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PROSECUTION OF THE CRIME OF AGGRESSION IN INTERNATIONAL AND UKRAINIAN JURISDICTION: CHALLENGES AND PROSPECTS

Abstract: *This article explores the genesis of Russian aggression against Ukraine, tracing its origins from the unprovoked illegal invasion initiated in February 2014 to the full-scale invasion in 2022. Despite initial international responses, the lack of significant sanctions against Russia or efforts to prosecute its leaders for the crime of aggression persisted until the 2022 invasion. The international community's condemnation of the brutality accompanying this invasion underscored the need for accountability mechanisms within the existing international legal framework. However, limitations in prosecuting aggression within the International Criminal Court, coupled with challenges in amending the Rome Statute, have led to proposals for an ad hoc mechanism to address aggression gaining traction. These proposals highlight the urgency of holding aggressors accountable and safeguarding victims' rights. Concurrently, Ukrainian jurisdiction incorporates the concept of the crime of aggression in its Criminal Code but lacks clarity on essential elements necessary for prosecuting such crimes, including the leadership element. An analysis of court verdicts reveals discrepancies in interpreting the crime of aggression, emphasising the necessity of adopting a unified approach that is consistent with international law. The article underscores the critical importance of enhancing legal frameworks, building capacity and encouraging international cooperation to ensure accountability for the crime of aggression and to preserve the rule of law.*

Keywords: crime of aggression, criminal law of Ukraine, domestic jurisdiction, ICC, international criminal law, Russian aggression against Ukraine, Special Tribunal for the Crime of Aggression

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1. THE GENESIS OF RUSSIAN AGGRESSION AGAINST UKRAINE

On 24 February 2022, Russia began an unprovoked, full-scale invasion and shelling of the territory of Ukraine. This was another phase of the international armed conflict that started with the act of Russian aggression against Ukraine in February 2014,¹ leading to the occupation and attempted annexation of the Autonomous Republic of Crimea and the city of Sevastopol, which continued with the occupation of parts of the Donetsk and Luhansk regions. It also ended with the Russian Federation's attempted annexation on the basis of the decisions of 21 February and 29 September 2022 on the status of the Donetsk, Kherson, Luhansk and Zaporizhzhia regions of Ukraine,² which proved to be the largest attempted annexation in Europe since World War II. In fact, the conflicts in Crimea and Donbas between 2014 and 2022 were not separate – it was and still is the armed conflict between Russia and Ukraine, a continuous act of aggression for which the Russian state should be held accountable and its individual leaders held criminally responsible. Since 24 February 2022, Belarus³ – which allowed its territory to be used in violation of Art. 3(f) of UN General Assembly (UNGA) Resolution 3314 (XXIX)⁴ – has also committed the act of aggression against Ukraine.

At the end of March 2014, UN members reaffirmed the territorial integrity of Ukraine in a UNGA resolution,⁵ but did not use the term “aggression”. European countries reacted more appropriately⁶ in 2014, especially those with bitter common historical memories.⁷ Nevertheless, the European and global response was “soft”:⁸ it did not include substantial economic sanctions against Russia or attempts to

¹ E.g. Parliamentary Assembly of the Council of Europe, Resolution 2132 (2016): *Political consequences of the Russian aggression in Ukraine*, available at: <https://tinyurl.com/4hppmhxr> (accessed 30 August 2024); ECtHR, *Ukraine v. Russia (re Crimea)* (App. No. 20958/14 and 38334/18), 14 December 2020; ECtHR, *Ukraine and the Netherlands v. Russia* (App. No. 43800/14, 8019/16 and 28525/20), 30 November 2022; Report on Preliminary Examination Activities 2020, International Criminal Court, Den Haag: 2020, available at: <https://tinyurl.com/54ctx47z> (accessed 30 August 2024).

² E.g. *Putin priznal “nezavisimost” Hersonskoj i Zaporozhskoj oblastej Ukrainy. Èto formal'nost' dlâ ih ann* [Putin recognized the “independence” of the Kherson and Zaporozhye regions of Ukraine. This is a formality for their annexation], BBC News Russia, 29 September 2022, available at: <https://www.bbc.com/russian/news-63084494> (accessed 30 August 2024).

³ UNGA resolution of 2 March 2022, *Aggression against Ukraine*, Doc. A/RES/ES-11/1.

⁴ UNGA resolution of 14 December 1974, *Definition of aggression*, Doc. A/RES/3314.

⁵ UNGA resolution of 27 March 2014, *Territorial integrity of Ukraine*, Doc. A/RES/68/262.

⁶ Resolution 2014/2627 (RSP) of 13 March 2014 on the Invasion of Ukraine by Russia.

⁷ See S. Lau, “*We Told you So!*” *How the West Didn't Listen to the Countries that Know Russia Best*, Politico, 9 March 2022, available at: <https://www.politico.eu/article/western-europe-listen-to-the-baltic-countries-that-know-russia-best-ukraine-poland/> (accessed 30 August 2024).

⁸ For more on this subject, see K. Kruk, *The Crimean Factor: How the European Union Reacted to Russia's Annexation of Crimea*, Warsaw Institute Review, 7 May 2019, available at: <https://warsawinstitute.org/crimean-factor-european-union-reacted-russias-annexation-crimea/> (accessed 30 August 2024).

prosecute Russian leaders for the crime of aggression. It was only after the full-scale invasion of Ukraine in 2022 – accompanied by massive, brutal violations of international humanitarian law and human rights which shocked the international community – that countries responded immediately and used the word “aggression”: in March 2022 a UNGA resolution condemning “the aggression by the Russian Federation against Ukraine”⁹ was adopted by 141 countries (with 5 votes against and a total of 193). In November 2022 the UNGA also determined that Ukraine is entitled to war reparations¹⁰ and in February 2023 that the need to ensure justice for all victims and to prevent future crimes are the highest priorities.¹¹ Almost all regional international organisations (the Council of Europe (CoE),¹² European Union (EU),¹³ Organization for Security and Co-operation in Europe (OSCE),¹⁴ and North Atlantic Treaty Organization (NATO)¹⁵) recognised and condemned the Russian aggression, and each of these statements is evidence for future proceedings on the crime of aggression.

2. THE ACCOUNTABILITY GAP IN THE INTERNATIONAL JUSTICE ARCHITECTURE

Since the onset of the Russian invasion in 2014, Ukrainian authorities have diligently pursued legal avenues within various international judicial bodies to seek justice against Russia. These efforts have included engaging institutions such as the International Court of Justice,¹⁶ the European Court of Human Rights (ECtHR),¹⁷ the International Tribunal for the Law of the Sea,¹⁸ the Permanent Court

⁹ UNGA resolution of 2 March 2022, *Aggression against Ukraine*, Doc. A/RES/ES-11/1.

¹⁰ UNGA resolution of 14 November 2022, *Furtherance of remedy and reparation for aggression against Ukraine*, Doc. A/RES/ES-11/5.

¹¹ UNGA resolution of 16 February 2023, *Principles of the Charter of the United Nations underlying a comprehensive, just and lasting peace in Ukraine*, Doc. A/RES/ES-11/6.

¹² Parliamentary Assembly of the Council of Europe, Resolution 2433 (2022): *Consequences of the Russian Federation’s continued aggression against Ukraine: Role and response of the Council of Europe*.

¹³ Joint Motion for a Resolution 2022/3017(RSP) of 18 January 2023 on the Establishment of a Tribunal on the Crime of Aggression Against Ukraine.

¹⁴ Resolution of 2–6 July 2022 on the Russian Federation’s War of Aggression Against Ukraine and its People, and its Threat to Security Across the OSCE Region, AS (22) D E.

¹⁵ Declaration on Standing with Ukraine, Vilnius, 30 May 2022.

¹⁶ ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Judgment, 8 November 2019, ICJ Rep 2019; ICJ, *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Judgment, 2 February 2024, ICJ Rep 2024.

¹⁷ ECtHR, *Ukraine v. Russia (re Crimea)* (App. No. 20958/14 and 38334/18), 14 December 2020; ECtHR, *Ukraine and the Netherlands v. Russia* (App. No. 43800/14, 8019/16 and 28525/20), 30 November 2022.

¹⁸ E.g. ITLOS, *Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation)*, Provisional Measures, No. 26 (2019).

of Arbitration¹⁹ and others. However, none of these courts had the jurisdiction to decide on the act of Russian aggression.

Although not a party to the Rome Statute, Ukraine has accepted the jurisdiction of the International Criminal Court (ICC) on an ad hoc basis for crimes committed since 21 November 2013.²⁰ Following the commencement of the full-scale invasion, the ICC Prosecutor initiated an investigation. On 17 March 2023, the ICC issued arrest warrants²¹ for Russian President Putin and Children's Ombudsman Maria Lvova-Belova, in connection with alleged war crimes committed in Ukraine, particularly the deportation of children.²² According to Art. 27 of the Rome Statute, Putin does not enjoy immunity from prosecution by the ICC, even as a sitting president.

The issuance of these arrest warrants is of immense significance: it mandates the 124 States Parties to the ICC to arrest the President of Russia. Other states may take similar action, although they are not obliged to do so (Art. 87(5)). Henceforth, President Putin will be in the humiliating position of seeking guarantees against arrest every time he travels abroad, if he dares to leave Russia at all.²³

The ICC lacks jurisdiction to prosecute the crime of aggression in this particular situation due to a political compromise that limits the ICC's jurisdiction over the crime of aggression compared to other crimes.²⁴ According to Art. 15*bis*(5), for the ICC to assume jurisdiction over the crime of aggression, either Russia or Belarus must be a party to the Rome Statute, which they are not at present. Furthermore, referral by the UN Security Council is unfeasible as long as Putin maintains his presidency and Russia its veto power.²⁵

¹⁹ E.g. PCA, *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation)*, No. 2017-06.

²⁰ See ICC, *Situation in Ukraine*, ICC-01/22, 2 March 2022, available at: <https://www.icc-cpi.int/situations/ukraine>.

²¹ *Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova*, International Criminal Court, 17 March 2023, available at: <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and> (accessed 30 August 2024).

²² O. Senatorova, *Deportation von Ukrainern seit Beginn der russischen Invasion – völkerrechtliche Einordnung und Empfehlungen*, Ukraine verstehen, Analyse, 17 March 2023, available at: <https://tinyurl.com/2nfrdekj> (accessed 30 August 2024).

²³ O. Senatorova, *Bringing Aggressors to Justice*, Deutsche Welle, 10 May 2023, available at: https://issuu.com/deutsche-welle/docs/dw-weltzeit_2023 (accessed 30 August 2024).

²⁴ See C. Kreß, *On the Activation of ICC Jurisdiction Over the Crime of Aggression*, 16(1) *Journal of International Criminal Justice* 1 (2018), pp. 1–17.

²⁵ See T. D. Grant, *Expelling Russia From the UN Security Council – A How-to Guide*, CEPA, 26 September 2022, available at: <https://cepa.org/article/expelling-russia-from-the-un-security-council-a-how-to-guide/> (accessed 30 August 2024); L. D. Johnson, *United Nations Response Options to Russia's Aggression: Opportunities and Rabbit Holes*, Just Security, 1 March 2022, available at: <https://tinyurl.com/wfpwa54x> (accessed 30 August 2024).

In March 2022, the members of the Global Institute for the Prevention of Aggression (GIPA) proposed²⁶ a change in the jurisdictional regime of the crime of aggression, and the same call was made by European parliamentarians:²⁷ to provide effective support to the ICC and to align the jurisdiction on the crime of aggression with the other international crimes.²⁸ This initiative has garnered strong support from the Court itself. Various proposals²⁹ have been put forth, such as aligning jurisdiction over the crime of aggression with that of other crimes or allowing the UNGA to refer situations directly to the ICC, bypassing the UN Security Council.

The process of amending the Rome Statute to address these issues is essential, but will be lengthy and will require considerable political will. Under Art. 121(4), seven eighths of the 124 Member States must ratify such amendments. This delay means that the victims of Russian aggression may have to wait decades for justice, with retroactive application likely to be no earlier than 17 July 2018, when jurisdiction over the crime of aggression was activated.

3. REASONS FOR AN INTERNATIONAL *AD HOC* MECHANISM TO FILL THE GAP

Given the challenges outlined above, it is imperative to pursue in parallel with the amendments to the Rome Statute the creation of a functional accountability mechanism to address the crime of aggression committed by Putin and his entourage. Merely prosecuting them for war crimes at the ICC is insufficient for a number of reasons.

Firstly, the crime of aggression, described as “a breeding ground for the most atrocious crimes”,³⁰ is a starting point for a wide range of serious violations, includ-

²⁶ Statement on Russia’s Invasion of Ukraine: A Crime of Aggression of 24 March 2022, *The Need to Amend the Crime of Aggression’s Jurisdictional Regime*, available at: <https://tinyurl.com/mr3ep8n7> (accessed 30 August 2024).

²⁷ Appeal of MEPs in support of the ICC Prosecutor to proceed with opening an investigation into the situation in Ukraine and to the States Parties to the Rome Statute of the ICC – including all EU Member States – to provide effective support to the ICC and align the jurisdiction on the crime of aggression to the other international crimes, Brussels, 4 March 2022, available at: <https://www.pgaction.org/pdf/2022/mep-ukraine-appeal.pdf> (accessed 30 August 2024). See also *Proposal to Amend the Rome Statute Kampala Amendment on the Crime of Aggression*, Parliamentarians for Global Action, 20 February 2023, available at: <https://tinyurl.com/3v4unmyd> (accessed 30 August 2024).

²⁸ Appeal of MEPs in support of the ICC Prosecutor to proceed with opening an investigation into the situation in Ukraine and to the States Parties to the Rome Statute of the ICC – including all EU Member States – to provide effective support to the ICC and align the jurisdiction on the crime of aggression to the other international crimes, Brussels, 4 March 2022, available at: <https://www.pgaction.org/pdf/2022/mep-ukraine-appeal.pdf> (accessed 30 August 2024).

²⁹ C. Kress, S. Hobe, A. Nußberger, *The Ukraine War and the Crime of Aggression: How to Fill the Gaps in the International Legal System*, Just Security, 23 January 2023, available at: <https://tinyurl.com/26hdw6e2> (accessed 30 August 2024).

³⁰ B.B. Ferencz, *Can Aggression Be Deterred by Law?*, 11 Pace International Law Review 341 (1999).

ing conflict-related sexual violence, torture, deportation, war crimes involving starvation and environmental destruction. This crime not only infringes upon the right to life,³¹ but also inflicts suffering on nations beyond those directly involved in the conflict.³² Addressing aggression demands swift action to finally enable both individual and general prevention, signaling an end to the tolerance of impunity for violating the Grundnorm³³ of post-UN international law.

Secondly, without creating special international jurisdiction to prosecute the crime of aggression, the group of Russian leaders who committed the crime of aggression does not necessarily overlap with the circle of war criminals (allegedly, such Troika members as Putin, Lavrov and Mishustin who allegedly committed the crime of aggression but not the war crimes), which means that without a mechanism to prosecute the crime of aggression, its perpetrators may enjoy impunity indefinitely.

Thirdly, the prohibition of aggression is the primary peremptory norm, mentioned first in the list of *jus cogens* violations³⁴ and binding on all States (obligations *erga omnes*); they are required to respond and hold aggressors accountable.³⁵ This means that every State has an obligation to hold Russia accountable under international law – to make the country end its violations and ensure reparation, as well as to hold its leaders criminally accountable.³⁶ If there is both a prohibition

³¹ HRC, *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, 3 September 2019, CCPR/C/GC/36.

³² *Russian Federation Invasion of Ukraine Bringing New Bloodshed, Suffering, Global Food Insecurity, Instability, Secretary-Tells Global Crisis Response Group*, United Nations, 8 June 2022, available at: <https://press.un.org/en/2022/sgsm21314.doc.htm> (accessed 30 August 2024).

³³ The term originally comes from Hans Kelsen's concept of "basic norm" or "ground rule" that underpins an international legal system (see H. Kelsen, *General Theory of Law and State*, The Lawbook Exchange, Clark: 1999). The term can now be applied to the first in the non-exhaustive list of *jus cogens* norms of international law – the prohibition of aggression – see Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_14_2022.pdf (accessed 30 August 2024).

³⁴ Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_14_2022.pdf (accessed 30 August 2024). See also *Analytical Guide to the Work of the International Law Commission, Peremptory Norms of General International Law (Jus Cogens)*, International Law Commission, available at: https://legal.un.org/ilc/guide/1_14.shtml (accessed 30 August 2024).

³⁵ See A. Hartig, *Making Aggression a Crime Under Domestic Law: On the Legislative Implementation of Article 8bis of the ICC Statute*, T.M.C. Asser Press, Hague: 2023, pp. 376, 379–380, 474. See also M. Ragazzi, *The Concept of International Obligations Erga Omnes*, Oxford University Press, Oxford: 2010.

³⁶ E.g. Austria and Liechtenstein clarified that it is consistent with the spirit of the UN Charter that the enacted criminal provisions cover acts of aggression against their State and other States. See Austrian Government *Erläuterungen der Regierungsvorlage*, ErläutRV 689 BlgNR XXV, 2015, p. 44; Government of Liechtenstein, *Bericht und Antrag an den Landtag des Fürstentums Liechtenstein betreffend die Abänderung des Strafgesetzbuches, der Strafprozessordnung, des Gesetzes über die Zusammenarbeit mit dem Internationalen Strafgerichtshof und anderen Internationalen Gerichten sowie des Naturschutzgesetzes*, No. 90/2018, 9 October 2018, p. 263.

of aggression and an *erga omnes* obligation, but not yet an effective mechanism for prosecuting those who enjoy personal immunities (Troika members³⁷), then this mechanism – namely an international tribunal – should be created in lieu of long sophisticated discussions about the lack of clear secondary rules for adjudication.

Fourthly, and most importantly, the group of victims of the crime of aggression³⁸ is by no means the same as that of victims of other international crimes. The aggression destroys the entire human rights architecture of the country against which it is unleashed, causing direct, indirect and cascading damage in all spheres of life: thousands of Ukrainians, both combatants and civilians,³⁹ have lost their lives and health – sometimes as a result of attacks that are lawful according to international humanitarian law or legitimate retaliatory attacks by the Ukrainian side (*e.g.* air defence) – and millions have lost and continue to lose their jobs, housing, education and other social, economic and environmental rights.

4. TAILORING THE MODEL OF THE SPECIAL TRIBUNAL FOR THE CRIME OF AGGRESSION AGAINST UKRAINE

Immediately after the full-scale invasion in 2022, the idea to create a special tribunal to prosecute Russian leadership for the crime of aggression was born.⁴⁰ There were many different proposals from outstanding international and Ukrainian lawyers, politicians and non-governmental organisations⁴¹ which were supported by the EU – in particular the European Parliament⁴² – and by Parliamentary

³⁷ See *Immunities and a Special Tribunal for the Crime of Aggression Against Ukraine*, International Renaissance Foundation, Kyiv: 2023, available at: <https://tinyurl.com/ax6vbrbh> (accessed 30 August 2024).

³⁸ O. Senatorova, *Welche Rolle ein "Sondertribunal zum Verbrechen der Aggression gegen die Ukraine" für die Opfer des Krieges spielen könnte*, 272 *Aus Ukraine-Analysen* 7 (2022), pp. 7–12, available at: <https://laender-analysen.de/ukraine-analysen/autoren/oksana-senatorova> (accessed 30 August 2024).

³⁹ Ten thousand civilians, including more than 560 children, have been killed and over 18,500 have been injured since Russia launched its a full-scale armed attack against Ukraine on 24 February 2022 (K. Janowski, *Civilian Deaths In Ukraine War Top 10,000, UN Says*, United Nations Ukraine, 21 November 2023, available at: <https://ukraine.un.org/en/253322-civilian-deaths-ukraine-war-top-10000-un-says> (accessed 30 August 2024)).

⁴⁰ P. Sands, *Russian President's Use of Military Force is a Crime of Aggression*, Financial Times, 1 March 2022, available at: <https://tinyurl.com/2mstfkwj> (accessed 30 August 2024).

⁴¹ See D.M. Crane, *Considerations for the Setting Up of the Special Tribunal for Ukraine on the Crime of Aggression*, Global Accountability Network, July 2022, available at: <https://tinyurl.com/mwsyd49m> (accessed 30 August 2024).

⁴² Resolution 2022/3017(RSP) of 19 January 2023 on the Establishment of a Tribunal on the Crime of Aggression Against Ukraine.

Assemblies of the CoE,⁴³ the OSCE⁴⁴ and NATO⁴⁵ in their resolutions and in-depth analysis⁴⁶ of regional international organisations, and were echoed in the reports of human rights institutions.⁴⁷ The coalition of states supporting the idea of establishing a Special Tribunal for the Crime of Aggression against Ukraine (the Core Group⁴⁸) is growing and currently includes 40 states.

On 3 July 2023 the International Centre for the Prosecution of the Crime of Aggression against Ukraine (ICPA),⁴⁹ embedded in the Joint Investigative Team, officially started operations in The Hague. Its main purpose is to enhance investigations into the crime of aggression by securing key evidence and facilitating the process of case-building at an early stage.

The Ukrainian President's Office and international partners were considering three models of a special tribunal⁵⁰ for the crime of Russian aggression against Ukraine. The first option is to establish it on the basis of an agreement between Ukraine and the UN, with the UNGA adopting a corresponding resolution. The second option for the Tribunal is on the basis of a multilateral, international open agreement between the States – the so-called “Nuremberg model”, although it is far from the same, at least because Russia has not yet been defeated, the crime of aggression is already well defined and the jurisdiction is to be complementary to the ICC (not exclusive). The third concept is an internationalised (hybrid) court, i.e. as part of the Ukrainian judicial system, with varying degrees of internationalisation, possibly located in Europe, etc. Supporters for this idea include Germany,⁵¹

⁴³ See Parliamentary Assembly of the Council of Europe, Resolution 2482 (2023): *Legal and Human Rights Aspects of the Russian Federation's Aggression Against Ukraine*, available at: <https://pace.coe.int/en/files/31620/html> (accessed 20 August 2024). See also Parliamentary Assembly of the Council of Europe, Report 15842 (2023): *Ensuring a just peace in Ukraine and lasting security in Europe*, available at: <https://pace.coe.int/en/files/33074/html> (accessed 30 August 2024).

⁴⁴ Resolution of 2–6 July 2022 on the Russian Federation's War of Aggression Against Ukraine and its People, and its Threat to Security Across the OSCE Region, AS (22) D E.

⁴⁵ Declaration on Standing with Ukraine, Vilnius, 30 May 2022.

⁴⁶ See O. Corten, V. Koutroulis, *Tribunal for the Crime of Aggression Against Ukraine: A Legal Assessment*, European Parliament, Strasbourg: 2022, available at: <https://tinyurl.com/2s4awayk> (accessed 30 August 2024).

⁴⁷ UNHRC, *Report of the Independent International Commission of Inquiry on Ukraine*, 15 March 2023, A/HRC/52/62.

⁴⁸ See *Joint Statement on Efforts to Establish a Tribunal on the Crime of Aggression Against Ukraine*, Ministry of Foreign Affairs of Ukraine, 9 May 2023, available at: <https://tinyurl.com/mn85w3s8> (accessed 30 August 2024).

⁴⁹ *International Centre for the Prosecution of the Crime of Aggression Against Ukraine* (Lectue at EuroJust), available at: <https://tinyurl.com/4uzh8tm3> (accessed 30 August 2024).

⁵⁰ See M. Shashkova, “*Putin and His Doppelgängers Must Be Tried at a War Crimes Tribunal*” – Deputy Head of Zelensky's Office, Kyiv Post, 16 March 2023, available at: <https://www.kyivpost.com/post/14386> (accessed 30 August 2024).

⁵¹ See M. Ghaedi, R. Romaniec, *Germany's Baerbock calls for special Ukraine tribunal at ICC*, Deutsche Welle, 16 January 2023, available at: <https://www.dw.com/en/germanys-baerbock-calls-for-special-ukraine-tribunal-at-icc/a-64408862> (accessed 30 August 2024).

the United Kingdom⁵² and the USA.⁵³ In this regard, Carrie McDougall's points that arguments based on the failure to prosecute earlier acts of aggression fall flat because they do not account for the fact that, until 2010, there was no consensus on the post-Charter definition of the crime, and that "Ukraine (unlike Syria and Yemen) is an enthusiastically cooperative partner."⁵⁴ Moreover, many countries are concerned that the hybrid (internationalised) model, which will essentially be a Ukrainian domestic court, will delay or even eliminate the prospect of bringing Russian and Belarusian Troika members to justice, as they will enjoy personal immunity before the domestic hybrid court.⁵⁵

5. PROSECUTION OF THE CRIME OF AGGRESSION UNDER UKRAINIAN JURISDICTION

The Criminal Code of Ukraine (CCU) uses the terms "aggression" or "aggressor" 52 times in its General⁵⁶ and Special Parts to define specific criminal offences or their consequences. Most of the articles of the CCU that use the term "aggression" or "aggressor" have been incorporated⁵⁷ since the beginning of the full-scale Russian invasion of Ukraine, and in fact have nothing to do with the crime of aggression per se. The one that criminalises aggression is Art. 437 ("Planning, preparation, initiation and waging of an aggressive war"), and its wording suggests that it dates back to the Nuremberg trials:

1. Planning, preparing or waging an aggressive war or war conflict, as well as participation in a conspiracy aimed at committing such actions is punishable by imprisonment for a term of seven to twelve years.

⁵² See *UK Joins Core Group Dedicated to Achieving Accountability for Russia's Aggression Against Ukraine*, Gov.UK, 20 January 2023, available at: <https://tinyurl.com/58663e2k> (accessed 30 August 2024).

⁵³ See *Ambassador Van Schaack's Remarks on the U.S. Proposal to Prosecute Russian Crimes of Aggression Remarks*, U.S. Department of State, 27 March 2023, available at: <https://www.state.gov/ambassador-van-schaacks-remarks/> (accessed 30 August 2024).

⁵⁴ C. McDougall, *The Imperative of Prosecuting Crimes of Aggression Committed Against Ukraine*, 28(2) *Journal of Conflict and Security Law* 203 (2023), pp. 228, 229.

⁵⁵ See *It is Only a Full-Fledged Tribunal That Will Allow Lifting the Immunity of the President, Prime Minister and Foreign Minister of Russia – Andriy Smyrnov*, President of Ukraine, 1 February 2024, available at: <https://tinyurl.com/3nmhdpk5> (accessed 30 August 2024).

⁵⁶ In the General Part, "aggression" is mentioned in the context of situations that exempt an act from criminal illegality – specifically, according to Art. 43(1) CCU, "the fulfilment of the duty to protect the motherland, independence and territorial integrity of Ukraine", with reference to "an act (...) aimed at repelling and deterring the armed aggression of the Russian Federation or the aggression of another country, if it caused damage to the life or health of the person committing such aggression" (incorporated on 15 March 2022).

⁵⁷ E.g. Public denial of armed aggression against Ukraine ("Collaborative activity" – Art. 111-1), Justification, recognition as legitimate, denial of the armed aggression of the Russian Federation against Ukraine or glorification of its participants (Art. 436-2).

2. Waging aggressive war or aggressive military operations is punishable by imprisonment for a term of ten to fifteen years.

There have been attempts to amend the CCU to domesticate international crimes since the beginning of the Russian aggression in 2014 (Draft Law No. 2689,⁵⁸ 2019) as well as since the full-scale invasion (Draft Law No. 7290,⁵⁹ 2022), but neither was enacted. Both proposed amendments to Art. 437, but the first one was to include a definition with the leadership component similar to that in Art. 8bis of the Rome Statute, and the last one would have only mentioned that this crime is a gross violation of the UN Charter.

There is no explicit element of leadership in Art. 437 CCU. Patrycja Grzebyk points out that only a few Eastern European nations, such as Croatia and Czechia, have integrated leadership clauses following the Rome Statute's ratification, whereas others allow for the prosecution of a broader range of individuals with control over state actions.⁶⁰ Nikola Hajdin noted that "Germany, Poland, Ukraine and other countries do not explicitly include the element of leadership in their criminal codes", but at the same time, he is sure that:

the crime of aggression is 'reserved' for prosecuting leaders who formulate or execute state policy and despite some states' reluctance to include the leadership element in their domestic legislations explicitly, any future prosecutions have to take the leadership requirement into consideration in line with customary international law.⁶¹

In our opinion, the phrase "planning, preparing or waging an aggressive war" in Art. 437 CCU is intended to refer to persons who are in a position to control or direct the political or military action of a state, and in no way to all the soldiers of the aggressor state who are not actually waging a war, but are merely participating in it on orders from above. Nevertheless, this formulation, without the concrete

⁵⁸ Draft Act on Amendments to Certain Legislative Acts of Ukraine on the Implementation of International Criminal and Humanitarian Law of 27 December 2019, No. 2689, available at: https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=67804 (accessed 30 August 2024).

⁵⁹ Draft Act on Amendments to the Criminal Code of Ukraine and the Criminal Procedure Code of Ukraine, of 15 March 2022, No. 7290, available at: https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=74105 (accessed 30 August 2024).

⁶⁰ P. Grzebyk, *Crime of Aggression Against Ukraine: The Role of Regional Customary Law*, 2021 (3) Journal of International Criminal Justice 435 (2023), pp. 435–459.

⁶¹ N. Hajdin, *The Leadership Clause in the Crime of Aggression and its Customary International Law Status*, Just Security, 17 March 2022, available at: <https://tinyurl.com/58nnw6vy> (accessed 30 August 2024).

element of leadership, opens the possibility of prosecuting a wider circle of those responsible for waging war.

According to the Prosecutor General's Office, 94 such crimes have been registered since the beginning of the large-scale Russian aggression against Ukraine (since 24 February 2002).⁶² At present, the “magistral” criminal case under Art. 437 CCU has been opened, involving 687 suspects.⁶³ The list includes ministers (defence and interior), members of parliament, military commanders, senior officials, heads of law enforcement agencies and instigators of war. Although this list of suspects does not include the leaders of the Troika due to their personal immunities, it demonstrates the *de facto* application of the leadership element.

The Unified State Register of Court Decisions⁶⁴ contains 20 verdicts delivered in cases where Art. 437 CCU is one of the elements of the qualification formula for the period from 27 February 2014 to 1 September 2023. The verdicts were delivered between 2015 and 2023. In ten cases there was a trial in which the accused participated and evidence of their guilt was fully examined; four sentences were pronounced in absentia, and six sentences were handed down in so-called “summary trials”, where the defendants pleaded guilty (in these cases, it is difficult to say whether there is an *actus reus*, as the evidence was not examined). The texts of all 20 court decisions do not mention a special subject (leadership element).

Overall, an analysis of the verdicts under Art. 437 CCU reveals different interpretations of the crime of aggression between national and international law, and a lack of understanding of the elements of the crime of aggression, rooted in customary international criminal law. For example, on 25 September 2015, the Dzerzhinskyy City Court of the Donetsk region convicted an individual of joining the terrorist organisation “Donetsk People's Republic”, acting as the “head of the rocket and artillery armament service” and supplying weapons and ammunition to members of the terrorist organisation. In another verdict of the same court, a convicted person acted as a scout for the reconnaissance company of the DPR terrorist organisation – observing the personnel of the Ukrainian armed forces and gathering information for hostile actions – and thereby committed the crime under Art. 437 CCU and other crimes.

⁶² See Homepage, Prosecutor General's Office, available at: <https://gp.gov.ua/> (accessed 30 August 2024).

⁶³ List of suspects in the main case of “24th February”, Prosecutor General's Office, available at: <https://gp.gov.ua/detectable> (accessed 30 August 2024).

⁶⁴ See Unified State Register of Court Decisions, available at: <https://reyestr.court.gov.ua/> (accessed 30 August 2024).

There have also been some high-profile cases, such as the Yanukovych case⁶⁵ and the Alexandrov and Yerofeyev case.⁶⁶ It was shown in both that there is a need to develop a unified approach to the definition of the crime of aggression, to bring it into line with international criminal law and to develop a consistent judicial practice. It is also essential to improve the knowledge and skills of law enforcement officials and judges in international criminal law and to better domesticate international crimes.

In its decision of 28 February 2024 (case no. 415/2182/20 (proceedings no. 13-15kc22)), the Grand Chamber of the Supreme Court, having considered the criminal proceedings on the cassation appeals of two persons convicted of crimes under Art. 437(2) CCU (planning, preparing, initiating and conducting an aggressive war), concluded that the acts defined in this Article may be committed by persons who, by virtue of their official authority or actual social position, are in a position to exercise effective control over or command political or military actions, and/or to significantly influence political, military, economic, financial, informational and other processes in their own country or abroad and/or to command certain areas of political or military actions. The planning, preparing and waging of an aggressive war or military conflict, participating in a conspiracy to commit such acts and conducting an aggressive war or aggressive military action require that the subjects have the relevant powers, resources in the areas of international relations, domestic policy, defence, industry, economy and finance or such a social position that allows them to influence the relevant decisions of authorised persons.⁶⁷ Thus, the Grand Chamber of the Supreme Court established the general practice of using the concept of a special subject in relation to the crime under Art. 437 CCU. Future national court practice will show how these guidelines are applied in specific decisions and whether they require further explanation.

CONCLUSION

The full-scale invasion of Ukrainian territory by Russia in 2022 marked a severe escalation in the ongoing international armed conflict initiated by Russian aggression in 2014. The ICC lacks jurisdiction to prosecute Russian and Belarusian leaders for the crime of aggression. Proposals to amend the Rome Statute would be time-consuming and face political hurdles. In light of these challenges, there is an urgent need to establish an ad hoc international tribunal to address the crime

⁶⁵ S. Sayapin, *The Yanukovych Trial in Ukraine: A Revival of the Crime of Aggression?*, 50 *Israel Yearbook on Human Rights* 63 (2020).

⁶⁶ S. Sayapin, *A Curious Aggression Trial in Ukraine: Some Reflections on the Alexandrov and Yerofeyev Case*, 16(5) *Journal of International Criminal Justice* 1093 (2018).

⁶⁷ Postanova VP VS vid 28 lútogo 2024 roku u spravi No. 415/2182/20 (provadžennâ No. 13-15x22), available at: <https://reyestr.court.gov.ua/Review/117555176> (accessed 30 August 2024).

of aggression. Because of the personal immunities of the Troika leaders, it must be international.

The pursuit of justice under Ukrainian jurisdiction also poses challenges. Whilst the CCU prohibits the crime of aggression, its application lacks clarity, leading to discrepancies in judicial interpretation. There is no explicit element of leadership in Art. 437 CCU, although the list of suspects within the Prosecutor General's Office "Magistral Case on Aggression" demonstrates its de facto application. On the contrary, the jurisprudence to date – 20 existing judgments convicting combatants – reveals a lack of understanding of the customary international law rooted in the crime of aggression.

The ongoing aggression against Ukraine is characterised by attempted annexation, incitement to genocide, widespread deportation of children and egregious violations of international humanitarian law on a scale not seen since World War II.⁶⁸ A more pressing concern, however, is that whilst eminent scholars debate the legal justifications for establishing an ad hoc tribunal or question its potential selectivity, the crime of aggression continues unabated. Lives continue to be lost on both sides of the conflict, leaving in its wake the poignant question of how many more must perish as a result of this act of aggression, or which other nations might be invaded by Russia (and Belarus), so that the victims of this aggression may see justice in their lifetime and the international community will finally begin to fulfil its *erga omnes* obligations to hold the perpetrators of this egregious breach of international law accountable.

⁶⁸ "Few countries since World War II have experienced this level of devastation (...). The scale is hard to comprehend. More buildings have been destroyed in Ukraine than if every building in Manhattan were to be leveled four times over. Parts of Ukraine hundreds of miles apart look like Dresden or London after World War II, or Gaza after half a year of bombardment" (*Russia's War Crimes site*, War Ukraine, available at: <https://war.ukraine.ua/russia-war-crimes> (accessed 30 August 2024); M. Hernandez, J. Gettleman, F. O'Reilly, T. Wallace, *What Ukraine Has Lost During Russia's Invasion*, The New York Times, 3 June 2024, available at: <https://tinyurl.com/4ys9uawe> (accessed 30 August 2024). *Russia's invasion places a generation of Ukrainian children under severe strain*, The UN Refugee Agency Ukraine, 31 May 2024, available at: <https://tinyurl.com/56kprmpy> (accessed 30 August 2024).