on prosecuting those leaders in Russia most responsible for the crime of aggression that are currently beyond the reach of the ICC. Meanwhile, the agreement should also seek to underline the role of the ICC in prosecuting those within its jurisdictional scope and responsible for the other international crimes outlined above.⁷¹ This would avoid an unnecessary jurisdictional crossover or reallocation of funds, and, crucially, preserve the validity of the ICC and the role of both the Court and states in the prosecution of war crimes, crimes against humanity and genocide. This would of course mean that many of those responsible for such crimes would remain effectively immune from prosecution, with the ICC and Ukrainian courts unable to exercise jurisdiction or secure their surrender from Russia. It is also questionable whether this proposed aggression court would fare any better on that front. Vasiliev points out that it is again inconceivable that Russia or indeed Belarus would surrender their leaders to such an institution, save for in the case of dramatic regime change. This is something that would in any case make the whole exercise unnecessary; given that a regime open to such a step would be more likely to cooperate with the ICC, potentially to the point of self-referral.⁷² Nonetheless, an aggression tribunal would at least go some way towards plugging the accountability gap in the ICC, demonstrating the resolve of the international community in ensuring that the crime of aggression, which has given rise to all the other atrocities committed in Ukraine, does not go unpunished. It would then be for the international community, potentially through the UNGA's Uniting for Peace procedure discussed above, to secure the compliance of those nations in the interest of international peace and security.

Conclusions

What is abundantly clear when discussing Ukraine is that the international community is facing an accountability crisis for which there are no clear or simple solutions. Whether crimes have been committed in Ukraine, both in the form of aggression stemming from the invasion itself, and war crimes, crimes against humanity and genocide, is no longer the real question, with every observer offering clear evidence of the same. However, this blatant disregard for rules supposedly applicable to all nations has exposed the stark limitations of international institutions supposedly responsible for preventing and punishing breaches of

⁶⁹ Larry D. Johnson, 'United Nations Response Options to Russia's Aggression: Opportunities and Rabbit Holes' (*Just Security*, 1 March 2022) <<https://www.justsecurity.org/80395/united-nations-response-options-to-russias-aggression-opportunities-and-rabbit-holes/>> accessed 18/12/2022

⁷⁰ The Extraordinary Chambers in the Courts of Cambodia were established by such an agreement; Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, UN Doc No. 417234 (6 June 2003) <https://www.eccc.gov.kh/sites/default/files/legal-documents/Agreement_between_UN_and_RGC.pdf> accessed 18/12/2022; for discussion of this process, see Helen Jarvis, 'Trials and Tribulations: The Long Quest for Justice for the Cambodian Genocide' in Simon M. Meisenberg and Ignaz Stegmüller (Eds.), *The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contribution to International Criminal Law* (Springer, 2016), 20-21.

⁷¹ Astrid Reisinger Coracini, 'The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part II)' (*Just Security*, 23 September 2022) <<https://www.justsecurity.org/83201/tribunal-crime-of-aggression-part-two/>> accessed 18/12/2022

⁷² Sergey Vasiliev (n.52)

the law. The ICC, the creation of which was a huge leap forward for international criminal justice, remains a deeply flawed institution, overburdened with expectations that ignore its limitations. Though the Court does conceivably have jurisdiction over crimes committed on Ukrainian soil, the exercise of that jurisdiction will be complex and controversial, not to mention restricted to those lower-level criminals located and detained within Ukraine itself. Even then, there is a real danger of either selectivity which would undermine the ICC's legitimacy, were it to target only Russian perpetrators, or a negative response from the wider community were it to begin prosecutions of Ukrainian nationals seen only as the victims of unwarranted aggression.

Of course, the prosecution of these atrocity crimes is crucial. Nonetheless, Ukraine and its allies understandably have their sights set on accountability for aggression committed by the Russian leadership as a priority. Being entirely outside of the ICC's reach, making this a reality will require change. That change could come from within Russia or from within the UN, though neither option appears particularly likely, certainly not in the short term. Hope therefore lies with the proposals being put forward and discussed for a new and unique approach to the aggression question in the form of an *ad hoc*, internationalised tribunal formed by agreement between Ukraine and the UN. This would satisfy a number of needs, ensuring accountability, resolving jurisdictional limitations, maintaining Ukrainian involvement while upholding the position of the ICC and demonstrating that no state is immune to international justice.

However, these lofty ambitions will not be easily satisfied, with real hurdles to be overcome in the establishment of such an institution, as well as enabling it to do its work, particularly in terms of securing potential perpetrators. Even were these matters to be resolved, the establishment of such a tribunal would no doubt have a knock-on effect, with suggestions of selectivity likely to be voiced in relation to every future instance of potential or realised aggression that does not inspire the creation of a new tribunal. Ultimately then, what needs to be determined is not just how to respond to the invasion of Ukraine, but rather to address the ongoing state inequality that is ingrained in the international system, placing the most powerful nations in a position of perpetual immunity.