



THE CRIME OF AGRESSION IN UKRAIN: ICC JURISDICTIONAL CONSTRAINTS AND THE CASE FOR A SPECIAL TRIBUNAL

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Abstract:

This study aims to analyze the legal framework of the crime of aggression under the Statute of the International Criminal Court, while clarifying the limits of the Court's jurisdiction and the reasons for its inability to prosecute those responsible for committing the crime of aggression in the Russian-Ukrainian conflict, particularly the restrictions related to jurisdiction over non-State Parties, our current study also discusses the political and legal ramifications of this inability and the resulting risk of perpetuating impunity and delegitimizing international deterrence, accordingly, an ad hoc international tribunal for the crime of aggression against Ukraine must be established as an alternative mechanism to fill the gap in the international judicial system and promote the principle of the rule of law globally.

Key words: Crime of aggression, Russia, Ukraine, international court.

Introduction:

The crime of aggression is one of the most serious international crimes threatening global peace and security. It represents a systematic attack by one state on the sovereignty, territorial integrity, or political independence of another state, in flagrant violation of the United Nations Charter and the fundamental rules of international law. This concept has historically been associated with wars of aggression witnessed around the world, particularly in the twentieth century, prompting the international community to establish legal frameworks to criminalize it and hold perpetrators accountable before international criminal courts. The crime of aggression is characterized by its complex political and military nature, where legal considerations

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overlap with the strategic interests of states. This has made its definition and practical application the subject of prolonged debate spanning decades, until it was included in the Rome Statute of the International Criminal Court, constituting one of the four most serious crimes within its jurisdiction.

the Russian–Ukrainian conflict, which began in February 2022, is one of the most prominent contemporary conflicts, sparking widespread debate about the application of the concept of the "crime of aggression" in international law. The Russian military intervention, in terms of its nature, scope, and intensity, is considered a clear violation of the principles of the UN Charter, particularly the prohibition on the use of force against the sovereignty and territorial integrity of states. Many jurists and international organizations have considered this military operation a blatant example of the crime of aggression, as it involved the invasion and occupation of Ukrainian territory and caused significant damage to the civilian population and infrastructure. The impact of this conflict was not limited to the borders of the two countries; it shook the foundations of the international order, reviving debates about the effectiveness of international accountability mechanisms and the possibility of prosecuting leaders of major powers before international criminal courts, despite the political and legal complexities surrounding this matter.

Study Problem:

Although the "crime of aggression" is explicitly criminalized in the Rome Statute of the International Criminal Court (ICC) as one of the most serious crimes threatening international peace and security, practical reality has revealed fundamental shortcomings in international accountability mechanisms, particularly when the perpetrators are leaders of major powers outside the Court's jurisdiction. The Russian invasion of Ukraine is a stark example of this shortcoming. While a large-scale crime of aggression occurred, which the international community unanimously condemned, the ICC was unable to prosecute those responsible for it for legal and political reasons, most notably the lack of jurisdiction over the crime for states not party to the Rome Statute. This situation raises fundamental questions about the effectiveness of the existing international legal

system and the need to develop alternative mechanisms, including the establishment of an ad hoc international tribunal for the crime of aggression against Ukraine, capable of bridging this gap and combating impunity. This would strengthen the principle of the rule of law at the international level and restore credibility to efforts to protect world peace. The study seeks to answer the following key question:

To what extent does the situation in Ukraine since February 2022 expose the limitations of the International Criminal Court in addressing the crime of aggression, and how effective could the establishment of an ad hoc international tribunal be as an alternative mechanism for achieving international justice and preventing impunity?

Study Objects:

Our current study seeks to achieve the following objectives:

- To identify the most important definitions offered for the crime of aggression.
- To study the judicial constraints on the crime of aggression against Ukraine.
- To shed light on ways to establish a special international tribunal for the crime of aggression.

Study Methodology:

This study adopts a descriptive and analytical approach, reviewing and analyzing the legal framework for the crime of aggression in light of the provisions of public international law and the Statute of the International Criminal Court, with a focus on texts relevant to the prohibition of the use of force and the accountability of political and military leaders. The study draws on international legal sources, including the Charter of the United Nations, the Statute of the International Criminal Court, and resolutions of the General Assembly and the Security Council, in addition to reports issued by international and human rights organizations, legal opinions, and specialized academic articles. A case study approach will also be employed to address the Russian invasion of Ukraine as a practical model, leading to an assessment of the feasibility of establishing an international tribunal for the crime of aggression, given the inability of the International Criminal Court to exercise its jurisdiction in this case.



1- Efforts to Define the Crime of Aggression:

1.1- Nuremberg to Kellogg-Briand:

Armed conflict has long been accompanied by accusations of aggression, prior to the adoption of the Kellogg-Briand Peace Pact, (Treaty for Renunciation, 1928, P. 57), international law did not generally prohibit the recourse to war. Since the Pact prohibited “recourse to war for the solution of international controversies” and required its signatories to renounce it ‘as an instrument of national policy in their relations with one another’”, the term aggression was neither defined nor even used at that time. The Pact had no provisions imposing criminal culpability on individuals; it only restricted the actions of states parties. All of the main combatants in World War II were signatories to the Pact, which was both broadly embraced and extensively ignored (Schuster, 2003, PP. 2- 3).

Sixteen defendants were tried for “crimes against the peace”, the practical equivalent of the crime of aggression, before the International Military Tribunal in Nuremberg following the war. Twelve were found guilty (Trial of the Major War Criminals Before the International Military Tribunal, 1947, pp. 279- 366). A crime against the peace was described as “participation in a common plan or conspiracy for the accomplishment of any of the foregoing, or the planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances” (Treaty for Renunciation, 1928, P. 57). There was no analogous norm in customary international law at the time (Schuster, 2003, P. 32). The International Military Tribunal for the Far East and Allied military tribunals operating under Control Council Law in Germany also prosecuted such offenses (Dinstein, 1994, PP. 118- 119). This “Tokyo Tribunal” found Japanese Prime Minister Hideki Tojo guilty of crimes against peace, including responsibility for planning and waging wars of aggression, at the time of the Pearl Harbor attack, and sentenced him to death (Weisbord, 2008, P. 49). The Tokyo Tribunal found 23 more Japanese citizens guilty of the crime of aggression overall, but it did not define the term (Schuster, 2003, P. 6). The first and only prosecution of the crime of aggression took place during the tribunals that followed World War II.

Some American jurists are uneasy about the prosecution of Nazi leaders for “crimes against the peace”, which can be partially explained by the lack of precedent and the ambiguity of the offense (Gallant, 2009, P. 83).

“I believed at the time and continue to believe[s] that the Nuremberg trials were unprincipled”, wrote Justice William O. Douglas. Ex post facto legislation was made to accommodate the fervor and clamor of the moment (Thompson & Strutz, 1983, P. 196). Justice Douglas clarified in his autobiography: “Those trials were challenging for two reasons: (1) There was no explicit crime of fighting “an aggressive war” at the time, and ex post facto legislations are prohibited under American norms. Indeed, clever attorneys could explain it using conventions and treaties. However, by our standards, criminal law needs to be unambiguous, and specific in order to deter any potential offenders. There was no such clarity and precision in any international taboo against aggressive war. (2) The loser was penalized under the prohibition against “aggressive war”. The idea of “aggressive war” must be precisely defined in order to be a manageable matter under American criminal law standards. As Stone stated, a nation facing threats may have to act first or risk being destroyed (Douglas, 1980, P. 29).

Chief Justice Harlan Fiske Stone claimed that Robert Jackson, the chief U.S. prosecutor, was “conducting his high-grade lynching party in Nuremberg.” I don't like his handling of the Nazis, but I hate the idea that he is acting as a judge and applying common law. This is a bit too sanctimonious of a scam to fit my traditional beliefs. “If they were put in the position of the accused, I wonder how some of those who preside over the trials would justify some of the acts of their own governments”, he wrote elsewhere (Mason, 1957, PP. 794- 797). Chief Justice Stone specifically asked on a third occasion “whether, under this new [Nuremberg] doctrine of international law, if we had been defeated, the victors could plausibly assert that our supplying Britain with fifty destroyers [in 1940] was an act of aggression...” Jackson, a justice on the Supreme Court, considered the charge's hypocrisy in the context of the Soviet Union's conduct. In a secret letter to President Truman, he stated, “We say aggressive war is a crime, and one of our allies asserts sovereignty over the Baltic States



based on no title other than conquest” (Letter to Justice Jackson Upon the Conclusion of His Duties With the Nurnberg Tribunal, 1945).

The possibility that the Nuremberg prosecution was based on "general principles of criminal law as derived from the criminal law of all civilized nations" was further considered by Judge Wyzanski. If it were the foundation for prosecution, he retorted, most lawyers wouldn't be satisfied with that basis. The widely denounced Nazi law of June 28, 1935, which said that “Any person who commits an act which the law declares to be punishable or which is deserving of penalty according to the fundamental conceptions of the penal law and sound popular feeling, shall be punished”, would be similar to this. Nullum crimen et nulla poena sine lege, which states that there can be no crime and no punishment without an antecedent law, and that criminal laws cannot be ex post facto, would be directly violated.

Deeply ingrained sentiments against the law developed after an offense was committed. Cicero and Demosthenes were aware of the pernicious effects of retroactive legislation; philosophers ranging from Hobbes to Locke expressed their opposition to it; and almost all constitutional governments forbid ex post facto legislation, frequently in the exact words of Magna Carta, Article I of the US Constitution, or Article 8 of the French Declaration of Human Rights. Ex post facto legislation are not opposed because of a lawyer's bias disguised in a Latin proverb. It is based on the political reality that authority is arbitrary and unlimited to the extent that a law can be made in response to an offense. The concept of constitutional limitation would be denigrated if retroactive legislation were permitted. It means giving up what is typically considered to be one of the fundamental principles at the heart of our democratic beliefs (Wyzanski, 1946, PP. 60- 65).

1.2- The Charter of the United Nations:

In the meantime, new guidelines governing governments' use of force were established by the 1945 signing of the U.N. Charter. The Charter framework is simple and consists of a general prohibition with two exceptions. This ban is outlined in Article 2(4): “In their international relations, all members shall abstain from threatening or using force against any state's political independence or territorial integrity, or in any other way that is incompatible with the goals of the

United Nations” (United Nations Charter, art 2, Para 4). The two exclusions are outlined in detail in Article 51, which deals with the use of force in self-defense, and more generally in Chapter VII, which deals with Security Council permission. The following is provided by Article 51: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the Charter to take action as it deems necessary to restore or maintain international peace and security” (United Nations Charter, art 51).

Subject to certain restrictions, the Security Council may authorize the use of force under Chapter VII. The Council must first “determine the existence of any threat to the peace, breach of the peace, or act of aggression” in accordance with Article 39 (United Nations Charter, art 39). It then has to decide if the “measures not involving the use of armed force” that Article 41 permits “would be inadequate or have proved to be inadequate” (United Nations Charter, art 41). The Council may then, in accordance with Article 42, “take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security” if these two requirements are satisfied. Such measures could include protests, blockades, and other actions by United Nations air, sea, or ground forces (United Nations Charter, art 42).

There are two noteworthy issues with the Charter's plan. First, if the duties imposed by the Charter clash with those imposed by another treaty, the Charter takes precedence. Article 103 states that “the obligations of the Members of the United Nations under the present Charter shall prevail in the event of a conflict between their obligations under the present Charter and their obligations under any other international agreement” (United Nations Charter, art 103). This clause is important for determining whether the Security Council has plenary, concurrent, or preemptive jurisdiction to decide if aggression is present.



Second, the word “aggression” appears twice in the Charter: once in Article 39 and once in Article 1 paragraph 1, which includes “the suppression of acts of aggression or other breaches of the peace” as one of the Charter's goals (United Nations Charter, art 1, para 1). The United States and the United Kingdom successfully opposed the definition of “aggression” at the pertinent procedures at Dumbarton Oaks and San Francisco, hence the term is not defined anywhere in the Charter.

1.3- The Rome Conference, the International Law Commission, and the General Assembly:

To address the definitional vacuum in the Nuremberg Charter, the U.N. General Assembly overwhelmingly confirmed the circular definition of aggression in 1946 (Charter of the International Military Tribunal, art 6, P. 82). As part of the same legislation, the Assembly asked the International Law Commission (ILC) to draft a Code of Offenses Against the Peace and Security of Mankind. However, the ILC placed the project on hold in 1954 because it was difficult to define aggression.

After three failed attempts to define the crime of aggressiveness on its own (Weisbord, 2008, P. 166), Resolution 3314, adopted by the General Assembly in 1974 without a vote, provided a final definition of aggression. Resolution 3314 described aggressiveness as a violation of the use-of-force regulations of Article 2(4) and Article 51 of the U.N. Charter, although it merely provided illustrative instances of what aggression was. leaving things where they were before, practically speaking. Chapter VII of the Charter and its support of the “inherent right of... self-defense” (United Nations, art 51) were not specifically mentioned in the Resolution. According to Resolution 3314, the potential that a specific use of force would actually be allowed under Chapter VII is instead supposed to be considered only after a first use of armed force has established a *prima facie* case of aggression. The Resolution simply aimed to give the Security Council guidelines for determining whether specific state actions would qualify as aggression, since the U.N. Charter does not grant the General Assembly any legislative powers, much less the ability to modify the Charter. Importantly, individual criminal responsibility was not specifically mentioned in Resolution 3314. However, as will

be seen, the Resolution has appeared repeatedly in later attempts to define aggression, and its provisions serve as the foundation for the SWGCA's suggested definition.

When the ILC resumed its attempt to define aggression in the 1990s by creating a Draft Code of Crimes Against the Peace and Security of Mankind, it rejected the General Assembly's definition, arguing that it was too ambiguous to be used as a foundation for the prosecution of an aggressive crime (Schabas, 2007, P. 135). The General Assembly “did not adopt this definition for the purpose of imposing criminal liability, and the history of this definition shows that it was intended only as a political guide and not as a binding criminal definition”, the U.S. delegate stated. Similar to this, the delegate of the United Kingdom voiced “severe doubts” regarding a definition based on Resolution 3314, a viewpoint that was widely accepted, even by the states that had agreed to the resolution: The United Kingdom completely concurs with the Commission members who believed that a resolution meant to act as a guidance for the UN's political organs should not be used as the foundation for criminal charges brought before a court. To clearly and precisely define the activities that carry personal criminal responsibility, the resolution's wording needs to be carefully modified.

If not, the representative from the United Kingdom contended, it would be applied retroactively and violate the *nullum crimen sine lege* principle. Similar worries had previously been expressed by the French delegate: “The general view was that the Definition [of aggression in Resolution 3314] was poorly drafted”, that it “had never been regarded as properly defining anything”, and that it had “no specific scope”. He stated that a “definition would probably prove to be an insurmountable task for the Commission” if the ILC were to take up the issue once more. The ILC refused to define the term as a result. Although it lacked a definition, the Commission's Draft Statute of the International Criminal Court would have allowed the prosecution of the crime of aggression. Its discussions were tinged with worries regarding the legality concept, which is covered below.

Only at the Rome Conference, which established the ICC, was the matter brought up again. Despite the United States' protests, Aggression is one of the four crimes that can be prosecuted under the



Rome Statute. However, the drafters of the Statute could not agree on a definition or whether the U.N. Security Council would have any participation in the crime's prosecution. Leaving the prosecution of the aggressive crime aspirational (Rome Statute of the International Criminal Court, art 5, Para 1, 2). The matter was turned up to the Rome Conference's Preparatory Commission (Schofield, 2007, PP. 15- 20).

Because of this, it was infamously deemed to as the “supreme international crime” by the Nuremberg tribunal, which rendered it, at least temporarily, unenforceable. The SWGCA was established by the Assembly of States Parties after its final session in 2002 to continue working toward a definition that would be discussed at the Assembly's review conference in 2010 because the Preparatory Commission was unable to deliver one (ICC, 2002).

1.4- The the Special Working Group on the Crime of Aggression (SWGCA)

The findings of the SWGCA's work were released on 13 February 2009. It declared that it has “produced draft amendments to the Rome Statute that would give the Court jurisdiction over the crime of aggression” following “five years of deliberation” (ICC, 2009). The definition of the crime and the Security Council's role in its prosecution were covered separately by the SWGCA. Its proposed amendments would add the following definition of aggression to Article 5 of the Rome Statute:

- For the purposes of this Statute, “crime of aggression” refers to the planning, preparation, initiation, or execution of an act of aggression that, by its nature, severity, and scope, clearly violates the United Nations Charter by a person who is in a position to effectively control or direct a State's political or military action.
- A State's use of armed force against another State's sovereignty, territorial integrity, or political independence, or in any other way that is in violation of the UN Charter, is considered an “act of aggression” for the purposes of paragraph 1. According to United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974,

any of the following actions will be considered acts of aggression, even if no war has been declared:

- The use of force to annex the territory of another State or a portion of it, or the invasion or attack of another State's territory by a State's armed forces, or any military occupation, even if brief, that results from such an invasion or attack;
- When armed forces from one state bombard another's territory or employ any kind of weaponry against another state's territory;
- When armed forces from another state blockade a state's ports or coastlines;
- An assault by a state's military forces on another state's air, sea, or land forces, or air and marine fleets;
- The act of a State allowing another State to utilize its territory, which it has made available to that State, to commit an act of aggression against a third State;
- Violating the terms of the agreement by using one State's military forces on another State's territory with the receiving State's assent, or by continuing to remain present in that area after the agreement has ended;
- The deployment of armed bands, groups, irregulars, or mercenaries by or on behalf of a state that engages in violent acts against another state that are serious enough to qualify as the aforementioned acts, or the state's significant involvement in such acts (ICC, 2009, PP. 11- 12).

The following proposed modification to Article 25(3) of the Rome Statute on individual criminal liability for an act of assault was also included in the SWGCA's report: "The provisions of this article shall apply only to persons who are in a position to effectively exercise control over or to direct the political or military action of a State with respect to the crime of aggression" (Glennon, 2010, PP. 73-82).

The SWGCA failed to reach a consensus on the involvement, if any, of the Security Council in the prosecution decision. A variety of choices were compiled; some of them included the Council in the prosecution decision, while others did not.



At the Review Conference, which will take place in Kampala in May 2010, the definition will be discussed for possible inclusion in the Statute (ICC, 2009, P. 13).

From the vague ideas of the Kellogg-Briand Pact and the post-World War II tribunals to the comprehensive (though still contentious) definition accepted at the Kampala Review Conference in 2010, the legal and historical development of the crime of aggression has established the normative framework for dealing with states' unlawful use of force. Nonetheless, there are still political and legal complexities around this legal framework's relevance in modern environments.

The crime of aggression has returned to the center of international legal discussion since the start of the Russia-Ukraine conflict in February 2022. Given the Rome Statute's structural limitations and the UN Security Council's role, the invasion—which was widely denounced as a flagrant violation of the UN Charter's ban on the use of force—has brought into sharp relief the viability of prosecuting state leaders for the crime of aggression under the current international mechanisms.

2- Ukraine's Crime of Aggression: A Legal Examination of Jurisdictional Restrictions:

Russia, a nuclear-armed state, launched a large-scale invasion of Ukraine more than three years ago, shortly after a United Nations Security Council meeting in New York that aimed to avert war. Russian president Vladimir Putin announced the start of a “special military operation”, which has been widely characterized as an act of aggression against Ukraine, despite Russia’s denials of any intention to invade. Russian forces, including Wagner Group fighters, are suspected of having committed serious violations of international humanitarian law, including killings, sexual violence, forced deportations, and violence against civilians. Ukraine and its international partners have called for accountability as evidence of these crimes grows, highlighting the role that international law plays in addressing aggression and delivering justice. (Alessandra, 2023, PP. 54- 66).

2.1- The ICC's Jurisdiction Over Other Core International Crimes in Ukraine:

The International Criminal Court actively exercises its jurisdiction over other core international crimes, but it does not have jurisdiction over the crime of aggression in the context of the Russia–Ukraine conflict. Following Ukraine's acceptance of the Court's jurisdiction under Article 12(3) of the Rome Statute, the Court is investigating alleged war crimes and crimes against humanity committed on Ukrainian territory (Rome Statute, art 12, Para 3).

In the context of the conflict, allegations of genocide have also been made. The Court may potentially exercise jurisdiction over genocide under article 6 of the Rome Statute, provided the required legal threshold is met.

The lack of jurisdiction over the crime of aggression in this context has therefore been described as reflecting a structural limitation in the Court's jurisdictional framework.

2.2- The ICC'S Lack of Jurisdiction over the Crime of Aggression in Ukraine:

Since aggression is considered a leadership crime and an act attributable to the state with significant political consequences, many states have advocated for a separate legal framework to address it. This framework is notably more stringent than the ICC's jurisdiction over genocide, war crimes, and crimes against humanity. Over two decades of negotiations regarding the Court's authority to prosecute aggression were marked by intense sensitivity, ultimately resulting in such a restrictive regime that it remains unlikely the Court will ever successfully bring charges under it. (Kress, 2017, P. 67), (Heller, 2022). In particular, the ICC lacks the authority to prosecute non-State Parties or their nationals for the crime of aggression. This means that even when aggression is directed at a State Party, the Court cannot assert jurisdiction without the approval of the state responsible for the act. At present, the only mechanism through which the ICC could address aggression by a non-State Party is via a referral from the UN Security Council—an avenue that is not applicable in this case (Rome Statute, art 15, Paras 4- 5).

The restricted regime created by the Kampala Amendments to the Rome Statute, specifically Articles 15 bis and 15 ter, is the main



reason the Court lacks jurisdiction over the crime of aggression in this particular situation (Rome Statute, art 15).

Unless the United Nations Security Council refers a case, Article 15 bis expressly excludes the Court's jurisdiction over acts of aggression committed by citizens of non-State Parties or on their territory. This clause essentially prevents the Court from exercising jurisdiction in this matter because the Russian Federation is not a State Party to the Rome Statute.

Furthermore, Article 15 ter reaffirms the Security Council's pivotal role in establishing jurisdiction over crimes of aggression. Such a referral is still politically impossible given Russia's permanent membership in the Council and its veto power.

The special and highly politicized nature of the crime of aggression, which has been purposefully subject to a tougher jurisdictional system than other international crimes, is reflected in these legal restrictions.

There has been a proposal to eliminate the provision in the Rome Statute that prohibits the ICC from exercising jurisdiction over non-State Parties, especially in relation to the crime of aggression (Rome Statute, art 15, bis (5)). Alternatively, it has been suggested that the UN General Assembly be granted the authority to refer cases, as a way to overcome the ICC's current jurisdictional limitations regarding the crime of aggression (Trahan, 2022). In December 2022, during the Assembly of States Parties, the ICC Prosecutor emphasized the need to address existing gaps in the legal framework of the Rome Statute, stating: "We should attempt to address it through the Rome Statute [...] when we recognize that there is a gap in that [legal] architecture." The message is one of strengthening, not weakening, the system. The Court has demonstrated its readiness and capacity to target the highest levels of the Russian leadership in pursuit of justice for those most responsible for serious international crimes within its jurisdiction. This marks a historic moment, as it is the first-time arrest warrants have been issued for President Vladimir Putin. In light of this, countries backing Ukraine's call for a special tribunal should actively push for amendments to the Rome Statute to empower the Court to act in similar future scenarios—and ideally, to prevent such crimes from occurring at all.

However, the Court currently lacks jurisdiction over the crime of aggression in this context, and any amendment to the Rome Statute would require approval by a two-thirds majority of ICC States Parties, followed by adoption by the Assembly through either a seven-eighths majority or consensus. Establishing such a high threshold for amending the Rome Statute would likely require lengthy negotiations—and if history is any indication, the process could take years, if not decades. Although the crime of aggression was formally added to the Statute in 2010, the ICC only gained jurisdiction over it in 2017, after 30 member states ratified the amendments. Importantly, it remains doubtful that the core group of states that originally opposed the aggression regime have shifted their positions. While more states have since endorsed the amendments, the current total still falls short of the 82 ratifications now required for further revisions. As Professor Reisinger Coracini recently observed, this reality explains why many advocates of a Special Tribunal favor a dual-track strategy: “the reason why many supporters of a [Special Tribunal] argue for a two-tiered approach [...] is their understanding that a quick fix of the Court's jurisdictional regime is unrealistic.” Put simply, if amending the Rome Statute were a viable and timely option, many of those currently calling for a Special Tribunal would fully support that route instead (Coracini, 2023).

3- Routes for Establishing a Special Tribunal for Aggression

The proposal to create a special tribunal has emerged as an essential substitute mechanism in light of the International Criminal Court's jurisdictional constraints, particularly its incapacity to try the crime of aggression in the Russian-Ukrainian conflict. Such a tribunal seeks to guarantee accountability for one of the most serious international crimes and close the legal loophole in international criminal justice.

For a tribunal to qualify as “international” in a way that renders sovereign immunities inapplicable, it must meet two specific criteria. The first essential requirement is that the tribunal must be established in accordance with international law. This can occur through a formal treaty or through legal authority granted by a recognized source of international law—such as a resolution adopted by an organ of an international organization, like the United Nations, the European



Union, or the Council of Europe—provided that the organ is acting within the scope of powers conferred upon it by the organization’s founding charter. Second, the “nature of an international criminal court or tribunal must be such that it is sufficiently detached from national jurisdictions through its establishment and its institutional design” (Coracini & Trahan, 2022). and that the enforcement of offenses under customary international law adequately represents the collective intent of the international community. As was previously mentioned, the crime of aggression has an undisputed standing under customary international law. However, many people, believe that the Rome Statute definition of the crime must be adopted by the tribunal in order for international law to grow cohesively (McDougall, 2021, P. 43).

It may be argued that Ukraine already has the authority to prosecute any of the individuals it has identified who do not fit the leadership criteria of the Rome Statute; the question of immunity may primarily concern these latter suspects. Because of this, the analysis in this section will primarily focus on the nature and possible mechanisms of the tribunal's establishment, which, as previously said, would be rooted in Ukraine's jurisdiction as the aggrieved state. How, therefore, would such a tribunal be established?

3.1- Establishment by Treaty at the UNGA's Request:

To satisfy the first requirement, one possible approach to establishing a tribunal would be through a bilateral treaty or agreement—particularly one concluded between Ukraine and an international entity such as the United Nations, the European Union, or the Council of Europe. Under the UN Charter, the General Assembly holds “residual responsibilities” in matters relating to international peace and security, which could serve as a legal basis for such an initiative (United Nations, art 11). Some experts suggest that such a tribunal could be initiated through a General Assembly resolution directing the UN Secretary-General to negotiate an agreement with Ukraine under the *Uniting for Peace* mechanism. There is precedent for establishing a tribunal through a treaty between the UN and the affected state—for example, the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC). Both of these tribunals were created with the

consent of the states involved and were intended to prosecute individuals over whom those states already had jurisdiction, typically their own nationals—none of whom were still in office at the time of prosecution. However, it is crucial to note that both were not fully international bodies but rather “internationalized” or hybrid tribunals. A prominent example is former Liberian President Charles Taylor, who was indicted by the SCSL while still in office but was only prosecuted after stepping down, meaning he was no longer shielded by personal immunity at the time of his trial (Kreicker, 2017, PP. 675-703). This is particularly significant given the longstanding controversy in international law over prosecuting sitting heads of state. Thus, although the UN General Assembly does have the authority to authorize the creation of a tribunal through a treaty, such a tribunal would still depend on the cooperation and participation of states—something that has not always been guaranteed in past efforts.

As an alternative, the UN General Assembly could endorse or recommend that a regional organization—such as the European Union or the Council of Europe—take the initiative in establishing such a tribunal (Goldstone & Khalfaoui, 2023). Article 28A(1)(14) of the Malabo Protocol, which extends the jurisdiction of the proposed African Court of Justice and Human Rights to include the crime of aggression, provides a precedent for a regional tribunal having authority over this specific offense (Sayapin, 2019, PP. 314- 335). In this scenario, Ukraine would need to enter directly into a founding treaty with the regional organization—be it the EU or the Council of Europe. This approach could be referred to as the “General Assembly Model,” as it involves the UN General Assembly not only endorsing but actively proposing the creation of a tribunal through an international treaty prior to its establishment. Since a UNGA resolution can be seen as “reflecting the will of the international community as a whole,” this model may also help satisfy the second requirement mentioned earlier. However, the same political sensitivities that previously limited the ICC’s jurisdiction over the crime of aggression may lead some states to hesitate, fearing the precedent such a tribunal could establish. Still, the most pressing question is not about the model’s legal foundations or political implications—but rather whether there is sufficient political will, even



within the General Assembly itself, to adopt such a resolution. Introducing a resolution without securing sufficient support could, in fact, undermine the prospects for establishing a special tribunal—and more broadly, the pursuit of accountability for the crime of aggression. Such a move could signal that a significant segment of the international community is unwilling to uphold justice even in the face of what is widely regarded as one of the most serious instances of aggression since the founding of the United Nations. It may also inadvertently imply that if the crime of aggression is not addressed in this case, it may never be meaningfully prosecuted at all.

3.2- Establishment by Treaty via a Regional Organization in Europe:

A second option would be to establish the tribunal independently at the regional level in Europe, drawing authority from the founding instruments of regional organizations rather than from the UN Charter. This means that both the European Union and the Council of Europe could potentially create such a tribunal on their own. Specifically, the European Union could do so under its foreign and security policy framework, provided that “the powers of the Union. There is precedent for this type of approach, as demonstrated by the EU’s creation of the Kosovo Specialist Chambers through a treaty with Kosovo, the concerned state. This shows that the EU has the necessary institutional flexibility to establish such a tribunal under its foreign and security policy framework. In contrast, the Council of Europe has a more limited scope. It has stated that “matters relating to national defense do not fall within” its mandate, as its primary objective is “to achieve a greater unity among its members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress” (Council of Europe, 1949, art 1). However, some experts argue that even if such a tribunal were created through this route, it would not be considered *ultra vires*—so long as it is viewed through the lens of promoting accountability for international crimes, combating impunity, and ensuring full reparations for the harm caused by the offense. In fact, the Council of Europe’s Parliamentary Assembly has previously called for the creation of an *ad hoc* international criminal tribunal. However, even if established “on the

basis of a multilateral treaty,” it would most likely involve Ukraine and member states of the Council of Europe (Pociej, 2022, P. 15), The rapporteur of the Council of Europe’s Committee on Legal Affairs and Human Rights has also advocated for the creation of such a tribunal. Furthermore, the European Parliament has already passed a resolution formally endorsing the need to establish a special tribunal. The European Commission has likewise announced that Eurojust will support the establishment of the International Centre for the Prosecution of the Crime of Aggression (ICPA) in The Hague. The European Union could potentially expand this initiative into a fully functioning court. Given that both the European Union and the Council of Europe are regional organizations independent of the United Nations, there would be no requirement to seek prior approval from the UN General Assembly. Accordingly, this approach can be referred to as the “Regional Model”.

One critique of the purely “Regional Model” is that such a tribunal would, by its nature, reflect regional consensus rather than the collective will of the “international community as a whole.” This concern is particularly relevant if the tribunal were established solely by the 27 EU member states. However, the concern might be less pronounced if the Council of Europe were the driving force, given its broader membership of 46 states, which encompass a wider diversity of legal traditions and affiliations across political and military alliances (Heller, 2022). For this reason, even though a UN General Assembly resolution would not be a formal requirement in either scenario, its adoption following the unilateral action of a regional organization to establish a tribunal would carry significant political weight. In fact, the existence of a regionally established tribunal could influence voting dynamics within the General Assembly—particularly among states concerned about the financial implications of such a body or those who might prefer amending the Rome Statute to create a more universally applicable precedent. Moreover, even if the tribunal were created entirely through regional means, it could still help satisfy the second requirement mentioned earlier—especially if the founding treaty allowed for universal accession, either as an alternative to, or in combination with, UNGA endorsement. Since none of the current proposals would impose a legal obligation on non-Member States to



cooperate, making the treaty open to universal accession could be vital for the tribunal's effective functioning. Given that the most severe consequences of the aggression are being experienced across Europe, a regional court would undoubtedly serve a clear purpose. Such a regional initiative would also play a crucial role in restoring European stability, sending a strong signal that European states and their regional partners remain firmly committed to accountability and the rule of law—and that further acts of aggression threatening regional security will not be tolerated. Still, regardless of which region is most directly impacted, it is equally important—at a political level—to reaffirm that the crime of aggression constitutes a threat to global peace and security. If a UN General Assembly resolution can be achieved, whether in advance or retrospectively, it could serve this purpose. In fact, such a resolution might emphasize that while global accountability is essential, priority should be given to regional solutions where regional institutions are willing and equipped to act, as is the case here.

3.3- Limited Multilateral Treaty Creation:

The third proposed option is the creation of the tribunal through a multilateral treaty between Ukraine and other “willing” states—referred to here as the “Multilateral Treaty Model.” The primary concern with this model is the issue of immunity. Advocates often point to the International Military Tribunal (IMT) at Nuremberg as precedent, arguing that even a tribunal established by a limited number of states can override immunity. However, this comparison is flawed. The IMT was established by the Allied powers in their capacity as occupying forces, and the Allied Control Council functioned as the *de facto* government of Germany. As such, it held the legal authority to waive immunity for Nazi officials—an authority that would not exist under a treaty-based model among sovereign states today (Anderson, 2022). It is highly unlikely that the governments of Russia or Belarus would agree to waive the immunities of their leaders—at least not under current circumstances. While some may argue that such immunities do not apply in light of Ukraine's rights to self-defense and self-help, a tribunal created through a limited multilateral treaty would likely fall short of meeting the second key requirement: that it “sufficiently reflect the will of the

international community as a whole.” More importantly, recognizing that a small group of states can unilaterally establish a tribunal capable of disregarding head-of-state immunity sets a troubling precedent. Such a move could be easily misused or politicized in the future, ultimately weakening the principle that the crime of aggression is a grave offense governed by international justice.

3.4- A Globalized Group of Chambers:

A fourth option under consideration is the creation of internationalized chambers within Ukraine’s domestic legal system—often referred to as the “Internationalized” or “Hybrid” model. Unlike the first three models, which focus primarily on the legal authority and process for establishing a tribunal—such as a limited multilateral treaty, a bilateral agreement between Ukraine and a regional body, or a UN-Ukraine treaty endorsed by the General Assembly—this approach primarily concerns the institutional design and nature of the tribunal itself. It envisions a structure embedded within the Ukrainian judicial system but incorporating international elements, resembling an ICC-style court: an independent body with supranational features, yet operating within the framework of national jurisdiction (Lüder, 2022, PP. 79- 92). This model would involve the use of foreign judges, prosecutors, and legal personnel, and the application of international law—effectively creating a “hybrid” or “internationalized” tribunal, for which there is extensive precedent in international criminal justice. A hybrid or internationalized tribunal—often referred to as High, Specialist, or Extraordinary Chambers—would not only be embedded within Ukraine’s domestic legal system but would also draw on the expertise of international judges and prosecutors integrated into the court. These officials would apply international law, either independently or alongside Ukrainian domestic law. Notably, some states appear to be leaning toward this model as a preferred path forward (Chambers and Meyer, 2023), especially the G7. Moreover, a recent survey of Ukrainians indicated that a hybrid tribunal would be their preferred option. Notably, 93% of respondents expressed a preference for such a court to have jurisdiction not only over the crime of aggression but also over other core international crimes, including war crimes, crimes against humanity, and genocide. Ukraine’s domestic legal system alone is not



equipped to manage the sheer volume of international crimes currently under investigation. For this reason, Ukraine's international partners should strongly consider investing in the capacity-building and support of its domestic judicial institutions. One proposed approach involves the establishment of a hybrid tribunal specifically tasked with addressing war crimes, crimes against humanity, and genocide—designed to operate alongside the ICC and any potential tribunal for the crime of aggression (Scharf et al, 2022) (Scharf et al, 2023). However, if the aim is to close an accountability gap, the proposed tribunal's jurisdiction should be complementary to that of the ICC, rather than duplicative.

The idea of a hybrid court to address the crime of aggression has, to date, been firmly rejected by the Ukrainian government, several legal experts, and smaller European states that belong to the “core group” of countries—an alliance broader than, but including, the G7—advocating for the creation of a tribunal. Critics of the hybrid model argue instead in favor of establishing “a fully international tribunal” through the United Nations General Assembly. This position assumes that a UN-backed tribunal would be the legally superior option—provided, of course, that it is politically achievable. However, many of the tribunals often cited as precedents for a UN General Assembly-endorsed “international” court—such as the ECCC and the SCSL—were, in reality, hybrid or internationalized courts, featuring structural links to the domestic legal systems of the states concerned. While one may reasonably prefer the political optics of a tribunal created under UN auspices rather than by a regional body like the EU or the Council of Europe, critics should not be too quick to dismiss the establishment of what would, in essence, be a functionally equivalent tribunal—especially if created under the legitimate authority of a European institution—when an UN-led option remains, as of now, politically unfeasible.

Ultimately, the primary obstacle to this proposal lies in its potential incompatibility with the Ukrainian Constitution—specifically Article 125, which explicitly states that “the establishment of extraordinary and special courts shall not be permitted”. In addition, Ukraine's Constitution cannot be amended while the country remains under martial law or a state of emergency, further

complicating the feasibility of this proposal at the present time (Komarov & Hathaway, 2022). Some have pointed to the creation of the High Anti-Corruption Court of Ukraine in 2019 as a potential precedent, particularly in light of legislative developments in May 2022, when the Verkhovna Rada expanded the court's authority to include issuing orders to seize the property of specific individuals and legal entities linked to the ongoing military aggression by the Russian Federation against Ukraine (Olekhoy & Ilchenko, 2022). Others have argued that the constitutional prohibition likely would not extend to an internationalized domestic court established through legislative means. According to Ukrainian judicial experts, the intent behind this provision is to bar temporary courts set up by executive authority, rather than those created through proper legislative procedures (Scharf, 2023). It is debatable to what extent the High Anti-Corruption Court serves as a viable precedent. While it features international "advisors," it notably lacks international judges or prosecutors—precisely because such arrangements are arguably barred by Article 125 of the Ukrainian Constitution. This raises legitimate concerns about whether a more robustly internationalized tribunal could be established without running afoul of existing constitutional constraints.

If the constitutional obstacle could be overcome, a hybrid chamber system would, represent a highly effective—if not optimal—solution. This would be especially true if such a tribunal were:

- Supported by a competent international or regional body (e.g., the UN, EU, or Council of Europe);
- Grounded in international law, ideally incorporating the ICC's substantive definition of the crime of aggression;
- And crucially, if it included international judges and prosecutors, not just "advisors."

These elements would be vital to securing both the tribunal's legitimacy and its international character, especially given the potential challenge of prosecuting high-ranking Russian officials in a court rooted solely in Ukrainian jurisdiction. Such an internationalized structure may also be essential to overcoming head-of-state immunity barriers, since it would more clearly reflect the will of the broader international community.



In terms of legal architecture, the best approach would be to establish the court via a bilateral treaty between Ukraine and the international or regional institution. This method has the benefit of legal clarity and institutional commitment.

Moreover, non-member states of the founding body, such as the United States in the case of a European-led court, could still play a meaningful role. This could take the form of:

- Joining the treaty directly;
- Providing logistical or financial support;
- Or even entering into side agreements, as the U.S. has done with the Kosovo Specialist Chambers, which it funds and supports despite not being a member of the EU.

Such flexibility could help build broader coalitions of support, even in the absence of full consensus at the UN level (Alessandra, 2023, PP. 1- 17).

However, there may be problems with coordination, jurisdictional overlap, and even fragmentation of international criminal justice if such a tribunal operates alongside the International Criminal Court.

Conclusion:

The Russia–Ukraine conflict has made it evident that one of the most challenging issues facing the international legal system today is the crime of aggression. Even if legal structures and standards have evolved, they are insufficient on their own to bring about justice in the absence of strong enforcement mechanisms. Due to political and legal restrictions, the International Criminal Court (ICC) has been unable to prosecute Russian officials for the crime of aggression. This has exposed a significant weakness in the international accountability system, endangering the rule of law and fostering continued impunity.

However, the ICC's lack of jurisdiction over crimes of aggression exposes a fundamental flaw in the current legal system, even though it has been able to exercise its authority over war crimes and crimes against humanity. In order to guarantee responsibility, give victims justice, and discourage further breaches of international peace and security, proposals for the creation of a special international

tribunal with explicit jurisdiction over the crime of aggression have intensified.

But there are also significant issues with the selectivity of international criminal justice brought up by this circumstance. Perceptions of an imbalance in the application of international law may arise from the issue of arrest warrants against Russian officials without comparable scrutiny of Ukrainian players. Furthermore, the political circumstances that continue to affect the operation of international justice are reflected in Ukraine's declaration under Article 124 of the Rome Statute, which temporarily excludes the Court's jurisdiction over war crimes despite recognizing authority under Article 12(3).

In the end, the crisis in Ukraine is a crucial test of the legitimacy and efficacy of the international legal system as a whole, in addition to being a regional problem. Either changing the ICC's jurisdictional structure or creating supplementary systems that can guarantee accountability for all major international crimes, including the crime of aggression, are necessary to address these issues. The possibility of selective justice and ongoing impunity will continue to be a major worry in the absence of such initiatives.

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