

REPORT

A CALL TO ACTION FOR GOVERNMENTS,
LEGAL PRACTITIONERS, AND CIVIL SOCIETY

FILLING THE ACCOUNTABILITY GAP:
**THE ESTABLISHMENT OF A
SPECIAL TRIBUNAL FOR RUSSIAN
AGGRESSION AGAINST UKRAINE**



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*“This particular situation is
not just a legal problem but
also a political problem.”*

David Crane

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“The crime of Aggression is considered the supreme crime in international law. A failure to address a crime of this magnitude renders the international rules-based order meaningless and leaves the world’s citizens vulnerable to the whims of aggressive autocratic regimes and dictators. Failure to address it is a global problem and therefore a global issue to resolve. It poses a threat to all of us, not just to Ukrainians”¹

Jason McCue,

Founding Partner, McCue Jury & Partners LLP,
JAFUA Chief Legal Counsel

This report provides a comprehensive analysis of the legal implications surrounding Russia’s aggression in Ukraine and the push for the establishment of a Special Tribunal to address this grave violation of international law. It provides an update on the status of the Core Working Group: a coalition of states, legal experts, and organizations working toward the establishment of this tribunal. The group’s progress with the Council of Europe mechanism is discussed, providing insights into the potential pathways for achieving justice for Ukraine and upholding international law in the face of unprecedented aggression. The report also highlights what steps are needed to finalise the establishment of the tribunal.


Finally, the report provides an illustrative history of the Crime of Aggression, shaping down the definition to what we have today, and why an ad hoc tribunal is necessary.

This report is published in order to shed light upon the gravity of Russia’s aggression against Ukraine and to highlight the resulting need for justice. By highlighting the legal and moral imperatives for holding perpetrators accountable, the report seeks to strengthen the momentum for establishing the tribunal and ensure that it remains a priority on the international agenda.

¹ Interview with JAFUA, January 2025

1. HOLDING RUSSIA ACCOUNTABLE

WHY DO WE NEED A SPECIAL TRIUBNAL?

 *Russia is rapidly rewriting the norms of international law, rejecting the universality of its principles and replacing them with a dangerous political relativism...If the international community does not hold Russian leaders accountable for the crime of aggression, then I am not sure when it will do so for any future aggression.²*

Mark Ellis,

Executive Director, International Bar Association

Preventing impunity in international law is paramount. The crime of aggression is sometimes argued to be the ‘supreme international crime’³. Indeed, David Crane considers that: *“The crime of aggression in some ways is the ultimate crime...an aggressive act causes other international crimes to happen, so the unlawful invasion of the Russian Federation into Ukraine not only was an international crime in and of itself, but it also perpetrated war crimes, crimes against humanity, that have been going on for three years and so that is the cornerstone by which we need to and rarely do hold individuals who commit the crime of aggression is accountable”*.⁴

As outlined in Section 4 of this report, it is clear that the Crime of Aggression has been committed in Russia’s illegal invasion of Ukraine, and preventing impunity for this is essential. However, as must always be considered within the consent-based international law context, the invasion did not take place in a political vacuum. As such, geopolitics and the current political situation concerning Ukraine must be considered when creating the necessary legal structures for accountability.

In March 2022, a number of politicians and experts signed a combined statement and declaration calling for a “Special Tribunal for the punishment of the crime of aggression against Ukraine”.⁵ In April 2022, the Parliamentary Assembly of the Council of Europe called for an ad hoc criminal tribunal to hold to account perpetrators of the crime of Aggression against Ukraine.⁶ The impetus for creating a Special Tribunal has continued to grow from state actors, including the Ukrainian Government, the legal community, transnational organisations and others. The question now turns to how the Tribunal can be created, and what it should look like.

² Interview with JAFUA, January 2025

³ Sellars, Kirsten, ‘Crimes Against Peace’ and International Law, 2013

⁴ Interview with JAFUA, January 2025

⁵ [Statement Calling For The Creation Of A Special Tribunal For The Punishment Of The Crime Of Aggression Against Ukraine](#), March 2022

⁶ [Parliamentary Assembly of the Council of Europe, PACE Calls for the Setting Up of an Ad Hoc International Criminal Tribunal to Hold to Account Perpetrators of the Crime of Aggression Against Ukraine](#), January 2023,

2. THE WAY FORWARD

A COUNCIL OF EUROPE TRIBUNAL AND THE CORE GROUP

There is now a clear mandate for creating a Special Tribunal for Aggression against Ukraine, through the “Core Working Group” and the Council of Europe. The Core Group is composed of Ukrainians and over 40 supporting states, with legal advisers from their respective Ministries. The mandate of the Core Group has been to draft the tribunal’s legal, operational, and structural design, whilst creating support for the tribunal across the global political sphere to provide an “international character” for the Tribunal.

The Core Group is now completely decided upon the Council of Europe mechanism. This consists of:

- A bilateral agreement between Ukraine and the Council of Europe setting up the Special Tribunal and containing the statute governing the function of the tribunal.
- This is complemented by an enlarged partial agreement which will coordinate the financing and non-judicial organisation of the Tribunal.
- The Tribunal is therefore set up under Ukrainian territorial jurisdiction but is a truly internationalised tribunal.

The Council of Europe’s mechanism requires support from two-thirds of its member states to formally create the tribunal. Whilst there may be some states who will vote against this (Hungary, for example, has consistently taken a pro-Russian stance on the war, whilst Turkey has often tried to take a neutral “building bridges” approach), the opposition is unlikely to influence the efforts to streamline the process, given the two-thirds mandate.


The statute will allow for other non-member states from the Council of Europe to sign on in support of the Tribunal. This is likely to include both G7 members and states from the Global South, enhancing the international character of the Tribunal.

In 2023, the European Commission also confirmed the establishment of an International Center for the Prosecution of the Crime of Aggression in Ukraine (ICPA) to be set up in The Hague. The purpose of this Center is to coordinate the collection of evidence and be part of a Joint Investigative Team within the Eurojust agency (the European criminal justice agency for judicial cooperation and investigation). The ICPA began operations in July 2023, supporting and enhancing investigations into international crimes including the Crime of Aggression. The Netherlands is also financing an Interim Prosecutor’s Office in Ukraine, which is collecting evidence of Aggression.



3. JOINING THE DOTS WHAT IS NEEDED NEXT?

3.1 Political Will

 *“This particular situation is not just a legal problem but also a political problem.”⁷*

David Crane,

Founding Chief Prosecutor, UN Special Court for Sierra Leone

The timeline of the establishment of the special tribunal largely depends on political will and international consensus. The immediate steps include agreements on the tribunal’s scope and jurisdiction alongside continual efforts to document evidence. Public endorsements of the COE mandate and thorough and immediate strategic communications efforts are needed to strengthen public awareness of what the Tribunal is, why it is needed, and why it should be implemented as quickly and efficiently as possible.

It is important that such a blatant act of aggression and violation of territorial sovereignty does not become normalized in the international landscape. Whilst some actors seem to be taking a peace-at-any-cost approach which would fail to hold Russia to account and enable future aggression both in Ukraine and elsewhere, such an approach would not only be morally wrong, but would lead to the gradual disintegration of the international rules-based order and impunity for those guilty of the gravest international crime.

Recent US-Russian negotiations on an end to the war and a likely lack of US participation in the tribunal stress the importance of a strong European political lead. Global South participation is also important to ‘internationalise’ the tribunal as much as possible; nevertheless, there is a clear emphasis on the need for European leadership in advancing justice.

 *“Journalists and the press are the cornerstone for any successful prosecution.”⁸*

David Crane,

Founding Chief Prosecutor, UN Special Court for Sierra Leone

Aside from the required impetus from the Core Group and leading Countries, other actors from across various sectors are needed to drive the establishment and legitimacy of the Tribunal. The media, legal practitioners and civil society engagement with the process and publicization and communication of the Tribunal are essential for its effective establishment and legitimacy.


⁷⁻⁸ Interview with JAFUA, January 2025

3.2 Legal Obstacles

Modalities for the Special Tribunal

Since the outbreak of the full-scale invasion, several modalities have been posited for the Special Tribunal prosecuting Russian aggression against Ukraine. These include a tribunal created by the UN Security Council, a mechanism mandated by the UN General Assembly (UNGA), and a domestic tribunal.

Using the UN Security Council to create an ad-hoc special tribunal (as was done to create the International Criminal Tribunal for the Former Yugoslavia) is not an option: Russia is a Permanent Member of the Security Council and would simply veto any proposition.

 *“Other states need to step up on both accounts; they need to provide leadership on both the tribunal and support for Ukraine”⁹*

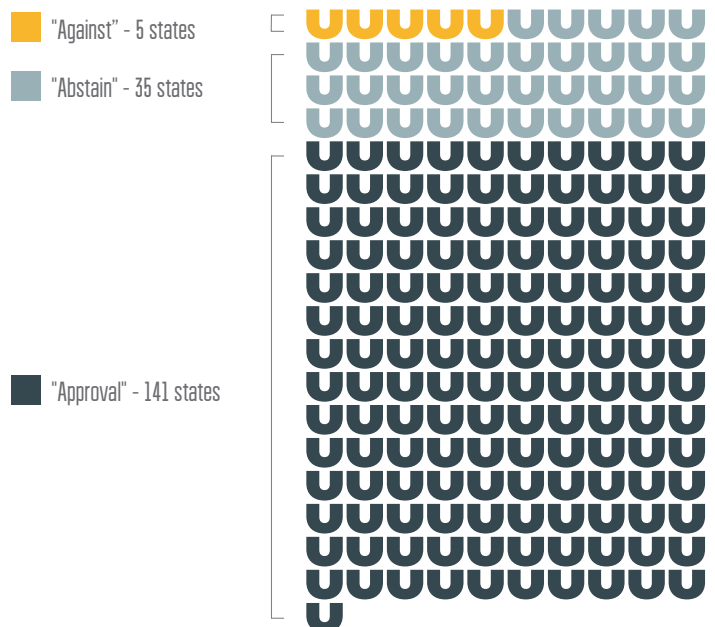
Jennifer Trahan,
 Director of the Concentration in International
 Law & Human Rights, NYU Center for Global Affairs

Following the outbreak of the full-scale invasion, some stakeholders advocated for the formation of an international tribunal under the umbrella of the UN General Assembly (reference). 141 UN states voted for UN General Assembly Resolution ES-11/1, which deplored Russia’s invasion of Ukraine, demanding a full withdrawal of Russian forces and a reversal of its decision to recognise the self-declared People’s Republics of Donetsk and Luhansk. Having stated this, there has been a growing consensus that whilst many States condemned Russia’s invasion of Ukraine, going beyond this and engaging support from all these states for the formation of a Special Tribunal is a considerable step further, and the 2/3 of the votes in the General Assembly that this would require could be difficult.

There has also been some support for a ‘hybrid’ tribunal which would be embedded in Ukraine’s judicial system, whilst perhaps having some international elements (for example, being based in the Hague). However, the Ukrainian government favours a court with international jurisdiction, for both the legal implications this would have and for its greater impact and political legitimacy.

**UN General Assembly
 Resolution ES-11/1
 on Aggression Against Ukraine**

“Deplores in the strongest terms the aggression by the Russian Federation against Ukraine...and Demands that the Russian Federation immediately cease its use of force against Ukraine”



⁹ Interview with JAFUA, January 2025

Bilateral agreements have also been proposed – for example, between Ukraine and the UK or Ukraine and the US. However, the Council of Europe has taken the lead on this, and its international character and legitimacy therefore provide the appropriate solution:

“the Tribunal will be established under the Council of Europe. The form of the Tribunal will definitely be highly internationalized, primarily focusing on European countries, but also allowing any country in the world to join”¹⁰

Ukrainian Government Official

Appointment of Judges

The appointment of judges for the tribunal is an area currently awaiting agreement within the COE; whilst the tribunal is created under an international mechanism, it requires careful consideration to ensure the integrity of the judge selection process. Judges must be selected independently and impartially, with a mind to both securing expertise and the perceptions of an inclusive and truly international court. The expertise of these judges will “ensure that criminal proceedings are conducted in respect of the procedural safeguards and applicable international human rights law”.¹¹

Immunities

One particular challenge needing to be addressed by any Special Tribunal is that of immunities. In international law, senior government figures are generally immune from prosecution in foreign domestic courts because of the principle of sovereign equality. Functional immunities to the protection afforded to government officials for actions they take as part of their official duties; they are continuing and do not apply after the official has left office.

These immunities do not apply before “certain international criminal courts” - as stipulated by the International Court of Justice in *Yerodia*.¹² What exactly constitutes a sufficiently international tribunal is unclear - this creates questions as to the ability to prosecute the “Troika” - the President, Prime Minister and Minister of Foreign Affairs of Russia.

¹⁰ Interview with JAFUA, January 2025

¹¹ European Commission, February 2025, “[The Commission and High Representative Kaja Kallas welcomes a major step towards holding Russia accountable for its war of aggression against Ukraine](#)”.

¹² Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) [2002] ICJ Rep 3

A solution is still needed to ensure a truly international tribunal with the legal power and political will to overcome the immunities of the Troika. Whilst debate has been had as to the issue of immunities (Some states are concerned with setting a precedent that could jeopardise their own leaders), it is imperative that the rule of law is applied effectively and the Troika face justice for their ultimate culpability for Russia's illegal and brutal invasion of Ukraine. Professor Phillippe Sands proposes a solution:

“my view on the issue of immunities is very clear: don't address it. Leave it to the judges to sort out in due course. That's what happened with the Special Tribunal for Sierra Leone...find a way to break the deadlock”¹³

Tribunals in Absentia

Whilst the situation in Russia is fluid, at present the Russian Federation will clearly be uncooperative with any tribunal set up to prosecute its leaders and those responsible for the crime of aggression. This brings up the question of trying individuals in absentia. This is not something that the ICC permits and can be a controversial topic, given concerns such as the right to a fair trial.

Having said the above, ad hoc tribunals such as the ICTY And the International Criminal Tribunal for Rwanda have allowed in absentia proceedings - there is clear precedent for this under international law. In September, the Ministers of Justice of the Council of Europe confirmed that:

“where the applicable law so permits, certain procedural steps in absentia in the prosecution of international crimes may serve the interest of justice in Ukraine”¹⁴

Whilst legal safeguards are necessary to ensure the fairness of the process, the Russian Federation's lack of cooperation with International Law and procedures should not prevent impunity for its leaders who have committed the ultimate international crime against the Ukrainian people.

¹³ JAFUA Conference on Special Tribunal for the Crime of Aggression against Ukraine, February 2024

¹⁴ European Commission, September 2024 “[Justice for crimes committed in Ukraine: Ministers of Justice discuss legal cooperation and a special tribunal for the crime of aggression](#)”

4. THE CRIME OF AGGRESSION AND AD-HOC TRIBUNALS

Following the horrors of the Second World War, international consensus was established to prevent such atrocities from ever occurring again. The United Nations began to provide a more comprehensive legal framework around warfare – legally defining ‘armed attack’ and ‘aggression’. Article 1 of the United Nations General Assembly Resolution 3314 of 1974 states that “*Aggression is 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, as set forth in this definition*”;¹⁵ whilst Art. 2(4) of the UN Charter states 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*”¹⁶. Russia’s invasion of Ukraine is a paradigm of both the General Assembly definitions of armed attack and aggression and Article 2(4)’s prohibition of the use of force. The invasion has violated Ukraine’s territorial integrity and sovereignty, in direct violation of the fundamental principles of the UN Charter.

In London in 1945, the Charter of the International Military Tribunal was adopted to try war crimes, crimes against peace and crimes against humanity in the second world war. In 1950, the United Nations General Assembly agreed to set up a Commission for the Establishment of an International Criminal Court.¹⁷ This was an arduous process: before the Commission submitted its final report to the General Assembly in 1994, the UN Security Council set up an ad hoc tribunal in 1993 for crimes committed in the former Yugoslavia since 1991 and for Rwanda in 1994. For this reason, the General Assembly set up an ad hoc committee to examine the Commission’s draft. Finally, in Rome in 1998, after several rounds of discussions, the Rome Statute was adopted as the foundational treaty for the ICC – the International Criminal Court.

The ICC has jurisdiction over the four ‘core international crimes’: genocide, crimes against humanity, war crimes and aggression. UN Member States have demonstrated relative consensus on definitions of the crimes of genocide, war crimes and crimes against humanity; however, this is not the case with the crime of aggression. “*Aggression has been the most difficult of the crimes to define, although a General Assembly resolution contains all the elements necessary for a satisfactory text. The core of the problem was clarifying the role of the Security Council, which under the United Nations Charter has the mandate to determine when aggression has occurred*”.¹⁸

¹⁵ Art. 1, United Nation Resolution, 1974.

¹⁶ Art. 2(4), United Nations Charter, 1945.

¹⁷ Schabas W. A., The International Criminal Court: An Historic Step to Combat Impunity, in *Refuge: Canada’s Journal on Refugees*, Vol.17, No.3, Current Issues in Refugee and Human Rights Policy and Research, August 1998, pp. 21-29.

¹⁸ Schabas W. A., *ibidem*.

Even though the crime was recognized as one of the subjects of the Court’s jurisdiction, the adoption of a formal and definitive provision in the work of the ICC was not achieved because of problems in finding a common ground for a definition that would be shared and recognized by all member states.¹⁹ However, in 2010, a package of amendments to the crime of aggression was adopted in Kampala, Uganda. State Parties, Observer States and civil society representatives to the Rome Statute gathered in Kampala to review and discuss the Review Conference of the Rome Statute.²⁰ Now, after eight international preparatory sessions and much diplomatic wrangling, the following passage in Article 8-bis of the Rome Statute can be seen as the modern definition of the crime of aggression: “For the purpose of this Statute, “crime of aggression” means 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”.²¹

The need for an ad hoc tribunal

Following the Rome Statute’s clarification on the definition of the crime of aggression in International Law, there is a clear legal mandate for prosecution. Here, the international community can look to the examples of ad hoc international tribunals used in recent history to prosecute international crimes.

The ICTY tribunal and the ICTR which, in the early 1990s, were created with the aim of restoring justice to victims of genocide in the Former Yugoslavia and Rwanda respectively, when the ICC’s jurisdiction could not be easily established. Whilst no state has ever yet been tried for aggression, not to mention a permanent member of the Security Council, ad hoc tribunals have been an effective method in the past of prosecuting specific core crimes with a greater focus, speed, and more effective justice than the ICC has.



¹⁹ Schabas W. A., *ibidem*.

²⁰ Barriga S., Grover L., A Historic Breakthrough on the Crime of Aggression, in *The American Journal of International Law*, Vol. 105, No. 3, July 2011.

²¹ Rome Statute, 2010.

Conclusion

It is a legal, political and moral imperative for Russian aggression against Ukraine to be prosecuted, for Ukraine as a State, for its people and for us all more broadly that benefit from the upholding of the International Rule of Law. In an age of increased uncertainty and threats to the sanctity of International Law and the just peace it enables, ensuring accountability for Russia's brutal and illegal invasion of Ukraine is paramount.

On 4 February 2025, President of the European Commission Ursula von der Leyen affirmed: *“When Russia chose to roll its tanks over Ukraine’s borders, breaking the UN Charter, it committed one of the gravest violations: the Crime of Aggression. Now, justice is coming. Justice for Ukraine. We have laid down the legal foundations for a Special Tribunal. There can also be no justice without compensation. Russia must be held accountable for its aggression – and it must pay.”* We support this statement entirely and by all means, and strongly urge all stakeholders to support the acceleration and implementation of the Tribunal.

We are happy to speak to interested stakeholders or to put you in touch with our connections concerning the Special Tribunal or other accountability issues on Ukraine – do not hesitate to get in touch with our team.

Justice and Accountability for Ukraine (JAFUA)

An independent human rights NGO, operating as a non-profit, which seeks to establish legal channels of accountability for violations of international law in Ukraine. We focus on three main objectives: ensure the return and rehabilitation of abducted Ukrainian children, reparations for underrepresented victims of Russian war crimes, and establishment of an effective International Special Tribunal for Ukraine seeking fair accountability and justice.

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