



Doc. 15689

24 January 2023

Legal and human rights aspects of the Russian Federation's aggression against Ukraine

Report¹

Committee on Legal Affairs and Human Rights

Rapporteur: Mr Damien COTTIER, Switzerland, Alliance of Liberals and Democrats for Europe

Summary

The Parliamentary Assembly should express clearly that the acts of aggression committed by the Russian Federation against Ukraine meet the definition of the crime of aggression under international law. The Russian political and military leaders responsible should be identified and prosecuted. Given that the International Criminal Court (ICC) does not have at present jurisdiction over the current crime of aggression, the Assembly should reiterate its call on member States and observer States to set up a special international criminal tribunal for such crime, which should be supported by as many States and international organisations as possible. The Council of Europe Heads of State and Government, at the 4th Summit in Reykjavik in May 2023, should give their political support to the creation of such a tribunal.

The Assembly should also condemn the numerous atrocities and violations of international humanitarian law committed by Russian forces or affiliated armed groups in Ukraine. Many of these atrocities can be qualified as war crimes or crimes against humanity. There is also mounting evidence that the Russian official rhetoric to justify the aggression carries characteristics of public incitement to genocide. Member States should support the current investigation launched by the ICC Prosecutor into the situation in Ukraine, which covers allegations of war crimes, crimes against humanity or genocide. They should also assist the Ukrainian authorities in their efforts to investigate such crimes, by providing resources and expertise.

There can be no comprehensive accountability for the serious violations of international law arising out the Russian Federation's aggression against Ukraine without full reparation of the damage caused to Ukraine and its citizens. The Assembly should therefore call for the setting up of an international compensation mechanism, including an international register of damage. The Council of Europe should play a leading role in setting up and managing the future mechanism.

1. Reference to committee: Bureau Decision, Reference 4698 of 23 January 2023.



Contents	Page
A. Draft resolution	3
B. Explanatory memorandum by Mr Damien Cottier, rapporteur	8
1. Introduction	8
2. Accountability for the crime of aggression	8
2.1. The crime of aggression committed against Ukraine and the importance of prosecution	8
2.2. Filling a jurisdictional gap: the need to create an ad hoc international criminal tribunal for the crime of aggression against Ukraine	10
2.3. Legal and practical challenges for the establishment and functioning of an ad hoc international criminal tribunal for the crime of aggression against Ukraine	13
3. Accountability for war crimes, crimes against humanity and possible genocide	17
3.1. Alleged crimes committed	17
3.2. Existing accountability mechanisms and the need for effective co-ordination	21
4. State accountability for human rights violations and other violations of international law	24
5. Compensation for the damage caused by the aggression and related violations of international law committed by the Russian Federation	25
5.1. Proposals for the establishment of an international compensation mechanism	25
5.2. Enforcement of compensation awards and payment: finding the sources of funding	26
6. Conclusions	28

A. Draft resolution²

1. The Parliamentary Assembly reiterates that the Russian Federation's armed attack and large-scale invasion of Ukraine launched on 24 February 2022 constitute an "aggression" under the terms of Resolution 3314 (XXIX) of the United Nations General Assembly adopted in 1974 and are clearly in breach of the Charter of the United Nations. The attempted annexation of the Ukrainian regions of Donetsk, Kherson, Luhansk and Zaporizhzhia, following the illegal so-called referendums organised by the Russian Federation in these regions in September 2022, is a further escalation of the aggression against Ukraine. It clearly violates the principle of international law according to which no territorial acquisition resulting from the use of force shall be recognised as legal. The Russian Federation will be considered as continuing its aggression as long as the sovereignty, territorial integrity, unity and political independence of Ukraine within its internationally recognised borders will be fully re-established. The Assembly recalls that the ongoing aggression is a continuation of the aggression started on 20 February 2014, which included the invasion, occupation and illegal annexation of Crimea by the Russian Federation.

2. The Assembly notes that the aggression constituted a serious violation by the Russian Federation of the Statute of the Council of Europe (ETS No.1), which justified the unprecedented decision by the Committee of Ministers to exclude the Russian Federation from the Organisation, in line with the unanimous position expressed by the Assembly in its [Opinion 300 \(2022\)](#).

3. The Assembly also notes that Belarus has participated in the Russian Federation's aggression against Ukraine, as it has allowed its territory to be used by the Russian Federation for perpetrating acts of aggression against Ukraine. Its role and complicity should be condemned by the international community and its leaders should be held to account.

4. The Assembly considers that the unprovoked acts of aggression committed by the Russian Federation and Belarus, given their character, scale and gravity, constitute manifest violations of the Charter of the United Nations, in particular of the prohibition on the use of force contained in Article 2(4). They lack any plausible legal justification under *jus ad bellum*, such as self-defense. These acts therefore meet the definition of the crime of aggression as set out in Article 8 bis of the Statute of the International Criminal Court (ICC) and under customary international law. The Russian and Belarusian political and military leaders who planned, prepared, initiated or executed these acts, and who were in a position to control or direct the political or military action of the State, should be identified and prosecuted. Without their decision to wage this war of aggression against Ukraine, the atrocities that flow from it (war crimes, crimes against humanity and possible genocide), as well as all the destruction, death and damage resulting from the war, including from lawful acts of war, would not have occurred. As the United Nations Human Rights Committee has stated, States engaged in acts of aggression as defined in international law, resulting in deprivation of life, violate *ipso facto* the right to life guaranteed by Article 6 of the International Covenant on Civil and Political Rights.

5. The Assembly notes that the ICC does not have at present jurisdiction over the crime of aggression committed against Ukraine, given that neither the Russian Federation, Belarus nor Ukraine are parties to the ICC Statute and that the United Nations Security Council has not referred the situation to the ICC Prosecutor. The likely exercise and abuse of the right to veto by the Russian Federation at the UNSC render such a referral highly implausible in the present circumstances. The Assembly further notes that there is no other international criminal tribunal competent to prosecute and punish the crime of aggression committed against Ukraine. Domestic prosecutions, in Ukraine and in other countries on the basis of the principles of territoriality or universal jurisdiction, face many legal and practical challenges, including in terms of perceived impartiality, legitimacy and immunities.

6. The Assembly therefore reiterates its unanimous call on member States and observer States of the Council of Europe to set up a special international criminal tribunal for the crime of aggression against Ukraine, which should be endorsed and supported by as many States and international organisations as possible, and in particular by the United Nations General Assembly. The proposal to create a special tribunal for the crime of aggression against Ukraine has so far received the support of several national parliaments and governments, the European Parliament, the European Commission, the Parliamentary Assembly of the Organization for Security and Co-operation in Europe and the Parliamentary Assembly of the North Atlantic Treaty Organization. The Committee of Ministers has welcomed the ongoing efforts, in co-operation with Ukraine, to secure accountability for the crime of aggression. The Assembly considers that the Council of Europe Heads of State and Government, at their 4th Summit in Reykjavik in May 2023, should give their political support to the creation of such a tribunal and provide Council of Europe's concrete expert and

2. Draft resolution unanimously adopted by the committee on 24 January 2023.

technical support to the process of its establishment, in close co-ordination with other interested international organisations and States. The Assembly considers that the Council of Europe should have an active leading role in the establishment of the special tribunal, participate in relevant consultations and negotiations and provide concrete expert and technical support for the process of establishment of the special tribunal.

7. The Assembly strongly supports the creation of a special tribunal that would have the following features:

7.1. Its jurisdiction would be limited to the crime of aggression committed against Ukraine and would extend *ratione temporis* to the aggression started by the Russian Federation in February 2014. Its jurisdiction would include the role and complicity of the leaders of Belarus in the war of aggression against Ukraine.

7.2. Its statute would contain a definition of the crime of aggression in line with Article 8bis of the ICC Statute and customary international law.

7.3. Its statute would clearly state that personal immunities would not apply to incumbent State officials, in line with the practice of other international criminal tribunals, and that functional immunities would in any event not be applicable to the crime of aggression. The official capacity as a head of State or government, a member of government or parliament, an elected representative or government official should in no case exempt the accused person from criminal responsibility for the crime of aggression or justify a mitigated punishment. This principle should apply to nationals of States non-parties to the constitutive treaty or agreement, in particular those of the aggressor State and its accomplice.

7.4. Its statute would contain a list of fair trial rights of the accused, as well as a reference to the principles of legality and *non bis in idem*, in line with international human rights law and the European Convention on Human Rights (ETS no. 5), as interpreted by the European Court of Human Rights.

7.5. Its role would be complementary to the ICC's jurisdiction and in no way limit or affect the latter's exercise of jurisdiction over war crimes, crimes against humanity and possible genocide committed in the context of the ongoing aggression and its jurisdiction in general. Both the ICC and the special tribunal should agree on practical and legal issues such as sharing of evidence, custody of suspects, developing common witness protection schemes, sequencing of trials of individuals prosecuted by both courts.

7.6. Its seat should be established in The Hague, with a view to ensuring complementarity and co-operation with the ICC and other international courts and institutions.

7.7. States and international organisations supporting the special tribunal should provide to it sufficient human and financial resources, ensuring its full independence and effective operational functioning while taking into account, in its structure, the fact that it will certainly not immediately or not permanently be able to operate at full capacity.

8. Pending the establishment of a special tribunal on the crime of aggression against Ukraine, the Assembly calls on member States and the Council of Europe to support and provide concrete expert and technical assistance to the process of setting up an Interim International Prosecutor's Office to investigate the crime of aggression, in close co-operation with the Prosecutor General's Office of Ukraine. Member States should co-operate closely with that Office and make sure in their internal legislation that close judicial co-operation with it is ensured. Such an office could be based outside Ukraine, ideally in The Hague.

9. In parallel to the creation of a special tribunal, the Assembly calls on member States and observer States that have not yet ratified the ICC Statute or the Kampala amendments to do so at the earliest possible date. They should also take the necessary steps to amend the ICC Statute's jurisdictional regime, either by allowing referrals to the ICC by the United Nations General Assembly when the UNSC is blocked, or by removing the existing limits on the jurisdiction over the crime of aggression in order to make it consistent with the other crimes subject to its jurisdiction. These changes would reinforce the overall consistency, legitimacy and universality of international criminal justice, in particular with regard to the crime of aggression. The proposal to create a special tribunal to respond to the ongoing criminal aggression against Ukraine and the long-term reform of the ICC Statute enabling the ICC to prosecute and punish similar (future) aggressions are not mutually exclusive and should be pursued in parallel.

10. The Assembly is outraged by the numerous reports of atrocities, gross human rights violations and violations of international humanitarian law committed by Russian forces or affiliated armed groups, and specifically the horrendous role of the Wagner Group, in the course of hostilities or in areas temporarily occupied by them during the ongoing war of aggression. These include indiscriminate attacks against civilians

and civilian objects, including hospitals, schools, nuclear power plants, energy and water infrastructure, and cultural heritage sites, in breach of the principles of distinction, proportionality and precaution. They also include summary executions of civilians; targeted killings; torture and ill-treatment of civilians and prisoners of war; enforced disappearances; abductions; rape and other forms of sexual violence; unlawful confinement of civilians; forcible transfer and deportation of Ukrainian citizens, including children, to the Russian Federation or Russian-occupied areas; use of explosive weapons in populated areas; looting; forced “passportisation” and conscription of Ukrainian citizens; and trials and death sentences against prisoners of war. There are strong indications that many of these violations amount to grave breaches of the Geneva Conventions and war crimes and that some may even qualify as crimes against humanity, as part of a widespread or systematic attack against the civilian population in Ukraine.

11. The Assembly utterly condemns these crimes and reiterates its call on the international community to send a clear message that perpetrators of war crimes and crimes against humanity will be held to account and that impunity for such crimes is unacceptable. This applies equally to low-ranking perpetrators and those who bear command responsibility for the crimes. Both the Russian Federation and Ukraine have a primary responsibility under international law to investigate and prosecute such crimes and to bring the perpetrators to justice.

12. The Assembly notes that there is mounting evidence that the Russian official rhetoric used to justify the full-scale invasion and aggression against Ukraine, the so-called “de-Ukrainianisation” process, carries characteristics of public incitement to genocide or reveals a genocidal intent to destroy the Ukrainian national group as such or at least part of it. It recalls that the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, to which both Ukraine and the Russian Federation are parties, prohibits direct and public incitement to commit genocide and the attempt to commit genocide. It also notes with the utmost concern that some of the acts committed by Russian forces against Ukrainian civilians could fall under Article II of the Convention, such as killings and forcible transfer of children of one group to another group.

13. The Assembly recalls that all States Parties to the Genocide Convention have a duty to punish genocide. As interpreted by the International Court of Justice, they also have an obligation to prevent genocide and a corresponding duty to act, which arises at the instant when the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed.

14. The Assembly notes that international and domestic accountability mechanisms already exist in order to investigate, prosecute and, where appropriate, punish war crimes, crimes against humanity, and possible genocide committed during the ongoing war. These include the ICC, which has jurisdiction over such crimes allegedly committed on Ukrainian territory; the criminal justice system of Ukraine; and the criminal justice systems of third States that have jurisdiction on the basis of the principle of universal jurisdiction or the principles of active or passive personality. The Assembly welcomes the referral of the current situation in Ukraine to the ICC Prosecutor by 43 States Parties to the ICC Statute. It strongly supports the investigations opened by the ICC Prosecutor, the Prosecutor General’s Office of Ukraine and third countries and welcomes the setting up of a Joint Investigation Team to co-ordinate relevant efforts.

15. The Assembly calls on member States and observer States of the Council of Europe to:

15.1. fully support the investigation launched by the ICC Prosecutor into the situation in Ukraine, by sharing any evidence in their possession, and by providing in a sustainable manner adequate human and financial resources to the ICC enabling it to face its increased and unprecedented workload;

15.2. assist the Ukrainian authorities and, in particular, the Prosecutor General’s Office in their ongoing efforts to investigate alleged international crimes committed in Ukraine, by strengthening their capacities, by providing resources and expertise, including forensic experts, and where appropriate, by collecting, preserving and sharing evidence from potential victims and witnesses who have fled Ukraine, in accordance with human rights standards in order to ensure its admissibility in criminal proceedings;

15.3. provide expert support to the Ukrainian authorities in their efforts to investigate conflict-related sexual violence, which is often under-reported by victims;

15.4. make use of the principle of universal jurisdiction or other principles (active or passive personality) to investigate and prosecute alleged international crimes committed in Ukraine;

15.5. join or co-operate with the Joint Investigation Team set up by Ukraine and certain European Union member States under the auspices of Eurojust and with the participation of the ICC Prosecutor, with the aim of exchanging evidence and information in connection with the ongoing investigations on alleged crimes committed in Ukraine;

15.6. make use of Council of Europe and other international instruments on mutual legal assistance to the widest extent possible, for the purposes of collecting, transferring and using evidence in connection with alleged crimes committed in Ukraine, and if necessary envisage extending them;

15.7. support the work of Ukrainian and international non-governmental organisations, as well as human rights defenders and journalists on the ground, in the collection of evidence and documentation of alleged international crimes or the provision of different types of assistance to victims and witnesses;

15.8. ensure increased co-ordination and coherence between all accountability mechanisms and actors involved, with a view to preventing duplication and enhancing efficiency;

15.9. ratify the Rome Statute of the ICC and its amendments, including the Kampala amendments, if they have not yet done so.

16. The Assembly calls on the Ukrainian authorities to strictly comply with their obligations under international humanitarian law and to conduct thorough investigations of all alleged war crimes and violations of international humanitarian law allegedly committed by Russian or by Ukrainian forces and combatants, regardless of the affiliation of the perpetrator or the victim. All trials before Ukrainian courts should be conducted respecting the right of the suspects to a fair trial under international human rights law and international humanitarian law. To this end, the Assembly encourages the Ukrainian authorities to co-operate with international trial observers and to consider inviting international legal professionals to participate in upcoming trials. Resulting convictions should be compatible with the principle of legality enshrined in Article 7 of the European Convention on Human Rights, which cannot be subject to derogation in time of war.

17. The Assembly welcomes the adoption on 14 November 2022 by the United Nations General Assembly of the resolution entitled “Furtherance of remedy and reparation for aggression against Ukraine”, which recognises that the Russian Federation must bear the legal consequences of all its internationally wrongful acts in or against Ukraine, including by making reparation for the injuries and losses caused by such acts. This resolution further recognises the need for the establishment of an international mechanism for the reparation of related damage, loss or injury and recommends the creation by member States, in co-operation with Ukraine, of an international register of damage.

18. In this context, the Assembly reiterates its call on all member States of the Council of Europe to set up an international compensation mechanism, including an international register of damage, in co-operation with the Ukrainian authorities. The Assembly stresses the Council of Europe’s comparative advantage due to the experience gained by the European Court of Human Rights and the Committee of Ministers in assessing and enforcing just satisfaction claims for serious human rights violations and considers that the Organisation should play a leading role in setting up and managing the future mechanism. Such a mechanism would have the following features:

18.1. It would be established by a multilateral treaty or agreement, open to all like-minded States, with the support of the United Nations, the Council of Europe, the European Union and other international organisations.

18.2. It would include as a first step a register of damage, which would create a record of evidence and claims on damage, loss or injury caused to all natural and legal persons in Ukraine, as well as the State of Ukraine, by violations of international law arising from the Russian Federation’s aggression against Ukraine.

18.3. It would include at a later stage an international compensation commission, mandated to review and adjudicate the claims submitted and documented by the register, as well as a compensation fund, from which compensation awards would be paid to successful claimants. The founding treaty or agreement would regulate matters such as the funding of the compensation fund, the enforcement of compensation awards, and how decisions by other international bodies and courts on reparation and compensation in connection with the Russian aggression, such as judgments of the European Court of Human Rights, could be enforced through such a mechanism.

19. The Assembly, while reiterating its previous recommendations addressed to the Russian Federation since the outbreak of its aggression against Ukraine, calls on the Russian Federation to:

19.1. cease its aggression against Ukraine immediately and unconditionally;

19.2. completely and unconditionally withdraw its occupying forces, including its own military as well as proxies, from the internationally recognised territory of Ukraine;

19.3. comply strictly with its obligations under international law, including the Charter of the United Nations, international human rights law and international humanitarian law;

19.4. immediately stop attacks against civilians and civilian objects, including mass indiscriminate attacks, ensure full respect for the principles of distinction, proportionality and precaution, and authorise the International Committee of the Red Cross to have full access for visits to prisoners of war;

19.5. immediately cease the forced deportation and transfers of Ukrainian civilians, including children, to the Russian Federation and the Russian-occupied territories, allow their safe return and, in the case of children, ensure that they are promptly reunited with their families;

19.6. investigate effectively all allegations of war crimes, crimes against humanity and possible genocide committed by Russian forces and affiliated armed groups, and ensure as appropriate that all perpetrators and those bearing command responsibility are properly prosecuted and punished;

19.7. co-operate with the investigations and proceedings before the ICC and the International Court of Justice (ICJ) and comply with their decisions, including the ICJ order of 16 March 2022 indicating that the Russian Federation should immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine;

19.8. co-operate with the United Nations Commission of Inquiry on Ukraine and comply with its recommendations;

19.9. co-operate with proceedings before the European Court of Human Rights, in relation to acts or omissions capable of constituting a violation of the Convention provided that they occurred up until 16 September 2022, in particular in the context of the inter-state case *Ukraine v. Russia (X)* concerning alleged mass and gross human rights violations committed by the Russian Federation in Ukraine since 24 February 2022, and of any related individual applications against the Russian Federation, and comply with the interim measures indicated by the Court under Rule 39 of its Rules of Court in the context of these proceedings.

20. The Assembly furthermore invites:

20.1. the European Court of Human Rights to further prioritise the examination of inter-state and individual applications against the Russian Federation stemming from the ongoing war of aggression;

20.2. the members of the United Nations Security Council to consider putting to a vote and not obstructing a Security Council resolution seeking referral of the situation in Ukraine to the ICC Prosecutor under Chapter VII of the Charter of the United Nations;

20.3. the United Nations General Assembly to support and endorse the setting up of a special international criminal tribunal for the crime of aggression against Ukraine and of an international compensation mechanism for the injury, damage and loss incurred by the State of Ukraine as well as by natural and legal persons in Ukraine, due to the Russian war of aggression;

20.4. the European Union to co-ordinate closely its efforts with the Council of Europe in ensuring a comprehensive system of accountability for the Russian Federation's aggression against Ukraine, including the crime of aggression, war crimes, crimes against humanity, possible genocide, and reparation of damages.

21. The Assembly calls on Belarus and the regime in place to refrain from any further involvement in the aggression, including by allowing its territory to be used by the Russian Federation for perpetrating acts of aggression against Ukraine, and to comply with its obligations under international law.

22. The Assembly should continue to follow developments relating to the Russian Federation's aggression against Ukraine and its legal and human rights aspects. Once hostilities have ended, the Assembly should consider holding one of its part-sessions in Kyiv, as an expression of solidarity with Ukraine.

B. Explanatory memorandum by Mr Damien Cottier, rapporteur

1. Introduction

1. The present report has been prepared for a debate under urgent procedure, following a request by the Committee on Legal Affairs and Human Rights to the Bureau of the Parliamentary Assembly to fast-track the report entitled “Legal and human rights aspects of the Russian Federation’s aggression against Ukraine”.

2. On 26 April 2022, the Committee on Legal Affairs and Human Rights constituted an *ad hoc* sub-committee on carrying out a fact-finding visit to Ukraine for the purpose of gathering information on possible war crimes and crimes against humanity committed during the war of aggression launched by the Russian Federation against Ukraine. The *ad hoc* sub-committee carried out its mission between 27 and 29 June 2022. The sub-committee’s delegation was composed of ten members of the committee, including myself as chairperson.³ Following its visit and discussions with Ukrainian authorities on 28 June, the sub-committee decided to prioritize work along the following three axes: (1) accountability for the crime of aggression; (2) the prosecution of war crimes, crimes against humanity and possible genocide; and (3) the establishment of a compensation mechanism to fund post-war reconstruction in Ukraine.⁴ I therefore decided to treat these 3 axes as a priority in the report. They are interrelated components of a comprehensive system of accountability for violations of international law arising out of the Russian aggression against Ukraine. Other topics covered in the original motion may be examined in parallel or future reports.

3. In the preparation of this report, the committee held three hearings with experts. On 6 September 2022, we heard from Mr James Goldston, Executive Director of Open Society Foundations, Justice Initiative, and Professor Dapo Akande, Professor of Public International Law, Blavatnik School of Government, University of Oxford.⁵ On 12 October 2022, the committee held a second hearing, with the participation of Mr Jonathan Agar, Special Assistant to the Prosecutor of the International Criminal Court (ICC), and Ms Tamar Tomashvili, Associate Professor of Law, Free University of Tbilisi, Georgia. Finally, on 12 December 2022, we heard from Ms Iryna Mudra, Deputy Minister of Justice of Ukraine, and Professor Burkhard Hess, Director of the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law. I should also mention that in my capacity as Chairperson of the Committee and Rapporteur, I had a meeting with Mr Andrii Kostin, Prosecutor General of Ukraine, on the occasion of his first visit to the Council of Europe on 14 October 2022. I would like to thank all these people for their valid input.

2. Accountability for the crime of aggression

2.1. The crime of aggression committed against Ukraine and the importance of prosecution

4. The Nuremberg Tribunal, in its judgment of 30 September 1946 famously declared: “To initiate a war of aggression is not only an international crime; it is the supreme international crime, differing only from other war crimes in that it contains within itself the accumulated evil of the whole”. In other words, the crime of aggression is the international crime from which all others flow. The crime of aggression was codified in Article 8 bis of the ICC Statute (2010 Kampala Amendments)⁶ but has also been part of customary international law for a long time.⁷

3. The other members were: Sunna Ævarsdóttir (Iceland, SOC), Boriss Cilevičs (Latvia, SOC), Erkin Gadirli (Azerbaijan, EC/DA), George Katrougalos (Greece, UEL), Eerik-Niiles Kross (Estonia, ALDE), Arkadiusz Mularczyk (Poland, EC/DA), Davo Ivo Stier (Croatia, EPP/CD), Ingvild Wetrhus Thorsvik (Norway, ALDE) and Emmanuelis Zingeris (Lithuania, EPP/CD).

4. Declassified report, 9 September 2022.

5. Hearing by the Sub-Committee on Human Rights (of the Committee on Legal Affairs and Human Rights) in Bern.

6. Article 8 bis of the ICC Statute inserted by Resolution RC/Res.6 of 11 June 2010: “... ‘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”. “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”. Paragraph 2 enumerates the acts that qualify as an act of aggression in accordance with UNGA Resolution 3314 (XXIX) of 14 December 1974. The jurisdiction of the ICC over the crime of aggression was activated as of 17 July 2018 by a resolution of the ICC Assembly of States Parties (Resolution ICC-ASP/16/Res.5).

7. Mr Goldston, when addressing the committee, said that the definition of the crime of aggression in the ICC Statute was highly relevant as an expression of customary international law. See also Astrid Reisinger Coracini, “The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part II)” ([justsecurity.org](https://www.justsecurity.org)),

5. The Russian Federation's large-scale invasion of Ukraine launched on 24 February 2022 clearly constitutes an "aggression" under the terms of Resolution 3314 (XXIX) of the United Nations General Assembly (UNGA) adopted in 1974.⁸ It amounts to an act of "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". The attempted annexation of the four partly occupied regions of Donetsk, Kherson, Luhansk and Zaporizhzhia, following the so-called referendums held in September 2022, could also qualify as an act of "annexation by the use of force of the territory of another State or part thereof", and is an example of the continuing escalation of the Russian Federation's aggression. The ongoing aggression is in fact a continuation of the aggression started on 20 February 2014, which included the occupation and illegal annexation of Crimea. All these acts committed against Ukraine, given their character, gravity and scale, constitute a manifest violation of the Charter of the United Nations, in particular of Article 2(4) which prohibits the threat or use of force against the territorial integrity or political independence of any State. They lack any plausible *jus ad bellum* justification, for instance individual or collective self-defence by Russia under Article 51 of the UN Charter. The acts of aggression committed by the Russian Federation against Ukraine clearly meet the threshold of the definition of the crime of aggression under customary international law and Article 8 *bis* of the ICC Statute. Aggression is a continuing crime until such time as the sovereignty, territorial integrity and political independence of the victim State is re-established. Criminal responsibility for this crime is attributable to those who planned, prepared, initiated or executed the acts of aggression, and who were in a position to control or direct the political or military action of the aggressor State (so-called leadership requirement). This should cover the highest political and military leaders of the country, possibly including the members of the National Security Council who on 21 February 2022 publicly approved the Russian President's course of action.⁹ The question of whether members of the Russian Parliament and political parties that have voted for illegal decisions validating the aggression and attempted annexation meet the leadership requirement is more difficult to answer and needs to be examined further.¹⁰

6. In addition, Belarus' complicity in the aggression against Ukraine, widely condemned by the international community,¹¹ could give rise to a crime of aggression by Belarusian leaders. Article 8 *bis*(2)(f) of the ICC Statute defines "the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State" as a self-standing act of aggression. Here too the highest political and military leaders who were in a position to control or direct the behaviour of the country should face criminal responsibility for their decisions.

7. The importance of prosecuting the crime of aggression lies in the fact that it is an "umbrella crime" from which the other crimes (war crimes, crimes against humanity and possible genocide) flow. None of these crimes would have occurred without the political decision by Russian leaders to wage an unlawful and unjustified war.¹² An additional reason to prosecute the crime of aggression would be that the responsibility for this crime extends also to all the deaths, suffering and destruction resulting from the unlawful war, including for acts compliant with international humanitarian law, which may not qualify as war crimes (for example deaths of Ukrainian combatants who are lawful targets under IHL).¹³

23 September 2022, noting that the definition was endorsed by a special working group open not only to States parties to the ICC Statute, but to all States, including the Russian Federation. Others have argued that the definition contained in the ICC Statute does not fully correspond with the definition of the crime under customary international law, which would not necessarily include the so-called leadership requirement.

8. [Opinion No. 300 \(2022\)](#), para. 3. See also [UNGA Resolution ES-11/1](#), 2 March 2022, entitled "Aggression against Ukraine", adopted by a vote of 141 in favour to 5 against, during an emergency special session of the UNGA called under the "Uniting for Peace" Resolution due to the lack of unanimity of the permanent members of the UNSC.

9. See [Security Council meeting • President of Russia \(kremlin.ru\)](#). The model indictment by Open Society Justice Initiative, mentioned by Mr Goldston during the hearing held on 6 September, named MM. Putin, Lavrov, Schoigu, Gerasimov, Patrushev, Naryshkin, Beseda and Ms Matviyenko. See: ["Model Indictment for the Crime of Aggression Committed against Ukraine" \(justsecurity.org\)](#).

10. See Advisory Committee on Public International Law of the Netherlands, *Challenges in prosecuting the crime of aggression: jurisdiction and immunities*, 12 September 2022, p. 9; [Resolution 2463 \(2022\)](#), pars. 3 and 13.6.4. referring to the Russian Duma and Russian political parties that have voted for illegal decisions encroaching on the sovereignty and territorial integrity of Ukraine.

11. [Opinion No. 300 \(2022\)](#), para. 18.2. [UNGA Resolution ES-11/1](#), 2 March 2022, entitled "Aggression against Ukraine".

12. Oona A. Hathaway, ["The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine \(Part I\)" \(justsecurity.org\)](#), 20 September 2022. It has also been argued that failing to prosecute for aggression would also facilitate the impunity of Russian leaders, as their individual responsibility for war crimes requires showing a precise connection between them and the specific criminal conduct.

13. See Andrew Clapham, ["Ukraine Tribunal Could Try Russian Leaders for Aggression"](#), *Balkan Insight*; Tom Dannenbaum, ["A Special Tribunal for the Crime of Aggression?"](#), *Journal of International Criminal Justice* (2022), pp.5-6.

8. Moreover, the crime of aggression, including the attempted annexation of the occupied regions, is an attack on the international legal order as a whole. It is a flagrant violation of the prohibition on the use of force and its corollary principle of the illegality of territorial acquisition resulting from the threat or use of force.¹⁴ States have an obligation not only not to recognise as lawful the situation created by the aggression and not to render aid or assistance in maintaining it, but also to co-operate to bring it to an end through lawful means.¹⁵ For all these reasons, it is essential that Ukraine and the international community find proper legal avenues to prosecute and punish this crime.

9. Finally, prosecuting the crime of aggression may have an important function of prevention of such crimes in the future in the same or other countries. The mere existence of clear legal pathways and criminal prosecution in case of violation of the prohibition of the use of force might encourage political and military leaders to think twice before they decide to commit an act of aggression. It might also reinforce the arguments and position of those, within the institutions, the military, the media, civil society, etc. who oppose such a course of action. On the contrary, if such a clear violation of international law is not prosecuted, this might reinforce the confidence of political and military leaders who think that aggression is still a possible option without too many personal risks.

2.2. Filling a jurisdictional gap: the need to create an ad hoc international criminal tribunal for the crime of aggression against Ukraine

10. The ICC has at present no jurisdiction over the crime of aggression against Ukraine. Unlike the other three crimes in the ICC Statute (war crimes, crimes against humanity and genocide), the crime of aggression cannot be prosecuted when committed by nationals of non-State parties or on the territory of non-State parties.¹⁶ Ukraine, Russia and Belarus are not parties to the ICC Statute. While Ukraine has made two declarations (in 2014 and 2015) submitting itself to the jurisdiction of the ICC, this ad hoc acceptance of jurisdiction can only cover war crimes, crimes against humanity and genocide.¹⁷ The jurisdictional regime for the crime of aggression agreed in Kampala was the result of a political compromise and excludes this possibility. The only other option under the ICC Statute to exercise jurisdiction would be through the referral to the ICC Prosecutor by the United Nations Security Council (UNSC) acting under Chapter VII of the UN Charter.¹⁸ This would likely be vetoed by the Russian Federation in the UNSC. In any event, members of the UNSC could still try to pass a resolution for referral, in order to demonstrate that all possible avenues to grant the ICC jurisdiction over the crime of aggression have been exhausted. It has even been argued that the UNGA could have the power to refer the situation to the ICC by virtue of the “Uniting for Peace” resolution, if the UNSC failed to exercise its responsibilities under Chapter VII due to the Russian veto.¹⁹ But this option could be challenged as the possibility of referrals by the UNGA is currently not foreseen in the ICC Statute.²⁰

11. The alternative to accountability before an international court is prosecution before domestic courts. Russia and Belarus have codified the crime of aggression under their domestic criminal legislation, but for obvious reasons there is currently no prospect for prosecution. Certain countries have opened investigations

14. Article 2(4) of the UN Charter and UNGA Resolution 2625 (XXV) of 24 October 1970, “Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations”, which contains the principle that “the territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force”. According to the International Court of Justice, these two principles reflect customary international law: see [Advisory Opinion of 9 July 2004, “Legal consequences of the construction of a wall in the Occupied Palestinian Territory”](#), para. 87.

15. See in this regard Article 41 of the International Law Commission’s “Draft Articles on Responsibility of States for Internationally Wrongful Acts” (2001), in respect of serious breaches of obligations arising under peremptory norms of general international law (*jus cogens*); ILC 2019 report, pp. 193-197. The ILC cited as an example of a *jus cogens* norm the prohibition of aggression (https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf, p. 112).

16. Article 15bis (5) of the ICC Statute: “In respect of a State that is not party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State’s nationals or on its territory”. According to Resolution ICC-ASP/16/Res.5 of the ICC Assembly of States Parties, both States should have ratified not only the Statute, but also the Kampala amendments on the crime of aggression. See also Article 121(5) of the ICC Statute; Dapo Akande and Antonios Tzanakopoulos, “Treaty Law and ICC Jurisdiction over the Crime of Aggression”, [European Journal of International Law | Oxford Academic \(oup.com\)](#), 9 November 2018.

17. Under Article 12 (3) of the ICC Statute. Article 15bis (5) is viewed as a *lex specialis* for the crime of aggression, displacing the ordinary jurisdictional regime set out in Article 12.

18. Article 15ter of the ICC Statute.

19. [www.europarl.europa.eu/RegData/etudes/IDAN/2022/702574/EXPO_IDA\(2022\)702574_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702574/EXPO_IDA(2022)702574_EN.pdf), 9 December 2022, pp. 20-21.

20. Shane Darcy, “Aggression by P5 Security Council Members: Time for ICC Referrals by the General Assembly” (justsecurity.org), 16 March 2022, who points out that this option was supported by some States during the negotiations of the ICC Statute and the Kampala amendments, but was not retained.

into the crime of aggression against Ukraine, on the basis of the principle of universal jurisdiction or the protective principle.²¹ The Ukrainian legislation itself criminalises the planning, preparation, unleashing or waging of an aggressive war,²² but the Office of the Prosecutor General and Ukrainian authorities are well aware that personal immunities of foreign State leaders and government officials (the so-called troika: head of State, head of government and minister of Foreign Affairs) are applicable under international law and would likely constitute a bar to domestic prosecution. Besides the possible legal obstacles to domestic prosecution of the crime of aggression,²³ there are also reasons related to objective impartiality and legitimacy which seem to militate in favour of an international prosecution instead of a purely domestic prosecution by the victim or other State's courts.²⁴

12. In this context, shortly after the launch of the full-scale armed attack on Ukraine in February 2022, a number of prominent figures from the legal and political spheres proposed the creation of a special tribunal for the punishment of the crime of aggression against Ukraine, by an *ad hoc* "coalition of the willing" and inspired by the Nuremberg precedent. According to this proposal, States would agree to grant jurisdiction arising under national criminal codes and general international law to such a dedicated tribunal.²⁵

13. The Assembly was the first international body to make a similar proposal. In its [Resolution 2436 \(2022\)](#) "The Russian Federation's aggression against Ukraine: ensuring accountability for serious violations of international humanitarian law and other international crimes" (report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Aleksander Pocij; urgent debate), adopted on 28 April 2022, the Assembly unanimously called on all member and observer States of the Council of Europe to urgently set up an *ad hoc* international tribunal with a mandate to investigate and prosecute the crime of aggression allegedly committed by the political and military leadership of the Russian Federation, through a multilateral treaty between like-minded States endorsed by the UN General Assembly and with the support of the Council of Europe, the EU and other international organisations.²⁶

14. The Assembly's call was later followed by the European Parliament, the OSCE Parliamentary Assembly and NATO Parliamentary Assembly.²⁷ National parliaments have also supported the idea.²⁸

15. On 12 September 2022, an event on "Ensuring coherence in accountability for the Russian aggression against Ukraine: the *ad hoc* Special Tribunal for the crime of aggression against Ukraine and the Compensation Commission for Ukraine" was organised by the Permanent Representation of Ukraine to the Council of Europe and was held under the auspices of Ireland's Presidency of the Committee of Ministers, with the participation in person of the Deputy Minister of Justice of Ukraine. At this event, Ukraine's proposal to establish an *ad hoc* special tribunal for the punishment of the crime of aggression against Ukraine was

21. Lithuania and Poland.

22. Article 437 of the Criminal Code of Ukraine. In this case, Ukraine's jurisdiction is based on the principle of territoriality.

23. On the issue of whether the victim State or another State other than the aggressor State can exercise domestic jurisdiction over the crime of aggression under international law, see Advisory Committee on Public International Law of the Netherlands, "Challenges in prosecuting the crime of aggression: jurisdiction and immunities", 12 September 2022, pp. 7-9. For instance, the International Law Commission (ILC) has argued that only the aggressor state itself can exercise jurisdiction over this crime.

24. Tom Dannenbaum, "A Special Tribunal for the Crime of Aggression?", *Journal of International Criminal Justice* (2022), p. 4; 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.

25. Gordon Brown, Philippe Sands, Philip Leach, Dapo Akande, Sir Nicolas Bratza and others, "Calling for the Creation of a Special Tribunal for the Punishment of the Crime of Aggression Against Ukraine", 4 March 2022. The Statement was supported by the Ukrainian Foreign Minister in an event hosted by Chatham House on 4 March 2022, at [A criminal tribunal for aggression in Ukraine \(chathamhouse.org\)](#).

26. [Resolution 2436 \(2022\)](#), para. 11.6. See also [Recommendation 2231 \(2022\)](#), paras. 2.3 and 2.4; [Resolution 2433 \(2022\)](#) "Consequences of the Russian Federation's continued aggression against Ukraine: role and response of the Council of Europe", para. 11.20; and [Resolution 2463 \(2022\)](#) "Further escalation in the Russian Federation's aggression against Ukraine", para. 13.6.

27. "Ukraine: MEPs want a special international tribunal for crimes of aggression", [European Parliament \(europa.eu\)](#), 19 May 2022. The EP referred to the support of established multilateral forums such as the UN and the Council of Europe for the creation without delay of an appropriate legal basis. In its resolution of 23 November 2022 on recognising the Russian Federation as a state sponsor of terrorism, the EP called again on the EU and its Member States to provide the appropriate support for the establishment of a special tribunal (para. 11). See also OSCE Parliamentary Assembly's Resolution on the Russian Federation's War of Aggression Against Ukraine and its People, and its Threat to Security Across the OSCE Region, para. 35-36, 2-6 July 2022; NATO Parliamentary Assembly [Resolution 479](#), para. 19(h), 21 November 2022.

28. See also "Statement by Foreign Affairs Committee Chairs Calling for the Creation of an International Criminal Tribunal into Vladimir Putin's Criminal Conspiracy", 7 March 2022.

presented to delegations. According to this proposal, the special tribunal would be complementary and not interfere with the jurisdiction of the ICC, as it would only have jurisdiction to investigate and prosecute the crime of aggression committed by the political and military leadership of Russia. It could be established on the basis of a multilateral treaty between States or on the basis of an agreement with an international organisation (for example the EU or the Council of Europe). The definition of the crime of aggression would be in line with that provided in Article 8 *bis* of the Rome Statute of the ICC. The official position of a defendant, whether as Head of State or other official, would not exempt them from individual criminal responsibility. The special tribunal and competent national courts (Ukrainian) would have concurrent jurisdiction, but the special tribunal should have primacy, meaning that it could request that the national court deferred a case to its competence if the interest of justice so required.²⁹ President Zelenskyy also pleaded for the creation of a special tribunal for the crime of aggression when addressing the UNGA in September 2022³⁰ and the Assembly during its October 2022 part-session.³¹

16. Following a discussion of the Ukrainian proposals at its meeting of 14 and 15 September 2022, the Committee of Ministers adopted a [decision](#) in which it “stressed the urgent need to ensure a comprehensive system of accountability for serious violations of international law arising out of the Russian aggression against Ukraine to avoid impunity and to prevent further violations”. It “noted with interest the Ukrainian proposals to establish an ad hoc special tribunal for the crime of aggression against Ukraine and welcomed ongoing efforts, in co-operation with Ukraine, to secure accountability for the crime of aggression (...)”.³² The Committee of Ministers called on member States and the Council of Europe to remain actively seized of the matter and actively engage in further developing a comprehensive system of accountability.

17. This issue was also raised by the High-Level Reflection Group of the Council of Europe in its report of 5 October 2022, in which it stressed “the importance of ensuring a comprehensive system of accountability for serious violations of international law, arising from the Russian aggression against Ukraine”, and asked the Council of Europe to remain engaged and contribute to the international efforts in this regard.³³ In my view, the 4th Summit of the Council of Europe Heads of State and Government that will be held in Reykjavik in May 2023 would be an excellent occasion to give the necessary political impetus and support to the creation of the special tribunal.³⁴

18. The European Commission, on 30 November 2022, explicitly supported the idea of setting up a special tribunal for the crime of aggression against Ukraine, in order to fill the existing jurisdictional gap and ensure full accountability for all crimes. The Commission is for the time being considering alternative options involving backing by the UNGA: either a special international tribunal based on a multilateral treaty, or a specialised court integrated in a national justice system with international judges (a hybrid court).³⁵ These options still need to be further detailed by the Commission and then examined by the EU Council.³⁶ Following the position of the European Commission, France immediately announced that they had started working with European

29. See DD(2022)317E, distributed to the Committee of Ministers at the request of Ukraine. Other proposals have been launched by civil society, academics and different State representatives following the adoption of the Assembly [Resolution 2436 \(2022\)](#): Ukraine Task Force of The Global Accountability Network (UBA), 7 September 2022; Yale Club Roundtable: “A Special Tribunal for the Crime of Aggression Recommended by the UN General Assembly?”, New York, 22 June 2022 ([Chair’s summary](#)).

30. Representatives of Poland, Lithuania and the Czech Republic also spoke in favour of a special tribunal within the UNGA.

31. Volodymyr Zelenskyy: “Never yet in history was united Europe as strong as it is today” ([coe.int](#)): Europe can play “a historic role in creating a special tribunal for Russia’s aggression against Ukraine. Let’s do it. It will be the best way to protect the principles of international law”, he said.

32. “No impunity for Russia’s crimes against Ukraine”, [Newsroom \(coe.int\)](#). See also [CM Reply](#) to Recommendation 2231 (2022), 18 October 2022.

33. <https://rm.coe.int/report-of-the-high-level-reflection-group-of-the-council-of-europe-/1680a85cf1>, para. 40.

34. See in the same vein, Report “The Reykjavik Summit of the Council of Europe: United around values in the face of extraordinary challenges” ([Doc. 15681](#), rapporteur: Ms Fiona O’Loughlin, Committee on Political Affairs and Democracy), 13 December 2022, para. 8.3.1 of the draft recommendation and para. 70 of the explanatory memorandum. The report took into account the input of an *ad hoc* committee on the Fourth Summit set up by the Bureau of the Assembly, in which I took part in my quality of Chairperson of the Committee on Legal Affairs and Human Rights. See, more generally, the call on the international community to take action to ensure accountability for all crimes committed in Ukraine, [Human Rights Day: Council of Europe leaders call for collective action to end impunity for crimes committed against Ukraine – Portal \(coe.int\)](#)

35. https://ec.europa.eu/commission/presscorner/detail/en/IP_22_7311.

36. In the conclusions adopted by the Heads of State or Government at the end of the European Council meeting on 15 December 2022, there was no mention of a special court, but the EU Council “welcomes and encourages further efforts to ensure full accountability for war crimes and other most serious crimes in connection with Russia’s war of aggression against Ukraine, including ways to secure accountability for the crime of aggression. (...) It invites the Commission, the

and Ukrainian partners on the proposal to establish a special tribunal on Russia's crime of aggression against Ukraine.³⁷ The Netherlands has on its turn said that it would be willing to host the special tribunal in The Hague.³⁸ The German Foreign Minister has also recently called for the establishment of a special tribunal.³⁹ On 19 January 2023, the European Parliament adopted a new resolution calling for the creation of a special international tribunal to prosecute Russian leaders and its allies for the crime of aggression.⁴⁰

19. At the United Nations level, a draft resolution of the UNGA proposing the establishment of an international tribunal on the crimes of aggression committed against Ukraine was circulated by Ukraine, but it has not yet been put to a vote.⁴¹

2.3. Legal and practical challenges for the establishment and functioning of an ad hoc international criminal tribunal for the crime of aggression against Ukraine

2.3.1. Legal basis

20. Various alternatives are currently being examined with a view to setting up a special tribunal on the crime of aggression against Ukraine. The possibility of establishing an ad hoc tribunal by the UNSC under Chapter VII of the UN Charter (like the ones created for the former Yugoslavia/ICTY and Rwanda/ICTR) is to be excluded, given Russia's veto power within the UNSC. Some have argued that due to the blockage of the UNSC by a permanent member, the UNGA could establish such a tribunal acting under the "Uniting for Peace" mechanism.⁴² However, it could be challenged as too broad an interpretation of UNGA powers. Also a resolution adopted by the UNGA does not in principle create international obligations binding on States. In any event, the UNGA could recommend the creation of a special tribunal for the crime of aggression, for example through an agreement between Ukraine and the United Nations.

21. The main viable options are: (a) an international tribunal based on a multilateral international treaty concluded by States, including Ukraine, (as was for example the tribunal of Nuremberg); and (b) a special tribunal set up through an agreement between Ukraine and an international organisation, for example the UN, or the Council of Europe. For the first option, such a tribunal could and should also be endorsed and supported (logistically, technically and financially) by as many international organisations as possible. For the second option, the statute of the agreed tribunal could also be open for signature and ratification by States and other international and regional organisations. Regarding its nature (international/hybrid), there are different possible options and degrees of integration of the tribunal within the Ukrainian system, with a wide range of precedents such as the Kosovo* Specialist Chambers, the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia.⁴³ The integration of a hybrid court within the Ukrainian system appears to raise some issues, as Article 125 paragraph 6 of the Ukrainian Constitution prohibits the establishment of extraordinary and special courts and as according to Article 127 paragraph 3, only a citizen of Ukraine may be appointed to the office of judge. Ukrainian representatives have made it clear that a change of the constitution in wartime would be very difficult to achieve. Although a hybrid court (comprising

High Representative and the Council to take work forward, in accordance with EU and international law, stressing that the prosecution of the crime of aggression is of concern to the international community as a whole". See the conclusions at: www.consilium.europa.eu/en/press/press-releases/2022/12/15/european-council-conclusions-15-december-2022/.

37. www.diplomatie.gouv.fr/en/country-files/ukraine/news/article/ukraine-special-tribunal-on-russian-crimes-of-aggression-30-nov-22.

38. www.swissinfo.ch/eng/netherlands-willing-to-house-special-court-for-russia-invasion-of-ukraine--minister-says/48129172.

39. www.reuters.com/world/europe/germany-calls-special-tribunal-against-russia-over-ukraine-war-2023-01-16/, 16 January 2023.

40. www.europarl.europa.eu/news/en/press-room/20230113IPR66653/ukraine-war-meps-push-for-special-tribunal-to-punish-russian-crimes. The text was adopted by 472 votes in favour, 19 against with 33 abstentions.

41. www.theguardian.com/law/2022/dec/04/russian-war-crimes-draft-resolution-circulated-un-ukraine-zelenskiy.

42. [www.europarl.europa.eu/RegData/etudes/IDAN/2022/702574/EXPO_IDA\(2022\)702574_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702574/EXPO_IDA(2022)702574_EN.pdf), 9 December 2022.

43. * Throughout this text, all reference to Kosovo, whether to the territory, institutions or population shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

The Kosovo Specialist Chambers were created following an exchange of letters between the President of Kosovo and the High Representative of the EU for Foreign Affairs and Security Policy; they are part of the court system in Kosovo. The Special Court for Sierra Leone was set up through an agreement between the UN and Sierra Leone, following a resolution by the UNSC (not acting under Chapter VII of the UN Charter) requesting the Secretary General to negotiate an agreement with Sierra Leone. This court, while applying a mix of international and national law, was not part of the judiciary of Sierra Leone. The Extraordinary Chambers in the Courts of Cambodia were established under Cambodian law and later accompanied by a bilateral agreement between the UN and Cambodia pursuant to a resolution of the UNGA.

Ukrainian and international judges or only international judges but applying Ukrainian legislation) could perhaps be created outside the Ukrainian system, I believe that the fully international option would be preferable, also for the reasons that I will explain below concerning personal immunities.⁴⁴

22. In any event, as things stand, the Assembly should leave the question of the legal basis (multilateral treaty agreement with an international organisation or a combination of both) open. Although the Council of Europe could legally provide a forum for both options, for example reaching an agreement with Ukraine or providing the institutional framework for the negotiation of a multilateral treaty⁴⁵ (perhaps in the form of a partial enlarged agreement open to non-Council of Europe member States), the final legal form of the instrument should be decided pragmatically, aiming to involve the largest possible number of States, ideally representative of different regions of the world.

2.3.2. Jurisdiction

23. Some have argued that States cannot simply transfer their universal or territorial jurisdiction over the crime of aggression to a newly established international tribunal.⁴⁶ However, other authors have rejected the theory of “delegation” of jurisdiction to international tribunals, arguing that this fails to consider the international legal personality of international organisations and courts independent from founding States.⁴⁷ When creating international criminal courts to exercise jurisdiction over certain crimes and apply international law, States are not necessarily constrained by their own laws and domestic jurisdiction rules.

24. The special tribunal should have jurisdiction only over the crime of aggression. It should not go beyond this, in order not to interfere with the ICC’s jurisdiction over other international crimes. The future statute of the special tribunal should include the definition of the crime of aggression codified in Article 8*bis* of the ICC Statute, which is considered to reflect customary international law, or even preferably contain a direct reference to the Rome Statute, which would ensure the complementarity and co-operation with the ICC.⁴⁸

25. As regards temporal jurisdiction, the question arises as to whether it should start in February 2014 with the attempted illegal annexation of Crimea, followed by the occupation of parts of the Donetsk and Luhansk regions, or in February 2022 with the full-scale invasion of Ukraine. Although the UNGA resolutions have not mentioned the 2014 events when condemning the aggression, it seems clear that at least the attempted annexation of Crimea also meets the high threshold of the definition of the crime of aggression. The Assembly has indeed considered the current aggression as a continuation of the war of aggression waged since 20 February 2014.⁴⁹ The circumstance that the ICC jurisdiction over the crime of aggression was only activated on 17 July 2018 should not be an obstacle, as the crime of aggression already existed before under customary international law.

44. See also Report “The Russian Federation’s aggression against Ukraine: ensuring accountability for serious violations of international humanitarian law and other international crimes” (Doc. 15510, Rapporteur: Aleksander Pocij, Committee on Legal Affairs and Human Rights), para. 30 of the explanatory memorandum.

45. See Opinion of the CAHDI (Committee on Legal Advisers on Public International Law) on Recommendation 2231 (2022). See also, concerning the possible role of the Council of Europe, Kevin Jon Heller, <https://opiniojuris.org/2022/03/16/the-best-option-an-extraordinary-ukrainian-chamber-for-aggression/>, 16 March 2022; Tom Dannenbaum, “A Special Tribunal for the Crime of Aggression?”, *Journal of International Criminal Justice* (2022), p. 14, noting that the CoE members comprise over 2/3 of the States that have criminalised aggression domestically and more than 60% of those that have ratified the Kampala amendments; Owiso Owiso, “An Aggression Chamber for Ukraine Supported by the Council of Europe”, *Opinio Juris*, 30 March 2022; [www.europarl.europa.eu/RegData/etudes/IDAN/2022/702574/EXPO_IDA\(2022\)702574_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702574/EXPO_IDA(2022)702574_EN.pdf), 9 December 2022. The experts heard by our Committee, Professor Akande and James Goldston, said that the Council of Europe, as the guardian of human rights and the rule of law, could play an important role in providing legitimacy to the special tribunal. Professor Akande referred in this respect to the example of the 2014 Malabo Protocol (not yet entered into force), which conferred international criminal jurisdiction to the African Court of Justice and Human Rights, including over the crime of aggression.

46. See Advisory Committee on Public International Law of the Netherlands, “Challenges in prosecuting the crime of aggression: jurisdiction and immunities”, 12 September 2022, p. 8, pointing out that the Nuremberg Tribunal based its jurisdiction over aggression on the transfer of jurisdiction by the Allied Powers that occupied Germany after the Second World War and thereby assumed the powers of the German aggressor State.

47. Chile Eboe-Osuji, www.justsecurity.org/84416/the-absolute-clarity-of-international-legal-practices-rejection-of-immunity-before-international-criminal-courts/, 8 December 2022.

48. See Ukrainian proposal, para. 19; Astrid Reisinger Coracini, “The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part II)” (justsecurity.org), 23 September 2022; “Ukraine Task Force of The Global Accountability Network” (UBA), 7 September 2022.

49. *Opinion No. 300 (2022)*, para. 1.

2.3.3. Immunities

26. There seems to be a consensus on the fact that personal immunities of the so-called troika (incumbent heads of State, heads of government and ministers of foreign affairs)⁵⁰ are not applicable to international criminal courts or tribunals under customary international law.⁵¹ The rationale behind personal immunities from foreign courts lies in the principle of sovereign equality of States, according to which one sovereign state cannot adjudicate on the conduct of another State. Such principle has no relevance when it comes to international courts. Moreover, there is also support for the position that functional immunity or immunity *ratione materiae* (namely for acts committed in official capacity) from criminal jurisdiction does not apply to international crimes, including the crime of aggression.⁵²

27. Nevertheless, the question remains whether the new special tribunal would be sufficiently “international” to avoid the applicability of personal immunities. According to some authors, the international court or tribunal should be sufficiently detached from national jurisdictions and sufficiently reflect the will of the international community to collectively enforce crimes against customary international law.⁵³ Although there are different views on whether this could be achieved through an agreement with the UN (following the example of the Special Court of Sierra Leone), or with the involvement of an *ad hoc* group of States or a regional organisation,⁵⁴ it seems to me that the issue of immunities could be better addressed (and solved) in a treaty or agreement establishing a fully (not hybrid) international tribunal, preferably with the endorsement of different international organisations (UN, CoE, EU, ...). Such endorsement would be important for showing that the tribunal reflects the will of the international community as a whole. In any event, the statute of the tribunal should explicitly contain a provision similar to Article 27 of the ICC Statute, stipulating that the official capacity of the accused shall in no case exempt him/her from criminal responsibility or mitigate punishment. This would obviously apply to nationals of non-parties to the treaty (namely aggressor States), as is the case

50. Immunities from criminal proceedings during their term of office for both official and private acts, committed during or prior to, that term in office.

51. According to the ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, judgment of 14 February 2002, paragraph 61, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction, citing the examples of the ICTY, the ICTR and the ICC. See also ICC, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, judgment of 6 May 2019, paragraphs 113 and 115, and Article 27 of the ICC Statute; Special Court for Sierra Leone, *The Prosecutor against Charles Ghankay Taylor*, “Decision on immunity from jurisdiction”, 31 May 2004, paragraphs 52-53. The CAHDI, in its Opinion on [Recommendation 2231 \(2022\)](#), adopted on 5 September 2022, §§ 7-8, noted as follows “one of the most difficult subject to address from the legal standpoint is the question of immunity from criminal jurisdiction, based on customary international law, which particularly applies to certain State officials (so called Troika...). The CAHDI notes in this regard that the law on immunities is under constant evolution as evidenced by the case law of the ICC, the Special Court for Sierra Leone and the work of the International Law Commission. The prospects of any international tribunal to effectively contribute to individual accountability of members of the Troika for acts of aggression committed against Ukraine will depend on whether the issue of immunities is addressed in an accurate manner”. The European Committee on Crime Problems (CDPC), in his comments on Recommendation 2231 (2022), noted that personal immunities are widely considered inapplicable in respect of proceedings before international tribunals. Both experts Mr Goldston and Professor Akande confirmed that an international court would not face the problem of immunities of top State officials, contrary to national courts. See also Chile Eboe-Osuji, www.justsecurity.org/84416/the-absolute-clarity-of-international-legal-practices-rejection-of-immunity-before-international-criminal-courts/, 8 December 2022. For the view that immunities could be disregarded on the basis of Ukraine’s right to self-defence, see [https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702574/EXPO_IDA\(2022\)702574_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702574/EXPO_IDA(2022)702574_EN.pdf), 9 December 2022, p. 29.

52. See Advisory Committee on Public International Law of the Netherlands, “Challenges in prosecuting the crime of aggression: jurisdiction and immunities”, 12 September 2022, pp. 11-12, noting however that the ILC did not mention the crime of aggression in the 2017 draft article providing that functional immunity before the courts of foreign States does not apply for six international crimes. According to the Advisory Committee, there is no logic in distinguishing between the crime of aggression and other crimes in this regard. See also Tom Dannenbaum, “[Mechanisms for Criminal Prosecution of Russia’s Aggression Against Ukraine](#)” (justsecurity.org), 10 March 2022: “functional immunity would logically appear to be out of place in the context of an international crime that is by definition a state act”.

53. Astrid Reisinger Coracini and Jennifer Trahan, “[The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine \(Part VI\): On the Non-Applicability of Personal Immunities](#)” (justsecurity.org), 8 November 2022, referring to the case law of the ICC and the Special Court for Sierra Leone.

54. *Ibid.*; Larry D. Johnson, “[United Nations Response Options to Russia’s Aggression: Opportunities and Rabbit Holes](#)” (justsecurity.org), 1 March 2022; 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; Alexander Komarov and Oona A. Hathaway, “[The Best Path for Accountability for the Crime of Aggression Under Ukrainian and International Law](#)” (justsecurity.org), 11 April 2022; [www.europarl.europa.eu/RegData/etudes/IDAN/2022/702574/EXPO_IDA\(2022\)702574_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702574/EXPO_IDA(2022)702574_EN.pdf), 9 December 2022.

now under the ICC jurisdictional regime for situations referred by the UNSC (for example President Al Bashir from Sudan) or crimes other than aggression (for example crimes against humanity committed by a Russian national on the territory of a state party or a state having accepted the ICC jurisdiction).

2.3.4. Co-operation from aggressor States and effectiveness

28. It has been argued that a special international tribunal would be unable to secure the co-operation from the aggressor States and the presence of the accused. In this respect, there are important differences with previous special international or internationalised tribunals which were established after the end of the relevant conflicts (Nuremberg and Tokyo, Sierra Leone, Cambodia and Kosovo). However, the issuance of indictments and of arrest warrants against Russian leaders would already severely limit their freedom of movement and lead to further political isolation. They could also act as a deterrent for further crimes.⁵⁵ Indictments and arrest warrants would also have their own intrinsic value for victims.⁵⁶ The co-operation with the ad hoc tribunal, including the surrender of political or military leaders, could also be part of a future peace agreement with Russia, or at least conceivable in the event of a regime change.

2.3.5. Rights of the accused

29. The Statute of the future tribunal should contain a list of fair trial and due process rights of the accused, in line with the rights guaranteed under the European Convention on Human Rights (ETS No. 5) and the International Covenant for Civil and Political Rights. Trials *in absentia* should be avoided, in line with the practice of other international criminal tribunals, including the ICC.⁵⁷ They would indeed raise human rights and legitimacy concerns. The Statute should also guarantee the principle of *non bis in idem*, as well as the principle of legality. With regard to the principle of legality, the definition of the crime of aggression should reflect the state of customary international law (for example in line with Art. 8 bis of the ICC Statute), in order to avoid any challenge of retrospective or unforeseeable application to the accused person's disadvantage.⁵⁸

2.3.6. Complementarity with the ICC and long-term implications for international criminal justice

30. The different proposals on the special tribunal for the crime of aggression have given rise to concerns that such a tribunal would compete with the ICC or undermine its legitimacy. It should be emphasized that the special tribunal's jurisdiction would be limited to the crime of aggression committed against Ukraine, and that the ICC's jurisdiction over war crimes, crimes against humanity and genocide in Ukraine would not be affected in any way. A narrow material jurisdiction would have budgetary advantages (compared to the investigation of war crimes) but the funding of the special tribunal should in no way lead to diverting resources away from the ICC. Furthermore, the two courts should negotiate a co-operative relationship agreement that would cover issues such as avoiding competing investigations, arrest warrants, custody of suspects, sharing of evidence, sequency of trials, etc.⁵⁹ If the new special tribunal had its seat in The Hague, this would obviously facilitate such co-ordination and complementarity with the ICC. A direct reference to the Rome Statute of the ICC in its Statute would have the same effect.

31. More importantly, the creation of a special tribunal should be pursued in parallel with the strengthening of international criminal justice system for the future. In order to address the selectivity concerns that such a special tribunal for the aggression against Ukraine raises, States supporting this initiative (including Ukraine) should as a minimum ratify the ICC Statute and the Kampala amendments.⁶⁰ In addition, they should step up efforts to amend the ICC jurisdictional regime for the crime of aggression and make it more universally

55. The precedent of former President of Sudan al Bashir, who was subject to an arrest warrant issued by the ICC while he was in power, is often cited.

56. Tom Dannenbaum, "A Special Tribunal for the Crime of Aggression?", *Journal of International Criminal Justice* (2022), p. 8.

57. Articles 60 and 63 (1) of the ICC Statute. For the trial proceedings before the ICTY, ICTR, Special Court for Sierra Leone, Extraordinary Chambers in the Courts of Cambodia, and Kosovo Specialist Chambers, the right for an accused to be tried in his or her presence was listed among the minimum guarantees to which the accused was entitled. Only the Special Tribunal for Lebanon explicitly allows for *in absentia* trials.

58. See also the CDPC's comments to Recommendation 2231 (2022).

59. David Scheffer, www.justsecurity.org/83757/forging-a-cooperative-relationship-between-intl-crim-court-and-a-special-tribunal-for-russian-aggression-against-ukraine/, 25 October 2022.

60. Only 44 States have ratified the Kampala amendments, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-b&chapter=18&clang=_en.

CoE member States: Andorra, Austria, Belgium, Croatia, Cyprus, Czech Republic, Estonia, Finland, Georgia, Germany, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, North Macedonia, Poland, Portugal, San Marino, Slovak Republic, Slovenia, Spain, Sweden and Switzerland.

applicable, either by removing its existing limitations (Article 15 bis of the Statute) or by introducing the general possibility of UNGA referrals to the ICC Prosecutor in case of blockage of the UNSC.⁶¹ They should be prepared to accept that the accountability regime for the crime of aggression at the ICC needs to be more equal and universal, including vis-à-vis permanent members of the UNSC. Such a commitment would help address the selectivity concerns raised against the special tribunal for Ukraine and contribute to the overall consistency of international criminal justice.

32. Both options (amending the ICC Statute and setting up a special tribunal) should be pursued in parallel, since amending the ICC Statute may take time and be rather complex.⁶² Pending the extension of the ICC's permanent jurisdiction over the crime of aggression, the setting up of a special tribunal to address the ongoing crime of aggression against Ukraine seems to be the best possible option.

3. Accountability for war crimes, crimes against humanity and possible genocide

3.1. Alleged crimes committed

3.1.1. War crimes and crimes against humanity

33. Since the outbreak of the war of aggression, the Assembly has expressed on several occasions its horror at reports of serious violations of IHL committed by the Russian Federation and Russian troops in Ukraine, including: attacks against civilian targets; indiscriminate use of artillery, missiles and bombs in densely populated areas; attacks on humanitarian corridors; hostage-taking and abductions; the use of rape and torture as weapons of war; torture, ill-treatment and death sentences against prisoners of war; and forced deportation of Ukrainians, including children, from temporarily occupied territories. It has for instance referred to specific atrocities in cities and towns temporarily under the control of Russian troops (for example Bucha and the vicinity of Kyiv), missile attacks targeting Ukrainian cities (for example on 10 October 2022) or the death sentences against three Ukrainian Armed Forces soldiers of foreign origin.⁶³

34. During our **ad hoc sub-committee's mission to Ukraine** on 28 June 2022, we were shocked by what we saw and heard in Bucha and Irpin, two towns that had been only briefly under Russian control at the beginning of the full-scale invasion. The sub-committee found that there were clear indications that Bucha had been the theatre of cold-blooded murder of civilians on a massive scale. In Irpin, we saw the massive destruction of residential buildings and civilian infrastructures. The damage had been obviously caused by the use of heavy weapons by Russian forces, in what appeared to be a clear violation of international humanitarian law.⁶⁴

35. In her "Memorandum on the human rights consequences of the war in Ukraine" of 8 July 2022, the **Council of Europe Commissioner for Human Rights** wrote of being confronted with compelling evidence of patterns of violations of the right to life, including arbitrary killings and enforced disappearances, as well as violations of the right to property, including massive destruction of civilian infrastructure; violations of the prohibition of torture and ill-treatment, in particular gender-based violence and war-related sexual violence; and violations of the right to liberty and security, including abductions and arbitrary or *incommunicado* detention. Identifiable patterns of certain types of violations of IHL, including attacks of a widespread or systematic character, "point to the possible qualification of many such violations as war crimes or crimes

61. Tom Dannenbaum, "A Special Tribunal for the Crime of Aggression?", *Journal of International Criminal Justice* (2022), p. 11; Shane Darcy, "Aggression by P5 Security Council Members: Time for ICC Referrals by the General Assembly" (justsecurity.org), 16 March 2022. Some authors have also suggested that such referrals would be already be possible through a dynamic interpretation of the UNGA powers under the "Uniting for Peace" Resolution: [https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702574/EXPO_IDA\(2022\)702574_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702574/EXPO_IDA(2022)702574_EN.pdf), 9 December 2022.

62. Proposed amendments require the consensus of the Assembly of States Parties or a two-thirds majority. An amendment allowing UNGA referral of situations to the ICC (for example providing for this possibility in Article 13 of the ICC Statute) would in principle also require the ratification or acceptance of seven-eighths of all States Parties, according to Article 121(4) of the Statute. There are also doubts as to whether the amendments would have retroactive effect and as from which date the ICC's extended jurisdiction over aggression would arise. See Shane Darcy, "Aggression by P5 Security Council Members: Time for ICC Referrals by the General Assembly" (justsecurity.org), 16 March 2022; 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.

63. See *Opinion No. 300* (2022), para. 6; *Resolution 2436* (2022), paras. 1-4, and Report, paras. 5-18; *Resolution 2446* (2022) "Reported cases of political prisoners in the Russian Federation", paras. 13-14; *Resolution 2463* (2022), paras. 5-6, and Report paras. 11- 19.

64. *AS/Jur* (2022) 27.

against humanity”.⁶⁵ More recently, she has expressed particular concern about the forcible transfers of Ukrainian children to Russia, and stressed that the forcible transfer of protected persons to the territory of the occupying power and the changing of children’s personal status, including nationality, by an occupying force are both prohibited under the Fourth Geneva Convention.⁶⁶

36. There have been numerous international reports documenting the war crimes and crimes against humanity that appear to have been committed by Russian forces during the ongoing war of aggression. For example, the second **OSCE Moscow Mechanism** “Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity Committed in Ukraine (1 April-25 June 2022)” published on 14 July 2022, concluded that there have been indiscriminate attacks against civilians and civilian objects (houses, hospitals, schools, kindergartens, nuclear power plants, cultural heritage, places of worship, etc.) in numerous towns and villages; their magnitude and frequency is “credible evidence that hostilities were conducted by Russian armed forces with disregard to their fundamental obligation to comply with the basic principles of distinction, proportionality and precaution that constitute the fundamental basis of IHL”. The events concerning the towns of Bucha (summary executions of civilians with signs of torture⁶⁷) and Irpin were found to be emblematic examples of grave breaches of IHL under the Geneva Conventions, which constitute war crimes. As regards prisoners of war, the report refers to the case of three Ukrainian Armed Forces members, two British and one Moroccan, who were found to be mercenaries and sentenced to death following a farce trial by the so-called Donetsk People’s Republic’s Supreme Court. They should have been entitled to prisoner of war status according to the Third Geneva Convention and not be punished simply for participating in the conflict. Other reported violations of IHL concerned treatment of detainees (“filtration” process of civilians,⁶⁸ torture), administration of the occupied territory (“passportisation”), enforced disappearances (including of children transferred to Russia for adoption), respect for private property (looting), deportations or forcible transfer of civilians to the territory of the occupying power,⁶⁹ conscription of Ukrainian nationals (including of Crimeans), blocking the provision of relief, use of non-combatants as human shields, and use of cluster munitions and other weapons in populated areas. Many of these violations of IHL could amount to war crimes under the ICC Statute and give rise to individual criminal responsibility.⁷⁰ The mission also concluded that some patterns of violent acts violating international human rights law, such as targeted killings, enforced disappearance or abductions of civilians, could qualify as a “widespread or systematic attack directed against any civilian population”, and that any single violent act of this type, committed as part of such an attack and with the knowledge of it, constitutes a crime against humanity.⁷¹

37. The **UN Independent International Commission of Inquiry on Ukraine**, set up by the UN Human Rights Council, has also concluded that war crimes, violations of human rights and IHL have been committed in Ukraine, mostly by Russian armed forces. In its report focused on the events during late February and March 2022 in the four regions of Kyiv, Chernihiv, Kharkiv, and Sumy, published on 18 October 2022, the Commission documented the following violations: indiscriminate attacks with explosive weapons (cluster munitions, unguided rockets, and air strikes) in populated areas; attacks on civilians trying to flee; patterns of

65. <https://rm.coe.int/memorandum-on-the-human-rights-consequences-of-the-war-in-ukraine/1680a72bd4>. The Commissioner refers in particular to the crime of forcible transfer of population in relation to the transfer of Ukrainian citizens to Russia or non-government-controlled areas of Ukraine, through the so-called “filtration” process.

66. www.coe.int/en/web/commissioner/-/protecting-and-supporting-children-impacted-by-the-war-in-ukraine-must-be-top-priority, 18 November 2022.

67. After the withdrawal of the Russian armed forces, reports, photos and videos of some 20 dead persons in civilian clothing left lying in one street of Bucha started circulating in the media. It has been reported that over 350 civilian bodies had been discovered in Bucha following Russia’s withdrawal. Torture chambers were also discovered in a summer camp in Bucha; in one chamber the bodies of five men dressed in civilian clothes were discovered. BBC reported that more than 1 000 civilians had been killed in Bucha and the surrounding area, out of whom more than 650 had been shot dead by the Russian armed forces.

68. “Filtration” centres serve to filter individuals seeking to leave besieged cities or other dangerous areas. “Filtration”, according to testimonies, involves harsh interrogation and humiliating body inspection. Those who pass through “filtration” are often transferred, with their consent or without it, to Russian territory. Those who do not pass through it, tend to be transferred to Donetsk and Luhansk regions and their whereabouts are mostly not known. See also, for a legal analysis of “filtration” camps under IHL, Natia Kalandarishvili-Mueller, www.ejiltalk.org/civilians-are-protected-under-gc-iv-1949-the-illegality-of-russian-filtration-camps-under-ihl/, 30 November 2022.

69. Numbers of Ukrainian civilians deported to Russia differ depending on the source of information. UNHCR estimated that 1 136 243 Ukrainian citizens had crossed the border to Russia by 9 June 2022. According to the Ukrainian Parliament Commissioner for Human Rights, by 14 June 2022, Russia had deported 1 700 000 Ukrainians, including 276 000 children.

70. The report cites examples such as intentionally directing attacks against cultural property (Art. 8(2)(b)(ix)), attacks on hospitals and medical units (Art. 8(2)(b)(ii)(ix) and (xxiv)), extrajudicial killings of protected persons (Art. 8(2)(a)(i)), acts of torture (Art. 8(2)(a)(ii)) or pillage (Art. 8(2)(b)(xvi)).

71. See Article 7 of the ICC Statute.

summary executions, unlawful confinement, torture, ill-treatment, rape and other sexual violence in areas temporarily occupied by Russian forces; forcible transfers and deportations to Russia; as well as violations of the rights of children.⁷² The Commission also documented two cases in which Ukrainian forces apparently shot, wounded and tortured captured Russian soldiers, which could qualify as war crimes.⁷³

38. The **UN Office of the High Commissioner for Human Rights (OHCHR)** has recently published a report detailing how Russian troops killed civilians in Ukrainian towns and villages across the Kyiv, Chernihiv and Sumy regions from 24 February until 6 April 2022. In Bucha, the OHCHR – through the UN Human Rights Monitoring Mission in Ukraine (HRMMU) – documented the killing of 73 civilians and was in the process of corroborating an additional 105 alleged killings. In total, the Mission documented the violent deaths of 441 civilians in the three regions in the initial 6 weeks of the Russian invasion alone. The killings fall into two categories: summary executions, either in detention or on the spot; and lethal attacks against individual civilians, usually while they were moving on foot, by bicycle or in vehicles. The report also found that men and boys were overwhelmingly targeted, comprising 88% of all victims of summary executions. According to the report, “the circumstances of the summary executions provide strong indications that these killings may amount to the war crime of willful killing, a grave breach of the Geneva Conventions”.⁷⁴ In its latest update on the situation in Ukraine (1 August-30 October 2022), the HRMMU has also reported increasing attacks on energy and water infrastructure, resulting in significant electricity and water shortages across the country; destruction of educational and medical objects; killings of civilians (for example 447 bodies exhumed near Iziium), conflict-related sexual violence (86 cases documented since 24 February), forced transfers of children to Russia or Russian-occupied territory, “filtration processes” of persons; torture and ill-treatment of prisoners of war; arbitrary detention and enforced disappearances of civilians; as well as the application of Russian legislation and granting of Russian citizenship to Ukrainian citizens in the four purportedly annexed regions. The vast majority of these violations of IHL and human rights law are attributable to Russian armed forces and affiliated armed groups. The HRMMU also reported some serious violations by Ukrainian armed forces, such as torture or ill-treatment, although on a much lower scale.⁷⁵

39. **International and Ukrainian non-governmental organisations** have also been documenting a wide range of violations of IHL and possible war crimes and crimes against humanity in the context of the ongoing war.⁷⁶

40. Finally, it should be stressed that all prisoners of war are entitled to receive regular visits from delegates of the **International Committee of the Red Cross (ICRC)** under the Third Geneva Convention. ICRC-Delegates are then usually able to check their conditions and treatment, share news with their families, and provide personal items like blankets, warm clothes, hygiene products or books. While recent visits were allowed by the Russian authorities, which is an important progress, the ICRC must be granted unimpeded access to see all prisoners of war repeatedly and in private, wherever they are held. Not allowing such visits to all prisoners constitutes a violation of IHL.

41. I would like to pay tribute to the courage and commitment of all national and international actors, from governmental, intergovernmental, or non-governmental organisations which help evaluate and document atrocities or work to support affected populations with humanitarian aid in such difficult circumstances.

72. www.ohchr.org/en/documents/reports/a77533-independent-international-commission-inquiry-ukraine-note-secretary. The Commission will submit its final report, covering other areas and events, in March 2023.

73. The Prosecutor General's Office of Ukraine informed the Commission that his office had opened criminal proceedings regarding both cases.

74. www.ohchr.org/en/press-releases/2022/12/un-report-details-summary-executions-civilians-russian-troops-northern, 7 December 2022. The report and its annex present in detail one hundred killings, as illustrative examples of the suffering borne by civilians in these areas.

75. www.ohchr.org/en/documents/country-reports/hrmmu-update-human-rights-situation-ukraine-1-august-31-october-2022, 2 December 2022. See as regards prisoners of war: www.ohchr.org/en/press-briefing-notes/2022/11/ukraine-russia-prisoners-war, 15 November 2022.

76. See, among many others:

www.hrw.org/news/2022/12/20/ukraine-russians-pillage-kherson-cultural-institutions; www.hrw.org/report/2022/09/01/we-had-no-choice/filtration-and-crime-forcibly-transferring-ukrainian-civilians; www.hrw.org/news/2022/10/19/ukraine-russian-forces-tortured-izium-detainees; www.hrw.org/news/2022/12/06/ukraine-russian-attacks-energy-grid-threaten-civilians; www.amnesty.org/en/documents/eur50/5713/2022/en/; www.amnesty.org/en/documents/eur50/6136/2022/en/; <https://hub.conflictobservatory.org/portal/apps/sites/#/home/pages/kherson-1>; <https://ccl.org.ua/en/about-the-ccl/>; <https://t4pua.org/en/1202>; www.5am.in.ua/en.

3.1.2. Genocide

42. Allegations that Russia is committing genocide in Ukraine have also been made, mostly by political leaders and national parliaments.⁷⁷ Some claims appear to use the term in a more political or rhetorical sense. But others appear to be based on the legal definition of genocide under international law. For instance, a report produced by New Lines Institute and Raoul Wallenberg Centre for Human Rights published in May 2022 finds that there are reasonable grounds to conclude that Russia bears State responsibility for (a) direct and public incitement to commit genocide in breach of Article III (c) of the 1948 Genocide Convention and (b) a pattern of atrocities from which an inference of intent to destroy the Ukrainian national group in part can be drawn, in breach of and Article II of the Genocide Convention.⁷⁸ The report establishes the existence of a serious risk of genocide, triggering the legal duty of all States to prevent genocide under Article I of the Genocide Convention.⁷⁹

43. As regards the charge of incitement to genocide, the above-mentioned report relies on the official Russian propaganda denying the existence of a Ukrainian national group, the “denazification” campaign,⁸⁰ the construction of a Ukrainian existential threat for Russia and the conditioning of the Russian public to commit and condone atrocities.⁸¹ The persons disseminating the incitement messages would be attributable to the State as they are all *de jure* or *de facto* organs, including the head of State, key members of the State Duma, or State media outlets owned by or under the control of the Kremlin.

44. The report then goes on to argue that the genocidal intent (“intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”⁸²), the *mens rea* that distinguishes genocide from other international crimes, can be attributed to a State through evidence of a general plan or can be inferred from a systematic pattern of atrocities targeting the protected group. The five genocidal acts under Article II can also point towards genocidal intent when viewed in their totality. The report provides many examples of atrocities against civilians that could qualify as genocidal acts in breach of Article II (for example mass killings, deliberate infliction of life-threatening conditions, forcible transfer of children, rape and sexual violence⁸³) committed by Russian forces. According to the report, genocidal intent can be inferred from a pattern of these atrocities targeting Ukrainians.⁸⁴

45. This analysis has been criticised by some scholars who find that it does not fully reflect the case law of the International Court of Justice (ICJ) on the threshold of genocide.⁸⁵ It will obviously be for the competent international and other courts to adjudicate on the Russian Federation’s State responsibility under the Genocide Convention (in case Ukraine or other States bring new proceedings against Russia before the ICJ under the Convention) and/or the potential criminal responsibility of Russian officials for such a crime in each

77. Including President Zelenskyy and President Biden. See <https://www.justsecurity.org/81564/compilation-of-countries-statements-calling-russian-actions-in-ukraine-genocide/>, 20 May 2022.

78. Article II contains a list of possible genocidal acts: killing members of the group; causing seriously bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; and forcibly transferring children of the group to another group. This list is replicated in Art.6 of the ICC Statute, although the ICC Elements of Crimes additionally require that the conduct must have taken place in the context of a “manifest pattern of similar conduct directed against that group” or that it could itself effect the destruction.

79. <https://newlinesinstitute.org/an-independent-legal-analysis-of-the-russian-federations-breaches-of-the-genocide-convention-in-ukraine-and-the-duty-to-prevent/>, May 2022.

80. For instance, on 3 April 2022, Timofey Sergeytsev published an editorial entitled “What Russia should do with Ukraine” in state-owned RIA Novosti, in which he referred to Ukrainians as “a Nazi society”, asserted that Ukraine’s elites “must be liquidated as re-education is impossible” and that “denazification will inevitably include de-ukrainization”. Another example cited is a Telegram post by Dmitry Medvedev on 5 April: “... It’s no wonder that, having transformed itself into the Third Reich, and having written into its history textbooks the names of traitors and Nazi henchmen, Ukraine will suffer the same fate. This kind of Ukraine gets what it deserves...”.

81. The report cites the example of an honorary title granted to the 64th motorised brigade suspected of mass killing in Bucha.

82. Art. II of the Genocide Convention. According to the ICJ case law, destruction must be understood in the physical or biological sense.

83. The report cites the example of Russian soldiers telling women and girls held in a basement for 25 days that “they would rape them to the point where they wouldn’t want sexual contact with any man, to prevent them from having Ukrainian children”.

84. In a similar vein, Genocide Watch issued a genocide emergency alert for Ukraine in August 2022, relying on Russia’s intentional massacres of Ukrainian civilians, forced deportations, torture, sexual violence, and hate speech to incite, justify and deny genocide: www.genocidewatch.com/_files/ugd/b3be20_eea90f3cb7fd4c6ca73c59f7d2d89eb1.pdf. See also the EP resolution of 15 September 2022, in relation to the forced relocation and deportation of Ukrainian children and their forced adoption by Russian families.

individual case (given the ICC's current jurisdiction on the Ukrainian situation). But there seems to be mounting evidence that the Russian rhetoric⁸⁶ used to justify the full-scale invasion contains elements that are characteristic of public incitement to commit genocide. Moreover, some of the atrocities repetitively committed by Russian forces in different areas of Ukraine may possibly indicate an intent to destroy the Ukrainian national group, at least in part.⁸⁷ It should also be noted that Article III (d) of the Genocide Convention prohibits the *attempt* to commit genocide as a self-standing punishable act. If parliaments and governments of States Parties to the Genocide Convention establish the existence of a serious risk that genocide is being or will be committed, this should activate the legal obligation on those States "to employ all means reasonable to them, so as to prevent genocide as far as possible" under Article I of the Convention.⁸⁸ This duty of prevention should at least imply taking individual and collective action to ensure accountability for the atrocities already committed by Russian forces in order to deter further crimes, for instance through domestic prosecutions or by supporting the ICC jurisdiction.

3.2. Existing accountability mechanisms and the need for effective co-ordination

46. On 2 March 2022, the **ICC Prosecutor**, Karim Khan, announced that he had opened an investigation into the situation in Ukraine on the basis of referrals received from 39 States Parties to the ICC Statute (including 34 Council of Europe member States).⁸⁹ The scope of the situation being investigated encompasses any past and present allegations of war crimes, crimes against humanity or genocide committed on any part of the territory of Ukraine by any person from 21 November 2013 onwards.⁹⁰ The ICC Prosecutor carried out three visits to Ukraine and deployed an investigative team on the ground.⁹¹ He also plans to open a field office in Kyiv in 2023. He has sent several communications to the Russian Federation, but has received no reply.

47. Jonathan Agar, Special Assistant to the ICC Prosecutor who participated in a hearing before our committee, explained that in his address to the UNSC on 22 September 2022, the ICC Prosecutor had mentioned as a priority of his investigation the alleged deportations and transfer of Ukrainian civilians, including children, to Russia. In terms of co-operation with other accountability actors, Mr Agar highlighted the "extremely good co-operation" and "strong relationship" with the Ukrainian Prosecutor General, the participation of the ICC Prosecutor in the Joint Investigation Team set up by several countries under the auspices of Eurojust⁹² and the engagement with NGOs.⁹³ In this context, it is important to note that Ukrainian legislation was amended in 2022 to facilitate the work of the ICC Prosecutor on the ground (for example

85. See William A. Schabas, "Genocide and Ukraine: Do Words Mean What We Choose them to Mean", *Journal of International Criminal Justice* (2022), who considers that it would seem difficult to conclude that the intent to destroy physically the people of Ukraine is the only reasonable explanation for Russia's military activities and conduct, as required by the case law of the ICJ (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*), Judgment of 3 February 2015, paras. 143-148).

86. See a collection of publicly available statements at: www.justsecurity.org/81789/russias-eliminationist-rhetoric-against-ukraine-a-collection/, 1 November 2022. See also Douglas Irvin-Erickson, <http://opiniojuris.org/2022/04/21/is-russia-committing-genocide-in-ukraine/>, 21 April 2022. According to a recent paper by the Ukrainian NGO Regional Center for Human Rights, public statements of political leaders and pro-government mass media confirm the existence of a State policy or plan of the Russian Federation to exterminate the Ukrainians as a national group. The report also points to the use of religious propaganda (for example by Russian Orthodox Church) as tool of incitement to genocide against the Ukrainian nation and its justification.

87. The "part" of the group can for instance refer to political and community leaders of the group, such as local heads of government. In this sense, during our sub-committee's visit to Bucha, we heard reports of Russian soldiers going from house to house in search of people on a list, which included family members of officers, local officials and other community leaders, who then "disappeared" or whose bodies were later found.

88. ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, judgment of 26 February 2007, paras. 430-431. According to the ICJ, "a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of these means as the circumstances permit".

89. The number later increased to 43 States Parties.

90. Jurisdiction given on the basis of two declarations made by Ukraine in 2014 and 2015 under Article 12(3) of the ICC Statute, which enables a State not Party to accept the exercise of jurisdiction by the ICC over alleged crimes committed on its territory.

91. "ICC Prosecutor Karim A.A. Khan QC announces deployment of forensics and investigative team to Ukraine, welcomes strong cooperation with the Government of the Netherlands", International Criminal Court (icc-cpi.int). The mission consisted of 42 investigators, forensic experts, and support personnel.

92. www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-office-prosecutor-joins-national-authorities-joint.

interviewing victims). Although States Parties to the ICC Statute and the EU helped with national secondments and voluntary financial contributions,⁹⁴ voluntary contributions cannot be a substitute for regular and sustainable funding of the ICC, which is facing an unprecedented workload. The Assembly of States Parties to the ICC Statute recently approved a limited increase in the regular budget of the Court for 2023.⁹⁵

48. We must not forget that the ICC's jurisdiction is complementary to that of states, meaning that it will pursue cases only when States are unwilling or unable to investigate or prosecute themselves.⁹⁶ In this respect, both Russia and Ukraine, as parties to the Geneva Conventions and Additional Protocol I, have obligations to effectively investigate allegations of war crimes.⁹⁷ This obviously applies also to each party's own soldiers and commanders.

49. The **Ukrainian Criminal Code** criminalises the violation of laws and customs of war (Article 438), including the use of methods of warfare prohibited by international instruments or any other violations of the rules of warfare recognised by international instruments consented to be binding by the Parliament of Ukraine as well as giving an order to commit such actions. It also criminalises genocide (Article 442) as a wilfully committed act with the purpose of total or partial destruction of any national, ethnic, racial, or religious group by extermination of members of any such group or inflicting grave bodily injuries on them, creation of living conditions calculated for total or partial physical destruction of the group, prevention of births, or forceful transfer of children from one group to another. These provisions allow Ukraine to prosecute an individual for crimes that can qualify as war crimes and genocide under international law. However, since the Criminal Code does not include crimes against humanity, the **Office of the Prosecutor General** does not have jurisdiction over this crime. We heard from Tamar Tomashvili (Associate Professor of Law, Free University of Tbilisi) that the Ukrainian authorities could, as a result of their lack of domestic jurisdiction, possibly hand over the investigation of crimes that could amount to crimes against humanity under international law (for example forced deportations) to the ICC.

50. As of 4 January 2023, the Office of the Prosecutor General had registered 60 734 incidents involving violations of the laws and customs of war.⁹⁸ As of 21 November 2022, there were 217 suspects notified, 61 persons indicted and 12 persons already convicted.⁹⁹ At the hearing before our committee, Ms Tomashvili informed us that episodes of deliberate policy of forced deportation of Ukrainian children and initiation of adoption processes in Russia could also be investigated as genocide (forcible transfer of children of one group to the other).¹⁰⁰ Moreover, she underlined the numerous challenges that the national investigations in Ukraine could be facing, including the need for specific expertise given the nature of the crimes; case prioritisation policy; capacity building of all stakeholders, including judges and defense lawyers; development of IT tools; difficulties in accessing evidence in war zones or territories under temporary occupation; and access to intelligence information from Ukraine and allied partners and its use in criminal proceedings to support command responsibility charges.

51. We have also been informed that pre-trial and trial proceedings against Russian soldiers and state officials may be conducted *in absentia*. During my meeting with the Prosecutor General Mr Kostin in October 2022, we discussed the issue of whether mutual legal assistance and extradition requests from Ukraine to third countries could face obstacles precisely because of this. It is of the utmost importance that prosecutions and trials conducted in Ukraine comply with the main aspects of the right to a fair trial guaranteed by Article 6 of the European Convention on Human Rights, including the European Court of Human Rights standards related to trials *in absentia*. The Council of Europe, through its project "Human Rights Compliant Criminal Justice System in Ukraine" has been providing expertise to Ukrainian authorities in this field.¹⁰¹

93. www.icc-cpi.int/news/icc-prosecutor-and-eurojust-launch-practical-guidelines-documenting-and-preserving-information.

94. Voluntary contributions to the ICC cannot be earmarked to a specific situation and the ICC Prosecutor has repeatedly emphasised that these additional resources are going to support the work of his office across all situations.

95. <https://jffjustice.net/larger-budget-reflects-increased-icc-workload-in-2023/>, 15 December 2022; <https://www.justiceinfo.net/en/109715-2023-booster-year-icc-budget.html>, 2 December 2022.

96. Articles 1 and 17 of the ICC Statute. See also the Preamble to the ICC Statute ("it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes").

97. See, for instance, Article 129 of the Third Geneva Convention and Article 146 of the Fourth Geneva Convention. The obligation to investigate and prosecute war crimes is also an established norm of customary international law (<https://ihl-databases.icrc.org/en/customary-ihl/v1/rule158>).

98. www.gp.gov.ua.

99. <https://rm.coe.int/taras-semkiv-presentation/1680a93ca9>.

100. See also www.rferl.org/a/ukraine-russian-genocide-children-deportation-venediktova/31881902.html.

52. During the sub-committee's visit in Kyiv, we noted the difficulties in reporting cases of rape and other forms of sexual violence. According to the information received, around 30 cases had been opened at the time.¹⁰² A Unit for Conflict-Related Sexual Violence was recently established within the Prosecutor General Office and a strategy with a victim-oriented approach was prepared. The question of international support for the Ukrainian authorities on this important matter arises, in particular from member States with expertise to share in this field and from the Council of Europe.¹⁰³

53. Another issue that raises concerns is the extent to which possible war crimes committed by Ukrainian combatants are being investigated by Ukrainian authorities. The former PG assured members of the sub-committee that investigations were ongoing, and that a separate department was dealing with those crimes. Mr Kostin said that the crimes committed by Ukrainian forces fell within the competence of military prosecutors. Currently, there does not seem to be any officially published information on the volume of ongoing and terminated investigations based on accusations against Ukrainian combatants for violations of IHL since 24 February 2022. It is important that both sides of the conflict extend their investigations to suspects on their own side.

54. With regard to Russia, its Criminal Code also punishes war crimes (Article 356) and specifies that members of Russian military units shall bear criminal responsibility for their crimes committed in the territories of foreign states (Article 12(2)). However, despite the growing volume of allegations of war crimes against Russian troops, there is no information that Russian authorities have been investigating or prosecuting any such cases.

55. There are other investigations and inquiries apart from those led by the ICC Prosecutor and the PG of Ukraine. Already at the end of March 2022, a **Joint Investigation Team (JIT)** was set up by Poland, Lithuania and Ukraine under the auspices of Eurojust. It is aimed at exchanging evidence and information in connection with the ongoing investigations on alleged core international crimes committed in Ukraine. It also allows investigators to operate in the partner countries, with the consent of the state involved. The ICC Prosecutor has joined the JIT,¹⁰⁴ as well as Estonia, Latvia, Slovakia and Romania.¹⁰⁵ In this context, the Eurojust Regulation has been amended to envisage the creation of a dedicated database to store evidence of core international crimes and to give Eurojust a new mandate to analyse such evidence, with a view to establishing links, identifying investigative gaps and advising prosecutors.¹⁰⁶ At the same time, several **third countries** have opened investigations into crimes committed in the territory of Ukraine, under the principle of universal jurisdiction or the principles of active or passive personality.¹⁰⁷ According to Ms Tomashvili, 18 States had opened national investigations. In her view, JIT members and third States should gather evidence from Ukrainian refugees who could be potential victims or witnesses of these crimes and assist Ukraine in investigations on the ground. There is a strong need for international co-ordination in order to prevent that evidence or testimonies collected in one country fail being used in proceedings in another country due to lack of knowledge or because of long and complex mutual legal assistance proceedings.

56. Finally, it is worth mentioning the role of the **UN Independent International Commission of Inquiry on Ukraine** set up by the UN Human Rights Council on 4 March 2022. Its wide mandate includes investigations of all alleged violations and abuses of human rights and violations of IHL, and related crimes, in the context of the aggression against Ukraine by the Russian Federation. It can identify, where possible, individuals and entities responsible for such abuses and violations, in view of any future legal proceedings.

101. <https://rm.coe.int/coe-ua-info-note-public-outreach-re-war-crimes-proceedings-final/1680a72dcf>; <https://rm.coe.int/coe-ua-info-note-in-absentia-trial-re-war-crimes-proceedings/1680a83583>. More generally, the Council of Europe Commissioner for Human Rights has emphasised the need to respect international standards enshrined in international human rights law and IHL (see <https://rm.coe.int/memorandum-on-the-human-rights-consequences-of-the-war-in-ukraine/1680a72bd4>). See also the OSCE Moscow Mechanism report: <https://www.osce.org/files/f/documents/3/e/522616.pdf>, pp. 74-76, concerning the first convictions of Russian soldiers for violations of the laws and customs of war. The issue of the Ukrainian derogation under Article 15 of the Convention on the basis of martial law and its possible effects on Article 6 is a topic for another report.

102. The former Prosecutor General mentioned 30 cases in June 2022 during our visit. Ms Tomashvili referred to more than 30 in October 2022.

103. For example, the Council of Europe organised a webinar on conflict-related sexual violence for Ukrainian judges and prosecutors on 30 November 2022.

104. Statement by ICC Prosecutor, Karim A.A. Khan QC: Office of the Prosecutor joins national authorities in Joint Investigation Team on international crimes committed in Ukraine | International Criminal Court (icc-cpi.int).

105. Romania becomes seventh member of joint investigation team on alleged core international crimes committed in Ukraine | Eurojust | European Union Agency for Criminal Justice Cooperation (europa.eu).

106. Eurojust legal framework | Eurojust | European Union Agency for Criminal Justice Cooperation (europa.eu).

107. These countries include Lithuania, Germany, Poland, Spain, Sweden, the Czech Republic. See OSCE Moscow Mechanism Report, p. 113.

The Commission will submit a comprehensive written report in March 2023. It has already documented several crimes and announced that it will make recommendations concerning forms of accountability that supplement criminal accountability, including measures such as reparation.

57. There are many accountability actors involved in Ukraine and there is a clear need of co-ordination to improve effectiveness and avoid duplication. The recent developments concerning the JIT and the co-operation between the ICC Prosecutor and the PG of Ukraine seem to go in the right direction. The suggestion of establishing hybrid courts for war crimes committed in Ukraine, adding another accountability layer to the existing ones, does not seem to have an added value in the current context. Nevertheless, there is room for more international assistance. States and international organisations should support Ukrainian authorities by providing more resources, expertise and capacity building. The Council of Europe will continue providing expert support to the Ukrainian authorities in their investigation and prosecution of war-related human rights violations within the new Council of Europe Action Plan for Ukraine, entitled “Resilience, Recovery and Reconstruction” (2023-2026). Steps should also be taken to ensure more co-ordination and coherence between all international, regional and national accountability actors involved. In this regard, initiatives such as the establishment of an Atrocity Crimes Advisory (ACA) Group for Ukraine by the EU, the United Kingdom, and the United States,¹⁰⁸ and of a Dialogue Group on Accountability for Ukraine following the Ukraine Accountability Conference held in July 2022¹⁰⁹ should be commended and further developed.

4. State accountability for human rights violations and other violations of international law

58. While Russian leaders, perpetrators and commanders may be held individually criminally responsible for the different crimes mentioned above, the Russian Federation as a State should also be held to account for all the violations of international law committed by its organs or by private entities whose acts are attributable to the State. Comprehensive accountability also implies establishing the international responsibility of the Russian Federation for all the violations of international law (including IHL and international human rights law) arising out of the aggression, which can be determined by international courts and other international mechanisms. At the moment there are at least two inter-state international judicial proceedings that are key in this respect. One takes place before the European Court of Human Rights (*Ukraine v. Russia* (X) (No. 11055/22)), and concerns allegations of mass and gross human rights violations committed by the Russian Federation in the context of the ongoing war on the territory of Ukraine since 24 February 2022. It is recalled that the Court remains competent to deal with applications against Russia concerning actions or omissions amounting to violations of the European Convention on Human Rights occurring up until 16 September 2022. It is to be welcomed that 23 Council of Europe member States have requested leave to intervene as third parties in the inter-State case concerning the events since 24 February, as a sign of support to Ukraine.¹¹⁰ In the context of these proceedings, the Court indicated a number of interim measures to the Government of the Russian Federation, which have unfortunately been ignored. The Court has also received a number of interim measures requests and applications submitted by individuals affected by the ongoing war.¹¹¹

59. The other judicial proceedings are before the ICJ and concern a dispute relating to the interpretation, application and fulfilment of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The application lodged by Ukraine aims at showing that Russian claims that Ukraine is responsible for genocide in the Luhansk and Donetsk regions are unfounded, thus establishing that the Russian Federation has no lawful basis to take military action based on those claims.¹¹² In the context of these proceedings, the ICJ indicated provisional measures to the Russian Federation to immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine. Without prejudging the merits of the dispute, the ICJ stated that it was not in possession of any evidence substantiating the Russian allegation that genocide had been committed.¹¹³

108. www.state.gov/creation-of-atrocity-crimes-advisory-group-for-ukraine/.

109. www.government.nl/ministries/ministry-of-foreign-affairs/documents/diplomatic-statements/2022/07/14/political-declaration-of-the-ministerial-ukraine-accountability-conference.

110. <https://hudoc.echr.coe.int/eng-press?i=003-7442168-10192988>.

111. For instance, on 30 June 2022, the Court granted interim measures in cases lodged by two British prisoners of war sentenced to death in the so-called “Donetsk People’s Republic”.

112. See ICJ, «Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide” (*Ukraine v. Russian Federation*), Order of 16 March 2022.

113. www.icj-cij.org/en/case/182/provisional-measures.

60. It will likely take many years for both international courts to deliver judgments determining the scope of Russia's international responsibility for these violations, including possible measures of reparation and just satisfaction. With regard to the European Court of Human Rights proceedings, it will be challenging for the Court to proceed with the cases without the participation and co-operation of the respondent State, which has stopped responding to the Court. But this obstacle and the risk of Russia not implementing the future judgments should not prevent the Court from documenting and determining the aggressor State's responsibility for human rights violations and delivering justice for the Ukrainian State and its citizens. In relation to human rights violations committed after 16 September 2022 in areas under the *de facto* control of the Russian Federation, the Council of Europe should consider alternative mechanisms to monitor the human rights situation in the occupied territories, which are within Ukraine's internationally recognised borders and are therefore part of the Convention legal space. At the same time, the Council of Europe should support the work of other international human rights mechanisms (UN, OSCE) which are still accessible to people in these areas. The Assembly should look into these issues in future reports, in order to avoid the creation of "black holes" in these territories and contribute to the ongoing reflection on the role of the Council of Europe in "conflict areas".

5. Compensation for the damage caused by the aggression and related violations of international law committed by the Russian Federation

5.1. Proposals for the establishment of an international compensation mechanism

61. Justice and comprehensive accountability for the aggression and its consequences cannot be achieved without full reparation for the damage caused to Ukraine and its citizens. During our sub-committee's visit in Kyiv, the Ukrainian authorities presented us with a proposal for a compensation mechanism for the damages arising out of the aggression, based on the precedent of the UN Iraq/Kuwait compensation commission (UNCC¹¹⁴). In September 2022, they presented a detailed proposal to the Committee of Ministers, including as a first step the establishment of a register of damage that would record information about claims for damages and serve as a repository of evidence of damage caused. The Committee of Ministers **noted with interest** the Ukrainian proposal and recalled that the Russian Federation bears responsibility for the act of aggression and that it is under an obligation under international law to ensure full reparation for the damage, loss or injury, whether material or moral, caused by Russia's violations of international law. In October 2022, the Assembly called on member States to set up a comprehensive international compensation mechanism, including an international register of damage, in co-operation with the Ukrainian authorities, as part of a comprehensive system of accountability for violations of international law arising from the aggression.¹¹⁵

62. At the United Nations level, on 14 November 2022, the UNGA adopted a resolution entitled "Furtherance of remedy and reparation for aggression against Ukraine", co-sponsored by Ukraine and nearly 50 States.¹¹⁶ The UNGA recognised the need for the establishment of an international mechanism for reparation for damage, loss or injury arising from the Russian Federation's internationally wrongful acts. It recommended the creation by member States, in co-operation with Ukraine, of an international register of damage, loss or injury caused to all natural and legal persons concerned, as well as the State of Ukraine. The register would not be part of the UN but is to be created by member States. Although the mechanism for the creation would be new (through an agreement among States), the use of such a register is not unprecedented; it follows the example of the UN Register of Damage (UNRoD) that was created by the UNGA for the damage caused by the construction of the wall in the Occupied Palestinian Territory.¹¹⁷

63. Ms Iryna Mudra, Deputy Minister of Justice of Ukraine, presented the Ukrainian proposal for a compensation mechanism to our committee at a hearing held on 12 December 2022 in Paris.¹¹⁸ She explained that the compensation mechanism would provide for the establishment of: a) a compensation commission dedicated to consider compensation claims; b) a compensation fund, from which the compensation would be paid; and c) an effective procedure for the enforcement of the commission's decisions. The proposal is based on an incremental or step-by-step approach, with the creation in the short-term of an international register of damage that would establish the infrastructure for a future compensation

114. [Home | UNCC](#).

115. [Resolution 2463 \(2022\)](#), para. 13.6.3. See also [Resolution 2448 \(2022\)](#) "Humanitarian consequences and internal and external displacement in connection with the aggression of the Russian Federation against Ukraine", para. 10.

116. [A/RES/ES-11/5 \(undocs.org\)](#). 94 countries voted in favour, 14 against and 73 abstained.

117. [index.htm \(unrod.org\)](#). In this case, the Register of Damage is a subsidiary organ of the UNGA and operates under the administrative authority of the UNSG.

118. [PACE public hearing: mechanisms for Ukraine to be compensated for Russia's aggression – YouTube](#).

mechanism and would have the mandate to record claims and evidence for losses, injuries and damages, assess the *prima facie* admissibility of claims (territoriality, temporality, causality) and, ultimately, record the admissible claims in the register. The register would be independent of the UNGA and would be established and operate within the framework of an international organisation. It would be based in a European city. It would not be intended as a claims commission with an adjudicatory role at this stage, but it is envisaged that the mandate of this international body could be subsequently expanded to include that function.

64. As regards its legal basis, the register would be an international organisation founded by an international multilateral treaty, open to all States and regional organisations. It would be financed through voluntary contributions of participating States and international institutions. The future commission would be tasked with reviewing and assessing the claims submitted by natural persons, legal persons, State-related entities and the State of Ukraine. It is interesting to note that according to this proposal, enforceable monetary judgments of international tribunals, including the ICJ and the European Court of Human Rights, should also be paid through this compensation mechanism. That is one of the reasons why the Ukrainian authorities believe that the Council of Europe could take a leading role in setting up such a mechanism and encouraging its member States to join it. Ms Mudra added that the Council of Europe could provide expertise to the register or even act as platform for its operation, if there is sufficient financial support.

65. In my opinion, the Council of Europe should as a minimum support setting up the compensation mechanism, including the register of damage, by calling its member States to join it and become parties to the founding agreement. It could also become itself party to the agreement or provide legal and technical expertise. But it could even go further and take a leading role. Having regard to the experience of the Council of Europe, in particular of the Court and the Department of execution of judgments, in processing just satisfaction claims and monitoring the payment of awards arising from gross and serious human rights violations, the Organisation would be well placed to host the register of damage or provide its institutional architecture, as long as it is properly resourced by States. At the same time, since the future compensation commission would have the mandate to adjudicate claims for damages suffered as a consequence of the Russian aggression, namely from 24 February 2022 on, it would not be limited like the Court to damages resulting from human rights violations committed until 16 September 2022, date on which the Convention ceased to apply with regard to Russia. It should have a wide mandate, encompassing all the damage arising out of violations of international law committed by Russia, including its aggression as well as any violations of international humanitarian law and international human rights law. The commission could therefore fill an important gap in ensuring accountability and full reparation for Ukrainian victims and Ukraine.

66. There are issues that will need to be addressed when establishing the proposed Compensation Mechanism. For instance, the articulation between this mechanism and domestic proceedings in Ukraine, as well as with the different international tribunals or bodies competent to deal with different aspects of the aggression (ICJ, European Court of Human Rights, ICC, or the future special tribunal for the crime of the aggression). Another issue is whether individual claims should be prioritised over claims filed by the Ukrainian State, or whether claims could be adjudicated on an individual or “class action” basis.¹¹⁹

5.2. Enforcement of compensation awards and payment: finding the sources of funding

67. Once the proposed compensation commission would start processing and assessing claims, its awards would have to be paid to successful claimants. Ms Mudra informed us that she would not address the issue of how to finance the compensation fund, as they wanted to focus at this stage on claims collection and adjudication. She pointed however to some legal options that were being explored apart from seizing Russian frozen assets. These included financial instruments proposed by the parties to the future agreement and international financial institutions; using the revenues from oil and gas export deals of the Russian Federation (similar to the Iraq-Kuwait scheme); and the establishment of a simplified procedure of enforcement of awards by the courts of the participating States with the possibility of lifting the sovereign immunity of Russia.

68. Professor Burkhard Hess also gave some suggestions on how to possibly use assets that have been seized or even frozen and that belong to the Russian Federation and some of its citizens (so-called “oligarchs” or with links with the State) for compensation purposes. Of course, the easiest way would be to organise it with the consent of the Russian authorities through a peace-agreement, an agreement on a compensation mechanism or a treaty. Professor Hess underlined that it may be difficult to overcome the different legal obstacles, in the absence of Russian consent, but he referred generally to the possibility of justifying the expropriation and transfer of assets as *countermeasures* taken by States opposing this war of aggression.¹²⁰ As regards the Russian Central Bank’s assets, he mentioned a recent judgment by the Swedish Supreme

119. “Launching an International Claims Commission for Ukraine” ([justsecurity.org](https://www.justsecurity.org)), 20 May 2022.

Court which had recognised an exception to State immunity from enforcement in the event that the assets were used for investment and therefore for commercial purposes.¹²¹ As regards the private assets of Russian citizens (“oligarchs”), he recalled that in certain cases the European Court of Human Rights had accepted the non-conviction-based confiscation of assets acquired under dubious circumstances by suspected organised criminals or corrupt officials as compatible with the Convention, provided that the principles of lawfulness, public interest and proportionality were respected, along with procedural guarantees.¹²² Such a path is difficult and legally narrow. It requires in the legislation of most member States solid elements of proof of wrong-doing also in order to ensure the protection of Article 1 of Protocol No. 1 to the European Convention on Human Rights (ETS No. 9). And this raises in any case the question of the use of such assets that should, normally, be given back to the population who were affected by its illegitimate use.

69. The Assembly has so far supported the non-conviction-based confiscation of illegal assets and the reversal of the burden of proof in the specific context of the fight against organised crime and corruption, underlining the need for appropriate safeguards.¹²³ With regard in particular to the assets of Russian citizens and State enterprises subject to targeted sanctions for their responsibilities in the war of aggression against Ukraine, although the Assembly has called on member States to use these assets, once they are confiscated definitively, to compensate Ukraine and its citizens for the damage caused by its war of aggression, this decision was taken in a different context, the report focussing on the use of illicit assets in the fight against organised crime and corruption.¹²⁴ This possibility raises important and difficult legal questions that should obviously be solved while respecting national legal remedies and the guarantees of the Convention.

70. The European Commission is also working on possible legal avenues to use the frozen assets of Russian Central Bank reserves and Russian citizens (“oligarchs”) to compensate Ukraine for the damage caused. In the short term, they are considering creating a structure to manage these funds and invest them, and then using the proceeds for the benefit of Ukraine. In the long term, once the sanctions are lifted, these funds could be used as guarantee to ensure that Russia pays full compensation for the damages caused.¹²⁵ To me this avenue of using frozen assets as guarantee, beginning with those belonging to State institutions like the Central Bank, seems legally more promising than the possibility to, legally, seize them and use them in the context of the reconstruction of Ukraine without an agreement with the Russian Federation.

71. In this context members States should also consider that seizing and using such assets without a very strong legal framework would weaken the confidence in, thus the strength of, the financial system of European and more generally Western countries. Additionally, their institutions, citizens and businesses would be at risk of seeing their own property seized and misused in countries like the Russian Federation, or maybe in other countries, for political purposes.

72. Different legal options will need to be explored to ensure the enforcement and payment of compensation awards, while respecting the individual rights guaranteed by the European Convention on Human Rights and international human rights law. A possible future multilateral treaty or agreement establishing a compensation mechanism and/or a future peace agreement will need to regulate these and other matters in detail.

120. Referring to the International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, which accepts that a State can act not in conformity with an international obligation towards another State to the extent that the act in question constitutes a countermeasure taken against the latter State, subject to certain conditions.

121. [“The Swedish Supreme Court: Certain property owned by a central bank is not protected from enforcement according to international principles of state immunity”](#), Magnusson (magnussonlaw.com). Professor Hess also referred to a recent judgment by the Ukrainian Supreme Court (April 2022) which waived Russian immunity from war damage lawsuits in civil proceedings, on the basis of a tort exception to State immunity applicable where the tort occurred in the territory of the State of the court and the author of the harmful act or omission was present in that territory.

122. See, for example, *Gogitidze and Others v. Georgia*, Application No. 36862/05, 12 May 2015; *Telbis and Viziteu v. Romania*, Application No. 47911/15, 26 June 2018.

123. [Resolution 2218 \(2018\)](#) “Fighting organised crime by facilitating the confiscation of illegal assets”.

124. [Resolution 2436 \(2022\)](#) “The Russian Federation’s aggression against Ukraine: ensuring accountability for serious violations of international humanitarian law and other international crimes”, para. 11.9. See also [Resolution 2434 \(2022\)](#) “How to put confiscated criminal assets to good cause?”, para. 9.6, opening the way for using these assets to partly offset the financial debt of the Russian Federation vis-à-vis Ukraine.

125. [President's statement on Russian accountability and \(europa.eu\)](#).

6. Conclusions

73. The Russian Federation's unjustified armed attack and large-scale invasion of Ukraine launched on 24 February 2022 constitutes an aggression and a clear breach of the United Nations Charter. This aggression constituted a serious violation by the Russian Federation of the Statute of the Council of Europe, which justified the unprecedented decision by the Committee of Ministers to exclude the Russian Federation from the Council of Europe on 16 March 2022, in line with the position expressed by the Assembly.

74. The Assembly has already adopted a number of texts on the different political and legal aspects of Russian Federation's aggression against Ukraine. It should now express clearly that the acts of aggression committed by the Russian Federation leaders meet the definition of the crime of aggression under international law. The Russian political and military leaders who planned, prepared, initiated or executed these acts should be identified and prosecuted for this crime. Without their decision to wage this war of aggression, the atrocities that flow from it (war crimes and other crimes) as well as the destruction and death resulting from the war would not have occurred. This should also apply to Belarusian leaders who allowed their territory to be used by the Russian Federation for perpetrating the aggression. Given that the ICC does not have at present jurisdiction over the crime of aggression committed against Ukraine, the Assembly should reiterate its unanimous call on member States and observer States of the Council of Europe to set up a special international criminal tribunal for such crime, which should be supported and endorsed by as many States and international organisations as possible, and in particular by the United Nations General Assembly. The Council of Europe Heads of State and Government, at the 4th Summit in Reykjavik in May 2023, should give their political support to the creation of such a tribunal. The jurisdiction of this tribunal should be limited to the crime of aggression committed against Ukraine, and in no way limit or affect the ICC's jurisdiction over other crimes committed in the context of the ongoing aggression.

75. Member States should at the same time ratify the Rome Statute of the ICC and its Kampala amendments on the crime of aggression if they have not already done so. In addition, and in parallel to the creation of a special tribunal for the current aggression, they should take the necessary steps to amend the ICC Statute's jurisdictional regime on the crime of aggression, to make it more universally applicable.

76. The Assembly should also condemn the numerous atrocities and violations of international humanitarian law committed by Russian forces or affiliated armed groups in Ukraine in the course of hostilities or in areas temporarily occupied by them. Many of these atrocities (for example indiscriminate attacks against civilians, summary executions of civilians, torture and ill-treatment, enforced disappearances, sexual violence, forcible transfer and deportation of Ukrainian citizens, etc.) can be qualified as war crimes or crimes against humanity. There is also mounting evidence that the Russian official rhetoric to justify the aggression carries characteristics of public incitement to genocide or reveal an intent to destroy the Ukrainian national group as such or at least part of it, according to the definition of genocide under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. All States Parties to this Convention have a duty to prevent and punish genocide. Member States should support the current investigation launched by the ICC Prosecutor into the situation in Ukraine, which covers allegations of war crimes, crimes against humanity or genocide. They should also assist the Ukrainian authorities and, in particular, the Prosecutor General's Office, in their efforts to investigate international crimes committed in Ukraine, by providing resources, expertise and capacity building. While making full use of the principle of universal jurisdiction and existing mutual legal assistance mechanisms, they should ensure increased co-ordination and coherence between all accountability actors involved.

77. Finally, there can be no comprehensive accountability for the serious violations of international law arising out the Russian Federation's aggression against Ukraine without full reparation of the damage caused to Ukraine and its citizens. The Assembly should therefore call for the setting up of an international compensation mechanism, including an international register of damage which would create a record of evidence and claims on damage, loss or injury caused to all natural and legal persons in Ukraine, as well as the State of Ukraine, by violations of international law arising from the Russian aggression. The Council of Europe should play a leading role in setting up and managing the future mechanism. Decisions by international courts on reparation of damage caused by the current aggression, such as judgments of the European Court of Human Rights, could also be enforced through this mechanism.

78. The Council of Europe as a whole and its member States should contribute to ensure, together with other international organisations, that the Russian Federation, its leaders and officials are held accountable for the serious violations of international law committed in Ukraine in the context of the ongoing aggression.