CICJ Statement No. 3

# States Parties Should Strengthen the ICC's Ability to Prosecute Aggression

*Berlin, Florence, Oslo and Wellington, 27 April 2023*

While a proposal to establish some form of special tribunal or jurisdiction for the crime of aggression against Ukraine is gaining support among Western states – including the permanent members of the UN Security Council France, the United Kingdom and the United States – two questions should be addressed: How is it that the International Criminal Court ('ICC') has been left so powerless when it comes to prosecuting the crime of aggression? And how can the international community ensure that future instances of aggression will be prosecuted?

When adopting a definition of the crime of aggression in the ICC Statute in 2010, the ICC States Parties agreed to a jurisdictional regime requiring a referral of this crime from the UN Security Council to the ICC if it is committed by nationals of a state that is not a party to the ICC Statute or has not recognized the jurisdiction of the ICC.[1] "This explicit bar contrasts with other ICC crimes that originate in a non-State Party but are partially realized on the territory of a State Party or state that has accepted the jurisdiction of the Court (as can be the case with deportation). This may result in leaders of powerful states being treated more leniently", said the Steering Group of the Coalition for International Criminal Justice ('CICJ').

"In agreeing to this compromise, states curtailed the ability of the ICC to prosecute the crime of aggression. This is evident in the Ukraine situation where the ICC is unable to charge or convict for the crime of aggression despite the war's serious disruption of international peace and security. This is counter-intuitive to what is reasonably expected of international criminal justice", said Gunnar Ekeløve-Slydal, Director of CICJ.

The restrictive jurisdictional regime is a result of the negotiations during the 2010 Kampala Review Conference of the ICC Statute. At the time, powerful states like those now proposing a special tribunal or jurisdiction for the crime of aggression – including France, the United Kingdom and the United States – insisted on strict limitations on the ICC's jurisdiction over this crime. As permanent, veto-power members of the UN Security Council, they gave the impression that they, along with other permanent members, should possess an exclusive right to decide whether accountability for this far-reaching crime was ever to be pursued.

The majority of States Parties from Africa, Latin America and Europe opposed this position. Nevertheless, the Kampala Conference ultimately gave way to the debilitating conditions regarding the crime of aggression, although they were undoubtedly understood as being driven by the self-interest of larger powers. The leaderships of the latter had recognized the risk that their use of force or that of their allies (whether States Parties or non-States Parties) could potentially become the subject of future ICC investigations with respect to the crime of aggression. Certainly, some of their

[1] ICC Statute, Article 15*bis*(5) (https://www.legal-tools.org/doc/7b9af9/).

actions in the past could be seen as falling "within the grey area surrounding the prohibition of the use of force".[2]

The consequences of this gap in criminal responsibility are apparent in the situation in Ukraine, as has been noted by legal experts.[3] Whilst establishing a special tribunal or jurisdiction for the crime of aggression may address the current lacuna with respect to Russia's attack on Ukraine, how will such acts be adequately and objectively dealt with in the future? A sustainable solution appears to include a reversal of the earlier compromise regarding the conditions around the exercise of the crime of aggression.

"The solution lies in the hands of the 123 States Parties to the ICC Statute, which should strengthen the ICC's jurisdictional regime for this crime by removing the exceptional constraint in Article 15*bis*(5), with effect for future or ongoing aggression at the time of entry into force", said the CICJ Steering Group.

Furthermore, if more States Parties accede to the Kampala amendments to the ICC Statute, the territorial scope of the ICC's jurisdiction over the crime of aggression would broaden and become more effective. Of the 45 states that have already ratified the amendments, all but four are European or Latin-American. Only two African (Botswana and Niger) and two Asian states (Mongolia and Samoa) have ratified. The former colonial powers France and the United Kingdom have been opposed to the amendments. "International lawyers in the States Parties of France and the United Kingdom face a particular responsibility to persuade their governments to accede to the Kampala amendments. Similarly, international lawyers who advocate for a special tribunal or jurisdiction for aggression against Ukraine should persuade Ukraine's government to ratify the ICC Statute as soon as possible, thus mitigating concerns that Ukraine's quest for external involvement in accountability may be politicized", observed the CICJ Steering Group.

**Lesson Learned**

On 17 March 2023, the ICC issued an arrest warrant for Russia's President Vladimir Putin (and the Russian Federation's Commissioner for Children), for the "unlawful deportation of population (children) and that of unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation", in what may be described as a thematic prosecution.[4] In a statement, ICC Prosecutor Karim A.A. Khan KC underlined that "most acts in this pattern of deportations were carried out in the context of the acts of aggression committed by Russian military forces against the sovereignty and territorial integrity of Ukraine which began in 2014". Still, referring to aggression as the context of war crimes is very different from actually prosecuting aggression, and it appears that the Prosecutor himself is frustrated by his lack of jurisdiction.

It is worth noting that the ICC arrest warrant for President Putin was issued almost exactly 20 years to the day since the United States launched the invasion of Iraq on 19 March 2003. At the time, this action was described by UN Secretary-General Kofi Annan as "illegal" and a breach of the UN Charter. Although the ICC existed in 2003, it was unable to investigate the invasion of Iraq as a potential crime of aggression due to its lack of jurisdiction and definition of this crime. Twenty years later, the crime of aggression has been defined and activated in the ICC Statute, one party in the current war has recognized the jurisdiction of the Court (Ukraine), "planning, preparation, unleashing or waging of aggressive war" is criminalized in both Russian and Ukrainian law,[5] and yet

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[2] Claus Kreß, Stephan Hobe and Angelika Nußberger, "The Ukraine War and the Crime of Aggression: How to Fill the Gaps in the International Legal System", *Just Security*, 23 January 2023.

[3] The crime of aggression may be the only basis for "attributing individual criminal responsibility for the targeting of Ukrainian soldiers and certain harms to Ukrainian civilians, such as killing Ukrainian combatants during hostilities, or 'proportionate' civilian deaths due to an attack on a military target", *ibid.*

[4] For discussions on risks associated with thematic prosecutions, see Morten Bergsmo (ed.), *Thematic Prosecution of International Sex Crimes*, Torkel Opsahl Academic EPublisher, Brussels, 2018 (Second Edition) (https://www.toaep.org/ps-pdf/13-bergsmo-second).

[5] Article 353 of the Penal Code of the Russian Federation (https://www.legal-tools.org/doc/0656c9/) and Article 437 of the Penal Code of Ukraine (https://www.legal-tools.org/doc/72593c/).

establishing a special or *ad hoc* jurisdiction for the crime of aggression seems to be the exceptional measure favoured by many international lawyers to fill the current accountability gap.

"This situation is yet another painful example of the shortcomings of multilateral decision-making *when* it is driven by short-term horizons and the self-interest of individual states at the expense of 'the peace, security and well-being of humanity' as a whole", said the CICJ Steering Group. "Global agreements and decision-making processes must move rapidly towards recognizing our common heritage and collective future – the value of unity of humankind.[6] For States Parties to the ICC, that means revising the jurisdictional constraints of the crime of aggression", the Steering Group said.

More broadly, it means that *preventing* acts of aggression is more important than accountability after such acts have occurred. Increasing respect for the UN Charter's prohibition of unlawful use of force may not be possible without giving proper effect to the Charter's detailed provisions on collective security. To save future generations "from the scourge of war",[7] the Charter's insight born out of the horrors of World War II seeks not only collective *authorization* by the UN Security Council of the use of force to maintain or restore international peace and security, but also its collective *implementation* through co-operation among the permanent members of the Security Council. "They should not betray the trust humankind placed in them in 1945", the Steering Group cautioned.

**Background: The Crime of Aggression**

The crime of aggression is defined in Article 8*bis* of the ICC Statute as "planning, preparation, initiation or execution […] of an act of aggression" by a perpetrator "in a position effectively to exercise control over or to direct the political or military action of a State", that is, a political or military leader.

Acts of aggression must, by their character, gravity and scale, constitute a manifest violation of the UN Charter, and include "the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof", as well as bombardment "against the territory of another State or the use of any weapons by a State against the territory of another State", "blockade of the ports or coasts" of another state, and attack "on the land, sea or air forces, or marine and air fleets of another State".

Since 1948, no individuals have been tried for the crime of aggression. The Nuremberg and Tokyo Tribunals remain the only judicial proceedings in which verdicts were handed down for this crime, at the time referred to as "crimes against peace". In Nuremberg, 12 defendants, including Göring and Hess, were tried, while 25 out of 28 defendants were convicted in Tokyo.

However, alleged acts of aggression have taken place several times since the Tokyo and Nuremberg judgments: for example, the Soviet invasion of Afghanistan in 1979, Iraq's invasion of Kuwait in 1990, and the United States invasion of Iraq in 2003. The alleged aggressors were never tried.

**Coalition for International Criminal Justice**
Via San Gallo 135r, 50129 Florence, Italy
URL: www.cicj.eu
Twitter: @_cicj_

[6] For further explication of this point, see Morten Bergsmo, Emiliano J. Buis and Song Tianying, "Protected Interests in International Criminal Law", in Bergsmo, Buis and Song (eds.), *Philosophical Foundations of International Criminal Law: Legally-Protected Interests*, Torkel Opsahl Academic EPublisher, Brussels, 2022, pp. 1–56 (in particular Sections 1.4.3. and 1.5.) (https://www.toaep.org/ps-pdf/36-bergsmo-buis-song).

[7] Preamble, Charter of the United Nations (https://www.legal-tools.org/doc/6b3cd5/).