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Sommario

War and Crimes against Peace: Avenues to Prosecute Russia's Aggression of Ukraine

Stefano Marinelli

Stefano Marinelli, transitional justice researcher and M&E at Agency for Peacebuilding, is PhD in International Law at Middlesex University of London, and author of The International Criminal Court and the Responsibility to Protect (Routledge 2022, forthcoming).

Abstract

On February 24, 2022, the Russian attack on Ukraine provoked a strong international community reaction, in terms of diplomatic condemnation of Russia and support for Ukraine. There is an international consensus on the qualification of the facts that have occurred as a crime of aggression, and an unprecedented political support for Ukraine. Nevertheless, international justice does not have the possibility to prosecute those responsible for the crime.
The article presents the structural obstacles of international law in prosecuting the crime of aggression committed against Ukraine, in particular by the International Criminal Court, and illustrates possible alternatives to bring those responsible to justice. The article presents the strong and coherent reaction of the international community to the Russian military intervention, with unprecedented unity in the United Nations General Assembly, and a majority in the Security Council stopped exclusively by the Russian veto. Then, the article examines the international prohibition of the use of force, and the justifications put forward by Russia to support the legality of the operation. The Russian reasons, based on self-defense and on the purpose of protecting the populations of Donbas from genocide, prove to be unfounded. The analysis therefore concludes that the attack on Ukraine constitutes a manifest act of aggression.
The study then examines the criminalization of the aggression by the International Criminal Court, presenting the jurisdictional limits that prevent the Court from prosecuting the crime in this circumstance: unlike other international crimes that the ICC is already investigating on the Ukrainian territory (crimes of war, crimes against humanity) the Court cannot exercise its jurisdiction for the crime of aggression committed by individuals of states that are not party to the Rome Statute.
Finally, alternative mechanisms for bringing justice to the Ukrainian aggression are examined: from the trial in a national court, which has the problem of immunities and of lack of expertise in prosecuting international crime, to the creation of an ad hoc or hybrid tribunal.

Il 24 febbraio 2022, l'attacco della Federazione Russa all'Ucraina ha provocato una forte reazione della comunità internazionale in termini di condanna diplomatica della Russia e di sostegno all'Ucraina. Nonostante il consenso internazionale nella qualifica dei fatti occorsi, e il sostegno politico senza precedenti, la giustizia internazionale sembra impossibilitata a perseguire i responsabili del crimine. L'articolo presenta gli ostacoli strutturali del diritto internazionale nel perseguire il crimine di aggressione commesso contro l'Ucraina, in particolare da parte della Corte Penale Internazionale, e illustra possibili alternative per fare giustizia sul

crimine. Dopo aver presentato la reazione unitaria della comunità internazionale all'intervento militare russo, con un'unità senza precedenti nell'Assemblea Generale delle Nazioni Unite, e una maggioranza nel Consigli di Sicurezza fermata esclusivamente dal veto russo, l'articolo prende in esame il divieto internazionale di uso della forza e le giustificazioni avanzate dalla Russia per sostenere la legalità dell'operazione. Le ragioni russe, fondate sull'autodifesa e sulla finalità di proteggere le popolazioni del Donbas da un genocidio, si rivelano infondate. Si conclude quindi che l'attacco all'Ucraina costituisce un chiaro atto di aggressione. L'analisi esamina poi la criminalizzazione dell'aggressione da parte della Corte Penale Internazionale, presentando i limiti giurisdizionali che impediscono alla Corte di perseguire il crimine in questa circostanza: a differenza di altri crimini internazionali su cui ha già iniziato attività di indagine (crimini di guerra, crimini contro l'umanità) la Corte non può esercitare la propria giurisdizione per il crimine di aggressione commesso da individui di Stati che non sono parte allo Statuto di Roma. Infine, si prendono in esame meccanismi alternativi per fare giustizia sull'aggressione Ucraina: dal processo in un tribunale nazionale, che ha problemi di immunità e di specializzazione nel perseguire il crimine internazionale, fino alla creazione di un tribunale ad hoc o ibrido.

Keywords

Russia, Ukraine, International law, War crimes

1. Introduction

On 24 February 2022, the Russian Federation started a military intervention in the territory of Ukraine. The attack triggered a global «unprecedented response» (Chachko and Linos, 2022), in terms of diplomatic efforts, humanitarian aid to migrants, economic sanctions against Russia, and arms transfers to Ukraine. As a «discipline of crisis» (Charlesworth, 2002), international law is expected to play a role in the maintenance of peace and security, and in identifying and prosecuting those responsible for alleged international crimes. This study examines the structural implementation problems of international justice, which seems «largely paralyzed» (Trahan, 2022) even in a context of widespread political support and consensus on the qualifications of the events. Furthermore, this analysis presents possible avenues to hold accountable those responsible for the aggression against Ukraine.

A clear consensus developed, among scholars and states, that the invasion constitutes «one of the clearest violations of article 2(4) of the United Nations Charter since its entry into force» (Dannenbaum, 2022) and «a textbook example of the crime of aggression» (McDougall, 2022). A draft UN Security Council resolution, co-sponsored by 82 States, deplored «in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the Charter». On 25 February, the draft was voted by 11 out 15 members of the Security Council, with 3 abstentions, but it was stopped by

the only vote against: the Russian's veto. On 2 March, an emergency session of the UN General Assembly (hereinafter, UNGA) adopted Resolution ES-11, using the same wording qualifying the Russian military operation as an act of aggression, with an overwhelming majority of 141 against 5 (UNGA, 2022). At the time of writing, the armed conflict is evolving rapidly. Negotiations are underway to find a political settlement and stop Russian's attacks, which reportedly target also «the most vulnerable» (UNICEF, UNFPA and WHO, 2022). The international community's reaction came to include the Russian expulsion from the Council of Europe (Council of Europe, 2022) and a variety of exceptional initiatives and tailored sanctions against the Russian leadership (Johns and Kotova, 2022).

In contrast with the situation on the field, efforts to bring to justice those responsible for the attack are far from evolving rapidly. Indeed, despite the general agreement on the occurrence of an illegal aggression and the widespread international support to the Ukrainian side, it is unlikely that an international tribunal will make a judicial determination of the crime of aggression, and identify and prosecute those responsible. Antonio Cassese used to affirm that «international justice has its own tempo» (Gaeta and Zappalà, 2021): the long-term nature of the international criminal law discipline, and its even longer-term objective and effects, allow drawing an analysis which transcends the current events. First, this article assesses how the invasion of Ukraine violates the prohibition of the use of force and constitutes an act of aggression. Second, it examines the criminalization of aggression in international law, and the institutional weakness of the international legal system, of the International Criminal Court *in primis*, in prosecuting those responsible. Third, it considers possible alternative avenues to grant accountability for the Ukrainian aggression.

2. The Putin Defense: Assessing the Legality of the Russian Intervention

This section examines the Russian justification for the use of force in Ukraine, to present the overall consensus on the occurrence of a crime of aggression. The use of force of the Russian Federation in the territory of Ukraine dates back to 2014, when Russia occupied Crimea and started an armed conflict in Donbas. The 2014 attacks are widely considered to constitute an act of aggression (Grant, 2015). This analysis will focus on the 2022 events.

The international law prohibiting the use of force, or *ius contra bellum* (Dinstein, 2017), is unequivocally expressed in the UN Charter, and it is consistently affirmed in the case law of the main UN judicial body: the International Court of Justice (ICJ). The Charter prohibits the use of force at

Article 2(4): «All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations». Furthermore, it sets two exceptions to the prohibition: Security Council authorization to take «action by air, sea, or land forces as may be necessary to maintain or restore international peace and security» (Article 41), and «the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations» (Article 51). The ICJ reaffirmed the prohibition in several cases. For instance, in the *Nicaragua* case, the ICJ specifically stated that the alleged purpose to protect human rights cannot constitute a legal basis to use force in violation of the UN Charter: «[t]he protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming and equipping of armed forces» (*Nicaragua*, 1986, para. 268).

The Russian Federation justified the legality of its military intervention in a letter to the Security Council on February 24. The letter reported the speech delivered by Russian President Vladimir Putin the previous day: «The people's republics of Donbass have asked Russia for help. In this context, in accordance with Article 51 (Chapter VII) of the UN Charter ... I made a decision to carry out a special military operation. The purpose of this operation is to protect people who, for eight years now, have been facing humiliation and genocide perpetrated by the Kiev regime» (Security Council, 2022b). In so doing, the Russian Federation claimed two separate legal basis for the use of force: collective self-defense of 'the people's republics of Donbass', Donetsk and Luhansk, and protecting the same people from genocide.

Concerning collective self-defense, in accordance with article 51 of the UN Charter, this legal justification does not apply to military operations supporting non-state armed groups (see also *Nicaragua*, 1986, para. 246). Himes and Kim (2021, p. 278), examining the US justification for its military operations in Syria on the same legal ground, explain that self-defense on behalf of non-state actors is not acceptable: «by simply designating an aggrieved non-state group in any conflict in any region of the world as a "partner," any willing state may invoke the collective self-defense of that partner to lawfully use military force against another sovereign state that poses no direct threat to its counterpart(s)». In the effort of overcoming the statehood requirement to claim self-defense, the 21 February 2022, on the eve of the attack, the Russian Federation recognized the Donetsk People's Republic (DPR) and Luhansk People's Republic (LPR) as independent states. Yet, this unilateral act alone does not grant statehood to the entities, which remain *de iure* Ukrainian regions, called oblasts. As Weller (2022) asserted, «Russia therefore manufac-

tured the statehood necessary to invoke self-defense based on its previous invasion of parts of the two territories». Furthermore, the Russian recognition violates the principle of non-intervention and the principle of territorial integrity (Miklasová, 2022)

With reference to the protection of Donetsk and Luhanks population from Ukrainian genocide, the problem is both factual and legal. First, claims that genocide is taking place in the oblasts are preposterous (Schabas, 2022). Second, genocide does not constitute an exception to the prohibition of the use of force under the UN Charter. Ukraine filed an application to the International Court of Justice, which can now make a determination on the Russian claims. The ICJ issued an order on provisional measures on March 16 (ICJ, 2022), declaring that «Ukraine has a plausible right not to be subjected to military operations by the Russian Federation for the purpose of preventing and punishing an alleged genocide in the territory of Ukraine» (para 60). The Court also considered «doubtful that the Convention, in light of its object and purpose, authorizes a Contracting Party's unilateral use of force in the territory of another State for the purpose of preventing or punishing an alleged genocide» (para 59). A further clarification on the issue at the following stages of the proceedings is desirable to clarify and reinforce the *ius contra bellum*: as Schabas (2022) maintains, «[u]nequivocal rejection of the doctrine that there are any exceptions to the use of force that are not specified in the Charter of the United Nations will make the world a safer place».

More generally, Putin's reference of the purpose of protecting people recalls the language of the doctrine of the responsibility to protect (RtoP). RtoP is a doctrine created in the early 2000s to address the international community's failure to prevent international crimes. Its definition and evolution have not been consistent, and the legal value of the doctrine is debated, as RtoP seems to have not modified existing international law norms. It has acquired an increasing relevance in the language of the UN, introducing a new jargon and a new focus on human protection in the diplomatic debate. A school of thought (e.g. Weiss, 2012; Davenport, 2016) considers RtoP as a new legal justification to use force outside the UN Charter framework. Yet, the controversy is limited to the scholarly debate, as States have consistently opposed the constitution of such an exception to the *ius contra bellum*. Indeed, all RtoP definitions adopted within the UN unequivocally mention that any measure taken pursuant to the doctrine must respect the UN Charter. The 2005 World Summit Outcome Document, adopted by consensus, specifies that all the measures invoked to protect populations must be taken «in accordance with the Charter, including Chapter VII» and «bearing in mind the principles of the Charter and international law» (UNGA, 2005). The 2009 Secretary-General's Report 'Implementing the Responsibility to Protect' af-

firms that «the responsibility to protect does not alter, indeed it reinforces, the legal obligations of Member States to refrain from the use of force except in conformity with the Charter» (UN Secretary General, 2009). As Louis Henkin (1971) observed over 50 years ago, «the fissures of the Charter are worrisome but they, too, are not as wide in international life as they loom in academic imagination».

This analysis clarifies that both Putin's claimed legal bases for the invasion of Ukraine, collective self-defense and protection of Donetsk and Luhansk population, are unfounded in international law. The following section will examine how this violation of the *ius contra bellum* constitutes a crime of aggression, thus entailing individual criminal liability, and explores the obstacles in prosecuting the crime despite the widespread international condemnation of the Russian action.

3. Crime and No Punishment: the Problems with Prosecuting Aggression

With the words of Nuremberg Prosecutor Robert Jackson, aggression «is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole». (*France v. Goering*, 1946, p. 172). The International Military Tribunal at Nuremberg after saw the first prosecutions for aggressive warfare in international criminal law. At Nuremberg, twelve individuals were convicted of crimes against peace. In contrast with the international law prohibiting the use of force, entailing state responsibility, the criminalization of aggression, entailing individual criminal liability, did not evolve in international law during the following decades. The crime was not included in the statutes of the ad hoc tribunals for former Yugoslavia and Rwanda. When the first permanent international criminal tribunal, the International Criminal Court was established, (with the 1998 Rome Statute, entered into force in 2002) the crime of aggression was finally included among the crimes within its jurisdiction, in addition to genocide, crimes against humanity, and war crimes. The Rome Statute defines both the crime of aggression and the act of aggression (Article 8 bis):

> 1. For the purpose of this Statute, '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. 2. For the purpose of paragraph 1, 'act of aggression' means 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 definition implies that certain violations of the prohibition to use force are not criminalized. It establishes a threshold of 'manifest violation', which is both quantitative, according to gravity and scale, and qualitative, according to its character (Kress, 2018). The Elements of Crimes further detail the concept, stating for instance that the term 'manifest' is an objective qualification (UN Review Conference, 2010, para 3). As a manifest violation of the UN Charter, or «the most brazen illegal war waged by one sovereign state against another since World War II» (Hathaway, 2022), there is a widespread consensus that starting the invasion of Ukraine, the Russian leadership has committed a crime of aggression as defined by the ICC Statute.

While 123 countries are State Parties to the Court, the Russian Federation and Ukraine are not among them, not having ratified the ICC Statute. However, in 2015 Ukraine lodged two declarations accepting ICC jurisdiction over international crimes committed on its territory from 21 November 2013 on. As a result, the ICC can exercise jurisdiction on war crimes, crimes against humanity and genocide being committed on Ukrainian territory. Accordingly, 41 States referred the situation of Ukraine to the ICC Prosecutor, who started an investigation and commenced evidence-collection activities (International Criminal Court, 2022).

However, the crime of aggression has a separate jurisdictional regime, and the ICC cannot investigate and prosecute the crime. State Parties to the Rome Statute activated the jurisdiction on aggression in 2018, with various restrictions. Most relevantly for the present case, the Court cannot deal with the crime when committed by non-State parties nationals or on their territory, pursuant to Article 15bis of the Rome Statute. The UN Security Council would have the power to trigger the ICC jurisdiction on aggression in Ukraine, but the Russian Federation can veto any Council's referral to the Court. In so doing, Russia can permanently avoid that its leadership is prosecuted before the International Criminal Court. Given the incapability of the ICC to investigate and prosecute aggression, the following section will explore possible alternative avenues for bringing accountability to the crime.

4. What is to be done? Alternative Avenues for Accountability

Possible solutions for prosecuting aggression in Ukraine besides the ICC include domestic prosecution before a national court, and the establishment of an ad hoc international tribunal or a hybrid tribunal.

First of all, as detailed in the previous section, the International Criminal Court cannot deal with the crime of aggression, but it is already investigating other international crimes committed in Ukraine. Thus, Einarsen and Rikhof (2022) suggest that the ICC could bypass the jurisdictional issues on the crime of aggression by prosecuting the same individuals for war crimes and crimes against humanity. This way, the Court could at least establish if a crime of aggression was perpetrated, and consider the gravity of the crime at the stage of sentencing. This creative suggestion would not constitute a proper prosecution of the crime of aggression. However, it is important to note that the ICC is likely to investigate and indict, although with different charges, the same persons who would be responsible for the crime of aggression.

Concerning opportunities for domestic prosecutions, several national systems are already investigating the crimes at stake, including Ukraine, which in 2016 convicted two Russian nationals for aggression, Alexandrov and Yerofeyev, for acts committed in Luhansk in 2015 (Sayapin, 2018), Poland and Lithuania, under the principle of universal jurisdiction (Dannebaum, 2022). Given that aggression is by definition a state crime, necessarily perpetrated by State leaders in their official capacity, the first obstacle to prosecute those responsible is immunity. Immunities have controversial limits with reference to international crimes. To sum up the prevailing views, which are not undisputed, personal immunity (*rationae personae*) concerns Heads of State, Heads of Government, diplomatic representatives and ministries of foreign affairs for any act committed while in office. Therefore, personal immunity would hinder domestic prosecutions of those responsible for aggression, which is a leadership crime, at least until they are in office. Functional immunity (*rationae materiae*) covers all state officials for acts committed in their official capacity, so including in the act of aggression, even after they leave office. Functional immunity is excluded in case of certain international crimes, but case-law and the work of the International Law Commission do not allow a definitive conclusion on the possibility to exclude functional immunity when prosecuting a crime aggression before a national court (Epik, 2021). A further problem with domestic prosecutions includes the technical expertise to conduct a trial on a complex international crime, which was already questioned in case of Ukraine with the *Alexandrov and Yerofeyev* case (Sayapin, 2018). For this reasons, the establishment of an international tribunal might be a preferable option.

On 4 March 2022, a statement titled "Calling for the Creation of a Special Tribunal for the Punishment of the Crime of Aggression Against Ukraine" was issued, signed by a number of international law academics and experts, but also politicians like Gordon Brown (who is controversially involved in the aggression against Iraq in 2003), writers like Paul Auster, Javier Cercas, Siri

Hustvedt, and Stephen Fry. An international tribunal would exclude immunity issues, given the precedent of the Special Court of Sierra Leone prosecuting a sitting Head of State (*Prosecutor v Charles Ghankay Taylor*, 2004). Furthermore, the ICC Appeals Chamber affirmed that, under customary international law, heads of state do not enjoy immunity in front of international courts, as «there is a *ius puniendi* that transcends state sovereignty and resides in the international community itself» (*Prosecutor v Al-Bashir*, 2019). Compared to a domestic prosecution, an international tribunal would also guarantee a specific expertise on the crime of aggression. An ad hoc tribunal following the model of Former Yugoslavia and Rwanda, however, should be established by the Security Council, where the Russian Federation holds the veto power. As a possible solution, some scholars (Dannebaum, 2022, Heller, 2022) may be a hybrid tribunal, on the example of the Special Court of Sierra Leone and the Extraordinary Chambers of Cambodia. This would be the result of an agreement between Ukraine and the UN, and would arguably overcome issues of immunities and lack of expertise, granting an international nature to the prosecution of the crime of aggression (Johnson, 2022).

Last but not least, all efforts to prosecute the Russian aggression against Ukraine carry a problem of selectivity. Several States supporting the current prosecution have perpetrated past aggressions which remained unpunished. The US have been consistently opposing ICC jurisdiction on the crime (Pecorella, 2021). Sander and Tallgren (2022) warn of «the longer-term expressive costs that such a tribunal would send about the selectivity of international criminal justice». These concerns require further reflection. At the present moment, they do not seem a founded reason to stop efforts to hold accountable those responsible for a blatant act of aggression. The only international trials for a crime of aggression took place in Nuremberg and Tokyo. The double-standards and biases of the Nuremberg and Tokyo trial would probably be unacceptable for the current (although flawed) standards (Sellars, 2010, Rabkin, 1999). Still, the historical legacy of these tribunals is of a positive contribution to the evolution of international justice. The character from *War and Peace* Platon Karataev affirms «Where there's law there's injustice» (Tolstoj, 1869). This recalls the necessity to acknowledge the limits of the discipline. International law, like any form of law, is inherently tied to power, is administered by human beings, and can thus only deliver partial justice. Efforts to improve fairness and equality require the adoption of other disciplines and methodologies, transcending legal concerns, and embracing social and political action.

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Largo Gemelli 1, 20123 Milano - tel. 02.72342235 - fax 02.80.53.215
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