

Putting Russia on trial. Ukrainian efforts to establish a tribunal for crimes of aggression

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Almost since the beginning of the Russian invasion, Ukraine has been calling for the establishment of a special international tribunal to prosecute Russia for its crime of aggression against Ukraine. This is because the International Criminal Court in the Hague cannot deal with this case: the provisions of the ICC's Rome Statute stipulate that this court can only consider the crime of aggression if both parties (the aggressor and the victim) have ratified it, but neither Russia nor Ukraine has done so. It also rules out trying anyone *in absentia*. For this reason, Ukraine has been pushing for the establishment of an *ad hoc* institution modelled on the International Military Tribunal in Nuremberg which dealt with the crimes of Nazi Germany. This demand is one of the components of the peace formula that President Volodymyr Zelensky proposed in November 2022.

However, the establishment of such a tribunal depends on overcoming numerous legal and political problems: Vladimir Putin and the rest of Russia's leadership enjoy functional and personal immunities, and there is no precedent for waiving these under international law. Many countries also fear that setting up such a court could set a precedent for punishing their leaderships for the aggressions they have committed in the past.

Ukraine's calculations

Establishing such a tribunal is one of the priority objectives of Ukraine's foreign policy. The Ukrainian government would like to see such an institution created as soon as possible, preferably while the war is still ongoing, as this would add to Russia's diplomatic isolation in the international arena. The operation of such a tribunal would make it more difficult to return to business as usual in relations with Russia and to freeze the conflict, as societies in other countries would see maintaining contacts with the Russian leadership as inappropriate while it faces specific charges in a court with international authority. The ongoing investigation to expose the atrocities that the invaders have committed in Ukraine would also strengthen the unity of Western countries in supporting Ukraine, and provide an additional argument for the creation of an international commission to seek reparations for Ukraine. Unsurprisingly the restoration of justice, including through the establishment



of such a tribunal, forms one of the ten points of the peace formula that Zelensky has announced.¹ In addition, Putin's indictment before the international community would contribute significantly to his delegitimation in the eyes of the Russian elite: the state's leadership would be *de facto* recognised as criminals, which would deal a heavy blow to his prestige.

It is essential for Ukraine for such a tribunal to have an international profile. This would emphasise that this court would not only seek to resolve the conflict between two

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states, but also to judge the crime against the entire global community. In this narrative, punishing the Russian leadership is one of the conditions for the restoration of international order. Importantly, Ukraine applies the term 'aggression' to both Russia's full-scale invasion starting on 24 February 2022 and to all the actions Russia has taken since 2014. Ukraine is currently considering two models for such a tribunal. The first of these would be based on an agreement with the UN, which its Secretary-General would conclude with Ukraine under the authority granted by the UN General Assembly (UNGA) by a two-thirds majority. For Ukraine, signing an agreement with the UN is the most desired way of establishing such a court because of the authority this formula would confer on it. Hence, Ukrainian diplomacy has stepped up its activities in this regard: according to media reports, in December 2022 it pressed the UNGA to adopt a draft resolution on this issue, but this attempt failed mainly due to opposition from African and Asian countries.² Ukraine has continued its efforts to persuade them to support its initiative: last October, at Zelensky's invitation, a delegation of 35 officials from African, Latin American and Asian countries visited the sites of war crimes in Irpin near the Ukrainian capital. The Ukrainian president also met African politicians during his visit to the UN last September.

The second option is to establish a so-called hybrid (internationalised) tribunal. This would be a special national court, operating either in Ukraine or on the territory of another country, which would function under that country's domestic law and involve international judges and prosecutors. However, Ukraine is more reluctant to adopt this solution for a number of reasons. Firstly, the country's constitution prohibits the functioning of special courts, and bars persons who do not have Ukrainian citizenship from holding judicial office. Secondly, Ukrainian law appears ill-suited to trying crimes of aggression as it provides for relatively low penalties for such acts. Finally, the verdict of such a court would be issued in the name of Ukraine or another state rather than the international community, which would weaken the significance of its ruling. It is also unclear whether any country would agree to host such a tribunal, although Ukrainian media reports have suggested that the Netherlands would be ready to do so regardless of what form it might take.³

Another option under consideration is to set up such a tribunal under an agreement between Ukraine and an unspecified group of countries, or a regional organisation such as the Council of Europe or the European Union, rather than the UN. Such a court would issue a verdict on behalf of the international community thus united. However, the problem is that this formula would have no equivalent in existing practice. Therefore, this is currently the option least discussed, although no one has yet rejected it outright.

¹ The Ukrainian people have also expressed their support for the establishment of a tribunal: according to a survey by the Active Group and the Active Research Foundation from last October, for the majority of them (56%) putting Putin on trial is the most important condition for victory, alongside the restoration of the 1991 borders. See 'Results of survey of Ukrainians' attitudes by Active Group and Future Research Foundation', Interfax-Ukraine, 1 November 2023, interfax.com.ua.

² 'A New Court to Prosecute Russia's Illegal War?', International Crisis Group, 29 March 2023, [crisisgroup.org](https://www.crisisgroup.org).

³ С. Сидоренко, "Гаазький трибунал" стає реальністю: як Україна та Захід домовляються про спецсуд для Путіна, *Європейська правда*, 22 August 2023, euromaidanpress.com.

In order not to duplicate the ICC's tasks, any such institution, regardless of the method of its creation, would have a limited scope of action: it would mainly be empowered to deal with the crime of aggression. On 2 March 2022, the ICC opened an investigation into war crimes, crimes against humanity and genocide committed by Russia on Ukrainian territory; on 17 March 2023, it issued an arrest warrant for Putin and Maria Lvova-Belova, the presidential commissioner for children's rights. Such an *ad hoc* court would have jurisdiction over a relatively narrow group of defendants charged with complicity in crimes of aggression, including the president, prime minister, foreign minister and top military commanders: around 20 people in total.

However, Ukraine is aware of both the legal problems and political resistance associated with the different formulas for establishing such a tribunal, as well as with its very creation. For this reason Zelensky has set up a working group whose task is to work towards the establishment of such an institution. On behalf of the Ukrainian foreign ministry, it is headed by Ambassador Anton Korynevych, an international law specialist, and Andriy Smyrnov, Deputy Head of the Office of the President.

Legal obstacles

In international law, there is a principle that 'an equal cannot judge an equal'. In practice, it means that one state cannot judge another state or its representatives. Under this principle, public officials enjoy two types of immunity. The first of these, the functional immunity of the state, relates to the acts of officials on its behalf. It extends to each and every one of them and protects them even after they have ceased to perform their functions, although it is limited to actions connected with their official duties. The other, personal kind of immunity is enjoyed only by the head of state, the head of government and the minister of foreign affairs, the so-called 'troika'. It protects them only during the period they hold office and covers any steps they take during this time, both in official (related to the exercise of their office) and private capacities. After they leave office, however, the principle of functional immunity continues to protect the sphere of the troika's official activities.

In order to try Putin, Sergei Lavrov and Mikhail Mishustin, it would therefore be necessary to waive their immunity, a move which would face considerable difficulties.

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It is international practice that immunity is respected by national and international courts and can only be lifted in exceptional situations. One of these is indicated in Article 27(2) of the ICC's Rome Statute, which stipulates that immunities and other privileges related to the exercise of a person's public function, whether under national or international law, do not prevent the ICC from exercising its jurisdiction.⁴ This provision made it possible for the ICC to issue an arrest warrant against Putin over his responsibility for the deportation of Ukrainian children from the occupied territories. The legal basis in this regard stems from the unilateral declarations of recognition of the ICC's jurisdiction that Ukraine submitted on 9 April 2014 and 8 September 2015. However, as mentioned, this court's jurisdiction could only cover the crime of Russia's aggression against Ukraine if both countries had ratified the ICC's Rome Statute. This is not the case.

The UN's International Law Commission has drafted a proposal to regulate the functioning of the immunities enjoyed by state officials that protect them from the criminal jurisdiction of another state. Under its provisions, functional immunity would not apply to certain crimes under international law,

⁴ Moreover, despite these kinds of immunity, prosecution remains possible: a) before a national court of the state of origin; b) when the state of origin waives its immunity; c) when the persons concerned cease to exercise their functions (this only applies to their personal immunity); d) before certain international courts – in exceptional situations, in particular when the UN Security Council takes a relevant decision.

but the crime of aggression is not listed among these. Therefore, those who support the establishment of a tribunal as advocated by Ukraine have to keep searching for an appropriate legal formula based on the existing body of international jurisprudence.

Precedents

The problem of immunity comes into focus when the leadership of a state has been successfully indicted. The mandates of the special tribunals for crimes in the former Yugoslavia and Rwanda to try persons who were legally untouchable resulted directly from decisions to revoke these privileges taken by the UN Security Council. In the context of Russia (veto-wielding member of the Council), it is obviously impossible to issue such a decision. In the case of the International Military Tribunal in Nuremberg, the decision to waive immunities was taken by the Allied High Commission, which was considered to be the effective governing body in post-World War II Germany, and as such was entitled to take that step. As regards other courts, such as those for Kosovo and Cambodia, the parties themselves undertook not to invoke the international immunities enjoyed by their leaderships. It is beyond doubt that the Russian Federation will never make such a statement.

There is only one precedent that could be used in the case of Ukraine: the Special Court for Sierra Leone (SCSL), which tried Liberian President Charles Taylor even though he enjoyed both personal and functional immunity; both of these were revoked by the SCSL in May 2004 (a year after it indicted Taylor). However, this institution operated under an agreement between Sierra Leone and the UN, and was therefore regarded as an 'international court' that expressed the opinion of 'the entire international community'. The SCSL argued that personal immunity did not apply in that case: in its view, no legal principle indicated that a head of state was entitled to this immunity before an international court. While national courts cannot indict the leader of another state, this rule does not apply to the authority of a court established under an agreement with the UN.

Therefore, a tribunal established in this way would have some basis in existing practice, though this would be very limited, as the SCSL's position remains isolated and has often been criticised by experts.⁵ Bringing the Russian leadership to justice under current international law would set a major precedent. Therefore, Ukraine is keen for such a tribunal to be established under the aegis of the UN, as only this model has any basis in practice, as opposed to a hybrid court.

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Political obstacles

As already mentioned, setting up such a tribunal would face not only legal obstacles, but also political resistance. Due to the precedent-setting nature of such a court, some countries fear the implications of its establishment for their own actions, as their leaderships could also be charged with crimes of aggression in the same manner. This includes the US, which is concerned that countries of the Global South could move to establish a similar body, for example with regard to its invasion of Iraq.⁶ There is a risk that they could accuse the West of the selective application of justice, prosecuting only some acts of aggression. In this context, Israel's ongoing war with Hamas in Gaza has also generated a problem. Iran has demanded the establishment of a special tribunal, similar to the one that Ukraine has been calling for, to try Israel for the crime of aggression.⁷ However, Israel's most important

⁵ D. Akande, 'ICC Appeals Chamber Holds that Heads of State Have No Immunity Under Customary International Law Before International Tribunals', *EJIL:Talk!*, 6 May 2019, ejiltalk.org; L.N. Sadat, 'Why the ICC's Judgment in the al-Bashir Case Wasn't So Surprising', *Just Security*, 12 July 2019, justsecurity.org.

⁶ M. Duclos, 'A Special Tribunal for the Russian Crime of Aggression in Ukraine', *Institut Montaigne*, 31 January 2023, institutmontaigne.org; K.J. Heller, 'Creating a Special Tribunal for Aggression Against Ukraine Is a Bad Idea', *Opinio Juris*, 7 March 2022, opiniojuris.org.

⁷ 'Practical steps to prosecute Israel for its crimes in Gaza', *Teller Report*, 27 November 2023, tellerreport.com.

allies, especially the US, will not agree to this, which reinforces an impression of international justice being applied selectively, and undermines Ukraine's efforts to gain support for its initiative among the countries of the Global South that sympathise with the Palestinians.

Moreover, an opinion is emerging among diplomats and lawyers that the establishment of such a tribunal could make it more difficult to reach a political settlement to the conflict and hold peace negotiations, as the Russian leadership would have no incentive to do so if faced with an international court.⁸ Taking these views into account, some Western countries – contrary to their declarations – actually do not want to establish such an institution, or would seek to limit its scope, for example by pushing for the adoption of a hybrid form.

The ICC's decision in March to issue a warrant for Putin's arrest somewhat weakened the argument relating to peace negotiations. Under that decision, states that are party to the Rome Statute (numbering 123 countries) are indefinitely obliged to hand over the Russian president to the ICC if he enters the territory under their control, including after he leaves office. This fact alone makes it difficult to return to business as usual with Russia, whether it wins the war outright or comes to some form of compromise with Ukraine. This situation, where the president has very limited options to move around the world due to criminal charges against him, will obviously constrain Russian diplomacy. It would also be difficult for Western decision-makers to justify any agreement with Putin to their own constituencies.

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Those who are sceptical of the idea of establishing a special tribunal⁹ have also pointed to the related technical problems, as well as the issue of funding it: it is unclear what group of countries or international organisation would be willing to bear these costs. This is a real problem: the Special Tribunal for Lebanon, which was created by a resolution of the UN Security Council, devoured at least \$970 million¹⁰ over its 11 years of operation and still failed, mainly due to insufficient funding (Lebanon provided 49% of the court's funds while the rest came from voluntary donors). Lawyers who raise this argument have also pointed out that it would likely take several years, rather than months, to secure premises and find staff for a special tribunal for Ukraine, as it took two years to set up the STL.

The legal community has also voiced numerous concerns regarding the illusory chance that the Russian leaders could actually be handed over to such a tribunal, at least at this stage.¹¹ This chance will drop even further if the current regime remains in power in the Russian Federation over the coming years. Moreover, even if it is replaced, it seems very doubtful that any new Russian government would be willing to hand over its own citizens to such a court. If it wanted to put them on trial, it could do so using a national court; or it could decide that Russia would sign the Rome Statute and join the ICC with retroactive effect.¹² It would then no longer be necessary to create a special tribunal.

⁸ This argument of the tribunal's opponents is mentioned by: M. Duclos, 'A Special Tribunal for the Russian Crime of Aggression in Ukraine', *op. cit.*; F. Wesslau, 'A tribunal like no other: Prosecuting Russia's crime of aggression in Ukraine', European Council on Foreign Relations, 23 February 2023, ecfr.eu.

⁹ For example, ICC Prosecutor Luis Moreno Ocampo (see 'A pragmatic legal approach to end Russia's aggression', *Just Security*, 23 February 2023, [justsecurity.org](https://www.justsecurity.org)) and prof. Kevin Jon Heller (see 'Creating a Special Tribunal for Aggression Against Ukraine Is a Bad Idea', *op. cit.*)

¹⁰ T. Lingsma, 'Special Tribunal for Lebanon: Billion Dollar Trial', *JusticeInfo*, 7 July 2020, [justiceinfo.net](https://www.justiceinfo.net).

¹¹ S. Vasiliev, 'Aggression against Ukraine: Avenues for Accountability for Core Crimes', *EJIL: Talk!*, 3 March 2022, [ejiltalk.org](https://www.ejiltalk.org).

¹² It would not be easy to retroactively extend the ICC's jurisdiction to Russia for legal reasons: Article 11 of its Rome Statute establishes the principle that the Court can only exercise its jurisdiction with regard to crimes committed after the Statute entered into force for a particular country (that is, after its ratification), unless that country has submitted a relevant declaration under Article 12(3) of the Statute. Such a declaration could apply retroactively; Ukraine has submitted two such statements, which have allowed the ICC to open an investigation into certain crimes committed by the Russian Federation. For the ICC's jurisdiction to cover Russia's crime of aggression, however, Russia itself would have to ratify the Statute and also submit a similar declaration.

On the other hand, the functioning of a court that is unable to enforce its own judgment in any way would send a very negative message and essentially make a mockery of the international judiciary.

However, Ukraine has nothing against trying Putin *in absentia*, as it probably hopes that a verdict against him alone would have sufficient international resonance to produce the desired results.

The state of play in the international arena

Ukraine is currently trying to make the case that a tribunal must be established at the UN while speaking out against the concept of a hybrid court, but its Western partners have so far given it the cold shoulder. The UK, Germany and the US (the latter at a fairly low level) have been officially urging Ukraine to embrace the model of an internationalised court.

A group of 40 lawyers and scholars expressed their support for the establishment of a special tribunal in a declaration of 4 March 2022.¹³ The signatories to this document included Philippe Sands, professor at University College London; Nicolas Bratza, former President of the European Court of Human Rights; Benjamin Ferencz, one of the prosecutors of the International Military Tribunal in Nuremberg; and Richard Goldstone, Chief Prosecutor of the International Criminal Tribunal for the Former Yugoslavia. The Parliamentary Assembly of the Council of Europe, the European Parliament, the OSCE Parliamentary Assembly and the head of the European Commission Ursula von der Leyen have also officially endorsed this idea. Since January 2023, the Core Group has also been meeting regularly to work on a formula for establishing such a tribunal and the details of how it would function. It is an informal, steadily growing group which now comprises 40 countries, including all the members of the G7, almost all of the EU and several Latin American countries.

However, Ukraine's international efforts to have such a tribunal established are not limited to moderating this body's activities. Work

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on documenting the crimes committed on Ukrainian soil has been ongoing for quite some time now. The Joint Investigation Team (JIT) which Poland, Ukraine and Lithuania created in June 2022 has been at the forefront of this effort. It is a platform for the exchange of information between national prosecutors whose tasks include investigating crimes against humanity and other international crimes. Several other EU countries¹⁴ and the ICC have also joined the JIT, while the US Department of Justice has signed a cooperation agreement with it. The JIT's activities will also be supported by the International Centre for the Prosecution of the Crime of Aggression in Ukraine (ICPA), which began operations on 3 July 2023 as part of Eurojust, the European Union Agency for Criminal Justice Cooperation that coordinates the work of the prosecutor's offices in the EU countries. The ICPA has been conceived as a platform for the prosecutor's offices to exchange data, preserve evidence and develop a joint strategy to prosecute crimes. Von der Leyen called the ICPA's creation the 'first step' towards the establishment of a tribunal. It is worth noting that the scope of this agency (the crime of aggression) is narrower than the jurisdiction of the JIT, which covers crimes against humanity and international crimes. However, the ICPA is crucial to the efforts to establish such a tribunal: the material collected will greatly facilitate the process of prosecuting this crime of aggression as it will relieve the tribunal's prosecutors of some of the burden of collecting evidence.

¹³ 'Statement Calling for the Creation of a Special Tribunal for the Punishment of the Crime of Aggression against Ukraine', per: gordonandsarahbrown.com.

¹⁴ Estonia, Latvia, Romania and Slovakia.

Will politics prevail over justice?

Many obstacles stand in the way of the swift establishment of such a tribunal, but this does not mean that the efforts to create it while the war is still ongoing are doomed to failure. This largely depends on shifts in the political will of the countries involved, as well as developments on the battlefield: should the balance tip in Ukraine's favour, its case for the establishment of such a tribunal would gain greater weight. One factor working in favour of Ukrainian efforts is that negotiations have already started on the concrete and desirable legal formula for establishing a tribunal under an agreement with the UN, although Ukraine will still have to persuade its partners to endorse it. The ICC's arrest warrant for Putin, which rules out an easy return to business as usual with Russia, also works in Ukraine's favour in this regard.

However, the problem is that the strong legal arguments against the establishment of such a tribunal provide a convenient excuse for political resistance. The outcome of the war remains unknown, so not all countries want to risk facing additional difficulties during potential negotiations with Russia. Some members of the Core Group may also fear that setting up such a precedent-setting court will spur efforts to set up similar institutions to prosecute their leaderships. This may explain the relatively slow pace of action and the preference of some of Ukraine's partners for an internationalised tribunal, which would lack the legitimacy to try the Russian troika. The role of the ICPA can also be considered in this context: its activity will only be relevant if an *ad hoc* court is created. For now, however, it remains a fig leaf for real action.

Nonetheless, the establishment of such a court would have a major impact on the international security system. It would show that not even a member of the UN Security Council is completely free of responsibility for crimes under international law. It could also provide an incentive to reform the ICC and strengthen its legitimacy to investigate crimes of aggression, although it is perhaps this very prospect that raises the greatest fears among Ukraine's potential partners and weakens the chances of establishing such a tribunal.