

Research Briefing

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By Dr Patrick Butchard

Conflict in Ukraine: A Special Tribunal on the Crime of Aggression



Summary

- 1 Russia's 2022 invasion of Ukraine and Aggression
- 2 Possible forms of a Special Tribunal and legal issues
- 3 International support for a Special Tribunal

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Contents

1	Russia’s 2022 invasion of Ukraine and Aggression	7
1.1	What is Aggression in international law?	8
1.2	Jurisdiction over aggression at the International Criminal Court	9
1.3	Proposals for a Special Tribunal	11
2	Possible forms of a Special Tribunal and legal issues	12
2.1	Issues of immunity	13
2.2	Issues of selective criminal justice?	15
3	International support for a Special Tribunal	17
3.1	States supporting different models	20
	G7 support for a hybrid tribunal	20
	Others support an international tribunal	20
	Ukraine’s initial preference	20
	Reports of compromise talks	21
3.2	Institutional developments	22

Summary

This briefing updates and supersedes research from the Commons Library Debate Pack [relating to the proposed Special Tribunal](#) (5 May 2023), and updates developments originally covered in the Commons Library Briefing Paper [Ukraine crisis: Recognition, military action, and international law](#) (24 March 2022).

Russia's 2022 invasion of Ukraine and Aggression

Proposals for a Special Tribunal for Ukraine relate directly to the specific crime of aggression, and is separate to international [investigations ongoing by the International Criminal Court](#) relating to alleged war crimes and other international crimes that may have been committed following Russia's invasion of Ukraine.

After Russia invaded Ukraine on 24 February 2022, some states were quick to label this as an act of aggression in their immediate reactions. On 2 March 2022 the UN General Assembly passed a [Resolution](#) titled "Aggression against Ukraine". Among other statements, it said that the General Assembly "Deplores in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the Charter."

What is Aggression in international law?

Aggression is an international crime in international law. It is closely related to the prohibition of force in international law under [Article 2\(4\) of the UN Charter](#), but aggression is a crime with specific criteria. This briefing outlines the [definition of aggression](#), as agreed by the UN General Assembly in 1974. The General Assembly declared in Article 1 of the definition what aggression is and lists some of the acts that could amount to aggression as including:

- Invasion, occupation, or annexation of another state's territory.
- Bombardment of another state's territory.
- Blockades of ports or coasts.
- Attacks by one armed force against another.
- In situations where there is an agreement between two states that provides for the presence of forces within the territory of the receiving state. A use of force in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement.

- Allowing a state's own territory to be used to launch such attacks by another state against a third state.
- The sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out armed acts of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Proposals for a Special Tribunal

The International Criminal Court (ICC) cannot exercise jurisdiction over the crime of aggression unless both the victim and the aggressor state has ratified and accepted the Court's jurisdiction over that crime, or where the UN Security Council refers the situation to the Court. Neither Russia nor Ukraine are parties to the Rome Statute, and Russia is able to veto any decision at the UN Security Council.

Ukraine did submit a declaration in 2015 [to accept the jurisdiction of the Court](#) over any acts of genocide, crimes against humanity or war crimes that may be committed within the territory of Ukraine since 20 February 2014 onwards. However, the Prosecutor of the ICC has [noted that this does not apply to the crime of aggression](#), and that the crime of aggression cannot apply to the current situation in Ukraine.

Because the ICC does not have jurisdiction over the crime of aggression in Ukraine, 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"](#).

Possible forms of a Special Tribunal and legal issues

There are a number of different avenues to establishing an international tribunal to prosecute aggression, and the most suitable and legally-sound avenue to establishing this is the subject of [ongoing considerable debate](#) among experts.

Based on the commentary cited in this briefing, some of the main routes being considered to create such a Special Tribunal are outlined. However, not all of these options are considered legally viable. Each of the options outlined have specific and complex legal obstacles, as well as political and practical issues that may need to be addressed.

- Option 1 – Amending the International Criminal Court's Rome Statute to allow referrals by the UN General Assembly to prosecute aggression.
- Option 2 – A Ukrainian court established with international support (the hybrid model).
- Option 3 – An international court established by the UN General Assembly, with the agreement of Ukraine.
- Option 4 – A treaty between interested states creating a Special Tribunal.

Recent reports and comments [also suggest a fifth option has been considered](#), including the hosting of a tribunal in a third state, but details on this and its precise legal basis are still to be made clear.

Other models are also possible, but not notably considered as yet.

The main issues to be considered in creating such a tribunal include:

- On what basis the Special Tribunal would have jurisdiction
- How the Special Tribunal would address the functional and personal immunities of members of Russia's leadership
- The resources available to the Special Tribunal, and how it would be funded

Commentators have also questioned whether a Special Tribunal on the Crime of Aggression would give rise to selective justice, because the crime of aggression has not been prosecuted for any conflict since World War II. This issue is further explored in the briefing paper.

Support for a tribunal

Ukraine itself supports the creation of a Special Tribunal, and has been open to exploring the different legal avenues. Ukraine's President Zelensky [has called for the Tribunal](#). A 'Core Group' of 40 states [has been established](#) to discuss and develop the precise form of a special tribunal, and discussions are ongoing about how to proceed.

1 Russia's 2022 invasion of Ukraine and Aggression

Proposals for a Special Tribunal for Ukraine relate directly to the specific crime of aggression, and is separate to international [investigations ongoing by the International Criminal Court](#) relating to alleged war crimes and other international crimes that may have been committed following Russia's invasion of Ukraine.

After Russia invaded Ukraine on 24 February 2022, some states were quick to label this as an act of aggression in their immediate reactions. This included [the UK](#),¹ [the US](#),² and [the EU](#).³

Russia [vetoed a draft Resolution](#) at the UN Security Council that would have “deplored in the strongest terms the Russian Federation’s aggression against Ukraine”.⁴ [This draft](#), co-sponsored by 81 member states, stated that Russian aggression against Ukraine was in violation of article 2, paragraph 4 of the UN Charter and demanded that Russia immediately withdraw all its military forces from Ukraine. In addition to the Russian veto, 11 members voted in favour of the text and three members abstained (China, India and the United Arab Emirates).

Blocked by Russia’s veto, the Security Council [called on the UN General Assembly to step in](#) under [the Uniting for Peace procedure](#)⁵ – the first time the Security Council had used this procedure in 40 years.⁶

On 2 March 2022 the UN General Assembly passed a [Resolution](#) titled “Aggression against Ukraine”. Among other statements, it said that the

¹ Foreign, Commonwealth, and Development Office, “[Foreign Secretary statement on Ukraine situation: 24 February 2022](#)”, 24 February 2022.

² US, White House, “[Statement by President Biden on Russia’s Unprovoked and Unjustified Attack on Ukraine](#)”, 23 February 2022.

³ EU Commission, “[Press Statement of President Charles Michel of the European Council and President Ursula von der Leyen of the European Commission on Russia’s unprecedented and unprovoked military aggression of Ukraine](#)”, 24 February 2022.

⁴ “[Russia blocks Security Council action on Ukraine](#)”, UN News, 26 February 2022.

⁵ For an overview of the Uniting for Peace process at the UN, see: Security Council Report, [Security Council Deadlocks and Uniting for Peace](#), (opens PDF), October 2013; UN Audio-Visual Library of International Law, [Uniting for Peace procedure and history](#), October 2008; Asia-Pacific Centre for the Responsibility to Protect, [The Powers of the UN General Assembly to Prevent and Respond to Atrocity Crimes: A Guidance Document](#), 29 April 2021.

⁶ UN General Assembly, [11th Emergency Special Session](#), 28 February 2022.

General Assembly “Deplores in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the Charter.”⁷

141 states voted in favour of the Resolution, with 5 voting against, 35 abstentions, and 12 states absent or not voting. Those voting against were Belarus, North Korea, Eritrea, Russia, and Syria. The full voting record [is available on the UN Website](#).⁸

This was [the first of a series of General Assembly Resolutions](#) that have been adopted since Russia’s February 2022 invasion, with many of these repeating the recognition of Russia’s acts as aggression.

1.1

What is Aggression in international law?

Aggression is an international crime in international law. It is closely related to the prohibition of force in international law under [Article 2\(4\) of the UN Charter](#), but aggression is a crime with specific criteria.

The [definition of aggression](#) was agreed by the UN General Assembly in 1974.⁹ The General Assembly declared in Article 1 of the definition 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 UN Charter.

Article 3 of the definition lists some of the acts that could amount to aggression as including:

- Invasion, occupation, or annexation of another state’s territory.
- Bombardment of another state’s territory.
- Blockades of ports or coasts.
- Attacks by one armed force against another.
- In situations where there is an agreement between two states that provides for the presence of forces within the territory of the receiving state. A use of force in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement.
- Allowing a state’s own territory to be used to launch such attacks by another state against a third state.

⁷ UNGA Res ES-11/1 *Aggression against Ukraine*, 2 March 2022, UN Doc [A/RES/ES-11/1](#), para 2.

⁸ UN Digital Library, [Aggression against Ukraine: resolution / adopted by the General Assembly](#), Voting Record of 2 March 2022.

⁹ UNGA Res 2214(XXIX), [Definition of Aggression](#) (14 December 1974) UN Doc A/RES/3314(XXIX).

- The sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out armed acts of such gravity as to amount to the acts listed above, or its substantial involvement therein.¹⁰

Aggression is also recognised as a crime in international law. The UN General Assembly definition, in Article 5 states:

2. A war of aggression is a crime against international peace. Aggression gives rise to international responsibility.
3. No territorial acquisition or special advantage resulting from aggression is or shall be recognised as lawful.¹¹

1.2

Jurisdiction over aggression at the International Criminal Court

The [Rome Statute of the International Criminal Court](#) also recognises the modern definition of aggression in Article 8 *bis*.¹²

Activation of the Crime of Aggression at the ICC

The ICC did not automatically have jurisdiction over the crime of aggression when the Rome Statute was first adopted. The [2010 Kampala Review Conference](#) adopted amendments to the Rome Statute to define aggression and provide the path for activating jurisdiction over the crime for the Court.

The [outcome of the Kampala Amendments](#) (PDF) on aggression required that the Court's jurisdiction over aggression would only apply to that State Party where:

- The State accepts and ratifies the Kampala amendments on aggression; and
- The State Party has not opted out of the ICC's jurisdiction over aggression, under the new Article 15 bis (4)

The ICC's Assembly of States Parties [adopted Resolution ICC-ASP/16/Res.5](#) (PDF) on 14 December 2017, activating the crime of aggression for those states that ratify the Kampala Amendments, to take effect on 17 July 2018.

¹⁰ UNGA Res 2214(XXIX), [Definition of Aggression](#) (14 December 1974) UN Doc A/RES/3314(XXIX).

¹¹ UNGA Res 2214(XXIX), [Definition of Aggression](#) (14 December 1974) UN Doc A/RES/3314(XXIX), Annex.

¹² [Rome Statute of the International Criminal Court](#) (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, since amended. (PDF)

As of February 2024, [45 states have adopted the amendments](#), accepting the Court's jurisdiction over aggression. Two states have made declarations opting out of the Court's jurisdiction ([Kenya](#) and [Guatemala](#)).

The International Criminal Court (ICC) cannot exercise jurisdiction over the crime of aggression unless both the victim and the aggressor state has ratified and accepted the Court's jurisdiction over that crime.¹³ Alternatively, the UN Security Council is able to refer any situation to the Court, but this would be subject to Russia's veto.

Russia signed but did not become a full party to the International Criminal Court and [withdrew from the process of joining the ICC](#) in full in 2016.¹⁴

Ukraine is also not a member state, but did submit a declaration in 2015 [to accept the jurisdiction of the Court](#) over any acts of genocide, crimes against humanity or war crimes that may be committed within the territory of Ukraine since 20 February 2014 onwards.¹⁵

The Prosecutor of the ICC has [noted that this does not apply to the crime of aggression](#), and that the crime of aggression cannot apply to the current situation in Ukraine, when he said on 25 February 2022:

... my Office may exercise its jurisdiction over and investigate any act of genocide, crime against humanity or war crime committed within the territory of Ukraine since 20 February 2014 onwards.

Any person who commits such crimes, including by ordering, inciting, or contributing in another manner to the commission of these crimes, may be liable to prosecution before the Court, with full respect for the principle of complementarity. It is imperative that all parties to the conflict respect their obligations under international humanitarian law.

My Office has also received multiple queries on the amendments to the Rome Statute with respect to the crime of aggression, which came into force in 2018, and the application of those amendments to the present situation. Given that neither Ukraine nor the Russian Federation are State Parties to the Rome Statute, the Court cannot exercise jurisdiction over this alleged crime in this situation.¹⁶

¹³ See [Rome Statute of the International Criminal Court](#) (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, since amended, Article 15 *bis* and Article 15 *ter*. (PDF)

¹⁴ "[Russia withdraws from International Criminal Court treaty](#)", BBC News [online], 16 November 2016 (accessed 24 February 2022).

¹⁵ Ukraine, [Letter Dated 8 September 2015 from the Minister of Foreign Affairs of Ukraine to the Registrar of the International Criminal Court](#), 8 September 2015.

¹⁶ International Criminal Court, "[Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine](#)", 25 February 2022.

1.3

Proposals for a Special Tribunal

Because the ICC does not have jurisdiction over the crime of aggression in Ukraine, 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”](#).¹⁷

The statement directs states to adopt the proposed declaration, which gives support to establishing an international tribunal by agreeing:

to grant jurisdiction arising under national criminal codes and general international law to a dedicated international criminal tribunal that should be established to investigate and prosecute individuals who have committed the crime of aggression in respect of the territory of Ukraine, including those who have materially influenced or shaped the commission of that crime.¹⁸

The exact legal basis for the tribunal is not specifically proposed by the declaration, but some experts [discussed possible legal arguments at the launch of the declaration](#) at an [online event](#) hosted by Chatham House on 4 March 2022.¹⁹ These have also been outlined in brief below.

¹⁷ [Statement Calling for the Creation of a Special Tribunal for the Punishment of the Crime of Aggression against Ukraine](#), 4 March 2022; see also, [“A criminal tribunal for aggression in Ukraine”](#), Chatham House [online], 4 March 2022.

¹⁸ [Statement Calling for the Creation of a Special Tribunal for the Punishment of the Crime of Aggression against Ukraine](#), 4 March 2022, Declaration para 3.

¹⁹ [“A criminal tribunal for aggression in Ukraine”](#), Chatham House [online], 4 March 2022.

2 Possible forms of a Special Tribunal and legal issues

There are a multitude of avenues to establishing an international tribunal to prosecute aggression, and the most suitable and legally-sound avenue to establishing this is the subject of ongoing considerable debate among experts. Some of the initial debates were outlined in the [Library Briefing Paper: Ukraine crisis: Recognition, military action, and international law](#).

There have been several more recent studies which have generally examined the possible forms of a Special Tribunal. Studies include, for example, research by [Professor Kevin Jon Heller](#) (Professor of International Law and Security at the University of Copenhagen's Centre for Military Studies);²⁰ a policy Q&A by the [International Crisis Group](#);²¹ and [academic research by Dr Carrie McDougall](#) (Melbourne Law School, University of Melbourne).²²

A further in-depth assessment by international legal experts, Olivier Corten and Vaios Koutroulis, [has been published for the European Parliament](#), detailing further international legal issues and questions that a Special Tribunal raises.²³

Academic commentary has also explored wider issues, with the website Just Security [hosting several articles and comments](#) on different aspects of a Special Tribunal on Aggression.²⁴

Based on the commentary above, some of the main routes being considered to create such a Special Tribunal are outlined below. However, not all of these options are considered legally viable by the commentary cited above. Each of the options outlined have specific and complex legal obstacles, as well as political and practical issues that may need to be addressed.

- Option 1 – Amending the International Criminal Court’s Rome Statute to allow referrals by the UN General Assembly to prosecute aggression.

²⁰ Kevin Jon Heller, “[Options for Prosecuting Russian Aggression Against Ukraine: A Critical Analysis](#)” (2022) *Journal of Genocide Research* (Online, 6 July 2022).

²¹ “[A New Court to Prosecute Russia’s Illegal War?](#)”, International Crisis Group, 23 March 2023, accessed 29 January 2024.

²² Carrie McDougall, “[The Imperative of Prosecuting Crimes of Aggression Committed against Ukraine](#)”, (2023) 28(2) *Journal of Conflict and Security Law* 203.

²³ Olivier Corten and Vaios Koutroulis, “[In-Depth Analysis: Tribunal for the crime of aggression against Ukraine - a legal assessment](#)”, European Parliament, December 2022 (PDF).

²⁴ Just Security Series: “[U.N. General Assembly and International Criminal Tribunal for the Crime of Aggression Against Ukraine](#)”, Just Security, accessed 29 January 2024.

- Commentary suggests this seems unlikely to be workable, given the numbers of ICC member states who still have not submitted to the Court’s jurisdiction over aggression themselves.
- Option 2 – A Ukrainian court established with international support (the hybrid model).
 - This would involve Ukraine having jurisdiction over the crime of aggression, but applying international crimes to prosecute, possibly involving both Ukrainian and international judges and prosecutors from another international organisation.
 - However, [there may be restrictions in Ukraine’s constitution](#) on setting up such a hybrid court, depending on its form.
- Option 3 – an international court established by the UN General Assembly, with the agreement of Ukraine.
 - This would be a court set up through an agreement between the United Nations and Ukraine, endorsed by a General Assembly Resolution authorising the UN Secretary-General to set up such a mechanism. This could work similarly to the [Special Court for Sierra Leone](#).
- Option 4 – a treaty between interested states creating a Special Tribunal.
 - This would be an international agreement between like-minded states to prosecute aggression against Ukraine. But there are potential jurisdictional and immunity issues with this model, as well as a risk of the court being seen as politically selective.

Recent reports have also suggested states are exploring options where a third state, outside of Ukraine, would host a tribunal – but the legal basis and framework on how this would be set up is still to be clarified.²⁵

Other models are also possible, but not notably considered as yet.

2.1 Issues of immunity

One of the main legal questions surrounding the tribunal is whether it would be able to override the legal immunities provided to heads of state and other officials.

²⁵ See, for example, Office of the President of Ukraine, “[Special international tribunal should become an effective way to punish Russia for its aggression against Ukraine - Andriy Smyrnov](#)”, 18 July 2023. See also, “[Netherlands willing to house special court for Russia invasion of Ukraine, minister says](#)”, Reuters, 12 December 2022.

For example, Professor Kevin Jon Heller, while agreeing that President Putin and others may have committed the crime of aggression, [raises the issue of immunities when he argued](#):

A Special Tribunal would not find it easier to prosecute Russian officials for aggression than a national court. A Special Tribunal is not necessary to affirm the unacceptability and criminality of aggression. And a Special Tribunal would be no less obligated than a national court to honour the personal immunity of people like Putin and Lavrov.²⁶

The International Court of Justice, in the [Arrest Warrant](#) case,²⁷ had indicated that the immunities of state officials would not apply before certain international criminal courts:

an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person".²⁸

But Professor Heller [suggests that the immunity issue is not resolved in international law](#), that [there are gaps in the legal explanations for this judgement](#), and could still provide a legal hurdle for the actual arrest and detention of possible defendants by states before being presented to the tribunal – depending on what form it takes.²⁹

Experts such as [Dr Carrie McDougall](#)³⁰ and [Tom Dannenbaum](#)³¹ note the position of several international legal decisions which have indicated that immunities of heads of states or ministers do not apply before international courts and tribunals,³² and suggest that although these court decisions have

²⁶ Professor Kevin Jon Heller, "[Creating a Special Tribunal for Aggression Against Ukraine Is a Bad Idea](#)", *Opinio Juris*, 7 March 2022.

²⁷ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, [Jurisdiction. Judgment of 14 February 2002](#), [2002] ICJ Rep 3, para 61.

²⁸ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, [Jurisdiction. Judgment of 14 February 2002](#), [2002] ICJ Rep 3, para 61.

²⁹ Kevin Jon Heller, "[Options for Prosecuting Russian Aggression Against Ukraine: A Critical Analysis](#)" (2022) *Journal of Genocide Research* (Online, 6 July 2022),

³⁰ Melbourne Law School, University of Melbourne.

³¹ Assistant Professor of International Law at the Fletcher School of Law and Diplomacy.

³² See, "[A criminal tribunal for aggression in Ukraine](#)", Chatham House [online], 4 March 2022, from 39min 22 seconds.

been controversial among some international lawyers, they nevertheless provide some legal weight to this conclusion.³³

Alternative legal views, from Professor Dapo Akande for example, suggest that there could be an answer to this immunity issue in Ukraine's right of self-defence or as a measure of self-help. At the launch of the initial proposal for the tribunal, [Dapo Akande suggested an argument](#) whereby, as a measure of self-defence or self-help, Ukraine could be delegating its own jurisdiction to an international tribunal to prosecute aggression.³⁴

2.2 Issues of selective criminal justice?

One consideration discussed by experts is whether establishing a Special Tribunal would be too selective in achieving international justice for the crime of aggression.

Professor Jon Heller [raised the issue selectivity](#) in March 2022,³⁵ and again [in published research in July 2022](#),³⁶ raising two arguments:

- Firstly, that it would be selective to create a Special Tribunal at this point, when military action by other states has also been accused of amounting to aggression in previous conflicts. Critics raise the argument that aggression has not been prosecuted for any conflict since World War II.
- Secondly, the identity of the states supporting a Special Tribunal, especially the treaty-based model (option 4 above), could also raise issues of selective justice. This would be particularly problematic, according to the critics, if states who either sought to avoid giving the ICC automatic jurisdiction over the crime of aggression, or do not consent to the ICC's jurisdiction over this crime at all, also sought to establish a Special Tribunal in this instance.

Some supporters of a Special Tribunal do address the potential issue of selective justice. For example, [Tom Dannenbaum argues](#):

The failure to hold accountable those who have waged such wars is lamentable. However, the revival of the crime of aggression has to begin

³³ Carrie McDougall, "[Why Creating a Special Tribunal for Aggression Against Ukraine is the Best Available Option: A Reply to Kevin Jon Heller and Other Critics](#)", *Opinio Juris*, 15 March 2022; Tom Dannenbaum, "[Mechanisms for Criminal Prosecution of Russia's Aggression Against Ukraine](#)", *Just Security*, 10 March 2022.

³⁴ See, "[A criminal tribunal for aggression in Ukraine](#)", Chatham House [online], 4 March 2022, from 39min 22 seconds.

³⁵ Professor Kevin Jon Heller, "[Creating a Special Tribunal for Aggression Against Ukraine Is a Bad Idea](#)", *Opinio Juris*, 7 March 2022.

³⁶ Kevin Jon Heller, "[Options for Prosecuting Russian Aggression Against Ukraine: A Critical Analysis](#)" (2022) *Journal of Genocide Research* (Online, 6 July 2022),

somewhere. The invasion of Ukraine, as one of the most blatantly aggressive wars in the past 80 years, offers an opportunity to begin that revival.³⁷

Similarly, [Carrie McDougal argues](#):

Further, while the relative merits of accountability and equality are frequently debated in selectivity literature, we do not have to choose between these values. The reality is that if we refuse to support justice initiatives when they are available unless justice everywhere is possible, we would effectively have to give up on the international criminal justice project. This will not help victims in places like Syria or Yemen. It will simply send a message that serious international crimes can be committed by the powerful with impunity—which will lead to further crimes. The international community can support the proposed tribunal while acknowledging that justice is selective, and that this is unacceptable. As a former government lawyer, my firm view is that the best chance we have of making justice less selective is by demonstrating that international criminal justice mechanisms can apply justice impartially and fairly, and that they are an indispensable part of the international security architecture.³⁸

³⁷ Tom Dannenbaum, "[Mechanisms for Criminal Prosecution of Russia's Aggression Against Ukraine](#)", Just Security, 10 March 2022.

³⁸ Carrie McDougal, "[The Imperative of Prosecuting Crimes of Aggression Committed against Ukraine](#)", (2023) 28(2) Journal of Conflict and Security Law 203.

3

International support for a Special Tribunal

Ukraine itself supports the creation of a Special Tribunal. Ukraine's President Zelensky [has called for the Tribunal](#),³⁹ and the Ukrainian First Lady Olena Zelenska has also [called for the UK to lead the initiative](#).⁴⁰ Initially, states and organisations offering public support for the general idea of the Tribunal included:

- [Estonia, Latvia, and Lithuania](#) (joint statement of 16 October 2022)⁴¹
- [The European Union, President of the Commission](#) (statement of 20 November 2022)⁴²
- [France](#) (statement of 30 November 2022)⁴³
- [Germany](#) (Foreign Minister statement of 16 January 2023)⁴⁴

In December 2022, [reports from The Guardian](#) suggested that an EU official expected “good enough numbers” in the United Nations to support the idea of a tribunal. Reuters also reported that [the Dutch government has also indicated its willingness](#) to host the Special Tribunal in its territory.⁴⁵ The Netherlands currently hosts several international courts and tribunals at The Hague, including the International Court of Justice, the International Criminal Court, the International Residual Mechanism for Criminal Tribunals, and [also hosted the Special Tribunal for Lebanon](#).

At the UN Human Rights Council, a new ‘Group of Friends of Accountability following the aggression against Ukraine’⁴⁶ has expressed its support for

³⁹ Office of the President of Ukraine, “[We must create a Special Tribunal on the crime of aggression against Ukraine - address by President Volodymyr Zelenskyy to the participants of the public debate "War and Law" in Paris](#)”, 2 October 2022.

⁴⁰ “[UK must lead creation of tribunal to punish Russian war crimes, Ukraine's first lady Olena Zelenska says](#)”, Sky News, 30 November 2022.

⁴¹ Lithuania, Ministry of Foreign Affairs, “[The ministers of Estonia, Latvia and Lithuania call to establish a Special Tribunal to investigate the crime of Russia's aggression](#)”, 16 October 2022.

⁴² European Commission, “[Statement by President von der Leyen on Russian accountability and the use of Russian frozen assets](#)”, 30 November 2022.

⁴³ France, Ministry of European and Foreign Affairs, “[Ukraine - Special tribunal on Russian crimes of aggression \(30 November 2022\)](#)”, 20 November 2022.

⁴⁴ “[Germany's Baerbock calls for special Ukraine tribunal at ICC](#)”, DW News, 16 January 2023.

⁴⁵ “[Netherlands willing to house special court for Russia invasion of Ukraine, minister says](#)”, Reuters, 12 December 2022.

⁴⁶ This Group was launched in March 2022: see, “[High-Level Launch Meeting of the Group of Friends of Accountability Following the Aggression Against Ukraine](#)”, International Peace Institute, 25 March 2022.

mechanisms of accountability for aggression, including exploring a Special Tribunal.⁴⁷

In January 2022, Ukraine announced that a new ‘Core Group’ of states was established, focussed on considering legal avenues for accountability for the crime of aggression in Ukraine.⁴⁸ The membership of this Core Group (also referred to as the Coalition by Ukraine) grew gradually, with recent statements indicating a membership of 40 states as of February 2024.⁴⁹ According to the news outlet Pass Blue, the Core Group has met seven times since January 2023, with a further meeting scheduled for March 2024 in Vienna.⁵⁰

The UK initially indicated [it would explore the legal arguments](#) for a Special Tribunal, and that the details of the proposals would matter. When announcing its membership of the core group of states seeking to achieve criminal accountability in this situation, [the Government indicated it would be willing to explore the hybrid model](#):

... the details of the proposal will matter. The UK would be willing to explore a ‘hybrid’ tribunal (a specialised court integrated into Ukraine’s national justice system with international elements). Any new tribunal would also need sufficient international support and must not undermine the existing accountability mechanisms.⁵¹

The US position on a Special Tribunal for aggression was [outlined by Beth Van Schaack, the US Ambassador-at-Large for Global Criminal Justice](#), on 21 November 2022. At this briefing, Van Schaack said:

On the aggression tribunal idea, there are a number of proposals that are floating around as to how this tribunal might be created. One of them would be by way of a bilateral treaty between the United Nations and Ukraine that would be blessed by the General Assembly. Of course, the Security Council is foreclosed in this regard because Russia will exercise its veto, which it is

⁴⁷ See, for example, US Mission to Geneva, “Joint Statement of the Group of Friends of Accountability Following the Aggression Against Ukraine”, 27 February 2023; and US Mission to Geneva, “[Joint Statement of the Group of Friends of Accountability Following the Aggression Against Ukraine Interactive Dialogue on Ukraine with the UN High Commissioner for Human Rights 53rd Session of UN Human Rights Council](#)”, 12 July 2023. This Group of Friends includes: Albania, Australia, Austria, Belgium, Bosnia-Herzegovina, Bulgaria, Canada, Colombia, Croatia, Cyprus, Czechia, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Guatemala, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Marshall Islands, Moldova, Montenegro, the Netherlands, New Zealand, North Macedonia, Norway, Poland, Portugal, Republic of Korea, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, Ukraine, United Kingdom, United States of America, and the EU representative.

⁴⁸ Ukraine, Ministry of Foreign Affairs, “[Dmytro Kuleba: Coalition for the establishment of a Special Tribunal for the crime of aggression of the Russian Federation against Ukraine will continue to grow](#)”, 27 February 2023.

⁴⁹ Ireland, Department of Foreign Affairs, “[Dáil Statement by the Tánaiste on the second anniversary of Russia’s full-scale invasion of Ukraine](#)”, 20 February 2024.

⁵⁰ Dawn Clancy, “[Ukraine Warns the World: It’s Now or Never for Prosecuting Putin](#)”, Pass Blue, 21 February 2024.

⁵¹ Foreign, Commonwealth and Development Office, “[UK joins core group dedicated to achieving accountability for Russia’s aggression against Ukraine](#)”, 20 January 2023.

entitled to as a permanent member of the Security Council. And so the Ukrainians are looking for other potential modalities, and one of these has been before the General Assembly.

The U.S. at the moment, we have been focused on supporting existing institutions that seem that they are already operational and seem most likely to be able to accord accountability here. But we're still reviewing the various proposals and talking with friends and allies to gather everyone's perspectives on this. There is some activity happening at the General Assembly, and so it'll be interesting to see where that ends up going and where the United States ultimately lands.⁵²

When asked to expand on the discussions the US has had about the tribunal, Van Schaack said:

There are a number of conversations happening, mostly in New York at this point but I think also in capitals across Europe. What we're seeing is that a number of the neighboring states and the Baltic states are quite supportive as well of this, and Ukraine is continuing to advocate for some kind of a reaction to the crime of aggression as its sort of original sin that unleashed all of the war crimes that we've seen flowing from that initial reinvasion back in February. Some of the larger European states I think are more cautious and are continuing to examine various proposals and think through some of the legal and policy issues. So those conversations I know are ongoing and eventually will, I'm sure, result in a particular path forward.⁵³

In March 2023, Van Schaack [confirmed the US's support for a hybrid tribunal](#):

I am pleased to announce that the United States supports the development of an internationalized tribunal dedicated to prosecuting the crime of aggression against Ukraine. Although a number of models have been under consideration, and these have been analyzed closely, we believe an internationalized court that is rooted in Ukraine's judicial system, but that also includes international elements, will provide the clearest path to establishing a new Tribunal and maximizing our chances of achieving meaningful accountability. We envision such a court having significant international elements—in the form of substantive law, personnel, information sources, and structure. It might also be located elsewhere in Europe, at least at first, to reinforce Ukraine's desired European orientation, lend gravitas to the initiative, and enable international involvement, including through Eurojust.

This kind of model—an internationalized national court—will facilitate broader cross-regional international support and demonstrate Ukraine's leadership in ensuring accountability for the crime of aggression. It also builds upon the example of other successful hybrid justice mechanisms.⁵⁴

⁵² US Department of State, "[Briefing With Ambassador-at-Large for Global Criminal Justice Beth Van Schaack On Justice and Accountability for Russia's Atrocities in Ukraine](#)", 21 November 2022.

⁵³ As above.

⁵⁴ US Department of State, "[Ambassador Van Schaack's Remarks on the U.S. Proposal to Prosecute Russian Crimes of Aggression](#)", 27 March 2023.

3.1

States supporting different models

While the US and UK initially expressed their support for the hybrid model of the tribunal, based within Ukraine’s judicial system with international support, Ukraine and other states have suggested preferences for an international model.

G7 support for a hybrid tribunal

At the G7 Foreign Ministers’ meeting in Japan in April 2023, Foreign Ministers indicated a more specific preference to explore the possibility of a hybrid tribunal. In the [G7 statement](#), the Foreign Ministers of the G7 said:

We support exploring the creation of an internationalized tribunal based in Ukraine’s judicial system to prosecute the crime of aggression against Ukraine.⁵⁵

This was agreed by the foreign ministers of Canada, France, Germany, Italy, Japan, the UK and the US, alongside the High Representative of the European Union.

Others support an international tribunal

On 17 April, 13 states issued a joint declaration [in support of a more international model for the tribunal](#). The statement explained that for the tribunal to be fully effective, it “should allow for the prosecution of the most senior leadership of such aggressor State(s).”⁵⁶ It went on to state:

We believe that an international tribunal, before which the immunities granted by international law to the most senior leadership of a state do not apply, is best placed to deliver the above-described objectives. We therefore call on the international community to actively engage in discussions on the establishment of such a tribunal, in particular through decisions of the United Nations General Assembly.⁵⁷

The statement was issued by Albania, Belgium, Costa Rica, Czech Republic, Estonia, Guatemala, Latvia, Liechtenstein, Lithuania, Luxembourg, Marshall Islands, North-Macedonia and Poland.

Ukraine’s initial preference

In December 2022, reports suggested that Ukraine [had begun circulating a draft resolution at the United Nations](#) for the General Assembly to adopt, but the International Crisis Group reports that [states were hesitant to support](#)

⁵⁵ Foreign, Commonwealth and Development Office, “[G7 Japan 2023 foreign ministers’ communiqué, 18 April 2023 Karuizawa, Nagano](#)”, 18 April 2023.

⁵⁶ Permanent Mission of Estonia to the UN, “[Joint statement on the accountability for the crime of aggression committed on the territory of Ukraine](#)”, 17 April 2023.

⁵⁷ As above.

[that proposal at the time](#), with some purportedly raising fears that such a move could undermine future peace talks.

On 4th May 2023, Ukraine's President Zelenskyy repeated his call for a Special Tribunal to be established in The Hague. In doing so, [he was hesitant to accept the idea of this tribunal being a 'hybrid' court](#):

But we know that the lasting peace after victory is achieved by nothing else but the strength of values. First of all, it's the strength of freedom and of law, which must work to the full to ensure justice. Not hybrid promises instead of human rights, but real freedom. Not hybrid impunity and symbolic formalities, but full-scale justice. Not hybrid peace and constant flashes of violence on the frontline, but reliable peace. When one respects values - true freedom, true justice, true peace is respected instead of hybrid forms, but it's exactly what we need now.⁵⁸

Reports of compromise talks

While recent reports [suggest there is a divide](#) among states on the exact form of a Special Tribunal,⁵⁹ some reports suggest that diplomats are also considering a different form of hybrid tribunal based in a third country.⁶⁰

Ukrainian publication, European Pravda, reported in August 2023 that [Ukraine and others may be considering a tribunal based in a third state](#), with an international element or international endorsement from the UN General Assembly. No final decision or official announcement has been made on this so far. It should be noted, however, that the Deputy Head of the Office of the President of Ukraine, Andrii Smyrnov, wrote on Facebook and [clarified Ukraine's position](#) after the European Pravda report to reaffirm Ukraine's preference for an international tribunal, and that Ukraine would not agree to any hybrid tribunal based on Ukraine's jurisdiction.⁶¹ Smyrnov had also [earlier confirmed in a July 2023 Press Release](#) from the Office of the President of Ukraine that:

One of the compromises we are considering is the possibility of creating an "internationalized tribunal", but not in Ukraine and not as part of the Ukrainian judicial system. This is necessary in order to find a way to establish the tribunal supported by all partners. [...]

In this case, the UN General Assembly will support the establishment of a tribunal in an internationally reputable jurisdiction. [...]

⁵⁸ Office of the President of Ukraine, "[Speech by Volodymyr Zelenskyy to representatives of the public, political and expert circles of the Kingdom of the Netherlands and international institutions based in The Hague](#)", 4 May 2023.

⁵⁹ Dawn Clancy, "[The Divide Hardens on What a Special Court for the Crime of Aggression by Russia Should Look Like](#)", Pass Blue, 23 May 2023.

⁶⁰ For a recent overview of negotiations, see, Dawn Clancy, "[Ukraine Warns the World: It's Now or Never for Prosecuting Putin](#)", Pass Blue, 21 February 2024.

⁶¹ Mr Smyrnov's statement was also outlined in: "[Report: Ukraine Willing to 'Compromise' on a Non-Ukrainian Internationalized Tribunal](#)", Opinio Juris, 23 August 2023.

Establishing such a tribunal - a hybrid tribunal - as part of the Ukrainian system will require amendments to the Constitution, which is impossible under martial law. The creation of a "hybrid" tribunal carries a high risk that the crime of aggression will be classified as an interstate conflict between two countries. In the end, we do not need a tribunal's decision in the name of Ukraine, we need a tribunal's decision in the name of the civilized world.⁶²

Legal commentary on the developments suggests a third state hosting such a Tribunal [could be based on their recognition of universal jurisdiction](#) over the crime of aggression,⁶³ while other commentary considers whether this could involve alternative bases for jurisdiction or a 'transfer' of jurisdiction through an international agreement with Ukraine.⁶⁴ It remains unclear whether either legal route could answer other legal issues such as the immunities of Russian leadership.

3.2 Institutional developments

In February 2023, the European Commission announced that [the EU would establish an International Centre for the Prosecution of the Crime of Aggression in Ukraine](#) (ICPA), to be set up in The Hague.⁶⁵ This Centre would not prosecute the crime of aggression, but would coordinate the collection of evidence, and be embedded within a Joint Investigative Team within Eurojust (the European criminal justice agency for judicial cooperation and investigation). The ICPA launched [and began operations in July 2023](#).⁶⁶

The current Prosecutor of the International Criminal Court [seemed to address the idea of a Special Tribunal](#) when he said in December 2022, "We should avoid fragmentation, and instead work on consolidation."⁶⁷ Later, however, the Prosecutor did attend the launch of the International Centre at Eurojust, where the ICC will be participating in the ICPA.⁶⁸

⁶² Office of the President of Ukraine, "[Special international tribunal should become an effective way to punish Russia for its aggression against Ukraine - Andriy Smyrnov](#)", 18 July 2023.

⁶³ Patryk I. Labuda, "[Making Counter-Hegemonic International Law: Should A Special Tribunal for Aggression be International or Hybrid?](#)", Just Security, 19 September 2023.

⁶⁴ "[Report: Ukraine Willing to 'Compromise' on a Non-Ukrainian Internationalized Tribunal](#)", *Opinio Juris*, 23 August 2023.

⁶⁵ [Statement by President von der Leyen at the joint press conference with Ukrainian President Zelenskyy](#), 2 February 2023; see also, "[International Centre for the Prosecution of the Crime of Aggression made official at United for Justice Conference in Ukraine](#)", Eurojust, Press Release, 5 March 2023.

⁶⁶ "[History in the making - the International Centre for the Prosecution of the Crime of Aggression Against Ukraine starts operations at Eurojust](#)", Eurojust, Press Release, 3 July 2023.

⁶⁷ Molly Quell, "[ICC prosecutor opposes EU plan for special Ukraine tribunal](#)", AP News, 5 December 2022.

⁶⁸ "[History in the making - the International Centre for the Prosecution of the Crime of Aggression Against Ukraine starts operations at Eurojust](#)", Eurojust, Press Release, 3 July 2023.

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