https://doi.org/10.15388/TMP.2023.16

WHY THE INTERNATIONAL CRIMINAL COURT CANNOT AFFORD JUSTICE FOR THE CRIME OF AGGRESSION AGAINST UKRAINE AND WHAT IS THE WAY FORWARD?

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Summary. *The article focuses on the investigation at the International Criminal Court for the crime of aggression committed by Russia and the limitations that exist for ensuring justice at the ICC, and analyzes alternatives for punishing those responsible for aggression against Ukraine.*

Keywords: *Ukraine, Russia, crime of aggression, International Criminal Court (ICC), special tribunal.*

Santrauka. *Straipsnyje atkreipiamas dėmesys į Tarptautinio Baudžiamojo Teismo (angl. ICC) tyrimą dėl Rusijos įvykdyto agresijos nusikaltimo ir apribojimus, užtikrinančius TBT teisingumą. Be to, analizuojamos bausmės alternatyvos asmenims, atsakingiems už agresiją prieš Ukrainą.*

Raktiniai žodžiai: *Ukraina, Rusija, agresijos nusikaltimas, Tarptautinis Baudžiamasis Teismas (TBT), specialusis tribunolas.*

Introduction

On February 24, 2022, the Russian Federation launched a war against Ukraine, calling it a „special military operation." On February 28, ICC Prosecutor Kareem Khan announced that he had decided to open an investigation into crimes committed on the territory of Ukraine, and on March 2, he began collecting evidence. The inves-

tigation was launched into three types of crimes: genocide, crimes against humanity, and war crimes. Unfortunately, no investigation was initiated for the crime of aggression. The purpose of this study is to analyze all the ways to initiate an investigation for the crime of aggression and to investigate the possibility of applying these procedures by the International Criminal Court in the issue of Russia's aggression against Ukraine. At the same time, to discuss alternatives for ensuring justice for the crime of aggression against Ukraine, comparing their advantages and disadvantages, and to identify the most realistic and preferable option.

The object of the study is the application of international law to punish senior officials of the Russian Federation responsible for aggression against Ukraine.

Despite the high level of relevance of this issue due to the great attention of the world community to the invasion of Ukraine, this topic requires a greater analysis of the application of international law to this particular conflict.

The article is based on the works of legal scholars on the crime of aggression and the International Criminal Court, as well as on the opinions of well-known international lawyers on special tribunals. Additionally, a number of international documents were used, such as the UN Charter, the Rome Statute, the Kampala Amendments, a number of UN and Council of Europe Resolutions, as well as customary international law.

1. A brief overview of the emergence of the „crime of aggression" since the beginning of the XX century

Despite the fact that the main object of our study is the crime of aggression committed by Russia against Ukraine, without understanding how international society perceived and punished this crime in the past, it will be extremely difficult to understand how we got to the current situation and what difficulties the entire world society, including Ukraine, faces in punishing the leaders of the aggressor country.

Despite the formation of the rules of war and the concept of „just and unjust war", The possibility of punishing unlawful aggression began to be considered after the First World War, when the victorious countries established the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties. (Report of the Commission (ibid.), of March 29, 1919. See Claus Kress, ‚On the Activation of ICC Jurisdiction over the Crime of Aggression' (2018) 16 (1) JICJ, 2.). It was this commission that recommended the basic principles of international law on war, as well as the idea of criminalizing the crime of aggression.

At the same time, the first world body that was supposed to prevent any large-scale wars appeared - the League of Nations. Each member state had to „respect the territorial integrity". At that time, the idea of appealing to the War Crimes Council or Arbi-

tration was also expressed, as well as the possibility of „resorting to war by decision of the Council.". But as we know, the usual restrictions on aggressive war did not work, and were only a first and weak attempt to influence wars in general. Additionally, it was proposed to adopt a number of documents, such as the Geneva Protocol for the Peaceful Settlement of International Disputes in 1924 and the Kellogg-Briand Pact in 1928, which recognized aggression as an international crime, but the responsibility was on the state, not the individual (rulers and civil servants).

The Second World War proved that the League of Nations did not bring the result that most participants wanted, and therefore two of the most important moments in the history of international law and history in general took place: The Nuremberg and Tokyo Tribunals and the creation of the United Nations.

Immediately after the Allied victory over the Axis powers, the question of punishing their leaders for attacking other countries arose. Then the International Military Tribunals were established, which are better known as the Nuremberg Trials and the Tokyo Trial. At that time, they dealt with three types of crimes: crimes against humanity, war crimes, and a crime against peace, which is essentially a crime of aggression. It was then that individual criminal liability for this crime was first applied. The Nuremberg Principles, created by the United Nations International Law Commission, were also formed and are still in use today.

But we must admit that there was a certain collectivity and desire to prevent such a crime from happening again. But then, during the Cold War and after, this collectivity on the crime of aggression was not there, and therefore there was no great progress even during the creation and existence of the United Nations.

It was this new organization that was supposed to provide new guarantees of peace and that everyone would be punished for aggression against another state, and the very fact of the UN's creation, the adoption of its Charter, this and many other articles already recognize one „golden rule": the prohibition of aggression is enshrined and defined in international law, both written and customary. This can be confirmed, for example, by the fact that 193 countries as of 2022 are members of this organization, and thus have recognized the UN Charter, its purpose and principles.

Despite such guarantees, the issue of the crime of aggression remained problematic. The word „aggression" is practically not used in UN Security Council resolutions to this day. Even the official definition of the crime of aggression was given only in 1974 (Resolution 3314). There have also been many failed attempts to create a Code of Crimes in 1954, 1991 and 1996, and the Rome Statute, which was drafted in 1998, did not include the crime of aggression. Therefore, it took as long as 20 years for states parties to include and activate jurisdiction through the Kampala Amendments.

To date, the only permanent judicial body is the International Criminal Court. However, as for the crime of aggression, at the Rome Conference, the parties reached a compromise to include the crime of aggression in the list of crimes within the juris-

diction of the ICC, but to postpone the decision on its definition and the conditions under which the Court can exercise jurisdiction over it until the first Conference. Such a conference was held in 2010 in Kampala, Uganda. During the conference, and based on the work of the Ad Hoc Working Group on the Crime of Aggression (‚AWG'), which worked between 2003 and 2009, the ICC States Parties adopted a formal decision (i.e., the ‚Kampala Resolution') and agreed on the definition of the crime of aggression and the conditions under which the Court may exercise jurisdiction over it. In 2017, the ICC Assembly of States Parties in New York decided to activate the ICC's jurisdiction over the crime of aggression. But at that time, there was a lot of debate, which caused the most problems for countries that wanted to protect themselves from aggression, including Ukraine, which will be discussed in Section II.

2. Problems of starting the investigation of the crime of aggression against Ukraine in the ICC

2.1 Prerequisites and methods for initiating an investigation by the Court for a crime of aggression

On February 24, Russian President Vladimir Putin announced the so-called „special military operation", which essentially means a full-scale invasion. The international community condemned the aggression against Ukraine at many levels, and the ICC Prosecutor Karim A.A. Khan QC announced a few days after the war began that he would open an investigation into Russia's crimes based on two statements by the Verkhovna Rada of Ukraine. In addition, 39 states parties referred the situation to the ICC to initiate an investigation, which means strong support from the international community. But then it was immediately recognized that the investigation would only cover three types of crimes out of four possible: the crime of genocide, crimes against humanity, and war crimes. As for the crime of aggression, the Court, unfortunately, has no jurisdiction in this particular case.

In order to consider why the ICC is unlikely to do anything in this case, it is necessary to analyze all possible options for launching an investigation: how they were legitimized and what problems they pose for both Ukraine and other countries.

In order to initiate an investigation under Article 8 bis, one of the following options must be applied: a) Adoption of a resolution by the UN Security Council to refer the case to the International Criminal Court - Article 15 ter of the Rome Statute; b) State referral or proprio motu for crimes of aggression.

2.2. UN Security Council resolution on the referral of the case to the ICC

One of the first options to be considered is through the referral of the case to the ICC by the UN Security Council by adopting a resolution, i.e., if the Security Council decides to initiate an investigation in the Court for a crime of aggression, the jurisdictional regime is the same as that already existing in the Rome Statute for other crimes for a particular country. Let us first analyze this option.

As we discussed in the first chapter, the end of World War II led to the creation of the United Nations, which finally became the main platform for international relations and law. One of the main issues to be regulated by this body is aggression against another state. However, in order not to repeat the mistakes of the League of Nations, the „core of the Organization" was created, which seemed to be able to respond quickly to any conflicts and general problems that arise in the world. This core is the UN Security Council, which in the process of solving the problems of war and peace has the so-called „authority" that comes from Chapter VII of the UN Charter.

The P5 countries even believe that the Security Council should have a monopoly on determining whether an act of aggression has occurred. That is why even France and the United Kingdom, signatories to the Rome Statute, adhere to the „concept of the Security Council's monopoly", referring to Chapter VII.

Let us consider an example that confirms the fact of „monopolization". The Security Council has experience in referring cases to the ICC by resolution, namely: Resolutions 1593 (2005) on Darfur and 1970 (2011) on Libya. But in both of these cases, there is a simple reason why these resolutions were adopted: the Security Council member states did not have their citizens in the conflict who could have committed any crime even indirectly, and therefore had no problem making this decision. But if there is a draft resolution that concerns the citizens of a Security Council member state or their allies, they will vote against it, and permanent members can veto it. This is the very monopolization of jurisdiction over the crime of aggression.

This is what happened in the case of Russia's invasion of Ukraine: Russia is a permanent member of the UN Security Council and therefore exercised its veto power. The country was skeptical of the ICC in general when it withdrew its signature from the Rome Statute after the ICC recognized the occupation of Crimea as an international armed conflict on November 14, 2016.

So, the first option, unfortunately, loses all its chances: Ukraine may try to push this resolution through, but it will be nothing more than a political gesture, knowing that Russia will veto or try to fail the vote.

2.3. Transfer of cases by the state or proprio motu for crimes of aggression

The next possible option is for a state party to the Rome Statute to refer the case to the Prosecutor or proprio motu, i.e., upon the opinion of the Prosecutor himself. In other words, in order to apply Article 15 bis, one must: 1) be a full member of the ICC; 2) sign and ratify the Kampala Amendments; 3) not previously declare that the state party does not recognize such jurisdiction by sending a relevant statement to the Registrar (15(4) bis). That is, either at the request of the Prosecutor or at the request of the State Party, but only if it concerns the State Party, only then can Article 15 bis be applied. In our situation, Ukraine has not only not ratified the Kampala Amendments, it has not ratified the Rome Statute either. And the statements of the Verkhovna Rada of Ukraine and the amendment to the Constitution of Ukraine recognizing the jurisdiction of the ICC on its territory do not allow for the initiation of an investigation for the crime of aggression under Article 15 bis. Unfortunately, this is only the first problem with the application of this article.

Then we have a separate obstacle, which, in our opinion, is the biggest problem: Article 121(5) of the Rome Statute:

Next, we have a separate obstacle, which we believe is the biggest problem: Article 121(5) of the Rome Statute, which states that „with respect to a State Party that has not accepted this amendment, the Court shall not exercise its jurisdiction in respect of a crime covered by such amendment when committed by nationals of that State Party or on its territory." Then many countries had a question: „Who should accept the amendments for the Court to have jurisdiction: the victim or the aggressor and the victim?" This is quite an important question, referring to this issue.

Then the participating countries were divided into two sides. The supporters of the negative interpretation argued that the article should be read literally, which means even more conditions for initiating an investigation for the crime of aggression that are not present in other crimes. Another argument is the principle of international treaties effet utile.

Proponents of the positive interpretation, on the other hand, argue that a system requiring potential aggressor states to accept the amendment would not be effective, as it is unlikely that such states would take such a step (Princeton Report (n. 981). It also turns out that Article 15bis(4), which gave a chance to waive the ICC's jurisdiction over the crime of aggression against a particular state, becomes simply unnecessary in the presence of Article 121(5). Thus, using the „negative interpretation", we have the following situation: as of 2023, if one of the 45 countries that have ratified the Kampala Amendments attacked another ratifying country, an investigation could be initiated under Article 15bis. The use of „positive jurisdiction," by contrast, would expand the number of countries against which a victim country could defend itself.

Nevertheless, on December 15, 2017, the ICC Assembly of States Parties in New York adopted a decision on activation, where a „negative interpretation" was applied, although many scholars believe that there will be further attempts to clarify these articles. There are still many complaints about this paragraph, as there is no formal reference to the legal basis for the second paragraph of the Resolution, and further practice does not confirm the opinion expressed as opinio juris. Nevertheless, an effective way for aggressor countries to avoid falling under the jurisdiction of the Court for the crime of aggression has been approved: to file a declaration of non-recognition of jurisdiction.

An analysis of Article 121(5), namely its third condition, reveals a very big problem that some representatives of the „positive interpretation" feared - the inability to defend oneself against the aggressor. This is manifested in the issue of the war against Ukraine. Even if there were no problems with the ratification of the Rome Statute and the Kampala Amendments, which we will discuss below, Ukraine would still not be able to apply to the ICC Prosecutor with a state referral, because Russia also does not recognize the jurisdiction of the Court even within the framework of the Rome Statute, which is obvious.

2.4. The Problem of Ratification of the Rome Statute and the Kampala Amendments in Ukraine

In Section 2.2, we noted that Ukraine is not a state party to the Rome Statute, but has recognized the jurisdiction of the ICC by using the declaration mechanism, thereby assuming all the obligations to cooperate with the ICC and to comply with its decisions that will be made in the future regarding violations of international humanitarian law already identified in the Prosecutor's reports for 2016, 2017, and 2018. This status of Ukraine does not provide all possible rights provided for in the Rome Statute for state parties. For example, Ukraine does not have the opportunity to participate in the election of the ICC Prosecutor, to nominate candidates for the positions of ICC judges, or to resolve other organizational and functional issues related to the ICC's activities. Also, what interests us in the topic of this article is the absolute impossibility of starting an investigation for the crime of aggression.

Ukraine was one of the countries that actively participated in the development of the Rome Statute and the ICC, and signed the document on January 20, 2000, but has not yet ratified it. It should be noted that Ukraine is not the only country that has signed but not ratified: there are 31 states in total. But each country has its own reasons, and we will consider the Ukrainian situation here.

The main obstacles appeared back in 2001, when the Constitutional Court of Ukraine adopted a conclusion on the inconsistency of the Constitution of Ukraine with the Rome Statute at the request of President Leonid Kuchma. The main problem

was that the Rome Statute did not comply with the provisions of Article 124 of the Constitution of Ukraine, which stipulates that justice in Ukraine is administered exclusively by the courts of Ukraine, and Article 1 of the Rome Statute, which states that the ICC complements the criminal justice system, which is not provided for in the Constitution. Many Ukrainian scholars believe that the CCU has misinterpreted the principle of complementarity, which is expressed in Article 1 of the Statute.

This problem was resolved on June 2, 2016, through an amendment stating that part six of Article 124 of the CC now provides that „Ukraine may recognize the jurisdiction of the International Criminal Court under the conditions set forth in the Rome Statute of the International Criminal Court". This provision is not unique, as it exists in the Fundamental Laws of France, Luxembourg, Portugal, etc.

Another problem is the gaps in the criminal legislation of Ukraine. This does not prevent the ratification of the Rome Statute itself, but it does prevent the ICC from fully working on the territory of Ukraine together with the national courts of Ukraine. For example, this is manifested in the definitions of the crime of aggression given by the Rome Statute and Ukrainian legislation. In both cases, it is planning, preparation, waging war, etc. But the difference is that the Rome Statute clearly states that only those in control are responsible for these actions. The Ukrainian definition does not provide a clear list, and therefore this interpretation may not be recognized by other countries. Additionally, the CCU article provides for a maximum of 15 years, whereas the Rome Statute can punish for life. Therefore, this is another argument for ratification of the Rome Statute.

It is worth noting that on May 20, 2022, the Law of Ukraine „On Amendments to the Criminal Code of Ukraine on Cooperation with the International Criminal Court" came into force, which introduced a mechanism for interaction between the relevant Ukrainian authorities and the ICC. Thus, the Criminal Code now distinguishes between a large number of crimes that are included in the Rome Statute, including the crime of aggression. This law introduced such changes as defining the scope and procedure for cooperation with the ICC. It provided for the central authorities of Ukraine to cooperate with the ICC, the procedure for transferring criminal proceedings and fulfilling a request for assistance related to procedural actions and the procedure for the Court to perform actions (functions) on the territory of Ukraine.

Another peculiarity of this law is that the notes to it state that the jurisdiction: a) applies to citizens of Ukraine, citizens of other states and stateless persons; b) who, at the time of the commission of the crime that falls under the jurisdiction of the ICC, acted against the security of Ukraine; c) on the orders of Russian officials or the military. Failure to meet these criteria means that it is impossible to initiate an investigation against them. Thus, this law directly excluded almost all Ukrainian citizens from the jurisdiction of the ICC.

Currently, the main obstacle to ratification is political. Basically, a number of Ukrainian officials state that the Ukrainian military fears that they may be investigated, which would discredit them in general. Although we noted in the previous paragraph that this is not possible. Ukraine's Justice Minister Denys Malyuska said that the military had formed a misconception that they could be arrested abroad and investigated, but also he said that ratification of the Rome Statute during the war would not seriously change the situation.

In fact, it is difficult for us to agree with this argument. Cases against the Ukrainian military are unlikely, as there are currently no known cases of their crimes, which is not the case with the Russian military. Furthermore, we have described above why the Ukrainian military will not be arrested. In addition, not ratifying the Rome Statute means depriving Ukraine of the rights that it could have gained to better judge the war in general, as we noted at the beginning of this section.

2.5. Amendment or reinterpretation of the Rome Statute

Finally, consideration should be given to introducing a new amendment, for example, to Article 15 bis (5), to recognize that in the event of a declaration recognizing the jurisdiction of the ICC over a particular country, the Court will have jurisdiction over the crime of aggression. In such a case, a declaration from the Verkhovna Rada of Ukraine would be sufficient for the Prosecutor to initiate an investigation.

First, it would provide the most legitimized investigation and conviction of Russian officials responsible for the aggression, as it would be conducted by a single permanent criminal institution. Second, it would have spurred the development of international criminal law on the crime of aggression. As we recall, the Nuremberg and Tokyo tribunals were formed as a result of the collectivity of countries. If the same happens in this case, it will give the same impetus as it did 75 years ago.

But this option faces many problems at once. First, many countries will not agree to such an amendment, not wanting to either give up their judicial powers (in the case of permanent members of the UN Security Council) or protect their citizens (for example, African countries that are members of the ICC). That is, Ukraine is not a factor in uniting states to condemn Russia's leaders.

Secondly, even in the case of collective action, this amendment can take a very long time. Recall that it took 10 years to draft the Kampala Amendments, and another 8 years to activate them. Even if these 18 years are reduced by several times, it is still too long for Ukraine.

Thirdly, we should not forget about the „negative interpretation" of Article 121(5). There are two options to address this issue. The first is to introduce another amendment, which also faces two synonymous problems. The second option is for the Court to use paragraph three of the 2017 Assembly resolution, which refers to Article 119,

which provides that any dispute concerning the judicial functions of the Court shall be settled by a decision of the Court itself. That is, the Court can interpret the disputed rules. Theoretically, it could give itself the opportunity to apply a positive interpretation of Article 121(5), while ignoring paragraph 2 of the Assembly Resolution. But in our opinion, the Court is unlikely to do anything of the sort, because the legitimacy of the ICC would be undermined, as would the support among the member states. Of course, the Court does not need this.

Of course, there is also the option of not amending Article 15 bis (5), but then Ukraine would ratify the Rome Statute and the Kampala Amendments, and the ICC would make a „positive interpretation" of Article 121(5). However, due to the obstacles mentioned both in this subsection and in subsection 2.3 above, this option is unlikely. Therefore, we can immediately note that although these options for amending the Rome Statute are theoretically possible, it is unlikely that any of them will be applied in practice.

Having analyzed all the problems Ukraine faces not only in the investigation of the crime of aggression with the help of the ICC, including the issue of ratification of the Rome Statute, we have come to the conclusion that, unfortunately, during the war, the chance of starting an investigation is extremely minimal. The crime of aggression itself is the most problematic not only in the Rome Statute, but in international criminal law in general. Ukraine has many obstacles, both because of the delay in ratifying the Rome Statute and because of restrictions imposed by some member states. The impossibility of using the Rome Statute to punish the leaders of Russia pushes Ukraine and its partners to punish these officials in other ways, which we analyze in the next section.

3. Alternatives to punishing Russia for the crime of aggression

3.1 List of possible options for Ukraine to punish the leaders of the Russian Federation for the crime of aggression

Having analyzed all the problems of jurisdiction over the crime of aggression on the territory of Ukraine by the ICC, we must consider other options for punishing Russia's leaders. In this section, we will consider both theoretical and more practical options based on examples that have already been used in the history of international law. We will try to analyze other options that are possible for Ukraine. Some are more realistic, and some are practically impossible, although they require analysis. These are: a) a new amendment to the Rome Statute; b) a resolution or treaty with the UN on the establishment of the tribunal; c) a treaty with regional organizations and partner countries on the establishment of the tribunal;

3.2 Establishment of a special tribunal with the help of the United Nations

Let's start with the United Nations. There are grounds for a special tribunal, namely Chapter VII of the UN Charter. The decision to establish a special tribunal by the United Nations makes this „temporary court" as legitimate as possible, since the UN is the main organization of international law and the arena of all recognized countries. Denial or concealment of criminals on its territory could lead to, for example, sanctions against that state. That is, this way of creation makes it the most legitimate, which will have the most likely chances of delivering justice.

Special tribunals are created with the help of the UN Security Council. The UN Security Council has such experience when it created international tribunals for the former Yugoslavia (Security Council Resolution 827 of May 5, 1993) and Rwanda (Security Council Resolution 977 of February 22, 1995), but the decision was not very problematic because none of the P5 blocked the decision. In the case of the war against Ukraine, Russia is a permanent member of the Security Council, which automatically means that any decision on a special tribunal for Russia itself would be vetoed.

In case the UN SC cannot make a decision, then the UN General Assembly can make a recommendation to resolve a specific situation on the basis of the 1950 „Uniting for Peace" resolution. The adoption of a recommendation to establish a tribunal is quite possible, based on a large number of other resolutions that were adopted in the early days of the war. For example, 140 UN member states voted to condemn aggression against Ukraine. Moreover, it should be noted that the word „aggression" was used, which emphasizes the support of Ukraine by most countries.The very fact of the resolution's adoption will have a strong political character and the possibility of pushing for an agreement with the UNGA on the establishment of the tribunal. For example, a recommendation to the UN Secretary-General on a treaty establishing a special tribunal. But if the UN Security Council cannot do anything, can the General Assembly create this tribunal? This is a very problematic question, but it requires a little analysis.

In general, the UN General Assembly has not created special tribunals for war. However, there was a case in history when the UN Administrative Tribunal was established on November 24, 1949, whose legitimacy was recognized by the International Court of Justice. In our case, we know that the UN General Assembly condemns Russia's aggression against Ukraine by adopting several resolutions, against which only 5 countries out of 193 voted. We also see that the Security Council does not resolve the issue of war, and therefore we can expect some proposals for a tribunal.

But on the other hand, there are several arguments that, on the contrary, prove that this is impossible. Firstly, the UN Administrative Tribunal was created only to decide cases of UN officials, i.e., it had administrative functions. Secondly, such a decision would undermine the ability and supremacy of the Security Council and its

jurisdiction in situations related to Chapter VII of the UN Charter. Thirdly, based on an advisory opinion of the International Court of Justice in 1962, the UNGA cannot take „coercive or executive decisions", which the UNSC can do. And even the fact that in 1956 the UNGA created the UN Emergency Force on the basis of the „Uniting for Peace" Resolution, it didn't diminish the legitimacy of the UN Security Council.

Let us return to the agreement with the UNGA. The UN already has such experience, namely the ECC in Cambodia. We can try to draw up a treaty with the UN General Assembly. If there is broad support, such a treaty is possible. Right now, Ukraine is working on such a project and hopes to get support from other countries. If the decision is made and the treaty is signed, the tribunal will have a high level of legitimacy, which will allow it to conduct proceedings almost at the same level as if the tribunal were established by a decision of the UN Security Council. Even if the resolution about recommendation is adopted, but the treaty is not signed, it will be a serious signal to other countries to join the creation of a special tribunal.

Having analyzed three options for establishing a tribunal with the help of the UN, we can state that, unfortunately, this is unlikely and difficult, mainly due to Russia's status in the UN and the much smaller capabilities of the UN GA compared to the Security Council, which is why the following ways of establishing tribunals should be considered.

3.3. Creation a special tribunal with the help of regional organizations

If it is not possible to establish a tribunal with the help of the UN, there is another option - to turn to integration organizations, which, although they do not have such a large number of member states, are nevertheless more flexible in this matter. In the world, this has already happened in the case of Senegal and the African Union, which signed an agreement to establish The Extraordinary African Chambers to address international crimes committed in Chad. For Ukraine, such organizations could be the Council of Europe and the European Union.

The Council of Europe is one of the main regional organizations with 46 member states. It has never had the experience of establishing tribunals, but in fact, the Charter does not restrict it from doing so. If we look at the purpose of the Council of Europe, we can see that it is rather vague, but it is enough to participate in such projects. Moreover, there are no restrictions on this either. It is enough to hold negotiations, create a project, vote, sign an agreement and, based on this project, possibly improve Ukrainian legislation to harmonize and improve the efficiency of judicial proceedings. This opinion is shared, for example, by the Secretary General of the Council of Europe, Marija Pejčinović-Burić. But, of course, a completely different mechanism can be used.

Ukraine is a member of the Council of Europe, and in addition, all 45 countries express support, which is a majority, or take an ambiguous but not categorical position (example: Hungary). Russia was expelled from this organization immediately after the outbreak of the war. On April 28, 2022, the Parliamentary Assembly of the Council of Europe (hereinafter - PACE) unanimously adopted a resolution calling for the establishment of a special international criminal tribunal to investigate and prosecute the crime of aggression (as defined in customary international law) of the Russian Federation. In October, a decision of the Council of Europe's deputy ministers was adopted, which states that it „recognizes the Russian Federation as an aggressor, supports Ukraine's desire to establish a special tribunal in this regard, and calls on the member states of the organization to take an active part in this matter". 24 January Council of Europe had voted for recommendations for the Council of Europe Summit in Reykjavik, which reads as follows: „Voted for recommendations for the Council of Europe Summit in Reykjavik, it was emphasized".

The second organization with which Ukraine can sign a treaty is the European Union. This organization is smaller, with only 27 member states. The creation of such a tribunal could follow the same scheme as we have outlined in the agreement with the Council of Europe, but the legitimacy of such a body, as well as funding and technical assistance, the scope of the investigation, would be much smaller. Rather, we would consider it a „plan B" in case of unforeseen events related to the Council of Europe.

The European Union has experience in establishing tribunals, such as the Kosovo Specialist Chambers and Specialist Prosecutor's Office, which was also formed on the basis of a treaty between Kosovo and the EU. Of course, such a tribunal did not consider the crime of aggression, but the very fact that such a tribunal exists on the basis of a treaty already proves that it is quite possible.

Another option is to sign agreements with countries that support Ukraine. It is hard to say how many such countries there will be. However, if Ukraine chooses this option, it is expected that the number of countries will be at least 60, because this is the number of countries that joined the draft UNGA resolution on the establishment of the tribunal. That is, in fact, it will be very similar to the Nuremberg and Tokyo tribunals, which were also established on the basis of an agreement between countries, but such a tribunal will have a low level of legitimacy.

The last option among the special tribunals is the so-called „hybrid" tribunal. It involves the creation of a national special court with the integration of international elements into national legislation. An example of this is the ECC in Cambodia. This idea, proposed by the UK and some scholars, is not to create a new tribunal, but to create new judicial authority on the basis of the existing system, which already has judges, legislation, case law, and so on, which seems to speed up the proceedings.

Unfortunately, we deny the effectiveness of such a tribunal for several reasons. Firstly, the Constitution of Ukraine prohibits the establishment of „extraordinary and

special courts" (Article 125, part 5), and it is extremely difficult to classify this as a „special court", as it contradicts the conclusions of the ECHR in the case of Bahaettin Uzan v. Turkey, which states, for example, that judges of specialized courts have the same legal status as judges working in general courts (issues of appointment, promotion, etc.). All procedures will be completely new. For example, the procedure for appointing both Ukrainian and foreign judges, which is not allowed by Ukrainian law, will be extremely problematic. Even if the „hybrid tribunal" is classified as a special authority, it cannot be established while martial law is in effect (Article 157), and after its lifting, it will require the approval of two consecutive parliamentary sessions and the Constitutional Court's opinion on constitutionality, which will take a very long time.

Additionally, there is the problem of the legitimacy of such proceedings, since the conviction of leaders of a permanent member of the Security Council at the national level looks ambiguous. The support of other countries for such a tribunal is also questionable, as it violates the principle of immunity at the national level, which we discuss in the next section. It would also undermine the credibility of the ICC and the UN Security Council, which are the very authorities that punish these international crimes. Therefore, we highly doubt the existence and effectiveness of a „hybrid tribunal"

To summarize this section, we can say that there are other ways for Ukraine to punish Russia's leaders who are guilty of the crime of aggression. The support in both the Council of Europe and the European Union is very strong, and this is confirmed by numerous statements from various political figures, as well as by the fact that each member state directly supports Ukraine.

But let's not forget that the tribunal can be established under a treaty with both the UN General Assembly and the Council of Europe at the same time. This could provide an opportunity to obtain a very high level of legitimacy, as well as financial and technical support, which will be extremely necessary for Ukraine and the future tribunal.

3.4. General obstacles to the establishment of a special tribunal by treaty

Despite the general support of the international community for punishing Russia's leaders for their aggression against Ukraine, we have already noted that there are many problems with this due to, for example, Russia's strong legal standing in the UN and international law in general. But two additional issues need to be considered.

The International Criminal Court, as we have said, is the only permanent criminal tribunal in international law that has special capabilities and functions. One of these capabilities is Article 27 of the Rome Statute, which provides for the punishment of

the perpetrator regardless of official position. That is, despite the principle of immunity of state leaders, this Court can try anyone who is within its jurisdiction. It is the same with the tribunal established by a UN Security Council resolution. Since its decisions are binding on all states based on the accession of all states to the UN Charter, the legitimacy of lifting immunity from certain leaders will also be undeniable.

But if we speak for a tribunal that will be established on the basis of a treaty with an organization or countries, many questions arise. We have repeatedly noted that the UN Security Council and the ICC have the greatest legitimacy in terms of judicial proceedings, which cannot be said about the UNGA, the Council of Europe, the EU or a group of states. If we analyze the history of international law, we will not find any exceptional situations. The Tokyo and Nuremberg tribunals were against ex-officials. The ICTR and ICTY were in relation to former state leaders and were established by a UN Security Council resolution.

Of course, this issue is being addressed. For example, one of the CoE reports states that „Heads of State and other government officials (from non-parties to the treaty) could not rely on immunities vis-à-vis such an international tribunal. Professor Klaus Kress also argues that customary international law provides for an exception to personal immunity that applies exclusively to international courts. Thus, it is possible to form a „new" custom based on opinio juris if it is well argued.

The ICC Appeals Chamber stated that there is not enough practice and opinio juris to establish the immunity of leaders in relation to international justice. But such a decision is challenged by the trivial fact that if a country has not agreed to judicial jurisdiction over it, then its leaders cannot be judged by these international tribunals.

Ultimately, the issue of personal immunity in the context of international tribunals remains unresolved, and there is insufficient clarity as to whether it can be waived in such cases. Therefore, it will be quite important for Ukraine and its partner countries to formulate a program in this regard in order to raise the legitimacy of the tribunal itself. But we can say for sure that if the tribunal is established by treaty, we can expect new ideas and explanations of the principle of personal immunity of officials before the courts.

The case of a treaty where one of the parties is the UN General Assembly should be considered separately. Since this is the most legitimate body, it would seem that if a tribunal is established on the basis of a treaty with the UN General Assembly, it can be assumed that this tribunal can lift immunity from the leaders of a particular state. And there is such a case, namely the SCSL. But several problems immediately arise here. Firstly, even in the case of the SCSL, the Security Council Resolution (1315) was later adopted to grant such powers under Chapter VII of the Charter. Second, the UNGA cannot adopt coercive resolutions.

Nevertheless, if we follow the opinion of Professor Kress, which we expressed above, it is still possible to formulate the Resolution in such a way that the court could

deprive, and this can be done with the help of opinio juris. But in order to get this element, you need to argue your position very strongly and get broad support. How broad is unknown, but it can be noted that it will be problematic, because African countries, for example, do not want to lose their immunity at the level of international tribunals, as well as a number of other countries. Therefore, the adoption of such a resolution by the General Assembly is unlikely.

The second problem society faces is Russia's recognition of the tribunal's jurisdiction. It should be understood that Russia will be one of the parties to this treaty, because it will apply to it and its officials. But it is unlikely that this country will recognize this treaty. This obstacle is based on Article 34 of the Vienna Convention on the Law of Treaties:

> "A treaty does not create either obligations or rights for a third State without its consent."

In fact, Russia, for obvious reasons, will not recognize such an agreement, and therefore will not even assist in the extradition of some criminals. Even if this happens, it will only be due to certain political events (e.g., regime change).

There are several ways to solve this problem. The first is a broad interpretation by the UN General Assembly. We have mentioned this option both in this section and in section 3.2. The second option is to use political mechanisms to put pressure on Russia, for example, through stronger sanctions, hoping that Russia will extradite at least some of the politicians. But this is not a legal option, but a political one, so it is difficult to analyze it within the framework of this article. The third option is the forcible seizure of officials. This precedent already existed with Adolf Eichmann, but at that time it caused great concern to the Security Council because of the violation of Argentina's sovereignty. But Ukraine may not have this problem because it is acting under Article 51 of the UN Charter on self-defense. In any case, this is also seen more from a political and military perspective than a legal one. The fourth option is a trial in absentia. International law already has such experience (referring to the decision of the ICJ). And even though there are restrictions in Article 14 of the 1966 International Covenant on Civil and Political Rights and Article 6 of the European Convention on Human Rights on guarantees for the defendant, these are not restrictions due to the gravity of such crimes and the failure of the defendants to appear under their decision. However, we would like to point out that such a decision will be symbolic, but will not have much legitimate significance.

So, Ukraine and its partners have a serious challenge: to address the issue of Russia's immunity and statute in the future treaty. In any case, we will see a number of precedents on these issues that will change international criminal law forever.

4. The conclusion

1. The crime of aggression is perhaps the most problematic crime in international criminal law, as its criminalization began only at the beginning of the 20th century, and the first trials took place in the late 1940s. Today, there are still many problems and obstacles that prevent most countries from receiving full justice for aggression by another state.
2. The International Criminal Court is the only permanent criminal court that has the crime of aggression in its jurisdiction, but due to a number of limitations, this institution is ineffective in this regard and therefore requires further development. In the matter of punishing Russian leaders, the ICC is unlikely to be able to contribute to this, both because of the restrictions imposed by the Kampala Amendments and the reluctance of many countries to withdraw such amendments in order to continue to protect the leaders of these states from ICC investigation.
3. The UN Security Council, as the „world's premier body," has repeatedly proven its inflexibility and inability to often reach a solution to a particular issue, but we doubt that the war in Ukraine will be an impetus to start reforming the UN as a whole.
4. The most likely way to punish Russian politicians is to create a special tribunal based on the treaty. We have considered that there are a number of partner countries that will join the treaty. We also know that this tribunal would be supported by regional organizations such as the Council of Europe and the European Union. But in order to increase the legitimacy of such a tribunal, it is desirable to enlist the support of the UN General Assembly, so Ukraine should focus on this as much as possible.
5. The special tribunal is formed with the support of various organizations and countries through a treaty, and then uses the new Statute, international treaties and, partially, the national legislation of Ukraine, if necessary.
6. An exceptional option would be to form a Ukrainian tribunal with partial support from the international community, but this is an extreme and very limited option. This form of tribunal would have a low level of legitimacy and little chance of delivering justice.

Sources

List of legislation

1. Chapter of the United Nations and Statute of the International Court of Justice, 1945.
2. Rome Statute of the International Criminal Court (1998). Treaty Series, vol. 2187, 2002, 38544
3. Amendments to the Rome Statute of the International Criminal Court Kampala, 11 June 2010.

4. Resolution ICC-ASP/16/Res.5, 14 December 2017.
5. The Criminal Code of Ukraine (2001). Holos Ukrayiny Nr. N 107. 2341-III.
6. The Constitution of Ukraine (1996). Uryadovyy Kur'yer N 129 - 130. 254к/96-BP.
7. On Amendments to the Criminal Procedure Code of Ukraine and Other Legislative Acts of Ukraine on Cooperation with the International Criminal Court (2022). Uryadovyy Kur'yer Nr. N 114. 2236-IX.
8. Report of the commission on the responsibility of the authors of the [First World] War and on enforcement of penalties. (1919)
9. Resolution A/RES/377(V) (1950)
10. United Nations Security Council Resolution 2623

List of academic literature

11. Heller, K. J. (2022). Options for Prosecuting Russian Aggression Against Ukraine:A Critical Analysis. Journal of genocide research, 25(1), p. 1-23. https://doi.org/10.1080/14623528.2022.2095094 [06 Jul 2022].
12. Corten, O. and Koutrolius, V. (2022). Tribunal for the crime of aggression against Ukraine - a legal assessment. Brussels: Think Tank
13. Hildner, G. (2018) The Activation of the International Criminal Court's Jurisdiction over the Crime of Aggression: The Edifice is Completed. German Yearbook of International Law 1 (61), p. 439–450. URL: https://doi.org/10.3790/gyil.61.1.439 (date of access: 03.03.2023).
14. On the Activation of ICC Jurisdiction over the Crime of Aggression, Claus Kreß Kreß, C. (2018). On the Activation of ICC Jurisdiction over the Crime of Aggression, Journal of International Criminal Justice, 1 (16), p. 1-17. https://doi.org/10.1093/jicj/mqy007 [March 2018].
15. Akande, D., Tzanakopoulos, A. (2018). Treaty Law and ICC Jurisdiction over the Crime of Aggression. European Journal of International Law. 3(28), p. 939–959. URL: https://doi.org/10.1093/ejil/chy059 (date of access: 03.03.2023).
16. Nussbaum, A. (1954), A Concise History of the Law of Nations. Journal of Legal Education. 2(7), p.139. https://www.jstor.org/stable/42890867
17. Kress, C. (2012). The International Criminal Court and Immunities under International Law for States Not Party to the Court's Statute. Torkel Opsahl Academic EPublisher.
18. Kress, C., von Holtzendorff L. (2010). The Kampala Compromise on the Crime of Aggression. Journal of International Criminal Justice. 5 (8), p. 1179–1217. URL: https://doi.org/10.1093/jicj/mqq069 (date of access: 03.03.2023).

List of case law

19. Bahaettin Uzan v. Turkey [ECHR], № 30836/07, [2020-11-24]. ECLI:CE:ECHR:2020:-1124JUD003083607.

Other literature

20. Ukraine's Constitutional Constraints: How to Achieve Accountability for the Crime of Aggression. [Online] (April 5, 2022). Available at the link: https://www.justsecurity.org/80958/ukraines-constitutional-constraints-how-to-achieve-accountability-for-the-crime-of-aggression/
21. Why a "Hybrid" Ukrainian Tribunal on the Crime of Aggression Is Not the Answer. [Online] (February 6, 2023). Available at the link: https://www.justsecurity.org/85019/why-hybrid-ukrainian-tribunal-on-crime-of-aggression-is-not-the-answer/
22. The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine (Part IV). [Online] (September 28, 2022). Available at the link: https://www.justsecurity.org/83290/tribunal-crime-of-aggression-part-four-2/
23. Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation. [Online] (2 March 2022).Available at the link: https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states
24. International Law Commission, 1950, Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, Yearbook of the International Law Commission, vol. II, para. 97
25. Malyuska poyasniv, chomu Ukrayina ne mozhe ratifIkuvati Rimskiy statut pIya chas vIyni. [Online] (June 02, 2022). Available at the link: https://www.radiosvoboda.org/a/news-maluska-ukraina-rymskyy-statut/31880061.htm