

# Association of European Journalists: Accountability for International Crimes in Ukraine and the Creation of a Special Tribunal for the Crime of Aggression

## Aarif Abraham - Text of Speech - 27 September 2022

I'd like to thank William Horsley for the invitation, Dr Tatyana Eatwell for connecting us and for the AEJ and Regent's University for being today's generous hosts. I would like to make four short points by way of introduction to the issue, before what I hope will be a lively discussion.

First, I will consider the ongoing armed conflict in Ukraine since 2014, what types of international crimes are allegedly being committed, and what the current accountability landscape looks like.

Second, I will outline why accountability for the crime of aggression, which is allegedly being committed by Russia and Belarus in Ukraine, can only be ensured by a Special Tribunal. I should disclose that I advise on this matter led by Philippe Sands QC and work with colleagues Dr Anton Korynevich, Prof. Dapo Akande, Prof. Alex Whiting, and Dr Carrie MacDougal. What I propose to discuss is already in the public domain.

Third, I shall identify some of the precedents that may help to formulate an agreement and statute for a Special Tribunal.

Fourth, I consider the practicality of setting up a Special Tribunal and address extant challenges and critiques.

### ***1: Widespread commission of war crimes in Ukraine***

1. On 24 February 2022, Russia, aided by Belarus, began what is widely acknowledged to be the largest cross-border land war in Europe since World War II (notwithstanding the devastating armed conflict in Bosnia between 1992 and 1995). This followed from the illegal annexation of Crimea (and the City of Sevastopol) by Russia in 2014, the *de facto* annexation of parts of the Donbas, and the first conquest of territory / aggressive war in Europe since World War II (if we consider the *de facto* annexation of Georgian territory to be an exception). These acts stand as a blatant challenge to the global prohibition on the use of force and territorial conquest, as well the prohibition on acts of aggression.

2. During this ongoing armed conflict, there has been a very widespread commission of crimes - those crimes, a large number being committed by individuals affiliated to Russian state agents, organs or officials (including its armed forces) could constitute war crimes, crimes against humanity and presents possibly the risk of genocide. On Russia's

part, they say these crimes are not occurring - despite widespread and credible allegations and widely available evidence - and/or that their actions in Ukraine are motivated by humanitarian considerations: protecting Russian speaking Ukrainians from genocide or other crimes (another claim that remains in largely unsubstantiated).

1. The statistics shock. The Ukrainian civilian casualties number approximately 15,000 and growing, some 13 million people have been displaced and, of those, half have left. And Ukrainian domestic prosecutors (alone) are considering some 38,000 crimes allegedly committed by Russian forces.

2. The crimes are broad in scope: murder, torture, forcible transfer, forcible deportation, sexual violence, transfer of children from Ukraine to Russia, widespread destruction of property and cultural heritage and so on.

3. So who has authority to investigate these crimes and hold those who commit them responsible? Responsibility under international law is often divided into state responsibility and individual criminal responsibility.

4. Over war crimes, crimes against humanity and allegations of genocide, the ICC has jurisdiction ever since Ukraine self-referred the situation on its territory to the ICC in 2014. Several other States later made their own referral, some 43 states did so in March of this year. This means all such international crimes committed since 2014 on Ukrainian territory where it concerns high- to mid- level perpetrators can be prosecuted by the ICC where Ukraine is unable or unwilling to do so - this includes Russians, Ukrainians or, in fact, anyone of any nationality committing crimes in Ukrainian territory.

5. In respect of allegations of state-sponsored genocide - whether by Russian forces in Ukraine or Ukrainians committed such a crime against their own Russian-speaking nationals - the International Court of Justice has jurisdiction to consider any such allegations and adjudicate on them - the obligations of prevention, prohibition and punishment of genocide are all engaged and this is a question of State responsibility or the failure of States to uphold their obligations under the Genocide Convention.

6. On top of these courts, a whole host of other mechanisms are being utilised by Ukraine for accountability purposes: the Human Rights Committee has created the Commission of Inquiry in Ukraine to investigate all serious violations of international law, the European Court of Human Rights has jurisdiction to consider all major human rights violations until the point Russia was removed from the Council of Europe in 2022, the Joint Investigative Team (JIT) of the EU has been activated to consider all major international crimes (with members including Lithuania, Poland, Ukraine, Estonia, Latvia and Slovakia), and various civil and criminal complaints are being brought around the world under domestic (including universal jurisdiction) legal provisions.

7. Ukraine itself has mobilised a vast investigation and prosecution exercise through its domestic court system to prosecute war crimes.

8. So what crimes are not within scope of any formal international court, tribunal or mechanism? Principally, the crime of aggression, which brings me to my second point.

## ***2: Why is a Special Tribunal to bring prosecutions for the crime of aggression really necessary?***

Russia's use of force against a sovereign Ukrainian state constitutes one or more illegal acts of aggression, contrary to binding international law; having not been authorised by the UN Security Council (UNSC) and it not being an act of self-defence. As aggression is considered a leadership crime, those exercising control over, or directing, political or military action of the acts, in the words of the Nuremberg Tribunal, are committing the "supreme international crime".

*[Definition of the "crime of aggression": 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. An "act of aggression" means 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. The acts, are set out in the United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974.]*

As aggression against Ukraine continues, there is no international body before which those responsible in Russia or Belarus can be brought. Russia is not a state party to the International Criminal Court (ICC), which is the only body that could try serving high officials who are responsible. A referral to the ICC by the UNSC would be vetoed by Russia. It is because of this vacuum, a Special Tribunal would help enforce binding international law relating to aggression (and be complementary to, rather than in competition with, the ICC).

Why is such a tribunal important?

1. It is the surest route to trying the Russian and Belarusian leaders for international crimes. Trying senior leaders for war crimes, CAH or genocide is notoriously difficult because of the difficulty in linking crimes committed on the ground (by troops) to senior military or political figures who are often aware of the risk of having crimes attributed to them.
2. A Special Tribunal would be cost effective, lean and focused on a single crime for a relatively narrow clique of perpetrators.
3. By charging senior leaders, political dynamics within Russia and Belarus could change and give democratic opposition possible options.
4. It would reinforce the idea – a fundamental idea - that the prohibition on the illegal use of force and the crime of aggression is important as is international rule of law.

5. It would ensure accountability for conduct which does not strictly constitute strictly international crimes, but which are extremely significant: the huge suffering brought to the entire civilian population, the destruction of the economy and critical infrastructure, the prospect for millions of people to lead normal lives for the foreseeable future, the loss of life within the armed forces, and so forth.

This brings me to my third point in relation to precedents for a Special Tribunal.

### ***3: Precedents for Special Tribunals in international law***

In relation to precedents, there are approximately 25 relevant agreements since the 1929 Kellogg Briand Pact which is often cited as the original marker for the prosecution of German and Japanese leaders for waging aggressive wars after WWII - 10 of those are particularly relevant and they are:

- 1945 Charter and Agreement on the IMT;
- 1993/1994 Statutes on Rwanda and Yugoslavia
- In 1998, of course, we had the Rome Statute - first major int'l instrument to deal with the crime of aggression since WWII Following the Kampala amendments.
- 2002 Agreement between UN and Sierra Leone for the Special Court
- 2003 Agreement between UN and Cambodia on the Extra-ordinary Chambers
- 2007 Agreement between UN and Lebanon on the Special Tribunal
- 2012 Agreement between AU and Senegal on the Extra-ordinary African Chambers within the Senegalese Judicial System
- 2014-16 Kosovo Special Chambers' Foundational Documents - between EU and Kosovo
- 2015 Draft Statute for Tribunal on MH17 - the documents relating to that since
- Other more unconventional precedents are the recent trend in People's Tribunals though of course they have no formal authority or powers - these are light-footed, highly versatile and may provide lessons in cost-effectiveness and streamlining the work required.

Whilst majority of these precedents dealt with a range of international crimes, and only two perhaps substantively addressed the crime of aggression, they all helpfully point to possible means and methods of creating a Special Tribunal - that brings me to my fourth point.

### ***4: Challenges and critiques of the Special Tribunal proposal***

How does one go about creating a Special Tribunal?

An Agreement/Statute for a Special Tribunal can be between the UN and Ukraine, on recommendation from the UNGA; this would provide significant international legitimacy. [The tribunal could consist of a hybridized chamber within the Ukrainian court system (like the Extraordinary Chambers in the Courts of Cambodia - note created upon recommendation by the UNGA) or a freestanding hybrid tribunal (like the Special

Court for Sierra Leone - note created by UNSC but not under Chap VII]). Jurisdiction would derive from Ukrainian law which proscribes the crime of aggression (and possibly through pooling UJ of other states). [Note customary international law is also relevant].

A more realistic option (politically) is an agreement between Ukraine and the EU - following the Kosovo precedent and given that a JIT under EU auspices has already been set up and which ostensibly covers the crime of aggression. This would appear to be a natural progression and the European Parliament has endorsed the creation of a Special Tribunal.

An alternative and increasingly possible one - following loosely the African Union/Senegal precedent - would be a regional tribunal where an agreement could be formed between Ukraine and the CoE. The Parliamentary Assembly of the Council of Europe (PACE) vote approving the creation of such a tribunal significantly augments that possibility.

There also two further alternatives: one is simply an agreement between an *ad hoc* group of States and Ukraine - a coalition of the willing if you might with possibility of future endorsement by others; the other is an amendment of the Rome Statute in respect of jurisdiction for the crime of aggression - the latter is neither realistic nor practicable and the former may suffer from a lack of legitimacy.

Finally, we know that agreements in IOs take time. The very first step could be to already to begin the work of a Special Tribunal in earnest with a coalition of the willing through an interim / preparatory office as Alex Whiting has identified. The sooner that work begins the more likely that the creation of a Special Tribunal becomes a matter of inevitability as opposed to one of political expediency. Thank you.

[END]