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Research Article

RUSSIA'S ATTACK ON UKRAINE: A REVIEW OF THE INTERNATIONAL CRIMINAL COURT'S CAPACITY TO EXAMINE THE CRIME OF AGGRESSION

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ABSTRACT

Background: *24 February 2022 shall be remembered as a day on which the international law principle prohibiting the use of force was breached once again. This incident could come under scrutiny from several different standpoints. The present study looks at this occurrence via the lens of international criminal law and the occurrence of the crime of aggression and its examination by the International Criminal Court (ICC). This study aims to analyse whether the inclusion of the crime of aggression in the ICC Statute was symbolic and practically useless or whether it could move the international community one step closer to the end of impunity. To this end, the incidence of aggression as defined by the ICC Statute will be determined after an assessment of the justifications offered by Russia. Despite the prohibition entailed in Art. 15 bis (5) of the Statute, which has led the doctrine to rule in favour of the Court's lack of jurisdiction, a solution to this impasse must be sought.*

Methods: *This paper uses doctrinal methods, and its dominant theoretical perspective is positivism. It relies on an accurate description and analysis of Russia's invasion as aggression and the capacity of the court to deal with it. The authors has attempted to collect as much pertinent data as possible, analyse the same, and review the applicable and relevant legal instruments and literature. Other publications on this subject matter accepted the inability of the ICC to prosecute the Russian aggression. The novelty of this paper is its search for the few loopholes in the rules and judgments of the ICC to investigate this crime in Ukraine. As a result, recommendations are made to stop Russia's wrongdoing while also offering suggestions and answers. This would ultimately result in the protection of international law and the preservation of Ukrainian territory.*

Conclusions and Recommendations: *The Russian claims, namely, anticipatory and collective self-defence, humanitarian intervention, and intervention by invitation, cannot face the crucible of international law norms, and, as such, the attack is a flagrant violation of the UN Charter. Thereafter, the exercise of jurisdiction seemed challenging, bearing in mind that Russia and Ukraine are not members of the IC, that the situation was not referred to the Security Council, and that the declaration issued by Ukraine accepting the Court's jurisdiction entailed a number of limitations (being restricted to crimes against humanity and war crime). Nonetheless, a case could be made that the Court has some capacity to engage with the question of an act of aggression based on a study of the Court's jurisprudence regarding such declarations and the Trial Chamber's interpretation of the phrase 'occurrence of crime in the territory of the State Party', affirming a positive interpretation of Art. 15 bis (5) and confirming the possibility for the presence of Ukrainian secessionists in the decision to attack.*

According to the authors, the following recommendations merit attention: 1) the necessity of a teleological interpretation of the Statute's articles by the Prosecutor and the Member States Assembly's solemn efforts to amend and deal with jurisdictional burdens in the Court's competence to entertain the crime of aggression; 2) reviewing the possibility of establishing an ad hoc or hybrid tribunal via an agreement between Ukraine and the UN; 3) consistent state practice in not recognising the auto-proclaimed governments at Donetsk and Luhansk; 4) establishing Russia's civil liability and the payment of proper compensation by the same.

1 INTRODUCTION

The political climate in Crimea and two Eastern Republics in Ukraine was tumultuous in 2014. That year, an illegitimate referendum was held on 16 March in a portion of Ukrainian territory. The subject of that referendum was Crimea's annexation into Russia. The residents of the peninsula voted in favour of the decision. Despite the non-acceptance of this

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referendum and its result by the international community, the Crimean local parliament then ratified the outcomes, and the Russian military entered the area. Eastern Ukraine saw heightened tensions when persons of Russian descent who had received training and backing from the Russian military and were based in the Donbas area took control of government structures.[1] Later on, the Republics of Luhansk and Donetsk declared independence further to a referendum on 11 May 2014. Military campaigns by the Ukrainian government to re-establish control in these regions and the Russian backing of the separatists stoked the flames of the conflict. The Minsk Agreement was first signed on 5 September 2014 by officials of Russia, Ukraine, and the Organization for Security and Cooperation in Europe, together with Germany, Russia, and leaders of the separatist-controlled territories. But the dispute did not stop as a result of this agreement. Another 13-article agreement was agreed upon by the parties in February 2015, allowing Ukraine to reclaim control over its boundaries and proposing measures for the autonomy of the two Republics. The Second Minsk Agreement could not be implemented either, and. pursuant to a request by Ukraine to join NATO and the EU and subsequent skirmishes between that country and two Republics, Russia attacked Ukraine on 24 February 2022. This military campaign took place two days after Russia recognised the independence of the Donetsk and Luhansk Republics.[2] In the speech delivered by the Russian president, Vladimir Putin,[3] and the communique[4] submitted to the International Court of Justice (hereinafter the ICJ) by the Russian representative on the same day, the cause of action was claimed to be self-defence and defence of the above-said Republics based on an invitation of the heads of those two entities due to the genocide of Ukrainians with Russian ancestry. Considering Russia's veto powers, the Security Council was unable to make any meaningful decisions, and the General Assembly could not adopt any measures within the framework of the 'Uniting for Peace' resolution.[5]

Concurrent with these developments, reports were published by the Human Rights Watch[6] and Amnesty International[7] indicating the use of cluster munitions in residential areas in Kharkiv and attacks on civilians and protected premises such as hospitals and schools. Forty-three state parties to the International Criminal Court (hereinafter the ICC or the Court) referred the situation to the Prosecutor.[8] Subsequently, the Prosecutor

1 Donbas is an unofficial, historical, economic, and cultural region in Eastern Ukraine, comprised of the northern and central sections of the Donetsk province, the southern parts of the Luhansk province, and the eastern extremities of the Dnipropetrovsk Oblast province.

2 Prior to Russia, only Serbia, Venezuela, and Cuba had recognized the two Republics.

3 'Address by the President of the Russian Federation' (*President of Russia*, 24 February 2022) <http://en.kremlin.ru/events/president/news/67843> accessed 10 October 2022.

4 'Document (with annexes) from the Russian Federation setting out its position regarding the alleged "lack of jurisdiction" of the Court in the case' (*International Court of Justice (ICJ)*, 7 March 2022) <https://www.icj-cij.org/en/case/182> accessed 10 October 2022.

5 UNGA Res ES-11/1 'Aggression against Ukraine' (2 March 2022) UN Doc A/RES/ES-11/1.

6 'Ukraine: Cluster Munitions Launched Into Kharkiv Neighborhoods: Russian Forces' Indiscriminate Attacks May Amount to War Crimes' (*Human Rights Watch*, 4 March 2022) <http://www.hrw.org/news/2022/03/04/ukraine-cluster-munitions-launched-kharkiv-neighborhoods> accessed 10 October 2022.

7 'Russia/Ukraine: Invasion of Ukraine is an act of aggression and human rights catastrophe' (*Amnesty International*, 1 March 2022) <https://www.amnesty.org/en/latest/news/2022/03/russia-ukraine-invasion-of-ukraine-is-an-act-of-aggression-and-human-rights-catastrophe> accessed 10 October 2022.

8 Lithuania, Republic of Albania, Commonwealth of Australia, Republic of Austria, Kingdom of Belgium, Republic of Bulgaria, Canada, Republic of Colombia, Republic of Costa Rica, Republic of Croatia, Republic of Cyprus, Czech Republic, Kingdom of Denmark, Republic of Estonia, Republic of Finland, Republic of France, Georgia, Federal Republic of Germany, Hellenic Republic, Hungary, Republic of Iceland, Ireland, Republic of Italy, Republic of Latvia, Principality of Liechtenstein, Grand Duchy of Luxembourg, Republic of Malta, New Zealand, Kingdom of Norway, Kingdom of the Netherlands, Republic of Poland, Republic of Portugal, Romania, Slovak Republic, Republic of Slovenia, Kingdom of Spain, Kingdom of Sweden, Swiss Confederation, United Kingdom of Great Britain and Northern Ireland. Japan, and North Macedonia.

initiated its investigations for war crimes, crimes against humanity, and genocide on 2 March 2022.

The Ukrainian government and many states endeavoured to benefit from legal and political movements of international bodies against this attack. For this purpose, the Committee of Ministers of the Council of Europe suspended the Russian Federation from its rights of representation in the Committee and in the Parliamentary Assembly of the Council,[9] the UN's Human Rights Council established an independent fact-finding commission, the Organization of Security and Cooperation in Europe (OSCE) used its 'Moscow Mechanism', the European Parliament put forth a proposal for an *ad hoc* international tribunal to prosecute the crime of aggression, and some petitions were filed before the European Court of Human Rights.[10] Jurists, too, have taken this matter under scrutiny from different standpoints, including the following: bringing to light Russia's underlying motives for the attack,[11] Russia's commitments under general and specific treaties,[12] reviewing the attack in light of international law principles,[13] analysing the Russian justifications for their actions[14] (mainly self-defence and humanitarian intervention), and the criminal implications of this attack. Scholars who studied the criminality of Russia's act all believed that a judicial review of aggression before the ICC is not possible.[15] The current authors was inspired to undertake the present study by focusing on the ICC's lack of competency. Every effort must be made to ensure that this devastating international crime[16] is not left unanswered, as it opens the door for additional wrongdoing, and a lack of response to it establishes a precedent for other derogations. In the past century, if jurists were to content themselves with *lex lata*, the principle of the prohibition to resort to force would never have been solidified as it is today, and international law norms would have remained undeveloped. Realistically speaking, the academic endeavours might not lead to instant, concrete outcomes and alleviate the pain suffered by the Ukrainians (for instance, even if the ICC is deemed competent, the institution of proceedings is contingent upon the accused being in the custody of the Court, which

9 Giulia Lanza, 'The Fundamental Role of International (Criminal) Law in the War in Ukraine' (2022) 66 (3) Orbis 426, doi:10.1016/j.orbis.2022.05.010.

10 Marika Lerch and Sara Mateos Del Valle, 'Russia's war on Ukraine in international law and human rights bodies: Bringing institutions back in' (*Think Tank European Parliament*, 8 April 2022) 1, 2, doi: 10.2861/685584 <https://www.europarl.europa.eu/thinktank/en/document/EXPO_BRI(2022)639322> accessed 10 October 2022.

11 David R Marples, 'Russia's war goals in Ukraine' (2022) 64 (2-3) Canadian Slavonic Papers 207, doi: 10.1080/00085006.2022.2107837.

12 Foundation Robert Schuman, 'Russia, Ukraine and international Law' (2022) 623 European Issues. <https://www.robert-schuman.eu/en/european-issues/0623-russia-ukraine-and-international-law> accessed 10 October 2022.

13 Maya Khater, 'The Legality of the Russian Military Operation against Ukraine from the Perspective of International Law' (2022) 3 (15) Access to Justice in Eastern Europe 107, doi.org/10.33327/AJEE-18-5.3-a000315.

14 James Green, Christian Henderson and Tom Ruys, 'Russia's attack on Ukraine and the jus ad bellum' (2022) 9 (1) Journal on the Use of Force and International Law 4, doi: 10.1080/20531702.2022.2056803.; Khater (n 15).

15 Iryna Marchuk and Aloka Wanigasuriya, 'The ICC and the Russia-Ukraine War' (2022) 26 (4) ASIL Insights 1 <https://www.asil.org/insights/volume/26/issue/4> accessed 10 October 2022; Ann Neville, 'Russia"s war on Ukraine: Investigating and prosecuting international crimes' (*Think Tank European Parliament*, 10 June 2022) 4 <https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2022)733525> accessed 10 October 2022; Claus Kreß, *The Ukraine War and the Prohibition of the Use of Force in International Law* (TOAEP 2022) 22; Patrick Butchard, *Ukraine Crisis: Recognition, military action, and international law* (*House of Commons Library*, 24 March 2022) 29 <https://commonslibrary.parliament.uk/research-briefings/cbp-9470> accessed 21 May 2022; Lerch and Mateos Del Valle (no 12) 4.

16 'To initiate a war of aggression … is not only an international crime; it is the supreme international Crime…', See 'International Military Tribunal (Nuremberg), Judgment and Sentences' (1947) 41 (1) American Journal of International Law 186, doi: 10.2307/2193873.

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seems unlikely under the current circumstances, or other criminal courts might not be able to get involved in terms of other states' lack of cooperation, given the principle of immunity of heads of states), but it could increase the cost of war for Russia and reduce, to some extent, the intensity of hostilities against civilians and non-military objectives. Moreover, the ICC is at a very important juncture, and any act by it has an enormous impact in terms of its subjective and objective legitimacy since states have been unprecedentedly cooperative in terms of providing financial and technical support to the Court.[17] In return, they expect the Court to act differently. If the Court fails to make significant advances in this case, it will lose a huge part of its credibility. This would lead to a reduction in state support and less success in the Court's mission, i.e., putting an end to impunity. Furthermore, it might create a suspicion that the ICC is only able to intervene in crimes committed by nationals of the state parties or those belonging to states without enough clout to contradict the Court.[18]

This article aims to investigate the criminal dimension of the Russian attack on Ukraine through a teleological lens and particularly to analyse the occurrence of the crime of aggression. This confirmation is not only to establish the criminal responsibility of the perpetrators (which is important in itself and a point of concern of the present paper) but also affirms the civil liability of the aggressor state,[19] which could be expounded upon in the literature to follow. The next logical step after establishing the existence of aggression is to determine whether the Russian strike might be brought before the ICC as such. According to Art. 12(3) of the Court's Statute, Ukraine accepts the Court's jurisdiction over war crimes and crimes against humanity committed on its territory between 21 November 2013 and 22 February 2014 and thereafter without any time restrictions.[20] This is taken into consideration when examining the ICC's jurisdiction. These declarations are a requirement for the Court's competence.[21] In the descriptive-analytical method, upon reviewing international judicial decisions and documents and doctrine, an attempt is made to answer the following question: Does Russia's attack on Ukraine amount to the crime of aggression as defined by the Rome Statute and if so, what is the Court's capacity once faced with such an event? To answer the above inquiry, a decision should be made concerning the Court's competence *ratione materiae* under Art. 8 *bis* of the Statute. Furthermore, can the Court exercise jurisdiction in this specific situation? As a result, the arguments offered by Russia will be used to determine whether aggression occurred in accordance with the Statute's requirements. The next stage is to assess the Court's capacity to play a role against this crime in the attack on Ukraine.

17 Yvonne Dutton and Milena Sterio, 'The War in Ukraine and the Legitimacy of the International Criminal Court' *(Just Security*, 30 August 2022) <https://www.justsecurity.org/82889/the-war-in-ukraine-and-the-legitimacy-of-the-international-criminal-court/> accessed 10 October 2022, [2023] American University Law Review 15-6 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4235675> accessed 10 October 2022.

18 Nuotio Kimmo, 'The war in Ukraine, the evolution of international criminal law and the crumbling of the rule of law in Russia' (2022) 103 (1,5) Defensor Legis: Suomen asianajajaliiton äänenkannattaja 319.

19 As Haque stated, since there can be no fully lawful attacks or truly legitimate targets in a war of aggression, Russia incurs state responsibility for all the damage caused by its internationally wrongful act of aggression and it must make full reparation for all injuries directly caused by the unlawful use of force, whether or not these injuries result from violations of international humanitarian law. See Adil Ahmad Haque, 'An Unlawful War' (2022) 116 American Journal of International Law 155, doi: 10.1017/aju.2022.23.

20 The latter was submitted to the registrar of ICC on 4 February 2015.

21 'Information for Victims Ukraine' (*International Criminal Court*, 2022) <https://www.icc-cpi.int/victims/ukraine> accessed 10 October 2022.

2 THE COURT'S JURISDICTION *RATIONE PERSONAE* REGARDING RUSSIA'S ACTIONS

Unlike other crimes mentioned in Art. 5 of the Statute, the crime of aggression is related to *jus ad bellum*. Despite the view expressed by some scholars who doubt the Court's standing for the judicial review of ambiguous cases of *jus ad bellum*[22] or those who question the legality of ascertaining the occurrence of aggression by a tribunal acting independently of the Security Council and its ensuing international relations implications,[23] nonetheless, this crime was defined in the Statute's Review Conference, and the Court had competence for its review starting from 17 July 2018. The first paragraph of Art. 8 *bis* provides the following definition of aggression:

> […] 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 second part of the second paragraph of the same article defines 'act of aggression' as: 'using armed forces 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 paragraph continues on to list various examples of aggression, such as an armed force invasion or attack on another state's territory, bombardment by the armed forces of a state against the territory of another state, or the use of any weaponry by one state against another state's territory. This is a narrow[24] working definition for the Court and has no bearing on general international law.[25] Moreover, the amendment to the Statute does not create a responsibility to prosecute aggression in domestic courts.[26]

Reviewing the commission of aggression by individuals at the ICC is contingent upon verifying that the act of aggression was perpetrated by a state. This act must have a particular character, gravity, and scale, which should be a manifest violation of the UN charter. According to Art. 46(2) of the Vienna Convention on the Law of Treaties, the 'manifest' requirement means being 'objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith [acting to the utmost extent possible in keeping with the provisions of the Convention as construed from its letter and spirit]'.[27] The 'manifest' proviso stated in the article does away with suspect cases. Besides, the mere satisfaction of one of the conditions of having the necessary character, gravity, and scale does not suffice.[28] Moreover, this condition paves the way for a limiting interpretation of armed

22 Carrie McDougall, *The crime of aggression under the Rome Statute of the International Criminal Court* (2nd ed, CUP 2021) 209-10, doi: 10.1017/9781108769143.

23 Bing Bing Jia, 'The crime of aggression as custom and the mechanisms for determining acts of aggression' (2015) 109 (3) American Journal of International Law 580, 581, doi: 10.5305/amerjintelaw.109.3.0569.

24 Claus Kreß, 'On the Activation of ICC Jurisdiction over the Crime of Aggression' in Pavel Šturma (ed), *The Rome Statute of the ICC at Its Twentieth Anniversary: Achievements and Perspectives* (Brill Nijhoff 2018) 64-5.

25 RC/Res.6 'The Crime of Aggression' (11 June 2010) RC/11, pt II, Annex III, 4. See also Art 10 of the Rome Statute of the International Criminal Court (17 July 1998).

26 Ibid 5.

27 Mark Eugen Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publisher 2009) 367, doi: 10.1163/ej.9789004168046.i-1058.

28 See The crime of aggression Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression (RC/Res.6, Annex III, 2010) 7.

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attacks as aggression.[29] The word 'character' refers to the nature of the act, to be determined by the actual intent of the perpetrator. To assess the gravity and scale, one could review the duration, extent, and instruments used.[30] The *mens rea* of the crime comprises knowledge of the circumstances, and knowing that the act violates the UN Charter is not a necessary condition.[31]

There is no question that the armed strike launched by Russia in the war under consideration in this study had notable seriousness and was conducted throughout a sizable portion of Ukrainian territory over the course of many months. The invasion and occupation of another state's territory, the bombardment of another state's territory, the blockade of the port of Mariupol and the Sea of Azov, an attack against the land, sea, or air forces of another state, and even the sending of armed bands, irregulars, or mercenaries (including the Syrian fighters or mercenaries from the 'Wagner Group') were carried out.[32] As a result, the criteria for character, gravity, and size are all satisfied. The question is whether this attack complies with or violates the rights guaranteed by the UN Charter, including the prohibition against the use of force. The main challenge to be resolved is not uncertainty regarding the definition but ambiguities associated with *jus ad bellum*.[33] Consequently, arguments put forth by Russia in justifying the attack should be studied in keeping with principles of international law so that a decision concerning the existence of aggression could be made.

3 RUSSIA'S JUSTIFICATION

Despite Russia's repeated attempts to link its actions to the international law violations committed by some western states during their illegal wars against Iraq, Libya, and Syria in the name of self-defence and the defence of human rights in the countries they attacked, any prior violations and breaches cannot negate or justify the current violations.[34] Hence, as mentioned earlier, in the statement issued by Putin and the document submitted by the Russian representative at ICJ, titles such as the self-defence of Russia and the self-proclaimed governments within the purview of Art. 51 of the UN Charter and humanitarian intervention against a claim of genocide could be inferred. The doctrine of Intervention by Invitation may also be analysed in light of the use of the term 'invitation' in the Russian president's statement. It goes without saying that the issue of the two Republics' claims to independence must also be taken into consideration when discussing collective self-defence and intervention by invitation. Only if these claims are corroborated, the attack is not a manifest violation of the Charter and could not be deemed as an act of aggression. Then, the Court shall be devoid of jurisdiction *ratione personae* to review the matter.

29 For instance, McDougal, Zimmermann and Freiburg do not consider armed attacks for humanitarian intervention as manifest violation of the Charter, given their nature. See Andreas Zimmermann and Elisa Freiburg, 'Articl 8bis Crime of Aggression' in Kai Ambos and Otto Triffterer, *The Rome Statute of the International Criminal Court: A Commentary* (3rd ed, Nomos Verlagsgesellschaft 2016) 602, doi:10.5771/9783845263571-581; McDougall (no 24) 162.

30 Zimmermann and Freiburg (no 31) 597.

31 Ibid 598.

32 Green, Henderson and Ruys (no 16) 6.

33 Carsten Stahn, *A critical introduction to international criminal law* (CUP 2019) 103.

34 Khater (no 15) 109.

3.1 Self-defence

The most important claim of Putin and the Russian representative is the self-defence of Russia and the self-proclaimed governments, with reference to Art. 51 of the Charter. In this scenario, self-defence, in the case of Russia, is anticipatory self-defence, and for the Republics, it is collective self-defence.

3.1.1 Anticipatory self-defence

The UN Charter forbade the use of force, and the only exceptions that were permitted were self-defence and a Security Council permission within the scope of the collective security paradigm. The ICJ's jurisprudence normally leans towards a restrictive interpretation of Art. 51 and requires an armed attack with significant[35] effect and extent for a justification under this Art.[36] since otherwise, how can one assess factors such as necessity and proportionality?

In a part of his statement, Putin mentions dealing with future threats against the existence and interests of Russia posed by Ukraine and NATO members as among the reasons for his military operations.[37] Putin's use of the word 'possible aggressors' implies that Russia has not been the target of an actual invasion by Ukraine or NATO countries. Putin's speech recalls George W. Bush's doctrine, which was incorporated in the US National Security Strategy on 20 September 2002.[38] In legal parlance, this points to an argument based on anticipatory self-defence. This doctrine is founded upon the *Caroline* affair and indicates the measures that are adopted by a state with the aim of destroying the infrastructure and capabilities of another state, which might, in the unforeseen future, attack the first state.[39]

There is little doubt that anticipatory self-defence has no standing in the Charter since *expressio unius est exclusio alterius*. Some might argue that later practice by states (either via acquiescence or estoppel) has implicitly modified the Charter and its obligations. This form of revision is permitted for the foundation texts of international organisations via various institutional actions and subsequent adoption by state parties.[40] While emphasising the existence of customary law on the use of force,[41] it seems improbable that the UN's practice and that of its state parties confirm implicit amendment of the Charter by accepting anticipatory self-defence. In *the Armed Activities on the Territory of the Congo Judgment*, the ICJ, in keeping with its previous judgment in *the Military and Paramilitary Activities in and*

35 *Oil Platforms (Islamic Republic of Iran v. United States of America)* [2003] ICJ Rep 161, para 51 (6 November 2003).

36 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14, para 195 (27 June 1986); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 139 (9 July 2004); *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 41 (8 July 1996).

37 'The problem is that in territories adjacent to Russia, which I have to note is our historical land, a hostile "anti-Russia" is taking shape. Fully controlled from the outside, it is doing everything to attract NATO armed forces and obtain cutting-edge weapons. For our country, it is a matter of life and death, a matter of our historical future as a nation. This is not an exaggeration; this is a fact. It is not only a very real threat to our interests but to the very existence of our state and to its sovereignty'. See Address (n 4).

38 'US National Security Strategy 2002: V Prevent Our Enemies from Threatening Us, Our Allies, and Our Friends with Weapons of Mass Destruction' (*The White House President George W Bush*, 2002) <http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/nss5.html> accessed 10 October 2022.

39 Zimmermann and Freiburg (no 31) 600.

40 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, p 22 (21 June 1971).

41 *Nicaragua v United States of America* (no 38) para 176.

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against Nicaragua, considered Art. 2(4) as the cornerstone of the UN Charter and stressed the fact that except for actions taken by the Security Council under Chapter VII, Art. 51 of the Charter may justify a use of force in self-defence only within the strict confines laid down there. Furthermore, Art. 51 does not allow using force by a state to protect perceived security interests beyond these parameters.[42]

Referring to criticisms raised to the Secretary General's 2005 report, which discussed anticipatory self-defence with regard to state parties' subsequent actions, the right to pre-emptive self-defence against an imminent and definite attack or known and impending assault is only partially recognised by state practice.[43] However, anticipatory self-defence lacks such a status.[44] The Security Council, too, treats these two types of defences differently and usually condemns anticipatory and not pre-emptive self-defence.[45] Russia has taken NATO's measures as a threat of an imminent armed attack, to which it could respond with an anticipatory use of defensive force. It is baseless because there was no evidence that NATO was about to launch an armed attack against Russia imminently. Prior to Russia's invasion, NATO Member Nations had relatively few military assets stationed along their eastern boundaries, and they had also avoided being drawn into a war with Russia after Russia had invaded. Moreover, Putin's use of the words '[A] military presence in territories bordering on Russia, if we permit it to go ahead, will stay for decades to come or maybe forever, creating an ever-mounting and totally unacceptable threat for Russia' did show the threat had not been imminent.[46]

Putin's resort to anticipatory self-defence is the result of such uncalled-for actions by states in previous cases; more than 45 countries attacked Iraq in response to unsubstantiated claims that it had a stockpile of chemical weapons. Such measures are indeed used as an excuse by other powers to resort to illegitimate acts in the following years.

At the end of this section, the ICJ's point in its order on 16 March 2022 is worth mentioning, where it stated: 'it is doubtful that the [Genocide] Convention, in light of its object and purpose, authorises a Contracting Party's unilateral use of force in the territory of another State for the purpose of **preventing** or **punishing** an alleged genocide'.

3.1.2 Collective self-defence

Another claim put forward by Russia is that in attacking Ukraine, it is defending the self-proclaimed governments in the Donbas region, relying on a treaty of reciprocal friendship, cooperation, and mutual assistance,[47] wherein Russia recently recognised them as independent states.[48]

According to the ICJ judgment, collective self-defence is only permissible if the victim state announces aggression against it after an armed attack, and this defence must be carried out

42 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168, para 148 (19 December 2005).

43 Zimmermann and Freiburg (no 31) 600.

44 James Crawford, *Brownlie"s principles of public international law* (8th ed, OUP 2019) 725.

45 Compare Security Council Resolutions 233, 234, 235, 236 and 237 (1967) with Resolution 487 (1981). See 'Resolutions' (*United Nations Security Council*) <https://www.un.org/securitycouncil/content/resolutions-0> accessed 10 October 2022.

46 Green, Henderson and Ruys (n 16) 10, 11.

47 Document (no 6) paras 15-17.

48 Victor Jack and Douglas Busvine 'Putin recognizes separatist claims to Ukraine's entire Donbass region' (*Politico*, 22 February 2022) <https://www.politico.eu/article/vladimir-putin-russia-ukraine-donbass-separatist-recognition> accessed 10 October 2022.

in response to that victim's request while adhering to the basic rules regulating justifiable self-defence.[49] Furthermore, a reading of Art. 51 of the Charter and ICJ's opinion in *the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case indicate that collective self-defence is a request for defence by a state against an armed attack.[50] Therefore, first, it should be proved that the two Republics in question are indeed states.

In the conflicts of 2014, the two Republics declared independence without the Ukrainian government's consent. Up to now, only Cuba, Venezuela, Serbia, and Russia have recognised these two entities as states. In classic international law, secession from the central government is illegal without its consent. But some legal professionals cite the 'safeguard clause' found in 'the Declaration on Principle of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations', which the International Court of Justice (ICJ) claims reflects customary international law.[51] Based on this clause, conditional secession is permissible and recognised for people devoid of the possibility to implement the right of internal self-determination and those who are subject to flagrant violations of human rights.[52] By virtue of this clause, only those states that respect the fundamental rights of their inhabitants and represent all ethnic or religious groups and minorities residing in their territories can benefit from the rights and prerogatives of safeguarding territorial integrity. In the current situation, the permanent representative of Russia to the UN emphasised that Russia cannot respect Ukrainian territorial integrity since ethnic Russians in eastern Ukraine are unable to exercise their right to self-determination.[53]

The right of conditional secession was reinforced after the ICJ's ruling in the *Kosovo* case and prompted some scholars to speak of the theory of 'Remedial Secession'. This theory has its roots in the principle of self-determination, previously accepted only for territories under colonial rule, occupied lands, and racist governments. Remedial secession is a right that develops when a state consistently and systematically violates the basic human rights of a subset of its inhabitants who are allowed to exercise their right to external self-determination. For those residents who use it by proclaiming independence, this is their only option. This is a right reserved for a minority who form the majority in a specific section of a state's territory, and their fundamental rights are breached to such an extent that it endangers their collective identity (made up of language, religion, and other distinct cultural elements). They have resorted to all other amicable mechanisms to settle the issue, and secession is their only and final solution.[54] The African Commission on Human and People Rights' decisions in the *Katanga* and *South Cameroon* cases and the Supreme Court of Canada[55] confirm the existence of this

49 *Nicaragua v United States of America* (no 38) paras 195, 196.

50 *Legal Consequences of the Construction of a Wall* (no 38) para 139.

51 *Nicaragua v United States of America* (no 38) paras 191, 193.

52 James Crawford, 'The Right of Self-Determination in International Law: The Development and Future' in Philip Aleston (ed) *Peoples Rights* (OUP 2001) 65; Simone Van den Driest, 'Crimea's Separation from Ukraine: An Analysis of the Right to Self-Determination and (Remedial) Secession in International Law' (2015) 62 Netherland International Review 340, doi.org/10.1007/s40802-015-0043-9; *Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo* (Separate Opinion of Judge Yusuf) [2010] ICJ Rep 618, para 16 (22 July 2010).

53 'Statement and reply by Permanent Representative Vassily Nebenzia at UNSC briefing on Ukraine' (*Permanent Mission of the Russian Federation to the United Nations*, 23 February 2022) <https://russiaun.ru/en/news/230222un> accessed 10 October 2022. See also Document (n 5) para 19.

54 John Dugard and David Raič, 'The Role of Recognition in the Law and Practice of Secession' in Marcelo Kohen (ed) *Secession: International Law Perspectives* (CUP 2006) 109, doi: 10.1017/CBO9780511494215.006.

55 *Reference re Secession of Quebec*, Case No 25506 (Supreme Court of Canada, 20 August 1998) 2 SCR 217, paras 119-126.

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right under special circumstances and where flagrant and serious violations of human rights take place.[56]

First, there is disagreement about whether or not this right exists.[57] Even if one acknowledges its existence, the situation was not so dire that there were no alternative options to consider, even if the Ukrainian government had violated the human rights of the citizens of these two Republics and had not behaved as the representative of all ethnic groups. In the Second Minsk Agreement, mechanisms were incorporated to grant considerable autonomy to those entities. In the case of Kosovo, the Russian government itself deemed the right of secession appropriate only if all other endeavours to settle the issue bore no fruit and recognised it solely as a measure of last resort.[58] Moreover, it asserted:

> It is widely accepted that a population of a trust or mandated territory, of a non-self-governing territory, or of a present State, taken as a whole, undisputedly qualifies as a people entitled to self-determination. Whether, and under which conditions, an ethnic or other group within an existing State may qualify as a people, is subject to extensive debates.

Based on the estoppel rule, Russia cannot recognise the citizens of Donbas as a 'people' either because it believed that the term 'people' referred to the population of a state as a whole rather than sub-national groups and did not recognise the people of Kosovo as a people with the right to self-determination.[59]

Concerns for the protection of human rights are commendable, but maintaining international peace and security is more important. Although the atrocities committed in Kosovo and empowering that state for governing cannot be compared to the circumstances of the two Republics, once close to 100 states recognise the legality of secession of a part of the state legitimate without that state's consent and the ICJ, with a positive nod, deems the unilateral declaration of independence permissible,[60] the groundwork is laid for other secessionists to do the same.

In addition, and regardless of debates about the legality of secession, an entity may only assert its 'state' status if it satisfies the criteria listed in the Montevideo Convention. The two Republics have no distinct borders and are obviously reliant on Russia for the assertion of their sovereignty. As such, the conditions constituting statehood are absent, and so are the prerequisites for the legitimacy of state creation. The limited recognition by a handful of states confirms the invalidity of this so-called independence.

Even if one considers the two Republics as states, in what way were they subjected to an 'armed attack' by Ukraine, as meant by the ICJ? Moreover, how could the extent of the Russian attack on Ukrainian territory and its continuation for several months be justified under the founding pillars of self-defence, namely proportionality and necessity?[61]

56 *Katangese Peoples" Congress v Zaire*, Comm No 75/92 (ACHPR, 22 March 1995) IHRL 174, para 10; *Kevin Mgwanga Gunme et al v Cameroon*, Comm No 266/03 (ACHPR, 27 May 2009), para 188.

57 For scholars defending the existence of this right, see: Van den Driest (n 53) 337-40. Cf. Nicolas Brando and Sergi Morales-Gálvez, 'The Right to Secession: Remedial or Primary?' (2019) 18 (2) *Ethnopolitics* 107, doi: 10.1080/17449057.2018.1498656.

58 *Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo* (Written Statement of the Russian Federation) [2009] ICJ Written proceedings, para 87 (17 April 2009).

59 Ibid para 81.

60 Separate Opinion of Judge Yusuf (no 54) para 84.

61 *Nicaragua v United States of America* (no 38) para 194; *Legality of the Threat* (no 38) para 41; *Oil Platforms* (no 37) para 43; *Democratic Republic of the Congo v Uganda* (no 44) para 147.

3.2 Humanitarian intervention of responsibility to protect

Referring to genocide in Ukraine and in defence of a people in pain for eight years because of it,[62] Russia mentions humanitarian intervention in one way or another as the other justification for its attacks. Regarding various viewpoints expressed by states[63] and bearing in mind the ICJ's opinion that the use of force could not be the appropriate method to respect human rights,[64] such interventions were rebranded as the 'responsibility to protect', according to which it is permitted to militarily intervene and breach the sovereignty of a state which itself violates human rights or is unable to preclude it from happening. In other words, other states with approval from the Security Council shall adopt prompt measures in collaboration with regional organisations to protect those people when peaceful mechanisms are ineffective, and the state is manifestly incapable of upholding its responsibility to protect its people against genocide, ethnic cleansing, war crimes, and crimes against humanity.[65] Such an intervention is not considered a new exception to the prohibition against the use of force and is only legitimate pursuant to an authorisation by the Security Council. Since the occurrence of those crimes is yet to be proved,[66] and there is no permission granted by the Council, this claim is also refuted.

3.3 Intervention by invitation

The Russian president and his representative, in the speech and the document submitted to the ICJ, respectively, refer to an invitation by the heads of the two self-proclaimed Republics.[67] This phraseology could be a reference to the legal institution known as an 'invitation to intervention' or military aid with the previous consent in hostilities short of an armed conflict.

In the law of resort to force as included in the UN Charter, there is no mention of an invitation to intervention, and the Institut de Droit International, in a 1975 resolution, first declared any invitation at any level of tension and to the benefit of any side of the conflict illegal.[68] However, this position changed in a subsequent resolution in 2009.[69] Hence, one can infer *ex contrario* from Art. 3 of the General Assembly's Definition of Aggression resolution,[70] the International Law Commission's opinion in interpreting Art. 20 of the Draft Articles on the

62 Document (n 5) para 19.

63 Crawford (no 46) 729.

64 *Nicaragua v United States of America* (no 38) para 268.

65 UNGA Res 60/1 'World Summit Outcome' (16 September 2005) UN Doc A/RES/60/1, para 139. See also UNGA 'Implementing the Responsibility to Protect, Report of the Secretary-General' (12 January 2009) 63rd session UN Doc A/63/677.

66 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)* (Order) [2022] ICJ General List No 182, para 59 (16 March 2022). Green, Henderson and Ruys (no 16) 26 point that the lack of evidence is despite the constant monitoring of the situation in Ukraine by the Organization for Security and Cooperation for Europe and the UN Office of the High Commissioner for Human Rights, as well as various NGOs.

67 Document (no 6) para 16.

68 M Schindler, 'The Principle of Non-Intervention in Civil Wars: The Draft Report of The Institute of International Law' (Wiesbaden Session, 14 August 1975) Art 2 <https://www.idi-iil.org/app/uploads/2017/06/1975_wies_03_en.pdf> accessed 10 October 2022.

69 G Hafner, 'Present Problems of the Use of Force in International Law, Intervention by Invitation: The Draft Report of the 10th commission Institute de Droit international' (2009) 73 *Annuaire de l'Institut de droit international* 415 <www.idi-iil.org/app/uploads/2017/06/Hafner.pdf> accessed 10 October 2022.

70 UNGA Res 3314 (XXIX) 'Definition of Aggression' (14 December 1974) UN Doc A/RES/3314 XXIX.

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Responsibility of States,[71] and confirmation in state practice[72] that intervention by invitation has legitimacy in international law.[73] Nonetheless, jurists disagree on the theoretical foundation of its legitimacy (such as a customary exception to the prohibition on resort to force, consent in the law of international responsibility, and the issue of its consistency with the principle of state sovereignty and territorial integrity given its specificity to the territory of one state).[74]

The legitimacy of such an invitation stems from a state's sovereignty and its authority over its territory within the confines defined by international law. Consequently, its authorised officials can act upon valid consent to neutralise insurgent groups who endanger the sovereign's stability.[75] Such consent could be transferred to another state on a case-by-case basis or through a treaty.[76]

In the judgment in the *Military and Paramilitary Activities in and against Nicaragua*, the ICJ, while confirming the state's discretion in asking for intervention from another state, does not recognise the same right for insurgents.[77] According to the majority of academics, a valid invitation from a representative of the government with the authority to exercise real sovereignty would be sufficient.[78] As stated previously, two self-proclaimed Republics could not be deemed as states, and their leaders lack any authority to invite foreign powers or give consent for military intervention in another state's territory. Even if these two entities are capable of exerting effective sovereign authority in an independent territory, an invitation to intervene by a puppet state who relies on foreign powers and asks for the same power's military presence cannot receive a legal stamp of approval.[79] Just like the Soviet presence in Hungry (1956) and Afghanistan (1979) and that of the US in Panama (1989) is legally questionable.

It is also important to note that an invitation to intervene should only be used against non-state actors on the territory of the state issuing it, not against another state on its own territory. Therefore, using that reason in the instance under consideration here is not appropriate. In light of the above, the Russian claims are not compatible with international law norms, and the attack on Ukraine is a blatant violation of the UN Charter and an instance of aggression, as mentioned in Art. 8 *bis* of the ICC Statute. This conclusion was confirmed by scholars[80] and 141 member states of the United Nations General Assembly.[81]

71 ILC 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (November 2001) 53rd Session, Supplement No 10 (A/56/10), chp IV E1, 72-75 <https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> accessed 10 October 2022.

72 Georg Nolte, 'Intervention by Invitation' (*Max Planck Encyclopedia of Public International Law*, 2010) 6 <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1702> accessed 10 October 2022.

73 Malcolm N Shaw, *International Law* (8th edn, CUP 2017) 876. *See also* Yoram Dinstein, *War, Aggression and Self-Defense* (5th edn, CUP 2011) 119.

74 Laura Visser, 'May the Force Be with You: The Legal Classification of Intervention by Invitation' (2019) 66 *Netherlands International Law Review* 43, doi.org/10.1007/s40802-019-00133-7.

75 Hafner (no 71) 415.

76 Dinstein (no 75) 122-3; Crawford (no 46) 743.

77 *Nicaragua v United States of America* (no 38) para 246.

78 Shaw (no 75) 876-8.

79 Dinstein (no 75) 121.

80 Haque (no 21) 155; Green, Henderson and Ruys (n 16) 27; Butchard (n 16) 26; Kreß (no 17) 13.

81 UNGA Res ES-11/1 (2 March 2022).

4 ICC'S EXERCISE OF JURISDICTION

Once the Court's jurisdiction *ratione personae* is confirmed, the next step is reviewing its jurisdictional competence. As a general provision and by virtue of Art. 12 of the Statute, a precondition for the Court's jurisdiction is the referral of the matter by a member state or the Security Council or issuance of a declaration by a non-member state. Crimes committed on a member state's territory or by its nationals are the focus of this referral. Furthermore, according to Art. 15 *bis*, paragraph 5, the Court lacks jurisdiction over crimes committed by nationals of non-member states or those that occurred on their territory.

In the present case, the governments of Russia and Ukraine are not members of the ICC, and the Security Council has not referred the current situation to the Court for review. The only resort available for the Court's jurisdiction is the declarations issued by Ukraine per Art. 12(3) of the Statute. Ukraine first issued a declaration on 9 April 2014 and accepted the Court's jurisdiction for crimes against humanity and war crimes committed on its territory from 21 November 2013 to 22 February 2014. Later on, it accepted ICC's jurisdiction for the same crimes starting from 20 February 2014 onward by a declaration dated 8 September 2015, with no time constraints.

At first glance, these two declarations could only be used as a foundation for the Court to examine war crimes and crimes against humanity that were committed in Ukrainian territory starting in 2014, including during the Russian attacks against Ukraine. Since the crime of aggression is not expressly mentioned in these documents, the Court lacks jurisdiction in this area. However, the practice reflected in the Rules of Procedure and Evidence, positions adopted by the Prosecutor and the Court's Chambers, indicate otherwise.

Per Art. 44 of the Court's Rules of Procedure and Evidence, the Registrar shall inform the state concerned that the declaration under Art. 12, paragraph 3, has, as a consequence, the acceptance of jurisdiction with respect to the crimes referred to in Art. 5, the provisions of Part 9, and any rules thereunder that would apply to state parties. Court's jurisdiction is no longer limited to the crimes designated in the declaration of acceptance as issued by a non-member state. The Pre-Trial Chamber in the *Gbagbo* case considers the *raison d'être* of Art. 44 of the Statute to be the following: 'Rule 44 of the Rules was adopted in order to ensure that States that chose to stay out of the treaty could not use the Court "opportunistically"'. In fact, there were worries that the language of Art. 12(3) of the Statute would enable states that are not parties to the Statute to utilise the Court as a political instrument by choosing to accept the exercise of jurisdiction over certain crimes or specific parties to a dispute.[82]

Hence, the Court is not limited to the issued declaration, and this document only grants the jurisdictional ability to the Court concerning a situation. Similarly, from a temporal standpoint and according to the Court's Appeals Chamber, the Court's judicial review is not limited to the crimes committed[83] since the ICC serves the purpose of deterring the commission of crimes in the future and not only of addressing crimes committed in the past.[84] As a result, the Chamber will decide the relevant timeline of the inquiry, if it is approved, based on the Prosecutor's Request, the supporting documentation, and the claims made by the victims under Art. 15 of the Statute. Consequently, the relevant timeframe of the investigation, if authorised, will be determined by the Chamber on the basis of the Prosecutor's Request and the supporting materials, as well as the victims' representations

82 *Situation in the Republic of Cote d'Ivoire in the Case of the Prosecutor v Laurent Gbagbo*, Case No ICC-02/11-01/11-212 (ICC Pre-Trial Chamber I, 15 August 2012) para 59.

83 *Situation in the Republic of Cote d'Ivoire in the Case of the Prosecutor v Laurent Koudou Gbagbo*, Case No ICC-02/11-01/11 OA 2 (ICC Appeal Chamber, 12 December 2012) para 80.

84 Ibid para 83.

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under Art. 15 of the Statute.[85] Hence, the lack of reference to the crime of aggression in the declaration issued by Ukraine is not an impediment to the Court's exercise of jurisdiction, and the attack also fits temporally within the timeframe of the declaration (2014 onward).

Extension of the Court's jurisdiction to the crime of aggression based on the Ukrainian 2015 declaration does not contradict Art. 121(5) of the Statute, whose provisions are underlined in the member states' statement at the time of implementing the 2017 amendment.[86] That paragraph prohibits the exercise of the Court's jurisdiction on member states who have not ratified the Kampala Summit amendment. This paragraph, which applies only to member states, ensures their sovereignty and permission to undertake international commitments as set out in the Statute. A majority vote, not a consensus, was used to amend the definition of an international crime, which affects those who confronted differing normative provisions in the founding treaty at the time of admission. Consequently, the Statute requires their consent for the implementation of new rules. By explicit reference in the Statute, this matter is related to member states and is not applicable to a non-member such as Ukraine, which has been aware of these alterations and has authorised the Court to examine the matter after amendments in the definition of aggression.

Regardless of the Ukrainian government's declaration as the jurisdictional basis, the Trial Chamber's position in the *Myanmar* case could be counted as a jurisdictional foundation to review the Russian attack. Based on the principles of good faith, beneficial effect and given the customary status of the principle of territorial jurisdiction, the Court interpreted Art. 12(2)(a) of the Statute in such a way that, in case the commission of a cross-border crime in the territory of a non-member state has affected member states, then just like domestic courts, the ICC shall have jurisdiction to review the matter. In the eyes of the Court, the states, by drafting Art. 12(2)(a), did not intend to limit the Court's jurisdiction solely to crimes that were committed in the territory of member states.[87] It goes without saying that the occurrence of aggression has significant ramifications for the international community as a whole and particularly for those states who receive refugees and displaced persons.

The main burden against a judicial review of the Russian aggression before the Court is paragraph 5 of Art. 15 *bis* of the Statute, which states: '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'. As mentioned earlier in the introduction, upon referring to this provision and with no further explanation or justification, the doctrine unanimously declares the Court's lack of jurisdiction and moves on to seek other paths in the prosecution of aggression. Those substitute mechanisms are either not completely practical or, if realised, suffer from several shortcomings. We shall not delve into the pros and cons of those mechanisms; however, some cursory points are mentioned hereunder. The establishment of a new tribunal calls for states' consent which is not easy to acquire. Furthermore, in addition to financial costs, it could be criticised as an instance of exceptionalism. Moreover, a newly-constituted court would not have any advantages over the Court in terms of taking custody of the accused individuals.[88] Proceedings before national courts also require criminalisation and acceptance of universal jurisdiction in national laws.

85 *Situation in the Republic of Cote D'Ivoire*, Case No ICC-02/11-14-Corr (ICC Pre-Trial Chamber III, 15 November 2011) para 15.

86 ICC-ASP/16/Res.5 'Activation of the jurisdiction of the Court over the crime of aggression' (14 December 2017) 16th Session, para 2.

87 *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar,* Case No ICC-01/19 (ICC Pre-Trial Chamber III, 14 November 2019) paras 56-62.

88 In the ICC, where the states are committed to cooperation in remanding the accused to the Court, their performances in the *Omar al-Bashir* and *Kenyatta* cases were far from satisfactory. See Dutton and Sterio (n 19) 11-3.

These two requirements exist in countries such as Germany, Poland, and Lithuania, but even then, courts, in effect, limit themselves to low-level criminals. Besides, given the political implications of a judicial review of aggression committed by a state, there remains little incentive for national proceedings in other jurisdictions, even when the two requirements mentioned earlier are available.[89] Moreover, bringing the case before Ukrainian courts would question the realisation of the principle of a due and impartial process.[90] The above observations all indicate that strengthening the Court's mechanism and an amendment to its provisions (if need be) are the best strategy. Needless to say, other options must also remain on the table.

We must now turn to paragraph 5 of Art. 15 *bis*. Relying on a negative interpretation of Art. 121(5) of the Statute, many scholars believe that Art. 15(5) shares the same phraseology, and therefore it must be interpreted the same way.[91] A positive interpretation of Art. 15(5) means that the Court does not have jurisdiction over non-member nationals or crimes committed on the territories of those states. On the other hand, a negative interpretation expands the limitations on the Court's jurisdiction. In such a case, the Court is only permitted to take the matter under review when both the state of the accused and the state wherein the act has been perpetrated are member states and have acquiesced to the exercise of jurisdiction. Put simply, a mere link between the crime of aggression with a non-member state negates the Court's jurisdiction even toward a member state.

Among the justifications put forth by the proponents of negative interpretation are Art. 34 of the Vienna Convention on the Law of Treaties[92] and the Monetary Gold principle. Upon a comprehensive analysis of the arguments of the opponents and proponents, McDougal concluded that a positive interpretation of this paragraph is correct. Among these reasons is that the Court's Statute does not repeal Art. 34 of the Vienna Convention since it does not create obligations for third parties, and it is solely a mechanism for the exercise of extant rights and legal prosecution of individuals.[93] According to the Monetary Gold Principle, an international tribunal cannot pronounce upon a matter wherein the interests of a non-consenting third-party state are at issue. It must be noted that there is no precedent indicating the inapplicability of this principle in international criminal tribunals whose jurisdiction is not exercised over states.[94] Further confirmation in rejecting negative interpretation is that one cannot give more weight to the will of a state in not committing to an obligation compared to that of another state that puts its territory and nationals within the jurisdiction of the Court.[95] Consequently, if the Court's competence is justified due to the Ukrainian declaration, the fact that Russia is not a member state does not preclude a future proceeding.

Once this obstacle is overcome, the problem to be resolved is that aggression is committed by high-level officials, and when the accused are Russian officials, how can the Court initiate its judicial process given the prohibition entailed in paragraph 5 of Art. 15 *bis*? Since the aim of this article and many legal proposals provided is not that they be fully implemented, and the real intent is the maximisation of international pressure on the aggressor, the Prosecutor can commence its investigations in light of the fact that per Art. 8 of the Statute, a person accused of the crime of aggression is an individual who effectively controls or directs the

89 Kimmo (no 20) 316.

90 Lanza (no 11) 434-5.

91 Stefan Barriga and Niels Blokker, 'Conditions for the exercise of jurisdiction based on state referrals and proprio motu investigations' in Claus Kreß and Stefan Barrriga (eds), *The Crime of Aggression: A commentary* (CUP 2017) 658, 659.

92 A treaty does not create either obligations or rights for a third state without its consent.

93 See McDougall (no 24) 290.

94 Ibid 299.

95 Ibid 300.

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political or military actions and is significant in planning, provision, commencement, or implementation of an aggressive act. The word 'person' does not mean that only 'one' individual is responsible for the commission of aggression.[96] Footnote 1 attached to the second Element of Crimes adopted concerning the crime of aggression and related to the leadership requirement confirms that '[w]ith respect to an act of aggression, more than one person may be in a position that meets these criteria of exercising such degree of control'.[97]

Therefore, given the possibility of the multiplicity of the accused of the act of aggression, one can initiate the investigation under the improbable (and yet not impossible) assumption that there are East Ukrainian secessionists (who are Ukrainian nationals) among the high-ranking decision-makers because their presence is advantageous due to their familiarity with the region. If upon further review, it became apparent that there were not any non-Russian individuals among the high command, the Chamber would issue proper injunctions. Regardless of the media impact, once the Russian dossier enters the Court's agenda for several months, any injunction or ruling would inevitably include opinions concerning various aspects of the jurisdiction (subject matter, temporal, territorial, personal). Although an injunction indicating a lack of jurisdiction will be issued due to the non-existence of personal jurisdiction, the judicial review and verification of the matter from a subject-matter jurisdiction standpoint by the only permanent and international organ in charge of criminal wrongful actions is a unique achievement. Doubtless, such an opinion will resonate with the international community.

The present justifications and use of the Court's precedent are not provided with the aim of proving the Court's ability to review the Russian act of aggression. The author of the present paper could have opted for the easiest way and repeated the provisions of paragraph 5 of Art. 15 *bis* to substantiate the Court's lack of competence. Yet, this paper endeavours to use analogy and refer to different actions adopted by the Court to take a step, however small, to safeguard humanity and the international community[98] and react in its own way against a derogation of the norms of *jus cogens*.

5 CONCLUSIONS

The Russian attack on Ukraine brought attention once again to the strengths and weaknesses of international law's ability to respond to violations of the use-of-force prohibition principle. Reviewing the potential for a judicial process to evaluate that attack in light of the crime of aggression was motivated by the establishment of the ICC, in particular the ratification and implementation of the aggression resolution that inspired much optimism for proponents of peace and justice. To that end, this attack should satisfy the requirements specified in the definition of aggression. Moreover, the Court must be granted competence to adjudicate the matter. The Russian claims, namely, anticipatory and collective self-defence, humanitarian intervention, and intervention by invitation, could not face the crucible of international

96 See Zimmermann and Freiburg (no 31) 591.

97 RC/Res.6 (n 26) Annex II, Amendments to the Elements of Crimes for Article 8bis, Elements, para 2, fn. 1 qtd. in ibid.

98 Karim AA Khan QC, 'Statement of ICC Prosecutor, Karim AA Khan QC, at the Arria-Formula meeting of the UN Security Council on "Ensuring accountability for atrocities committed in Ukraine"' (*International Criminal Court*, 27 April 2022) <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-arria-formula-meeting-un-security-council-ensuring> accessed 10 October 2022, 'This is a time when we need to mobilize the law and send it into battle—not on the side of Ukraine against the Russian Federation or on the side of the Russian Federation against Ukraine, but on the side of humanity to protect, to preserve, to shield people who are children, who are women and who are men, who have certain basic rights'. Qtd. in Lanza (no 11) 435.

law norms, and as such, the attack is a flagrant violation of the UN Charter. Thereafter, the exercise of jurisdiction seemed challenging, bearing in mind that Russia and Ukraine are not members of the ICC, that the situation was not referred to the Security Council, and that the declaration issued by Ukraine accepting the Court's jurisdiction entailed a number of limitations (being restricted to crimes against humanity and war crime). Nonetheless, a study of the Court's jurisprudence regarding such declarations and also the Trial Chamber's interpretation concerning the phrase 'occurrence of crime in the territory of the State Party' is necessary. Affirmation of a positive interpretation of paragraph 5 of Art. 15 *bis* and acknowledging the possibility that the Ukrainian secessionists can play a role in decision-making creates a capacity for the Court to act. Even if the actions of the ICC do not lead to a trial for aggression with the Russian perpetrators present, it imposes substantial international pressure on them. Additionally, confirmation by the Court that an act of aggression has occurred carries a lot of weight.

During this examination, it is impossible to deny that the states themselves are the primary reason why violence continues unpunished under international law. The adoption of conflicting political stances in numerous wars and subjective interpretation have made it possible for each aggressor to present its own explanation and understanding of state activity contrary to incontestable international law standards. On the other hand, states, as principal subjects of international law, impose innumerable restrictions on the exercise of the Court's jurisdiction and create undue limits by including the word 'manifest' next to violation of the Charter when defining aggression. All of these measures have minimised the Court's capacity to adjudicate and punish those who commit this crime.

In such a context, if the Prosecutor and Court also adopt a restrictive mindset, criminal investigations to be carried out in this incident should be limited to war crimes and crimes against humanity, and the violations of Russia's commitments under the following instruments would remain unexamined: the UN Charter and the prohibition of the resort to force enshrined therein; specific undertakings under paragraphs 1 and 2 of the Budapest Agreement and part II of Section A of the Declaration on Principles Guiding Relations among Participating States adopted as the final act of the Conference on security and cooperation in Europe, according to which resorting to threat or use of force against the territorial integrity or political independence of Ukraine is advised against; the Second Minsk Agreement, which acknowledges Ukrainian sovereignty over its land and borders. Overall, the article defining aggression in the Statute is not merely symbolic and without effect. This notwithstanding, it also faces serious limitations, which came to the fore in light of the Russian aggression against Ukraine. It seems all venues to counter the Russian actions must be pursued, namely:

1. The necessity of a teleological interpretation of the Statute's articles by the Prosecutor and the Member States Assembly's solemn efforts to amend and deal with jurisdictional burdens in the Court's competence to entertain the crime of aggression;

2. Reviewing the possibility of establishing an *ad hoc* or hybrid tribunal per an agreement between Ukraine and the UN;

3. Consistent state practice in not recognising the auto-proclaimed governments at Donetsk and Luhansk;

4. Establishing Russia's civil liability and payment of proper compensation by the same.

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