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Master's Thesis

Prosecution of The Crime of Aggression in the Context of Russian Military Aggression Against Ukraine: Between Law and Politics

Atsakomybė už agresijos nusikaltimą Rusijos karinės agresijos prieš Ukrainą kontekste: tarp teisės ir politikos

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Vilnius

2024

ABSTRACT AND KEY WORDS

The work examines the possibility of the prosecution of the crime of aggression in the context of Russian military aggression against Ukraine. The study analyses legal and institutional framework around the crime and determines, whether the present venues should be considered as relevant and sufficient legal response against Russian military aggression. In the absence of ICC jurisdiction, the study provides detailed analysis of different options for eliminating the jurisdictional gap and reaching justice for Ukraine. As a result, the work outlines the reasons for the significant need to establish the special international tribunal for Ukraine and suggests which models should be regarded as the most preferable or plausible alternative from the legal perspective.

Key words: Special Tribunal for Ukraine, ICC, Russian Military Aggression, Unlawful Use of Force, Accountability Gap, Impunity.

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LIST OF ABBREVIATIONS

ICC – International Criminal Court

SCSL - Special Court for Sierra Leone

ECCC - Extraordinary Chambers in the Courts of Cambodia

ICTY - International Criminal Tribunal for the former Yugoslavia

ICTR - International Criminal Tribunal for Rwanda

ICJ – International Court of Justice

JIT – Joint Investigation Team

ICPA - International Centre for the Prosecution of the Crime of Aggression against Ukraine

CICED - Core International Crimes Evidence Database

EU – European Union

CoE – Council of Europe

UN – United Nations

UNSC – United Nations Security Council

UNGA – United Nations General Assembly

VCLT - Vienna Convention on the Law of Treaties

INTRODUCTION

Relevance – Since Russian invasion in Ukraine in February 2022, the failure of the international criminal justice against the ongoing aggression became apparent. The reoccurring military aggression, that had induced enormous causalities, indicates the urgent need to overcome the risks of impunity. Impunity itself is firmly connected with the accountability gap. The special jurisdictional regime created by the Rome Statute around this crime hinders the process of achieving justice. Neither Russia nor Ukraine were the state parties of Rome Statute, in the time of invasion. Heated discussions emerged about the related challenges: the absence of the jurisdiction of the International Criminal Court, the importance of security council and its referral to the international court about the conflict, the possibilities regarding broadening the scope of ICC jurisdiction or the alternatives for establishing the special tribunal for the purposes of prosecuting the crime of aggression committed against Ukraine. Meanwhile this crime, compared to other international crimes, is relatively new concept, since Nuremberg trials, it had not been prosecuted. Therefore, solutions that had emerged regarding the venues of prosecuting Russian military aggression, raised various concerns. Hence, the following work which refers to the issue has significant relevance.

The main object of the study is to examine the possibility of the prosecution of Russian military or political leaders for the crime of aggression in the absence of ICC jurisdiction.

Aims and objectives: firstly, the thesis is focused on classification of the Russian invasion as the crime of aggression and determination of the legal framework. Second objective is to estimate the present means against Russian military aggression and understand whether they represent an adequate legal response, and final objective is to analyze the possibility of creating the special tribunal in the existing political background – options and related drawbacks, as well as to highlight the significance of political acknowledgment of prosecuting Russian aggression against Ukraine.

Tasks: 1. To determine the nature of Russian conduct in Ukraine and reasons of classifying it as the crime of aggression, while also revealing Russian false narratives and factual circumstances around the invasion. 2. To analyze the ICC's jurisdictional framework around Russian aggression, including various options suggested by the scholars to prosecute Russian aggression within ICC – such shifting the referral powers, amending the jurisdictional clause,

or entitling the court with the power of extensive interpretation. 3. To analyze the drawbacks, efficiency and plausibility of abovementioned ideas, and determine whether they will represent credible legal solutions for achieving justice for Ukraine. 4. To define the grounds for establishing special tribunal and to determine its most relevant form which will be able to respond anticipated problems 5. To determine the importance of political will for achieving justice for Ukraine.

The originality of the research: First of all, through analysis of the historical context, the study outlines the legacy of ICC to prosecute the crime of aggression and the importance of coherent practice, which drives some to search for solutions for Ukraine within the present venues and hesitate on establishing the special tribunal. The study provides in-depth analysis of underlying reasons of accountability gap and the legal and political constraints which makes it implausible to expand the court's jurisdiction over Russian military aggression. The work examines the reasons of why those challenges are surmountable legally or politically. Study divines the present political background and the will of the international community to restrict the ongoing aggression against Ukraine, and identifies, why establishing the special tribunal is an only option for adequate legal response. The work analyses the possible forms of the potential tribunal, in correlation with past precedents as well as expected legal challenges and concerns regarding immunities, political selectivity, universality and other. Through this analysis the study provides several suggestions regarding the models of the potential tribunal and its key characteristics. Finally, the work outlines the role of political will in acknowledgment of essential need to prosecute the crime and eventually resolve the risks deriving from impunity.

To achieve the main object, the Study is based on various Methods: **Historical analysis method** is used to analyze the criminalization process of interstate aggression, in particular, to distinguish the underlying reasons of why international society had faced the necessity of establishing Nuremberg Tribunals despite controversies and scarce legal basis and later, what were the major impediments that resulted in prolonged process of defining and activating the crime under Rome Statute. Moreover, the method is used to examine the genesis of Russian invasion – further revealing its nature and intent. In addition, the method is applied to understand the historical role of UN Security Council and UN in prosecution of Aggression. Eventually, the work through **Comparative historical analysis** highlights the necessity for the

prosecution of Russian Aggression analogues – while highlights the reoccurring nature of Russian military aggression, as well as past precedent of Nuremberg Trials, as an outcome of pressure need to avoid future wars.

Analysis of legal acts and documents is firstly applied to determine the general legal and institutional framework over the crime of aggression. Furthermore, it used to define the jurisdictional gap of ICC over Russian aggression against Ukraine and legal limitations for expanding the court's jurisdiction. Analysis of relevant acts, Such as Resolutions of European Parliament, Declarations of states and etc. is also used to define the political readiness for the establishment of special tribunal. Moreover, analysis of national legislature is also applied to define the preference of international tribunal over domestic prosecution of the crime.

Analysis of scientific literature is applied to examine options regarding interpretation of the Statute, overview the interconnection of the International Criminal Court with other institutions and organizations while analyzing options and problems of expanding its jurisdiction. The analysis is also used to describe the challenges regarding various alternatives of the special tribunal – including examination of costs, issues of immunity, selectivity and universality. **Case Study analysis** is used to examine the relevant precedents of prosecuting the crime of Aggression through special tribunals in order to distinguish the most viable option for the tribunal for Ukraine, and highlight the possibility of prosecuting the crime in the absence of ICC jurisdiction. **The Linguistic Method** is used to interpret the Rome Statute, particularly, clauses regarding the definition of the crime of aggression, legality principle and etc.

Main Sources: While conducting the study, various sources were used, legal acts, documents, Scientific Literature, Case law and etc. Particular significance had *The Crime of Aggression: A Commentary* edited by C. Kreß and S. Barriga in analyzing the general legal framework of the crime of aggression, while works of Dinstein and Buchan & Tsagourias, were the main sources for contouring the historical context. The works of McDougall, Trahan were also analyzed while examining the possibilities of expanding ICC jurisdiction, and later, the viable forms of the special tribunal and anticipated Challenges. Acts, such as UNGA Resolutions were essential to determine the international response against Russian Aggression, whereas cases, and especially Nuremberg Precedent became sources to determine the possibilities and imperative to prosecute the crime of Aggression against Ukraine.

I. GENERAL LEGAL AND INSTITUTIONAL FRAMEWORK FOR THE CRIME OF AGGRESSION AGAINST UKRAINE

1.1. Aggression in International Law

In comparison with other international crimes, the concept of aggression is relatively new. Since 1945, when the historical precedent established to prosecute military and political leaders of the countries for embarking war, until 2017, it had not been fully activated in positive international law[1]. It took half a century to define the term, to find the agreement point on its components and jurisdictional issues, meanwhile the mankind faced challenging political shifts, conflicts and wars (Heller, 2024, p. 13)[2]. The usage of unlawful interstate forces compelled international community to finalize the prolonged process of defining the concept under Rome Statute.

1.1.1. Historical Perspective on Shaping the Concept of The Crime of Aggression

Before WW1 war was considered as inherited right. However, in the absence of the unformal approach that would prohibit commencing war on unlawful grounds, still, even ancient civilization acknowledged the responsibility of justification of using the force[3] (Buchan & Tsagourias, 2021, p. 2). This later drew the distinguishing line between the "just" and "unjust" wars, and gave the impetus for elaboration of the “just war” doctrine over time in the middle ages[4]. However, it was not clear what should be considered as "just" causes (Dinstein, 2011, p. 66), and the debates over this matter often culminated in formulating the biased arguments.[5]

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[1] In 2017 the crime of aggression amendments under Rome Statute finally came into force.

[2] Throughout history, there were situations which raised the doubts that state’s actions amounted the crime of aggression, such as military actions in Iraq in march 2003

[3] In ancient Greece neither the city-states found the war permissible only in those cases when hostilities served the public good, aligned with the interests of authorities and citizens (Buchan & Tsagourias, 2021, p. 2). While in Ancient Rome war should be embarked under the supremacy of gods, endorsing their interests, also for the necessity of self-defense and territorial integrity, and etc. There had to be stated ultimatum, requesting the compensation for the wrongful acts and, the formal announcement of war. (Buchan & Tsagourias, 2021, p. 2). The special body consisting of priests *(Jus Fetiale*) was assessing the causes. (Dinstein, 2011, p. 65). Though, those bodies were acting in accordance to the orders of their rulers (Dinstein, 2011, p. 66),

[4] Later, this approach was more encouraged by Christianity which became the official religion of Roman empire. Requiring an excuse for the inclination from the pacifistic views and demanding believers to engage in wars, the theologians elaborated, that there was the inexorable need of commencing just wars, in certain circumstances: leader’s command to attack, the just causes for the force, and intentions to spread good.

[5] The great example of this was the Thirty Years War in early 15th century, enticed by the conflict between Protestants and Catholics, from which both of the sides narrate their own arguments on justifying causes to engage in war. Treaty of Westphalia following the end of the Thirty Years War indicated the fragility of the just war doctrine, while giving the state’s ability to embark wars without stating their just causes to the higher authority. However, the doctrine remained prevalent (Buchan & Tsagourias, 2021, p. 6).

In customary international law, the doctrine was depicted in the states prevalent practice: waging wars was considered to be allowed only under certain circumstances, such as self-defense, response to the prior wrongdoings, or the purpose to save people from tyranny (Buchan & Tsagourias, 2021, p. 7). Since the differentiation of "just and "unjust" wars was not depicted in positive international law, in the absence of restrictions and uniformity, and one objective and superior legal body, that would evaluate the situations leading to the use of force, countries continued to pursue their own narratives while engaging in hostilities,[6] without legal accountability. International lawyers did not acknowledge connection between the countries' inherent right of war and international law, some considered that the just causes of war were the matters of morality and theology rather than international law (Dinstein, 2011, p. 69).

In the beginning of 20th century even though the absolute prohibition of use of force was still far from the international law agenda, there were attempts to restrict several aspects of it while trying to regulate the warfare (Buchan & Tsagourias, 2021, p. 9) such as Hague conventions declaring states will to maintain peace (Hague Convention 1899, preamble), and prioritizing peaceful resolutions of conflicts (Hague Convention 1907, Article 1),[7] as well as Bryan treaties similarly limiting the preconditions of use of force (Bryan Treaties, 1913-1914)[8].

The First World War made it clear that the customary doctrine of "just war" was futile and there was the pressure need to develop further mechanisms for maintaining peace among nations, The very first idea of criminalization of waging war and prosecution of military leaders, also emerged, however later abandoned (Sellars, 2016, p. 21)[9]

In particular, the grave damage caused by the war encouraged countries to delineate some concepts regarding *Jus ad Bellum*. This was one of the main underline reasons of carrying out the Paris Peace conference after WW1. The outcome of it – Treaty of Versailles of 1919 not

[6] For instance. European States maintained that use of force during colonization against people that they considered "Uncivilised" was justified by the purpose of civilizing (mission civilisatrice) (Buchan & Tsagourias, 2021, p. 8).

[7] Hague peace conferences played the big part in codifying the basic common customary rules already practiced by countries. Although Its primary objective was confined to set Jus in bello rules, Jus ad bellum was not left beyond notice. The preamble of Hague Convention I 1899 declared the states strong will for maintaining peace, while Article 1 of Hague Convention 1907 highlighted the states obligation to refer to the arbitration before starting the war in case of contractual debts (Buchan & Tsagourias, 2021, pp. 8, 9)

[8] Made between US and 19 other countries in 1913-1914, required states to submit their complaints to the conciliation commission before waging war, and wait for the commission's report

[9] The idea derived from the David Lloyd George's political campaigns where he insisted that the war had to be considered as crime and the leaders who waged it had to be prosecuted. The idea was considered as an extreme deviation from traditional practice, discussed but abandoned.

only oriented towards the punishments against Germany, but also addressed several important concepts regarding aggression, which was referred as “the supreme offence against international morality and the sanctity of treaties” (The Versailles Treaty, Article 227). Moreover, the urgent need to develop preventative means to avoid future wars was depicted in creation of the League of Nations. The covenant of League of Nations particularly presented part 1 of the Peace Treaty of Versailles.

Maintenance of peace and security was underlined as the main objective of the treaty by the preamble of the covenant, which stated, that it was the "obligations" of countries to abstain from war, maintain the peaceful relations among each other and firmly acknowledge the rules of international law (The Versailles Treaty, I, Preamble). Articles 10-16 of the covenant provided the main framework regarding the matter[10]. Although the punishment measures towards the aggressor state were confined to the economic sanctions, limitations in diplomatic relationships and restrictions towards its nationals[11]. The covenant did not criminalize waging of war.

League of Nations innovatively set unformal decision-making bodies[12] and legal frameworks regarding peace matters, acknowledged war as the subject of positive international law and ended the flexible[13] Just War doctrine. However, it is criticized by scholars for the drawbacks, among which the primary obstacles were the absence of absolute prohibition of war, inadequate enforcement and executive measures[14] and the lack of universality[15] (Buchan

[10] Those articles demanded the members of Ligue of nations to not to interfere in other member states territorial integrity and independence (article 10), to address Ligue of nations in case of wars or threats of wars, while the Ligue of nations was equipped by the authority to undertake all necessary measures to protect peace (article 11). member states were compelled to prioritize alternative dispute resolutions over waging wars (article 12-15), or address the situation to the Council (article 15). The unanimous report of the letter excluded states entitlement to embark wars, though in the absence of the unanimousity, countries had then permission to carry out measures for justice - that also implied their right to engage in war. Starting the war by disregarding those rules, was considered as an act of war against whole Ligue of nations (article 16).

[11] Military measures could also be used by the states for the purposes of League of Nations, According to Article 16 of the covenant, Council was also entitled to give recommendations regarding the military measures, however those recommendations were not binding

[12] Such as the Council of the League of Nations

[13] According to Buchan and Tsagourias, the doctrine was called” flexible” since it was practiced by countries without any legal accountability for their own interests.

[14] Gravity of Economic sanctions against the aggressor state were not clearly determined, while Council's recommendations regarding military actions were not legally binding for the countries (Buchan & Tsagourias, 2021, p. 11)

[15] Even the US that played the kay role in shaping the Ligue of Nations did not eventually became the part of it, US did not ratify the treaty. Later the most important members such as Japan Germany and Italy withdrew from the Ligue (Buchan & Tsagourias, 2021, pp. 11, 12)

& Tsagourias, 2021, pp. 10, 11, 12). Later Geneva Protocol[16] was an attempt to tackle down the drawbacks of the treaty, mentioning that countries had the obligation to not to resort to war "in no case", however it never entered into force, due to countries' hesitation towards the absolute prohibition of war (Buchan & Tsagourias, 2021, p. 12).

Kellogg - Briand Pact in 1928 changed the perception on the permissibility of waging wars by absolutely prohibiting it for the first time – condemning "recourse to war for the solution of international controversies". As scholars believe, it filled the void left by the League of Nations (Buchan & Tsagourias, 2021, p. 12). Though its major issue was that the pact represented the political statement, it was part of national policy of member states, and was beyond international law, which made difficulties in enforcement and execution (Buchan & Tsagourias, 2021, p. 13)[17].

As some scholars notice, the main reason of the failure to prevent World War II was that none of those mechanisms were legally binding (Dinstein, 2011, p. 125). After which it became clear, that more sophisticated approach and the absolute prohibition was required to prevent future calamities of war. This was the emerging point of the core document of the modern international law - UN charter.

The fact, that the avoidance of war became the foundation of the U.N. Charter**,** is depicted in the very first words of the preamble, the stated determination "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind". Article 2(4) provided the absolute prohibition of "the threat or use of force". Which, as ICJ later explained, became the *Jus Cogens* norm in international law (Nicaragua v. United States of America, ICJ, 1986, §190). Chapter VII Art. 39-51, established exceptions allowing use force[18].

The fact that the UN charter did not avoid the subject of aggression resulted in "collective security system" (Akande & Tzanakopoulos, 2016, p. 215), In alignment with this systematic approach, aggressive war had to be criminalized in international law, otherwise, the voids left by those political documents, statements or ineffective pacts and charters would prevail – making the space for countries to wage wars without accountability.

[16] Signed in 1924

[17] There were other drawbacks, in the absence of the definition "recourse to war" and "the war" itself, countries were able to use force and avoid prohibitions. Also, it did not refer the subject of self-defense, though its presence was implied, the pact also lacked universality (Buchan & Tsagourias, 2021, p. 13).

[18] When it is 1. an act of self-defense or 2. when it is sanctioned by the Security Council of the United Nations.

Hence, the devastated consequences of the WWII created the strong will among countries to criminalize the crime of aggression – it was criminalized within the agreement on the Charter of International Military tribunal (London Charter)[19]. More Particularly, Article 6 of the charter established the jurisdiction of the International Military Tribunal over crimes against peace, war crimes and crimes against humanity, among which crimes against peace was described as planning, preparation, initiation or waging of war of aggression, or war in violation of international treaties, agreements. Assurances or participation in the plan or conspiracy for the accomplishment of any of the foregoing. According to the article, the responsibility[20] was held by the leaders, organizers, instigators and accomplices of the crime.

The Charter became the fundament for the Nuremberg trials and prosecution of WWII criminals. With some modifications Article 6(a) was repeated while forming legal foundations for other tribunals, for example articles of the same character were used in trials against lower-level German war criminals by the American Military Tribunals, and trials against Japanese war criminals (Tribunal for the far east) (Dinstein, 2011, p. 126).

However, it should be mentioned that Nuremberg tribunal in its judgement of 1946 avoided to directly refer to the London Charter and Article 6(a) to avoid the violation of the *nullun crimen sine lege principle* - Tribunal stated, that the charter had declaratory nature and that waging wars was already illegal under international customary law. Hence, it relied on Briand Kellogg Pact, Geneva Protocol and etc. Even though they neither criminalized waging wars, nor introduced the individual liability of state leaders.[21] Tribunal called it "Supreme international crime".

Though the Tribunal was strictly criticized already in late 1940s, due to its implication that illegality of war inexorably means its criminalization. (Dinstein, 2011, p. 128) Scholars also assume, that London Charter and specifically, Article 6(a) had not declaratory nature at all, rather, it was the turning point in international law - changing approach towards aggressive

[19] It was annexed to the Agreement made in London 1945. It was originally concluded among four major powers - United States, the USSR, the United Kingdom and France, that expressed strong political will to prosecute the authorities in charge of waging war, later it was joined by 19 additional allied nations

[20] For all acts performed by any person in execution of such plan

[21] According to the Tribunal, those documents depicted the development of the above-mentioned customary international law. Tribunal depended on the Briand Kellogg pact, and even though the pact did not expressly criminalized war and just underlined its illegal nature, the Tribunal used the parallel interpretation method – it referred to the Hague conventions that also prohibited several means and methods of war without even introducing penal sanctions. However, the state's practices also aligned with those conventions. Tribunal highlighted the analogous character of criminality of war. It mentioned, that without punishing individuals, only banning the war in customary international law, would not have any practical effect. (Dinstein, 2011, p. 127)

war. From this point, it was novelty of the Nuremberg Judgement to find criminality of war as the part of the general international law. (Dinstein, 2011, p. 128)

It was another milestone, when in 1946 UN General Assembly (UNGA) acknowledged Nuremberg principles[22], and the precedential Judgement of Nuremberg Tribunal, as the part of international law, after which the novel approach set by the Nuremberg Precedent was reflected in following years, while prosecuting the criminals of WWII at Tokyo and Nuremberg. (Dinstein, 2011, p. 129)

Although it remained challenge to shape the clear and well defined legal framework for the crime of aggression - Since 1947 International Law Commission (ILC) under the instruction of UNGA started the formulation of Nuremberg Principles and working on the draft code on crime of aggressive war, even though the commission managed to structure the principles in 1950, the process of creating the draft code was prolonged. (Dinstein, 2011, p. 129)

In 1974 UNGA finally adopted the definition of aggression - in Resolution 3314, referring it as "a crime against international peace". The resolution mainly focused on state's acts of aggression and not individual conducts of leaders, and illustrated those acts such as bombardment of one state by another (UNGA Res 3314).

After Nuremberg Trials it took decades to define the contours of the concept of aggression - that resulted in the lack of effectiveness of measures against it. (Dinstein, 2011, p. 130) Eventually, 1998 Rome Statute of the International Criminal Tribunal listed the crime of aggression together with other core international crimes- crimes against humanity, genocide, and war crimes, finally, newly established international court gained the jurisdiction over the matter. However, even though the jurisdiction was conferred, unlike other abovementioned crimes, the crime of aggression lacked the definition and the statute provided the provision according to which the court could not exercise the jurisdiction until the framework of the definition and exercising conditions were formulated. (Dinstein, 2011, p. 131) Eventually, After the efforts of working group[23], the definition of the crime of aggression was finalized in 2010 by the Kampala amendments, Amendments came into force in 2017.

In conclusion, throughout history, countries had faced the necessity to acknowledge the importance of criminalizing war, however they hesitated due to the lack of political will to

[22] Particularly those stated by the London Charter
[23] Working group on the amendments of the crime of aggression

include the matter in international law. This had its detrimental consequences - the urgent proper legal response was only possible through criminalizing the aggression, and prosecuting it. The outcome was Nuremberg trials, established on controversial legal basis still managed to create long lasting precedent. The process led to the UNGA resolution defining a crime against international Peace, and finally, Rome Statute definition of the crime of aggression.

1.1.2. Modern Definition of the Crime of Aggression

Some scholars generally conclude that term "aggression" often refers to the unlawful use of force (Dinstein, 2011, p. 124), but to say more precisely, crime of aggression definition is enshrined in Rome statute, while the gravity threshold that an act of aggression should meet in order to amount the crime, is connected with the UN charter and the violation of absolute prohibition of the use of force.

While working on Rome Statute, agreeing on definition of the crime of aggression faced difficulties with scoping what kinds of aggression should be considered as the ground of individual responsibility (McDougall, 2021, p. 10).

States failed to reach an ultimate agreement, but not including the matter in the Rome Statute would inexorably cause the endless prolongation of determining this crucial issue, which is why it was set by the states that Rome Statute would also include the matter of aggression in Article 5(2), but without the defining or jurisdictional clauses. (McDougall, 2021, p. 11).

Eventually, the working group managed to define the contours of the crime. It is said that the modern definition of the crime of aggression represents the synthesis approach of UNGA Resolution 3314, UN Charter and historical development of the concept (Boas, 2013, p. 6). This argument is grounded since the process of adopting the defining provisions of the crime of aggression included the discussions over those models[24].

Article 8 *bis* of the Rome statute represents the definition of the crime of aggression, which despite the controversies regarding its effectivity to adequately respond the modern challenges, remains the main framework for establishing crime of aggression. According to

[24] According to McDougall, various states supported three different kinds of definitions for the crime of aggression - these models were reflected on preparatory committees draft Statute - first mostly based on the "war of aggression" description that was resulted by the historical development of the concept, though this model did not correspond adequately UN approach. However, the second model, completely based on the UN charter that mentioned in Article 2(4) "the threat or use of force" lacked the determined scope, the third model favored the UNGA definition (resolution 3314), though the shortcoming of the model was presented in the political nature of the resolution

the Article, crime of aggression" means "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". This part constitutes the general clause.

The next paragraph defines the "act of aggression", which 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. The paragraph lists the acts that regardless of a declaration of war, should be considered as an act of aggression aligned with the UNGA resolution 3314.

The list of acts include: Armed attack or invasion in another state's territory (a) or against the forces of another state (d), Bombardment or use of other weapons against another state's territory (b), The armed blockade of the ports or coasts (c), Usage of installed armed forces in another state beyond the agreement (e), Permission to another states act of aggression in the territory which is in agreed disposal (f), Sending armed groups mercenaries and etc, acts amounting the equal gravity of use of force as above-listed situations (g).

In modern definition of the crime of aggression, three factors are significant:

First, it is the leadership crime - the perpetrator should be the authority - a political or military leader - responsible for the crime of aggression – individuals who hold the positions which entitles them with effective control over the military or political actions and directions of a state (Permanent Mission of the Principality of Liechtenstein to the United Nations, 2019, 7). The leadership clause is not limited by one person, more than one person can be held accountable. This is the clause, that causes the major difference from the crime of aggression's definition in customary international law (Grzebyk, 2023, p. 450). It should also be mentioned that due to the dual nature of the crime of aggression that derives from both - individual and state conducts (which will be further discussed in the thesis), not only leader's individual liability arises, but also the aggravated responsibility[25] of the state towards the whole international community (Bonafè, 2009, 25, 26).

Second element, named as "the conduct of individuals" (Permanent Mission of the Principality of Liechtenstein to the United Nations, 2019, 7-8) refers to the different forms and

[25] However the state responsibility is more entrenched in customary international law, such as the practice of SC, ICJ Case law and etc.

stages of the perpetrator's involvement in the realization of a state act of aggression, such as its "planning, preparation, initiation or execution" (Rome Statute, Article 8 bis (1)).[26]

And third, the state act of aggression - should be qualified in alignment with the definition contained in UNGA Resolution 3314, and it must, by its character, gravity and scale, constitute a manifest violation of the UN Charter. 1974 UNGA Resolution was oriented on the state acts and did not represent the leadership clause[27], Its achievement was to illustrate the examples that should be considered as acts of aggression, such as invasion, military occupation, and bombardment by the armed forces, those examples where shared by the Paragraph 2 of Article 8 *bis* in Rome Statute, indicating that the interpretation and understanding of those acts should be held in accordance with the predecessor resolution.

Thus, more importantly the resemblance shared by the Rome Statute and UNGA definition of the acts of aggression is depicted by the general clause in Article 8 *bis*, reference to the UN Charter and its prohibition of the use of armed force. "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" is the very first criteria that has to be met in order to qualify the state's act as an act of aggression, "inconsistent with the UN charter" concisely means that act should be unlawful use of interstate armed force which does not represent the self – defense, and has not been authorized by the Security Council (UNSC).

Furthermore, there is another, one of the most essential - threshold clause that has to be met, namely, due to its "character, gravity and scale" an act should establish the "manifest violation of the charter of UN". The clause was one of the major compromising points for countries that tried to refrain from accountability. From their point of view, it guaranteed that the state leaders' safety from the prosecution might only be threatened by the most serious, certainly illegal instances of the use of force (Permanent Mission of the Principality of Liechtenstein to the United Nations, 2019,7-8). At one glance, the wording of the clause might be seen as an open possibility for the state leaders to argue that the nature of their interstate use of force does not meet the gravity threshold.

[26] The wording is similar to the one used in Nuremberg Charter regarding the Crimes against Peace (Nuremberg Charter, Article 6(a)).

[27] It is said to have more political nature though, deriving from the pressing needs of cold war period, rather than oriented on the prosecution of individuals.

However, in reality the threshold does not primarily refer to the statistics of casualties and disastrous consequences of war[28], It most importantly refers to the "manifest violation of UN": As soon as the acts establish such kind of violation, they should be considered as the crime of aggression.

Therefore, U.N. Charter is equally important document for determining the crime of aggression. And the question, precisely, what acts should be considered as amounting "manifest violation of the Charter"[29]. Article 2(4) of the UN Charter as mentioned before bans "the threat or use of force", whereas, in chapter VII Articles 39-51 provides exceptions – allows use of force when it is 1. an act of self-defense[30] 2. authorized by the UNSC.

Some scholars note, that not any act can meet the "crime of aggression" threshold, and name accidental border crossing by an armed forces for the illustration (Kreß, 2016, p. 426), however that kind of force would not be considered as deliberately used "against another states sovereignty, territorial integrity or political independence", to violate Article 2(4) of the UN charter.

The absolute prohibition of the use of force represents an imperative, jus cogens norm, hence, if the use of the interstate armed force against another states sovereignty, territorial integrity or political independence, does not represent the exceptions stated by the charter, it amounts to the violation of *Jus Cogens* norm, which on the other hand, establishes the manifest violation due to the character of the imperative norms, that must not deviated. That is why some scholars reasonably suggest that the UN exceptions are the main determining factors of the crime of aggression, if the act of aggressions listed in the Article 8 *bis*(2) occurs, Interstate force which is not considered as an exception by the Charter, will amount the crime of aggression (McDougall, 2021, p. 126).

1.1.3. Means and Grounds for The Prosecution of The Crime of Aggression and The Legacy of ICC

Nuremberg trials where the first and so far, the only instance of the prosecution of military leaders for the crime of aggression. While some *ad hoc* tribunals where also established over time for the prosecution of international crimes, namely UNSC established tribunals such as ICTY in 1993 (for the crimes committed in former Yugoslavia) and ICTR

[28] Even though analyzing those elements are also important for collecting evidences of mass atrocities and evaluate the possible future remedies.
[29] There is no case caw on the interpretation of the following wording
[30] Self-defense itself should be evaluated by the criteria of necessity and proportionality.

(for the crimes committed in Rwanda) in 1994, The concept of the crime of aggression and the possibility of its prosecution remained intact. The crime was also not mentioned in the hybrid criminal tribunals established in Sierra Leone and Cambodia, on the basis of an agreement between UN and the certain states.

As some note, even after the concept of aggression had emerged in international law, either because of its controversial character or the prolonged process of codification that was delayed multiple times, the prosecutive mechanisms of the crime of aggression was almost nonexistent before establishing ICC, and before activation of the Kampala amendments, which made ICC jurisdiction over this crime into force. (Dinstein, 2011, p. 131) However, another point of view seems more reasonable: that the prosecution was legally possible, but the main hurdle were concerns regarding novelty of the crime in international law and absence of its positive definition (McDougall, 2023, p. 227).

However, even before Rome Statute, the concept had maintained actuality in case law, for instance, ICJ[31] with its judgements and advisory opinions largely contributed in the development of the law around legality of the use of force (Gray, 2012, 1)[32], despite the fact, that the Court had never found that the crime of aggression was committed, and avoided to discuss the concept of aggression itself, since it did not have the authority to prosecute individuals (Akande & Tzanakopoulos, 2016, p. 216).

With establishment of the ICC, the authority to prosecute the core international crimes was granted to the newly established court. However, it was not clear from the beginning if the crime of aggression would also be under the jurisdiction of the ICC (McDougall, 2021, p. 9), Whether the ICC would have authority to prosecute this crime was one of the biggest issue the agreement on which was hard during the negotiations on the definition of Aggression (McDougall, 2021, p. 8)**.** Some countries contradicted the ICC jurisdiction over aggression due to the limited time which was not enough to completely define the crime. But some hesitated because of reluctance to generally give the court such authority[33] (McDougall, 2021, pp. 9-10).

[31] ICJ was even handed out the allegations of aggression (Democratic Republic of Congo).
[32] ICJ of course did not have the authority to prosecute the crime of aggression, but had the ability shape the law around use of force through the Judgements on Corfu Channel, Nicaragua, Oil Platforms, and DRC v Uganda, and Advisory Opinions on The Nuclear Weapons Case and the Wall Case
[33] Among 15 states that were hesitant about including crime of aggression in the jurisdiction of ICC there was USA too, which argued that the prosecution of the crime of aggression had to remain absolutely beyond the court's jurisdiction.

Therefore, Kampala amendments were the outcome of heated discussions. Finally, the court's jurisdiction over the crime activated in 2017, ICC eventually became able to exercise the jurisdiction. For the ratifying countries amendments came into force in 2018[34] (Butchard, 2024, p. 9)

Besides determining ICC''s general authority to prosecute the crime, many jurisdictional issues were controversial, first, upon which basis should ICC exercise its jurisdiction, Second, whether it would be enough for the victim state to be the part of the amendments for the ICC jurisdiction to be exercised.

For the prosecution of the crime, while certainly, the crime should be present within all of its components that were defined before, there are two conditions determined by the Rome Statute, when ICC has the right to prosecute, first, according to Article 15 *bis*, on the basis of state party's referral or the prosecutors own initiative, when the states involved in conflict are Rome Statute parties, and have also joined Kampala amendments in any way, resulted in expressing their consent to the Crime of Aggression amendments. Therefore, only being the party of Rome Statute is not enough. Amendments also make it possible for the states to opt out of the jurisdiction over aggression (Rome Statute, Article 15 *bis* (4)).

The second way, according to the Article 15 *ter*, is based on the Security Council's referral to the ICC about the conflict situation, in this case there is no requirement for the conflicting states being parties of the ICC Rome Statute aggression amendments.

As for the next question, it should be said, that crime of aggression jurisdictional clause represents deviation from Article 12(2). While in case of other crimes – the territories of state parties are protected, in case of crime of aggression, ICC cannot prosecute neither aggressor or victim states, if they are not parties of the statute and amendments. (Permanent Mission of the Principality of Liechtenstein to the United Nations, Handbook, 2019, 9), meaning that both states involved in conflict must have ratified Rome Statute with Kampala amendments, Also unlike other crimes[35], in case of the crime of aggression, non – state parties cannot *ad hoc* grant the jurisdiction to ICC on case to case basis. Hence, it is believed that Article 5(2) creates special jurisdictional regime for the crime of aggression (Permanent Mission of the Principality of Liechtenstein to the United Nations, Handbook, 2019, 9).

[34] According to the Statute clause, in one year at least thirty States had to ratify it, to enter the amendments into force.
[35] Jurisdictional regime is presented in Article 12(3)

There is another difference between other international crimes and the crime of aggression. Other international crimes - genocide, crimes against humanity and war crimes are encompassing complementarity principle, which gives the state's primary responsibility to investigate and prosecute those crimes, while ICC will exercise its power only in cases of the absence of the states will or ability to prosecute. This principle is not present regarding the crime of aggression. As some scholars suggest, Kampala amendments creates different approach around this crime - the complementarity principle is absent, implicitly suggesting that it's not preferable to domesticate the crime (Kemp, 2015, p. 192). Of course, Rome Statute does not prohibit national prosecutions, however the clause, that the crime of aggression is defined for the purposes of Rome Statute only[36], hints about the priority of ICC jurisdiction (Kemp, 2015, p. 193).

It should also be noted that domestication of the crime must be based on the principles of active personality,[37] territoriality,[38] and universality principle[39]. Moreover, Personal immunities most probably will become the major challenge for the domestic prosecutions for foreigner high- officials.

For today, there are 46 states that had ratified Kampala amendments on crime of aggression including Ukraine, which ratified the statute with its amendments in 2024. The statute will enter into force in January 2025.

1.2. Nature of Russia's Invasion in Ukraine

In February 24, 2022, Russia launched the full-scale military invasion in Ukraine. The nature of Russian invasion is undoubtable –it represents an act of aggression, manifestly violates the absolute prohibition of the use of force presented in the UN Charter, and represents the crime of aggression both under the Rome Statute definition and under understanding of customary international law[40]: 1. Russia used the armed force 2. Against the sovereignty, territorial integrity and political independence of Ukraine 3. With no justification of self-defense and without authorization of UN. 4. The attack with its nature, gravity and scale established manifest violation of UN Charter. Moreover, Russian military action represents the

[36] Article 8 *bis*
[37] It does not represent the legal challenge for the country to prosecute its own nationals for the crime of aggression.
[38] Prosecution based on the principle of territoriality will face the problems regarding personal immunities of high officials of foreign states.
[39] Universal jurisdiction has not been tested yet regarding the crime of aggression; it is also predictable that the prosecution based on this principle will face the problems regarding immunities.
[40] Goes against the Nuremberg principles, UNGA resolution 3314 and etc.

listed acts, that regardless of a declaration of war, should be considered as an act of aggression according to Rome Statute, in alignment with UNGA 3314 Resolution (Rome Statute, Article 8 bis (2)).

Soon after the invasion UN General Assembly, in its Resolution stated, that Russia's use of force against Ukraine was an 'aggression ... in violation of Article 2(4) of the Charter", and that the Russian military conducts represented the acts of aggression (A/ES-11/L.1).

Russia tried to disguise the crime. Prior to invasion, Russia officially recognized the independence of Donetsk and Luhansk, Separatist regions, that were very much influenced over years by unofficial support of Russia (Värk, 2022, p. 2)[41]. Though the official recognition of Luhansk and Donetsk by Russia as independent states worsened the political landscape, which was indicated by many states and international organizations while condemning Russia's decision.

Recognition itself meant the breach of international law principles and interference in Ukraine's internal affairs, sovereignty and territorial integrity. Furthermore, now it became possible for Russia to carry out activities by the name of "inter-state" relations. Russia concluded friendship, cooperation and mutual assistance treaties with Donetsk and Luhansk, which as claimed by the treaty "for the joint defense" and "mutual security" ("Treaty of Friendship, Cooperation and Mutual Assistance between the Russian Federation and the Donetsk People's Republic", Article 3) included grounds for military assistance to "counter acts of aggression against them" and to keep "peace". ("Treaty of Friendship, Cooperation and Mutual Assistance between the Russian Federation and the Donetsk People's Republic", Article 4). The treaty by Article 5 was "granting" Russia power to use armed forces. Ratification of the treaty in Russia and the preposterous requests for the "military assistance" from Donetsk and Luhansk separatist regions took only one day, allegedly aimed for the "defense against the aggression of Ukraine" (Värk, 2022, p. 2).

Russia even followed the formal requirements –to get the consent from the Federation Council to send Russian troops in Ukraine[42], without any detailed explanation on the gravity

[41] In 2014, "the referendums" were carried out in those regions regarding their status, organizers later declared those regions as Independent states, based on the claim, that majority of people were supporting independence from Ukraine. Russian military support towards those separatist regions, as scholars claim, was broad enough to be considered as an intervention itself for the purposes of international law, however officially Russia followed the narrative that in 2014-2022 it was not interfering in Donbas region

[42] Relied on the "Generally recognized Principles and norms of international law"

or type of force planned to be used. President Putin titled the invasion as the realization of "peacekeeping functions".

It was not the first time, when Russia committed aggression against other countries territorial integrity by naming "peacekeeping" as the main purpose, and supporting separatists.[43] Clearly, Russian authorities attempted to manipulate the international law by following some formal requirements, tried to pursue the ungrounded narrative that the "special military operation in Ukraine" (Värk, 2022, p. 7), as they called the invasion, was held in accordance with the UN charter, and did not violate the charter's principles. The Main Russian argument referred to NATO expansion in the East (as the president Putin stated), as well as the false narrative that Russian speaking population was discriminated, oppressed and assaulted in Ukraine (Address by the President of the Russian Federation, 24 February 2022).

Hence, the first argument stated in the president's speech was collective self-defense alongside Luhansk and Donetsk. He even mentioned, that this "special military operation", was in alignment with the Article 51 (chapter VII) of the UN charter (Address by the President of the Russian Federation, 24 February 2022). Since the Article requires states to immediately report to security council regarding the exercise of self-defense, Russia also notified security council, maintaining that the "people's republics of Donbass" (Donetsk and Luhansk) as victim state needed help from Russia. However, only following the procedural requirements to camouflage aggression is not enough to automatically establish lawful self- defense, and especially, this procedural step taken by Russia did not authorize its invasion in Ukraine.

The right to collective self-defense and the right to request for the military support both only refers to actual states, and not the separatist groups of the other country. Aiding and encouraging them do not constitute collective self-defense, but in opposite, constitutes the violation of the noninterference principle in other country's internal affairs. The principle otherwise, as stated by the ICJ (ICJ, Nicaragua v. United States of America, 1986, §246) would lose its meaning. Russia cannot claim participation in collective self-defense while acting on behalf of separatist groups, which are not recognized as independent states by the international community, considering the fact that the regions unconstitutionally, and by breaching the international law principles, claimed independence. Besides, even in that narrative maintained by Russia, the invasion absolutely disregarded principles of proportionality and necessity,

[43] The same happened in Georgia in 2008

while attacking Ukraine beyond Donetsk and Luhansk. The full-scale military aggression absolutely depicts the real aims of Russia to deteriorate the territorial integrity of Ukraine.

Stating, that the interference was necessary for the Genocide prevention was another speculation. There had been no evidences of such oppression of Russian speaking population by Ukraine. Several days before the invasion in Ukraine, president of Russia claimed that "almost 4 million" people faced Genocide (Värk, 2022, p. 6). The statement was groundless, aimed to mislead that saving people was the main motive of Russia while encouraging separatist regions in Ukraine and abused the notion of the responsibility of protect and "humanitarian intervention"[44]. Legally, the responsibility to protect is the authority of UN within the involvement of the Security Council, meanwhile states are not entitled to use force on behalf of this this concept.

Another groundless argument of Russia was the protection of compatriots – Russian nationals or citizens abroad. In past, attacking the national of one state amounted an indirect attack on the state itself, but modern international law, that has shaped the concept of self-defense around the article 51 of UN charter, establishes different approach. Activation of self-defense requires the direct attack against state. Even though some countries had still developed practices of protecting nationals outside the borders, still, there are criteria that have to be met in order to classify the self – defense, like imminent thread of injury of nationals (Värk, 2022, p. 7).[45] no such situation had been present in Ukraine. Meanwhile, in order to claim the precondition that many Russians were present and damaged in Ukraine, numerous Russian passports were given away by Russia to originally Ukrainian nationals in Donetsk and Luhansk (Burkhardt, et al., 2022, p. 6).

Even in the scenario created by Russian rhetoric, the measures used by Russia were utterly unproportionate, absolutely going beyond just "protecting nationals or compatriots"[46].

[44] The letter suggests the possibility of military intervention in case of necessities, such as stopping war crimes, crimes against humanity, genocide, and etc. The concept of Humanitarian Intervention is largely debatable, and even though its existence is supported by various scholars, it is widely agreed that the concept leaves gaps for misinterpretation and misuse like in this case.

[45] 1. Imminent threat of injury to nationals; 2. Failure or inability on the part of the territorial sovereign to protect them; 3. Measures of protection strictly confined to the object of protecting them against injury.

[46] Russia also included "compatriots" in the list of those, who needed "protection. Compatriots unlike nationals are only connected to the country by ethnicity and language, there has not been any kind of practice developed in international for using force on behalf of protection of compatriots. By mentioning compatriots Russia tried to strengthen of false narrative, that many people in Ukraine were "in imminent need" to be saved.

The usage of the words “special military operation” indicates intention to avoid the responsibility towards international law (Värk, 2022, p. 8), when the “operation” in reality, was the clear invasion and violation of other country’s territorial integrity. Terminology used by the aggressor state’s leaders has no effect on qualification of the nature of invasion.

Therefore, to conclude, there is no question, that despite attempts to disguise the main intentions by some procedural steps, Russian political and military leaders who participated in any stage of directing state’s act of aggression have conducted the crime. It has reached by its gravity and scale the act of aggression threshold constituting the manifest violation of the UN charter and represents the crime of aggression defined in Rome statute. The issue however is the absence of the International Criminal Court jurisdiction over the crime of aggression committed by Russia against Ukraine.

II. PRESENT MEANS AND OBSTRUCTIONS FOR PUNISHMENT AND PROSECUTION OF RUSSIA

2.1. The Absence of ICC Jurisdiction in The Context of Russian Military Aggression Against Ukraine - The Accountability Gap

ICC, as concluded before, in general, holds the legitimacy and the authority to prosecute the crime of aggression, while none of the other international or regional courts are endorsed such authority. However, even though it is considered as the main mechanism for the prosecution, in this case, the main dilemma that the court faces is the lack of jurisdiction over this particular situation.

In 25 February, 2022, on the background of emerged discussions and "multiple queries" (as stated in the speech) regarding the prosecution of the crime of aggression against Ukraine, the prosecutor of ICC made a clear statement, that the court was unable to exercise jurisdiction over this particular crime, "given that neither Ukraine nor the Russian Federation are state parties to the Rome Statute" (Statement of ICC Prosecutor, 25 February 2022). As mentioned before, ICC exercises its jurisdiction in two conditions: on the basis of Security Council referral about the situation to the ICC (then no further conditions apply); (Rome Statute, Article 15 *ter*) and on the basis of a State Party referral or the Prosecutor’s initiative to start an investigation, when the States involved in the situation are parties to the Rome Statute and have expressed their consent to the Kampala amendments in some form**.** (Rome Statute, Article 15 *bis*)

There is the issue regarding prosecuting crime of aggression against Ukraine in given jurisdictional constraints:

1. Neither Ukraine nor Russia had ratified Rome Statute with Kampala amendments in the time of invasion. This requirement is absent - Russia decided to desist becoming the party of Rome Statute in 2016, while Ukraine was not the member state of Rome statute, although in 2015 by the declaration, it accepted the court's jurisdiction over three other international crimes: genocide, crimes against humanity and war crimes committed in the territory of Ukraine since 2014 (Butchard, 2024, p. 10). The listed crimes over which Ukraine endorsed the jurisdiction to ICC lacked the crime of aggression, since the ad hoc acceptance of court's jurisdiction is restricted in jurisdictional regime regarding this crime. In 2024, Ukraine ratified Rome statute with its amendments, however it will come into force in 2025 January.

The possibility of ICC obtaining jurisdiction if Russia continues its military aggression against Ukraine after January 2025, faces the major challenge since Russia will still not be the party of Rome Statute, which excludes the possibility of prosecution of non- state parties. Moreover, as mentioned before, some indicate, that even in case of expanding the jurisdiction there will be issues regarding the legality principle, which will be further discussed.

2. Meanwhile, to activate the court's jurisdiction on the basis of Article15 *ter*, the legal quandaries resulted by the interconnection of the UNSC and the ICC should be resolved.

Since Rome Statute nowadays represents the core document regarding the crime of aggression, and ICC is the main body entitled with the authority of prosecution, some scholars suggest to expand the means of prosecuting Russian leaders for the crime of aggression within the jurisdiction of ICC. This proposition is coherent, since the characteristic of the crime of aggression under Rome Statute is that it is defined for the "purposes" of Rome Statute only (Rome Statute, Article 8 *bis* (1))[47].

Bypassing ICC and referring the outside institutions to fill the accountability gap in case of Ukraine, might raise concerns: some argue, that the decades discussion on detailing the Rome Statute and inclusion of crime of aggression amendments might lose its idea, if there will always be an open possibility to substitute International criminal court by an outside body, instead of strengthening the court. It also threatens the unformal and independent international criminal justice system, that was aimed by establishing ICC. This is why some politicians and

[47] Implies the preference of the cases to be dealt with ICC

scholars firmly advocate for changing referral system, or expanding ICC jurisdiction either by amending the Rome statute (Speech by Federal Foreign Minister Annalena Baerbock, 2023), or encouraging the court to use more extensive interpretation methods (Mégret, 2023, p. 469).

2.1.1. Possible Solutions and Obstructions for the Execution of ICC Jurisdiction

The prosecution of the crime of aggression through ICC is not theoretically implausible. Scholars suggest two different alternative options, through which the execution of the jurisdiction might be possible: first one refers to the potential changes in the interconnection of the UNSC and ICC, the second refers to the possibility of broadening ICC jurisdiction itself.

2.1.1.1. UN Security Council and ICC

Even though there are no preconditions for the Article 15 *bis*, another way for the access to international justice might be achieved through UNSC and its referral to ICC which according to Article 15 *ter* does not require any precondition such as being the party of the statute or acceptance of the amendments. The sole referral of the UNSC is enough for ICC to start proceedings. However, this interconnection is seen by the international law scholars, as one the main obstructions, rather than possibility[48].

Since the creation of the collective security system, it was obviously implied that the Security Council, as the body completely entitled to take coercive or enforcement action, which is its exclusive prerogative, would have special obligations and powers regarding the prosecution of interstate use of force. Even the general definition of the crime of aggression adopted by UNGA in 1974 (Resolution 3314) primarily aimed to guide the UNSC in defining the state's acts of aggression (Permanent Mission of the Principality of Liechtenstein to the United Nations, Handbook, 2019, 2).

In the beginning of the establishment of ICC, and working on the possible crime of aggression amendments, there were discussions around what kind of connection could security council have with the court in terms of this particular crime, specifically, permanent member of the UNSC persisted, that it should have the authority to identify particular acts as the acts of aggression, as the precondition for the ICC to start investigation proceeding. Another suggestion was that the court should only be able to exercise its jurisdiction on the basis of the UNSC referral. Though other states expressed concerns that this kind of correlation would infringe the court's independence (McDougall, 2021, p. 10).

[48] Especially, particularly regarding the situation in Ukraine, Russian permanent membership in UNSC is commonly agreed as the factor, for which UNSC is not going to refer the case to the ICC.

The working group clearly intended to keep the same level of judicial independence compared to other three international crime regulated by the statute, however it was hard in the given circumstances when countries as it seems, were more willing to keep the subject of the aggression as the political matter rather than exhaustively regulated by international law. Limiting ICC jurisdiction by strictly consent-based regime made it possible to forgo some aspects of the UNSC involvement: as a result, according to Rome Statute, UNSC does not possess the sole authority to refer to the ICC regarding the crime or to determine whether the act of aggression happened or not. The letter requirement does not exist as the precondition for the ICC to continue proceedings.

The relationship between ICC and security council is complex throughout different stages of proceedings. The elements of this connection are present even in the circumstances when the ICC investigates crime of aggression on the basis of the state party referral, in this case, there is the duty to check whether the UNSC has already determined that the specific action from a state amounted an act of aggression (Article 15 *bis* (6)) . Such kind of determination from the UNSC is enough to continue proceedings, however the absence of this determination does not affect the investigation as the prosecutor may still continue it with authorization by the pretrial division. (15 *bis*, 7, 8)

The determination of "an act of aggression" is not also required by the UNSC in case of its referral to ICC, The UNSC is considered as an "outside organ", the decision from which is not binding for the ICC (Article 15 *ter* (4)).

Even though, apparently, ICC was granted with some amount of independency, some scholars since the beginning anticipated the possible political nature of this connection, which for the future would create legal dilemmas (McDougall, 2021, p. 78). UNSC acquired the essential levers over the proceedings: in the absence of state's consent to jurisdiction, it had become the only path to justice (Article 15 *ter*), not to mention that any time it can interrupt the investigation (Article 16).

Scholars wrongly predicted that the UNSC had to be considered as the supporter of ICC rather than opponent (Ferencz, 2009, p. 288), and claimed that in case of Security Council's apparent inactivity the scolding and condemnation factor from the international society would create the adequate pressure to compel council to act (Ferencz, 2009, p. 289). Today the given circumstances imply otherwise: the referral power given to the UNSC is considered as the

major impediment due to political selectivity of justice, and the veto power of its permanent members represents the detrimental decisive factor.

First of all, referral system itself creates jurisdictional gap. While none of the states were the parties of the Rome Statute and crime of aggression amendments in the moment of invasion, which means that Ukraine was not able to refer ICC regarding the crime of aggression on the basis of Article 15 *bis*, the referral of the UNSC to the ICC included in Article 15 *ter*, was left as the only present possibility. However, this referral system is absolutely ineffective in this specific situation, since Russia itself is among the five permanent members of the UNSC. It is obvious that the societal pressure did not have any impact on the UNSC, and it was not compelled to refer to the ICC regarding the Russian invasion in Ukraine.

And second, even in case of referral, there is the undoubtable expectation of Russia using Veto Power – even if this alternative path will be used to activate ICC jurisdiction by the referral of the UNSC, it is clear, that with high probability, it will become the subject of Russian veto. (Butchard, 2024, p. 10) Scholars even consider, that the referral is not practically plausible at all regarding this particular crime of aggression and is considered as absolutely theoretical (Grzebyk, 2023, p. 437). The prediction regrading Russian veto is grounded, considering that the country had already used its veto power against the draft Resolution of UNSC (S_2022_155-AR) which stated that the nature of Russian invasion in Ukraine violated the absolute prohibition of the use of force[49] (UN charter, Article 2(4)). The draft, which was supported by 81 member states, also compelled Russia to remove its military forces from the territory of Ukraine. (Butchard, 2024, p. 7).

The permanent members of the Security council have veto powers over any kind of Resolutions, including Resolutions regarding referrals to the ICC to investigate, prosecute the crime of aggression. It increases the threads of politically selective justice[50]. Scholars suggest several alternatives, by which the above-mentioned issues can be overcome.

The most prevalent suggested solution involves setting limitations on self-serving veto powers of the UNSC permanent members**.** There were various claims, that the veto power is often misused by the Permanent members of UNSC, for example, vetoes are often used by

[49] Later Russia again vetoed another draft resolution of UNSC (S/2022/720)
[50] The veto power regarding the ICC referral was already used by China and Russia regarding the atrocities in Syria

Russia to avoid the council's collective actions and measures against Russian aggression itself (Peters, 2023, pp. 163, 169-170).

The suggestion is legally grounded, since by abusing the veto power, Article 27(3) of the UN Charter - obligation to abstain from voting, the principle of good faith and the prohibition of the abuse of rights are violated. This creates the destructive flaw in collective security system. The fact that the prohibition of the abuse of rights represents an *Jus Cogens* norm in international law, suggests that the UNSC should annul self-serving vetoes based on the above listed norms and principles (Peters, 2023, pp. 163, 169-170). In this case, Russian Veto should be annulled if it will be made regarding the UNSC referral to ICC.

However, the solution is more theoretical: Those principles within UN charter already exists, and there is no answer on which impartial body can have levers over supervising how they are interpreted and used by the UNSC. Despite the fact that the abuse of law might seem obvious for the international community, the international pressure is not the sufficient substitute to oversee whether UN charter is abused or not.

Some scholars consider that UNGA acting upon the United for Peace resolution, can overcome the Russian veto on UNSC referral, however, it is still the UNSC's decision, to refer the case to ICC at all or not, and so far as anticipated, it has not referred and is not going to. Even in case of referral, it is highly doubtable that UNGA due to its illicit powers, is entitled to bypass Russian veto. The discussions on using those norms against unlawful vetoes, had been open since a long time without achieving the compromising point.

Furthermore, some scholars suggest the second option, which also includes the changes in the interconnection of ICC and UNSC – modifications in referral system. This alternative consists of the suggestion to amend the Rome Statute and to shift the referral power from UNSC to UNGA, or including UNGA as another body entitled to make such kind of referrals. (Butchard, 2024, pp. 12-13) By granting UNGA the ability to refer the situation regarding the crime of aggression to ICC jurisdictional system will be broadened.

This suggestion emerges not only from the current situation but also from the past discussions, when the working group oriented on crime of aggression amendments foresaw the political nature of the Security council's connection to the ICC regarding the crime of aggression and tried to replace the involvement of the council with the UNGA or other international courts on different stages of the ICC proceedings. (Ferencz, 2009, p. 286)

However, this solution also faces the major drawbacks, in the context of Russian military aggression, it may be completely ineffective. Changing the body that has the referral power will require amending the Rome Statute. It must also be said, that it took a decade to define and compromise over the crime of aggression amendments presently in force, amending the Statute once again and regarding the same issue will take uncertain amount of time, the endeavor will most likely be futile and even in case of its success, it might have no impact on the present situation.

1. Amendments will most probably be prolonged - in general amending should take place in accordance with the Article 121 of Rome Statute. The article does not limit the time scale for working on the amendments. Renewal of the discussions over the issue that had just finally been the subject of compromise after the decades lasting debates, will trigger more uncertainty and obscurity. The agreement on Kampala amendments was achieved on the expense of narrowing ICC jurisdiction, and keeping the UNSC role intact. The suggested solution consists of changing the pivotal point of compromise, hence, the lack of time constraints in the statute regarding amendments, the past experience of prolonged discussion, consistently postponed conclusion and the present importance for some countries to maintain the narrow jurisdiction of ICC, all imply that the amending process will be time consuming and ineffective to prosecute Russian military or political leaders, this will even more negate the current situation and perils caused by the impunity gap.

Even in case of the member states unanimous endorsement of the suggested amendments, due to every formal requirement and stage presented in article 121, the process will still take more than one year which might lose its impact on the current situation for the time when amendments will come into force. However, it is less expected that the Assembly of countries gathered to discussed proposed amendments will directly make a decision without establishing review conference.

2. Amendments will be depended on the ICC member states will – Obviously, there is no regulation that implies the necessity of the Statute amendments in case of its infectivity. Acknowledging the need for the amendments, make a proposal and submit it to the Secretary General of the UN is the ICC member states' prerogative, after which in no less than three month the gathered Assembly of member states will vote whether approve the proposal or not, or to establish the review conference regarding the initiated amendments by the majority of the

present states. In case of an absence of consensus on review conference, the decision requires the two-thirds majority of state parties.

Hence, the process lacks the legal nature, meanwhile countries may decide to abstain from permanently changing and broadening the jurisdiction of the statute by shifting the referral power to UNGA,

3. The endeavor will most likely be futile – it depends on the countries will, if they will make initiative or later agree on the changes. However, many ICC member states still haven't accepted the Court's jurisdiction on the crime of aggression, which implies their unwillingness to broaden the jurisdiction by allowing UNGA to make referrals. (Butchard, 2024, pp. 12-13)

4. Changes might still be ineffective – Even if all the above listed barriers will be handled by the fast-paced decision-making process, the amendments do not guarantee that UNGA will refer to ICC regarding the crime of aggression against Ukraine – UNGA is also considered as political forum itself, and lacks the legal accountability. Furthermore, the changes should also be accompanied with the previously suggested limitation on UNSC permanent member states veto power, since UNGA's referral to ICC will only be efficient only if Russian veto will have no impact on the proceedings. (Ferencz, 2009, p. 287)

5. Under UN charter unlike UNSC, UNGA lacks the ability to take coercive or enforcement action, which is also stated by ICJ (Certain Expenses of the United Nations, Advisory opinion, ICJ, 1962). Therefore, amendment will contradict the UN charter.

And last, as for the suggestions to exclude Russia temporarily or eventually from permanent members or in general from UNSC, those alternatives are the matter of politics and goes beyond the scope of law around the prosecution of Russian military aggression. Neither of them guarantees that after Russia's exclusion UNSC will refer the case to the ICC.

In conclusion, even though the interconnection of the ICC and UNSC is considered as the main impediment to prosecute crime of aggression against Ukraine, proposed solutions still do not represent the adequate medium for dealing with the current situation due to their theoretical nature, and impending prolonged proceedings resulting in inefficiency.

2.1.1.2 Possibility of Expanding the ICC Jurisdiction

Some scholars claim that abovementioned jurisdictional gaps could be overlapped not by initiating the changes in the interconnection of ICC and UNSC, but by broadening ICC jurisdiction, in general. (McDougall, Expanding the ICC's jurisdiction over the crime of

aggression, 2024, 1). The key to broaden ICC jurisdiction would be the amendments which would make it enough for one state involved in conflict, to be the part of the Rome Statute.

There is narrow and broad interpretation of jurisdictional clause. Broad interpretation implies that to exercise its jurisdiction it is enough that either one of these two: victim or aggressor states have accepted crime of aggression amendments. The narrow interpretation suggests, that the ICC should exercise jurisdiction when both of the states involved in the conflict have accepted the crime of aggression amendments (McDougall, Expanding the ICC's jurisdiction Over the Crime of Aggression, 2024, 1). The supporters of narrow interpretation refer to the second sentence of Article 121(5), which underlines, that the jurisdiction regarding the amendments of the statute should not exercise against the state party's nationals that has not accepted those amendments.

The suggested amendments of Rome Statute included removal of this special regime, so that it would leave no ground for interpretation - This change would make it clear that in order to exercise its jurisdiction, it will be sufficient for one of the states involved in conflict to accept the amendments, regardless the second state have accepted amendments, or are state parties of ICC or not.

It was stated several times by different officials, that those amendments could also be useful for the adequate response for the crime of aggression against Ukraine, if it would ratify the statute (Speech by Federal Foreign Minister Annalena Baerbock, 2023).

Although, first, the amendment process itself and then the ratification process will be time consuming. Second, Ukraine had already ratified the statute, however, from some scholar's point of view, which is quite reasonable, it will come into contradiction with the *nullun crimen sine lege principle* (Rome Statute Article 22 (1)), if ICC will exercise its jurisdiction retrospectively, on the basis of new amendments. Amendments would not constitute change for the current situation. Even leaders, advocating this idea, also admit that the process should occur in parallel of establishing special tribunal. There is no doubt, that this jurisdictional gap and possible amendments should be addressed for the future (Permanent Mission of the Principality of Liechtenstein to the United Nations, 2019,9) [51], but it is not the adequate mechanism for current challenge regarding prosecuting Russian military aggression.

[51] What makes it harder is that the agreement on that deviation was the core factor, that finalized the decade discussions over the inclusion of the crime of aggression in Rome statute, and it was the essential point of the ultimatum from various countries,

The very minority of scholars consider the possibility to prosecute the crime of aggression as the crimes against humanity (Mégret, 2023, p. 469) – The idea had been emerged long before the Russian invasion in Ukraine (Ferencz, 2009, p. 281), however the discussions became more relevant recently (Ferencz, 2015, p. 187).

The supporters of this opinion, consider the possibility to refer Article 7(1)(k) of the Rome Statute as the legal ground to prosecute the crime of aggression by the name of crimes against humanity, particularly, "other inhumane act". The right to self-determination is stated as the correlation point of the crime of aggression and other inhumane acts (Pinzauti & Pizzuti, 2022, p. 1062).

Scholars argue that Russia violated the self-determination of Ukrainian people (Mégret, 2023, p. 470). According to the ICC explanation, international and grave violations of fundamental rights amount to other inhumane acts (Decision on the confirmation of charges, Katanga and Ngudjolo, ICC, 2008, § 448). The main purpose, of prosecuting crimes against humanity, is to protect human rights from mass grave violations.

One of the underlying aims of Putin's military operation was to undermine Ukrainian people's right to self-determination by illegal alterations, to question the independence of the country. Self-determination consists people's right to choose by themselves their political direction, status, their government and policy without outside intervention, determine their own economic, social and cultural route. The principle is stated by the UN Charter Article 1 (2).[52] Some scholars considered that the annexation of a country to compel people to take certain political direction, amounts the breach of self-determination (Crawford, 2007, p. 137). Others also claim that there is no need of absolute annexation or overthrowing authorities to establish the violation of self-determination, rather it is enough to unlawfully use a force for the purposes to establish desired political course and agenda in other state (Pinzauti & Pizzuti, 2022, p. 1066).

The supporters of this idea, highlight the various means through which Russia aimed to intervene in the political independence of Ukraine, coerce the narrative that Ukraine has never been independent. Use of force in order to gravely interfere in Ukraine's political independence and sovereignty should be already considered as the violation of the self-determination of Ukrainian people – the clear illustration of this is the massive Russification process – including

[52] As one of the basis of peace, and one of the purposes determined by the charter, other founding documents of regional or international law also acknowledge the right.

the Russian attempts to erase Ukrainian identities on occupied territories, brutally eliminate demonstrations, install new authorities, organizing referendums against article 50 of the Geneva conventions, extending use of Russian language, pro-Russian broadcasts and channels. (Burkhardt, et al., 2022) Everything that led to those illegal "referendums" of Ukrainian regions such as Luhansk and Donetsk and full-scale invasion of Russia in the name of "special military operation". The grave breach of self-determination of Ukrainian people in internationally recognized borders of Ukraine, amounts to other inhumane acts.

As mentioned before, Russian claim, that "peoples" of Donetsk and Luhansk are entitled to external self-determination is manipulation and not the reasonable argument – Russians are one of the minority groups in their country, regardless strengthened emphasis on Ukrainian language education, they had not faced human rights violations against them, they had been living in the borders of Ukrainian territory with other minority groups, and Ukrainian people. The group entitled to external or in general, self-determination, are people – state itself and not any particular minority group. Russian invasion precisely aimed to devoid Ukrainian people to freely choose their government, political course and status and place in international community.

The breach of the right to self-determination does not automatically classifies as the crime against humanity, in particular, 'another inhumane act" enshrined in the Rome Statute Article 7. To be qualified as another inhumane act according to Article 7(1)(k), two requirements have to be met: 1. the act should cause great suffering, or serious injury to body or to mental or physical health 2. And by its nature and gravity, should equal to any other acts listed in the Article 7(1).

The supporters of this idea, claim that by depriving Ukrainians of the possibility to engage in determining their own political status and countries future, the first criteria is clearly met: the fact that Ukrainians are forced by the circumstances to leave their homes[53], they suffered physical injuries, amputations, witnessed the brutal killings of their family members. Scholars also claim that the fundamental rights are not constrained by the integrity or liberty of a person, hence, the right to self-determination - in various regional or international law documents, should also be considered as fundamental right, the breach of which by its nature equals the above listed acts in Article 7(1) of the Rome Statute, while for assenting the gravity

[53] But it does not fall under Article 7(1)(d))

of the act, scholars underline the mass violations of international humanitarian law: such as deliberate targeting on civilians, rape and sexual violence and etc. (Pinzauti & Pizzuti, 2022, p. 1066).

However grounded this opinion might seem, even the promoters of the idea admit the enormous perils connected with its implication.

Above all, it raises issue regarding the legality principle (Pinzauti & Pizzuti, 2022, p. 1066), Article 22(2) of the Rome Statue prohibits to extensively construe the definition of the crime on the basis of analogy. In the presence of doubt, interpretation should be made in favor of the person who's investigated, prosecuted or convicted.

In this particular case, the predominant problem is that according to ILC Special Rapporteur on peremptory norms of general international law, violation of the principle of self-determination is not criminalized, it does not establish a crime (ILC, UN Doc. A/CN.4/747, 2022, §213.) Though the scholars claim that it is not necessary for the breach the self – determination to establish a crime, since it is covered by the "other inhumane acts" under article 7(1)K which is criminalized (Mégret, 2023). However, the letter interconnection between the self-determination and other inhumane act is not commonly agreed in international society, and implication of this approach will indirectly criminalize the violation of self -determination. Article 22(2) of the Rome Statute does not allow this kind of alteration.

Moreover, prosecuting crime of aggression under the name of crime against humanity will be an artificial extension of the ICC jurisdiction, Article 22(2) while prohibiting using of the extensive interpretation on the basis of analogy, excludes such possibilities. These detailed restrictions of construing methods in Rome Statute aim to eliminate any kind of deviation and "creative" interpretation of norms that had place in ICC predecessor *Ad Hoc* tribunals – for example, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were following the Vienna Convention on the Law of Treaties (VCLT) regarding legal interpretations, and they were highly criticized for going beyond boundaries. The way those tribunals construed law was considered "adventurous", (Manley, et al., 2023, p. 772) since Vienna Convention did not include the specific rules on interpretation that are essential for penal law, Rome Statute had to specify

those methods and principles of interpretation in a way which is acceptable for the international criminal law.[54] It was an advent of the firm, far more stable and impartial justice.

Prosecuting crime of aggression in the name of crimes against humanity debilitates this achievement. The statute should be strictly construed. Scholars researching the ICC interpretation principles, indicate how unprecedently essential has the principle of legality become in Rome Statute - The meticulously detailed definitions of the crimes (Articles 6-8) and principles (22-24) suggests that the principle of legality cannot be override (Manley, et al., 2023, p. 775).

Even if the legality principle will be disregarded, this kind of interpretation blurs the distinction between *Jus ad bellum*, and *Jus in bello*, (Pinzauti & Pizzuti, 2022) It uses the humanitarian calamities caused by violating international humanitarian law to establish the gravity of the nature of conduct. Meanwhile the crime of aggression covers the issues of *Jus ad bellum*, which is absolutely distinct.

The scholars predict possible backlash as one of the hurdles for implementing the suggested interpretation (Pinzauti & Pizzuti, 2022). Although the anticipated criticism will be reasonable:

It will create hierarchy regarding international crimes in international criminal law system (Mégret, 2023, p. 469): it would imply that the crime against humanity includes the crime of aggression. Meanwhile this kind of correlation is not right neither under Rome Statute nor by the customary law. In 1946, International military tribunal at Nuremberg called the Crime of Aggression "the supreme international crime" (International Military Tribunal (Nuremberg) Judgment of 1 October 1946). Reducing the line between this and other crimes will undermine the specificity of the crime of aggression, legal protection and accountability system.

Following the Rome Statute, crime of aggression differs from any other international crime. It's a leadership crime, committed by the persons in authority to direct state towards the act of aggression (Rome Statute, Article 8 *bis*). Major differences (context, accountability

[54] The Vienna Convention on the Law of Treaties in Articles 31 and 32 suggests several interpretation elements, that encompass the general framework for different treaties. The importance of those articles decreased within the presence of Rome Statute and the interpretation principles enshrined in it; since due to the legal maxim of "*lex specialis derogat legi generali"*. More special rule overrides the general one.

system, reason of criminalization and etc) between these two crimes makes it preferable to not to blur the line between them[55].

Nonetheless the fact that the idea aimed to eliminate political selectivity (Mégret, 2023, p. 469), the problem is that this issue would still remain questionable for some – When will the court give itself the power of the broad interpretation? If there are detailed legal frameworks of two distinct international crimes – crime of aggression and crimes against humanity, it would absolutely become the matter of ICC's subjective vision to create new order of international criminal justice whenever it considers the necessity to do so. It will undermine the trust towards ICC. The selectivity will remain, since it will become in the court's discretion to decide when to prosecute the crime of aggression under the name of crimes against humanity without prior guidelines or even without general implication by the Rome Statute about the possibility of such kind of extensive understanding.

To conclude, making decision on the basis of interpretation that obviously changes the whole system of international law and goes beyond the scope of the authority of ICC considering the strict interpretation requirement regarding penal law. In general, it is obvious that the present mechanisms cannot adequately respond the necessity of prosecuting the crime committed against Ukraine.

2.1.2. Concerns and Speculations Regarding Impartiality of The ICC and Political Selectivity

Even in case of expanding ICC jurisdiction, there is the problem related to doubts regarding the impartiality of the ICC and its political selectivity. Some argue that the court struggles with bias since it is mostly financed by the western countries (Moran, 2023, p. 95), As for 2022, the biggest contributors for the ICC were Japan, Germany, France and UK (Financial Statement, ICC-ASP/22/12).

Some highlighted that the court's bias approach was connected with postcolonialism, more specifically, it emerged from avoidance of the reparation for the atrocities caused by colonialism (Moran, 2023, p. 99). They argued, that economic, military and other advantages

[55] Different by context (Crime against humanity might be conducted in the peacetime, while crime of aggression specifically refers to the aggression act), different perpetrators and accountability system (the state leaders are responsible for the crime of aggression), different underlying intent (crime against humanity is committed against civilians intending the broader harm, while crime of aggression encompasses military actions against another state), the reason of criminalization (in case of crimes against humanity, to protect and prevent mass human right violations, while in case of crime of aggression the primary reason is to strengthen international peace and security).

gave western and Christian countries the privilege and power to dominate their narratives and force their preferred application of law in the situations that involved their interests. This, as they claimed, created imbalance in the international Justice system. For the illustration, at some point in 2022, There were seventeen ongoing investigations by the court, eleven of which were African countries, all of them former Western European colonies. (Moran, 2023, p. 101)

However the perception of the ICC being the "neocolonial tool" against African countries was thought to be African leaders propagated narrative (Dancy, et al., 2020, pp. 1444-1446). In 2016 African Union by the big margin voted in favor to withdraw from the international criminal court (CFR Blog, 2016), though the vote was symbolic and has no legal consequence since it is up to individual countries to decide whether they will remain parties of the court or not. In 2017 African Union (AU) even issued resolution suggesting African states to *en masse* withdraw from Roma Statute (Dancy, et al., 2020, p. 1446). However, the various analysis showed that African people suffering from atrocities were more inclined towards the trust for ICC (Dancy, et al., 2020, p. 1451). Nowadays though the court is supported by large community in African countries (CFR, 2024).

The first time ICC opened investigations beyond African continent on the basis of the prosecutor's *proprio motu* request was in January 2016, when the court started investigations regarding the potential war crimes and crimes against humanity committed in Georgia in 2008 by Russia during August war (Situation in Georgia, ICC-01/15). The tendency to orient on only African continent has clearly changed considering the current investigations of the ICC in the Palestinian territories, Myanmar, Ukraine (regarding international crimes except crime of aggression), and Venezuela, (CFR, 2024) That implies that the court is expanding its impact.

However, some still suggest, that the court is still directed by the politics and the will of the most powerful states. This view is also strengthened by pointing out that the major political players such as China, India, Israel, Russia, and the United States, are not the parties of the ICC, meanwhile US, China, Russia, are the permanent members of the UN, and their referral, deferral and the veto powers as some argue, clearly guides the ICC into indulging or abstaining from investigations in various situations (Shamsi, 2016, p. 97). Investigations against P5 states had been always the challenge for the ICC,[56] this especially refers to Russia (Kuhrt & Kerr, 2021, p. 178). For example, the ICC case in Georgia is considered as the court's most

[56] Investigations regarding Georgia or Ukraine, UK-Iraq, Afghanistan.

prolonged investigation, which still adequately does not respond the atrocities which happened in August war (EJILTalk, 2023). Those powers of P5 members are even more significant regarding the crime of aggression (Shamsi, 2016, p. 97).

The point is that, in case of expanding the ICC jurisdiction on crime of aggression regarding Ukraine, either by changing the referral system or the veto powers of the UNSC; amending Rome Statute jurisdictional clause, or using the extensive interpretation by the ICC under the cover of other inhumane crimes, it would become the cause of depriving ICC from trust, as it would suggest that the decades discussion on formation of the legal and institutional framework around the crime of aggression can abruptly manipulated by the dominating European States for their interests. While international criminal justice, and the International Criminal Court as its instrument is already called sometimes as "Euro- centric" for only responding to the conducts committed by the non- Western countries, and abstaining to efficiently refer to the abuse of power by any state without political selectivity (Moran, 2023, p. 100). Russia will most probably maintain this narrative. Even in case of Georgia, Russia pressured the speculations, that investigation was one- sided and had "anti – Russian" purpose (Kuhrt & Kerr, 2021, p. 177).

Another problem is the possible alterations in the ICC investigation process later. For example, even not being party of the ICC, US stance had always been one of the biggest role players in determining ICC directions. For example, in 2018 US stopped cooperating with the court because of the court's preliminary investigation of alleged Israeli crimes in West Bank and Gaza Strip and as well as the pressure from ICC Prosecutors to investigate potential war crimes of the US armed forces and the CIA personnel in Afghanistan. Moreover, Trump's administration-imposed sanctions on the ICC staff and individuals related to the court, when in 2020, ICC renewed investigations in Afghanistan. (CFR, 2024).

While president Biden supported cooperation, in 2023 he opened the doors for the US to collect and share evidences of Russian war crimes with the ICC. However, with newly elected President Trump it is uncertain for many, if US will pursue cooperation and support regarding prosecution of crimes in Ukraine and investigation against Putin, considering his statements and will to quickly settle the conflict (CFR, 2024).

To conclude, prosecuting of the crime of aggression committed against Ukraine within ICC faces the crucial legal issues – On one hand it requires amending the statute, which is the prolonged and controversial process, and shifting the referral power to UNGA, the body which

is not in general, entitled of such authority, On the other hand, it still requires amendments in Statute to broaden the jurisdictional clause, and establishing it enough basis for one country of the conflict to have ratified the statute within amendments, this idea might attract attention since Ukraine have now ratified the statute and Kampala amendments, however, in this case, even if broadening ICC jurisdiction through new amendments, they should not have retroactive effect due to the principle of legality. In any case, disregarding these pivotal legal dilemmas will result in questions regarding the selective criminal justice system that adapts due to the interests of European countries.

2.2. Regional and International Response on Russia's Aggression against Ukraine

2.2.1. Statements, Sanctions, and Expressed Political Will for Prosecuting the Crime of Aggression against Ukraine

The international and regional response on Russia's military aggression against Ukraine was instant, moreover, even before the invasion, after "acknowledging" independence of Donetsk and Luhansk By Russia, international community condemned the act as the interference in Ukraine's territorial integrity, preemptively noticed the indicators of the impending attack and took some measures – which explains the emergency meeting of the UNSC and Secretary General's direct address to the president of Russia in February 23, 2022, to "give peace a chance" (UN News, 2022). Besides, this was the day when EU introduced the first package of sanctions against Russia[57] (EU, Sanctions against Russia, Timeline).

Therefore, anticipated Russian invasion was followed by an immediate international response with 141 states condemning the aggression against Ukraine on the emergency special session of UNGA held within a week after the attack. By the Resolution of 2 March UNGA highlighted commitment to territorial integrity, sovereignty and independence of Ukraine, acknowledged Russian invasion as an act of Aggression in violation with the absolute prohibition of the use of force by UN Charter and demanded withdrawal of Russian troops from the territory of Ukraine (UNGA Resolution A/RES/ES-11/1). Shortly after the invasion EU had imposed second package of Sanctions freezing the assets of the president and the minister of foreign affairs of the Russian Federation (EU, Sanctions against Russia, Timeline).

Russian invasion was followed by an unprecedent reaction from the Council of Europe which, at first, suspended the voting power of Russia the next day of invasion, and later, on 16

[57] The package included targeted sanctions on individuals, restrictions regarding economic relations on separatist regions, and restrictions on Russian markets and Services

March 2022, by the decision of the committee of ministers expelled Russian Federation from the organization due to its unalignment with the organization's core principles. It was the first time in history when Russia was excluded from international organization. Since 16 September 2022, Russia is not a party to the European Convention on Human Rights (CoE, Follow-up, 2024).

NATO faced the urgent situation caused by the Russian attack on Ukraine by calling an Extraordinary Summit in Brussels in 24 March 2022, also including G7 leaders, condemning Russian aggression (Extraordinary Summit of NATO, 2022). G7 also made the urgent statement emphasizing that Russia had to stop "the illegal war of aggression' and had to be accountable for the damage caused. (G7, Foreign Ministers' Meeting Communiqué, 2024).

Russian aggression also faced strong condemnation from the OSCE**,** the African Union, the Economic Community of Western African States, the Pacific Islands Forum, the Organization of American States, the Caribbean Community, the Nordic Council and other organizations. This response of course, from international community aimed to compel Russia to withdraw its troops. However, the attempts did not stop the invasion.

Since then organizations had been actively cooperating to strengthen their position, support Ukraine and find effective mechanisms to overlap various gaps in security system as Russian aggression continues in Ukraine. Till this day, EU in total had imposed fourteen packages of sanctions (EU, Sanctions against Russia, Timeline). In 2022, UNGA addressed the issue of Russian Aggression in three other Resolutions (UNGA Res A/RES/ES-11/4, Res A/78/322 & Res A/RES/ES-11/5)[58]. one of the most significant of which is the Resolution of 14 November, where UNGA acknowledged the necessity of accountability of Russian Federation for breaching international law, including "its aggression in violation of the Charter of the United Nations" (A/RES/ES-11/5, Par 2).

Russian military aggression and infectivity of legal or political instruments to stop the ongoing invasion shed light to various drawbacks in international security system: as mentioned before, the veto power of UNSC permanent members had been seen as one of the challenges, As well as the limited jurisdictional reach of the ICC. And even though overcoming those challenges became the subject of debates, it was obvious the main problem in

[58] UNGA Resolutions of: 12 October 2022 'Territorial integrity of Ukraine: defending the principles of the Charter of the United Nations'; 2 November 2022 entitled 'Report of the International Criminal Court' & 14 November 2022 entitled 'Furtherance of remedy and reparation for aggression against Ukraine'

international agenda was how to fill the impunity gap for the crime of aggression in this particular situation regarding Ukraine. Talking about possible amendments of the ICC which still will not have the retroactive effect to be relevant for responding Russian military aggression, or about changes in the international organization itself, which still remains as only an abstract possibility[59], could not lead to the relevant solution for holding Russian leaders accountable, even though those discussions are still necessary for the future prevention of impunity.

In March 2, 2022, ICC on the basis of referral of 45 member states opened investigations for the other three crimes committed in Ukraine since 2013 (Situation in Ukraine, ICC-01/22, Investigation). As a result, on March 17, 2023, the court issued arrest warrant against the president of Russian Federation **(**ICC, 2023). As Ukraine brought the case in ICJ against Russia arguing that Russia manipulated the Genocide convention, by naming it as the ground for "special military operation" which amounted the violation of the convention itself, In 16 March 2022, ICJ ordered Russian federation to instantly suspend its military operations the provisional measure, which of course, had not been followed.[60] Meanwhile ECHR considered the applications made by Ukraine and Netherlands against Russia as partially inadmissible, due to the lack of Ukrainian governance in separatist regions (Ukraine and The Netherlands v. Russia, ECtHR, 2022). With this decision the court highlighted what was already obvious, Russian interference and military presence in the separatist regions. Even though it was already acknowledged by international community: G7 considered Russia as the party of the conflict (G7 Foreign Ministers' Statement on Ukraine, March 2021), as well as ICC report had recognized Russia's military presence (ICC, Report on Preliminary Examination Activities, 2016, §158). Though the crime of aggression – the primary conduct which induced the chain of atrocities remained unaddressed.

In October 16, 2022 the Foreign Affairs Ministers of Estonia, Latvia and Lithuania by the joint statement called for the establishment of a special tribunal for the crime of aggression against Ukraine (Joint Statement, 2022). Establishment of the special tribunal was the only effective solution left in this case, even the leaders who emphasized the need for changes in the system and law in general to eliminate impunity gaps, could not avoid the necessity of

[59] For Instance, Changes regarding the UNSC permanent membership of Russian Federation

[60] Later, the judgement showed the flow in Genocide convention itself, since the manipulation of the convention remains beyond the jurisdiction of the court.

special tribunal in case of Ukraine (Speech by Federal Foreign Minister Annalena Baerbock, 2023). In favour of its establishment Lithuania, Latvia, Estonia and other countries as well as European Parliament adopted resolutions.

The chain reaction stressing on the need to hold Russia accountable and to establish the special tribunal that will investigate particularly the crime of aggression with the support of UN depicted in the statements of the President of the European Commission Ursula von der Leyen (Statement Nov 29, 2022)**,** as well as the political leaders of various countries such as Germany, Poland and others.

In European Council conclusions of 20 - 21 October 2022, the council recognised Ukraine's interest and actions in order to reach the full accountability of Russia for committing international crimes in Ukraine, including the crime of aggression, Council called the high representative and the commission for discussing alternative ways of reaching accountability (EUCO 31/22, 2022, Par 6).

In November 30, 2022, the commission introduced different solutions for holding Russia accountable for the crime of aggression on the background of absence of the ICC jurisdiction. Among the possible accountability mechanisms commission distinguished two: Special independent international tribunal based on multilateral treaty and a specialised hybrid court merged in national courts of Ukraine with international judges. Meanwhile any direction should be chosen in coordination with Ukraine (EC Press Release, Nov 29, 2022) .

In the conclusion of 15 December 2022, The council once again highlighted the importance of full accountability of Russia, and urged the Commission, the High Representative and the Council to take subsequent steps regarding the crime of aggression in alignment with WU and international law, since the prosecution of this crime presented the common interest for the international society (EUCO 34/22, 2022, Par 8).

Finally, European Parliament adopted the resolution in January 19, 2023, on the establishment of a tribunal on the crime of aggression against Ukraine (2022/3017(RSP), 2023) calling for the establishment of the *Ad Hoc* special tribunal, that, as mentioned in the text, would "complement" ICC. The resolution referred to the different old or recent documents around the crime, historical events that lead to its conceptualization, past and present statements emphasizing on the impunity gaps, ongoing situation in Ukraine and expressed positions regarding the matter. Starting from mentioning Nuremberg trials and the importance of effective criminalization of the "supreme crime", The resolution implicitly indicated, that

the establishment of the special tribunal for Ukraine would be the logical conclusion of the situation.

Since the tribunal has not yet established, various organizations got involved into the cooperation to investigate the crime. The Council of Europe established the register of damage to evaluate the damage caused by the Russian invasion in Ukraine, and to fully "hold Russia accountable for its acts" (CoE, Follow-up, 2024). This also aims to collect evidences, and to assess the gravity of conducts committed by Russia, which would be crucial for prosecuting international crimes including crime of Aggression. The will to prosecute the crime is present, and found its depiction in various ways, including the establishment of the International Center for the prosecution of the crime of aggression.

2.2.2. Establishment of the International Center for the Prosecution of the Crime of Aggression

Even before the establishment of unified investigation system for the crime of aggression, there were discussions on international cooperation regarding investigating core international crimes in Ukraine, including aggression. European Union Agency for Criminal Justice cooperation in three weeks after the Russian military attack in Ukraine, encouraged the establishment of joint investigation team (JIT) – Which for today includes Ukraine, Six EU member states, ICC and Europol, as well as Core International Crimes Evidence Database (CICED), for collecting, analyzing, and securing evidences (Eurojust, 2024).

In February 2, 2023 The President of the European Commission Ursula von der Leyen mentioned the impending establishment of the international Centre for the Prosecution of the crime of aggression against Ukraine (Statement at the joint press conference, Feb 2023). After the official statement on its establishment made in March (Statement, Brussels, March 3, 2023) The center was launched in July 3 at Eurojust, in which the newly established center was integrated (Eurojust, Press Release, 2023). Alongside with Ukraine, the initial participators included the countries from Joint investigation team - Lithuania, Latvia, Estonia, Poland and Romania. Furthermore, the office of the prosecutor of ICC is also involved, as well as special prosecutor for the crime of aggression appointed by the US, which facilitates the center's investigation (Eurojust (n.d)). The center is funded by European Commission, Eurojust (Eurojust (n.d)), some countries have also expressed the will to financially support the center's activities (Miller, Press Statement, 2023).

The international center primarily aims for facilitating the national investigations around the crime of aggression conducted by Russia. ICPA draws the common strategy for the investigation and prosecution the crime, and gives the independent prosecutors from various countries the possibility to more efficiently collect and share evidences (Eurojust, 2024). Meanwhile CICED ensures the protection and relevant classification of the collected evidences. The work of ICPA will contribute the future prosecution of the crime before any court, tribunal that will obtain jurisdiction over prosecuting Russian Aggression.

The center is the clear indicator of the expressed will of international community to not to bypass Russian military aggression without accountability, since it absolutely ensures the exhaustive investigation process and represents the preparatory phase for the prosecution of the crime.

To conclude, in general, international society had come into terms with reality that demands establishing the special tribunal as an only adequate solution for responding Russian invasion in Ukraine. The will is stated and preconditions are prepared – through statements and different legal documents organizations are expressing the readiness for establishing special tribunal, while the works of ICPA and JIT through collecting evidences are preparing the sufficient background for the prosecution of Russian military aggression.

III. SPECIAL TRIBUNAL AS THE POSSIBLE SOLUTION FOR THE PROSECUTION OF RUSSIAN MILITARY AGGRESSION

Soon after Russian invasion in Ukraine, Ukrainian parliament asked UN, EU and Council of Europe for international support for establishment of the special tribunal for Ukraine (Euro.Pravda, 2022), Experts, professionals and politicians from different countries also signed the joint declaration calling for its establishment (Combined Statement and Declaration, March 2022).

Establishing a special tribunal for Ukraine as mentioned by the European Parliament resolution (2022/3017(RSP), 2023) and stated by the leaders of numerous countries (Joint Statement of Lithuania, Latvia, Estonia, 2022; Statement of France, 2022; Statement of Baerbock, 2023)[61], soon has been considered as the incomparable solution for tackling down the impunity gap. The idea had also been widely supported by the international community -

[61] The very early statements were the joint statements of Estonia, Lithuania, Latvia, later other countries also started supporting the idea of special tribunal.

G7 (G7 Foreign Ministers' Communiqué, April 2023), The Council of Europe (CoE PA, Res. 2436, 2022), NATO (NATO PA, Declaration 11 SESP 22 E rev.1, 2022), OSCE and others. Since the Ukrainian courts cannot be considered as capable to prosecute the crime of aggression committed by the nationals of the "aggressor" state, due to immunities (Open Society Justice Initiative, Brief, 2023,7), and largely, due to the concerns regarding impartiality and legitimacy (D'Alessandra, 2023, p. 60), In order to endorse the special tribunal with the authority and legitimacy and to grant it the "international" character, there are several possible forms of establishment of the special tribunal.

3.1. Possible Forms of the Tribunal and Relevant Precedents

The very first thing, that the majority of international society agrees on, is that the tribunal should be international (McDougall, 2023, p. 214) (Hathaway, 2022) Belief that national courts are devoid of enough authority to prosecute the crime of aggression in the context of Russian military invasion is grounded: non-Ukrainian courts might struggle with the insufficiency of jurisdiction as non-territorial states. Even though Lithuania is Among 18 countries, that had assumed universal jurisdiction in accordance with the Princeton Principles of Universal jurisdiction, and based on the Universal jurisdiction had proclaimed domestic investigations (Article 7 (Universal jurisdiction), 110 (Aggression), 111(Prohibited War attack), Criminal Code), it is debatable among the Aggression scholars whether universal jurisdiction at all refers to the crime of Aggression (McDougall, 2023, p. 214). Poland, claims that its judicial competence arises also from the protective principle – enshrined in polish penal code, which refers to the acts against the interests or the security of Poland, whereas, it is not specified, that the clause can extend to the situation when Poland does not represent the party of military conflict and therefore, is not facing the direct hazards for security, that has not been interpreted by the domestic courts so far (McDougall, 2023, p. 214).

Notwithstanding the abovementioned issue of the lack of jurisdiction, the primary challenge of domestic trials centers on the problem regarding personal immunities of Troika members (Open Society Justice Initiative, 2023, 5). According to the ICJ, in the Arrest Warrant case. high-ranking officials have immunities from other States jurisdiction, both civil and criminal (ICJ Judgement, Democratic Republic of the Congo v. Belgium, 2002, § 51), including international crimes, (ICJ, § 58)[62] among others, the crime of aggression.

[62] However, the personal immunity protects High officials from prosecution, arrest warrants, it does not protect them from investigations.

Furthermore, domestic courts would lack credibility without the presence of defendants, and would be devoid of enforcement mechanisms too (McDougall, 2023, p. 216), national courts would most likely suffer from an absence of impartiality and therefore, universal trust necessary to prosecute the leaders for the international crime (McDougall, 2023, p. 217) and additionally, it will ultimately rise the questions regarding the competency and expertise of domestic judges to prosecute international crime (McDougall, 2023, p. 217).

For the reasons listed above, and primarily, to overcome the issue of immunity, the tribunal should be international, since as suggested by the case law, personal immunities do not apply before international courts and tribunals (Open Society Justice Initiative, 2023, p. 8). The "international" nature of the tribunal is determined by several criteria: Acting on behalf of interests of the whole international community (Open Society Justice Initiative, 2023, p.10) [63], based on which the court is not limited by the principle of *par in parem non habet imperium*[64], in short, international tribunal serves the interests of "international justice" (SCSL, Appeals Chamber, Prosecutor v. Charles Taylor, §51) and the sovereign equality of states is not violated (Open Society Justice Initiative, 2023, p.10), Furthermore, it should exercise jurisdiction on behalf of numerous states, and not one, (Open Society Justice Initiative, 2023, p.11) Separation from state organs and distinction from national jurisdictions are the characteristics of international tribunal (ICC, Appeals Chamber, The Prosecutor v. Omar Hassan Ahmad Al Bashir, 2019, §115), as well as its ability to depict the will of the international community (D'Alessandra, 2023, p. 61).

Scholars find the source of jurisdiction relevant to understand the tribunals nature – international tribunal should be founded upon the framework of international law – originating from either sources of international law, for instance, international treaty, agreement, or the authority, organization which is established and acts on the basis of such kind of treaty, such as international (for instance UN) or regional organizations (EU or CoE) (D'Alessandra, 2023, p. 61). Some find the joint concurring opinion on ICC's appeal's case relevant (Open Society Justice Initiative, 2023, p.13). Judges highlighted, that when "The collective Sovereign will of the enabling states" represents the main jurisdictional source, it ultimately grants the court

[63] Even though some might claim that prosecuting crime of aggression might be in the interest of the international community, especially when it comes to exercising universal jurisdiction, this is not the only criteria that has to be met to constitute the "international" nature of the crime.

[64] National courts are considered as the part of state's sovereign power, which is constrained by the other states' sovereignty. According to the principle one sovereign power has not the jurisdiction over another sovereign power.

international character (ICC, Appeals Chamber, The Prosecutor v. Omar Hassan Ahmad Al Bashir, Joint Concurring Opinion, 2019, §58). Hence, as mentioned above, except the direct expression of their will from the states through multilateral agreement, the source for constitution of the international tribunal might become an international body with relevant authority like UNSC, or international functionary, for instance, UN-Secretary general (ICC, Appeals Chamber, The Prosecutor v. Omar Hassan Ahmad Al Bashir, Joint Concurring Opinion, 2019, §58):

Therefore, there are several models distinguished by scholars, for the special tribunal for Ukraine, distinction between alternative options had been made based on the international character of different models of tribunal, efficiency, plausibility and etc.

The UNGA model represents the most supported, preferred and incomparable option, due to the universal character of UN and particularly, General Assembly.

In particular, to overview the *Ad hoc* international criminal tribunals established through the facilitation of UN, Undoubtedly, Security Council had the major role in their establishment which Is connected with its direct authority to maintain international peace and security under UN charter (Articles 39, 41,42). International Criminal Tribunal for the former Yugoslavia (ICTY) (UNSC Res S/RES/827(1993)) and International Criminal Tribunal for Rwanda (ICTR) (UNSC Res S/RES/955(1994)) were established by the UN Security council, Special Court for Sierra Leone (SCSL) was established on the basis of an agreement between UN and Sierra Leone (Agreement, 2002), the negotiation of which was requested by the Security Council to the Secretary-General, Extraordinary Chambers in the Courts of Cambodia (ECCC) was established on the basis of agreement between the UN and the Royal Government of Cambodia (Agreement, 2003) in which case the assistance for examination of past violations in Cambodia was directed by the UNSC resolution (Res 1997/49, 1997). To highlight its international nature, the special court of Sierra Leona even put the emphasis on the inclusion of security council as the authoritative body regarding international peace and security acting on behalf of whole UN (SCSL, Appeals Chamber, Prosecutor v. Charles Taylor §38).

Although UN Security Council resolution does not represent the only venue for establishment of the international tribunal and expression of the state's joint interest. (Open Society Justice Initiative, 2023, p.14).

It is commonly agreed that UNGA due to its limited power under UN charter does not hold the competency to directly establish the international tribunal (Hathaway, 2022)

(McDougall, 2023, p. 213), unlike Security Council which established International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR), that cited as undoubted examples of international tribunals by ICJ (ICJ, Democratic Republic of the Congo v. Belgium, 2002, §61). UN Security Council, with Russia as its permanent member, of course for the same reasons as it does not use its referral power to ICC, will not establish such kind of tribunal.

However, UNGA can facilitate the agreement between the UN and Ukraine, which will become the basis for the tribunal. Special Court for Sierra Leone (SCSL) and Extraordinary Chambers in the Courts of Cambodia (ECCC) are relevant examples, established on the basis of the agreement between UN and states concerned.

Due to the inability of the Security council, and its "paralysis" (D'Alessandra, 2023, p. 68) to act upon ongoing invasion, UN General Assembly is called by the scholars, to instruct the UN Secretary-General to establish such tribunal (Butchard, 2024, p. 13) (Trahan, 2024, p. 100). UNGA, as many believe, on the basis of its residual responsibilities under Article 10 and 11 of the UN charter and Resolution 377 "Uniting for Peace", can replace the UNSC as an authority body and by its instruction to the Secretary-General lead the negotiations between UN and Ukraine for the establishment of the international tribunal (D'Alessandra, 2023, p. 68). Furthermore, as mentioned by many (Johnson, 2022) (Trahan, 2022), UNGA had already played the role in creating special tribunal by approving the establishment of the ECCC (Res 57/228, 2003).

There are two possible ways of establishing the tribunal through UN, first, directly, on the basis of the agreement among Ukraine and UN (instructed by UNGA), Second, with inclusion of regional organizations – EU or the CoE upon a call of UNGA resolution (Open Society Justice Initiative, 2023, p.16). The Essential point is that in either way, tribunal would be backed by the UN, which will be the strongest form of expression of universal will and global response. (Trahan, 2024, p. 100)

International Tribunal supported by the UN will be characterized with the highest Legitimacy (McDougall, 2023, p. 220) and authority due to the large membership of the UNGA (Open Society Justice Initiative, 2023, p.16), questions will not arise regarding the universality of the Tribunal, since it will depict the undoubtable international support (Trahan, 2024, p. 100) and thus, the personal immunities will not protect Russian political leaders from prosecution. (Trahan, 2024, p. 100)

This kind of basis does not exclude tribunal's hybrid character in general, (Trahan, 2022) even though some make distinctions among those models [65], moreover, A hybrid tribunal established upon the recommendation of the UN General Assembly, based on an agreement between the UN and Ukraine was considered as preferable model for some (Trahan, 2022), since SCSL and ECCC were both hybrid tribunals. This kind of model would have activated Ukraine's jurisdiction over the crime of aggressions through applying international criminal law, the court might consist of the international, or Ukrainian judges, and prosecutors through international organizations. (Butchard, 2024, p. 13)

Option of hybrid tribunal in general, with indolent of international support, was preferred by the G7 (G7 Foreign Ministers' Communiqué, April 2023). However, some excluded the hybrid nature of the special tribunal for Ukraine due to the constraints of Ukrainian Constitution (Komarov & Hathaway, 2022), particularly because of the prohibition on creating special and extraordinary courts within the Ukraine's judicial system enshrined in Article 125 of the Constitution (The Constitution of Ukraine, Article 125), Fully international courts however, will not question the violation of article 125. (Trahan, 2024, p. 100) SCSL and ECCC should only be considered as examples of the basis of establishment of special tribunal, but the model cannot be fully shared (Komarov & Hathaway, 2022). In addition, the hybrid or internationalized nature of the tribunal would most probably undermine its legitimacy over the prosecution of the crime of aggression due to its insufficient detachment from the national system, thus, its character might not be considered as "international" enough to have the power over the personal immunity of Troika members (Open Society Justice Initiative, 2023, p.20) (D'Alessandra, 2023, p. 61). Hence it was the reasonable move, when April 2023, 13 states[66] made a joint declaration in support of a more international model for the tribunal (Joint Statement, 2023).

Even though UNGA based international tribunal represents the most preferable option, there are the questions regarding its plausibility. The anticipated political obstructions coming from the Security Council, particularly, from Russia might undermine and question UNGA's interference in this way (D'Alessandra, 2023, p. 62), however the main problem is whether there is enough political will in UNGA itself.

[65]For instance, the brief of Open Society Justice Initiative, 2023 makes such kind of Distinction, as well as D'Allesandra, those distinctions are most probably caused by the attempt to evaluate the issues of immunities.
[66] Albania, Belgium, Costa Rica, Czech Republic, Estonia, Guatemala, Latvia, Liechtenstein, Lithuania, Luxembourg, Marshall Islands, North-Macedonia and Poland.

To further elaborate, if the issue will be put on the agenda of the UNGA, but proposal to facilitate the international tribunal in any way will not attract enough votes, it will have the detrimental consequences for establishing such tribunal. The fact of UNGA discussing but rejecting option to support the tribunal's establishment might be seen as the absence of the will and interest of international community, which is crucial for the legitimacy of special tribunal and its establishment (D'Alessandra, 2023, p. 62). Even if the rejection will be caused by other reasons, it will at least, become the subject for the manipulation for Russian Federation, that there is no universal will to prosecute the crime of aggressions, hence no authority and power over Russian leaders and their immunity. it is thoroughly anticipated that UNGA would struggle with the united decision to establish such tribunal since the countries included have different political stance (Bogush, 2023, p. 5)., and the will to avoid questions regarding political selectivity (Bogush, 2023, p. 5)**.**

Other discussed models include a special tribunal based on numerous states' multilateral treaty, who are interested in achieving justice (Butchard, 2024). Although this kind of tribunal will more likely face issues regarding jurisdiction and personal immunities (Open Society Justice Initiative, 2023, p.19). It is true, that the prohibition of the use of force, is acknowledged as *Jus Cogens* norm, and therefore, prosecution of the crime of aggression clearly is in the interests of the international society (Open Society Justice Initiative, 2023, p.19), however prosecuting it by a few members of states still questions the legitimacy of the tribunal, due to the absence of universal will. It might be accused for the political selectivity.

Hence, it depends on how many states will be the part of this treaty, inclusion of as many states as possible will enable the tribunal to claim the that it acts on behalf of "international community as whole", and therefore, has mandate to prosecute the crime of aggression. Although, there is no threshold set, particularly, how many states should be the part of the treaty for the tribunal to be considered as an expression of international will (Open Society Justice Initiative, 2023, p.19).

Without the interference of UNGA, there is also the option for the fully regional model – That might be created on the basis of an agreement of Ukraine on one side, and EU or CoE on the other. As some consider, it might claim the nature of international tribunal (Open Society Justice Initiative, 2023, p.17)

There is no case law responding the issue of immunity when the tribunal is established by the facilitation of an international/regional organization other than UN (Open Society

Justice Initiative, 2023, p.17). Tribunal based on the agreement with CoE might be capable of obtaining international status, legitimacy and jurisdiction. First, with large membership of 46 states have more universal character, while its legitimacy and jurisdiction is also strengthened from the organization's stated aim, to maintain human rights, as well as Ukraine's membership, the tribunal, endorsed by the CoE would be entitled to express the interest for the security of the whole region, not only Ukraine due to the Organization's character, scale and stated legal interests. Scholars notice, that this tribunal might also refer to the notion of "specially affected States" and the historical precedent of Nuremberg trials and the criminalization of aggressions in their domestic law by the majority of member states, or ratification of Kampala amendments (Open Society Justice Initiative, 2023, p.18). Meanwhile the tribunal established on the agreement with only EU might not have such strong entitlement considering the smaller membership of 27 states. Despite Ukraine being the candidate of accession, still might not have strong reference on "specially affected states". Due to its conversely limited scale, the tribunal will struggle with claim for universality, and hence, will most likely become the subject of criticism because of politically selective nature (Open Society Justice Initiative, 2023, p.19).

While UNGA will unlikely contribute in establishing international tribunal, recently, CoE had been discussed as the possible preferable alternative (Stendel, 2024). First, CoE had stated readiness to cooperate for the purpose of establishment of the tribunal with Committee of Ministers (CoM) authorizing secretary general in April 2024 to start preparing necessary documentations for the future negotiations between the government of Ukraine and Council of Europe. regarding the establishment of the tribunal for Ukraine (Decisions CM/Del/Dec(2024)1497/10.2**)**, and in May referring Secretary general to set up the necessary files for the possible draft agreement (Decisions CM/Del/Dec(2024)133/2a). The decision was a logical continuation of the Ministerial Conference on Restoring Justice for Ukraine, carried out in the beginning of April 2024, where 44 states adopted political declaration, calling for the international organizations and states for stronger support to create reasonable legal basis for the establishment of the tribunal (Political Declaration of the Ministerial Conference, 2024). In the press conference, European Commissioner for Justice, Didier Reynders introduced an alternative of "multilateral agreement or a bilateral agreement between the Council of Europe and Ukraine" (Nuridzhanian, 2024). In Resolution if June 2024, the Council of Europe's Parliamentary Assembly supported the consultations over the draft agreement with Ukraine (CoE PA Res. 2557, 2024).

Scholars claim, that the agreement between CoE and Ukraine, with further support and inclusion of other states, will be sufficient ground for the establishment of tribunal with international status (Nuridzhanian, 2024).

Another intake is that the CoE has such kind of the treaty-making competence due to its Statute. The international organization should have the mandate for the establishment of the special tribunal (ICJ, Advisory Opinion on Reparation for Injuries, 1949, §182). Even though the Statute does not explicitly mention CoE's authority to establish the tribunal, the legal competence derives from its declared purpose to maintain human rights which has strong correlation with the prosecution of crime of aggression (Stendel, 2024). Furthermore, Enlarged Partial Agreement on the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine (CM/Res(2023)3) adopted by CoM highlights CoE's authority over the crime of Aggression against Ukraine (Stendel, 2024).

While precedent of Nuremberg trials is significant as an example that even in the absence of the clear jurisdiction, it is imperative to prosecute the crime of aggression, the Nuremberg tribunal based model, however, as scholars believe, should not be shared in this situations, to exclude the doubts of setting the "victor's justice" by likeminded states. International criminal justice had been developed since then so far, that it offers more reliable and impartial remedies which should not be disregarded. (Trahan, 2022). It should also be mentioned, either Nuremberg style tribunal, based on multilateral treaty of relatively small number of states, or tribunal created through EU will also most probably facilitate Russian speculation - of justice being western biased and the narrative that Europe has built the image of Russia as the "common enemy" (EuroNews, 2024).

To conclude, establishment of the tribunal on the basis of an agreement with CoE is the most reasonable, grounded and credible option.

3.2. Legal and Political Obstructions

There are several legal and political questions and obstructions in regards with the potential special tribunal for Ukraine. Some impediments might vary on the basis of different forms of possible tribunal, while some issues are common for any alternative.

The first common legal question refers to the definition of the crime of aggression (Stendel, 2024), if the special tribunal will be established will be the crime of aggression still defined according to the Rome statute, or will it find another, independent definition? The issue

arises from the clause of article 8 *bis* of the statute, which defines the crime of aggression just "for the purpose of this statute" (Rome Statute, Article 8 *bis*).

There are various options: First, to adopt the definition of crime of aggressions from customary international law (D'Alessandra, 2023, p. 61), to adopt the Rome Statute definition of the crime of aggressions (D'Alessandra, 2023, p. 61), or to adopt the definition of the crime of aggressions from Ukrainian domestic criminal law (Kreß, CAHDI Seminar, 2024).

On one hand, customary understanding of the crime of aggression enables to fill the gap, since the Rome statute definition is exclusively determined for the statute's purposes. The common nature of customary definition of the crime of aggression entrenched for decades, is considered as incomparable (D'Alessandra, 2023, p. 61): Moreover, It is the part of international law, and hence more relevant for the prosecution of the aggression than for example, domestic understanding (Kreß, CAHDI Seminar, 2024). EU resolution calling for the establishment of the tribunal referred to the Nuremberg Trials and UNGA resolution 3314, this reference to the customary law implies its strong impact and relevance for the special tribunal (2022/3017(RSP), 2023).

On another hand, customary definition of the crime of aggression does not acknowledge the leadership clause and focuses on the states, while in Rome Statute it represents the leadership crime, which creates the major difference regarding responsibility and accountability. Some scholars suggest that on reliance of the regional customary definition, the special tribunal should prosecute the broad range of individuals, and should not be limited by the leadership criteria (Grzebyk, 2023, p. 457).

Regarding this matter, it should be considered, that EU resolution itself (2022/3017(RSP), 2023), and different state leaders' statements (Speech by Federal Foreign Minister Annalena Baerbock, 2023) had clarified the necessity to establish the tribunal which will "complement" the ICC. The main purpose of the tribunal is to fill the jurisdictional gap. Taking this into account, it will be more reasonable to depend on Rome Statute definition to not to establish parallel practice and actually complement ICC. Many scholars support this idea for the purpose of cohesiveness of international criminal justice (D'Alessandra, 2023, p. 61). Not to mention that unlike the ICC, or customary definition of the crime of aggression, the national definition would suggest the narrower reach (Kreß, CAHDI Seminar, 2024). Therefore, the Rome Statute definition is the most desirable one for the special tribunal.

One of the most prevalent obstructions for any suggested model, that scholars mention, is that establishing special tribunal would be costly and time-consuming solution (Sácouto, 2024, p. 88). With this regard, some refer ICTY as an example, the trials of which took seven years, and four more for the appeal. For the justice to be at least achievable in reasonable time, there was the necessity to reduce witnesses and evidences (Lorenz, 2024, p. 74).

However, any other solution will take far more years of not decades, and still seem unfeasible: Not only proposing or working on Rome Statute amendments will most probably take decades, but also amending it would require its ratification by at least by 2/3 of ICC member states, and at least 7/8 vote by its Assembly (Rome Statute, Article 121) to activate the amendments. For illustration, out of 124 member states of ICC, till this day only 46 had ratified Kampala amendments on crime of aggression, among which is Ukraine, that only recently in 2024, ratified the Statute with its amendments (UN Treaties, 2024). Not to mention that other option outside Rome statute amendments absolutely depend on political will to change the whole system and decades practice of international organizations like UN: despite suggestions to temporarily or eventually exclude Russia from the permanent members of Security Council, or Security Council at all (Johnson, 2022), or states willingness of Security Council reform regarding limiting veto powers (Le Monde, 2024), not only those options are political, rather than legal venues, but also those reforms will require more finances and time. It does not mean that the possibility should not be discussed for the future, but comparing different solutions, establishing the special tribunal however costly or time consuming it might be, is still the best option based on this criteria. Moreover, there is the possibility for some costs to be mitigated. Those costs of tribunal will be less than the costs that were results of sanctions against Russia, or other kinds of support for Ukraine (McDougall, 2023, p. 225).

Another problem named by scholars include the potentially redundant character of the court, and possible trials *in absentia*, since the special tribunal will be challenged to secure Russian leaders' presence in the court (McDougall, 2023, p. 225). Although, the tribunal will share ICC standards regarding its practice, which also struggled to secure the presence of some in the proceedings.

Other issues, particularly, problems regarding immunity, universality, enforcement, or the selectivity of criminal justice are all interconnected and all those obstructions more or less depend on the form of the special tribunal.

The forms which guarantee firmer grounds for international status of the tribunal will face less problems with immunity and enforcement. If the tribunal will be established only on the basis of multiple states agreement the issue would inexorably arise (Heller, 2024, p. 8), but inclusion of many states and international organization in the establishment will constitute the tribunal where personal immunities would not apply, meanwhile functional immunities will be less challenging, since they do not provide protection from the prosecution for committed international crimes[67], hence, as explained before, concisely, immunity does not represent the issue when it comes to the warrants of international courts, tribunals (ICJ, Democratic Republic of the Congo v. Belgium, 2002) (McDougall, 2023, p. 221). Although, the enforcement might remain as the obstruction regardless the international nature that the tribunal might have.

The great example of this is the impact of ICC warrant, since ICC undoubtedly represents the illustration of international court. After ICC issued arrest warrant of Vladimir Putin for the unlawful deportation and transfer of population (children) from occupied areas of Ukraine (Situation in Ukraine, ICC-01/22, Investigation), even though Russian government did not acknowledge the ICC order, the president of Russian Federation faced some difficulties with traveling (CFR, 2024). He was forced to virtually attend 2023 BRICS summit, since as ICC member, the south African government would have duty to detain him in case of his visit in Johannesburg (PBS News, 2023). ICC arrest warrant on president Putin threatened him with imprisonment in case of visiting ICC member country.

However, in September 2024, since the issue of the warrant, president Putin made his first visit to the ICC member country – Mongolia, where he was met with the red-carpet ceremonial (BBC, 2024), despite Mongolia being called by ICC and Ukraine beforehand, to arrest the president of Russian Federation (BBC, 2024), Mongolia did not follow its obligation which clearly outlined the lack of enforcement mechanism (Human Rights Watch, 2024).

Moreover, the president of Russian Federation invited Mongolian President to a BRICS Nations Summit that took place in October, in Kazan, Russia. The summit gave the opportunity to Russian Federation to demonstrate the international relations of the country and its leaders (European Parliament, 2024) and indirectly, indicate the inefficiency of justice.

The special tribunal will face the same challenge regarding the enforcement. However, it should also be mentioned that Mongolia faced the international condemnation for not

[67] The precedent is established by the Nuremberg trials

arresting the president of Russian federation. In October 2024 pre-trial chamber of ICC made decision under Article 87(7) of the Rome Statute on the non-compliance by Mongolia with the court's request to cooperate regarding the detention of Russian president, and referred to the assembly of the state parties to discuss the matter (ICC-01/22-90, 2024). International pressure and inclusion of international support, especially if the special tribunal will be established on the basis of an agreement with international organization, will have the positive effects on enforcement of the special tribunal's judgement.

Another question arises regarding the selective criminal justice: why should be the special tribunal established in the context of Russian military aggression against Ukraine, while many cases of aggression had remained unaddressed (Sácouto, 2024, p. 89). Some scholars raised concerns on creating tribunal for this particular act of aggression against Ukraine but not for various other acts, that most probably amounted the acts of aggression and needed prosecution (Heller, 2024, p. 12)[68].

The concern might be also stated by the fact that ever since WWII the special tribunal for Ukraine will be the first to prosecute the crime of aggression after Nuremberg trials, and it will not happen through ICC – so far universal venue for international criminal justice. States, that had refrained from the ICC jurisdiction due to their unwillingness for accountability, now will support the establishment of the special tribunal for this particular case (Heller, 2024, p. 13). This question the tribunal's morality and legality, especially regarding US support[69] for the establishment of the tribunal (Lorenz, 2024, p. 81).

Nevertheless, scholars contradicting those arguments emphasize several factors, first, they note the development of international criminal justice, namely regarding the crime of aggression (McDougall, 2023, p. 227),. The concept had not officially defined under Rome Statute until 2010, and the amendments had not been activated till 2017, even though Heller argues, that the notion of crime of aggression was long entrenched in customary international law, (Heller, 2024, p. 13) it is unquestionable that the absence of the notion in positive international law and the controversial character of a crime would be the major impediment for prosecution of the crime in past, while for today, in the presence of more legal mechanisms and guarantees there is the greater obligation towards justice.

[68] For the illustration refers to the military actions in Iraq in march 2003, that raised concerns and been accused for its character as an aggression. Heller argues that Despite about 200,000 Iraqi civilians killed and 2,000,000 refugees, there was no expressed will from countries to investigate American and British leaders.
[69] Since US does not represent the state party of the Statute

Furthermore, scholars note the importance of the willingness of victim state's leaders to cooperate with international society, notably, Ukrainian government from the very first day calls for the international support, express willingness and is open for joint effort, which obligates the international community even more (McDougall, 2023, p. 228). Besides, Scholars note that international criminal justice should not be rejected just because it was rejected once, this kind of approach will not eliminate injustice, on the contrary, international criminal justice should be served whenever there is such kind of possibility (McDougall, 2023). As some refer, this might be an advent of the international criminal justice, "moment for the revival of a neglected atrocity crime", however, this also depends on how the challenges will be addressed regarding other future acts of aggression, for the justice to not be remained as selective (Dannenbaum, 2022).

One of the major hurdles which obstructs the establishment of the future tribunal is the matter of politics, namely the lack of the sufficient political will. For instance, UNGA model would be able to respond a lot of above-mentioned questions, but due to the different political directions of the countries in General Assembly, for most of the scholars, it remains implausible. The issue is whether some countries and organizations substantially acknowledge the necessity to prosecute the crime of aggression against Ukraine.

To conclude, anticipated legal challenges can be overcome, however international community should realize, that it has the responsibility towards international law, to acknowledge the necessity of prosecution of Russian military aggression and contribute in establishment of the tribunal.

3.3. The Necessity of the Prosecution of the Crime of Aggression Committed against Ukraine and the Importance of Political Will in Its Acknowledgement

As soon as the first world war ended David Lloyd George asserted that "The war was a crime" and that the Kaiser had to be prosecuted. Back then this was seen as a radical inclination from international law and past practices regarding waging war. In the absence of positive legal ground, jurisdiction, prior precedents or relevant institutions this absolutely novel idea was discussed and finally abandoned (Sellars, 2016, p. 21).

However, the idea was the very first thing revisited after the WWII, that lead to the establishment of Nuremberg and Tokyo tribunals. Clearly, there was an absence of jurisdiction, and the absence was almost absolute, unlike today - in the framework of positive criminalization of the crime of aggression in Rome Statute and decades entrenched customary

notion of the crime of aggression. Therefore, Nuremberg tribunals were and still are criticized by some – created on the basis of London charter and prosecuted the crime depending on Briand Kellogg pact which did not even criminalize waging of war, Nuremberg trials established the enormous precedent. One might say that the criminalization of the war of aggression derives from those tribunals.

While in modern international criminal law, which has further developed since then, today more sophisticated models of the tribunals can be established, with stronger legitimacy and authority. But something that must be shared from Nuremberg Trials is the essence of the created precedent: the imperative of prosecution of the crime of aggression. (Dinstein, 2011, p. 127) The state leaders understood the price of impunity, and even though the Nuremberg trials were condemned by some, they had strong and long-lasting effect not only on developing the concepts in international law, but also on world order.

The trials represent the milestone which changed direction of the international relations. Some might argue that it was the mere fact of the gravity of calamities coursed by two world wars that countries started establishing more peaceful relations, but there is the reasonable ground to realize the essentiality of the Nuremberg trials for the following years in compelling states to find more peaceful solutions for tension among them.

More of less anticipated impunity deriving from the ICC's jurisdictional gap is clear. Years ago, In the process of analyzing the crime of aggression amendments of Rome statute, some noticed aggression – specific restrictions as the hurdles for all the future cases to be prosecuted under ICC, while some thought that those limitations would not automatically cause impunity (Permanent Mission of the Principality of Liechtenstein to the United Nations, 2019, 9). Although today it became obvious that the limitations set by the statute, created the gap, that has to be filled in order to achieve justice. The problem should definitely be addressed for the future, however, at this moment, international law cannot refuse to act upon the atrocities happening in Ukraine, because of the flaw in the justice system and political impediments. Even though there is a jurisdictional gap it is not as absolute as in Nuremberg trials, today there are venues accessible to achieve justice, and those venues should be used - such as establishing special international tribunal.

Accountability matters. If there is the crime of aggression, it should be prosecuted. When in 2008 Russia attacked Georgia, President Lech Kaczynski, who along with other presidents visited Tbilisi to express support against Russia, said in his speech: "Today Georgia, tomorrow

Ukraine, the day after tomorrow Baltic states and then perhaps the time will come for my country Poland." (President.Pl, 2008), The words were recalled after years in 2022 when Ukraine was invaded by Russia.

The scale of calamities caused by Russian aggression and its use of force against sovereignty, territorial integrity of Ukraine is enormous. Russian narrative, that Ukraine has never been independent, reveals its deliberate purpose to deprive Ukrainian people of the right of self-determination, and in short, as some scholars say, "extinguish Ukraine" (McDougall, 2023, p. 207). And it is not the first time when Russia uses the tactic to disguise the invasion as some kind of humanitarian mission, since the same happened in Georgia in 2008. The reoccurring aggression committed by Russian leaders indicates the entrenched impunity, which must end.

It is not only the war between Russian and Ukraine – it is the war against democratic principles (McDougall, 2023, p. 207) – that is why Russian propaganda has demonized west. This Impunity threatens the existence of western democracies.

However preposterous the arguments of Russian federation might sound; they hint the attempts to camouflage the state's acts as if they are in alignment with international law. Despite its flaws, drawbacks and lack of efficiency regarding some matters, international law remains the framework that even the state leaders who commit the aggressive acts, acknowledge. The judgement of the tribunal despite the concerns with its symbolic nature, will have significant effect on eliminating the impunity regarding crime of aggression and to set the standard for the prosecution of the future crimes.

Hard to disagree that today there is not enough political will to acknowledge the essentiality of legal accountability. Even though some states and organizations are ready to take further steps, united approach is still lacking. For example, if the UN general assembly would decide to cooperate on the basis of United for peace resolution, with Ukraine and establish the tribunal, it would have the most "international" nature, and would exclude the problems with immunity or the issue with universality. Furthermore, with inclusion of UN general assembly or without it, it would be preferable if more states had realized the importance of their inclusion in support of the tribunal to give the tribunal more legitimacy and authority.

To conclude, the most reasonable solution for prosecuting the Russian military aggression against Ukraine, is the establishment of special international Tribunal. Constituting such tribunal is urgently necessary to overcome the impunity gap, however, international

community should express more political will and readiness – whether the tribunal will have strong grounds, legitimacy and authority, whether it will fit the framework of international criminal justice and respond the challenges of impunity, selectivity, all depends on international society – how the countries, organizations will acknowledge the imperative of the prosecution of this particular crime, support the establishment of the tribunal and contribute to the crucial development of international criminal justice.

CONCLUSIONS AND PROPOSALS

1. Through analyzing historical context, it should be concluded that crime of aggression represents relatively new concept, in acknowledgement of which the political will played significant role. The decades discussion on its definition and regulation under positive international law indicates how states were hesitant to entitle the International Criminal Court with the jurisdiction over this crime.

2. Analyzing the definition of the crime of Aggression under Rome Statute, the major role of the UN charter should be highlighted. Alongside it, the modern definition also derives from the UNGA Resolution 3314. It is leadership crime, which requires individual conduct, as well as state act of aggression, which on the other hand, should meet the gravity threshold and should manifestly violate the charter of UN. Examining the interconnection of UN charter and the Rome Statute definition of the crime in Article 8 bis In the absence of the case law interpreting what should be considered as "manifest' violation, it is reasonable to consider the listed acts of aggression in Article 8 bis (2) by state involving unlawful use of force as the crimes of aggression.

3. Russian conduct should be classified as the crime of Aggression disregarding the various speculations, through which Russian leaders try to hide the nature of the invasion. It represents unlawful use of force under UN charter 2(4), deliberately aiming against the territorial integrity of Ukraine, does not represent exceptions enshrined in the charter: neither self- defense, nor authorization from UNSC.

4. Due to the special jurisdictional regime around the crime of aggression created by the Rome Statute, and the late ratification of it by Ukraine, there is an absence of ICC jurisdiction. Even if amending the Statute once again, to more expand ICC Jurisdiction over the states that are not parties of the Statute but are committing the crime in the territory of a country that had ratified statute and Kampala amendments, Late ratification of statute and Kampala amendments cannot fill the jurisdictional gap due to the restriction on retroactive application in criminal law. Amending Rome Statute to expand its jurisdiction is desirable for the future, but not an effective solution for this particular situation.

5. Prosecuting the crime of aggression under the name of crimes against humanity is not reasonable solution. It will undermine the nature of the crime, will create hierarchy among core crimes in criminal law, and will violate the legality principle.

5. Other suggested ways to prosecute the crime within ICC are also inefficient: changing the referral system to entitle UNGA with referral power to ICC will face the legal constraints, since UNGA lacks the authority, it is mostly giving recommendations and is not entitled to take coercive action unlike UNSC. This change also represents political solution and not the legal one, since it does not guarantee that the prosecution will be held. Restricting the veto power also lacks the legal basis, whereas suspending Russia from permanent members of the UNSC is also political venue and does not automatically incites the achievement of justice for Ukraine.

4. International community acknowledges the crime of aggression against Ukraine and takes various measures to restrict it, by statements, sanctions and various measures. However, on the background of the ongoing aggression and casualties, prosecution of Russian military aggression is the incomparable remedy for achieving justice and eliminate impunity, while establishment of the special tribunal is the only viable option. States and organizations are expressing their will and readiness to prosecute Russian aggression and establish the special tribunal.

5. The special tribunal should be international: first, to successfully respond the challenges regarding immunities, and the concerns about political selectivity, moreover, to express the required universal will of the international community, Furthermore, constitutional constraints are hindering the establishment of internalized tribunal in Ukraine, while other domestic prosecution, based on universal jurisdiction will still face challenges of legitimacy.

6. Among different forms of the tribunal the model based on the agreement between UN (Instructed by UNGA on the basis of United for Peace Resolution) and Ukraine will be characterized with the firmest legal basis, however due to the variety political preference in the General Assembly, it is seen as less plausible option. In this sense, the tribunal established by the involvement of the Council of Europe remains the most legally grounded alternative.

7. The established tribunal should depend on the Rome Statute definition of the crime of aggression, other than customary or domestic one, to better facilitate the coherent practice and avoid to create parallel venues outside ICC.

8. Study also showed, that the discussed obstructions and drawbacks cannot overweight the importance of the prosecution of Russian aggression through special international tribunal. The potential tribunal will be able to overcome the issues within the efforts of international society.

9. International community and its expressed will have the major role in achieving criminal justice, there is the need of more inclusive process and higher coordination, Especially from the UNGA. The conduct of the crime should not be left disregarded, as the history showed the detrimental consequences of avoiding justice for various political reasons, it is the responsibility of international society to act upon injustice and, therefore, establish the special international tribunal.

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SUMMARY

Prosecution of The Crime of Aggression in the Context of Russian Military Aggression Against Ukraine: Between Law and Politics

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The study provides an analysis of the possible ways to prosecute Russian military aggression against Ukraine. Initially, the work outlines the legal framework around the crime of aggression and its formulation in international law from Nuremberg trials till Kampala amendments. Through analysis of the key characteristics of the crime, grounds of its prosecution and exploration of the nature of Russian invasion in Ukraine, the work underlines reasons why the invasion should be classified as the crime of aggression which manifestly violates the imperative norm of absolute prohibition of the unlawful use of force.

Moreover, the work determines the causes of jurisdictional gap and evaluates different venues through which ICC might obtain the jurisdiction over this case. The study overviews possibilities such as amending the statute to expand the jurisdictional regime; shifting the referral powers, or applying extensive interpretation methods. Through this detailed analysis the research underlines why the prosecution of Russian aggression is feasible only through establishing the special international tribunal, since other options are legally groundless, or practically implausible. Furthermore, through examination of the statements and actions of international and regional organizations, the work determines the presence of the will of international community to prosecute Russian military and political leaders through establishing special tribunal.

Through the examination of different discussed models and the past precedents, the study outlines that the international tribunal, established with involvement of international organizations will be the most resilient against anticipated challenges. The work assesses why despite the fact that some impediments are unavoidable, such as issues with cost, enforcement, they still do not represent enough ground for denying the access to justice for Ukraine.