Russia’s war on Ukraine in international law and human rights bodies: Bringing institutions back in

KEY FINDINGS

In the midst of war, human rights and international law institutions have responded with unprecedented speed to the unfolding crisis, not least due to the strong engagement of the Ukraine government in multilateral fora. While these institutions can deliver little immediate relief for Ukraine citizens, the initiatives have important political functions: they show the political and legal alternatives to the logic of war chosen by the Russian government; they contribute to formalising international consensus and providing independent legal assessments of the attack; and, most importantly, they prepare the ground to ensure accountability for crimes committed in the context of the war.

- At the Human Rights Council, Ukraine and its allies set up an independent inquiry commission in record time. This will strengthen the existing human rights monitoring mechanism and collect evidence on human rights abuses and individual perpetrators.
Russia's war on Ukraine in International law and human rights bodies: Bringing institutions back in

• The Organisation of Security and Cooperation in Europe (OSCE) has used its “Moscow Mechanism” to commission a group of independent experts with a similar mandate to the Human Rights Council’s.

• Ukraine has turned to the International Criminal Court as early as 2014, but Russia’s invasion has prompted the ICC Prosecutor to move faster. A full investigation was launched on 2 March 2022, building on exceptional political support and engagement by Ukraine, ICC state parties and the US government.

• In parallel, domestic investigations in EU Member States and in Ukraine by the Ukrainian Prosecutor have been launched into international crimes. These investigations – which should be closely coordinated – provide further avenues to accountability.

• The proposal for an ad hoc international tribunal to persecute the crime of aggression, thereby putting pressure on the Russian leadership, has received tremendous support from Ukraine and the wider public, and legally sound solutions are already being investigated.

• The application by the Ukrainian state to the European Court of Human Rights, complemented by individual applications by Ukrainian citizens, led to urgent provisional measures directed at the Russian Federation in the early days of the war. Russia was expelled from the Council of Europe, but the Court will remain competent for cases brought in relation to the war for some time, adding another level of judicial analysis of Russia’s actions and individual human rights violations. However, these cases will operate within the limits of the European Convention on Human Rights.

Providing resources and technical solutions for collection and storage of the vast amount of data and evidence regarding possible war crimes and crimes against humanity remains a priority to build cases for holding perpetrators accountable. The EU supports this process inter alia through funds from the Global Europe instrument.

Ukraine’s application to the International Court of Justice – which led the court to call on Russia to suspend military operations immediately – is analysed in a separate EPRS/Policy Department briefing.

UN Human Rights Council:
Human rights diplomacy and independent evidence collection

At the 49th session of the UN Human Rights Council (HRC), which took place from 28 February to 1 April, UN member states agreed, at Ukraine’s request, to hold an urgent debate on the critical situation and violation of human rights and to condemn Russia’s aggression. Only 5 of 47 countries voted against holding the debate: China, Cuba, Eritrea, Russia, and Venezuela, while 13 abstained (Armenia, Cameroon, Gabon, India, Kazakhstan, Mauritania, Namibia, Pakistan, Senegal, Somalia, Sudan, United Arab Emirates and Uzbekistan).

The resolution A/49/L.1 ‘Situation of human rights in Ukraine stemming from the Russian aggression’, adopted at the urgent meeting on 4 March 2022, endorses the demands contained in the UN General Assembly (UNGA) resolution on ‘Aggression against Ukraine’ adopted on 2 March 2022. It condemns Russia’s invasion of the territory of Ukraine, demands the immediate cessation of human rights violations and the withdrawal of troops by Russia. The resolution led even more states (32) to vote in favour, and only 2 against (Russia and Eritrea), while 13 abstained (Armenia, Bolivia,
The main operational outcome is the establishment of an independent international commission of inquiry, constituted by three human rights experts, appointed on 30 March 2022 by the President of the Human Rights Council for an initial duration of one year. As with previous commissions of this kind established by the HRC, the experts’ mandate is to investigate all alleged violations and abuses of human rights and violations of international humanitarian law; to collect, consolidate and systematically record and preserve evidence; to identify, where possible, those individuals and entities responsible; to make recommendations on accountability measures.

With a budget of USD 4.1 million, the independent commission will work with the United Nations High Commissioner for Human Rights and the UN Human Rights Monitoring Mission in Ukraine (HRMMU), which has a staff of 57 people and has so far remained in the country. Established in 2014, the HRMMU monitors, reports and advocates on the human rights situation in Ukraine, with a particular focus on the conflict area of eastern Ukraine and the Autonomous Republic of Crimea and the city of Sevastopol, occupied by the Russian Federation. It regularly publishes information about human rights abuses and civilian casualties in the war. It has seven field offices in Kyiv, Kharkiv, Donetsk, Luhansk, Kramatorsk, Mariupol and Odesa.

The commission of inquiry will deliver an oral update at the 51st session of the HRC in September/October 2022, and a written report at the 52th session in spring 2023. The information collected by the commission will be of relevance not only for ongoing investigations and procedures in other international courts, such as the ICC and ICJ, but also for investigations at the national level using the notion of “universal jurisdiction” (see below).

Early calls by civil society organisations and some UN Member states – e.g. Lithuania – to suspend Russia from the Human Rights Council were amplified after the evidence emerging about massive war crimes committed in the Ukrainian town of Bucha. At the UN General Assembly meeting of 7 April 2022, 93 Member voted in favour of Russia’s suspension from the Human Rights Council. According to paragraph 8 of the General Assembly (GA) resolution 60/251, which established the HRC, ‘the General Assembly, by a two-thirds majority of the members present and voting, may suspend the rights of membership in the Council of a member of the Council that commits gross and systematic violations of human rights’. This is the second case in the history of the HRC, after the suspension of Libya in 2011 (resolution A/RES/65/265). The decision will not impact the work of the Monitoring Mission, the commission of inquiry other actions by the Council.

OSCE Moscow Mechanism

Upon the request of 45 states and with Ukraine’s support, the OSCE decided on 3 March 2022 to invoke its Moscow Mechanism, an instrument instituted in 1991 that would send experts to assist OSCE States with questions or problems relating to human rights and democracy. A group of three independent experts was nominated by the OSCE on 15 March 2022 to ‘address the human rights and humanitarian impacts of the Russian Federation’s invasion and acts of war, supported by Belarus, on the people of Ukraine’. The group is mandated to establish the facts and circumstances surrounding possible contraventions of OSCE commitments, abuses of international human rights law and international humanitarian law; possible cases of war crimes and crimes against humanity;

1 United Arab Emirates, Mauritania, Senegal, Somalia abstained in the vote on the urgent debate and voted in favour for the resolution; Bolivia voted in favour of the debate but abstained from the resolution.
and to collect, consolidate, and analyse this information with a view to presenting it to relevant accountability mechanisms and courts.

At the same time, the OSCE Special Monitoring Mission to Ukraine (SMM) – which had been deployed in 2014 upon Ukraine’s request and which had some 500 international monitors on the ground when the war started – evacuated all personnel and had to suspend its reporting.

**International Criminal Court: Preparing for individual accountability**

On 28 February, the International Criminal Court’s Chief Prosecutor, Karim A. A. Khan QC from the United Kingdom, announced his decision to open an investigation into the situation in Ukraine. A **preliminary examination** had already been launched in April 2014 upon Ukraine’s request. This examination had resulted in the 2020 **conclusion** of the previous prosecutor (Fatou Bensouda), that there was sufficient basis to believe that war crimes and crimes against humanity had been committed. However, while the full investigation was put on hold as other priorities were pursued by the ICC, the investigation again became a priority with the Russian invasion on 24 February 2022.

The prosecutor has the competence to open an investigation **propio motu** according to Article 15 of the Statute, but – unlike the state referrals under Article 14 – needs the approval of the Pre-Trial Chamber of the Court. On 1 March 2022, the Republic of Lithuania, joined by 40 other States, **referred** the Ukraine situation to the ICC, thus allowing the investigation to start immediately. **The investigation will cover alleged war crimes and crimes against humanity** committed in Ukraine since 21 November 2013, and was assigned to Pre-Trial Chamber II. Russia rejects the ICC’s jurisdiction and denies to be responsible for war crimes.

Neither Ukraine nor Russia is a party to the ICC’s Rome Statute, the treaty establishing the ICC. Russia signed but did not ratify the statute, then withdrew its signature in November 2016. Ukraine has yet to ratify the statute. However, Ukraine has twice declared that it recognises Court’s jurisdiction on Ukrainian territory for the investigation of crimes – a procedure foreseen by Article 12(3) of the Statute. Ukraine’s first declaration was made on 21 November 2013, for a period until 22 February 2014. The second declaration granted the Court indeterminate jurisdiction from 20 February 2014.

The ICC has jurisdiction over three core crimes: **crimes against humanity, war crimes, and genocide**. In this case, the court cannot investigate the crime of aggression (ICC Statute art.15 bis (5), art. 15 ter ICC Statute), which requires either the ratification of the Rome statute by both parties, or a UN Security Council referral.

The ICC can investigate and prosecute those who are suspected of committing the crimes over which the Court has jurisdiction on Ukrainian territory, regardless of the nationality of the suspect. This could include Russian President Vladimir Putin or other high-ranking Russian officials. The investigation also covers crimes potentially committed by Ukrainian forces and officials.

The ICC conducts investigations only when states are unable or unwilling to prosecute the crimes themselves (complementarity principle).

Legal scholars have identified several **challenges for the Court**:

- Firstly to build cases against high level perpetrators, a **clear chain of command** between crimes and the military or political decision-makers needs to be proven.
• Secondly, the Court cannot try individuals *in absentia* (Article 63 of the ICC statue), so it would first have to issue a warrant for their arrest and transfer to the court (Article 58). But it seems highly unlikely that high-ranking Russian officials, including Vladimir Putin, would accept the arrest warrant and leave Russian territory, or that the arrest warrant would be executed by the Russian authorities. Precedents show that it is extremely difficult to prosecute indicted figures as long as they remain in power. Former president Omar al-Bashir of Sudan received the ICC’s first arrest warrant in March 2009, as well as a second in July 2010. It was not until 2021 that the Sudanese government ordered the surrender of its former president, who is now in prison.

• Thirdly, there have been concerns about the ICC being weakened by the US’s non-ratification of the Rome statute, meaning it can thus not provide full diplomatic support. The US has in the past objected to the principle that the Court jurisdiction is established by the ratification of the country in which crimes occur – regardless of the nationality of the defenders. Under the Trump administration, the US instituted sanctions against ICC prosecutors, creating a dangerous precedent. However, the US government has started to reconsider its position on the ICC and has expressed support for the ICC investigation in Ukraine, while announcing it is also collecting evidence of war crimes. The US Senate has adopted a resolution encouraging member states to petition the ICC or other appropriate international tribunals to take any appropriate steps and support any investigation into Russia’s war crimes.

The ICC investigation has a political impact: it underscores that war crimes and crimes against humanity on a scale of those alleged in Ukraine should not go unpunished. Although the ICC’s effectiveness so far has been limited, it can build on unprecedented support. In the best case scenario, publicising the investigations could deter commanders of the Russian armed forces from attacking civilian targets and committing other war crimes, or even weaken the regime. At the same time, some observers see a risk that the proceedings could further close exit strategies for President Putin.

The Court will be able to rely on evidence already being collected by Ukrainian authorities, ICC member states and civil society organisations. The widespread use of digital technologies, coupled with the international community’s experience in collecting and storing evidence during recent impunity cases, could create a solid ground for the work of the ICC.

Given the international attention focused on the conflict, the case is also likely to be given a high priority by the Prosecutor in terms of time and resources. The prosecutor has already travelled to Western Ukraine, where he met Ukrainian Minister of Foreign Affairs Dmytro Kuleba and Prosecutor-General Iryna Venediktova. He also met – virtually – President Volodymyr Zelensky, when announcing cooperation with the country’s national authorities in carrying out the investigation. Khan also travelled to the Polish border to interview refugees at the refugee reception centre in Medyka.

When launching the investigation, Khan called for ‘additional budgetary support, for voluntary contributions to support all our situations, and for the loan of gratis personnel. The importance and urgency of our mission is too serious to be held hostage to lack of means.’ At a meeting on 24 March 2022 in The Hague, several state parties committed to providing further financial and technical resources.
Other avenues for accountability: National jurisdictions and special tribunals

Domestic judicial procedures and courts provide a complementary avenue for ensuring accountability and securing evidence.

The Ukrainian Prosecutor has launched investigations and created a government site for the public to report crimes and abuses. War crimes committed in Ukraine, and the crime of aggression, are covered by the Ukrainian Criminal Code. A Working Group of international lawyers and human rights experts supports the Prosecutor General’s Office. But the capacity of Ukraine’s criminal system to prosecute will depend on how the military situation develops.

Universal jurisdiction is another way forward. Ten EU member states (including Germany, Estonia, Lithuania, Poland, Slovakia and Sweden) have reportedly launched investigations into international crimes, which could lead to arrest warrants issued by the national judicial authorities, or produce evidence to be shared with other courts or tribunals.

Ukraine’s prosecutor has called for an international coalition to investigate all the crimes committed by Russia. She works closely with the ICC, has signed a working arrangement with European Public Prosecutor’s office, as well as a memorandum on cooperation with the UK Attorney General’s Office to provide one another legal assistance and support.

Given that the ICC has no jurisdiction over the crime of aggression with respect to Russia or Ukraine, legal experts and politicians, such as International Law specialist Philippe Sands and former UK Prime Minister Gordon Brown, have proposed establishing an ad hoc international criminal tribunal. The proposal has been backed by the Ukrainian government, by several European parliaments’ foreign affairs committees, and by many individuals in a global petition. The practical and legal challenges of such a tribunal were discussed at the European Parliament’s Human Rights Subcommittee on 28 March 2022. Legal experts from some EU Member States are engaged in the ongoing reflections.

Such an international criminal tribunal would have jurisdiction to prosecute individuals – including the political and military leadership as well as financiers of the war – responsible for the international crime of aggression. Given the support from the Ukraine government, the tribunal could be based on an agreement between Ukraine and an international organisation, or between Ukraine and a group of states.

Some jurists propose a hybrid tribunal between the United Nations and the Ukrainian government. Precedents such as the Special Court for Sierra Leone (SCSL), formed by agreement between Sierra Leone and the United Nations, and the Extraordinary Chambers in the Courts of Cambodia (ECCC), formed by agreement between Cambodia and the United Nations, demonstrate that such an alternative is feasible.

Another proposal is to establish an agreement between Ukraine and the Council of Europe, using the Extraordinary African Chambers, which successfully prosecuted former President of Chad Hissène Habré, as an example of a regionally-supported hybrid tribunal.
Court of Human Rights: A last resort until September 2022

On 25 February 2022, the Council of Europe suspended the Russian Federation’s representation rights as a member state under Article 8 of the Council’s Statute. On 16 March, the Council’s Committee of Ministers decided definitively to expel Russia from the Council for serious and persistent violation of its obligations under Article 3 of the Statute. The decision noted that the Russian Federation had communicated its withdrawal and its intention to denounce the European Convention on Human Rights (ECHR) on 15 March. According to Article 58 of the ECHR, the Court still has jurisdiction for another 6 months. An ECHR resolution of 22 March 2022 confirmed that the ‘Court remains competent to deal with applications directed against the Russian Federation … until 16 September 2022.’

When it comes to the war in Ukraine, the Court remains competent for pursuing pending and new cases relating to abuses and violations occurring before 16 September 2022, which also means that Russia would be obliged to comply with the court’s decisions. This includes the decision related to Ukraine’s application of 28 February 2022, alleging massive human rights violations by Russian troops. On 1 March, the Court granted urgent interim measures ‘to indicate to the Russian government to refrain from military attacks against civilians and civilian objects’. On 4 March the Court indicated similar measures in response to applications from several individuals. The Court also ordered Russia to ensure civilians had unimpeded access to safe evacuation routes, healthcare, food and other essential supplies, as well as unconstrained passage of humanitarian aid and humanitarian workers.

There are currently four other inter-state applications launched by Ukraine and over 8,500 individual applications before the Court concerning the events in Crimea, eastern Ukraine and the Sea of Azova, as well as one Russian application against Ukraine, all dating from before the start of Russia’s February 2022 aggression. However, in previous cases the ECHR has taken a narrow approach to jurisdiction in cases of extra-territorial acts during active hostilities.

As detailed in the Committee of Ministers’ resolution of 23 March 2022 on the legal and financial consequences of Russia’s withdrawal from the Council of Europe, the country will also lose its membership in the Venice Commission and will cease to be a party of all conventions and protocols open only for Member States. The Committee of Ministers also suspended all relations with Belarus.

Russia’s departure from the Council has caused great concern among human rights organisations and Russian human rights defenders, as it closes one of the few international bodies they could turn to seek remedy for domestic abuses. Russia had a poor track record when it comes to the implementation of Court decisions, including many worrisome rights violations by Russian armed forces, including in Chechnya. But there was some chance for applicants to achieve improvements or protections for individuals, which has now been barred.

2For a more in-depth overview see the EPRS At A Glance on “Russia’s war on Ukraine: Russia ceases to be a member of the Council of Europe”, March 2022.
EU position and support

In line with the importance the EU assigns to international institutions and rules-based multilateralism, the Union strongly supported different international measures initiated by Ukraine government.

- At the **UN Human Rights Council**, the EU engaged in diplomatic outreach to increase votes in favour of the urgent debate and reach a strong resolution, including the new commission of inquiry. The EU and its Member States also supported the suspension of Russia from the Council.

- At the **OSCE** all EU Member States supported the creation of a group of experts under the Moscow Mechanism.

- All EU Member States have signed the referral of the situation in Ukraine to the **ICC**. All EU Member States are state parties to the **Rome Statute**, and the EU is closely cooperating with the ICC and its Prosecutor on the basis of a 2006 cooperation and assistance agreement. The EU provides funds for outreach and training activities related to the Rome statute under the **Human Right and Democracy programme of the Global Europe instrument**, which could also benefit Ukraine.

- EU ministers of justice encouraged the European Union Agency for Criminal Justice Cooperation (Eurojust) to coordinate Member State action and to make itself available to the ICC Chief Prosecutor. On 24 March 2022, Eurojust and the French Presidency of the Council hosted a meeting of EU Ministers of Justice to discuss the role of the Agency in coordinating investigations. A first joint team to investigate alleged core international crimes in Ukraine was set up on 28 March by Lithuanian, Polish and Ukrainian authorities, with support from Eurojust. Talks are ongoing between Eurojust and the ICC to make the Court part of the Joint Investigation Team.

- Concerning the **Council of Europe**, all EU Member States voted in favour of Russia’s suspension. After the expulsion, HRVP Josep Borrell described that the future lack of ECHR protection for Russian citizens as ‘highly concerning and yet another restriction of Russian citizens’ rights’. His statement left the door open for the future, urging the ‘Russian Federation to rapidly return to compliance with human rights, international law and international humanitarian law.’

The EU is actively supporting the collection of evidence with the crisis component of the **NDICI-Global Europe Instrument**. Actions prepared by the Service for Foreign Policy Instruments (FPI) will support systems to effectively preserve and archive information and evidence of violations of international humanitarian law. This will include support to Ukrainian authorities to help ensure missing and disappeared persons can be identified and traced. The work will be implemented in close coordination with national and international justice actors. The EU is also giving a role to the **EU Advisory Mission to Ukraine** to help secure evidence for international crimes.

In the **European Parliament**’s extraordinary plenary session on 1 March, Parliament President Roberta Metsola expressed the institution’s full support of the ICC’s jurisdiction and investigation of war crimes in Ukraine. In a **resolution** on the Russian aggression against Ukraine voted on 1 March, Parliament ‘underlines that the EU and its Member States will ensure that perpetrators of war crimes and human rights violations, including those who assisted such crimes by way of propaganda, will be held accountable.’ Parliament calls for cooperation to collect evidence and the investigation ‘of any war crime committed within the territory of Ukraine since 20 February 2014 onwards in order to bring to justice Vladimir Putin and Aliaksandr Lukashenka’. The resolution also welcomed the
Council of Europe’s decision to suspend Russia. On 7 April 2022, the EP reiterated strong support for the ICC investigation, the HRC Commission of Inquiry, and called for a special UN tribunal for the crimes in Ukraine to be set up. The EP also calls for financial and practical support for the ICC’s work e.g. by allowing the EU Advisory Mission Ukraine to assist with the documentation of evidence. The EP called on EU leaders and the leaders of other states to exclude Russia from the G20 and other multilateral cooperative organisations, including the UN Human Rights Council. The EP had in previous resolutions advocated for HRC membership to be made conditional on the country’s human rights record. The Parliament has also long recommended reforming the Security Council, including to remove members’ veto power in cases of war crimes and crimes against humanity.
Annex: International crimes

International Criminal Law is a body of rules defining crimes for which individual perpetrators are to be held liable and which are of concern to the international community as a whole. These ‘international crimes’ are based on international treaties (such as the 1949 Geneva Conventions establishing the rules of International Humanitarian Law, or the 1948 Genocide Convention) and customary international law. Prosecutions can take place in domestic courts, including through Universal Jurisdiction, and in international courts. The application of Universal Jurisdiction remains internationally contested. Crimes fall in two categories: Atrocity crimes (genocide, crimes against humanity and war crimes) and the crime against peace/crime of aggression.

Serious violations of human rights (e.g. the ban of torture, right to life) in many respects overlap in substance with international crimes, and core human rights apply in war as in peace times. Under human rights law, states have an obligation to persecute and punish perpetrators of certain serious human rights abuses through their domestic legal systems. International human rights courts such as the European Court of Human Rights cannot persecute individual perpetrators, but can order remedies for victims of rights abuses.

The Rome Statute of the International Criminal Court, which has been ratified by 132 states, provides the most recent international consensus on the definitions of core international crimes:

Genocide

According to art. 6 of the Rome Statute, ‘genocide’ means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- Killing members of the group;
- 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.

Crimes against humanity

According to art. 7 of the Rome Statute, ‘Crimes against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- Murder;
- Extermination;
- Enslavement;
- Deportation or forcible transfer of population;
- Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- Torture;
• Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
• Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
• Enforced disappearance of persons;
• The crime of apartheid;
• Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

The Rome Statute provides further definitions these acts. Crimes against Humanity can occur in both peace and war times. Work has been ongoing at UN level, supported by the EU, to adopt a new international treaty on Crimes against Humanity.

War crimes

Other than crimes against humanity and genocide, war crimes are limited to situations of conflict. According to Article 8 of the Rome Statute, war crimes include:

a. Grave breaches of the Geneva Conventions of 12 August 1949, namely
• Wilful killing;
• Torture or inhuman treatment, including biological experiments;
• Wilfully causing great suffering, or serious injury to body or health;
• Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
• Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
• Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
• Unlawful deportation or transfer or unlawful confinement;
• Taking of hostages.

b. a series of other serious violations of the laws and customs applicable in international armed conflict, including, inter alia,
• Intentionally directing attacks against the civilian population and civilian objects;
• Intentionally directing attacks against humanitarian assistance or peacekeeping missions;
• Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
• Attacking or bombarding towns, villages, dwellings or buildings which are undefended and which are not military objectives;
• Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

• The transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

• Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, or hospitals.

The Rome Statute provides further details and a separate list of war crimes applicable in non-international armed conflicts.

Crime of aggression

According to Article 8bis of the Rome Statute, which was added through the 2010 Kampala amendments, the ‘crime of aggression’ means ‘the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations’. The act of aggression is further defined as ‘the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations’. The concrete acts are further specified in the Statute.

The ICC has unconditional jurisdiction if there is a UN Security Council referral. For state referrals or proprio motu investigations, the aggressor and the country that is aggressed must have ratified the Rome Statute and not opted out from jurisdiction over the crime of aggression. Furthermore – and although there has been some legal discussion on the matter – the resolution which activated the Court’s jurisdiction in 2017, states that the Court has no jurisdiction when the crime of aggression was committed by a national or on the territory of a State Party that has not ratified or accepted the Kampala amendments. Only 43 states have ratified the Kampala amendments to the Rome Statute. Approximately 40 countries, including Ukraine, have implemented the crime of aggression into domestic law, and some 20 countries have ‘universal jurisdiction’ related to aggression.