



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

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Initial Considerations



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Initial Considerations

- International Military Tribunal (prosecuted Nazi war crimes):

“[t]o 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.”
- United Nations Charter created after World War II to “maintain and sustain international peace places prohibition of use of force at its core.” (Hathaway, September 2022)
 - Article 2(4), alongside Security Council Chapter VII powers and the right of states to individual and collective self-defense creates the “trifecta arrangement that is supposed to protect international peace and security.” (Trahan, May 2023)

Initial Considerations

- “Few experts deny the illegality of Russia’s use of force” against Ukraine, “and there is little debate over whether it rises to . . . a ‘manifest violation’ of Article 2(4) of the UN Charter, implicating individual accountability for aggression. . . .” (Labuda, December 2023)
- UN General Assembly (UNGA) adopted a resolution on March 2, 2022 that condemned the invasion (Ahmad, January 2023)
- But the invasion highlights the UN Security Council’s (UNSC) inability to enforce the Charter when Article 2(4) is violated by the UNSC (Trahan, May 2023)
 - Russia both presided over the UNSC meeting in which the resolution was introduced to condemn its invasion and then cast the sole veto against the resolution. (Ahmad, January 2023)

Initial Considerations

- The International Criminal Court (ICC) was established by the Rome Statute.
- Originally gave ICC jurisdiction over four crimes, including aggression. (Ahmad, January 2023)
- Difficulties in defining aggression resulted in the creation of a place holder in the Rome Statute. (Ahmad, January 2023)
 - Article 5(2) provided: “The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted . . . defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.”

Initial Considerations

- A 2010 amendment to the Rome Statute provides ICC jurisdiction over the crime of aggression where there is state consent. (Hamilton, Spring 2023)
- Very difficult for the ICC States Parties to reach agreement on the definition of aggression (McDougall, March 2022)
 - “Ultimately, however, the real fight was over the scope of the ICC’s jurisdiction over the crime. The result is a unique regime that governs the ICC’s jurisdiction in a narrower range of situations compared to the other Rome Statute Crimes—an outcome insisted upon by the [UNSC Permanent Five Members] and reluctantly accepted by other States as the price paid for reaching agreement on aggression.” (McDougall, March 2022)

Option 1 – ICC



Option 1 - ICC

- ICC jurisdictional limitations on aggression
 - Ukraine, Russia and Belarus are not parties to the Rome Statute. (Hathaway, September 2022)
 - Normally this would mean that the ICC does not have jurisdiction over events in Ukraine. (Hathaway, September 2022)
 - However, Ukraine has accepted jurisdiction of the ICC in two separate declarations. (Trahan, May 2023)
 - The second declaration was extended for an indefinite period over crimes occurring on or after February 20, 2014. (Ahmad, January 2023)
 - This gives the ICC Prosecutor jurisdiction to investigate and bring charges for war crimes, crimes against humanity, and genocide (if applicable). (Trahan, May 2023)
 - But in the “absence of a [UNSC] referral, the ICC is not able to exercise jurisdiction over a crime of aggression.” (McDougall, March 2022)

Option 1 - ICC

- BENEFITS

- Would be “ideal” if the Rome Statute were amended “to apply the ICC’s ordinary jurisdictional regime . . . to the crime of aggression.” (McDougall, March 2022)
- There might also be support for amending the Rome Statute to allow the UNGA to refer matters to the ICC. (Ahmad, January 2023)
- In May 2022, the ICC Prosecutor sent a team of investigators and forensic experts to collect evidence in Ukraine. (Labuda, December 2023)
 - “At a minimum, the ICC Prosecutor should highlight that any war crimes charges his office brings took place within the context of a war of aggression. While better than nothing, such a second-best option would reflect the reality that international law operates within the constraints of politics and power.” (Hamilton, Spring 2023)

Option 1 - ICC

- CHALLENGES

- Unlikely that States Parties will agree to amendments to the Rome Statute. (McDougall, March 2022)
- Even if a regime change occurs in Russia, “it is highly unlikely that the Russian Federation would ratify the Rome Statute and the aggression amendments and back date its acceptance of the jurisdiction of the Court...” (McDougall, March 2022)
- Some argue that there is an “ongoing crisis in international criminal law”: (Labuda, December 2023)
 - Critiques of double standards of the ICC Prosecutor “targeting” Africans and allegations of institutional racism.
 - A similar set of “neo-colonial” critiques of universal jurisdiction targeting Global South Officials.
 - Western states’ backlash against investigations that could expose their citizens to accountability.

Option 2 – National Prosecution



Option 2 – National Prosecution

- BENEFITS

- Ukraine could prosecute Russian political and military officials in its domestic courts. (Heller, March 2022)
- Several other European States have launched national investigations into aggression, genocide, crimes against humanity, and war crimes committed by Russia in Ukraine. (Labuda, December 2023)

Option 2 – National Prosecution

- CHALLENGES

- Would face almost insurmountable obstacles in obtaining physical presence of Russian defendants. (Heller, March 2022; McDougall, March 2022)
- Defendants might be able to successfully avoid prosecution before any domestic court on the basis of personal immunity. (McDougall, March 2022)
- Any domestic proceeding “will struggle to escape the taint of victor’s justice, or as the case may be, victim’s revenge.” (McDougall, March 2022)

Option 3 – Special Tribunal



Option 3 – Special Tribunal

- BENEFITS

- Shortly after the start of the war, 40 legal and political “luminaries” signed a Combined Statement and Declaration calling on the international community to create a Special Tribunal for the Punishment of the Crime of Aggression Against Ukraine. (Heller, March 2022)
- Additionally, within days of the invasion, Ukraine backed the first calls for a special tribunal focused on the crime of aggression committed against it. (Labuda, December 2023)
 - In April 2022, Ukrainian President Zelensky called for the creation of an aggression tribunal during his address to the UNSC. (Hamilton, Spring 2023)
 - Since then, Ukrainian government has been working with European governments to bring such a tribunal to life. (Hamilton, Spring 2023)

Option 3 – Special Tribunal

- BENEFITS (cont.)
 - A special tribunal may be able to prosecute senior Russian officials, who would otherwise be entitled to personal immunity (“*ratione personae*”) (Heller, March 2022)
 - Immunity *ratione personae* “exists so that one state cannot sit in judgment of another. As such, the immunity is not held by the head of state but the state itself.” (Hamilton, Spring 2023)

Option 3 – Special Tribunal

- BENEFITS (cont.)
 - Foundational language on applicability (or lack thereof) of immunity *ratione personae* in international criminal courts comes from the International Court of Justice (ICJ) decision in the *Arrest Warrant* case of April 2000. (Hamilton, Spring 2023)
 - There, the ICJ agreed with the Democratic Republic of the Congo that its incumbent foreign minister had immunity from arrest for international crimes with respect to Belgian judicial proceedings. (Hamilton, Spring 2023)
 - The ICJ indicated that government officials (who are protected by immunity in national courts) “may be subject to criminal proceedings before certain international courts, where they have jurisdiction.” (Heller, March 2022)

Option 3 – Special Tribunal

- BENEFITS (cont.)
 - One potential model is the Special Court for Sierra Leone (SCSL), which was established in 2002 through an agreement between Sierra Leone and the United Nations under the auspices of the UN Secretary General (SG), which followed a UNSC resolution that asked the SG to negotiate the agreement. (Hamilton, Spring 2023)
 - SCSL not under UNSC's Chapter VII powers. (Hamilton, Spring 2023)
 - In 2004, Appeals Chamber of the SCSL denied Liberian President Charles Taylor's immunity *ratione personae* argument, in large measure because "The Agreement between the United Nations and Sierra Leone is . . . an agreement between *all* members of the United Nations and Sierra Leone. This fact makes the Agreement an expression of the will of the international community." (Hamilton, Spring 2023) (quoting Prosecutor v. Taylor, Decision on Immunity from Jurisdiction at 1, May 31, 2004)

Option 3 – Special Tribunal

- BENEFITS (cont.)
 - In 2019, when reviewing an immunity challenge to an arrest warrant issued by the ICC against Sudanese President Omar al-Bashir, the ICC Appeals Chamber issued a joint concurring opinion that echoed the SCSL opinion, that “[t]he source of jurisdiction that the court is meant to exercise is the ultimate element of its character as an international court.” (Hamilton, Spring 2023) (quoting Prosecutor v. Al-Bashir, Joint Concurring Opinion at ¶58, May 6, 2019)
 - This ICC joint concurring opinion differed from the SCSL because it suggested that instead of jurisdiction flowing from a universal endorsement by the UN or its membership, some subset of states may be able to constitute an international court. (Hamilton, Spring 2023)

Option 3 – Special Tribunal

- BENEFITS (cont.)
 - A tribunal could be recommended by the UNGA, created through an agreement between Ukraine and the UN, and approved by the UNGA, based on the precedent of the SCSL or the Extraordinary Chambers in the Courts of Cambodia. (McDougall, March 2022)
 - “Such a special tribunal would exercise Ukraine’s territorial jurisdiction over the crime, which . . . would presumably provide roles for international judges and staff to try to overcome perceptions of bias.” (McDougall, March 2022)
 - It may, however, be difficult to obtain significant support for such an initiative from the UN Member States. (McDougall, March 2022)
 - An alternate model that would feature a tribunal established by international treaty. (McDougall, March 2022)
 - “Depending on the States ultimately prepared to join such a treaty, it is possible that it could . . . represent a significant percentage of the international community and a broad cross-section of States and thus enhance perceptions of legitimacy.” (McDougall, March 2022)

Option 3 – Special Tribunal

- BENEFITS (cont.)
 - A “good argument can be made that either model is at least potentially capable of being sufficiently international in nature to exclude the applicability of immunities for a prosecution of a serious international crime.” (McDougall, March 2022)
- Still other states may support the identification of an emerging customary international norm that would outright deny immunity *ratione personae* for the crime of aggression. (Hamilton, Spring 2023)
 - A downside to that approach would be the erosion of immunities “resulting in exactly the scenario that the development of immunity *ratione personae* first sought to avoid.” (Hamilton, Spring 2023.)

Option 3 – Special Tribunal

- BENEFITS (cont.)
 - A number of proponents of a special tribunal acknowledge concerns of selective prosecution (McDougall, March 2022; Labuda, December 2023)
 - But, as McDougall has said, “I don’t see the advantage of standing on principle and letting perfect be the enemy of good.” (McDougall, March 2022)
 - And, Labuda has argued that despite selective prosecution concerns, “many commentators still emphasize the potentially catalytic and forward-looking nature of aggression prosecutions.” (Labuda, December 2023)

Option 3 – Special Tribunal

- BENEFITS (cont.)
 - The Rome Statute requires that a perpetrator of aggression be in “a position to effectively assert control over or to direct the political or military action of a State.” (Hamilton, Spring 2023) (quoting Rome Statute, art. 8*bis*(1))
 - “Assuming that any aggression tribunal would follow the Rome Statute definition, this would seem to limit the range of actors to those who are state officials.” (Hamilton, Spring 2023)
 - If the special tribunal follows the ICC Prosecutor’s Office policy of focusing on the “most responsible,” this “would suggest that in a world of limited resources, indictments are pursued against President Putin and one or two of his senior officials. Alternatively, adherents of deterrence theory may argue in favor of charging as widely as possible.” (Hamilton, Spring 2023)

Option 3 – Special Tribunal

- BENEFITS (cont.)
 - Temporally, some commentators argue the tribunal’s jurisdiction would “ideally commence in 2014, thereby encompassing the attempted illegal annexation of Crimea and earlier incursions into Eastern Ukraine, as well as the 2022 invasion.” (Trahan, May 2023)
 - Alternatively, temporal jurisdiction could apply starting in 2022, but that might “give the inadvertent impression that the crime of aggression only applies when a full-scale invasion has occurred.” (Trahan, May 2023)

Option 3 – Special Tribunal

- CHALLENGES

- A special tribunal would face the difficulty of obtaining suspects and evidence. (Heller, March 2022)
- A poor message would be sent if the international community created a Russia-focused aggression tribunal that never actually prosecutes anyone. (Heller, March 2022)
- The ICJ in the *Arrest Warrant* case “never explained why international tribunals do not have to respect personal immunities of government officials or “what exactly makes a particular criminal tribunal international.” (Heller, March 2022)

Option 3 – Special Tribunal

- CHALLENGES (cont.)
 - Some argue that a special tribunal would come with the cost of the “selectivity message it sent.” They allege there will be hypocrisy if a special tribunal was created by the same states that were responsible for “neutering” the crime of aggression at the ICC. (Heller, March 2022)
 - Enthusiasm for establishing a special tribunal for aggression has proven to be uneven among the West. (Labuda, December 2023)
 - If a tribunal is established on the basis of a treaty, as opposed to an organ of the UN, there is doubt that such a tribunal could set aside the immunity of senior Russian officials. (Ahmad, January 2023)

Practical Considerations



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Practical Considerations

- Need for legitimacy of forum and process to support validity of result
 - Buy in of *all* involved
- Who will investigate/collect evidence?
 - Need to timely collect and preserve evidence
 - The uncertainty surrounding the forum for prosecution impacts investigation and evidence collection and preservation
 - This may result in a departure from best practices in investigation and could potentially impact admissibility of evidence at trial
- Potential for multiple entities bringing prosecution
 - ICC + ?

Questions?



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