

# Aggression against Ukraine: Failure of the International Criminal Justice?

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## Introduction

On March 2, 2022, during its 11<sup>th</sup> Emergency Special Session<sup>1</sup>, the United Nations General Assembly (“UN GA”) confirmed by 141 votes in favor of its resolution A/RES/ES-11/1, that an act of aggression has been committed by Russia against Ukraine.<sup>2</sup> Determining and condemning an ongoing aggression is, without question, an appropriate reaction to a full-scale military invasion of a sovereign state. However, it also creates justifiable expectations that further, specific steps will be taken. Ensuring accountability for the crime of aggression committed by the members of the leadership of the aggressor State would be one of them. The problem is that while the International Criminal Court (“ICC”) can exercise jurisdiction over war crimes, crimes against humanity, and possibly genocide committed in Ukraine, its jurisdictional framework regarding the

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<sup>1</sup> Mechanism of an Emergency Special Session was created pursuant to the UN GA resolution 377 (V), also known as “Uniting for Peace” resolution. It allows the UN GA to act if the UN SC fails to act because of lack of unanimity of the permanent members. See *What is the Uniting for peace resolution?* Dag Hammarskjöld Library [online]. Available at: <https://ask.un.org/faq/177134>.

<sup>2</sup> UN Doc. A/RES/ES-11/1. UN GA resolution dated 2 March 2022. Available at: <https://undocs.org/en/A/RES/ES-11/1>.

crime of aggression is very limited. Ukraine, backed by several other states, including the Czech Republic, thus calls for the establishment of a special tribunal to fill this gap. Moreover, the establishment of such a tribunal is supported by several international law scholars.<sup>3</sup>

In his speech at the General Debate of the 77<sup>th</sup> session of the UN GA, president Zelensky presented two priorities: the establishment of a compensation mechanism and the creation of a special tribunal to prosecute the crime of aggression committed against Ukraine. On November 14, 2022, the UN GA recommended the establishment of an international mechanism for compensation for damage, loss, and injury and a register to document evidence and claims by 94 votes.<sup>4</sup> While this was a success of the Ukrainian diplomacy in the UN, the second call is still resonating through the international fora. Whether and what specific steps towards its fulfilment will be taken by the representation of Ukraine in the UN is, at the moment, highly unpredictable. A draft resolution calling for the establishment of a special tribunal is expected to be presented to the UN GA. Many legal questions of such tribunal's parameters, including the method of establishment and the role of the UN in the establishment, however, remain unresolved.

## **Act of aggression and crime of aggression**

The act of aggression is defined in UN GA resolution 3314 of 1974 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*.<sup>5</sup> The definition further develops one of the basic rules of international law, the prohibition of the use of force. It must be noted that there are also exceptions to the prohibition of the use of force. In his speech given on February

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<sup>3</sup> *Statement calling for the creation of a special tribunal for the punishment of the crime of aggression against Ukraine*. The Office of Gordon and Sarah Brown [online]. Available at: <https://gordonandsarahbrown.com/wp-content/uploads/2022/03/Combined-Statement-and-Declaration.pdf>.

<sup>4</sup> *General Assembly Adopts Text Recommending Creation of Register to Document Damages Caused by Russian Federation Aggression against Ukraine, Resuming Emergency Special Session*. UN Meetings Coverage and Press Releases [online]. Available at: <https://press.un.org/en/2022/ga12470.doc.htm>.

<sup>5</sup> UN Doc. A/RES/3314(XXIX). UN GA resolution dated 14 December 1974. Available at: [https://undocs.org/en/A/RES/3314\(XXIX\)](https://undocs.org/en/A/RES/3314(XXIX)).

24, 2022, President Putin explicitly mentioned self-defense as a legal justification for Russia's so-called "special military operation". There are many reasons why this argument cannot be sustained, but a complex analysis of this issue is beyond the scope of this article.

The crime of aggression is then defined in Article 8bis of the Rome Statute of the ICC as *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*.<sup>6</sup> As such, it is one of the four crimes under the jurisdiction of the ICC. Being connected to the unlawful act of a state, however, it is quite different from the other three. Nexus between the act of the state and the act of the individual leader is required.

The crime of aggression, despite being marked by some as the "mother of crimes under international law," effectively remains outside the criminal accountability framework of crimes under international law set out by the Rome Statute of the ICC. There is yet to be an attempt by an international court or tribunal to prosecute crime of aggression based on its definition from 1974. This is not very surprising, given the political sensitivity of the topic resulting from the fact that aggression is, by its nature, a leadership crime. However, in the current situation of a full-scale invasion of a sovereign state, the incapability of the international community to find an adequate response might put the credibility of the whole international accountability system at stake. As Sands put it, *if this is not prosecuted as a crime of aggression, then the crime of aggression is basically dead*.<sup>7</sup>

There are several options regarding the prosecution of individuals for the crime of aggression committed against Ukraine. Each of those options enjoys a different level of viability, given the current legal and political *status quo*. It was already mentioned that prosecution before the ICC is nearly impossible. Before analyzing the methods of establishing a special tribunal, this article explains why. Ukrainian law also allows for the prosecution of the crime of aggression by a domestic court, the analysis of which is beyond the scope of the article, similarly as the possibility of exercising universal jurisdiction.

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<sup>6</sup> Rome Statute of the International Criminal Court. Adopted on 17 July 1998, in force on 1 July 2002 (Article 8bis adopted on 11 June 2010, in force on 17 July 2018). Available at: <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

<sup>7</sup> SPERI, Alice. The Mother Crime: Will Putin Face Prosecution for the Crime of Aggression in Ukraine? In: *The Intercept* [online]. 8. 10. 2022 [cit. 20. 11. 2022]. Available at: <https://theintercept.com/2022/10/08/russia-putin-ukraine-war-crimes-accountability/>.

## Limits of the ICC's jurisdiction regarding the crime of aggression

While the ICC prosecutor has already started an investigation into crimes against humanity and war crimes committed in Ukraine based on the referrals by a significant number of States Parties to the Rome Statute and Ukraine's acceptance of the ICC's jurisdiction over crimes committed on its territory,<sup>8</sup> his capability to prosecute the crime of aggression remains theoretical. We should not, however, forget that it formally does exist.

The 2010 Kampala Review Conference of the Rome Statute has left many international justice scholars with cautious expectations about whether the adopted definition and narrow jurisdictional framework will truly enable the prosecution of the crime of aggression before the ICC. The Assembly of States Parties decided to activate the ICC's jurisdiction over the crime of aggression as of July 17, 2018,<sup>9</sup> but since then, no attempt to open an investigation of the crime of aggression has been made.

According to Article 13 (b) and subject to conditions of Article 15ter of the Rome Statute, the United Nations Security Council ("UN SC"), acting under Chapter VII of the Charter, is entrusted with the power to refer a situation in which an act of aggression would appear to have occurred to the ICC. Unfortunately, the UN SC does not appear to be an effective guardian of international peace and security when one of its permanent members is the aggressor. The second option, opening an investigation by the Prosecutor upon his own initiative (*proprio motu*) or upon a referral by a State Party, is, without prejudice to other limitations, available only provided that the State of nationality of the perpetrator has ratified both the Rome Statute and the aggression amendments. This is due to the exclusion of jurisdiction *ratione personae* over nationals of a non-State Party provided in Article 15bis (5) of the Rome Statute. Russia is not a party to the Rome Statute. This does not, provided other conditions are met, prevent the ICC from prosecuting its nationals for crimes against humanity or war crimes. But with the UN SC blocked, it makes it impossible to deal with the Russian perpetrators of the crime of aggression. It ought to be mentioned

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<sup>8</sup> *Situation in Ukraine*. International Criminal Court [online]. Available at: <https://www.icc-cpi.int/ukraine>.

<sup>9</sup> *Assembly activates Court's jurisdiction over crime of aggression*. International Criminal Court [online]. Available at: <https://www.icc-cpi.int/news/assembly-activates-courts-jurisdiction-over-crime-aggression>.

that this very narrow jurisdictional framework benefits all permanent members of the UN SC who are not parties to the Rome Statute.

Some scholars see a way out of this deadlock in an amendment of the Rome Statute that would allow the UN GA to refer a situation of aggression to the ICC through the mechanism set forth by the Uniting for Peace resolution.<sup>10</sup> Such amendment would, without question, enhance the legitimacy of the ICC as well as our commitment to the prohibition of the use of force. But it would clearly not be an easy exercise with strong opposition not only among the States Parties. The general argument that would probably be presented by those opposing such amendment, is that it would allow for the interference of the UN GA into the UN SC mandate under Chapter VII of the Charter. It also seems impossible that such amendment would allow for a retroactive referral of the situation in Ukraine, even if the aggression was still ongoing by the time it would enter into force.

The ILC took note of the view that jurisdiction of a court could be paralyzed by veto abuse in the UN SC already in 1990.<sup>11</sup> Many states expressed their support for a stronger role of the UN GA in the relationship system between the UN and the ICC again in 1998 when the Rome Statute was drafted.<sup>12</sup> According to Article 121 (3) of the Rome Statute, two-thirds majority of States Parties is needed for adoption of an amendment. However, it can only enter into force after being ratified or accepted by seven-eighths of States Parties.<sup>13</sup> The Assembly of States Parties is, of course, a forum quite different from the UN GA. Support for such an amendment from the 103 states that voted in favor of the resolution A/RES/ES-11/1 and are also States Parties to the Rome Statute could have been expected. Also, no States Parties voted against this resolution. However, the process of adoption of the compensation mechanism resolution showed that supporting a specific mechanism (or a specific amendment) is, in the states' view,

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<sup>10</sup> UN Doc. A/RES/377(V). UN GA resolution dated 3 November 1950. Available at: [https://undocs.org/en/A/RES/377\(V\)](https://undocs.org/en/A/RES/377(V)).

<sup>11</sup> SCHEFFER, David. Forging a Cooperative Relationship Between Int'l Crim. Court and a Special Tribunal for Aggression Against Ukraine. In: *Just Security* [online]. 25. 10. 2022 [cit. 20. 11. 2022]. Available at: <https://www.justsecurity.org/83757/forging-a-cooperative-relationship-between-intl-crim-court-and-a-special-tribunal-for-russian-aggression-against-ukraine/>. See also UN Doc. A/CN.4/430. Eighth report on the draft Code of Crimes Against the Peace and Security of Mankind by Mr. Doudou Thiam, Special Rapporteur. *Yearbook of the International Law Commission*, Vol. II (1), 1990. Available at: [https://legal.un.org/ilc/documentation/english/a\\_cn4\\_430.pdf](https://legal.un.org/ilc/documentation/english/a_cn4_430.pdf).

<sup>12</sup> Ibidem.

<sup>13</sup> Article 121 (5), *Rome Statute of the International Criminal Court*.

something quite different from condemning an act of aggression. Only 74 States Parties to the Rome Statute voted for the compensation mechanism resolution, and 2 voted against it. In this context, it must also be reminded that the current situation – of significant power being concentrated within an organ blocked by a veto abuse – supports those who advocate a UN SC reform. The UN GA again this year debated this agenda item without any relevant outcome.

The investigation and prosecution of the crime of aggression against Ukraine within the ICC system would be a desirable and systemic way forward. However, when the narrow jurisdictional framework was being designed, the fact that the prosecution would be effectively prevented if the aggressor is also a permanent member of the UN SC must have been apparent. The current situation shows that any amendment to the Rome Statute that would expand this framework would be a step towards preventing impunity in the future. Although it is unlikely to happen in relation to the aggression against Ukraine, if ever.

### **Establishment of a special tribunal for the crime of aggression**

The establishment of a special tribunal for the crime of aggression against Ukraine has been widely debated since the beginning of the military invasion. This would be a very complex exercise requiring the vocal support of a large part of the international community and finding solutions to many legal and practical issues. Putting aside the questions of immunities *ratione personae* of state officials, jurisdiction *ratione temporis*, the possibility of proceedings *in absentia*, and other aspects of the tribunal's functioning, including whether this tribunal should be international or hybrid, the issue to be examined in this article is the possible methods of its establishment. It is worth noting that while the *ad hoc* and hybrid tribunals have some history within international criminal justice system and are being repeatedly referred to in the context of special tribunal for Ukraine, the methods of establishment of these tribunals vary. The below sections outline the possibilities by structuring them into two categories based on the involvement of the UN.

#### **Establishment of a special tribunal within the UN system**

This part describes the ways of establishing a special tribunal through a process conducted within the UN. The first two *ad hoc* tribunals, the International

Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, were established by the UN SC resolutions 827<sup>14</sup> and 955.<sup>15</sup> The UN SC also played a significant role in the establishment of the Special Court for Sierra Leone through a joint agreement between the UN and the government of Sierra Leone, as the UN Secretary General negotiated this agreement upon the request of the UN SC expressed in its resolution 1315.<sup>16</sup> Similar applies to the establishment of the Special Tribunal for Lebanon (“STL”). In this case, due to the political deadlock in Lebanon, the UN SC even had to implement the agreement between the UN and Lebanon by annexing it to its resolution 1757, acting under Chapter VII of the UN Charter.<sup>17</sup> The agreement between the government of Cambodia and the UN to establish the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) in order to prosecute the leaders of the Khmer Rouge regime, on the other hand, was approved by the UN GA and attached to its resolution.<sup>18</sup>

For the obvious reasons provided above in relation to the referral of the situation in Ukraine to the ICC by the UN SC, any path that requires an action by the UN SC is practically impossible. The UN GA could either substitute for the UN SC and act under its mandate provided for by the “Uniting for Peace” resolution, given the precedent of the STL established by a UN SC resolution adopted under Chapter VII of the UN Charter. The second option is to approve an agreement between Ukraine and the UN, similar to the case of the ECCC. This seems to be a viable path if Ukraine is able to find sufficient support among the UN member states, at least as high as was the case for the compensation mechanism resolution.

Such tribunal established pursuant to an agreement between Ukraine and the UN approved by the UN GA could enjoy a high level of legitimacy. However, reminding the results of the vote on the compensation mechanism resolution, putting forward such a draft resolution could pose some risks. Some scholars

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<sup>14</sup> UN Doc. S/RES/827(1993). UN SC resolution dated 25 May 1993. Available at: [https://undocs.org/en/S/RES/827\(1993\)](https://undocs.org/en/S/RES/827(1993)).

<sup>15</sup> UN. Doc. S/RES/955(1994). UN SC resolution dated 8 November 1994. Available at: [https://undocs.org/en/S/RES/955\(1994\)](https://undocs.org/en/S/RES/955(1994)).

<sup>16</sup> UN. Doc. S/RES/1315(2000). UN SC resolution dated 14 August 2000. Available at: [https://undocs.org/en/S/RES/1315\(2000\)](https://undocs.org/en/S/RES/1315(2000)).

<sup>17</sup> UN. Doc. S/RES/1757(2007). UN SC resolution dated 30 May 2007. Available at: [https://undocs.org/en/S/RES/1757\(2007\)](https://undocs.org/en/S/RES/1757(2007)).

<sup>18</sup> UN. Doc. A/RES/57/228. UN GA resolution dated 22 May 2003. Available at: <https://undocs.org/en/A/RES/57/228B>.

consider the selective and hypocritical approach of certain states, especially the permanent members of the UN SC that insisted on the narrow jurisdiction of the ICC over the crime of aggression, to be the reason for the probable low support of such a resolution.<sup>19</sup> The selectivity argument was already pointed out by some states during the UN GA debate on the compensation mechanism.

### Establishment of a special tribunal outside the UN system

Another set of options lies outside the UN system, meaning that the UN would not take a direct part in the process of establishment. This, however, does not prevent the UN GA from endorsing its establishment by adopting a supportive resolution. A draft pursuing this goal could certainly be less controversial than such that would propose an agreement between Ukraine and the UN.

It is possible to establish a special tribunal through an international agreement between like-minded states without the assistance or participation of any international organization. Alternatively, the UN as a party to such an agreement can be replaced by another international organization. This method of establishing a judicial body also has its precedents. The Kosovo Specialist Chambers and Specialist Prosecutor's Office, for example, was established through an agreement between Kosovo and the EU to prosecute war crimes committed by members of the Kosovo Liberation Army.<sup>20</sup> The Extraordinary African Chambers were established under an agreement between the African Union ("AU") and Senegal to prosecute those responsible for international crimes committed in Chad in the 1980s, including the former president of Chad.<sup>21</sup> Similarly, the establishment of the Hybrid Court for South Sudan through an agreement

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<sup>19</sup> Heller, for example, points out the „failure to seriously contemplate, much less create, a similar tribunal for the invasion of Iraq in 2003“. See HELLER, Kevin Jon. *The Best Option: An Extraordinary Ukrainian Chamber for Aggression*. In: *Opinio Juris* [online]. 16. 3. 2022 [cit. 20. 11. 2022]. Available at: <http://opiniojuris.org/2022/03/16/the-best-option-an-extraordinary-ukrainian-chamber-for-aggression/>.

<sup>20</sup> Law No. 04/L-274 on Ratification of the International Agreement Between the Republic of Kosovo and the European Union on the European Union Rule of Law Mission in Kosovo. Adopted on 23 April 2014. Available at: [https://www.scp-ks.org/sites/default/files/public/04-l-274\\_a.pdf](https://www.scp-ks.org/sites/default/files/public/04-l-274_a.pdf). & Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office. Adopted on 3 August 2015. Available at: [https://www.scp-ks.org/sites/default/files/public/05-l-053\\_a.pdf](https://www.scp-ks.org/sites/default/files/public/05-l-053_a.pdf).

<sup>21</sup> Statute of the Extraordinary African Chambers. Adopted on 22 August 2012. Available at: <http://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers>. See also HELLER, Kevin Jon. *The Best Option: An Extraordinary Ukrainian Chamber for Aggression*.



between Sudan and the AU has been proposed.<sup>22</sup> The two international organizations referred to as potential partners in the creation of a special tribunal are the European Union (“EU”) and the Council of Europe. The legitimacy of such process would, however, be lower compared to an UN-based process, given the regional limitation. On the other hand, the territorial proximity to the territory of the conflict can also be an asset. The proposal to conclude an agreement on the establishment of a tribunal is, in every way, more likely to be accommodated in those organizations than in the UN. EU can support the establishment of a special tribunal pursuant to the Kosovo precedent and conclude an agreement with Ukraine. Similarly, the Committee of Ministers of the Council of Europe can, pursuant to Article 15 (a) of the Statute, consider the action required to further the aim of the Council, in this case the aim of the maintenance and further realization of human rights and fundamental freedoms, including the conclusion of agreements.<sup>23</sup>

## Conclusion

Aggression against Ukraine has raised many new issues that are yet unresolved in international law. The rules set out by the Rome Statute for prosecuting the crime of aggression before the ICC create those problems rather than making things easier. The gravity of the situation, however, requires the international community not to resign on an adequate response.

In its Chapter 2 “Limits of the ICC’s jurisdiction regarding the crime of aggression”, this article examined the jurisdictional limits of the ICC regarding the crime of aggression. The possibility of lowering those limits by amending the Rome Statute exists, but if it is ever considered, it will almost certainly not happen in relation to the aggression against Ukraine. Still, the present situation uncovers the flaws of the ICC’s current jurisdictional framework adopted in

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<sup>22</sup> Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan. Adopted on 18 September 2018. Available at: <https://jmecssouthsudan.org/index.php/arcss-2015/igad-hlrf-agreement/108-revitalised-agreement-on-the-resolution-of-the-conflict-in-the-republic-of-south-sudan-r-arcss-2018/file>. See also OWISO, Owiso. An Aggression Chamber for Ukraine Supported by the Council of Europe. In: *Opinio Juris* [online]. 30. 3. 2022 [cit. 20. 11. 2022]. Available at: <https://opiniojuris.org/2022/03/30/an-aggression-chamber-for-ukraine-supported-by-the-council-of-europe/>.

<sup>23</sup> *Statute of the Council of Europe*. Adopted on 5 May 1949, in force on 3 August 1949. Available at: <https://rm.coe.int/1680306052>.

Kampala and supports those who point to the selective approach of permanent members of the UN SC.

The current impossibility of prosecuting the crime of aggression committed against Ukraine requires an alternative in the form of a special tribunal. The way forward to its establishment is being widely debated in the UN to figure out the role it should play in this process. In its Chapter 3 “Establishment of a special tribunal for the crime of aggression”, this article outlined the possible ways of establishing such tribunal and divided them into two categories based on the involvement of the UN. While establishing the special tribunal within the UN could grant it a high level of legitimacy, the options that do not require the direct participation of the UN appear to be more viable. Which path the proponents of a special tribunal will take is a matter of the near future.

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## **Abstract**

### **Aggression against Ukraine: Failure of the International Criminal Justice?**

On March 2, 2022, during its 11<sup>th</sup> Emergency Special Session, the United Nations General Assembly adopted a resolution that condemned the aggression by the Russian Federation against Ukraine. A resolution expected to be followed by further, specific steps. Ensuring accountability for the crime of aggression committed by the members of the leadership of the aggressor State would be one of them. However, gaps in the international criminal justice system still exist, which make the way forward difficult. The key organ of this system, the International Criminal Court, regarding the crime of aggression, is limited by its narrow jurisdictional framework. The present article first explains the limits of the International Criminal Court’s jurisdiction. Subsequently, methods of the establishment of a special tribunal for the crime of aggression are outlined and structured into two categories based on the involvement of the United Nations in the process. First, it describes the possibilities, advantages, and risks of attempting to draft and conclude an agreement between Ukraine and the United Nations on the establishment of a special tribunal. Furthermore, it outlines alternative ways without the direct involvement of the United Nations.