TALLINN UNIVERSITY OF TECHNOLOGY
School of Business and Governance
Department of Law

Henna Rinta-Pollari

LEGAL CHALLENGES IN PROSECUTING THE CRIME OF AGGRESSION IN THE RUSSO-UKRAINIAN WAR

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Supervisor: Evhen Tsybulenko, PhD

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Henna Rinta-Pollari ……
(signature, date)
Student code: 201801HAJB
Student e-mail address: herint@ttu.ee

Supervisor: Evhen Tsybulenko, PhD:
The paper conforms to the requirements in force

……
(signature, date)

Chairman of the Defence Committee:
Permitted to the defence

……
(name, signature, date)

TABLE OF CONTENTS

ABSTRACT

The Russian invasion of Ukraine has opened a debate over how to ensure accountability for the supreme international crime, namely the crime of aggression. Prosecuting the crime of aggression related to Russia's attack on Ukraine is hampered by the fact that neither country, Russia nor Ukraine, are signatories to the Rome Statute, which established the International Criminal Court and transferred the crime to its jurisdiction. The aim of this thesis is to analyze possible methods of prosecuting the crime and suggest the most appropriate method for it in the context of the Russo-Ukrainian war. The research is conducted with a qualitative method, and the research problem is approached by analyzing the norms and legacy of court decisions and *ad hoc* tribunals relating to the crime of aggression as well as comparing the methods on the ongoing situation in the Russo-Ukrainian war.

Based on the analysis of the legal aspects regarding the prosecution of the crime of aggression, the thesis suggests that the most appropriate approach to prosecuting the crime of aggression in the context of the Russo-Ukrainian war is to establish an international *ad hoc* tribunal, either through a treaty signed by the United Nations and Ukraine on the basis of a referral from the United Nations General Assembly and the United Nations Secretary-General or a multilateral treaty between Ukraine and other states supported by the United Nations.

Keywords: crime of aggression, ICC, Russo-Ukrainian war, ad hoc tribunal

LIST OF ABBREVIATIONS

ECCC	Extraordinary Chambers in the Courts of Cambodia
EU	European Union
ICC	International Criminal Court
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
IMFTE	International Military Tribunal for the Far East
IMT	International Military Tribunal at Nüremberg
SCSL	Special Court for Sierra Leone
UfP	United Nations General Assembly resolution 377 A (V) of 1950 “Uniting for Peace”
UN	United Nations
UNGA	United Nations General Assembly

INTRODUCTION

"Aggression" is an unjustified attack by a State against the sovereignty, territorial integrity, or political independence of another State that has no justifications and results in international responsibility.[1] On the other hand, a "crime of aggression" concerning individual criminal responsibility is one of the core international crimes together with crimes against humanity, genocide, and war crimes. The responsibility for the crime of aggression is one of the most important issues on the agenda of the international legal community as war has returned to Europe with greater intensity and scale than ever before since the Second World War. European Commission President Ursula von der Leyen has stated that the stake of the war is the right of might versus the rule of law.[2] The Russian invasion of Ukraine has triggered a debate on how to ensure accountability for the "supreme international crime", i.e., the crime of aggression.

Active investigations of alleged major international crimes are ongoing with the Ukrainian authorities, the International Criminal Court (ICC), and other international organizations. The European Union (EU) has taken the first step toward prosecuting the crime of aggression, with European Commission President Ursula von der Leyen announcing the establishment of an International Centre for the Prosecution of the Crime of Aggression in Ukraine in the Hague, whose responsibility will be to coordinate the collection of evidence.[3] However, the next step, i.e., the prosecution of the crime is a complicated issue that has not yet been resolved.

The prosecution of the crime of aggression related to Russia's attack on Ukraine is hindered by the fact that neither country, Russia nor Ukraine, are States Parties to the Rome Statute, which established the ICC and transferred the crime of aggression to its jurisdiction. Hence, there are a variety of approaches to the issue of prosecuting the crime of aggression against Ukraine. However, the lack of precedents in the modern era makes prosecuting it challenging. It is essential

[1] United Nations General Assembly. (1974). *Definition of Aggression*. UN Doc A/RES/3314. Articles 1 and 5.
[2] ORF. (2022, July 4). *The Right Of Might Vs The Rule Of Law | Ursula Von Der Leyen* [Video]. YouTube. Retrieved March 29, 2023, from https://www.youtube.com/watch?v=eI5l9Fk75VA
[3] Reuters. (2023, February 2). *EU: Centre for prosecution of "aggression" crimes in Ukraine to be set up in The Hague*. Reuters. Retrieved March 2, 2023, from https://www.reuters.com/world/europe/eu-centre-prosecution-aggression-crimes-ukraine-be-set-up-hague-2023-02-02/

to investigate alternative justice mechanisms for holding accountable those responsible for the crime of aggression associated with the invasion of Ukraine and to protect the norms of international law.

In addition, Ukraine has stated its desire for a separate *ad hoc* tribunal to prosecute the highest-ranking members of the Russian administration for the crime of aggression. The idea of the establishment of an *ad hoc* tribunal to prosecute the crime of aggression has political support throughout the world.[4] However, transforming political support into concrete technical and legal support is challenging.

The aim of the thesis is to analyze possible methods of prosecution and make a suggestion on the most appropriate method for prosecuting the crime of aggression in the context of the Russo-Ukrainian war. The key research question of the thesis is how and in what ways the crime of aggression may be prosecuted in the context of the Russo-Ukrainian war. Following a qualitative research methodology, the focus of the thesis is on the legal requirements of each method of prosecution.

The research problem is approached by analyzing the norms and legacy of court decisions and *ad hoc* tribunals relating to the crime of aggression and the situation faced in the Russo-Ukrainian war. The term "Russo-Ukrainian war" is used throughout the thesis to refer to the entire conflict from 2014 to the present. The scope of the thesis is limited to the prosecution of the crime; however, factors such as immunity are evaluated briefly when they are relevant to the evaluation of a particular prosecution method. In addition, the scope of the thesis does not include an examination of the possibility of prosecuting all atrocity crimes by a single judicial body.

The thesis consists of two main chapters. The first chapter gives an introduction to the Russo-Ukrainian war and provides an overview of the context and facts that have led to act(s) of aggression and the crime of aggression. In addition, the chapter examines the legal basis for the crime of aggression, focusing on the definition and elements of the crime that highlight the

[4] *See* NATO Parliamentary Assembly Resolution 479; The Statement by the Parliament of Estonia 18.10.2022 https://www.riigikogu.ee/en/news-from-committees/foreign-affairs-committee/riigikogu-declared-russia-a-terrorist-regime/; The ministers of Estonia, Latvia and Lithuania call to establish a Special Tribunal to investigate the crime of Russia's aggression. (2022, October 16). Ministry of Foreign Affairs of Lithuania. Retrieved February 19, 2023, from https://urm.lt/default/en/news/the-ministers-of-estonia-latvia-and-lithuania-call-to-establish-a-special-tribunal-to-investigate-the-crime-of-russias-aggression; European Parliament resolution on the fight against impunity for war crimes in Ukraine 2022/2655 (RSP).

complexity of the crime at hand and aid in the comprehension of the numerous issues associated with the crime. Finally, the last chapter analyzes and compares different methods of prosecuting the crime of aggression, namely prosecuting through ICC, domestic courts, or by creating an *ad hoc* tribunal. The chapter concludes with a recommendation for the optimal course of action in the matter.

1. CRIME OF AGGRESSION

The crime of aggression is one of the fundamental international crimes. In contrast to other core crimes, such as crimes against humanity, war crimes, and genocide, the scope and status of the crime of aggression are highly contested. In addition, there have been wide discussions on the definition of crime.

The central question of this thesis is how the crime of aggression may be prosecuted in the context of the Russo-Ukrainian war and, in particular, what are the legal requirements for it. To answer these questions, it is necessary to introduce the context of the war in addition to the legal context of the crime in order to comprehend the contentious issues it brings to the prosecution process.

1.1. Russo-Ukrainian war

The Russian aggression against Ukraine began in 2014 after President Viktor Yanukovych fled Ukraine as a result of the Euromaidan protests, which were in response to his decision to reject the EU's association agreement in favor of closer ties with Russia. Europe's support for the new Ukrainian government prompted Russia to declare the Kyiv authorities "illegitimate" and incite the Russian regular and irregular troops aided by local collaborators in Crimea and eastern Ukraine, groundlessly and illegally claiming responsibility for protecting these regions.[5] Subsequently, in April 2014, Russian collaborators in occupied territories of eastern Ukraine proclaimed the muppet "Donetsk and Luhansk People's Republics". Ukraine's attempts to retake the held territory in late 2014 were unsuccessful, resulting in a protracted war in Donbas, which eventually became a low-intensity conflict between Russia and Ukraine. Russia's declaration regarding Crimea's accession to the Russian Federation was an act that was forbidden *inter alia* by Article 73 of the Ukrainian constitution, which prohibits alterations to the country's territory

[5] Tsybulenko, E., & Francis, J. A. (2018). Separatists or Russian Troops and Local Collaborators? Russian Aggression in Ukraine: The Problem of Definitions. In *The Use of Force against Ukraine and International Law: Jus Ad Bellum, Jus In Bello, Jus Post Bellum* (pp. 123–144). T.M.C. Asser press/Springer. https://doi.org/10.1007/978-94-6265-222-4_6 p. 140

without an all-Ukrainian referendum. This was also against international law, which prohibits attacking a nation's sovereignty and territorial integrity.[6] UN has defined the status of Crimea as "the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, temporarily occupied by the Russian Federation"[7].

On the 24th of February in 2022, Russia launched a full-scale attack on Ukraine which has been deemed a flagrant violation of the United Nations (UN) Charter, specifically to the fundamental provision of Article 2 (4) stating that "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".[8] In a resolution adopted on the 2nd of March 2022, the UN General Assembly (UNGA) has condemned both the Russian Federation's aggression in Ukraine and Belarus' involvement in the conflict.[9] In addition, *inter alia* European Parliament and NATO Parliamentary Assembly have condemned the Russian aggression against Ukraine.[10]

Many states and organizations have adopted extensive sanctions against Russia since the full-scale attack on February 2022. Ukraine has lodged a case against Russia in the International Court of Justice (ICJ), considering allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide. ICJ's order from March 2022 indicated provisional measures, including inter alia that Russia must suspend the military operations launched in Ukraine on 24 February immediately, which was manifestly ignored by Russia.[11] In addition, e.g., the ICC has been investigating alleged international crimes, e.g., war crimes, committed in the context of the situation in Ukraine since 21 November 2013.[12]

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[6] *See* Shaw, M. N. (2021). *International Law* (Ninth edition.). Cambridge: Cambridge University Press. p. 446; Minesashvili, S. (2022). Before and after 2014: Russo-Ukrainian conflict and its impact on European identity discourses in Ukraine. *Journal of Southeast European and Black Sea Studies*, ahead-of-print(ahead-of-print), 1–27. https://doi.org/10.1080/14683857.2022.2121251. p. 1–2

[7] United Nations General Assembly. (2018). Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine. UN Doc A/RES/73/263

[8] Charter of the United Nations. (1945) [opened for signature 26 June 1945]. Trb. 1979 Nr. 37 (entry into force 24 October 1945). Article 2 (4)

[9] United Nations General Assembly. (2022). Aggression against Ukraine. UN Doc A/RES/ES-11/1

[10] NATO Parliamentary Assembly. Declaration "Standing with Ukraine" on the 30th of May 2022

[11] *Allegations of genocide under the convention on the prevention and punishment of the crime of genocide (Ukraine v. Russian Federation)*. Order of the ICJ. 2022.

[12] International Criminal Court. (2022). *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation*. Retrieved March 12, 2023 from https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states

1.2. Brief legal history of the crime of aggression and the crimes against peace precedent

Crime of aggression was first mentioned at the end of the First World War when the Prime Minister of the United Kingdom declared that initiating an aggressive war was a crime for which the head of state, German Emperor Wilhelm II, could be held personally accountable. The Council of Four[13] invoked Article 227[14] of the Treaty of Versailles against Wilhelm II, accusing him of initiating the invasion. Due to the Netherlands' refusal to hand over the emperor, this proposal remained a mere attempt and was never pursued.[15]

Following the end of the Second World War, a renewed focus was placed on holding an individual personally responsible for initiating an aggressive war. The judgment of the International Military Tribunal at Nüremberg (IMT) declared in 1946 that a crime against peace[16] is not only an international crime but rather the supreme international crime "differing only from other war crimes in that it contains within itself the accumulated evil of the whole"[17]. Nevertheless, the IMT did not define the term "war of aggression" despite its inclusion in the definition of the crime against peace. In addition, the IMT and the International Military Tribunal for the Far East (IMTFE) agreed that not everyone who contributed to their nation's wars should be held individually accountable. However, it was not determined how a person's position or role differentiated offenders of the crime of aggression from those who should not be held liable for the crime.[18]

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[13] Council of Four was composed of Georges Clemenceau of France, David Lloyd George of the United Kingdom, Vittorio Emanuele Orlando of Italy, and Woodrow Wilson of the United States. *See* Kampmark, B. (2007). Sacred Sovereigns and Punishable War Crimes: The Ambivalence of the Wilson Administration towards a Trial of Kaiser Wilhelm II. *The Australian Journal of Politics and History*, 53(4), 519–537. https://doi.org/10.1111/j.1467-8497.2007.00472.x.

[14] Article 227 declared the establishment of a special tribunal to try Wilhelm II. *See e.g., Papers Relating to the Foreign Relations of the United States, The Paris Peace Conference, 1919, Volume XIII. Office of the Historian.* (n.d.). https://history.state.gov/historicaldocuments/frus1919Parisv13/ch16subch1

[15] Sellars, K. (2016). The First World War, Wilhelm II and Article 227: The Origin of the Idea of 'Aggression' in International Criminal Law. In C. Kreß & S. Barriga (Eds.), *The Crime of Aggression: A Commentary* (pp. 21-48). Cambridge: Cambridge University Press. https://doi.org/10.1017/9781139058360.003. p. 21–23, 35

[16] The London Charter defines crimes against peace in Article 6a as the "planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing". *See* International Committee of the Red Cross. (n.d.). *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal*. London, 8 August 1945, Article 6. International Humanitarian Law Databases. Retrieved January 5, 2023, from https://ihl-databases.icrc.org/en/ihl-treaties/nuremberg-tribunal-charter-1945/article-6b?activeTab=undefined

[17] International Military Tribunal. (1947). *Trial of the Major War Criminals before the International Military Tribunal* "Blue Series": Volume 1. [Periodical]. p. 186

[18] McDougall, C. (2017). The Crimes against Peace Precedent. In *The Crime of Aggression* (pp. 49–112). United Kingdom: Cambridge University Press. https://doi.org/10.1017/9781139058360.004. p. 102

Furthermore, between the early 1950s and 1996, several attempts were undertaken to define aggression for the purposes of individual criminal responsibility by the International Law Commission (ILC), which was assigned with formulating both the Nüremberg Principles and draft Codes on criminal responsibility for *inter alia* aggression. However, the efforts of ILC were ultimately ineffective as a proper universally accepted definition of aggression was not reached.[19]

As a result, one can state that aggression has remained a theoretical crime since the end of the Second World War; jurisdiction was not included in the lists of crimes subject to prosecution in the Charters of the International Criminal Tribunals for the former Yugoslavia or Rwanda, or any of the UN-backed special tribunals established in recent years, such as the Special Courts for Sierra Leone or Cambodia. No individual has been prosecuted for this crime in international courts since the IMT and IMTFE.[20]

1.3. Definition of the crime

In 1998, the crime of aggression was incorporated into the Rome Statute of the ICC as a placeholder until the states parties agreed on its definition. At the Kampala Review Conference in 2010, the assembly of parties defined the crime of aggression and activated the ICC's jurisdiction over it under certain conditions.[21]

Crime of aggression is defined in the Rome Statute Article 8*bis* (1) as "the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity, and scale, constitutes a manifest violation of the Charter of the United Nations".[22] This definition of the crime is drawn from the 1974 General Assembly resolution 3314 (XXIX), which defined aggression but for purposes of state responsibility.[23] The provision contains three key features:

[19] Kemp, G. (2016). *Individual criminal liability for the international crime of aggression* (Second edition.). Cambridge: Intersentia. p. 106, 112-113
[20] Ruys, T. (2010). Defining the crime of aggression: the Kampala consensus. *Military Law and Law of War Review*, 49(Issues and 2), 95-140. p. 104
[21] *Ibid*. p. 104–105
[22] The United Nations Rome Statute of the International Criminal Court [opened for signature 17 July 1998] (entry into force 1 July 2002). Article 8*bis* (1).
[23] Sellars, K. (2013). *"Crimes against peace" and international law*. Cambridge: Cambridge University Press. p. 276–278. *See* also UN General Assembly (1974), *supra nota 1*.

aggression is a leadership crime, for individual criminal responsibility the relevant state must have committed an act of aggression[24], and the act of aggression should be a clear violation of the UN Charter in its nature, gravity, and scope.

Due to the definition of the crime of aggression as "planning, preparation, initiation or execution", the concept of prospective perpetrators in the Rome Statute is more limited than the category of persons who could be held personally criminally responsible for crimes against peace. This is demonstrated by the fact that the IMT defined form of involvement in the crime of peace as "planning, preparation, initiation or waging" of a war of aggression. These characteristics might encompass a broader class of individuals as, in theory, even lower-ranking soldiers could be participating in the waging of a war of aggression. However, based on the legacy of IMT, it is evident that only major criminals were charged with crimes against peace, even when this definition was utilized.[25]

1.4. State Responsibility

Although the primary objective of international law is the regulation of state interactions, the crime of aggression is a term that refers specifically to individual criminal responsibility rather than state responsibility, even though there is an essential connection between an individual's criminal responsibility and the State's responsibility for aggression.[26]

The act of aggression, which at its essence is the illegal use of force by one state against another, is at the core of the crime of aggression as it is one of the crime's components[27]. In order for an individual to be held liable for the crime of aggression under the Rome Statute as defined in Article 8*bis*, it is necessary first to determine whether or not a state has committed an "act of aggression".[28] Under conditions comparable to those in Article 2 (4) of the UN Charter, Article 8*bis* (2) of the

[24] Article 8*bis* differentiates between a crime of aggression defined in Article 8*bis* (1) and an act of aggression defined in Article 8*bis* (2).
[25] McDougall, C. (2016), *supra nota 18*, p. 49–50
[26] Wong, M. (2021). Aggression and State Responsibility at the International Criminal Court. *International and Comparative Law Quarterly*, 70(4), 961-990. https://doi.org/10.1017/S0020589321000373. p. 962
[27] Other components include individual actus reus and individual mens rea. *See e.g.*, Ziukelis, D. (2018). Establishing the Mens Rea of the Crime of Aggression in the Rome Statute of the International Criminal Court. *Australian International Law Journal*, 24, 135-154. p. 137
[28] Akande, D., & Tzanakopoulos, A. (2017). The International Court of Justice and the Concept of Aggression. In *The Crime of Aggression* (pp. 214–232). United Kingdom: Cambridge University Press. https://doi.org/10.1017/9781139058360.008. p. 214

Rome Statute defines an "act of aggression" as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations"[29]. In addition, UNGA Resolution 3314 has a list[30] of acts that qualify as an act of aggression. The list includes, e.g., "the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof"[31].

As specified in Chapter 1, the international community has condemned Russia's attack on Ukraine as an act of aggression and a flagrant violation of the UN Charter. However, in the present case this element has not yet been evaluated by a judicial body, but rather by a political statement and widespread condemnation.

1.5. Individual Responsibility

The principle that each person is responsible for their own criminal actions, i.e., the principle of individual criminal responsibility, is recognized as one of the cornerstones of modern international criminal law and is also present in the IMT judgment stating that "international law imposes duties and liabilities upon individuals as well as upon states"[32] as "Crimes against International Law are committed by men, not by abstract entities"[33].[34]

Crime of aggression is a term that specifically refers to individual criminal responsibility, i.e., individuals are to be held responsible for the contributions they made to state aggression.[35] Individual responsibility for the crime of aggression was reached by the IMT and the IMTFE; by prosecuting people for the crime against peace, they demonstrated that individuals might be held personally accountable for the conduct of this international crime. In addition, it is addressed in

[29] The United Nations Rome Statute of the International Criminal Court, *supra nota 22*, Article 8*bis* (2)
[30] The acts are not exhaustive, and the Security Council may determine that other acts constitute aggression under the provision of the Charter. *See* UN General Assembly (1974), *supra nota 1*, Article 4
[31] *Ibid*., Article 3 (a)
[32] International Military Tribunal (Nuremberg) Judgment of 1 October 1946 p. 446 retrieved from https://www.legal-tools.org/doc/45f18e/pdf/
[33] International Military Tribunal (1947), *supra nota 17*, p. 223
[34] Kemp, G. (2016), *supra nota 19*, p. 118
[35] Hajdin, N. R. (2021). The actus reus of the crime of aggression. *Leiden Journal of International Law*, 34(2), 489–504. https://doi.org/10.1017/S0922156521000042 p. 489

Article 25 of the Rome Statute, which states that an individual who commits a crime within the jurisdiction of the ICC will be individually responsible and liable for punishment.[36]

In order to be able to determine individual criminal responsibility for the crime of aggression, one has to determine that the elements of a crime, i.e., *actus reus*, *mens rea*, and leadership element, are present.

1.5.1. Actus reus

Actus reus, which can be translated as "guilty act", indicates that a crime requires the commission of illegal conduct. This aspect of the crime of aggression, which closely parallels that of the IMT and IMFTE[37], is defined as "planning, preparation, initiation, or execution … of an act of aggression" under Article 8*bis* of the Rome Statute. In accordance with the Rome Statute, fulfilling this element generally requires participation in the consequences of the crime.[38]

It has been argued that in the context of a crime of aggression, *actus reus* can be interpreted as requiring participation in one of the decisive processes preceding collective action, namely planning, preparation, initiation, or execution, prior to the actual use of collective action, i.e., the collective violence. To satisfy the *actus reus* requirement, it would suffice to prove the accused's participation in some of these actions. Therefore, an individual may be held criminally responsible without the physical consequence, i.e., without physically engaging in aggressive actions.[39]

1.5.2. Mens Rea

Mens rea means the mental element of a criminal act, and it can be understood as "a perpetrator's psychological attitude towards his or her crime as a whole, as well as towards its distinct objective elements"[40].

Article 30 of the Rome Statute applies the concept of *mens rea* to the crime of aggression, stating that an individual is criminally liable if the elements of the crime are committed with intent and

[36] The United Nations Rome Statute of the International Criminal Court, *supra nota 22,* Article 25
[37] IMT and IMFTE referred to "planning, preparation, initiation or waging of an aggressive war". *See* Hajdin, N. R. (2021), *supra nota 35*, p. 493
[38] Hajdin, N. R. (2021), *supra nota 35*, p. 493
[39] *Ibid*., p. 496–497
[40] Sayapin, S. (2014). The crime of aggression in international criminal law : historical development, comparative analysis, and present state. The Hague: Asser Press p. 236

knowledge. The Article enshrines customary international law and recognizes direct intent[41] as the primary mental element of the crime of aggression. Hence, to satisfy the mental element, it is *inter alia* essential that a person has intent and knowledge of the planning, preparation, or execution of an act of aggression.[42]

1.5.3. Leadership element

The IMT and IMFTE lacked a specific leadership clause. However, this element was covered in one of the subsequent trials after Nüremberg, the *High Command Trial* (the United States of America vs. Wilhelm von Leeb et al.). In that case, the tribunal addressed the leadership element of the crime against peace, concluding that merely having knowledge of an aggressive war did not constitute criminal liability for an accused individual if that individual was not in a position to shape or influence the policy of the state. Therefore, the crucial element in determining criminal liability was one's *de facto* power to shape or influence the policy of a state.[43] Leadership element of the crime is also present in the Rome Statute, although it differs from the language adopted by the IMT and IMFTE. Article 8*bis* (1) of the Rome Statute specifies that the crime of aggression is committed by "a person in a position effectively to exercise control over or to direct the political or military action of a State".

Therefore, the crime of aggression can be seen as a leadership crime, and under customary international law, "only a person in a position to shape or influence a state's policy can be responsible for aggression"[44]. It has been widely acknowledged that lower-ranking soldiers would be exempt from criminal responsibility according to this element of the crime, and only the highest levels of state leadership may be held responsible for aggression.

Due to the possibility that high-ranking officials and heads of state may enjoy immunities, this factor is essential when determining the possible methods of prosecution. Immunities can be a problem when one of the elements of the crime specifies that it is a crime of leadership, and the main objective is to hold those leaders accountable for their actions in relation to the crime of aggression.

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[41] By direct intent it is meant that person means to engage in the conduct and awareness that a circumstance exists as provided in Article 30 (2) (a) and Article 30 (3). *See* Sayapin, S. (2014), *supra nota 40*, p. 293
[42] *Ibid.*
[43] Hajdin, N. R. (2021), *supra nota 35*, p. 556
[44] Hajdin, N. (2017). The Nature of Leadership in the Crime of Aggression: The ICC's New Concern? *International Criminal Law Review*, 17(3), 543–566. https://doi.org/10.1163/15718123-01703007 p. 545

2. PROSECUTING THE CRIME OF AGGRESSION AGAINST UKRAINE

The first chapter outlined the legal framework for the crime of aggression, which assists in comprehending the legal contexts that may be utilized when prosecuting the crime committed against Ukraine. In the absence of a competent judicial body to prosecute the crime, the legal framework covering the crime and its elements is insufficient. Therefore, this chapter makes a comparative analysis of the various options for prosecuting the crime. The author concludes the chapter with a conclusion and recommendation for the optimal course of action in the matter.

2.1. International Criminal Court

The Rome Statute established the ICC as a permanent international criminal court in 1998, which came into force in 2002. However, the ICC lacks universal jurisdiction, and its jurisdiction over the crime of aggression is exceedingly complex. The Statute expressly stated that the ICC could only exercise jurisdiction over the crime of aggression once the crime was defined and jurisdictional requirements were established. In 2010, the crime was defined at the Kampala Review Conference, but the Assembly of State Parties did not agree to initiate the Court's jurisdiction until December 2017. On the 17th of July 2018, the 20th anniversary of the Rome Statute, the ICC's jurisdiction over the crime of aggression was activated.[45]

The ICC can exercise its jurisdiction over the crime of aggression with certain restrictions. However, in the case of the Russo-Ukrainian war, ICC lacks jurisdiction to prosecute the crime of aggression as, according to Article 15*bis* (5) of the Rome Statute ICC cannot exercise jurisdiction over the crime of aggression committed by non-party State nationals or on the territory of a non-

[45] Dias, T. de S. (2019). The Activation of the Crime of Aggression before the International Criminal Court: Some Overlooked Implications Arising for States Parties and Non-States Parties to the Rome Statute. *Journal of Conflict & Security Law*, 24(3), 567–591. https://doi.org/10.1093/jcsl/krz022 p. 567–568. *See also* Akande, D., & Tzanakopoulos, A. (2018). *Treaty law and ICC jurisdiction over the crime of aggression*. European Journal of International Law, 29(3), 939–959. https://doi.org/10.1093/ejil/chy059

party. Therefore, since neither Russia nor Belarus are State Parties to the Rome Statute, ICC does not have jurisdiction on the matter.[46] The only way the ICC could have jurisdiction over the crime of aggression against a non-party State, according to Article 15*ter,* is if the UN Security Council made a request to the ICC. However, the proposed decision or resolution would most probably be rejected due to Russia's veto power as a permanent member of the Security Council.[47]

2.1.1. Amending the Rome Statute

It has been argued that the ICC could be able to prosecute the crime of aggression and extend its jurisdiction to *inter alia* include the Russo-Ukrainian war by amending the Rome Statute with respect to the jurisdictional regime from Kampala Amendments.[48] Despite the fact that the Kampala Amendments were originally intended to apply to all States Parties and the failure of the ICC to successfully prosecute acts of aggression may undermine the legitimacy of the Court, the process of amending it would be extremely difficult, if not impossible, as evidenced by the difficulty of agreeing on the crime's definition and jurisdiction up to this point.[49] The States Parties are scheduled to review the crime of aggression's jurisdiction in 2025; therefore, a theoretical possibility exists for this option. According to Articles 121 and 122 of the Rome Statute, any State Party may propose an amendment to the Statute, which can be adopted by a majority of those present and voting at a meeting of the Assembly of States or at a Review Conference called by the Assembly.[50]

Prosecuting the crime through ICC by amending the jurisdictional regime would have the potential to strengthen the legitimacy of the ICC by protecting individuals from international crimes and thus enhancing the ICC's authority to adjudicate on issues of aggression. In addition, it has been argued that the chosen jurisdictional limitations for the crime of aggression pose a problem with respect to the principle of equality before the law, which again supports amending Article 15.[51]

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[46] *See e.g.*, International Criminal Court. (n.d.). The States Parties to the Rome Statute | International Criminal Court. Retrieved February 8, 2023, from https://asp.icc-cpi.int/states-parties; The United Nations Rome Statute of the International Criminal Court, *supra nota 22*, Article 15*bis*

[47] The United Nations Rome Statute of the International Criminal Court, *supra nota 22*, Article 15*bis*. *See also* United Nations Security Council. (n.d.). Voting System | United Nations Security Council. Retrieved February 8, 2023, from https://www.un.org/securitycouncil/content/voting-system

[48] There are also other possibilities on how the jurisdiction regarding crime of aggression in the ICC could be expanded, i.e., those who have not yet ratified the Kampala Amendments ratifying it. *See e.g.*, Trahan, J. (2022). Revisiting the History of the Crime of Aggression in Light of Russia's Invasion of Ukraine. *American Society of International Law Insights*, 26(2). 1–7. p. 5.

[49] Cowell, F., & Magini, A. L. (2017). *Collapsing Legitimacy: How the Crime of Aggression Could Affect the ICC's Legitimacy*. International Criminal Law Review, 17(3), 517–542. https://doi.org/10.1163/15718123-01703006 p. 519

[50] The United Nations Rome Statute of the International Criminal Court, *supra nota 22*, Articles 121 and 122

[51] Cowell, F., & Magini, A. L. (2017), *supra nota 49*, p. 535

However, in addition to the possible amending discussion, there is the issue and question of retroactive application that must be addressed if the jurisdictional clause is amended. Currently, the ICC's jurisdiction is non-retroactive, which means that the ICC has no power to investigate events that occurred prior to prior to the entry into force of the Statute (1st of July 2002), with the exception of States that ratify or accede after this date, in which case the ICC has jurisdiction only for crimes committed after the Rome Statute has entered into force in that State Party unless that State declares otherwise.[52]

2.1.2. Prosecuting the crime through war crimes and crimes against humanity

As stated, Articles 15*bis* and 15*ter* of the Rome Statute create jurisdictional weaknesses that pose obstacles for the ICC to effectively prosecute the crime of aggression, especially in the absence of Security Council referral as is currently the case in the Russo-Ukrainian war. The jurisdictional regime employed in Article 15*bis* (5) differs from the view employed with other core crimes with respect to crimes committed on the territory of a State Party.[53] ICC has been investigating alleged international crimes, e.g., war crimes, in the context of the situation in Ukraine[54] since 21 November 2013.[55] In addition, in March 2023, the ICC issued an arrest warrant for Russian President Vladimir Putin for alleged war crimes committed on Ukrainian occupied territory.[56]

In general, crimes against humanity, war crimes, and genocide are more likely to occur in the context and under the circumstances created by acts of aggression.[57] Hence, one proposed solution to the issue of prosecution of the crime of aggression would be to incorporate the crime into prosecutions of other crimes through ICC, e.g., by utilizing co-perpetration as a mode of liability

[52] International Criminal Court. (n.d.). *Joining the International Criminal Court, Why does it matter?* Retrieved March 28, 2023, from https://www.icc-cpi.int/sites/default/files/Publications/Joining-Rome-Statute-Matters.pdf
[53] Einarsen, T. (2018). Prosecuting Aggression Through Other Universal Core Crimes at the International Criminal Court. In L. Sadat (Author), *Seeking Accountability for the Unlawful Use of Force* (pp. 337-385). Cambridge: Cambridge University Press. https://doi.org/10.1017/9781316941423.017 p. 342
[54] To be precise, Ukraine is not a State Party to the Rome Statute, but it has accepted the ICC's jurisdiction over alleged crimes under the Rome Statute occurring on its territory, pursuant to article 12 (3) of the Rome Statute. *See Ukraine*. (n.d.-b). International Criminal Court. Retrieved March 17, 2023, from https://www.icc-cpi.int/ukraine
[55] Einarsen, T. (2018), *supra nota 53*
[56] International Criminal Court. (2023, March 17). *Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova* [Press release]. https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and
[57] Einarsen, T. (2018), *supra nota 53*, p. 343

in the case of crimes against humanity to "expand liability for foreseeable crimes against humanity to those high-ranking leaders responsible for the initial waging of aggression"[58].[59]

An ideal concurrence occurs when a single criminal act can be subdivided into two or more separate crimes.[60] This is due to the fact that distinct crimes contain different material elements and protect different legal interests, e.g., a crime of aggression protects the territorial and/or political integrity of a State, and its material elements are present in Article 8*bis* whereas crimes against humanity are more connected to protecting human rights and elements of the crime are present in Article 7 of the Rome Statute.[61]

The mandate of the ICC is to ensure accountability for the most serious crimes, and the purpose of the Rome Statute is to ensure the effective prosecution and end impunity for the perpetrators of these crimes.[62] These frameworks imply that the ICC could employ broader and more innovative approaches to the crime of aggression.[63] However, incorporating the crime of aggression as part of the prosecution stages in ICC may be considered not to be legitimate especially taking into account the principle of *nullum crimen sine lege*. The principle contains three relevant elements according to Article 22 of the Rome Statute. Firstly, a person is not criminally liable under the Statute unless the act in issue constitutes a crime within the ICC's jurisdiction at the time it occurs. Secondly, the definition of a crime should not be extended by analogy and shall be strictly construed. Thirdly, in the event of ambiguity, the definition will be interpreted in favor of the accused person.[64] In addition, the fact that the States Parties have limited the crime of aggression's jurisdiction supports the legitimacy of the notion affirmed in Article 22 (1).

[58] *Ibid.*, p. 344
[59] This analysis does not examine whether the elements of crimes against humanity or war crimes have been present in the Russo-Ukrainian war; rather, it examines briefly whether this proposed solution is even permitted by legal principles.
[60] Maria Palombino, F. (2017). Cumulation of Offences and Purposes of Sentencing in International Criminal Law: A Troublesome Inheritance of the Second World War. *International Comparative Jurisprudence (Online).* https://doi.org/10.1016/j.icj.2017.02.003 p. 89
[61] Einarsen, T. (2018), *supra nota 53*, p. 337
[62] The United Nations Rome Statute of the International Criminal Court, *supra nota 22*, preamble
[63] Einarsen, T. (2018), *supra nota 53*, p. 385
[64] The United Nations Rome Statute of the International Criminal Court, *supra nota 22*, Article 22 (1) and (2)

2.2. Domestic Courts

Domestic courts could have jurisdiction over the crime of aggression based on territorial[65], nationality[66], or universal jurisdiction. In contrast to other core crimes, the crime of aggression is not included in the penal codes of many states, and even fewer states have asserted universal jurisdiction over the crime. [67] In addition, the universal jurisdiction of the crime is highly contested as there is no clear consensus on whether the exercise of universal jurisdiction over the crime of aggression has a basis in customary international law.[68]

However, Ukraine has specifically criminalized the crime of aggression in Article 437 of their penal code, which states: "Planning, preparation or waging of an aggressive war or armed conflict, or conspiring for any such purposes – shall be punishable by imprisonment for a term of seven to twelve years" and "Conducting an aggressive war or aggressive military operations – shall be punishable by imprisonment for a term of ten to fifteen years".[69] In addition, the penal codes of some nations, such as that of Estonia, provide their courts with universal jurisdiction over the crime.[70]

Therefore, there is a normative basis to prosecute the crime of aggression on a domestic level, especially since Ukraine has criminalized the crime. However, in practice, prosecuting the crime in a national court would be difficult for multiple reasons. Firstly, international criminal law enforcement methods frequently fail in domestic courts, as evidenced by the case of former Ukrainian President Yanukovych, who was found guilty of treason and complicity in the crime of aggression by a Ukrainian court. The trial was held *in absentia,* and the sentence has not yet been carried out as Yanukovych resides in Russia. The trial raised numerous questions, including human

[65] In situations when a state has used its prescriptive jurisdiction to make activity that occurs on its territory criminal, it will often provide its national courts the authority to trial such conduct in line with its domestic laws. *See* Williams, S. (2012). *Hybrid and internationalised criminal tribunals selected jurisdictional issues* (1st ed.). Oxford: Hart Publishing. https://doi.org/10.5040/9781472565938 p. 12

[66] The nationality principle permits a state to exert jurisdiction over its nationals for conduct committed in another state. According to certain perspectives, the idea also applies to non-citizens with substantial ties to the state. *See* Gallant, K. S. (2022). *The Nationality Principle. In International Criminal Jurisdiction: Whose Law Must We Obey?* (Online edition, pp. 345–407). Oxford University Press. https://doi.org/10.1093/oso/9780199941476.003.0005 p. 345

[67] Van Schaack, B. (2012). Par in parem imperium non habet: Complementarity and the crime of aggression. *Journal of International Criminal Justice*, 10(1), 133–164. https://doi.org/10.1093/jicj/mqs004 p. 137–138, 143

[68] Scharf, M. P. (2012). Universal jurisdiction and the crime of aggression. *Harvard International Law Journal*, 53(2), 357–389. p. 374

[69] Criminal Code of Ukraine, April 5, 2001, No. 2341-III, Article 437

[70] U.N. Secretary-General. (2010) *Report of the Secretary-General prepared on the Basis of Comments and Observations of Governments: The Scope and Application of the Principle of Universal Jurisdiction*. UN Doc A/65/181 p. 29

rights concerns regarding the *in absentia* trial and allegations by Yanukovy's lawyers of state pressure influencing the outcome of the trial.[71] If the crime of aggression against Ukraine were to be prosecuted and tried in a Ukrainian domestic court, it is highly likely that the same issues would arise, particularly in terms of the possibility of holding a fair trial under the current circumstances.

Secondly, immunities for heads of state, heads of government, and other ministers pose a potential problem. ICJ has confirmed that these state officials enjoy immunity *ratione personae*[72] from foreign criminal jurisdictions.[73] Therefore, holding the leaders of the state accountable for the crime of aggression under domestic jurisdictions raises difficulties.

In addition to the possible legal issues associated with this method of prosecution, there is a high likelihood of political issues and pressure, regardless of whether the case is prosecuted in a Ukrainian domestic court or a court in another country.

2.3. Creating an ad hoc Tribunal

Another possibility to prosecute the crime of aggression against Ukraine is to create an *ad hoc* criminal tribunal. *Ad hoc* tribunals are tribunals with a limited mandate and jurisdiction that deal with specific situations.[74] Academics and the international community have shown the most support for this method of prosecution of the crime of aggression. However, there is no consensus on how this tribunal should be established, as the legal context surrounding its formation is extremely complex. In addition, for example, ICC prosecutor Kramin A. A. Khan has stated that prosecuting the crime of aggression through an *ad hoc* tribunal would weaken the international

[71] *See* Rodgers, J. (2019b, January 24). *Treason Charge Against Ukraine's Ex-President Yanukovych "Proven."* Forbes. Retrieved February 16, 2023, from https://www.forbes.com/sites/jamesrodgerseurope/2019/01/24/treason-charge-proved-against-ukraines-ex-president-yanukovych/?sh=210f76b97c33; Komarov, A., & Hathaway, O. A. (2022, June 9). *Ukraine's Constitutional Constraints: How to Achieve Accountability for the Crime of Aggression*. Just Security. Retrieved February 16, 2023, from https://www.justsecurity.org/80958/ukraines-constitutional-constraints-how-to-achieve-accountability-for-the-crime-of-aggression/; Akande, D., & Shah, S. (2010). Immunities of state officials, international crimes and foreign domestic courts. *European Journal of International Law*, 21(4), 815–852. https://doi.org/10.1093/ejil/chq080. p. 816

[72] Immunity *ratione personae* provides protection for actions of foreign officials in the course of their official duties or even before they take their position; however, it ceases to exist when an official leaves office. *See* D'Argent, P., & Lesaffre, P. (2019). Immunities and Jus Cogens Violations. In T. Ruys, N. Angelet, & L. Ferro (Eds.), The Cambridge Handbook of Immunities and International Law (pp. 614-633). Cambridge: Cambridge University Press. https://doi.org/10.1017/9781108283632.031 p. 624

[73] Kreicker, H. (2017). Immunities. In *The Crime of Aggression* (pp. 675–703). United Kingdom: Cambridge University Press. https://doi.org/10.1017/9781139058360.022. p. 684-687

[74] International Criminal Court. (2020). *Understanding the International Criminal Court.* Retrieved February 19, 2023, from https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf p. 10

system as the aim of the ICC was also to eliminate the need to establish criminal *ad hoc* tribunals and thus would cause confusion regarding the role of the ICC and the status of the crime of aggression.[75]

Theoretically, there are several options for establishing a criminal *ad hoc* tribunal, including regional, international, and hybrid court models. In the case of the Russo-Ukrainian war, however, the absence of precedents is obvious; IMT and IMFTE were the only tribunals with jurisdiction over the crime of aggression (then known as crimes against peace) where the Allied Powers exercised authority over Germany and Japan, whose nationals were tried by the tribunals. As a result, the situation differs from that of Ukraine.[76] However, although none of the previous *ad hoc* tribunals can be directly applied to the situation in Ukraine, they can provide insight into the potential legal basis for establishing the tribunal to prosecute the crime of aggression.[77]

In addition, despite the fact that the establishment of an *ad hoc* tribunal, at least in the context of the Russo-Ukrainian war, is viewed as a highly political process, one of the fundamental human rights provided by both conventional and customary human rights law requires that the tribunal be established "by law", i.e., it must have a solid legal foundation on both the international and domestic levels.[78]

2.3.1. Regional

In essence, establishing an *ad hoc* tribunal through the utilization of a regional strategy would imply the signing of a treaty between, e.g., the Council of Europe or EU and Ukraine. If this solution were selected as the one to adopt, the number of states participating in the creation of a tribunal could potentially be reduced in comparison to being established through an international organization, especially if it were established within the EU, affecting the legitimacy of the tribunal.

The most crucial concern regarding this regional strategy is whether or not the tribunal is considered international and, consequently, the concern regarding the immunities enjoyed by the

[75] IntlCriminalCourt. (2022, December 9). *ASP 21: Opening remarks of the ICC Prosecutor Karim A. A. Khan KC* [Video]. YouTube. Retrieved March 27, 2023, from https://www.youtube.com/watch?v=r3pY33tRurI
[76] Corten, O., & Koutroulis, V. (2022). *Tribunal for the crime of aggression against Ukraine - a legal assessment*. European Parliament's online database Think Tank. Retrieved February 19, 2023, from https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702574/EXPO_IDA(2022)702574_EN.pdf p. 7
[77] *Ibid.*, p. 13
[78] *Ibid.*, p. 14

head of state and other high-ranking officials.[79] In addition, this approach would probably pose constitutional issues in Ukraine, as the constitution prohibits extraordinary and special courts.[80] Hence, this method has the possibility of encountering significant problems.

2.3.2. International

The primary advantage of establishing an international *ad hoc* tribunal would be the avoidance of immunities issues, e.g., for the sitting head of state, since international tribunals do not apply personal immunities.[81] This is demonstrated, e.g., by the Nüremberg Principle III, which states, "The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law"[82].

United States Attorney General Merrick Garland has proposed that the establishment of the tribunal should take a model from the IMT, i.e., it should be established through an international agreement rather than by the UN.[83] In such a case, the *ad hoc* tribunal could be established on a multilateral treaty between states, to which states could accede. However, the context in which the IMT was developed differs significantly from that of the Russo-Ukrainian war. The IMT was established at a time when neither the UN nor the ICC existed. Furthermore, the IMT was established by the Allied Powers, who eventually exercised authority over occupied Germany, whose citizens were tried in the tribunal. As a result, applying directly such a model to the Russo-Ukrainian war could be difficult because no State has similar power, authority, or control over Russia. However, the pros of this method would be that it could be established rather quickly, and it could be possible that even this method would be backed by the UN, which would ultimately increase the legitimacy of the tribunal.

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[79] *Ibid.*, p. 18-19
[80] Constitution of Ukraine, 28th of June 1996, No. 254к/96-BP, Article 125
[81] *See e.g.*, Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgement, I.C.J. Reports 2002; Special Court for Sierra Leone, Prosecutor v. Charles Taylor Decision on Immunity from Jurisdiction, 31 May 2004 ; *Prosecutor V. Omar Hassan Ahmad Al-Bashir* (Judgement) ICC-02/05-01/09 OA2 (6th of May 2019)
[82] United Nations. (1950) Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal.
[83] United States Department of Justice. (2023, March 3). *Attorney General Merrick B. Garland Delivers Remarks in Lviv, Ukraine.* https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-lviv-ukraine

In addition, European Commission has proposed, e.g., the establishment of a special independent international tribunal based on a multilateral treaty backed by the UN.[84] The establishment of the tribunal through or backed by the UN would guarantee the obligation of UN Member States' cooperation with the tribunal.[85] However, establishing the tribunal through the UN is far from simple, and there are numerous ways to approach this issue through the different UN bodies that are addressed below.

2.3.2.1. United Nations Security Council

Chapter VII of the UN Charter grants the Security Council the authority to establish *ad hoc* tribunals, as it has done in the past, e.g., in 1991 with the International Criminal Tribunal for the Former Yugoslavia (ICTY) which was established by Resolution 827 of the Security Council.[86] In particular, Article 39 of the UN Charter gives the Security Council the power to determine the existence of any threat, breach of peace, or act of aggression and to make recommendations or decisions on measures to be taken to maintain or restore international peace and security. Article 41 of the UN Charter, which gives the Security Council the authority to decide measures other than the use of armed force to enforce its decisions, provides the legal basis for the establishment of the tribunals.[87]

However, Russia is a permanent member of the Security Council with veto power, which is why it is improbable that the UN Security Council will be able to implement any measures or methods to prosecute the crime of aggression.[88]

2.3.2.2. United Nations General Assembly

Another international possibility to establish a criminal *ad hoc* tribunal is through the UNGA, as the veto power does not affect it. Article 24 of the UN Charter assigns the Security Council primary responsibility for international peace and security.[89] However, UNGA resolution 377 established the Uniting for Peace mechanism (UfP), which states that if the Security Council fails to exercise

[84] European Commission. (2022, November 30). *Ukraine: Commission presents options to make sure that Russia pays for its crimes* [Press release]. https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7311
[85] Corten, O., & Koutroulis, V. (2022), *supra nota 76*, p. 16
[86] Schabas, W. (2006). Creation of the tribunals. In *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (pp. 3-46). Cambridge: Cambridge University Press. https://doi.org/10.1017/CBO9780511617478.002 p. 4
[87] Charter of the United Nations (1945), *supra nota 8*, Articles 39 and 41
[88] Shaw, M. N. (2021), *supra nota 6*, p. 334
[89] Charter of the United Nations (1945), *supra nota 8*, Article 24

its primary responsibility for international peace and security, the UNGA may make recommendations to maintain or restore international peace and security.[90] Despite the wording of the resolution as "make recommendations" and the UN Charter's description of the UNGA's functions as discussing, promoting, and recommending, the UNGA's actual duties have included, e.g., the creation of a Peacekeeping force and the involvement in the establishment of a hybrid tribunal, namely the Extraordinary Chambers in the Courts of Cambodia (ECCC), both of which were *intra vires*.[91]

In addition, Article 22 of the UN Charter gives the UNGA powers to establish subsidiary organs as it deems necessary for the performance of its functions.[92] Accordingly, the reasoning of the ICJ in its Advisory Opinion in the case *Effect of Awards* stated that the UN Charter does not confer judicial functions to the UNGA.[93] However, in the case of *Tadić*, the ICTY Appeals Chamber relied on the ICJ reasoning and acknowledged that the UNGA did not need military and police powers in order to create a peacekeeping force.[94] It has been argued that combined with the ICTY Appeals Chamber's assertion that the UNGA did not need to be a judicial organ with judicial functions and powers in order to establish the UN Appeal Tribunal[95], this can lead to the conclusion that although "the Assembly is not itself a judicial body [it] does not prevent it from establishing a judicial organ as an instrument for the exercise of its powers"[96].

It is proven by the ECCC that the UN Charter does not prohibit the UNGA from establishing a tribunal with the permission of the interested state.[97] However, there is the question of whether the UNGA would also need permission from, e.g., Russia, as it can also be considered in this case to be an "interested state" on the matter.

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[90] United Nations General Assembly. (1950). Uniting for peace. UN Doc A/RES/377(V)
[91] *Ibid.,* p. 19
[92] Charter of the United Nations (1945), *supra nota 8,* Article 22
[93] Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory opinion,1954 I.C.J. Rep. 47, at 56.
[94] Ramsden, M. (2016). "Uniting for Peace" in the age of International Justice. *The Yale Journal of International Law Online,* 42. p. 19
[95] The United Nations Appeals Tribunal was established by the UNGA in 2009. *See e.g.,* United Nations. (n.d.). *United Nations Internal Justice System*. Retrieved March 29, 2023, from https://www.un.org/en/internaljustice/unat/
[96] Barber, R. (2019*).* Accountability for Crimes against the Rohingya. *Journal of International Criminal Justice,* 17(3), 557–584. https://doi.org/10.1093/jicj/mqz031. p. 580
[97] *See* United Nations General Assembly. (2003). *Khmer Rouge trials.* UN Doc A/RES/57/288., which recommended the formation of the ECCC and urged the Secretary-General and Cambodian government to reach an agreement to establish the hybrid tribunal.

The legality of the potential *ad hoc* tribunal is rather questionable if it is established directly by the UNGA, similarly to the case with the UN Appeal Tribunal, as opposed to the UNGA authorizing the Secretary-General to evaluate the situation and take action. Noteworthy is the fact that the UfP and UN Charter provide the UNGA the authority to make recommendations. Therefore, the UNGA cannot adopt binding decisions. This is also demonstrated by Article 25 of the UN Charter, which grants this authority to the Security Council. In the end, this raises questions about the legality of the potential tribunal that would be binding on UN Member States if it were to be established and created by the UNGA.[98]

As the legal basis for establishing an international tribunal directly through the UNGA has been questioned, it has also been suggested that international law could be developed by adopting a new UNGA resolution on the UfP. This scenario could, e.g., grant the UNGA the authority to establish an international "judicial body designed to fight impunity for the most serious crimes of international law"[99] while recognizing the Security Council's responsibility to maintain international peace and security through military action.[100] UNGA has the authority to enact such resolutions based on the UfP, but this process is more political than legal, and consensus on such matters can be difficult to achieve. In addition, it should be noted that UN Member States are not obligated to act on the basis of a recommendation made by the UNGA, undermining the effect of this approach.[101]

2.3.2.3. United Nations Secretary-General

Chapter XV of the UN Charter addresses the UN Secretary-General, the organization's chief administrative officer. Article 98 stipulates that the Secretary-General must carry out the duties assigned to him by the Security Council and the UNGA.[102]

Consequently, the Secretary-General plays an important role if the *ad hoc* tribunal is created through UNGA as the UNGA can direct the Secretary-General to enter into negotiations with the Ukrainian government to establish an *ad hoc* tribunal, as was the case with the ECCC and the Special Court for Sierra Leone (SCSL)[103].

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[98] Corten, O., & Koutroulis, V. (2022), *supra nota 76*, p. 16
[99] *Ibid.*
[100] *Ibid.*
[101] Carswell, A. J. (2013). Unblocking the UN Security Council: The Uniting for Peace Resolution. *Journal of Conflict & Security Law*, 18(3), 453–480. https://doi.org/10.1093/jcsl/krt016 p. 465
[102] Charter of the United Nations, *supra nota 8*, Article 98
[103] However, both the ECCC and SCSL were established using a hybrid model.

2.3.3. Hybrid

The primary goal of establishing hybrid courts, which combine components of national and international legal systems, is to promote legitimacy and acceptability on both the national and international levels. In most cases, hybrid courts are utilized in challenging post-conflict conditions. These are circumstances in which reliance on exclusively domestic systems would be problematic due to factors such as large political risks or expenses. This form of the hybrid court system is exemplified, e.g., by the SCSL.[104] The SCSL was established in 2002 by a bilateral agreement between the UN and Sierra Leone to "prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law"[105] committed on Sierra Leonean territory since November 20, 1996, and during a violent civil war.[106] Consequently, the SCSL had a hybrid nature, e.g., the judges were appointed by both the Sierra Leonean government and the UN Secretary-General. In addition, the SCSL and the national courts of Sierra Leone had concurrent jurisdiction. The SCSL, however, had primacy over national courts.[107]

One way to establish the *ad hoc* court to prosecute the crime of aggression would be to take a model from both the ECCC and the SCSL. The ECCC was established in 1997 when the Cambodian government requested the UN to assist in establishing a trial process to prosecute the Khmer Rouge senior leaders. The ECCC was a national court even though the agreement between the UN and Cambodia provided an ECCC consisting of Cambodian and international judges.[108]

In addition, *inter alia*, the United States has supported the establishment of the special tribunal by employing a hybrid model, i.e., "the tribunal should be rooted in Ukraine's domestic judicial system"[109]. They have argued that this is the clearest path to establishing the tribunal and will increase the probability of achieving "meaningful accountability". However, as Article 125 of the

[104] Shaw, M. N. (2021), *supra nota 6*, p. 350
[105] Statute of the Special Court For Sierra Leone (entry into force 2002). Article 1 (1)
[106] Shaw, M. N. (2021), *supra nota 6*, p.350
[107] Statute of the Special Court For Sierra Leone (entry into force 2002), *supra nota 98*, Articles 8 and 12
[108] *Introduction to the ECCC*. (n.d.). Extraordinary Chambers in the Courts of Cambodia. Retrieved March 26, 2023, from https://www.eccc.gov.kh/en/introduction-eccc
[109] Reuters. (2023b, March 28). *US supports creation of a special tribunal for "aggression" against Ukraine*. Retrieved March 29, 2023, from https://www.reuters.com/world/europe/us-supports-creation-special-tribunal-aggression-against-ukraine-2023-03-28/

Ukrainian constitution expressly prohibits the establishment of extraordinary and special courts, the hybrid model may raise constitutional concerns in Ukraine if it is not amended.[110]

2.4. Analysis of possible options to prosecute the crime

To begin with, it should be noted that there is no clear or perfect solution to this issue, as all of the enumerated methods for prosecuting the crime involve varying degrees of legal complications. However, one must note that in order to ensure that the crime of aggression is not left unpunished, the most appropriate option must be selected, and one must weigh the pros and contras of all of the presented methods.

The original intent was for the crime of aggression to fall under the jurisdiction of the ICC and be prosecuted there. The desired method to prosecute the crime of aggression, also in the context of the Russo-Ukrainian war, would be through the ICC by amending Article 15*bis* (5) of the Rome Statute or by the referral of the Security Council. This is due to the clear legal status of the crime in the Rome Statute and the original intention that the ICC would have jurisdiction regarding it. This view has also been supported by the ICC prosecutor Karim A. A. Khan.[111] However, one must note the current issues with regard to the absence of jurisdiction, the issue of veto, and the length of the potential amending procedure of the Rome Statute, as well as difficulty in reaching a consensus on the subject and problems with retroactivity, which ultimately lead to the conclusion that prosecuting the crime through ICC most probably ineffective in the case of Russo-Ukrainian war. In addition, since the ICC does not currently have jurisdiction with regard to the crime of aggression in Ukraine, it should not be incorporated into other crimes over which the Court has jurisdiction, as it could be construed as employing the prohibited analogy. This method would also probably raise criticism and resistance to the Court.

Additionally, the domestic approach to prosecuting the crime has a possibility of encountering issues such as the enforcement of the judgment as well as probable problems with immunities. In addition, problems with human rights perspectives, if the trial is conducted *in absentia*, would undermine the legitimacy of the trial and the enforcement of the judgment through the international community. However, there is a clear legal basis in the Ukrainian penal code supporting the view

[110] Constitution of Ukraine cannot be amended e.g., when there is a state of emergency. *See* Constitution of Ukraine, 28th of June 1996, *supra nota 80*, Article 157
[111] IntlCriminalCourt. (2022), *supra nota 75*

of the domestic approach. Moreover, conducting the trial through other countries' domestic levels by using universal jurisdiction can be viewed as legally problematic as there is no clear legal consensus on whether the exercise of universal jurisdiction over the crime of aggression has a basis in customary international law. It can also be challenging to prosecute foreign nationals in domestic courts fairly during or after an armed conflict.[112]

In a similar manner, also the regional approach to establishing an *ad hoc* tribunal could face problems with immunities if it is not deemed to be an international tribunal. In addition, if it is a hybrid court, it poses constitutional issues in Ukraine, as the constitution prohibits extraordinary and special courts.

Therefore, based on a comparison of the currently proposed and available options for prosecuting the crime of aggression against Ukraine, the author concludes that an international *ad hoc* tribunal could be viewed as the appropriate way to prosecute the crime, despite the fact that this method also presents challenges. The author acknowledges that the potential problems associated with alternative methods of prosecution – specifically with regard to immunity – strengthen the decision not to employ these methods. This is because the individuals who may be eligible for immunity are those who should most likely be prosecuted for the crime due to it being considered a crime of leadership. In addition, possible constitutional issues advocate the selection of this method.

Consequently, the most appropriate, although not perfect, method to establish the tribunal would be through a bilateral agreement between the UN and Ukraine, with the distinction specifying that the court would be international rather than hybrid, as a hybrid court would pose legal difficulties under the current constitution of Ukraine. In this manner, the tribunal has the potential to be backed by most of the UN Member States, which ultimately strengthens the legitimacy and effectiveness of the tribunal. The UNGA has already condemned both the Russian Federation's aggression in Ukraine and Belarus' involvement in the conflict, indicating that the resolution will receive support from the international community. This resolution is based on the UfP. The Security Council is primarily responsible for maintaining international peace, but in the context of the Russo-Ukrainian war, it is unable to do so due to Russia's veto power. In such a scenario, the UNGA may

[112] Public International Law & Policy Group. (n.d.). Draft Law for a Ukrainian High War Crimes Court. Retrieved March 29, 2023, from https://static1.squarespace.com/static/5900b58e1b631bffa367167e/t/62d6c27baae10b6ca51cadb7/1658241661209/DRAFT+Ukraine+High+War+Crimes+Court.pdf p. 1

consider the issue. This would also be the basis for evaluating the establishment of an *ad hoc* tribunal by the UNGA and Secretary-General as opposed to the Security Council and Secretary-General. As a result, in this method, Ukraine would request UNGA to adopt a resolution establishing the tribunal as the consent of the concerned State is required for the UNGA to utilize these functions in relation to the formed subsidiary organs.[113] This resolution would ultimately be a recommendation from the UNGA to the Secretary-General, requesting that the Secretary-General examine the request made by Ukrainian authorities in the same way that the ECCC was established. Consequently, the Secretary-General would then have the authority to negotiate a bilateral treaty between the UN and the Ukrainian government.[114] In addition, this would fulfill the "establishment by law" requirement as the tribunal could be deemed to have a solid legal foundation stemming from the negotiated treaty.

Nonetheless, one must acknowledge that even this option can be viewed somewhat as legally problematic, especially concerning the UNGA's role and the lack of precedents on the matter in international law. However, if the UNGA acts similarly to the case ECCC and thus makes a recommendation, it can be viewed as *intra vires* as resolution 377 explicitly states that it can make recommendations to maintain or restore international peace. The problems regarding the UNGA's role and whether it is acting *ultra vires* arise if it would create new legal instruments based on the UfP to grant the UNGA the authority to establish international tribunals. Nevertheless, despite the fact that the UNGA would receive permission to establish the tribunal from Ukraine, it is uncertain whether, in this instance, e.g., Russia would also be considered an interested state from whom consent would be required.

Another option that can be viewed as suitable for the context of the Russo-Ukrainian war is an agreement by Ukraine and other States, i.e., the tribunal would be established on a multilateral treaty between Ukraine and other states, and it would be open for accession. It would be even better if the UN supported the multilateral treaty; in this manner, the legitimacy of the tribunal would increase. However, it would be essential that this tribunal would be deemed international and not as hybrid due to immunities and constitutional constraints. Therefore, if the tribunal would

[113] Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962 : I.C. J. Reports 1962, p. I65

[114] Crane, D. M., Arivalagan, K., Bhattacharjee, R., & Lampela, L. (2022). *Considerations for the Setting up of The Special Tribunal for Ukraine on the Crime of Aggression*. In The Global Accountability Network. The Ukraine Task Force of The Global Accountability Network. Retrieved March 2, 2023, from https://www.jurist.org/news/wp-content/uploads/sites/4/2022/07/The_Special_Tribunal_for_Ukraine_on_the_Crime_of_Aggression.pdf. p. 28

be backed by the UN and deemed to be an international *ad hoc* tribunal, it can be viewed as a suitable option as option to establish the tribunal directly through the UN. The legitimacy of the tribunal would increase in the situation where the multilateral treaty would also be backed by the UN. In such a scenario, the legal foundation of the tribunal would derive from the treaty. Similarly to the method of establishing the tribunal through UNGA, this would fulfill the essential requirement of "establishment by law".

In addition to legal difficulties and critique, the *ad hoc* court could also be susceptible to charges of selective justice given the international community's failure to seriously consider, e.g., the invasion of Iraq in 2003. Nevertheless, this problem would be present even if the ICC prosecuted the crime, as the possibility of selective justice and double standards would almost certainly arise. However, compared to this situation, this issue could have a greater impact, as it could undermine the legitimacy of the ICC as an institution. In addition, the fact that aggression was not prosecuted, e.g., in Iraq, does not mean that the crime should be left unpunished in the future or in the case of the Russo-Ukrainian war.

In addition, other practical concerns, such as the viability of concrete cooperation between the ICC and an *ad hoc* tribunal, are relevant factors that must be considered when evaluating the various options for prosecuting the crime. There have been discussions on whether the *ad hoc* tribunal should have jurisdiction over all atrocity crimes. However, the prevailing opinion is that an *ad hoc* tribunal in the case of Ukraine would supplement the ICC's lack of jurisdiction, and therefore it would only have jurisdiction over the crime of aggression.[115] Another option would be to create a hybrid court that ultimately, very simply stated, could be able to prosecute all the atrocity crimes taking into account the complementarity principle of the ICC. Nonetheless, this is a distinct issue that this thesis does not address further, as the hybrid court would currently be in conflict with the Constitution of Ukraine, which cannot be amended under martial law or a state of emergency.[116] Regardless, the *ad hoc* court would have to cooperate closely with the ICC, which has already started the investigation on crimes against humanity and war crimes in the Russo-Ukrainian war.[117]

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[115] *See e.g.,* European Commission. (2022, November 30). *Ukraine: Commission presents options to make sure that Russia pays for its crimes* [Press release]. https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7311;

[116] Ukraine has had martial law since the start of the full-scale attack on 24th of February 2022. The martial law was extended again on 7th of February in 2023 and will last at least until early May. *See e.g.* The Kyiv Independent news desk. (2023, February 7). Parliament votes to extend martial law, mobilization. Kyiv Independent. Retrieved March 29, 2023, from https://kyivindependent.com/parliament-votes-to-extend-martial-law-mobilization/

[117] International Criminal Court. (2022, February 28). *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: "I have decided to proceed with opening an investigation."* [Press release]. https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening

In addition, it is crucial to ensure that, in the future, there is no need for *ad hoc* tribunals to prosecute the crime of aggression and that, as was always intended, the jurisdiction resides with the ICC. However, the possible *ad hoc* tribunal in the case of the crime of aggression against Ukraine can advance what the ICC could do in the future regarding the crime of aggression, as it can demonstrate that the crime can be prosecuted, particularly if the definition of the crime is taken from the Rome Statute.[118] In addition, while this thesis concludes that under the current circumstances and out of the options presented, an international *ad hoc* tribunal would be legally the most suitable way to prosecute the crime of aggression in the context of the Russo-Ukrainian war, this does not mean that efforts should not be made to amend the Rome Statute jurisdictional clauses regarding the crime.

[118] Corten, O., & Koutroulis, V. (2022), *supra nota 76*, p. 36

CONCLUSION

The aim of this has been to analyze the different options for prosecuting the crime of aggression and provide a suggestion based on the analysis of the optimal course of action in the context of the Russo-Ukrainian war. In addition, the thesis has examined the legal context of the crime of aggression as well as described the overview of the Russo-Ukrainian war in Chapter 1.

Crime of aggression is regarded as the supreme international crime. However, it has not been prosecuted since the Second World War, and it has been difficult to reach a consensus on the definition of the crime. In addition, the ICC's jurisdiction over the crime is very complex and was activated in 2018, which is relatively late compared to the other core international crimes. Nevertheless, in the context of the Russo-Ukrainian war, prosecuting the crime through ICC is currently not possible as neither Ukraine nor Russia are States Parties to the ICC. In addition, the referral of the UN Security Council to the ICC is not probable due to Russia's veto power as a permanent member. Nevertheless, prosecuting the crime through ICC would be the most suitable strategy if there were no jurisdictional issues, as the crime has a clear legal basis in the Rome Statute, and the jurisdiction of the crime has been intended to be in ICC.

Therefore, it has been necessary to evaluate alternative methods for prosecuting the crime. The thesis has found that other methods than international *ad hoc* tribunal have the potential to encounter significant problems, particularly with regard to immunities. One of the elements of the crime of aggression is that it is regarded to be a leadership crime; therefore, immunities to heads of state or high-ranking officials would ultimately undermine the effectiveness of the prosecution. This issue would be avoided by an international *ad hoc* tribunal, as international tribunals do not apply personal immunities. This also explains why the regional aspect of establishing the tribunal could be problematic, given that there is no consensus on whether it would be considered an international tribunal.

In addition, the Constitution of Ukraine contains a provision prohibiting the establishment of extraordinary or special courts, which cannot be amended as long as martial law remains in effect,

thereby rendering the hybrid method of establishing an *ad hoc* tribunal inapplicable. Ukraine has criminalized the crime of aggression, establishing a legal basis for its prosecution in domestic courts. However, as stated previously, this is not an international court; therefore, personal immunities might apply. In addition, prosecuting the crime through domestic courts may face additional obstacles, such as enforcing the judgment. If the domestic approach is chosen, but the crime is prosecuted in a domestic court of a state other than Ukraine, it could face similar problems. In such a scenario, there could also be an issue with the court's use of universal jurisdiction, as there is no consensus on whether the exercise of universal jurisdiction over the crime of aggression has a basis in customary international law.

Therefore, the conclusion of the thesis is that, despite the fact that none of the analyzed methods of prosecuting the crime are perfect, the most appropriate approach in the context of the Russo-Ukrainian war would be to establish an international *ad hoc* tribunal. The thesis proposes two methods of establishing the tribunal 1) through a treaty signed by the UN and Ukraine on the referral of the UNGA and the Secretary-General or 2) multilateral treaty between Ukraine and other states, which could be supported by the UN. The first alternative would guarantee that the UN would support the tribunal, thereby enhancing its legitimacy, in contrast to the second alternative, where this could be viewed as probable but not certain. Additionally, in the second option, it would be necessary for the treaty to have the signatures of multiple states in order to be considered international. However, both international options to establish the *ad hoc* tribunal can be seen as legally viable in the context of the Russo-Ukrainian war.

Prosecuting the crime of aggression has remained a theoretical crime since the Second World War. Consequently, it has not yet been possible to analyze how prosecuting the crime in the modern era will impact international law and the community. In addition, if the crime of aggression is prosecuted by an *ad hoc* tribunal in the context of the Russo-Ukrainian war, it will be possible to analyze the effects of the process on the ICC.

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APPENDICES

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