

## CLE: Jurisdiction Options for Adjudicating the Russian Crime of Aggression in Invading Ukraine

Class Length: 60 minutes

Instructors: CAPT Robert Monahan, JAGC, USN (Ret.) & CAPT Deborah Mayer, JAGC, USN (Ret.)

Event: US Court of Appeals for the Armed Forces, CLE, May 15, 2024

The International Military Tribunal, which convened at Nuremberg to prosecute Nazi war crimes at the end of World War II described aggression as “the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.” Following World War II, the United Nations was created, in large measure to prevent the use of force by states against each other. The ongoing Russian invasion of Ukraine clearly violates the UN Charter and constitutes a crime of aggression. But what options are available to hold accountable Russian leaders who orchestrated the invasion and have maintained the war against Ukraine? We will discuss three jurisdiction options: the International Criminal Court (ICC), national prosecution, and the creation of a special tribunal.

The ICC was established in 2002 by the Rome Statute. However, it was difficult for States Parties of the ICC to reach agreement on the definition of aggression, and it was not until 2010 that an amendment to the Rome Statute established ICC jurisdiction over that crime. However, jurisdiction is predicated upon state consent. Therefore, because neither Ukraine nor Russia are parties to the Rome Statute, the ICC does not possess jurisdiction for the crime of aggression that Russia has committed against its neighbor. It is also extremely unlikely that Russia will ratify the Rome Statute and its aggression amendments, even if regime change were to occur.

Alternatively, Ukraine could prosecute Russian political and military officials in its domestic courts. However, it would be very difficult for Ukraine to take high level Russian officials into custody for purposes of war crimes prosecution. And, even if Ukraine was successful in doing so, it is likely that any high-ranking Russian official who was still in office when taken into custody could successfully assert personal immunity from prosecution by another nation’s domestic courts.

This leaves a special tribunal as a potential option. Numerous international law experts and political leaders have joined the Government of Ukraine in calling for the creation of a special tribunal to adjudicate the Russian crime of aggression. Such a tribunal may be able to pierce the personal immunity that Russian leaders could assert in a national tribunal to thwart their prosecution. But how would such a tribunal come into being? With the UN Security Council hamstrung due to the certainty of Russia wielding its Permanent Five Member veto, some commentators have suggested that the UN, under the auspices of the General Assembly, could form an agreement to create the tribunal based on the precedent of past special tribunals. Others have suggested that a tribunal could be brought into existence by international treaty. If a tribunal is brought into existence, its temporal jurisdiction would need to be ascertained (i.e., would

jurisdiction begin in 2014 to address Russia's illegal attempted annexation of Crimea and other incursions into Eastern Ukraine, or would jurisdiction commence with the 2022 invasion). Moreover, if the special tribunal follows the Rome Statute's definition of aggression, then only the highest officials in the Russian government involved in the planning and execution of the aggression against Ukraine would likely be prosecuted.

However, some commentators highlight the problems with creating a special tribunal under these circumstances. They raise the challenges of taking suspects into custody and obtaining evidence. They argue that a special tribunal would grapple with claims of selective prosecution. Some question whether personal immunity can truly be pierced if the special tribunal is established by any means other than by a component of the United Nations. Others emphasize that enthusiasm for establishing a special tribunal is not universally shared, even among Western nations.

We will conclude with Ms. Mayer leading a brief discussion about practical considerations on prosecuting war crimes based on her first-hand experience as she recently served in The Hague as a prosecutor of war crimes and crimes against humanity committed in Kosovo between 1998 and 2000.