

Assessing the Possibility of Prosecuting Putin and other leaders for War Crime in Ukraine

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Abstract: This article succinctly assessed the possibility of prosecuting Russian President Vladimir Putin and other key figures for alleged potential war crimes or crimes against humanity being committed in Ukraine. Precisely, it reviews existing literature on the ongoing Russian invasion of Ukraine as the methodological approach to exploring the possibility.

As the conceptual framework, this paper assessed the possibility from the background of power dynamics, particularly in the United Nations Security Council (UNSC) affecting international politics and puts Russia into context. The paper doubts not the possibility but argues that the chances are very slim due to the concept of power dynamics being exercised by Russia as one of the five permanent members of the UNSC and the political limits to what the International Criminal Court (ICC) can do in any of the crimes it investigates and prosecutes prime suspects bearing greater responsibility.

Keywords: International Criminal Courts, War Crime, Russia, Ukraine, United Nations Security Council, Power dynamics.

I. INTRODUCTION

Since the launch of Putin's "special military operation" to demilitarize and denazify Ukraine at the expense of the civilian population, the calls to prosecute President Putin and other leaders continue to dominate major international media outlets. For example, Ukrainian President Volodymyr Zelensky and UK Prime Minister Boris Johnson have previously both accused Russia of carrying out war crimes (Casciani, 2022). According to CNN and CNBC, US President Joe Biden has labeled President a "war criminal" (Fossum and Liptak, 2022), (Mangan, 2022). Even the prosecutor of the international criminal court (ICC) in The Hague has announced that he will launch an investigation into possible war crimes or crimes against humanity in Ukraine (The Guardian, 2022). Moreover, in his news conference, on February 28, 2022, the ICC prosecutor, Karim Khan, signaled his intention to seek to open a formal inquiry (Human Right Watch, 2022).

Similarly, European Union foreign policy chief Josep Borrell has accused Russia of committing war crimes in Ukraine, most notably in the besieged port city of Mariupol where hundreds of civilians have been killed (France24, 2022).

To sum it up, thirty-eight governments have taken a significant step toward ensuring documentation of potential war crimes by asking the International Criminal Court (ICC) prosecutor to open an investigation in Ukraine (Human Right Watch, 2022).

As the bombardment of Ukraine continues, the momentum to prosecute President Putin and other important figures or leaders will probably increase.

It is no doubt that all the calls labeling Putin a "war criminal" or suspect of war crime in Ukraine are apparently evidence-based and yet to be evaluated by the ICC in The Hague. However, will these calls subject Russian President Vladimir Putin and other important leaders to prosecution? Are those making the calls cognizance of the practical and political challenges given the current status of Russia in the theater of international politics?

The answer to these silent questions is the prime focus of this paper or article. To express it in other words, this paper provides insights into the question by assessing the possibility of prosecuting President Putin and other important leaders behind the "special military operation" going on in Ukraine.

It assesses the possibility by exploring the following thematic topics grouped under four different segments in this paper. The first segment layouts the conceptual framework of the paper. Precisely, it reviews the concept of power dynamics and put Russia into context. The main reason for using this conceptual framework stems from its relevance to the status of Russia as a major political challenge. The second segment of the paper assumes possible potential evidence that could be used to indict President Putin and other important leaders. The third examines the legitimacy of the ICC to prosecute President Putin and other leaders. Specifically, it looks at certain provisions contained in the Rome Statute

Finally, the fourth segment of this paper derives logical inference from the first three segments.

II. METHODOLOGY

As a research imperative, this paper employs a qualitative approach. Precisely, it critically reviews existing literature on the ongoing Russian invasion of Ukraine that help informs the conclusion of this paper or article.

Conceptual Framework

Considering the conceptual framework, this paper reviews power dynamics, especially from the United Nations Security Council (UNSC) perspective. As cited by GoodTherapy (2019), Kane (2014) conceptualized power dynamics as to how power affects a relationship between two or more people. In paraphrase, it suggests the interplay of power that all aspects of socially, politically, economically, religiously, and son. In international politics, it is argued that power dynamics

or the interplay of power explains the projection of states' influence. At the United Nations level, Luck (2006) posits that the UNSC is undoubtedly the most powerful body of the international community in which the interplay of power is observed among the five permanent members (United States, China, United Kingdom, Russia, and France). Through the concept of "veto power", the world continues to witness the interplay of power dynamics that affects the international system or order. In practice, veto power is enjoyed and exercised only by the five permanent members of the UNSC giving them the right to veto or say no to or block any substantive resolution that is critical to their national interests and strategic to the tenet of their foreign policy.

As a concept, veto power derives its legitimacy from the UN Charter's Article 27. According to the Charter:

- A veto is granted to each member of the Security Council.
- A majority of nine members of the Security Council must vote affirmatively on procedural questions.
- The Security Council's decision on all other matters is taken by an affirmative vote of nine members, including the permanent members' concurring votes.
- A party to a dispute must abstain from voting in decisions made under Chapter VI and Article 52, paragraph 3.

The concept is not applicable to "procedural" votes, as determined by the permanent members themselves. A permanent member can also block the selection of a Secretary-General, although a formal veto is unnecessary since the vote is taken behind closed doors.

In accordance with the basic tenets of democracy believed to be championed by the UN, veto power remains the most controversial or contradictory concept of power dynamics in the theater of the UN for one major reason. Inherently, it shows the inequality of power among the fifteen members of the UNSC. The current UN Secretary-General Antonio Guterres is on record to have acknowledged or confirmed this inherent fact. Addressing a cross-section of elite university students in Kashmir in February 2020, the UN chief stated that the veto power of five permanent members at the UN Security Council was against the 'spirit of equilibrium' and a sign of global inequality (News, 2020).

Considering its significance to protect their national interests, that so strategic the tenet of their foreign policy, veto power affects the international order or system. Arguably, it gives the five permanent members a free ride to do whatever is germane to their national interests with impunity or a get-out-of-jail-free card. The rise of the US unilateralism, a tendency in Washington to make decisions without much regard for the interests or views of its own allies or the rest of the world is a classic example evidenced by its military operation that ended the regime of Saddam Hussein in Iraq, the operation that took out Osama Bin Laden in Pakistan 2011. In passing, these

examples are notorious facts that do not demand citation as far as research is also concerned.

Similarly, there have been no attempts by the UNSC to hold China responsible for crimes against humanity and genocide in Xinjiang, a large region in the country's northwest that is home to the Uyghurs and other minority Muslim groups (Gunter, 2021).

Through the display of power dynamic, the concept of veto power also extends to the International Criminal Court (ICC) mandated to prosecute suspected criminals of war crimes or crimes against humanity. It has the inherent

power to either prevent or initiate prosecution. It can be argued that its ability to prevent prosecution can encourage impunity. For example, in the case of a State, not a party to the Rome Statute, Article 13 (b) of the Rome Statute gives the Security Council a unique jurisdictional role to refer a case to the ICC for prosecution. For this (referral) to happen, the UN Security Council passes a resolution that could be voted on. For example, when the Council attempted to activate the court's jurisdiction that would have if passed authorized the ICC to indict President Bashar Hafez al-Assad. Unfortunately, China and Russia cast a negative vote on the resolution referring the situation in Syria to the ICC on 22 May 2014. To the detriment of the innocent civilians, the culture of impunity goes on in Syria (UN, 2014). A similar situation can be seen in the alleged war crimes committed by U.S. forces, which in Afghanistan include extrajudicial killings, drone strikes that killed an untold number of civilians, torture, and acts committed by British troops in Iraq (Speri, 2021). Till now, there has been no attempt to indict the US President and the former British Prime Minister Tony Blair for bearing the greater responsibility. Not a party to the Rome Statute, it requires Article 13 (b) to hold the US accountable. On the flip side of the same coin, the US and UK will use their veto power to block any resolution.

Being a member of the UNSC, Russia according to data from the Dag Hammarskjöld Library has used its veto power about 120 times strategic to its national interests. Recently, Russia through its envoy Vasily Nebenzia casts the lone dissenting vote that blocked the UN resolution intended to condemn Russia's invasion of Ukraine (VOA, 2022). In other words, it asks the question, how can Russia fire itself in the legs by supporting the resolution?

The concept of power dynamics enjoyed by the five permanent members of the UNSC also extends to their allies. For example, as one of its allies, the U.S. has been accused of remaining complicit in Israel's alleged war crimes and crimes against humanity against Palestinians. Similarly, the world witnessed how China and Russia 2017 vetoed a UN resolution drafted by Britain, France, and the US that intended to impose sanctions on Syria over the alleged use of chemical weapons during the six-year war (The Guardian, 2017). In 2014, Russia and China mindful of their respective economic interests ignored the visible evidence of war crime and crime against

humanity and used their veto power to protect the Bashar Hafez al-Assad regime by blocking a UN Security Council resolution to refer the situation in Syria to the International Criminal Court (ICC) (Human Right Watch, 2014).

In summation, the concept of power dynamics accorded the five permanent members of the UNSC poses a significant challenge to Article 13 (b).

Assumption of Potential Pieces of Evidence of War Crimes committed in Ukraine

To begin with the assumption, it is prudent to take cognizance of reviewing the definition of war crimes as far as Article 8 of the Rome Statute of the International Criminal Court (ICC) is concerned.

War crimes include wilful killing, wilfully causing great suffering, extensive destruction, and appropriation of property, as well as intentionally targeting civilian populations or objects. Crimes against humanity include murder “committed as part of a widespread or systematic attack directed against any civilian population”.

Based on Russia’s assault on Mariupol, Guernica, Stalingrad, Grozny, Aleppo,” Manolis Androulakis, and the eight people that were killed in an overnight bombing of a shopping centre in Kyiv (France24, 2022), the ICC’s chief prosecutor, Karim Khan indicated a reasonable basis to believe that war crimes and crimes against humanity had been committed in Ukraine (The Guardian, 2022).

With close reference to the above summary of war crimes under Article 8 of the Rome Statute, this paper assumes that all the pieces of evidence (documentary and video footage) the ICC chief prosecutor received from researchers including Human Rights Watch, Amnesty International, etc., (The Guardian, 2022), (Human Rights Watch, 2022), (Amnesty International, 2022) meets all legal requirements to indict President Putin and other key figures responsible for the so-called “special military operation” in Ukraine for war crimes and perhaps crime of humanity or crime of aggression allegedly committed.

The legitimacy of the ICC to prosecute President Putin and other Leaders

As you are aware, the ICC derived its legitimacy to prosecute suspected war criminals from the Rome Statute from two inherent perspectives. Firstly, the legitimacy of the ICC is demonstrated by the fact that there are 123 states parties to the Court. This constitutes 64 percent of all members of the United Nations. Those 123 nations confirm their belief in the Court’s legitimacy by accepting the jurisdiction of the Court within their territory and over their nationals (Wheeler, 2018) This implies that the ICC has the legitimacy or jurisdiction over states party to the Rome Statute.

The second derives from the basis and extent of the ICC jurisdiction in cases of UN Security Council Referrals (as provided for in art 13(b) of the Rome Statute. In verbatim,

Article 13 (b) states the ICC is entitled to exercise jurisdiction over the territory and nationals of States not party to the Statute. In other words, The Rome Statute gives the Security Council a unique jurisdictional role. It grants the Council the power, acting under Chapter VII of the UN Charter, to refer to the ICC situations in which crimes under the jurisdiction of the court have taken place. Article 16 of the statute, on the other hand, allows the Council to defer an investigation or prosecution for one year through a Chapter VII resolution, for reasons relating to the maintenance of international peace and security.

This implies that the United Nations Security Council is among the various parties that have the right to refer a case to the ICC. For this (referral) to happen, the UN Security Council passes a resolution that could be vetoed. For example, when the Council attempted to activate the court’s jurisdiction that would have if passed authorized the ICC to indict President Bashar Hafez al-Assad, China and Russia vetoed the resolution referring the situation in Syria to the ICC on 22 May 2014. This makes it difficult to indict the Assad regime for crimes against humanity. Moreover, Syria is not a party to the Rome Statute. The only way Assad could face the ICC is for a new government that will see it expedient to hand him over to the ICC. This would mean that Assad is strip of immunity.

So far, the Council has referred only two situations to the court under Article 13(b): the situations in Darfur, in resolution 1593 (2005), in which the ICC based on preliminary evidence gathered indicted Sudanese President Omar al-Bashir since 2005 (Aljazeera, 2021) and Saif Al-Islam Gaddafi in Libya (REDRESS, 2020), resolution 1970 (2011).

Interestingly, in August 2021, Sudan’s Minister of Foreign Affairs Mariam al-Sadiq al-Mahdi announced that the country would hand over all suspects charged by the International Criminal Court (ICC) for crimes committed in Darfur from 2003 to 2004 (Mahdi and Maunganidze, 2021).

In furtherance, the ICC is only competent to hear a case if:

- the country where the offence was committed is a party to the Rome Statute; or
- the perpetrator's country of origin is a party to the Rome Statute.

The ICC may only exercise its jurisdiction if the national court is unable or unwilling to do so. The ICC only has jurisdiction over offences committed after the Statute’s entry into force on 1 July 2002.

Referring to the above legitimacy of the ICC, both Russia and Ukraine are not a party to the Rome Statute. So, what are the grounds to apply the first bullet point (***the country where the offence was committed is a party to the Rome Statute***) under the competence of the ICC to hear a case, especially in the wake of the call from Ukrainian President Volodymyr Zelensky that Russia has committed a war crime (Aljazeera,

2022). This literally means that the statute is not legally binding on them, although, under customary international law, Ukraine has certain limited obligations not to violate the object and purpose of the treaty. However, the UN Security Council may through resolution refer the case to the ICC. On the other hand, Ukraine has twice previously accepted the court's jurisdiction, including when Russia invaded Crimea in 2014, and on the second occasion it had accepted jurisdiction "on an open-ended basis". So, Ukraine cannot refer to the alleged crimes by itself, but the ICC does have jurisdiction over crimes committed on its territory (see Article 13 of the Rome statute)

Russia signed the Rome statute, which governs the ICC, in 2000 but never ratified the agreement to become a member. In 2016, President Vladimir Putin approved an order that withdrew Moscow from the process of joining the ICC following its ruling that Russia's activity in Crimea amounted to an "ongoing occupation" (BBC News, 2016). By this, it means that ICC has no jurisdiction over Russia.

However, the only available means lies in Article 13(b) which confers the right upon the UN Security Council to make a referral to the office of the ICC prosecutor. If this will ever happen, then it would be the third situation for the court under Article 13(b). However, Russia's current position as one of the permanent members of the same UN Security Council that should vote upon the resolution will stand in the way as the obvious obstacle. In other words, it raises the question. Will Russia abstain or vote against itself? Or will Russia literally fire itself in the legs? The answer is practically negative.

Despite the ICC legitimacy under Article 13(b) of the Rome Statute, to prosecute President Putin and other key figures, let it be borne in mind that as a permanent member, Russia has veto power for any resolution against its national interest. For example, just recently, Russia vetoed a UN Security Council resolution on 26 February 2022 that would have demanded that Moscow immediately stop its attack on Ukraine and withdraw all troops, a move several Council members said was deplorable but inevitable (UN News, 2022). While 11 of the Council's 15 members voted in favor of the text, China, India, and the United Arab Emirates abstained (UN News, 2022). A 'no' vote from any one of the five permanent members of the Council stops action on any measure put before it.

Russia will certainly use this same power of veto to block any resolution that would subject President Putin and other key leaders to the ICC for alleged war crimes or crimes of aggression.

III. CONCLUSION

Having assessed the legitimacy of the ICC to prosecute President Putin and other key figures for alleged potential war crimes or crime against humanity, it can be inferred that the possibility remains very slim and difficult because of the below reasons.

The dynamics of power within the walls of the UNSC stand as the obvious challenge that may frustrate or obstruct any possible attempts. In other words, the position of Russia as one of the five permanent members of the UN Security Council with veto power is the first difficult challenge the ICC is likely to encounter including the West and NATO.

The jurisdictional issue is also another difficult challenge the ICC is likely to encounter. Russia has withdrawn from the ICC. So, it is unlikely for the Russian high court to honor any indictment, especially for the incumbent or sitting political leader. Moreover, it is not as easy to link a political leader directly to offences committed by armed forces on the grounds required for these two offences – than it is to do so for the more overarching offence of crime of aggression (The Guardian, 2022) By virtue of his current position, Putin is a political leader of Russia. So, how will this happen?

Alternatively, if Putin were to be charged, he would have to be arrested in a state that unlike Russia accepts the jurisdiction of the court. For this to happen, Putin has to be stripped out of power and exiled to a country that accepts the ICC jurisdiction. How will this be possible remains a million-dollar question?

On the other hand, in practice, national courts can prosecute individuals irrespective of their nationality and where an offence has been committed if they have in place so-called universal jurisdiction laws. Assuming that Russia has universal jurisdiction laws and attempts to invoke universal jurisdiction for another head of state, there would still be a huge obstacle to arresting Putin and bringing him to trial. This would probably require him to be removed from office and then extradited by a new Russian regime with more cordial relations with the international community (The Guardian, 2022). Arguably, if this could happen, Putin is likely to take exile in one of his powerful allies that is unlikely to succumb to the West's pressure.

Even though China abstained from the proposed resolution that would have demanded Moscow's immediate withdrawal of its forces and stop attacking Ukraine and reverse its recognition of two separatist areas in eastern Ukraine as independent was a win for the West, however, one cannot doubt China decision to join Russia as it strong ally veto any resolution proposed by the UN Security Council to make a referral to the ICC to prosecute Putin and his acolytes for the war crimes or crime against humanity.

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