



Tribunal for the Russian Aggression in Ukraine: The Need for Accountability

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Abstract

The Russian aggression against Ukraine has raised the need for accountability and international rule of law. Russia through committing the supreme international crime has deliberately violated basic international principles and norms such as state sovereignty and territorial integrity of Ukraine and the prohibition of the use of force. Member states of the United Nations drafted and agreed to create the International Criminal Court to punish the most serious crimes. The Kampala amendments of the Rome Statute on aggression, adopted a decade later, can be activated if the two states concerned have accepted ICC jurisdiction. Russia and Ukraine are not members of ICC, although the unilateral declarations of Ukraine accepting ICC jurisdiction can be exercised for war crimes, crimes against humanity and genocide committed in the territory of Ukraine. The lack of an international mechanism to punish the crime of aggression against Ukraine have triggered calls and actions to create a special tribunal with a limited focus on that crime, based on the development of international criminal law over the past eighty years. The EU recently agreed to establish an International Center for the prosecution of the crime of aggression – to preserve evidence and prepare the analysis of the evidence for the prosecution for future national or international trials – which is considered a first step in that direction. This research will analyze options to create either a special international tribunal or a hybrid tribunal to investigate whether Russia's acts of violence in Ukraine constitute a crime of aggression and their prosecution. It will examine the legal basis of its establishment and functioning of the tribunal based on previous precedents, such as the International Military Tribunal (Nuremberg), or other specialized courts integrated in a national justice system with international judges – hybrid court. It will also explore the indispensable role of the United Nations in establishing such a tribunal and its implications in ending the conflict.

Keywords: Aggression, special tribunal, ad-hoc tribunal, United Nations, Russia, Ukraine

1. Introduction

Russian aggression against Ukraine is the greatest threat of international legal order. The international community has responded to this violation of the United Nations Charter and international law principles and norms through adopting a series of resolutions in the United Nations General Assembly.³⁸ Member states not only condemned this illegal war, but

³⁸ United Nations General Assembly Resolution A/RES/ES-11/1, "Aggression against Ukraine", 2 March 2022

UNGA resolution A/ES-11/2, "Humanitarian consequences of the aggression against Ukraine", 24 March 2022

UNGA resolution A/ES-11-4, "Territorial integrity of Ukraine: defending the principles of the Charter of the United Nations, 12 October 2022

UNGA Resolution A/ES-11/L.6, Furtherance of remedy and reparation for aggression against Ukraine, 7 November 2022

also imposed sanctions against Russia in response to the unjustified and unprovoked invasion in Ukraine.³⁹ Even the International Court of Justice ordered Russia to immediately suspend the military operation that it commenced on 24 of February 2022 in the territory of Ukraine.⁴⁰

Despite the actions undertaken by the international community to stop and condemn this aggressive war, increasing calls were made by scholars and current and former representatives of states and international organizations, to create a new mechanism for enforcing international law, to ensure criminal prosecution and legal accountability. A special tribunal is needed to hold into account the responsible authorities for committing the supreme international crime⁴¹ against a European country, the largest grand war in Europe since World War II.

This paper will present the historical development of the norm of aggression, its trial for the first time by an international tribunal (Nuremberg Tribunal, 1945, the establishment of other international criminal tribunals and the existing loophole for the trial of aggression in the International Criminal Court. Today there are three options under consideration for the creation of a special tribunal against Russian aggression in Ukraine. The creation of an international judicial institution to reaffirm the prohibition against war as an inviolable rule of the international order but also to ensure its enforcement and prosecution of those responsible, including the state Troika that enjoys immunity, will have to consider the legitimacy, credibility, and independence of this special tribunal. The support of such a tribunal by the United Nations General Assembly is considered essential. Its establishment may also influence the future peace process, but as Former Prosecutor of Nuremberg, Benjamin Ferencz, has stated "*There can be no peace without justice, no justice without law and no meaningful law without a Court to decide what is just and lawful under any given circumstance*".⁴²

2. Definition of Aggression

War and the use of armed force has been followed by rules imposed, first to regulate armed conflict and jus in bellum (international humanitarian law) and later to outlaw the illegal use of force and aggression. The Hague Peace Conferences of 1899 and 1907 were the first diplomatic efforts to limit wars. State parties to these conferences agreed to use diplomatic means to settle their disputes through good offices and mediation. It was the time when war was considered a usual way to follow their policies by states. In 1907 it was agreed only that war will not start to collect public debts (Hague Convention on the Limitation of the Employment of Force to Collect Public Debts - Drago Porter Convention). It was agreed also that military actions will start only after a prior declaration of war (III Hague Convention related with starting war actions).⁴³ It was important for the agreement of state parties to prohibit the use of armed forces for the 'recovery of contract debts claimed from the Government of one Party by the government of another country as being due to its nationals'.⁴⁴ The fourth Hague Conference defined the rules to respect laws and customs of war aiming to reduce miseries of war through limiting ways of fighting.⁴⁵

The League of Nations was proposed as a new organization after the first World War to prevent future aggressions against a country and to ensure the response of its members against such a violation, through creating the embryo of

A/ES-11/L.7, "Principles of the Charter of the United Nations underlying a comprehensive, just and lasting peace in Ukraine", 16 February 2023

39 European Union sanctions against Russia, Available at [EU sanctions against Russia explained - Consilium \(europa.eu\)](#)

USA sanctions and G7 sanctions, G7 nations unveil new sanctions against Russia,

Available at [G7 nations unveil new sanctions against Russia – DW – 05/19/2023](#)

40 International Court of Justice, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, 16 March 2022

41 "To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole." Nuremberg Trial Proceedings, Vol 22, 30 September 1946

42 Ferencz, B. B., *An International Criminal Court, A Step Towards World Peace: A Documentary History and Analysis*, (1980), Oceana Publications Inc.

43 Convention (III) relative to the Opening of Hostilities. The Hague, 18 October 1907.

44 Article 1(2), Hague Convention on the Limitation of the Employment of Force to Collect Public Debts

Merrills, J. Brabandere De. E. (2022) *Merril's International Dispute Settlement*, Cambridge University Press

Rousseau, C. *Droit International Public*, Paris, 1979, p. 327.

45 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

collective security that guaranteed peace and security.⁴⁶ Despite the original will and the commitment of member states, it seems that the covenant outlaws war,⁴⁷ but it was not absolutely sanctioned. It outlined the use of a 3-month moratorium and efforts to peacefully settle disputes through mediation, arbitration, judgement process or the Council of the League. If not successful, the covenant recognized the right to "the Members of the League to take such action as they shall consider necessary for the maintenance of right and justice."⁴⁸ The covenant seemed to forbid war only for a country that would respect judgments of PCIJ and arbitration of unanimous decision of the Council of the League.

The Briand-Kellogg Pact (1928) was one of the efforts to improve shortcomings of the Covenant of the League of Nations. A common effort by the Secretary of State of United States of America and its French counterpart to outlaw war, it was the first act that provided the renunciation of war as an instrument of national policy.⁴⁹ Signed by 47 states it formulates for the first time a general prohibition of war, subject only to self-defense. This agreement was the legal basis for the Nuremberg Tribunal to conclude that a war of aggression is outlawed by the Pact.⁵⁰ War as an instrument of national policy was already a crime.

The prohibition of the use of armed force against the territorial integrity and state sovereignty of another state was codified by the United Nations Charter.⁵¹ Article 2/4 reads: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations."

Although the UN Charter prohibits the use of force it doesn't refer specifically to aggression. The search for a consensual definition of aggression was lengthy and difficult, with states on one side in favor of a definition limited to the military intervention of a state on the territory of another, and states on the other side in favor of a broader definition that would reflect different forms of interference and violation of state sovereignty.⁵²

In 1974 the General Assembly adopted unanimously a resolution on the definition of aggression,⁵³ considering aggression as the most serious and dangerous form of the illegal use of force. This would serve as guidance to the Security Council in determining the existence of an act of aggression. It is UNSC that may conclude that the act does not constitute aggression based on other relevant circumstances, including the insufficient gravity of the act or its consequences. The resolution recognizes that a war of aggression is a crime against international peace. For an act to be considered aggression three criteria must be met. The act must be (1) perpetrated by a state; (2) involve the use of armed force; (3) reach the level of sufficient gravity, as defined by UNSC and must give rise to reactions of self-defense or sanctions imposed by the international community.

Article 1 defines aggression as "the use of armed force by a state against the sovereignty, territorial integrity of political independence of another state, or in any other manner inconsistent with the Charter". This definition is based on the proposal made during the Conference for the reduction and limitation of armaments (1935). It is article 3 that sets forth a non-exhaustive list of acts, which regardless of a declaration of war, qualify as an act of aggression.⁵⁴

46 "Article 10 "The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled."

Article 11 "Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations. In case any such emergency should arise the Secretary General shall on the request of any Member of the League forthwith summon a meeting of the Council."

Covenant of the League of Nations, 28 April 1919.

47 "Preamble, "In order to... and achieve international peace and security by the acceptance of obligations not to resort to war..."
Ibid.

48 Article 15, Ibid.

49 Convention Providing for the Renunciation of War as an Instrument of National Policy, August 27, 1928

50 "the solemn renunciation of war as an instrument of national policy necessary involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing. War for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression, and such a war is therefore outlawed by the Pact." Nuremberg Trial, 1945-46

United Nations, Historical review of Developments relating to Aggression, United Nations, New York, 2003.

51 Article 2/4, United Nations Charter, 1945

52 Médecins Sans Frontières, The practical guide to humanitarian law, 2016

53 United Nations General Assembly resolution 3314 (XXXIX), Definition of aggression, 14 December 1974

⁵⁴ Article 3 ":(a) the invasion of attack by the armed forces of a state of the territory of another state, or any military occupation, however temporary, resulting from such an invasion or attack, or any annexation by the use of force of the territory of another state or part thereof; (b) bombardment by the armed forces of a state against the territory of another state or the use of any weapons by a state

The prohibition of the use of force is embodied in the security collective system of the United Nations that foresees the right of collective sanctions against an aggressor state. Although it is impossible to undertake such actions due to the composition and veto power of the five permanent members states of the United Nations Security Council. Still the United Nations Security Council empowered with the primary responsibility to maintain international peace and security under Article 24 of the UN Charter, is authorized to determine the existence of any threat to peace, breach of the peace or act of aggression.⁵⁵ This body has also the authority to make recommendations or decide what measures shall be taken to maintain or restore international peace and security. The UN Security Council, in exercising these powers, has addressed acts of aggression in several situations, such as Southern Rhodesia, South Africa, Benin, Israel. Following the invasion of Kuwait on 2 August 1990 by the military force of Iraq, the Security Council, acting under Articles 39 and 40 of UN Charter, adopted resolution 660 (1990) in which it condemned 'the Iraq invasion of Kuwait',⁵⁶ and subsequent resolutions that while condemning the 'invasion' and illegal 'occupation' of Kuwait by Iraq, did not use the term 'aggression' or 'acts of aggression'. After the invasion of Kuwait by Iraq and its decision to order the closure of diplomatic and consular missions in Kuwait and to withdraw the privileges and immunities of these missions and their personnel, UNSC strongly condemned 'aggressive acts perpetrated by Iraq against diplomatic premises and personnel in Kuwait, including the abduction of foreign nations who were present in these premises'.⁵⁷

The United Nations Security Council has failed to act and exercise its primary responsibility in maintaining international peace and security, put at risk by the Russian aggression against Ukraine. A day after the invasion started, Russia vetoed a UN Security Council resolution that would have demanded that Moscow immediately stop its attack on Ukraine and withdraw all troops. The draft-resolution was voted in favor by 11 member states, with abstentions of China, India and United Arab Emirates.⁵⁸ This led to convening of a Special Emergency Session of the United Nations General Assembly, under the Uniting for Peace resolution, which gives the General Assembly power to take up matters on international peace and security when the Security Council is unable to act due to unanimity among its five permanent members – China, France, the United Kingdom, the United States, and Russia – who have the power of veto.⁵⁹

3. Serious Crimes and Accountability

3.1 Nuremberg Tribunal and the Trial of Aggression

The International Military Tribunal (Nuremberg, 1945) was the first international criminal trial and the first court with jurisdiction to try the crime of aggression (crimes against peace). It was established through a multilateral agreement between United Kingdom of Great Britain and Northern Ireland, United States of America, France, Soviet Union, signed at London on 8 August 1945, later joined by several other states.⁶⁰ The Nuremberg Charter was annexed to the London Agreement and formed an integral part thereof. The Nuremberg Tribunal had jurisdiction to try and punish major criminals of the European Axis who committed crimes against peace, crimes against humanity and war crimes.⁶¹

The crimes against peace, included: planning, preparation, initiating or waging a war of aggression, or a war in

against the territory of another state; (c) the blockade of the ports of coasts of a state by the armed forces of another state; (d) an attack by the armed forces of another state on the land, sea or air forces, or marine and air fleets of another state; (e) the use of armed forces of one state which are within the territory of another state with the agreement of the receiving state, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement; (f) the action of a state in allowing its territory, which it has placed at its disposal of another state, to be used by that other state for perpetrating an act of aggression against a third state; (g) the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to the acts listed above, or its substantial involvement therein."

Ibid.

⁵⁵ Art. 39 of the United Nations Charter. 1945

⁵⁶ UN Security Council resolution S 660 (1990) adopted by 14 votes to none. One member (Yemen) did not participate in the vote. United Nations, *Historical review of Developments relating to Aggression*, United Nations, New York, 2003.

⁵⁷ Security council resolution 667 (1990) 16 September 1990

⁵⁸ United Nations Press Release, Available at *Russia blocks Security Council action on Ukraine | UN News*

⁵⁹ Resolution 377 A(V), *Uniting for Peace*, 3 November 1950

⁶⁰ Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxembourg, Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Uruguay, Venezuela, Yugoslavia.

⁶¹ *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, United Nations Treaty Series, vol. 82. P. 279

violation of international treaties, agreements, or assurances, or participating in a common plan or conspiracy to accompany any of the above.⁶² 24 Nazi leaders faced trials for crimes committed during the war, including the 'crime against peace' as it was then called. Prosecutors filed an indictment, the first count of which charged defendants with participating in a conspiracy to commit acts of aggression, noting that invasions had been specifically planned in advance, in violation of the Kellogg-Briand Pact of 1928. The second count charged defendants who 'participated in the planning, preparation, initiation and waging of wars of aggression'. The Nuremberg court found eight defendants guilty of the first count and 12 guilty of the second. In its judgement it explained the foundational importance of this crime: "To initiate a war of aggression...it is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."⁶³

The Nuremberg Tribunal contributed to the definition of war crimes and the outlawing of wars of aggression, as well as the prosecution of high-ranking state officials. The Nuremberg tribunal considered the question of individual responsibility for the crime of initiating or waging an aggressive war, and identified three essential elements for a person to be held responsible for aggressive war: the person must have actual knowledge of the intention to initiate an aggressive war and of its aggressive character; the person must be in a position to shape or influence the policy of initiating or continuing the aggressive war; and the person must use this position to further such a policy.⁶⁴ It is now beyond dispute that an individual can be held to account under international law and that according to IMT, crimes against peace, war crimes and crimes against humanity had firm foundations in customary international law.⁶⁵

The precedent created by the Nuremberg trial was a significant step for the international community and a foundation of international criminal justice. It contributed to the demise of absolute sovereign power, the emergence of international community as a legal concept, and individual criminal responsibility becomes one of the cornerstones of the international community.⁶⁶

3.2 *The International Criminal Tribunals for Yugoslavia and Rwanda*

After the end of the Cold War, and the emergence of conflicts that threatened or breached international peace and security, it was the United Nations Security Council that created two ad-hoc international tribunals, International Criminal Tribunal for Yugoslavia (ICTY, 1993) and the International Criminal Tribunal for Rwanda (1994). These tribunals were established by a resolution adopted under Chapter VII of the UN Charter, that is they were binding on all members of the United Nations, and they had the duty to cooperate with these tribunals.⁶⁷ But the jurisdiction of these tribunals included only the crimes of genocide, war crimes and crimes against humanity. Aggression does not figure among the jurisdiction of these tribunals. Although in the Former Yugoslavia aggression was very real, the Security Council preferred not to touch upon this burning question.⁶⁸

3.3 *The International Criminal Court*

The trial of the crime of aggression remained latent since Nuremberg. Today the International Criminal Court (ICC) is the only international court with jurisdiction over the crime of aggression. Member states of the United Nations negotiated and agreed on the Rome Statute in 1998, which entered into force in 2002. But the definition of the crime of aggression was left for a later moment, in 2010, when the conference of state parties to the ICC's Statute met in Kampala, Uganda to fill in the missing pieces. Article 8 bis of Rome Statute defines aggression as "*Planning, preparation, initiation, or execution by a person effectively to exercise control over or to direct the political or military action of a state, or an act of aggression which by its character, gravity and scale constitute a manifest violation of the Charter of the United Nations.*" The drafters limited criminal liability to 'manifest' violations of the UN Charter by any person engaged in 'planning, preparation,

⁶² Article 6 of the Nuremberg Charter.

Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, 8 August 1945

⁶³ Hathaway A. O., *Russia's Crime and Punishment*, Foreign Affairs, 17 January 2023

⁶⁴ United Nations, *Historical review of Developments relating to Aggression*, United Nations, New York, 2003.

⁶⁵ Tomuschat, C. *The Legacy of Nuremberg*, *Journal of International Criminal Justice*, 4 (2006)

⁶⁶ *Ibid.*

⁶⁷ United Nations Security Council Resolution, S/RES/827 (1993), *International Criminal Tribunal for Former Yugoslavia*, 25 May 1993

United Nations Security Council Resolution, S/RES/955 (1994), *International Criminal Tribunal for Rwanda*, 8 November 1994

⁶⁸ Tomuschat, C. *The Legacy of Nuremberg*, *Journal of International Criminal Justice*, 4 (2006)

initiation or execution” who was “in a position effectively to exercise control over or to direct the political or military action of a state”. This meant that only those most responsible for war, and not ordinary soldiers, could be prosecuted. The conference agreed to limit the exercise of the court’s jurisdiction over the crime to wars of aggression committed by states that had ratified the Rome Statute and the new amendments.⁶⁹ Kampala amendments entered into force in 2018.

ICC can exercise its jurisdiction also for war crimes, crimes against humanity and genocide if committed in the territory of a member state, or by citizens of a member state to the Rome Statute. Russia and Ukraine are not members of the Rome Statute. But Ukraine has submitted two declarations accepting ICC jurisdiction over alleged crimes under the Rome Statute, pursuant to its article 12 (3): The first declaration by the Government of Ukraine accepted ICC jurisdiction with respect to alleged crimes committed on Ukrainian territory from 21 November 2013 to 22 February 2014 and the second one extended this time period on an open-ended basis to encompass ongoing alleged crimes committed throughout the territory of Ukraine from 20 February 2014 onwards.⁷⁰ ICC prosecutor launched investigation into these atrocity crimes, based also on the referral of over 40 member states. ICC has also opened a country office on the ground in Ukraine.⁷¹ Pursuant to the investigation and applications submitted by the Prosecution, on 17 March 2023, ICC Pre-Trial Chamber issued arrest warrants for Mr. Vladimir Vladimirovich Putin, the President of the Russian Federation, and Ms. Maria Alekseyevna Lvova-Belova, Commissioner for Children’s Rights in the Office of the President of the Russian Federation, based on reasonable grounds to believe that each suspect bears responsibility for the war crime of unlawful deportation of children and that of unlawful transfer of children from occupied areas of Ukraine to the Russian Federation, in prejudice of Ukrainian children.⁷² Another case under investigation the ICC is set to open is on Russia’s “unrelentingly” targeting civilian infrastructure, including water supplies and gas tanks, but as the ICC prosecutor Khan has announced “*There seems to be a lot of damage in Ukraine, and it may well be it is part of a policy and part of a plan and we need to get to the bottom of it and see whether or not there is criminal responsibility and if there is we have an International Criminal Court that has jurisdiction to look into it*”.⁷³

However, ICC does not have the power to prosecute the crime of aggression committed by Russian officials in Ukraine, despite the latter’s declaration of accepting ICC jurisdiction, because of the restrictions placed on the ICC in Kampala: Russia and Ukraine are not members of Rome Statute and have not ratified Kampala amendments on the crime of aggression.

Russia’s war in Ukraine has renewed interest in amending the Rome Statute, and expand the ICC’s jurisdiction, so that the crime of aggression can also be prosecuted against states that commit the crimes on the territory of a state that has accepted the court’s jurisdictions. Such an amendment may need years to be negotiated and agreed by member states of the ICC Statute. But it remains a valid option, as the ICC is the only international, permanent, universal criminal court with jurisdiction to try the serious crimes of international law. In response to the declaration of the President of the European Union Commission pushing for the establishment of a new United Nations-backed tribunal, ICC Prosecutor, Khan said, “*ICC is the right place to prosecute the crime of aggression, and it has the power to try heads of state. ... We should avoid fragmentation, and instead prefer consolidation of courts*”.⁷⁴

4. New Special Tribunal for the Russian Aggression Against Ukraine

The Russian aggression in Ukraine, the largest ground invasion in Europe since World War II, succeeded in forging a strong bond between states and organizations, not only in condemning this blatant violation of international law, but also to ensure its enforcement with concrete actions to ensure accountability and punishment of those responsible.

With the initiative of Ukraine, a coalition (Group of States) has been created to establish a special Tribunal on the crime of aggression against Ukraine. It comprises 37 states, not only European and Euro-Atlantic ones (G7) but also from

⁶⁹ Hathaway A. O. *Russia’s Crime and Punishment*, Foreign Affairs, 17 January 2023

⁷⁰ International Criminal Court, *Investigation of the Situation in Ukraine*, ICC-01/22

⁷¹ International Criminal Court, Available at *Ukraine and International Criminal Court sign an agreement on the establishment of a country office* | International Criminal Court (icc-cpi.int)

⁷² International Criminal Court, Press release, 17 March 2023

Available at *Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova* | International Criminal Court (icc-cpi.int)

⁷³ *ICC to open war crimes cases over Russian invasion of Ukraine*, NYT and Reuters report | CNN

⁷⁴ Sterling T. *ICC should prosecute aggression*, Reuters, December 5, 2022

Available at *War crimes Prosecutor: ICC should prosecute aggression, can try heads of state* | Reuters

the Global South.⁷⁵ All coalition members support the idea that those who committed the crime of aggression should be held accountable. Despite that, each country may have its own vision of how to create such a mechanism.

Three options have been discussed and are on the table regarding the establishment of ad hoc tribunal to try the crime of Russian aggression in Ukraine.

- The creation of a special tribunal by agreement between the United Nations and Ukraine.
- A multilateral agreement between Ukraine and like-minded countries to create such a tribunal
- And the creation of a hybrid tribunal, a domestic internationalized tribunal.

The first model would be an international tribunal established by agreement between Ukraine and the United Nations, which the UN Secretary General will sign to implement the previously adopted resolutions of the General Assembly, pursuant to a resolution of UNGA. Considering the recommendation effect of UNGA resolutions, such a tribunal would not be able to order coercive measures on any non-consenting state – for example carrying out arrests of those indicted. But it will enable the voluntary assistance of member states in carrying out its mission.⁷⁶

The Nuremberg trial serves as a precedent for the creation of an international tribunal through a multilateral agreement between Ukraine and like-minded states. IMT was established through a multilateral agreement between four allied powers of France the Soviet Union, the United Kingdom, and the United States in 1945 for the just and prompt trial of major criminals of the European Axis for crimes against peace (aggression), war crimes and crimes against humanity. Still, it should address main objections and criticism related to the consent and not being imposed upon, the number of participating states, its independence and impartiality of the bench, credibility and legitimacy.

A hybrid tribunal – a specialized court integrated in the Ukrainian national system with international elements, in the form of substantive law, personnel, information sources, structure, international funding, and its location – which may be in Ukraine, Hague or any other European country.

The United States has expressed its backing for the last model, an internationalized court that is rooted in Ukraine's judicial system but that also includes international elements as the clearest path to establishing a new tribunal and maximizing the chances of achieving meaningful accountability.⁷⁷ The flaws of a hybrid tribunal include not only its compatibility with the Ukrainian Constitution, but especially the immunity that enjoys the Troika of the Russian State if tried by a national court, considering that aggression is a leadership crime. Still it remains a mechanism for the prosecution of other high level representatives such as Minister of Defense, members of Russian Duma, etc.⁷⁸

Ukraine, but not only, prefers the creation of an international tribunal, and opposes a hybrid one, and has circulated a draft-resolution in the United Nations for the creation of an international tribunal to try the Russian aggression against Ukraine. The president of Ukraine, invoking Nuremberg when called for the establishment of a new aggression tribunal, stated *"We will work without any hybrid formats, we will work on a specific tribunal to ensure accountability for their crimes, murders and torture. We understand who gave the orders. These people must not be untouchable. This is very important for us, this is one of the fundamental issues."*⁷⁹

Even the European Commission emphasized the strong backing of the United Nations as essential, when presented options for the creation of a special tribunal: - a special independent international tribunal, based on a multilateral treaty; or a specialized court integrated in a national justice system with international judges – a hybrid court.

There are previous similar precedents of creating an international tribunal with the support and backing of United Nations General Assembly, although not identical in requests, the manner of establishment and its jurisdiction.

The Special court for Sierra Leone (2000) was created by the Secretary General based on a request by United Nations Security Council (UNSC) acting under chapter VI (not Chapter VII) of the UN Charter, to negotiate with the government of Sierra Leone to establish an independent special court.⁸⁰ Because UNSC did not act under Chapter VII,

⁷⁵ Zelensky, V. *The Aggressor's accountability for the crime must be inevitable*, Core Group Leaders on the establishment of the Special Tribunal for the crime of aggression against Ukraine, 9 May 2023,

Available at *The aggressor's accountability for the crime must be inevitable – President's speech at the online summit of Core Group leaders on the establishment of the Special Tribunal for the crime of aggression against Ukraine – Official website of the President of Ukraine*

⁷⁶ Hathaway O. Mills, M. Zimmerman, H., *The Legal authority to create a special tribunal to try the crime of aggression upon the request of the UN General Assembly*, Just Security, 5 May 2023

⁷⁷ *Ambassador Van Schaack's Remarks on the U.S. Proposal to Prosecute Russian Crimes of Aggression - United States Department of State*

⁷⁸ Trahan, J. *Why a 'hybrid' Ukrainian Tribunal on the crime of aggression is not the answer*, Just Security, February 6, 2023 Available at *Why a "Hybrid" Ukrainian Tribunal on the Crime of Aggression Is Not the Answer* (justsecurity.org)

⁷⁹ Zelensky, V. *Ukraine stands against hybrid formats of tribunal for Russian crime of aggression*, Hague, 4 May 2023

⁸⁰ *United Nation Security Council Resolution S/1315 (2000), The situation in Sierra Leone, 14 August 2000*

this court was unable to require non-consenting states to execute its arrest warrants. Still, the court was considered an international court, thus empowered to set aside personal immunities. Its appeals chamber found that a sitting head of state of a foreign state not party to the agreement between Sierra Leone and the United Nations – Liberian President Charles Taylor – was subject to prosecution in the court for crimes committed in Sierra Leone and could not rely on personal immunities to avoid indictment. The Appeals Chamber argued that UNSC was acting on behalf of all UN Member States and thus the agreement was made between all members of the UN and Sierra Leone, making it 'truly international'.⁸¹

Extraordinary Chambers in the Courts of Cambodia (ECCC) was created with the prior request of Cambodia for the assistance of United Nations and international community in bringing to justice those responsible for genocide and crimes against humanity during the rule of the Khmer Rouge. The group of experts for Cambodia established by the Secretary General after the request of UNGA resolution 52/135 recommended that 'the United Nations should establish an ad-hoc international tribunal to try Khmer Rouge officials for crimes against humanity and genocide, its establishment by the SC under Chapter VI or VII, or should it not do so, the General Assembly establish it'. Cambodia insisted in the creation of a tribunal within its legal system. UNGA resolution requested the Secretary General of the United Nations to negotiate with Cambodia an agreement creating Extraordinary Chambers and regulating the cooperation between the UN and Cambodia. While ECCC is located within the Cambodian Court system, it provides clear evidence that UNGA can contribute to the establishment of a treaty-based tribunal.⁸²

The United Nations Security Council will not be able to adopt a resolution for creating a tribunal against Russian Aggression, as happened with the creation of ICTY (1993) and ICTR (1994) due to the veto of its permanent members (Russia, China). UNGA can exercise its subsidiary powers to maintain international peace and security, when UNSC is unable to act, and based on abovementioned examples it can demonstrate the authority to request that UNSG enter an agreement with Ukraine to establish a special tribunal for the crime of aggression. But the main shortcoming of such a tribunal is raised since United Nations General Assembly has no enforcement powers, thus questioning the source of this tribunal's jurisdiction. A bilateral agreement between United Nations and Ukraine, or a tribunal established by negotiation between the United Nations Secretary General and Ukraine, as the consenting state, to try a crime under international law, would have an international character, and thus not be required to observe personal immunities,⁸³ enabling the prosecution of Troika (Head of state, head of government, and minister for foreign affairs) of the Russian state. A tribunal backed by the General Assembly might stand a greater, although not certain, legal chance of being able to prosecute Russia's top leaders. Unless they came into tribunal's custody, however it would have to do so in absentia.⁸⁴

The maximum support of the United Nations members states would be essential in establishing a special tribunal against Russian aggression in Ukraine. A strong majority of UN member states have voted several times in favor of the resolutions asking for ending the war, condemning the war, on Russia's reparations for aggression against Ukraine, etc.⁸⁵ Establishing a special tribunal to try the Russian aggression against Ukraine is something else, and there seems to be uncertainty especially among the Global South. Discussing about the future of the international legal order after Russia's aggression in Ukraine, Kenya's ambassador to the UN cautioned against 'believing that legalism will deliver us from this major conflict and its escalation dangers'.⁸⁶

Even the European Commission emphasized the strong backing of the United Nations as essential, when presented options for the creation of a special tribunal: - a special independent international tribunal, based on a multilateral treaty; or a specialized court integrated in a national justice system with international judges – a hybrid court.

There seems to be a united position on the idea to bring to account those responsible and to create a Special tribunal, but there are debates on the pros and cons of such a tribunal, related with its establishment, its statute, structure, costs, and relationship with ICC. But mainly it is the lack of political will to support such a tribunal, and some

⁸¹ Hathaway O. Mills, M. Zimmerman, H., *The Legal authority to create a special tribunal to try the crime of aggression upon the request of the UN General Assembly*, *Just Security*, 5 May 2023

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ Finucane B, Pomper, S. *Can Ukraine get justice without thwarting Peace? Now is not the time to create a special tribunal for Russia*, *Foreign Affairs*, 8 May 2023

⁸⁵ *United Nations General Assembly resolutions*, A/RES/ES-11/1, 2 March 2022, A/ES-11/2 of 24 March 2022, A/ES-11-4 of 12 October 2022, A/ES-11/L.6 of 7 November 2022, A/ES-11/L.7 of 16 February 2023

⁸⁶ *Russia's aggression against Ukraine and the international legal order, the ninth annual Justice Stephen Breyer Lecture on International Law*, *Brookings*, 30 March 2023

Available at *Russia's aggression against Ukraine and the international legal order* (brookings.edu)

reasons for reluctance include the risk of a selective international justice, pure regional European affairs, traditional position on universal justice, fears to create a boomerang effect,, Russia's political leverage over certain countries especially Global South, shut door to communication with current Russian political leadership, which will block a diplomatic solution to war.⁸⁷

5. Conclusions

Russian aggression against Ukraine has put at risk the legal international order. Aggression is the supreme international crime and leaders responsible should be held into account.

International criminal court has jurisdiction to try the crime of aggression, along other serious crimes against humanity, war crimes and genocide, only if Russia and Ukraine ratify the Rome Statute and Kampala amendments on accepting its jurisdiction for the crime of aggression.

Member states of the Rome Statute have the power to amend it through including aggression among the other serious crimes that can be prosecuted when committed on the territory of a state that has accepted the court's jurisdiction. Although such amendments may take years to enact, the International Criminal Court is a universal and a permanent one that will close the accountability gap in case of future acts of aggression.

In the meantime, the existing accountability loophole in trying the crime of Russian aggression requires the creation of a new special tribunal. This new special tribunal should be international and should ensure its independence, legitimacy, and credibility of the international community to bring to justice any authority responsible for planning, preparation, initiating or execution of acts of aggression, including members of the national troika. It is essential to establish such a tribunal under the auspices of an international organization, and with the majority support of United Nations member state and the strong backing of the United Nations.

There is no just and sustainable peace without accountability.

References

- Agreement for the prosecution and Punishment of the Major War Criminals of the European Axis, United Nations , Treaty Series, vol. 82. P. 279
- Brookings Institute, *Russia's aggression against Ukraine and the international legal order*, the ninth annual Justice Stephen Breyer Lecture on International Law, Brookings, 30 March 2023,
- Convention Providing for the Renunciation of War as an Instrument of National Policy, (Kellogg-Briand Pact)
- Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.
- Covenant of the League of Nations, 28 April 1919.
- Hathaway A. O., *Russia's Crime and Punishment*, *Foreign Affairs*, 17 January 2023
- Ferez B. B. *An International Criminal Court, A Step Towards World Peace: A Documentary History And Analysis*, Oceana Publications Inc., 1980
- Finucane B, P. Stephen, *Can Ukraine get justice without thwarting Peace?, Now is not the time to create a special tribunal for Russia*, *Foreign Affairs*, 8 May 2023
- Hathaway A. O., *Russia's Crime and Punishment*, *Foreign Affairs*, 17 January 2023
- Hathaway O. Mills, M. Zimmerman, H., *The Legal authority to create a special tribunal to try the crime of aggression upon the request of the UN General Assembly*, *Just Security*, 5 May 2023
- International Court of Justice, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, 16 March 2022
- International Court of Justice, *Nuremberg Trial Archives, The International Court of Justice: custodian of the archives of the International Military Tribunal at Nuremberg*, 2018 (2nd edt.)
- International Criminal Court, *Investigation of the Situation in Ukraine*, ICC-01/22
- International Criminal Court, *Ukraine and ICC sign an agreement on the establishment of a country office*, 23 March 2023
- International Criminal Court, *Press release, ICC judges issue arrests warrants against V. Putin and Maria Lvova-Belova*, 17 March 2023.
- International Military Tribunal (Nuremberg) Charter, 1945
- Merrills, J., & De Brabandere, E. (2022). *Merrill's International Dispute Settlement*, (7th ed.). Cambridge: Cambridge University Press
- Nuremberg Trial Proceedings, Vol 22, 30 September 1946
- Osmolovska, I. *Special Tribunal for the political leadership of Russia: Just punishment for war crimes*, 16 February 2023
- Scharf, P. M. *Universal Jurisdiction and the Crime of Aggression*, *Harvard International Law Journal*, Volume 53, Number 2, Summer 2012

⁸⁷ Osmolovska, I. *Special Tribunal for the political leadership of Russia: Just punishment for war crimes*, GLOBSEC, 16 February 2023

- Sterling T. ICC should prosecute aggression, *Reuters*, December 5, 2022
- Tomuschat, C. *The Legacy of Nuremberg*, *Journal of International Criminal Justice*, 4 (2006)
- Trahan, J. Why a 'hybrid' Ukrainian Tribunal on the crime of aggression is not the answer, *Just Security*, February 6, 2023
- United Nations, *Historical review of Developments relating to Aggression*, United Nations, New York, 2003.
- United Nations Charter, 1945
- United Nations General Assembly Resolution A/RES/ES-11/1, "Aggression against Ukraine", 2 March 2022
- UNGA resolution A/ES-11/2, "Humanitarian consequences of the aggression against Ukraine", 24 March 2022
- UNGA resolution A/ES-11-4, "Territorial integrity of Ukraine: defending the principles of the Charter of the United Nations, 12 October 2022
- UNGA Resolution A/ES-11/L.6, Furtherance of remedy and reparation for aggression against Ukraine, 7 November 2022
- UNGA Resolution A/ES-11/L.7, "Principles of the Charter of the United Nations underlying a comprehensive, just and lasting peace in Ukraine", 16 February 2023
- United Nations General Assembly Resolution 377 A(V), Uniting for Peace, 3 November 1950
- United Nations General Assembly Resolution 3314 (XXIX), Definition of Aggression, 14 December 1974
- United Nations Security Council Resolution 667 (1990) 16 September 1990
- United Nations Security Council Resolution, S/RES/827 (1993), 25 May 1993, International Criminal Tribunal for Former Yugoslavia
- United Nations Security Council Resolution, S/RES/955 (1994), 8 November 1994, International Criminal Tribunal for Rwanda
- UNSC Resolution S/1315
- Van Schaack, Remarks on the US Proposal to Prosecute Russian Crime of Aggression, United States Department, 27 March 2023
- Zelensky, V. *Ukraine stands against hybrid formats of tribunal for Russian crime of aggression*, Hague, 4 May 2023
- Zelensky, V. *The Aggressor's accountability for the crime must be inevitable*, Core Group Leaders on the establishment of the Special Tribunal for the crime of aggression against Ukraine, 9 May 2023