

ICC Jurisdiction and the Russian Invasion of Ukraine



Monyneath Men

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Introduction

Recent Russia’s military operation in Ukraine territory, which commenced on 24 February 2022, has massively triggered controversies over international laws and mechanisms. There are many debates going on concerning whether Russia can be held accountable for its conduct. In this article, we will specifically deliberate on whether the International Criminal Court (“the Court” or “the ICC”) has jurisdiction over this situation.

The Court investigates and, where warranted, tries individuals charged with the gravest crimes of concern to the international community: genocide, war crimes, crimes against humanity and the crime of aggression. It is a well-known and fundamental principle that any judicial body, including any international tribunal, holds the power and the duty to determine the boundaries of its own jurisdiction and competence.¹

The Court may exercise its jurisdiction in cases where: (i) the crime must have been committed on the territory of a State Party as set out in article 12 of the Rome Statute (“the Statute”) (*ratione loci*); (ii) the crimes must have been committed within the timeframe specified in article 11 of the Statute

¹International Court of Justice, Order of 10 May 1984, Military and paramilitary activities and against Nicaragua case (Nicaragua v. USA), para. 21; International Court of Justice, Judgment of 4 December 1998, Fisheries (Spain v. Canada), para. 37.

(ratione temporis); and (iii) the crime must be one of the crimes set out in article 5 of the Statute (ratione materiae).²

i. Ratione Loci

The Court may exercise its jurisdiction over the case where the conduct occurred on the territory of the State Parties.³ However, neither Russia nor Ukraine is a State Party to the Statute which means neither of them is able to refer to the situation to the Court. Yet, Ukraine declared twice that it accepts the jurisdiction of the court for crimes committed within its territory.⁴ In case the situation is referred to the Prosecutor by a State Party, the Court may exercise its jurisdiction if the State on the territory of which the conduct in question occurred has accepted the jurisdiction of the Court.⁵ Therefore, if any State Party to the Statute refers this case to the Court, the Court may exercise its jurisdiction since the conduct occurred within Ukraine's territory where they accepted the Court's jurisdiction. Noticeably, 42 State Parties referred this situation to the Court by April 2022.⁶

Alternatively, the Court may have extraterritorial jurisdiction over persons who should be charged with the commission of such crimes. Universal jurisdiction is a specific kind of extraterritorial jurisdiction whereby a State provides its competence jurisdiction even if the accused is not a national of that State.⁷ Persons against whom there is evidence that they have committed crimes against humanity shall be subject to trial and, if found guilty, to punishment, of the countries in which they

² ICC, Prosecutor v. Bemba, ICC-01/05-01/08-14-tENG, Pre-Trial Chamber III, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, 10 June 2008, para. 12.

³ Article 12(2)(a) of the Rome Statute.

⁴ Situation in Ukraine, ICC-01/22, Investigation. Retrieved from <https://www.icc-cpi.int/ukraine>

⁵ Article 12(2)(a) & 13(a) of the Rome Statute.

⁶ Situation in Ukraine, ICC-01/22, Investigation. Retrieved from <https://www.icc-cpi.int/ukraine>

⁷ Luc Reydam, *Universal Jurisdiction: International and Municipal Legal Perspectives*, Oxford Univ. Press, 2003, p. 3; Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Intersentia, 2005, p. 25, 26.

committed those crimes.⁸ Hence, the primary responsibility for repression lies with the State where the crime was committed.⁹ Furthermore, when State delegates authority to an international court they transfer all the powers necessary to achieve the purposes for which the authority was granted to the court.¹⁰ Subsequently, if State did not explicitly restrict its delegation of the territoriality principle, they must be presumed to have transferred to the Court the same territorial jurisdiction as they have under international law.¹¹ If the Government of Ukraine delegates its jurisdiction to the Court, thus the Court may exercise the same extraterritorial jurisdiction as Ukraine has over the accused persons.

ii. Ratione Temporis

The temporal parameters of the Court's jurisdiction are restricted to crimes committed after its entry into force,¹² which occurred on 1 July 2002. The temporal jurisdiction of the Court will apply from the entry into force of the Statute for that State unless that State has made a declaration under Article 12(3),¹³ which gives a Non-State Party to the Statute the right to accept the jurisdiction of the Court on a one-time basis. Ukraine has twice exercised its prerogatives to legally accept the Court's jurisdiction over alleged crimes under the Statute occurring within its territory. The first declaration of accepting ICC jurisdiction was lodged by the Government of Ukraine with respect to alleged crimes committed within Ukrainian territory from 21 November 2013 to 22 February 2014.¹⁴ The second

⁸ The UN General Assembly resolution 3074 (XXVIII). (1973), U.N. GAOR, 28th Sess., Supp. No. 30, at 78, U.N. Doc. A/9030.

⁹ Olivier De Schutter. (2006). *Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations*. p. 14.

¹⁰ ICC, *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, ICC-01/19, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, Pre-trial Chamber III, 14 November 2019, para. 60.

¹¹ Ibid

¹² Article 11(1) of the Rome Statute.

¹³ Article 11(2) of the Rome Statute.

¹⁴ Situation in Ukraine, ICC-01/22, Investigation. Retrieved from <https://www.icc-cpi.int/ukraine>

declaration extended the previous duration on an open-ended basis to encompass ongoing alleged crimes committed on the territory of Ukraine from 20 February 2014 onwards.¹⁵ For that reason, the Court's temporal jurisdiction is applicable over the current Russia and Ukraine conflict.

iii. Ratione Materiae

The Court has jurisdiction with respect to the crimes specified in Article 5 which are the crime of genocide; crimes against humanity; war crimes and the crime of aggression.¹⁶ To exercise its jurisdiction, the Prosecutor must prove that Russia have committed at least one among these four crimes in Ukrainian territory which requires in-depth assessment between nature, characteristic as well as elements of each crime and conducts of perpetrators.

A. Genocide

The crime of genocide is characterized by the specific intent to destroy in whole or in part a national, ethnic, racial or religious group by killing its members or by other means: causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; or forcibly transferring children of the group to another group.¹⁷ There are two elements to be established to constitute genocide: objective element, and subjective element.

¹⁵ Ibid.

¹⁶ Article 12(1) of the Rome Statute.

¹⁷ ICC, *How the Court Works*, The Crimes. Retrieved from <https://www.icc-cpi.int/about/how-the-court-works>

1) Objective Element

Not every act committed with the intention to destroy, in whole or in part, a protected group will lead to a conviction for genocide. Only those which are mentioned in Article 6 of the Rome Statute, including killing, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, forcibly transferring children of the group to another group, which took place in the context of a manifest pattern of similar conduct directed against that group or conducted that could itself effect such destruction may form the *actus reus* (objective element) of genocide.

2) Subjective Element

The mental elements of genocide comprise both the requisite intention to commit the underlying prohibited act (such as killing) and the special intent to destroy the protected group in whole or in part. The destruction specified here is physical or biological of the group. In time of conflict, where the intention is to defeat the opposing side, it may be difficult to assess whether mass killings are with genocidal intent or with the intent of winning the war. However, if the purpose of the killings was not to destroy the group as such and it was just to remove a military threat or achieve military advantages, special intent to genocide would not be established.

B. Crimes Against Humanity

Crimes against humanity are serious violations committed as part of a widespread or systematic attack against any civilian population. The 15 forms of crimes against humanity listed in

the Rome Statute include offences such as murder, rape, imprisonment, enforced disappearances, enslavement – particularly of women and children, sexual slavery, torture, apartheid, and deportation.¹⁸ Similar to genocide, this crime also required certain elements to be proven, including contextual element, objective element and subjective element.

1) Contextual Element

There must be widespread or systematic attack directed against any civilian population. The widespread or systematic test is disjunctive; a prosecutor need only satisfy one or the other threshold. The term ‘widespread’ has been defined in various ways, and generally indicates the ‘large-scale nature of the attack and the number of victims.’¹⁹ No numerical limit has been set; the issue must be decided on the facts. While ‘widespread’ typically refers to the cumulative effect of numerous inhumane acts, it could also be satisfied by a singular massive act of extraordinary magnitude.²⁰ Similarly, the term ‘systematic’ has been defined in various ways. However, consistent with the ordinary meaning of the term, it may be that the hallmark of ‘systematic’ is the high degree of organization, and that features such as patterns, continuous commission, use of resources, planning, and political objectives are important factors.²¹ An ‘attack’ need not involve the use of armed force and can encompass mistreatment of the civilian population.²² It refers to the broader course of

¹⁸ Ibid.

¹⁹ ICTY, Tadic, Trial Chamber II, 7 May 1997, para. 206; ICTY, Kunarac, Trial Chamber II, 22 February 2001, para. 428; ICTR, Nahimana, Appeal Chamber, 28 November 2007, para. 920; ICC, Situation in Darfur (Al Bashir arrest warrant case) ICC PTC-I, 4 March 2009, para. 81.

²⁰ ICTY, Kordic, Trial Chamber, 26 February 2001, para. 176; ICTY, Blaškic, Trial Chamber I, 3 March 2000 para. 206; ILC Draft Code, p. 94–5.

²¹ Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, Introduction to International Criminal Law and Procedure Law (2nd Edition) (Cambridge, 2010), p. 237.

²² ICC Elements of Crimes, Crimes Against Humanity Introduction para. 3; ICTY, Kunarac, Appeal Chamber, 12 June 2002, para. 86; ICTR, Akayesu, Trial Chamber I, 2 September 1998, para. 581.

conduct, involving prohibited acts.²³ Lastly, the law of crimes against humanity not only protects enemy nationals, it also covers, for example, crimes by a State against its own subjects. The nationality or affiliation of the victim is irrelevant. The term ‘civilian’ signifies crimes directed against non-combatants rather than combatants, while the term ‘population’ indicates that ‘a larger body of victims is visualized’, and that ‘single or isolated acts against individuals’ fall outside the scope of the concept.²⁴

2) Objective Element

The definition of crime against humanity includes certain prohibited acts when committed in the necessary context (widespread or systematic attack), including murder, extermination, enslavement, deportation or forcible transfer, imprisonment, torture, rape and other forms of sexual violence, persecution, enforced disappearance, apartheid, and other inhumane acts.²⁵ The accused person thus must commit one of the aforesaid acts to be constituted as crime against humanity.

3) Subjective Element

In addition to the requisite mental element for the particular offences, the accused must also be aware of the broader context in which his actions occur, namely ‘the attack directed against a civilian population’.²⁶ It is the context of a widespread or systematic attack against a civilian population that

²³ Article 7(2)(a) of the Rome Statute; ICTY, *Tadic’*, Trial Chamber, 7 May 1997, para. 644; ICTR, *Akayesu*, Trial Chamber I, 2 September 1998, para. 205.

²⁴ United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London, 1948), p. 193.

²⁵ Article 7 of the Rome Statute.

²⁶ ICTY, *Tadic’*, Appeal Chamber, 15 July 1999, para. 248; ICTY, *Kupreškic’*, Trial Chamber II, 14 January 2000, para. 134.

makes an act a crime against humanity, and therefore knowledge of this context is necessary for a crime against humanity.

C. War Crimes

War crimes are grave breaches of the Geneva conventions in the context of armed conflict and include, for instance, the use of child soldiers; the killing or torture of persons such as civilians, prisoners of war or other protected persons; intentionally directing attacks against hospitals, historic monuments, or buildings dedicated to religion, education, art, science, or charitable purposes; employing prohibited weapons.²⁷ To be constitute as war crimes, three elements need to be fulfilled: nexus with armed conflict, objective element, and subjective element.

1) Nexus with Armed Conflict

In order to constitute a war crime, conduct must be linked to an armed conflict. For example, the ICC Elements of Crimes require that the conduct be committed ‘in the context of and associated with an armed conflict.’²⁸ The term ‘in the context of’ refers to the temporal and geographic context in a broad sense: the conduct occurred during an armed conflict and on a territory in which there is an armed conflict.²⁹ The term ‘associated with’ refers to the specific nexus between the conduct of the perpetrator and the conflict, and the conduct be ‘closely related to the conflict.’³⁰ Not all criminal

²⁷ ICC, *How the Court Works*, The Crimes. Retrieved from <https://www.icc-cpi.int/about/how-the-court-works>

²⁸ ICC Elements of Crimes, Article 8(2)(a)–1.

²⁹ Knut Dörmann, Eve La Haye and Herman von Hebel, ‘War Crimes’ in Lee, *Elements and Rules*, p. 120–1.

³⁰ ICTY, *Tadic*, Appeal Chamber, 2 October 1995, para. 70.

activity on a territory in armed conflict amounts to a war crime. For example, if a husband kills his wife purely out of anger, and this occurs during an armed conflict, that is not a war crime.

2) Objective Element

Grave breaches of the Geneva Conventions, and other violations of the laws and customs of war under the Rome Statute can be classified in group of specific war crimes. First, at the heart of war crimes law is a series of prohibitions of violence against and mistreatment of non-combatants (including civilians, prisoners of war and wounded or sick former combatants). In addition to prohibiting violence against and mistreatment of protected persons, war crimes law also protects other rights of persons.³¹ For example, several provisions protect liberty and mobility rights. In international conflicts, the unlawful deportation, transfer or confinement of civilians is a grave breach. The taking of hostages is a war crime in international or internal conflicts. Second, attacks on prohibited targets is also serious violation of IHL. The relevant IHL instruments provide guidance on the differences between civilians, civilian population and objects, and military objectives. Third is the prohibition of attacks inflicting excessive civilian damage. Even where an attack is directed against a military objective, the anticipated incidental civilian damage must not be disproportionate to the anticipated military advantage. To assess proportionality, it may also be useful to examine the actual conduct of the parties: were target selections reviewed; were decision makers advised by military lawyers; were efforts taken to reduce incidental damage; were precautionary measures taken; and were precision weapons used when targets required?³² Fourth, several war crimes provisions address crimes

³¹ Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, *Introduction to International Criminal Law and Procedure Law* (2nd Edition) (Cambridge, 2010), p. 293.

³² ‘OTP Response to communications received concerning Iraq’, 9 February 2006, p. 6–7, Retrieved from www.icc-cpi.int, under ‘Structure of the Court’, ‘Office of the Prosecutor’, ‘Communications and Referrals’, ‘Iraq’.

involving property, namely the destruction, appropriation, seizure, and pillage of property, not justified by military necessity and carried out unlawfully and wantonly. The ICC Statute includes destruction, appropriation, seizure, and pillage in international conflict, but in internal conflict it includes only the long-established prohibition on pillage. Fifth, it is the prohibition on means of warfare (weapons). The prohibition on certain weapons flows from two rationales. One is to protect civilians: some weapons are inherently indiscriminate which cannot be used in a manner distinguishing civilian and military. The other is to protect combatants: some weapons are of a nature to cause superfluous injury or unnecessary suffering. In addition to the prohibition on certain means of warfare (weapons), war crimes law also prohibits certain methods of warfare. It is a war crime to kill or wound a combatant who has surrendered or is otherwise hors de combat; to declare that no quarter will be given; to kill or wound treacherously a combatant adversary; to make improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury; and to use 'human shields'. Finally, there are two war crimes provisions that do not originate in classic concerns of reciprocal protection of persons and property affiliated with the 'other side' and may be characterized as protecting interests and values.³³ It is a war crime for an Occupying Power to transfer parts of its own civilian population into the territory it occupies; and to use of child soldiers, namely 'conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities'.

³³ Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, *Introduction to International Criminal Law and Procedure Law* (2nd Edition) (Cambridge, 2010), p. 308.

3) Subjective Element

Unlike other international crimes, there are three categories of war crimes' mental elements according to the Element of Crimes, which are intention, awareness of, and knew or should have known. Each war crime requires at least one of these mental tests to fulfill. As nexus to an armed conflict is essential to establish a war crime, Element of Crimes entails the perpetrator to be aware of factual circumstances that established the existence of an armed conflict, in addition to conduct must be linked to an armed conflict. It is also important to prove that the perpetrator have intention to commit the unlawful conduct, have awareness of protected status or circumstance, or knew or should have known the result of the conduct or the prohibited nature of such conduct. To know a specific war crime requires which mental element, it is provided by the Element of Crimes.

D. Crime of Aggression

Aggression differs markedly from genocide, crimes against humanity and war crimes in that, unlike those crimes, it concerns the *jus ad bellum* (the law governing recourse to conflict).³⁴ Crime of aggression is the use of armed force by a State against the sovereignty, integrity or independence of another State through 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.³⁵ This crime also entails 2 elements: objective element and subjective element.

³⁴ Yoram Dinstein, 'The Distinction between War Crimes and Crimes against Peace' (1995), p. 24.

³⁵ Article 8*bis* of the Rome Statute.

1) Objective Element

Crime of aggression is committed (i) by perpetrators in leadership positions in a State (ii) who have participated (iii) in the collective act of the State. First, aggression is a ‘leadership crime’: it is committed only by leaders and high-level policymakers. The Rome Statute and Element of Crimes specify that a person be ‘in a position effectively to exercise control over or to direct the political or military action’ of the State. This phrase adequately encompasses the leaders of the government and of the military. Second, participation can be through either ‘planning, preparation, initiation or execution’ of aggressive act of State. Participation in threats to use military force does not come within the crime of aggression. Third, the Statute defines the act of aggression – the collective act by the State – 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 United Nations’.³⁶ Although the provision is at the heart of the rules of international law on the use of force, its interpretation and application are not easy. There are differences of view as to the exceptions to the prohibition. The only exceptions universally admitted are (i) individual or collective self-defence,³⁷ and (ii) force authorized by the Security Council acting under Chapter VII of the Charter.³⁸ There is controversy over whether there is also an exception for humanitarian intervention which is given to military action taken for humanitarian purposes but without Security Council authorization and without the agreement of the State concerned. On the surface, it is considered a breach of the prohibition on the use of force. However, questions arise on whether interventions such as that in 1991 in northern Iraq, and in 1999 by NATO in Kosovo are lawful and whether these examples

³⁶ Article 2(4) of the UN Charter: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.”

³⁷ Article 51 of the UN Charter.

³⁸ Chapter VII of the UN Charter.

humanitarian practice can constitute a new rule of customary international law.³⁹ Concerning this controversy, the Statute includes a threshold with intention was probably to exclude grey areas of international law on the use of force and such controversial uses of force as humanitarian intervention, self-defence against terrorist groups in other States, and anticipatory self-defence. It defines the crime of aggression as participation in ‘. . . an act of aggression which, by its character, gravity, and scale, constitutes a manifest violation of the Charter of the United Nations’. From the reference to ‘scale’ it may be thought that the phrase qualifying aggression is intended to exclude from the jurisdiction of the Court such small-scale violations as minor border incursions, but the use of the word ‘manifest’ is intended to include even a border incident which is manifestly in violation of the Charter, although of a minor nature.⁴⁰

2) Subjective Element

Crime of aggression demands two mental elements. First, it requires that the perpetrator is aware of the factual circumstances establishing the inconsistency of the use of armed force by the State with the Charter of the United Nations. Second, it requires that the perpetrator is aware of the factual circumstances establishing the manifest violation of the Charter of the United Nations. Neither of these requires it to be proved that the perpetrator knew of the illegality or made a legal evaluation of the act’s inconsistency with the Charter or its ‘manifest’ nature’.⁴¹ Therefore, provided that the perpetrator intended to lead his country into a conflict and knew of the circumstances surrounding the conflict, it is not necessary that he knew that the conflict was unlawful.

³⁹ Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, *Introduction to International Criminal Law and Procedure Law* (2nd Edition) (Cambridge, 2010), p. 325.

⁴⁰ *Ibid.*

⁴¹ Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, *Introduction to International Criminal Law and Procedure Law* (2nd Edition) (Cambridge, 2010), p. 325.

Conclusion

On 2 March 2022, the ICC Prosecutor announced he had proceeded to open an investigation into the Situation in Ukraine on the basis of the State Parties' referrals and the two ad hoc declarations by the Government of Ukraine accepting the jurisdiction of the Court in 2014 and 2015. The Office of the Prosecutor will gather and examine evidence, as well as question persons under investigation, victims, and witnesses for the purpose of finding evidence to prove a suspect's innocence or guilt. In accordance with the overall jurisdictional parameters conferred through these referrals and ad hoc acceptances, the scope of the situation includes any past and present allegations of war crimes, crimes against humanity or genocide committed on any part of the territory of Ukraine by any person from 21 November 2013 onwards. The investigation will not encompass crimes of aggression as the Rome Statute stipulates that "the Court shall not exercise its jurisdiction over the crime of aggression when committed by nationals or on territory" of a state not party to the Statute.