

# THE COMPETENCES OF THE INTERNATIONAL CRIMINAL COURT AND THE CONFLICT IN UKRAINE

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## ABSTRACT

This article endeavours to answer whether, in light of the current International Criminal Court's (ICC) powers, it is possible to hold the Russian Federation accountable for international crimes. The answer hinges on the type of crimes committed, as some (such as the crime of aggression) are considered excluded from the ICC's jurisdiction. The article also explores alternative methods of holding Russia accountable, such as establishing a special *ad hoc* tribunal, a topic widely discussed in the European Parliament and culminating in a resolution of 19 January 2023.

Keywords: International Criminal Court, conflict in Ukraine, competences of ICC, the possibility of prosecuting Russian Federation

## INTRODUCTION

On 17 March 2023, global media were abuzz with the news that the International Criminal Court in The Hague issued arrest warrants for the President of the Russian Federation, Vladimir Putin, and the Presidential Commissioner for Children, Maria Lvovska-Belova. The warrants were issued due to the forced deportation of Ukrainian children from occupied territories to Russia. The Hague Tribunal, in its statement, declared it had reasonable grounds to believe that President Putin bears individual criminal responsibility for the war crime of unlawfully deporting children

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and unlawfully transferring them from occupied areas of Ukraine to Russia.<sup>1</sup> Similar charges apply to Maria Lvovska-Belova,<sup>2</sup> with the alleged crimes dating back to at least the beginning of the invasion of Ukrainian territory on 24 February 2022.<sup>3</sup>

The International Criminal Court (hereinafter 'the ICC') currently stands as the only legal body with universal jurisdiction in international criminal matters. Individuals are accountable to it for international crimes covered by Article 5 of the Rome Statute of the ICC, including crimes of genocide, crimes against humanity, war crimes, and crimes of aggression.<sup>4</sup>

'For nearly half a century – almost as long as the United Nations has been in existence – the General Assembly has recognised the need to establish such a court to prosecute and punish persons responsible for crimes such as genocide. Many people thought that the horrific practices of World War II – the camps, acts of atrocities, exterminations, the Holocaust – could not be repeated. And yet it happened differently – in Cambodia, in Bosnia and Herzegovina and in Rwanda. Our times – even the last decade – have shown that human ability to do wrong has no limits. Genocide is also a topical word today, in the current, disgusting reality that requires unprecedented action from us.'<sup>5</sup>

Finally, after many years of negotiations conducted within the UN, on 15 June 1998 in Rome, at the Diplomatic Conference of Government Plenipotentiaries for the Establishment of the International Criminal Court, attended by representatives of 160 countries, 33 intergovernmental organisations and 236 non-governmental organisations gathered in the CICC, Kofi Annan, Secretary-General of the United Nations, said:

'The long-standing dream of a permanent international criminal court is becoming a reality. Punishment of the guilty by the Tribunal will be compensation for people (...) who became victims of crime, and the fate of the perpetrators will become a warning to potential criminals. The activities of the Tribunal will bring closer the day when no authority, no army will be able to violate human rights with impunity.'<sup>6</sup>

After years of concerted efforts by the international community, the International Criminal Court was established on 1 July 2002. The treaty establishing the ICC was adopted at the United Nations Diplomatic Conference in Rome on 17 July 1998.

<sup>1</sup> Del Monte, M., Barlaoura, N., *Russia's war on Ukraine Forcibly displaced Ukrainian children*, EPRS European Parliamentary Research Service, PE 747.093 – April 2023, p. 1 et seq.

<sup>2</sup> International Criminal Court, *Situation in Ukraine*, <https://www.icc-cpi.int/situations/ukraine> [accessed on 20 May 2023].

<sup>3</sup> International Criminal Court, *Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova*, <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and> [accessed on 16 May 2023].

<sup>4</sup> *Rome Statute of the International Criminal Court of 17 July 1998* (Journal of Laws of 2003, No. 78, item 708, as amended).

<sup>5</sup> Annan, K., Former Secretary General of the United Nations, *Speech on the occasion of the 50th Anniversary of the International Bar Association*, 11 June 1997, New York, <https://press.un.org/en/1997/19970612.sgs6257.html> [accessed on 24 November 2023].

<sup>6</sup> Statement published on the official website of the United Nations Information Center UNIC in Warsaw: [www.unic.un.org.pl/prawa\\_czlowieka/mtk](http://www.unic.un.org.pl/prawa_czlowieka/mtk); quoted [after:] Działak-Jankowska, J., *Status polityczny oraz prawny międzynarodowego korespondenta wojennego*, University of Warsaw, Faculty of Journalism and Political Science, Warszawa, 2015 (PhD thesis), p. 63.

As a permanent legal body, not constrained by time or territorial limits, the ICC is expected to be more effective in adjudicating crimes than existing *ad hoc* tribunals. The Tribunal's establishment through a 'treaty' mechanism removes any objections regarding its legality.<sup>7</sup> There will no longer be situations where defendants, like the former Serbian President Slobodan Milosevic during the Yugoslav Tribunal, could consistently challenge the Tribunal's legality and deny its right to adjudicate their cases due to its establishment by a UN Security Council resolution rather than an international convention.

The ICC's most significant strength, which will determine whether the Court becomes more than just another 'written warning' in the annals of UN initiatives,<sup>8</sup> is its general and universal scope of activity and the broad range of competencies conferred upon it. An analysis of these competencies, combined with an assessment of the admissibility of prosecuting international crimes by the ICC Prosecutor, will provide insights into the possibility of prosecuting the perpetrators of specific acts committed as a result of the aggression against Ukraine on 24 February 2022.

## THE COMPETENCES OF THE COURT

The general scope of the Tribunal's competences is articulated in Article 1 of the Statute of the ICC, which broadly defines the acts subject to prosecution. Subsequent sections of the Statute provide more precise definitions of the Tribunal's jurisdiction.

## THE *RATIONE MATERIAE* COMPETENCIES

The *ratione materiae* competencies and thus the material jurisdiction of the Tribunal, indicate the cases that may be considered by this legal body. The ICC's jurisdiction encompasses the most serious international crimes listed in the Statute. Contrary to earlier plans of the International Law Commission<sup>9</sup> and in adherence to the principle of *nullum crimen sine lege*, the definitions of prohibited acts subject to the Tribunal's jurisdiction were clarified, with autonomous definitions of individual crimes supplemented in the Statute.

Pursuant to the Statute, the ICC can adjudicate cases concerning the following crimes: genocide, crimes against humanity, war crimes, and crimes of aggression.

Genocide, as repeatedly emphasised by the UN Secretary-General, can be perpetrated both in times of peace and war. Its definition, recognised in international law, is contained in the Convention of 9 December 1948, on the Prevention and Punishment of the Crime of Genocide.<sup>10</sup> This definition has been incorporated in

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<sup>7</sup> Płachta, M., *Międzynarodowy Trybunał Karny*, Vol. I, Zakamycze, 2004, p. 112 et seq.

<sup>8</sup> Sterio, M., Dutton, Y., 'The War in Ukraine and the Legitimacy of the International Criminal Court', *American University Law Review*, January 2023, Vol. 72, Issue 3, p. 728.

<sup>9</sup> Ogonowski, P., 'Koncepcja Międzynarodowego Sądu Karnego', *Prokuratura i Prawo*, 1998, No. 7–8, p. 46.

<sup>10</sup> Journal of Laws of 16 January 1952, No. 2, item 9.

its entirety into Article 6 of the Statute of the ICC. Therefore, genocide means any of the acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, including acts such as killing members of the group, causing serious bodily or mental harm, deliberately inflicting on the group of conditions of life calculated to bring about to its physical destruction in whole or in part, imposing measures intended to prevent births within the group, and forcibly transferring children of the group to another group.

The liability for direct and public incitement to commit genocide, attempting to commit such a crime, commissioning, aiding, and abetting is also clearly provided for (Article 25(3) of the Statute).

The concept of 'crimes against humanity' first appeared in the early 20<sup>th</sup> century, but defining it proved challenging. For the ICC Statute, it was assumed that these acts were undertaken in support of state policy, committed as part of a widespread or systematic attack directed against the civilian population (Article 7). These criminal acts include mass killings, exterminations, slavery, forced deportations, torture, and persecution on racial, ethnic, national, political or grounds recognised as unacceptable by international law, as well as other inhumane acts of a similar character.

Notably, punishable acts classified as crimes against humanity include sexual crimes (rapes, forced prostitution, etc.) committed on a mass scale, as reportedly occurred in the conflict in Ukraine, such as in Bucha.<sup>11</sup> This legal classification of acts was first used in the Statute of the Tribunal for the former Yugoslavia.<sup>12</sup> Previously, sexual violence was not considered a crime per se, but rather an 'element of actions' in armed conflicts. Since 1993, these acts have been prosecuted and punished by international legal bodies.

Crimes against humanity are one of the most serious categories of offenses within the jurisdiction of the Court. Their characteristic feature is the fact that, similarly to the crime of genocide, they can be committed during armed conflicts and in times of peace. The ICC Statute provides for criminal liability not only for the perpetrator but also for those who instigate, induce, order, assist, or incite to commit such a crime, as well as those attempting to commit it (Article 25(3)).

The ICC was inaugurated in March 2003, with the Prosecutor taking office in June 2003. The first case before the Tribunal was brought in December 2003, when the President of Uganda referred a 'situation' concerning crimes committed by the LRA rebel group in northeastern Uganda. The mass crimes committed by the LRA against the civilian population, including forced conscription of children under the age of 15 into the army, mass executions, rapes, sexual slavery, and forced displacement, were deemed crimes against humanity within the jurisdiction of the Court. In February 2004, another attack occurred in the Barlony camp, further emphasising the gravity of these crimes. It is estimated that the Lord's Resistance Army (LRA) activities resulted in over 200 murders in the Barlony camp. In a press statement

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<sup>11</sup> On the so-called genocidal rape and the possibility of prosecuting members of the Russian armed forces for this type of crime: Szkodzińska, O., 'Zasadność zarzutu gwałtu ludobójczego w kontekście trwającej wojny na Ukrainie', *Wojskowy Przegląd Prawniczy*, 2023, No. 1, p. 37 et seq.

<sup>12</sup> Nowakowska-Małusecka, J., *Odpowiedzialność karna jednostek za zbrodnie popełnione w byłej Jugosławii i w Rwandzie*, Katowice, 2000, pp. 73–76.

on 23 February 2004,<sup>13</sup> the ICC Prosecutor committed to taking all necessary steps to ensure a fair investigation of the case and to bring those responsible to justice. This case marked the Tribunal's first. Since then, two decades have passed, and the Court has dealt with more than forty cases, all from Africa.<sup>14</sup> The conflict in Ukraine is the first non-African case to come before the Tribunal.

The Court also has jurisdiction over war crimes, especially those committed on a large scale or as part of a predetermined plan or policy (Article 8). The statutory definition of war crimes includes:

In the context of an internationally characterised armed conflict:

- Serious violations of the four 1949 Geneva Conventions for the Protection of Victims of Armed Conflict<sup>15</sup>

The term 'grave breaches' is defined in Article 8(2)(a) of the Statute.<sup>16</sup> It does not cite specific provisions of the Convention, but only lists the acts which constitute such violations. These include acts against protected people (e.g., the wounded, sick, prisoners of war) or goods (e.g., medical equipment), such as wilful killing, torture, conducting biological experiments, wilfully causing great suffering, extensive destruction and appropriation of property not justified by military necessity, compelling to serve in the forces of a hostile power, depriving of the right to a fair trial, unlawful deportation, and taking hostages.

- Other serious violations of the laws and customs of international law.<sup>17</sup>

This category encompasses a wide range of prohibited acts, including attacking or bombarding undefended cities or buildings, unlawful use of enemy flags, banners, military insignia, UN or Red Cross emblems resulting in death or serious bodily harm, attacking religious facilities, hospitals, humanitarian aid facilities, using weapons prohibited by international law, recruiting children under 15 to participate in the conflict, committing rape, forced prostitution, starving civilians or using them as 'human shields'.

In a situation where the armed conflict is not of an international character:

- Serious violation of the so-called 'minimum humanitarianism' principle from Article 3 common to the four Geneva Conventions.<sup>18</sup>

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<sup>13</sup> The full text of the ICC Prosecutor's statement was published on the official website of the Court: [www.icc-cpi.int/php/index.php](http://www.icc-cpi.int/php/index.php) [accessed on 20 May 2023].

<sup>14</sup> For this reason, it was widely criticised (and boycotted) by African countries, called a 'colonial court' and a 'a plot of Western powers'. Sterio, M., Dutton, Y., 'The War...', op. cit., p. 797 et seq.

<sup>15</sup> Geneva Convention of 12 August 1949 for the Amelioration of the Condition of the Wounded and Sick in Active Armies; Journal of Laws of 12 September 1956, No. 38, item 171. Geneva Convention of 12 August 1949 for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked of Armed Forces at Sea; Journal of Laws of 12 September 1956, No. 38, item 171. Geneva Convention of 12 August 1949 relating to the treatment of prisoners of war; Journal of Laws of 12 September 1956, No. 38, item 171. Geneva Convention of 12 August 1949 for the Protection of Civilian Persons in Time of War; Journal of Laws of 12 September 1956, No. 38, item 171.

<sup>16</sup> Ambos, K. (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, BECK, 2022, p. 56 et seq.

<sup>17</sup> *Ibidem*, p. 182 et seq.

<sup>18</sup> *Ibidem*, p. 881 et seq.

The aforementioned principle applies to prohibited acts committed against persons not directly involved in hostilities or against those who laid down their arms or were excluded from combat due to illness, wounds or imprisonment. These crimes consist of attacks on the lives, personal dignity and bodily integrity of the above-mentioned persons, cruel treatment and torture, taking hostages from them, depriving them of the right to a fair and fair trial.

- Other serious violations of laws and customs within established norms of international law.<sup>19</sup>

The list of crimes specified in Article 8(2)(e) of the Statute is a closed catalogue. Given the ICC's role as an international criminal code, adherence to the principle of *nullum crimen sine lege* required a strict and unambiguous definition of crimes under its jurisdiction. This was crucial for non-international conflicts, which continue to provoke lively discussions in academia. It is generally accepted that the right of a party to conduct certain military actions in a non-international conflict are not unlimited, and certain methods of warfare are outright forbidden. The Statute covers attacks on civilians, civilian objects, humanitarian personnel and facilities, recruitment of children under 15 to participate in a conflict, all forms of sexual violence, medically unjustified experimentation on adversaries, forced resettlement not necessitated by military needs, and unjustified destruction of enemy property.

Including these acts in the Tribunal's jurisdiction is a fully justified position. The majority of post-World War II crimes (e.g., in Rwanda) occurred in internal conflicts. Common justice dictates that protection against such serious crimes should be based on the same principles as those applicable in international conflicts.

The ICC also has judicial competence concerning the crime of aggression (Article 5(1)(d)). However, jurisdiction in this area was initially suspended until the crime was precisely defined. A resolution adopted by the UN General Assembly in 1974<sup>20</sup> defined aggression as the use of armed force by a state against the sovereignty, territorial integrity, or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations.

The definition of aggression was a key focus for the ICC's Preparatory Commission during its later stages. In addition to proposals from Arab countries, the Committee also deliberated over attempts to define the crime of aggression synthetically without specifying individual, specific manifestations.<sup>21</sup> A controversial issue was the role of the UN Security Council, which under the UN Charter, has exclusive

<sup>19</sup> Ibidem, p. 929 et seq.

<sup>20</sup> Resolution of 14 December 1974 on the definition of aggression (Definition of Aggression, United Nations General Assembly Resolution 3314 (XXIX), University of Minnesota, Human Rights Library, <http://hrlibrary.umn.edu/instreet/GAres3314.html> [accessed on 15 May 2023]. It was not given a binding character, for example, acts considered as acts of aggression were indicated, but the catalogue was left open, e.g. an attack by armed forces on the territory of another state, sending by or on behalf of a state bands or armed groups to carry out armed attacks against another state.

<sup>21</sup> Płachta, M., 'Dalsze prace nad Międzynarodowym Trybunałem Karnym', *Prokuratura i Prawo*, 1999, No. 6, p. 135.



competence in identifying acts of aggression.<sup>22</sup> Proposals regarding the crime of aggression were presented to the Assembly of States Parties for inclusion in the Statute during the Review Conference in Kampala on 10–11 June 2010 (Resolutions No. 5 and 6).<sup>23</sup> Reaching consensus on this matter was a significant achievement in the development of international law, impacting the ICC's adjudication quality and efficiency, despite some criticism in legal literature.<sup>24</sup> At this time, a definition of the crime of aggression and proceedings initiation processes for suspected commission of this crime were incorporated into the Statute.<sup>25</sup>

Initially, only 43 states ratified the Kampala Amendments, and it was evident that the procedure would only come into effect after acceptance by the States Parties, which occurred on 15 December 2017. Consequently, the General Assembly of the States Parties to the Statute passed a resolution enabling the ICC's jurisdiction over the crime of aggression from 17 July 2018.<sup>26</sup> Significantly for the current discussions, ICC proceedings are based on the principle of complaint. The Tribunal does not act *ex officio*; a 'representation of the situation' by a state party, the UN Security Council, or the ICC Prosecutor is necessary to initiate proceedings.<sup>27</sup> Although Ukraine is not a party to the Statute, it does not preclude the Court from exercising jurisdiction over crimes committed on its territory. Ukraine recognised the ICC's jurisdiction and commenced cooperation with it regarding crimes against humanity committed during the Maidan events between November 2013 and February 2014<sup>28</sup> and subsequently all crimes committed on Ukrainian territory *de lege ferenda* from February 2015 onwards.<sup>29</sup> It is thus now possible to prosecute all three types of crimes: against humanity, genocide and war crimes. This was the case in 2014,<sup>30</sup> and that recognition led to an ongoing investigation at the ICC into

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<sup>22</sup> The issue of the role of the UN Security Council has been the subject of discussion since the session of the UN Special Committee in New York held on 4–15 August 1997 (report on the work of the Committee: *Państwo i Prawo*, 1997, No. 10, pp. 88–90).

<sup>23</sup> Resolution RC/Res.6, text available on the UN website: [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XVIII-10-b&chapter=18&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10-b&chapter=18&clang=en) [accessed on 12 May 2023].

<sup>24</sup> Reisinger Coracini, A., 'The Kampala Amendments on the Crime of Aggression Before Activation: Evaluating the Legal Framework of a Political Compromise – Part 1', *OpinioJuris*, 29 September 2017, and *Part 2, OpinioJuris*, 2 October 2017. Texts available on the website [www.opiniojuris.org](http://www.opiniojuris.org) [accessed on 12 May 2023].

<sup>25</sup> A kind of *novum* in relation to the current legal status is the omission of the first-shot requirement, according to which the party that first used force is guilty of the attack. The Court may take into account both the priority of use of force and the *animus aggressionis* (Latin: intent to attack). Karska, E., 'Dorobek Konferencji Rewizyjnej Statutu MTK ze szczególnym uwzględnieniem poprawki definiującej zbrodnię agresji', *Kwartalnik Prawa Publicznego*, 2010, No. 3, p. 20.

<sup>26</sup> Wong, M.S., 'Aggression and state responsibility at the International Criminal Court', *International and Comparative Law Quarterly*, 2021, Vol. 70, pp. 961–962.

<sup>27</sup> Podkówka, A., 'Międzynarodowy Trybunał Karny jako wypełnienie »luki bezkarności« w prawie międzynarodowym', *Zeszyty Naukowe TD UJ, Nauki Społeczne*, 2018, Vol. 21, No. 2, p. 55.

<sup>28</sup> International Criminal Court, *Situation in Ukraine...*, op. cit.

<sup>29</sup> *Ibidem*.

<sup>30</sup> International Criminal Court, The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination in Ukraine, <https://www.icc-cpi.int/news/>

crimes committed in Ukraine by any person and in any part of its territory. This investigation resulted in the March 2023 arrest warrant for the president of the Russian Federation and his commissioner.<sup>31</sup>

The matter becomes more complicated in the case of the crime of aggression. The 'post-Kampala' definition of the crime of aggression,<sup>32</sup> as stated in Article 8bis(1) of the Statute, describes it as the planning, preparation, initiation or execution, by a person in a position to exercise effective control or direction, of an act of aggression<sup>33</sup> which 'by its character, gravity and scale'<sup>34</sup> constitutes a manifest violation of the Charter of the United Nations. When analysing the *ratione materiae* competencies, it is clear that the ICC may have jurisdiction over the prosecution of the crime of aggression committed against Ukraine.<sup>35</sup> However, this provision does not permit the initiation of proceedings by the Tribunal due to the lack of a prerequisite for personal jurisdiction ('a person in a position allowing for effective control over or directing the actions of the state'). Such jurisdiction can only be exercised in relation to nationals of states that have ratified the Statute and the Kampala Amendments, and only if such a state has not excluded this jurisdiction.<sup>36</sup> The Russian Federation, not being a party to the Statute, cannot be placed under jurisdiction in the context of the crime of aggression, regardless of whether it commits that specific crime on the territory of a State party to the Statute or not. Prosecution for the crime of aggression would also be impractical for another, more straightforward reason. Such proceedings are to be initiated and/or conducted in close cooperation with the UN Security Council. Given that the Russian Federation is a veto-wielding member of the Security Council, it is difficult to imagine that the Council would agree to such a solution.<sup>37</sup>

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prosecutor-international-criminal-court-fatou-bensouda-opens-preliminary-examination-ukraine [accessed on 24 November 2023].

<sup>31</sup> The exact scope of the Tribunal's work in this case in the period from 2014 to 2022 is presented below: Kuczyńska, H., 'Odpowiedzialność...', op. cit., p. 9 et seq. The next stage of ICC's work can be observed on its website – cf.: <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and> and <https://www.icc-cpi.int/situations/ukraine> [both accessed on 15 May 2023].

<sup>32</sup> <https://sip.lex.pl/akty-prawne/dzu-dziennik-ustaw/poprawki-do-rzymskiego-statutu-miedzynarodowego-trybunalu-karnego-18753723> [accessed on 17 May 2023].

<sup>33</sup> Article 8bis(2) defining an act of aggression: Amendments to the Rome Statute of the International Criminal Court, done in Rome on 17 July 1998, adopted at the Review Conference in Kampala (Resolutions No. 5 and 6) on 10 and 11 June 2010. *Journal of Laws* 2018, item 1753. On 'an act of aggression', cf. e.g. Jurewicz, J., *Jurysdykcja przedmiotowa Międzynarodowego Trybunału Karnego*, Łódź, 2008, pp. 83–97; Płachta, M., *Międzynarodowy...*, op. cit., pp. 450–508; Izydorczyk, J., Wiliński, P., *Międzynarodowy Trybunał Karny*, Zakamycze, 2004, pp. 58–60.

<sup>34</sup> Wong, M.S., *Aggression...*, op. cit., pp. 963, 966, 982.

<sup>35</sup> K. Nowakowska's interview with B. Krzan: 'Za Wojnę w Ukrainie może odpowiedzieć nie tylko Putin. Prof. Krzan: Zbrodnia wojenna i zbrodnia przeciwko ludzkości na pewno się kwalifikują', *Gazeta Prawna*, 3 March 2022, <https://serwisy.gazetaprawna.pl/orzeczenia/artykuly/8371206,putin-mtk-wojna-w-ukrainie-jak-wyglada-proces.html> [accessed on 20 May 2023].

<sup>36</sup> Heinsch, R., 'The Crime of Aggression After Kampala: Success or Burden for the Future?', *Goettingen Journal of International Law*, 2010, No. 2, pp. 721–723.

<sup>37</sup> In detail about such hypothetical proceedings in the case of the crime of aggression against Ukraine: Kuczyńska, H., 'Odpowiedzialność...', op. cit., p. 14 et seq.



*RATIONE PERSONAE* COMPETENCIES

*Ratione personae* competencies, as the subjective jurisdiction of the court, delineate the entities that may appear before the Tribunal as a party. The Statute of the ICC, in Article 1 and Article 25(1), specifies that the Court's jurisdiction applies solely to natural persons guilty of the most serious international crimes. This precludes the possibility of bringing legal persons or states, such as the Russian Federation, to criminal liability before the ICC. Furthermore, the Statute excludes persons under the age of 18 at the time of the alleged crime from its jurisdiction. It should be clearly stated that individuals from both sides of a conflict may be prosecuted equally for the specified international law crimes in the Statute (with the exception of the crime of aggression). In the case of the crime of aggression, prosecution is only possible on the part of the aggressor and for individually specified persons, after fulfilling a number of formal requirements. As explained by the Lithuanian MEP and former Prime Minister A. Kubilius, the crime of aggression, deemed the mother of all crimes, must not go unpunished under any circumstances. Therefore, the potential establishment of a special *ad hoc* tribunal to consider solely the issue of the crime of aggression should be contemplated. It would complement the investigative activities of the ICC and its Prosecutor, as their activities would also cover the alleged genocide, war crimes, and crimes against humanity committed in Ukraine. However, by extending its jurisdiction to include the crime of aggression, it would fill the current gap.<sup>38</sup>

Concerning the Tribunal's jurisdiction, a pivotal element is the principle of individual liability for an act, expressly stated in Article 25(2) of the Statute. Any natural person who directly perpetrates a crime, or acts as an accomplice, principal, instigator, assistant, or attempts to commit mass crimes specified in the statute, shall be criminally liable to the extent of their fault. The possibility of mitigating punishment or exemption from criminal liability for persons in high-ranking positions, such as heads of state, government members, parliamentarians, or other state functionaries, is explicitly ruled out. The Court does not recognise privileges or immunities;<sup>39</sup> they do not constitute any obstacle to the exercise of the Court's jurisdiction.

Separate liability is stipulated for superiors who knew or should have known about the commission of crimes by subordinates but did not take steps to prevent or punish the guilty parties. A superior bears criminal liability under the rules set out in the Statute if they knowingly disregarded information indicating the commission

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<sup>38</sup> Świętochowska, E., 'Nowa Norymberga: Jak osądzić rosyjskich zbrodniarzy na czele z Putinem?', *Gazeta Prawna*, 30 December 2022, <https://www.gazetaprawna.pl/wiadomosci/swiat/artykuly/8621294,wojna-w-ukrainie-zbrodnie-wojenne-sad.html>; Bielecki, T., 'Europosłowie: Rozliczyć Putina, nie tylko żołnierzy', *Deutsche Welle*, 19 January 2023, <https://www.dw.com/pl/europos%C5%82owie-rozliczy%C4%87-putina-nie-tylko-%C5%BCo%C5%82nierzy/a-64449463> [both accessed on 17 May 2023].

<sup>39</sup> Serious doubts in the context of the immunities of state leaders and the possibility of holding them accountable to the ICC in the context of, *inter alia*, cases of Al. Bashir, who, despite arrest warrants issued by the ICC in 2009 and 2010, has not been delivered to the Court to date: Singhi, Y., 'Head of State immunity: The ICC's biggest impediment', *Indian Journal of International Law*, 2021, No. 59, p. 391 et seq. Also on the need for states to cooperate with the ICC as a condition for its efficient functioning: Sterio, M., Dutton, Y., 'The War...', op. cit., p. 805.

or intention to commit a crime by a subordinate, and these crimes pertained to the scope of activity under their actual control. Additionally, acting on the orders of a government or superior does not absolve one from criminal responsibility, unless the offender was legally obliged to obey the order, the order was not manifestly unlawful, or the defendant did not know it was unlawful. Manifest unlawfulness as a 'mitigating circumstance' is not considered in the case of crimes of genocide and crimes against humanity, which are deemed manifestly unlawful by the Statute.

The essential condition for incurring criminal liability is the intentional act of the perpetrator. The offender carries out the crime consciously, aware of the effect as a normal consequence of the action taken, and with the intention of causing a specific effect. In principle, liability is not limited for acting under the influence of error – whether of fact or law, except when the perpetrator's intention is negated.

The grounds for excluding criminal liability are detailed in Article 31 of the Statute.<sup>40</sup> The catalogue of these grounds is not strictly closed, allowing the Court to consider other bases for exclusion when evaluating specific cases. These conditions include, among others: mental illness or mental retardation precluding the ability to understand the nature of the act, self-defence or defence of another person, acting under duress caused by the threat of direct loss of life or serious bodily harm.

A fair trial before the Court is guaranteed by the universal principle of criminal law *ne bis in idem*. No one can be tried by the Court for a crime for which they have already been convicted or acquitted by the ICC. Similarly, a person cannot be held criminally liable in another court for acts for which they have already been tried by the Court. The only exceptions to this principle are cases of an unfair or biased trial or proceedings in another court intended to shield the concerned person from the jurisdiction of the Court (Article 20 of the Statute).<sup>41</sup>

## RATIONE LOCI COMPETENCIES

The scope of *ratione loci* competencies determines the territorial jurisdiction of the Tribunal, based on where the prosecuted acts were committed. The Statute of the ICC stipulates that the Court has jurisdiction over crimes committed in:

- (1) the country of the 'place of the act' or the registration of the ship or aircraft or the country of which the defendant is a citizen – if this country is a Party to the Statute,
- (2) a country which is or is not a party to the Statute, provided that the UN Security Council, acting as the guardian of world peace and security, submits a relevant request to the Prosecutor, pursuant to Chapter VII of the UN Charter,
- (3) a country which is not a party to the Statute but which, by means of a declaration submitted to the Secretary of the ICC after the date of entry into force of the Statute, has recognised the jurisdiction of the ICC with respect to the crime, as was the case with Ukraine.

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<sup>40</sup> Klamberg, M., *Commentary Rome Statute*, Part 3, 2016, points 310–317; Krebs, B., 'Justification and Excuse in Article 31(1) of the Rome Statute', *Cambridge Journal of International and Comparative Law*, 2013, No. 2, pp. 382–410.

<sup>41</sup> Conway, G., *Commentary Rome Statute*, Part 2, 2017, points 243–249.

In principle, the ICC cannot prosecute crimes committed in the territory of non-signatory states to the Statute. However, such a limitation would significantly weaken the Tribunal's operational scope, especially as many states, including Israel, Libya, as well as the USA, which aspires to the title of 'carrying the torch of civilisation',<sup>42</sup> withdrew their signature from the text of the Statute.<sup>43</sup> To ensure a uniform and universal criminal jurisdiction, state parties and the UN Security Council have the right to present to the ICC Prosecutor situations indicating that crimes within the Court's jurisdiction have been committed in non-party states. The ICC Prosecutor can also act *ex officio* under Article 15 of the Statute, conducting an initial examination of a case and then applying to the Pre-Trial Chamber for authorisation to initiate an investigation. In the conflict in Ukraine, not only did Ukrainian authorities apply in 2015 under Article 12(3) of the Statute for ICC jurisdiction over future crimes committed on its territory, but in March 2022, forty state parties to the Statute requested the Prosecutor to investigate the case under Article 14 of the Statute.<sup>44</sup>

#### RATIONES TEMPORIS COMPETENCIES

Article 1 of the ICC Statute establishes the Tribunal as a permanent institution, not subject to time limits. In line with the principle of *lex retro non agit*, its jurisdiction, in principle, covers crimes committed after the Statute's entry into force, i.e., from 1 July 2002. For any state joining the Statute post this date, the Court's jurisdiction applies only to crimes committed from the Statute's effective date for that country. If a state has previously made a declaration recognising the Court's jurisdiction over a specific crime, the Court may exercise its jurisdiction over that crime from the date specified in the declaration, and for other crimes, from when the Statute becomes effective for that state. On 25 February 2014, Ukraine submitted a declaration to the Court extending its jurisdiction over the Maidan crimes. On 8 September 2015, Ukraine submitted to the jurisdiction of the ICC all crimes committed on Ukrainian territory since 20 February 2015.<sup>45</sup>

<sup>42</sup> *Koniec Świata kowbojów*, article available at: <https://www.rp.pl/literatura/art5632541-koniec-swiata-kowbojow> [accessed on 19 May 2023].

<sup>43</sup> In May 2002, the US Undersecretary General for International Relations, Marc Grossman, announced that the US was officially withdrawing President Clinton's signature from the Charter. In November 2016, Russia also announced – by decree of the Russian president – that it was withdrawing its signature from the treaty (although both countries signed the treaty in 2000). For this reason, Putin does not need to be detained within Russia's borders for delivery to the ICC. Zdrojewski, D., 'Złe wieści dla Putina. Sojusznik Rosji chce ratyfikować Statut Rzymski', *Interia*, 23 March 2023, [https://wydarzenia.interia.pl/zagranica/news-zle-wiesci-dla-putina-sojusznik-rosji-chce-ratyfikowacstatu,nId,6673000#utm\\_source=paste&utm\\_medium=paste&utm\\_campaign=firefox](https://wydarzenia.interia.pl/zagranica/news-zle-wiesci-dla-putina-sojusznik-rosji-chce-ratyfikowacstatu,nId,6673000#utm_source=paste&utm_medium=paste&utm_campaign=firefox) [accessed on 12 May 2023].

<sup>44</sup> International Criminal Court, *Situation in Ukraine...*, op. cit.

<sup>45</sup> *Declaration of the Verkhovna Rada of Ukraine*: <https://www.icc-cpi.int/sites/default/files/itemsDocuments/997/declarationVerkhovnaRadaEng.pdf>. Second document on the page: [https://www.icc-cpi.int/iccdocs/other/Ukraine\\_Art\\_12-3\\_declaration\\_08092015.pdf#search=ukraine](https://www.icc-cpi.int/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf#search=ukraine) [accessed on 24 November 2023].

## RATIONE IURIS COMPETENCIES

The *ratione iuris* competencies define the applicable legal provisions in proceedings before the ICC, while the statutes of the Criminal Tribunals for the former Yugoslavia and Rwanda do not explicitly specify such jurisdiction.<sup>46</sup> The Statute of the Permanent Court, on the other hand, akin to the Statute of the International Court of Justice, *expressis verbis* in Art. 21, outlines the range of legal sources to be used by the Tribunal and its legal bodies. Primarily, the ICC applies its Statute, the Elements of the Definition of Crimes,<sup>47</sup> Rules of Procedure and Evidence,<sup>48</sup> and relevant conventions, principles, and rules of international law. Only in the absence of these sources may the Court rely on general principles of law interpreted from the national laws of various legal systems, including those of states that would otherwise exercise jurisdiction, provided they are consistent with the Statute and international standards. The ICC's interpretation of the law must align with fundamental human rights guarantees and be free from any discrimination based on age, race, language, religion, national or ethnic origin, property, or other status.

Despite the extensive array of powers vested in the ICC, the primary responsibility for prosecuting and trying criminals lies with states. A case will only be initiated before the Court if a state fails to fulfil this obligation, i.e. when the state is 'unwilling' or 'unable' to prosecute crimes effectively (e.g. due to the collapse of the justice system). This underpins the principle of complementarity, central to the Tribunal's concept and the Statute. The ICC aims to 'force' states to exercise their powers and to 'control' this performance.<sup>49</sup> Only secondarily does it exercise jurisdiction in lieu of the state, ensuring the gravest crimes do not go unpunished. When prioritising national jurisdictions, it is typically the courts of Russia and Ukraine, or other states with jurisdiction over the committed crimes, that are obliged to conduct proceedings. Demonstrating the ICC's competence to conduct proceedings must always be grounded in the principle of complementarity.<sup>50</sup> In the current political

<sup>46</sup> More on that: Podkówka, A., 'Międzynarodowy...', op. cit., p. 49.

<sup>47</sup> Płachta, M., *Międzynarodowy...*, op. cit., pp. 212–227.

<sup>48</sup> The Rules of Procedure and Evidence should be applied in conjunction with the provisions of the Statute when the Court considers a particular case. They constitute a legal instrument of this kind to which the ICC's decision-making rules are subordinated. The 'Explanatory Note' attached to the Rules stipulates that the provisions of the Rules may not affect in any way the domestic judiciary system of the State – Party to the Statute. Płachta, M., *Międzynarodowy...*, op. cit., pp. 227–249.

<sup>49</sup> Płachta, M., Wyrozumka, A., 'Problem ratyfikacji Statutu Międzynarodowego Trybunału Karnego (uwagi polemiczne w związku z artykułem Karola Karskiego)', *Państwo i Prawo*, 2001, No. 5, pp. 95–96.

<sup>50</sup> In detail about the principle of complementarity, e.g. Helios, J., 'Legalność (nielegalność) Międzynarodowego Trybunału Karnego w Hadze – rozważania w oparciu o zasadę suwerenności państw-stron Statutu MTK', *Zeszyty Naukowe PWSZ w Legnicy*, 2007, No. 1, p. 52 et seq.; Marshall, K.A., 'Prevention and Complementarity in the International Criminal Court: A Positive Approach', *Human Rights Brief* 17, 2010, No. 2, <https://www.corteidh.or.cr/tablas/r24177.pdf> [accessed on 20 May 2023]; Augusto, T., 'Having Regard to the Jurisprudence of the ICC, Consider Whether the Concept of "Complementarity" in the Rome Statute is Working', *Giuricivile*, 14 September 2017, <https://giuricivile.it/complementarity-in-the-rome-statute/> [accessed on 20 May 2023].

situation, it is unlikely the aggressor state would judge the perpetrators of the crimes committed. It is also difficult for a victim state to do so, although it would be the most understandable situation.<sup>51</sup> On the other hand, the competences of third countries may raise some doubts. A specific precedent in this matter was created in Nuremberg, where such a possibility was allowed.<sup>52</sup> From a Polish perspective, such a possibility exists based on Article 112 of the Penal Code.<sup>53</sup>

## CONCLUSIONS

Since 2014, the ICC has been investigating crimes committed by the Russian Federation in Ukraine (excluding the crime of aggression). The models for prosecuting international crimes are not consistent. As noted by H. Kuczyńska, the crime of aggression can only be prosecuted in states voluntarily submitting to this jurisdiction. This significantly weakens the role of the ICC on the international arena, as limiting the grounds for responsibility for the crime of aggression to the *de facto* leaders of the states accepting jurisdiction means that they are understandably not interested in signing such a 'chirograph' on themselves.<sup>54</sup> And just as it is possible to hold Russian leaders accountable by the ICC for other crimes (however, it is important to remember that such a person must be brought before the ICC, as the Court does not proceed in the absence of the accused),<sup>55</sup> the crime of aggression either falls under national court jurisdiction (currently unlikely) or necessitates a special quasi-tribunal, as proposed by the Lithuanian politician A. Kubilius already in 2022.<sup>56</sup>

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<sup>51</sup> Of course, thousands of investigations are under way in Ukraine regarding the commission of crimes under international law by both Russian and Belarusian troops in the country. Also in Poland, in March 2022, an investigation into war crimes in Ukraine was launched based on Article 117 PC. It is 'ancillary' to the proceedings before the ICC. Świetlińska, M., 'Ruszyło śledztwo w sprawie zbrodni wojennych w Ukrainie', *Dziennik Prawny*, 15 March 2022, <https://www.dziennikprawny.pl/pl/a/ruszylo-sledztwo-w-sprawie-zbrodni-wojennych-na-ukrainie> [accessed on 17 May 2023]. Such an approach to the investigation in Poland may raise doubts as the activities of the ICC should be complementary and not vice versa. There is also a doubt as to the compatibility of the signs with Article 117 of the Penal Code with the definition of crime in international law. Proceedings are also conducted in a number of other countries (e.g. in Lithuania, which was also the first to refer this case to the ICC, in Estonia, Slovakia, Germany) and within the EU with the support provided by Eurojust. Osiński, Ł., 'Eurojust wspiera wspólny zespół dochodzeniowy w sprawie zbrodni wojennych na Ukrainie', *Gazeta Prawna*, 28 March 2022, <https://www.gazetaprawna.pl/wiadomosci/swiat/artykuly/8389013,eurojust-wspiera-wspolny-zespol-dochodzeniowy-w-sprawie-zbrodni-wojennych-na-ukrainie.html> [accessed on 17 May 2023].

<sup>52</sup> It is difficult to indicate here universal protection justifying the existence of this type of competence, because, as rightly argued in the literature, there is no treaty that would introduce such an obligation.

<sup>53</sup> The Penal Code Act of 6 June 1997, Journal of Laws of 1997, No. 88 item 553, as amended.

<sup>54</sup> Kuczyńska, H., 'Odpowiedzialność...', op. cit., p. 26.

<sup>55</sup> The Tribunal does not have its own police officers who could arrest perpetrators hiding abroad. It is up to states to arrest and bring suspects to The Hague to stand trial. As years of experience in the functioning of the ICC show, the cooperation between the states signatories of the statute and the Court is not the best. Sterio, M., Dutton, Y., 'The War...', op. cit., p. 818.

<sup>56</sup> Kubilius, A., *An international special tribunal for Putin's aggression crimes*, opinion available at: <https://www.youtube.com/watch?v=Sz7czN0zoHA> [accessed on 15 May 2023].

Such a project was indeed adopted by the European Parliament in a resolution of 19 January 2023.<sup>57</sup> It once again condemned Russia's aggressive war against Ukraine, expressed unwavering support for Ukraine's independence, sovereignty, and territorial integrity within internationally recognised borders, and called on Russia to immediately cease all military activities in Ukraine and unconditionally withdraw all its armed forces and military equipment from all internationally recognised Ukrainian territory. It emphasised that Russia's aggression in Ukraine constitutes a clear and undisputed violation of the United Nations Charter, which, in the interest of world security and international order, cannot remain unanswered by the international community. For this reason, it highlighted the urgent need for the EU and its Member States, in close cooperation with Ukraine and the international community, preferably through the UN, to establish a special international tribunal. This tribunal would prosecute the crime of aggression against Ukraine committed by the political and military leadership of the Russian Federation and its allies and find a legally reasonable, common approach to addressing this matter. The creation of such a tribunal was noted as essential to fill a large gap in the current institutional structure of international criminal justice.

The resolution also stressed that a special international court would have jurisdiction to examine not only the situation of President Putin and the political and military leaders of the Russian Federation, but also that of President Lukashenko and political and military leaders of Belarus. Belarus, as an enabling state from whose territory and with whose logistical support the Russian Federation is waging an aggressive war against Ukraine, falls under the category of the crime of aggression under Article 8 bis of the Statute. The EU's preparatory work on the Special Court should commence without delay, focusing on setting conditions for the Court in cooperation with Ukraine and supporting Ukrainian and international authorities in securing evidence for use in the future Special Court.

It is hoped that establishing this special court for the crime of aggression will send a clear signal to Russian society and the international community that President Putin and the Russian leadership could be convicted of all crimes, including aggression against Ukraine. Concurrently, considering changes to the legal bases on which the current ICC operates is necessary. Looking realistically into the future, such modifications should ensure that the Tribunal's jurisdiction cannot be questioned in any way.

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<sup>57</sup> *Resolution of the European Parliament (Joint Motion) – RC-B9-0063/2023 – on the establishment of a tribunal on the crime of aggression against Ukraine*, 2022/3017(RSP).



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