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Russia's Aggression Against Ukraine and the Pursuit of Individual Criminal Responsibility

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The Russian military invasion of Ukraine on 24 February 2022, which was clearly ordered by President Putin, meets the definition of a "crime of aggression". The International Criminal Court has opened investigations into war crimes, crimes against humanity and genocide. And yet, it is unable to indict and prosecute President Putin for the crime of aggression, as Russia is not a State Party to the Rome Statute. How can the sitting Head of State be held responsible for the unwarranted and unjustified aggression? This paper looks into the past cases of indicting and trying political and military leaders, including the sitting Heads of State, for crimes of aggression and other crimes to see what can be done to pursue the individual criminal responsibility of President Putin.

Keywords: aggression, accountability, Putin, Russia, Ukraine

Introduction

The Russian military invasion of Ukraine on February 24, 2022, was an act that undermined the very foundation of the international order built around the UN Charter. Through this act of aggression, Russia violated the basic principles of respect for sovereignty, territorial integrity, and political independence of neighboring Ukraine. The resort to the use of force without the justifications allowed under the UN Charter not only undermined the legitimacy of the Security Council as the defender of the post-WWII order but also its own legitimacy as a permanent member. Russia's action has serious legal and political implications, with broad international consequences, especially for the United Nations as a universal Organization.

There are already calls for prosecuting individual Russians who have committed acts considered war crimes, as well as an outcry by the international community to hold President Putin personally responsible for this act of aggression against Ukraine. The International Criminal Court (ICC) has already begun investigations in Ukraine into three types of crimes under its jurisdiction on the basis of referrals received from 41 States Parties to the Rome Statute.[1]

And yet, it is not certain if the ICC could successfully prosecute those chiefly responsible for the Russian aggression, primarily President Putin. The work of the ICC is hampered by the fact that it cannot prosecute the crime of aggression unless the country concerned has accepted the Rome Statute and Russia is not a signatory.

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[1] https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states. Two more States Parties later joined, making the total referrals to 41.

Still, there are precedents where Heads of State have been held accountable and even convicted for war crimes, crimes against humanity and genocide. The main question here is: what could be done to hold President Putin accountable for the crime of the Russian aggression.

This paper will examine the current state of affairs as far as the crime of aggression is concerned. Then, it will explore possible avenues for pursuing individual accountability for the crime of aggression by examining some past cases in which the Head of State or State leaders were held to account. It also looks into more recent cases of the *ad hoc* tribunals and the ICC charging a Head of State or government leaders for crimes other than the crime of aggression, thereby establishing the precedent for individual criminal responsibility of political leaders.

The study concludes that it may be possible to hold the Russian political leader accountable for the crime of aggression in the future, but this would first require establishing the evidence available of various crimes, which may open an avenue to identify the chain of command reaching up to the Head of State. This may have to wait until the Russian President loses his power and for the government that follows to accept the Rome Statute and cooperate with the ICC, which could facilitate a successful prosecution under international law. In the meantime, the ICC will have to pursue those who are responsible for the crimes under its jurisdiction to see if it can establish the chain of command responsibility, all the way to the Head of State. This will not be an easy task, but it is important to lay the ground work for future indictment for the crime of aggression.

Unfortunately, Russia is not the only country that has resorted to the use of force without first obtaining authorization from the Security Council. The Russian President has used that argument to justify his own "special military operation". Why then is the Russian case different from other similar cases involving other countries? This question will also be addressed.

Why Is the Russian Invasion an "Act of Aggression"?

The Rome Statute, which is the legal basis of the International Criminal Court (ICC), in its Article 8 *bis*, 2 states that an "act of aggression means the use of armed force by a State against the sovereignty, territorial integrity and political independence of another State, or in any other manner inconsistent with the Charter of the United Nations".[2]

The Russian action is neither for self- or collective defense, nor a collective security measure that is authorized under Chapter 7 of the UN Charter. Ukraine did not pose any "direct and imminent threat" to Russia, thereby excluding any justification for Russian military action under the definition of self-defense. Russia claims that its action was based on Article 51 of the UN Charter, in other words, "collective self-defense". The self-pronounced independence of the so-called Luhansk and Donetsk Republics is not recognized by the central Ukrainian government, nor by the international community, except Russia. This one-sided pronouncement of independence was against the principle of the right to self-determination and of territorial integrity.

The UN Charter, in its Article 2, also obliges the Member States of the United Nations to "settle their international disputes by peaceful means" and to "refrain in their international relations from the threat or use of

[2] See the full text of the Rome Statute. https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf.

force against the territorial integrity or political independence of any state".[3] Russia ignored these provisions. Its military action is therefore totally unjustified under international law and is inconsistent with the UN Charter.

Russia justified its military action by charactering it as a "special military operation" to denazify Ukraine and specifically cited a "genocide" being perpetrated by Ukraine in the self-declared "republics" of the Luhansk and Donetsk Oblasts in the Donbas Region (The Print, 2022). This justification was voted down by the International Court of Justice in its ruling on the provisional measures demanding Russia to immediately cease fire in Ukraine (ICJ, 2022).

Why Can the ICC Not Pursue the "Crime of Aggression" Against Russia?

The Rome Statute in Article 8 *bis*, 1 defines "crime of aggression" as "the planning, preparation, initiation or execution by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations".

Article 15 *bis*, 5 states that "In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory". This restricts the prosecution to only those States that have accepted the Rome Statute. Russia is not a party to the Statute. Therefore, the ICC cannot prosecute Russia for its crime of aggression.

As for genocide, war crimes, and crimes against humanity, the ICC could investigate those crimes with a referral either from a State Party or States Parties or from the Security Council under Chapter 7 of the UN Charter, and when the ICC Prosecutor initiates investigations *proprio motu* (an official act taken without a formal request) on the basis of information on crimes within the jurisdiction of the Court. The Prosecutor in fact received such referrals from 41 States Parties in March 2022 and with the consent of the Pre-Trial Chamber, the Prosecutor began to investigate the three crimes in Ukraine.[4]

The Debate About the Crime of Aggression: Concept of "Aggression Against Peace"—Historical Context (Nuremberg and Tokyo Trials)

The word "aggression" was already referred to in the Covenant of the League of Nations. The Covenant in Article 10 defined the main role of the League as respecting and preserving "against external aggression" the territorial integrity and exiting political independence of all Members of the League.[5] The League itself was the first attempt at collective security and meant to protect its members from aggression, which was seen as external in nature. War was still considered a legitimate act of a sovereign State.

It was the Kellogg-Briand Pact of 1928 that first outlawed "war as an instrument of national policy". It also called for the settlement of inter-state disputes by peaceful means. Having witnessed the devastation of the First World War, there was strong public sentiment to outlaw war. However, the Pact did not contain any provisions for the legal consequences of war. Still, war was understood to be a "war of aggression", though the text of the

[3] UN, United Nations Charter.
[4] ICC statement. Two more States were added later.
[5] See the text, https://www.ungeneva.org/en/covenant-lon.

Pact did not use the language. It did not exclude the military acts of self-defense. Attributing accountability of a war of aggression to individual responsibilities had to wait until the Nuremberg and Tokyo Trials.

The primary intent of setting up the Nuremberg and Tokyo Trials was to punish the leaders of Germany and Japan who had led the "war against the peace", and to deter further aggression in the future.[6] Article 1 of the Charter of the International Military Tribunal for Germany and for Japan states clearly that the tribunals were established for "the just and prompt trial and punishment of the major war criminals". The trials were intended to ensure justice and post-war security for the peoples of the defeated nations. They set the legal precedent for trying the political and military leaders of the defeated powers retroactively. There are legal scholars who argue that this contradicts the legal principle of "no crime without law, no punishment without law" (Futamura, 2008). Questions were also raised about the "acts of the state doctrine" that exempts individuals from personal responsibility for the acts they committed on behalf of the state, as well as the principle of territoriality that does not allow a state to prosecute individuals in their state. For this reason, the trials were described by some critics as "victors' justice" (Woetzel, 1960).

The Nuremberg trials were conducted by the four victorious powers after the end of WWII, while the Tokyo trials included seven more countries affected by the Japanese war. The two Charters, which the Allied Powers agreed upon in the Moscow Declaration in October 1943, in fact became the law itself. The Allied occupation of Germany was considered an *occupation sui genesis*, giving the Allied Powers special powers, which were then recognized by the international community as justification for the trials (Woetzel, 1960).

The Charter of the International Military Tribunal (IMT) for Germany defined "crimes against peace" as the "planning, preparation, initiation or waring of a war of aggression or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing", which includes war crimes and crimes against humanity (Article 6)[7] (Woetzel, 1960). The Charter of the IMT for Tokyo used the same language, but included "conventional war crimes" in addition to crimes against humanity. By "conventional war crimes" it referred to "violations of the law or customs of war". The law or customs of war were developed through the two Hague Conventions and the Geneva Convention that laid the foundation for international humanitarian law. "Wars of aggression" dominated the judgments of the two trials (McDougall, 2021).

In the case of Germany, it was evident that Germany unleashed a war of aggression without provocation by neighboring States. It was based on the personal ambition of Hitler to conquer Europe. On the other hand, the case of Japan was more complex. The defense used was "acts of self-defense against provocative acts of other nations", in addition to Japan's legitimate rights in Asia and right of national existence (Futamura, 2008). The United States had in fact imposed an oil embargo on Japan in 1940 in an effort to contain Japan's war against China. That forced Japan to find a way out, leading to the preemptive and ill-conceived attack on Pearl Harbor. And yet, Japan accepted the Potsdam Declaration of July 26, 1945, which stated in Article 10 that "stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners". The United States and the allied powers used the Declaration as the legal basis for the Tokyo trials. Still, it should be noted

[6] Charters of the International Military Tribunals.
[7] Various arguments were made for or against the "crime against peace".

that the final judgment was not unanimous. The Indian judge, Radhabinod Pal, in particular, made a strong dissenting opinion arguing against the retroactivity of the judgment, against the conspiracy theory for aggression and agreeing with the self-defense position of the defense (Futamura, 2008; Higure, 2008; Awaya, 2013). The questions surrounding the legality of the Tokyo trials were also raised by some scholars. Those who were critical of the two trials argued that the trials were political rather than legal. Nevertheless, the significance of the two trials was that individual criminality for a "war of aggression" was established.

The UN Charter provides the Security Council with the power to determine the existence of an "act of aggression" (Article 39). As the term was not defined in the Charter, the International Law Commission and the Special Committee set up to elaborate on the definition worked until 1974 to produce a definition. The Annex to the General Assembly Resolution 3314 (XXIX) defined that "aggression is 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" (McDougall, 2021). Still, the question of "a precise definition of aggression for purposes of individual criminal responsibility", in other words, how to apply the definition to indict individuals for such acts, was left unanswered.

The International Law Commission (ILC) encountered three difficulties in its elaboration (McDougall, 2021). Should the future international criminal court exercise universal jurisdiction or should it depend on the consent of the State concerned? Should the Security Council be the one to define an "act of aggression"? Should the international court exercise jurisdiction when a domestic court is trying its nationals? Even though there was no agreement in relation to the crime of aggression, the majority opinion in the ILC prevailed to include the crime of aggression in the Rome Statute that established the International Criminal Court (ICC).

After the Rome Statute entered into force in 2002, the Special Working Group on the Crime of Aggression continued its work with a view to enabling the ICC's work in this regard. The final compromise was reached by the Assembly of States Parties in 2017, and is now reflected in Articles 8 *bis*, 15 *bis* and 15 *ter* of the Statute.

The amendments adopted regarding the criminalization of acts of aggression were considered as a result of political compromise rather than a legally tight document (McDougall, 2021). The ICC's jurisdiction over the crime of aggression does not apply to those States that are not parties to the Statute. The requirement for the consent of the State has won over the Court's universal jurisdiction. Where consent exists, the ICC is also required to ascertain first where the Security Council has made a determination of an act of aggression, thereby deferring to the power given to the Council under Article 39 of the UN Charter. This does not necessarily negate the jurisdiction of the ICC as the Prosecutor can proceed with the investigation, should the Security Council not have made such a determination within six months after the notification. Still, should the aggressor State not be a party to the Statute, or should it have opted out from the consent, the Court would not be able to initiate an investigation. The domestic jurisdiction to try the crime of aggression is considered to be fraught with problems.

ICJ's Jurisdiction Over the Genocide Convention

The provisional measures, which the International Court of Justice (ICJ) ordered with respect to the request from Ukraine against Russia under the Genocide Convention on March 16, 2022, are significant in legal terms, as it tentatively negates the Russian justification for its invasion of Ukraine.

Both Ukraine and Russia are parties to the Genocide Convention of 1948 (the Convention on the Prevention and Punishment of the Crime of Genocide). Ukraine argued that "contrary to what the Russian Federation claims, no acts of genocide, as defined by Article III of the Genocide Convention, have been committed in the Luhansk and Donetsk oblasts of Ukraine". Russia refused to attend the court hearings and instead sent a letter to the Court, disputing the Court's jurisdiction (ICJ, 2022). The Russian argument was that the Court "does not regulate either the use of force between States or the recognition of States". It asserted that

> its "special military operation" on the territory of Ukraine is based on Article 51 of the United Nations Charter and customary international law and that the Convention cannot provide a legal basis for a military operation, which is beyond the scope of the Convention.[8]

The Russian logic is that the "Luhansk People's Republic" and the "Donetsk People's Republic" had declared independence from Ukraine, which the Russian Parliament recognized, and that the two Republics had requested assistance from Russia based on the "treaties of friendship and mutual assistance" ratified by the Russian Federal Assembly on February 22, 2022. This makes it look like the collective defense arrangement authorized under Article 51 of the UN Charter. The Russian argument ignores the fact that the right to self-determination can be legitimately exercised only when the central government authority consents to such action. Such consent is required as respect for territorial integrity and political independence of a sovereign state is a principle accepted under the UN Charter, hence by international law.

The ICJ ruled that it has jurisdiction over the case, as there exists a dispute between the Parties relating to the interpretation, application, or fulfillment of the Genocide Convention, pursuant to Article IX of the Convention.

The ICJ then delivered an Order on March 16, 2022, with the following provisional measures:

(1) "The Russian Federation shall immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine";

(2) "The Russian Federation shall ensure that any military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control or direction, take no steps in furtherance of the military operations referred to in point (1) above".

Votes on the above two measures were 13 to 2 (Russian and Chinese Judges). The third vote was adopted unanimously. It was a neutral expression: "Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve."

The deliberations on the case will take time, as is often the case with inter-State legal disputes before the ICJ. Even though the provisional measures ordered by the Court are to be enforced, the enforcement power resides with the Security Council, which can exercise such power under Chapter 7 of the UN Charter. It is obvious, therefore, that enforcement of the provisional measures is not possible as Russia yields veto power on the Council.

Therefore, the ICC cannot prosecute Russia over its "acts of aggression" against Ukraine. However, there are other avenues through which to indict President Putin, as can be seen from the previous cases involving former Heads of State or Government, for example, President Slobodan Milosevič of the former Yugoslavia and

[8] See Paragraph 15 of the Russian Federation's letter to the International Court of Justice, https://www.icj-cij.org/public/files/case-related/182/182-20220307-OTH-01-00-EN.pdf.

a former interim-Prime Minister of Rwanda Jean Kambanda, as well as former President Omar Hassan Ahmad Al Bashir of Sudan.

Cases by the Special Courts for the Former Yugoslavia and Rwanda and the ICC

Trial of Slobodan Milosevič

The International Criminal Tribunal for the former Yugoslavia (ICTY) set up by the Security Council in 1993 set a legal precedent in the post-Cold War era for indicting those who committed the following crimes:

- Grave breaches of the Geneva Conventions of 1949;
- Violations of the laws or the customs of war;
- Genocide;
- Crimes against humanity (OHCHR, n.d.).

The ICTY was given a mandate to pursue individual criminal responsibilities of those who committed the above-mentioned crimes (Art. 7). It targeted "a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution" of these crimes. It does not exclude those who hold official positions, including a Head of State or Government. (Art. 7, 2)

Slobodan Milosevič, who served as the President of the Federal Republic of Yugoslavia (FRY) from July 1997 to October 2000, and as such, also served as the President of the Supreme Defense Council of the FRY and the Supreme Commander of the Yugoslav Army, was charged on the basis of individual criminal responsibility (Article 7(1) of the Statute of the Tribunal), and on the basis of: (1) superior criminal responsibility (Article 7(3) of the Statute) with respect to Kosovo: deportation; murder; persecutions on political, racial or religious grounds; and other inhumane acts/forcible transfer (crimes against humanity, Article 5); and (2) murder (violations of the laws or customs of war, Article 3) (ICTY, n.d.).

The initial indictment, which was confirmed during Milosevič's Federal Presidency on 24 May 1999,

> alleged that, between 1 January 1999 and 20 June 1999, Milosevič participated in a Joint Criminal Enterprise (JCE) together with a number of other individuals…. It was alleged that the purpose of the JCE was the expulsion of a substantial portion of the Kosovo Albanian population from Kosovo, in an effort to ensure continued Serbian control over the province." The indictment used a conspiracy charge against Milosevič and his personal responsibility stemmed from his high government position with the authority to "exercise effective control or substantive influence over the participants of the JCE.[9]

After Milosevič lost his office in April 2001, he was arrested by the Serbian authorities on different charges and then transferred to the ICTY to face the above indictment. Once this happened, additional indictments were issued with respect to the crimes committed in Croatia and Bosnia and Herzegovina (ICTY, n.d.). The charges in Croatia were crimes against humanity, grave breaches of the Geneva Conventions of 1949, and violations of the laws or customs of war. The charges in Bosnia and Herzegovina involved an additional charge of genocide related to the mass killings of Bosnian Muslim men and boys in Srebrenica in July 1995.

The significance of the Milosevič case is that a sitting President of a country had been indicted for the first time, while still holding the office of the Presidency. This demonstrated that a sitting President therefore cannot

[9] See "Indictment and Charges", https://www.icty.org/x/cases/slobodan_milosevic/cis/en/cis_milosevic_slobodan_en.pdf.

escape from the charges of crimes, particularly when these are supported by the Security Council under Chapter 7 of the UN Charter.

Trial of Jean Kambanda

In the case of Rwanda, the International Criminal Tribunal for Rwanda (ICTR) indicted 93 people, including the interim Prime Minister, Jean Kambanda, and other senior government and military officials (ICTR, 2022). The ICTR was established by the Security Council in resolution 955 in November 1994 to "prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and neighboring States, between 1 January 1994 and 31 December 1994"[10].

The statute of the ICTR actually limited the jurisdiction of the Tribunal to Rwandan leaders, as so many Hutu militias had been involved. The lower-level defendants were to be tried in domestic courts or through traditional means of reconciliation. The doctrine of command responsibility or superior responsibility was used against senior political and military leaders.

The Prosecutor indicted Kambanda of six charges in October 1997: genocide, conspiracy to commit genocide, direct and public indictment to commit genocide, complicity in genocide, and two crimes against humanity (murder and extermination). Kambanda was arrested by the Kenyan authorities during a flight there and handed over to the Tribunal at its request. Once indicted, Kambanda pleaded guilty to all charges. The Court, after finding him guilty, sentenced him to life imprisonment in May 1998 (ICTR, 1998). The ICTR was the first criminal court to indict an individual for the crime of genocide and recognized rape as a weapon of war and a means of perpetrating genocide.

Trial of Omar Hassan Ahmad Al Bashir

A similar case involving the highest political leader can be found in the indictment by the ICC of the then sitting President of Sudan, Omar Hassan Ahmad Al Bashir. The first warrant for his arrest was issued on 4 March 2009 and the second on 12 July 2010 (ICC, 2022). The charges were:

> five counts of crimes against humanity: murder, extermination, forcible transfer, torture, and rape; two counts of war crimes: intentionally directing attacks against a civilian population….or against individual civilians not taking part in hostilities, and pillaging; three counts of genocide: by killing, by causing serious bodily or mental harm, and by deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction, allegedly committed at least between 2003 and 2008 in Darfur, Sudan.[11]

The indictment was based on the referral from the UN Security Council under resolution 1563 (2005). The Council action followed the recommendations made by the International Commission of Inquiry, which found that President Al Bashir had violated international humanitarian law and human rights law in Darfur.[12]

There was a concern at the time as to whether or not it was politically wise to indict a sitting President, who was in a position to negotiate a ceasefire and peace deal. After the ICC issued an arrest warrant, other African countries were reluctant to cooperate with the ICC, believing that the Court had a racial bias against Africans, indicting only Africans up to then. Al Bashir lost his power and Presidency on 11 April 2019 when the Sudanese

[10] See Security Council document, S_RES_955 (1994).
[11] See Case Information Sheet, ICC, https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/AlBashirEng.pdf.
[12] Security Council document, S/2000/60.

army sided with civilians demonstrating against the government. The military agreed to hand over Al Bashir to the ICC, but also included him in the domestic trial (ICC, 2021). While the international court should have had the prerogative over the domestic court to try an individual, Al Bashir was tried on domestic corruption charges and sentenced to two years in a reform facility due to his age.

Indictment of Sitting Political Leaders

None of the cases involving Milosevič, Kambanda or Al Bashir was related to the crime of "aggression". Milosevič was indicted initially on the crimes committed in Kosovo, which was still part of Serbia. The war in Croatia and Bosnia-Herzegovina happened in the course of the break away of these countries from the former Yugoslavia. Kambanda's case was a genocide committed inside Rwanda. Al Bashir's indictment derived from the atrocities committed in Darfur, which is part of Sudan. These cases involved war crimes, crimes against humanity and genocide. These are the crimes which the International Tribunals and the ICC had a mandate to investigate and prosecute individuals either on its own, with referrals from States Parties, or under the authorization of or referral by the Security Council.

In the case of Milosevič, the Prosecution was able to gather evidence and collect information from many witnesses, particularly in Kosovo, following the withdrawal of Serbian forces and the deployment of a NATO peacekeeping force (KFOR). In addition, many of Milosevič's associates, who were also tried, as well as the Serbian government, which decided to hand over Milosevič to the ICTY, provided the court with evidence used. The Prosecution was also able to present many witnesses to corroborate the charges against Milosevič. The Milosevič case demonstrated that even a Head of State is not immune from prosecution for serious crimes.

In the case of Al Bashir, the ICC Prosecutor could rely on the evidence that had been collected by the Commission of Inquiry on Darfur, established by the UN Secretary-General pursuant to the Security Council resolution 1564. In addition, the Prosecutor collected information independently from a variety of sources.

Both the Milosevič, Kambanda, and Al Bashir cases show that the involvement of the Security Council was crucial in indicting and prosecuting a Head of State as being individually responsible for crimes committed, as long as evidence had been sufficiently established to demonstrate the chain of command as leading to the top political leader and involving joint conspiracy of the political leadership.

Pursuing Individual Criminal Responsibility for the Crime of Aggression in Ukraine

In the case of Ukraine, charging President Putin for the crime of aggression against Ukraine is a difficult proposition, as was seen in the above analysis. Therefore, one would have to rely on other crimes under the ICC jurisdiction in order to pursue his accountability. For that to happen, the following steps would be needed:

1. The ICC Prosecutor would continue the investigation into the allegations of war crimes, crimes against humanity and genocide. These investigations would not only establish facts and records of these crimes, but also could reveal the chain of command up to the Russian President. The ICC has a mandate to pursue individual criminal responsibilities of a political leader, as long as that person lives.

2. The Commission of Inquiry established by the Human Rights Council collects evidence of these crimes, which can be shared with the ICC.

3. If President Putin loses his power in Russia, the ICC may ask the new government to hand him over to the ICC for prosecution for not only the three crimes identified as having been committed in Ukraine, but also

for the crime of aggression. The new government would also have to accept the Rome Statute for this to be accomplished. It would also require the active cooperation of the new government, as happened with the Milosevič case, to prosecute the deposed Head of State.

4. If Putin continues to wield power, one may look into the possibility of establishing an *ad hoc* tribunal outside the ICC and try Putin in abstentia. This would help establish the facts and records for individual criminal responsibility for the crime of aggression.

The idea of establishing an *ad hoc* criminal tribunal was floated by some legal scholars and politicians. More than 30 leading lawyers and academics from Goldsmiths, University of London, and other institutions have signed an open letter calling for urgent action to bring Putin, and those around him, to justice (Baksi, 2022). Two former Prime Ministers of the UK, Gordon Brown and Tony Blair also joined the petition (Snowdon & Turner, 2022).

There is, however, skepticism as to whether or not such a special court could ever be established or could successfully prosecute Putin, since he cannot be brought to the court in person. The Security Council is unable to establish such a court, as Russia remains a permanent member with veto power. The ICC already exists and could exercise jurisdiction, but only if the Russian government in the post-Putin era decides to cooperate with it.

Another idea involves the concept of "universal jurisdiction". This would be a way to use domestic jurisdiction to indict and prosecute an individual who was responsible for certain crimes which are viewed as "grave" crimes in violation of international law. These individuals are considered to be "enemies of all mankind" (*hostes humani generis*).[13] "Grave" crimes may include crimes against humanity, war crimes, genocide, and torture. The first three crimes are defined in the Rome Statute. Torture is defined in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of December 1984.[14]

The doctrine of universal jurisdiction does not apply to the crime of aggression, as has already been seen in the context of the negotiation to enable the Rome Statute on this crime. However, it has been used for other crimes. It goes back to the US case in the 19th century when the United States used the doctrine to charge cases of piracy outside its territory. Israel used the doctrine to prosecute a senior Nazi official, Adolf Eichmann, for his role in the Holocaust. Spain also used the doctrine to detain Augusto Pinochet, a former Chilean President, while he was in the United Kingdom and extradited to Spain to try him for the human rights violations he had committed during his Presidency in Chile.[15] Germany also relied on the doctrine to try and sentence a Syrian intelligence officer for murder and torture that he had committed in Damascus (NPR, 2022).

Once the facts of the crime are established and those who are responsible for the crime have been identified, it is possible for third countries to demand the extradition of such individuals to try them in their domestic courts. However, such individuals must be detained in the countries outside Russia. This would be another long-term proposition.

[13] Center for Justice & Accountability.
[14] General Assembly resolution 39/46.
[15] Center for Justice & Accountability, "Universal Jurisdiction".

Why Is Russia's Case Different From Others?

President Putin justified the Russian action citing the collective self-defense clause of the UN Charter. In addition, he cited the cases of NATO's attack on Serbia in the Kosovo crisis and the US invasion of Iraq in March 2003, both of which were carried out without first obtaining authorization from the Security Council for the use of force. He argued that the West distorted the Security Council resolution to topple the Libyan regime, and that the West's military intervention in Syria should have been considered aggression and intervention. President Putin made these points to justify his own use of force without going to the UN Security Council first. He portrayed the West, particularly the United States, as disregarding international law and threatening Russia with the eastward expansion of NATO with a view to world domination. According to Putin, Ukraine was seen as the last bastion in its defense, and yet it was ruled by a "nazi regime", which was committing genocide in the Donbas region. Russia's "special military operation" was meant, Putin argued, to save the people of the Donbas region from the Ukrainian atrocities (Bloomberg, 2022).

Why then are those cases cited by Putin any different from the Russian aggression against Ukraine?

NATO's military intervention in the Kosovo crisis happened without first obtaining authorization from the Security Council, as NATO judged that such authorization would not come, due to the veto power which Russia holds in the Council. Russia supported Serbia politically and was defending it in the Council. The NATO action was controversial. And yet, there was considerable support from the international community for such action, when large numbers of Kosovo Albanians were being driven out of Kosovo, thereby creating a huge humanitarian crisis (Daalder & O'Hanlon, 2000; Tomuschat, 2002; The Independent International Commission on Kosovo, 2000). This was happening when the world had witnessed the "ethnic cleansing", war crimes, crimes against humanity, as well as genocide perpetrated in Bosnia-Herzegovina and Rwanda. There was strong support for the action of the international community to stop another tragedy of a similar scale. And NATO was the only military organization that was capable of acting to deal with the crisis. Consequently, the NATO action was seen by the International community as an illegal but legitimate action and as a one-time exception to the rule. In the aftermath of the crisis, Russia supported the post-conflict arrangements in Kosovo, and did not undertake any campaign to negate the result of the NATO action.

The US invasion of Iraq in March 2003 took place in the context of the terrorist threats by Al-Qaeda following the attacks on the United States on "9-11", 2001, and the subsequent "war on terror" initiated by the United States (Cramer & Thrall, 2012). Prior to the invasion, Iraq had been given the opportunity to prove its innocence with respect to the weapons of mass destruction reportedly held in Iraq through the work of the UN weapons' inspectors from the IAEA and the UN Monitoring, Verification and Inspection Mission (UNMOVIC). The United States failed to obtain authorization for its use of force from the Security Council, but garnered support from the United Kingdom, Spain, and numerous other countries. Again, those who opposed the US action did not attempt to negate the result in its aftermath.

The NATO action in Libya was based on the Security Council resolution, which cited the "Responsibility to Protect (R2P)", a principle adopted by the General Assembly in 2005.[16] While the resolution allowed the creation of a "no-fly zone" over Libya as a means of protecting the anti-government forces, NATO's military

[16] General Assembly document A/RES/60/1.

attack to enforce this, ended up helping to overthrow the long-time dictator, Muammar Muhammad Abu Minyar al-Gaddafi (Engelbrekt, Mohlin, & Wagnsso, 2013; Weighill & Gaub, 2018). Russia and China accused NATO of overstepping the Security Council mandate, effectively putting an end to the concept of R2P. NATO had interpreted the mandate as permission to attack the military headquarters of the Libyan government to enforce the no-fly zone and the regime's collapse was the direct outcome of this authorized use of force.

The US military action in Syria was primarily targeted at ISIS, a well-recognized terrorist group, which had gained a large expanse of territory encompassing both Syria and Iraq. It was an extension of the "war on terror" provoked by Al Qaeda's direct attack on US soil. The United States retaliated in self-defense by employing air power and special military operations (Stein, 2022; Lambeth, 2021). It did not get involved militarily in the civil war in Syria. It was rather Russia, which found an opportunity to intervene militarily in Syria to prop up the Assad regime and made Syria dependent on this support.

Russia's military invasion of Ukraine was not based on a large-scale humanitarian crisis, a war on terror, or the R2P concept, but on the personal ambition of President Putin to restore the glory of Russia's past. He used the perceived threat of NATO's eastward expansion and the lies about denazification in Ukraine to justify his unilateral military action. Despite the ongoing military conflict between Ukrainian forces and the separatist forces backed by Russia, a situation had not existed that could have been considered threatening with a "present and immediate danger" to Russia.

Furthermore, President Putin argued that the people of the Donbas region could exercise the right to self-determination through a self-organized referendum and without the consent of the central Ukrainian government. He used the same argument when Russia annexed Crimea in 2014. This is contrary to the principle of territorial integrity enshrined in the UN Charter. During their meeting at the Kremlin on April 26, 2002, the UN Secretary-General António Guterres, clearly told President Putin that Russia had violated the UN Charter.

Conclusion

It is clear from the above analysis that pursing the individual criminal responsibility of President Putin is a long shot by any measure. Charging him for the crime of aggression is not possible so long as Russia remains outside the Rome Statute. The best approach would then be to use the doctrine of command responsibility for the crimes committed by Russian forces in Ukraine. The ICC is already investigating three crimes under its jurisdiction. Even if the ICC could collect enough evidence for these crimes, it would not be an easy task to bring to justice even those who are in the position of commanding the units responsible for these crimes, while they remain in Russia. It would be even more difficult to establish the chain of command all the way up to the Head of State, while President Putin remains in power and the Russian government remains unwilling to cooperate with the ICC, even if President Putin should leave his position.

Still, preparatory work is now being undertaken to collect enough evidence to bring charges of war crimes, crimes against humanity and genocide through onsite collection of forensic evidence, interviews with the victims and with information from publicly available sources. The ICC has established its largest on-site office inside Ukraine to collect evidence of these three crimes under its jurisdiction. Should these charges be established, including against the Head of State, President Putin would be outlawed internationally. Since the ICC charges have no statute of limitations, this will add pressure to any future Russian government that succeeds President

Putin to consider cooperating with the ICC on this matter. Crimes of aggression and other grave crimes cannot be prosecuted once the perpetrator has died. This would preclude any future prosecution against the Russian government, unless other individuals could be identified.

Indicting President Putin is a delicate political matter, as he is the one to negotiate a ceasefire and eventual peace settlement with Ukraine. Russia dismisses the ICC as a political instrument of the West. And yet, nobody is above the law. The ICC will have to continue to follow the evidence and seek justice for the victims of Russian aggression, even if President Putin were identified as the person ultimately responsible for the crimes committed against the Ukrainians. Truth must be sought and found to protect humanity from atrocities and for the maintenance of law and order in the community of nations.

History tells us that even if justice is not served during the lifetime of a dictator, the time will come to reckon with the "grave" crimes committed by such a dictator. We have seen some such cases in the above analysis. In the Russian context, Joseph Stalin was denounced by his successor, Nikita Khrushchev, following his death. President Putin is an admirer of Stalin, but he must remember Stalin's fate. The images and evidence of Russian aggression against Ukraine are there for everyone to see. President Putin will not be able to hide away from such crimes forever.

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