

Russia's invasion of Ukraine. How could Vladimir Putin be prosecuted for the crime of aggression?

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Summary

There is a wide consensus that the aggression against Ukraine represents a continued violation of international law conspicuously displayed by Vladimir Putin and his henchmen. The aggression echoes a dereliction from safeguarding the United Nations' *raison d'être* and infracts the very cornerstone of the modern international legal order, more specifically, the prohibition of the use of force. Sadly, Russia's illegal war in Ukraine reinforces, yet again, that the international community provides a rather futile ground to bring the perpetrators of the crime against peace to account. Moreover, the invasion strengthens Russia's longstanding reputation in the international arena, that of a transgressor.

Without a doubt, the prosecution of the crime of aggression for the first time during the Nuremberg trials marked a pivotal step for its periplus through the international arena. In the canon of criminal jurisprudence this momentous event occupies a conspicuous place. In light of this, the recurrent theme in the discussion about the Russian crime of aggression is how to hold Putin accountable for his wrongdoings. As the current thesis seeks to show, the road to accountability for the crime of aggression is, at least in the existing legal framework, impassable. There is no available mechanism that can enforce *ius puniendi* (the power to punish) over this crime of aggression. In light of this, in an attempt to close the loophole in the accountability framework for the crime that gives rise to all the other core crimes, several alternative accountability mechanisms have been put forward. At the heart of all these avenues lies the imperative of repudiating impunity by preventing Putin (and the others from the highest echelon of state authority) from escaping once again the tenets of accountability for the crime of aggression.

List of abbreviations

ECCC	Extraordinary Chambers in the Courts of Cambodia
EU	European Union
ECHR	European Convention on Human Rights
GC	Geneva Conventions
<i>Ibid</i>	In the same place (<i>ibidem</i>)
ICC	International Criminal Court
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
ILC	International Law Commission
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
NATO	North Atlantic Treaty Organization
OSCE	Organization for Security and Co-operation in Europe
p.	page
para./paras	paragraph(s)
<i>per se</i>	by itself
RS	Rome Statute
STCoA	Special Tribunal on the Crime of Aggression
SCSL	Special Tribunal for Sierra Leone
STL	Special Tribunal for Lebanon
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
VCLT	Vienna Convention on the Law of Treaties

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1 Introduction

1.1 Purpose of the thesis

Who would have imagined that the post 1945 international order and the European security could be obliterated in the 21st century? The likelihood of a war embroiling the European continent was something almost unthinkable as war *per se* was regarded as an obsolete notion. And yet the unthinkable happened when Russia's president, Vladimir Putin, decided to invade Ukraine through what he referred to as a *special military operation*. Under the preposterous pretenses of *demilitarization* and *denazification* of Ukraine, following the *Euromaidan protests*¹ and the *Revolution of Dignity*, the Russian annexation of Crimea the same year and the intervention in Donbas, on the 24th February 2022, *the sacred right to peace*² was yet again infringed.

The Russian aggression that engendered all the atrocities committed in Ukraine since the beginning of the invasion, triggered the war of words surrounding a quintessential aspect: accountability. Naturally, the issues that elicited the most interest in the current war discourse revolved around the prospects of holding Russia's head of state and the supreme commander-in chief of the Russian armed forces, Putin, and his henchmen accountable for the crime of aggression. In the accountability scheme, Putin's individual responsibility for the crime of aggression is of primary concern and a key objective.

In light of this, the current thesis seeks to explore the road to accountability for the crime of aggression in the context of the Russian aggression and the ongoing international armed conflict in Ukraine. The accountability question is currently pervading the discussion surrounding the war since the aggression ignited a global outcry for justice and a strong repudiation of impunity. Given Russia's status as a permanent member of the United Nations Security Council (UNSC) holding a veto right, the question of whether justice will prevail furthers a major concern.³ In this sense, ensuring accountability for the "mother of all crimes" from which the other core international crimes allegedly committed in Ukraine spawned represents an imperative for the ubiquitous fight against impunity. The current thesis will be examined under the aegis of the following research questions:

¹ In Ukrainian *Yevromaidan*, also known as the Euromaidan Revolution-a protest movement that was sparked in November 2013 by president Viktor Yanukovich's refusal to sign the agreement with the European Union. Instead he decided to associate with the Eurasian Economic Union (Russia, Belarus, Kazakhstan). The Revolution of Dignity (Revoliutsiia hidnosti) took place at the end of Euromaidan protests, in February 2014 and culminated with Yanukovich's ousting. He subsequently fled to Russia where he currently lives.

See further Shveda, Yuriy & Park, Joung. (2015). Ukraine's revolution of dignity: The dynamics of Euromaidan Journal of Eurasian Studies 7.

²UN General Assembly, *Declaration on the Right of Peoples to Peace*, 12 November 1984, A/RES/39/11

³Prior breaches of international law that show how Putin and his regime were not held accountable for horrific crimes including the crime of aggression they committed: the 1999 Russia heavy bombing of Chechnya, the 2008 invasion of Georgia, the 2014 the annexation of Crimea and the direct participation in the Syrian conflict with the most intense attacks happening in 2016.

- a. What are the accountability avenues that can ensure the prosecution of Putin for the crime of aggression, and
- b. What could be the most effective legal avenue to provide accountability for the crime of aggression in Ukraine?

There are two available frameworks in the discourse about accountability: state responsibility and individual criminal accountability or as the International Court of Justice (the ICJ or the Court) has pointed out, international law is characterized by a "duality of responsibility", each side of the accountability being under a different legal ambit and having a different objective.⁴ Consequently, in the discussion about accountability, the criminal liability of individuals delineates itself from state responsibility. However, the nature of the crime of aggression entails a link between the two. Under international law, determining whether a state bears responsibility for a wrongful act constitutes a *sine qua non* for establishing the individual criminal responsibility.⁵

In light of this, the crux of this research endeavor is to address the individual criminal accountability framework for the crime of aggression from a *de lege lata* perspective, and not through the lenses of a *de lege ferenda* perspective, albeit the latter will also represent a point of concern. As such, the chosen methodological approach is a theoretical excursus into the pertinent legal perspectives. Based on this, the thesis will look into each of the four alternative jurisdictional pathways for prosecuting Russia's president: an ad hoc tribunal, universal jurisdiction exercised by a domestic court, territorial jurisdiction or the International Criminal Court (the ICC or the Court). For each of the four different mechanisms for criminal prosecution I will consider the imperative aspects that are associated with the prosecution of the crime of aggression such as the substantive questions relating to immunity or jurisdiction. In this vein, the doctrine of head of state immunity in international law and the relevant case law will represent a valuable tool in understanding the obstacles that impede holding Putin to account for his crime of aggression. Thus, this will be further explored to enable a better understanding on the topic. Additionally, the provisions of the Rome Statute (RS) of the ICC pertaining to the crime of aggression and immunity will be systemically analyzed to shed light on the particularities of this crime, its jurisdictional contours and how the ICC regards state officials immunities.

⁴ *Application of the convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement, ICJ reports 2007, p. 116, para. 173.

⁵ It is considered that the crimes within the jurisdiction of the Court reflect „dual obligations.” In this sense, see Dopo Akande, Antonios Tzanakopoulos, *The crime of aggression in the ICC and State responsibility*, Harvard International Law Journal, 2017, p.33-34; See also Astrid R. Coracini, Pål Wange, *The specificity of the crime of aggression*, p. 312 in Kress C. & Barriga S. (Eds)..2016, *The crime of aggression: A commentary*. Cambridge University Press.

1.2 Structure of the thesis

The narrative and the argumentation of the current thesis develop over ten main chapters. The first chapter contextualizes the paper by providing the fulcrum and its purpose. Chapter two briefly reviews the historical background of the crime of aggression from Nuremberg to its *status quo* and assesses the framework of the prohibition of the threat or use of force in light of the Russian aggression. Moreover, it provides a brief overview over the Russian invasion of Ukraine and the circumstances that gave rise to the war. Chapter three is an inquiry into the Russian crime of aggression and provides the anatomy of the crime committed in Ukraine and the scope of criminal responsibility.

Chapter four deals with the issue of immunity by demarcating between immunity *rationae materiae* and immunity *rationae personae*. In chapter five, the paper's nucleus takes shape. This chapter opens the discussion about the four possible accountability mechanisms that could represent instruments to prosecute Putin for the crime of aggression by focusing on the creation of an *ad hoc tribunal*. The chapter explores the issues related to this type of international forum. Chapter six deals with the concept of universal jurisdiction whereas chapter seven brings the discussion to the possibility of prosecuting the crime of aggression at the Ukrainian domestic level. In chapter seven, the discussion is dedicated to analyzing the ICC or the so-called "pinnacle of the international institutionalization of accountability."⁶ Essentially, the chapter looks into the normative framework for accountability and the role of the ICC in fighting impunity in Ukraine. Chapter nine builds on the previous chapters by providing a forward-looking perspective about the prosecution of Putin. Chapter ten concludes the thesis by concisely assessing what has been discussed and pointing to further developments.

2 The act of aggression and the UN prohibition of the threat or use of force

2.1 Introductory remarks

This section will provide a brief overview of how the crime against peace, or the crime of aggression in modern parlance, emerged on the international stage. Its evolution offers the background for the discussion on the crime of aggression and contributes to fully comprehending how key events shaped the crime to become as it is today: "the most controversial and politically charged crime."⁷ The crime of aggression goes beyond what is legally accepted and the form of illicit recourse to force infracts the principle of prohibiting the use of force. For this reason, this section will also explore the international law's prohibition to use force in light of Russia's aggression.

⁶ Alana Tiemessen, *The Anti-politics of the International Criminal Court*, Centre for Transitional Justice and Post Conflict Reconstruction, Working Paper 1, 2014, p. 1.

⁷ Pål Wrangé, *The crime of aggression and complementarity*, International Criminal Justice: Law and practice from the Rome Statute Review, Roberto Bellelli (ed.) (Ashgate, 2010), 591-607, p. 6.

2.2 The crime of aggression from Nuremberg to its *status quo*

The Charter of the International Military Tribunal (IMT) signed in 1945 and establishing the Nuremberg Tribunal represents the starting point in criminalizing the crime of aggression. For the first time, acts of aggression were recognized as an international crime incurring individual criminal responsibility.⁸ The further prosecution of the crime of aggression during the Nuremberg Tribunal, albeit representing a significant juncture in the emergence of the crime *per se*, did not go beyond the yardstick established at Nuremberg;⁹ hence the reverberations of the prosecution fell silent in the years that followed. Sadly, this only led to a state of abeyance that suffused the crime of aggression.

In 1974, the UN General Assembly (UNGA) defined the crime of aggression through resolution 3314.¹⁰ The resolution was adopted under a firm conviction that "a definition of aggression ought to have the effect of deterring a potential aggressor."¹¹ Sadly, this "sunny emphasis on deterrence"¹² that characterized the definition's adoption did not have the desired deterrent effect the resolution sought to achieve.

The *ad hoc* tribunals established in the 1990s did not satisfy the need of universal justice since their establishment was only temporary.¹³ However, they gave the incentive to create the ICC.¹⁴ Subsequently, the aspiration to end impunity for the perpetrators of "unimaginable atrocities that deeply shock the conscience of humanity"¹⁵ found expression in 1998 with the adoption of

⁸ Article 6(a) of (IMT) annexed to the Agreement provided that acts of aggression entail the „planning, preparation, initiation or waging a war of aggression.”

⁹ In its 1946 judgement, the International Military Tribunal depicted aggression as “the supreme international crime differing only from other crimes in that it contains within itself the accumulated evil of the whole.” See International Military Tribunal (Nuremberg), Judgment of 1 October 1946, {421}.

¹⁰ Article 1 of the UN General Assembly defined aggression as “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.”

¹¹ UN General Assembly, *Definition of Aggression*, 14 December 1974, A/RES/3314, Annex

¹² Kevin Jon Heller, *Who is afraid of the aggression?*, Journal of International Criminal Justice 19 (2021), 999-1016, Oxford University Press, p. 999.

¹³ The *ad hoc* tribunals are International Criminal Tribunal for the former Yugoslavia (ICTY) established by UNSC Resolution 827 of 25 May 1993 (operational from 1993 until 2017) and The International Criminal Tribunal for Rwanda ICTR) established by UNSC Resolution 955 of 8 November 1994 (operational from 1994 until 2015). The hybrid tribunals: the Extraordinary Chambers in the Courts of Cambodia (2001), the Residual Special Court For Sierra Leone (2002), and the Special Tribunal for Lebanon (2009). Not surprisingly, neither of these tribunals had jurisdiction over the crime of aggression as the situations were internal (Yugoslavia was one state).

¹⁴ Cassese Antonio et al. 2013. *Cassese's International Criminal Law*. Third ed. Oxford United Kingdom: Oxford University Press, p. 262.

¹⁵ UN General Assembly, *Rome Statute of the International Criminal Court (last amended)*, 17 July 1998, Preamble; See also ICC President Judge Piotr Hofmanski, *Address to the United Nations General Assembly presenting the Court's Annual Report to the United Nations*, 31 October 2022, New York, p. 3.

the Rome Statute that established the ICC, the first permanent criminal court to have jurisdiction over the crime of aggression.¹⁶

From 17 July 2018 onwards, the ICC was vested with the powers to adjudicate not only war crimes, genocide and crimes against humanity, but the crime of aggression itself. The activation of the crime of aggression before the ICC, the *gift to all humankind*¹⁷ marked the culminating act in the long periplex towards its criminalization. This step positioned it in the quartet of serious international crimes, and concluded a long-century journey to complete the framework related to the jurisdictional architecture of the ICC. Not only did this step reaffirm the paramountcy of repudiating impunity, but it also sent an appeal that the international law does not fail to keep up with "the moral sense of mankind" and that in its incessant fight against impunity, acts that transgress the moral sense will not be regarded as "innocence in law."¹⁸ Curtailing the crime against peace through state consent only contributed to undermining the ICC effectiveness. Furthermore, it rendered the only mechanism that was created to end impunity (and international law in general) to resemble a rather 'toothless tiger' and not a court of law capable to eradicate the crime against peace.¹⁹

In light of the above and the context of the events happening in Ukraine, one can validly ask whether the crime of aggression will ever be deterred and what can contribute to its deterrence. Certainly a question that elicits a great deal of food for thought and that does not provide a straightforward answer.

2.3 The United Nations prohibition of the threat or use of force

The prohibition on the use of force is part of customary law and enshrined in the UN Charter, more specifically Article 2(4) which provides that "all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."²⁰ The provision includes a dual prohibition that covers both the *use* and *threat of use of force*.

¹⁶ On 17 July 1998, 120 States adopted the Rome Statute, the founding treaty of the ICC; The Rome Statute was further ratified by a number of 60 countries and it subsequently entered into force on 1 July 2002 when the ICC became operational.

¹⁷ Jutta F. Bertram-Nothnagel, permanent representative to the UN and ICC-Assembly of States Parties of the Union Internationale des Avocats, retrieved from <https://www.coalitionfortheicc.org/explore/icc-crimes/crime-aggression>

¹⁸ International Military Tribunal, *The trial of the major war criminals*, Vol.2, 21 November 1945, p.192.

¹⁹ Article 15bis paragraph 5 from the RS stipulates that "In respect of a State that is not party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory." As of 3 April 2023 a number of 44 countries have ratified the amendments on the crime of aggression the Rome Statute of the ICC.

²⁰ UN, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Article 2, para. 4.

It is generally accepted that the prohibition on the use of force represents a *jus cogens*²¹ norm. However, two circumstances allow derogations from its peremptory character: the Security Council's recourse to force when there is a "threat to peace, breach of peace and act of aggression" under Chapter VII of the Charter and individual or collective self-defense as reflected in Article 51. In the 1996 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, the ICJ emphasized that the right to self-defense is an inherent right pertaining states and based on the "fundamental right of every State to survival." In light of this, States are entitled to avail themselves of the right to self-defense if their security is in peril.²² But is the Russian aggression susceptible to fall under the ambit of self-defense as the exception to the prohibition against the use of force under Article 2(4) of the UN Charter and customary international law?

2.4 Vindicating the accumulated evil of the whole²³ on the grounds of military necessity

In the speech he addressed on 24 February 2022, Putin invoked, *inter alia*, claims of genocide (under the Convention on the Prevention and Punishment of the Crime of Genocide) against the Russian people in the eastern part of Ukraine. He further justified the invasion on the grounds of protecting the "people who, for eight years now, have been facing humiliation and genocide perpetrated by the Kyiv regime, (...) to this end, we will seek to demilitarize and de-Nazify Ukraine."²⁴ However, as the ICJ pointed out in its 16 March order, the Court was not in "possession of evidence substantiating the allegation of the Russian Federation that genocide has been committed on the Ukrainian territory." Moreover, the Court was "doubtful" that the Convention authorizes the unilateral use of force in the territory of another state" for the purpose of preventing or punishing an alleged genocide."²⁵ Thus, the defense of military necessity does not provide an exculpatory avenue for Russia's conduct and Putin's deviation from the prohibition of the use of force cannot be justified on the grounds of self-defense.

The animus that drove this unprecedented special military operation relied on a Russian imperialist attitude towards the "legitimacy of Ukrainian identity and statehood" and expressed through the unyielding belief that Ukraine is a part of the "post-Cold War security architecture in Europe."²⁶ Decisive in launching the atrocious attack was the longstanding quarrel about

²¹ See the commentary of the Commission to Article 50 of its draft Articles on the Law of Treaties, ILC Year book, 1966-11, para. 1, p. 247: "the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of jus cogens." See also the *Case concerning Military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ 1986, paras. 182-192.

²² *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, ICJ (1996), para. 96.

²³ International Military Tribunal (Nuremberg), Judgment of 1 October 1946, {421}.

²⁴ Transcript from Putin's speech, retrieved from <http://en.kremlin.ru/events/president/news/page/68> ;

²⁵ ICJ, *Allegations of genocide under the convention on the prevention and punishment of the crime of genocide, (Ukraine v. Russian Federation)*, 16 March 2022, Order, para. 59.

²⁶ Jeffrey Mankoff, *Russia's war in Ukraine*, Identity, History and Conflict, Center for Strategic & International Studies, April 2022, p.1.

Ukraine's potential adherence to the North Atlantic Treaty Organization (NATO), a move that could place his imperial project in peril.²⁷

Putin's reliance on Article 51 Chapter VII to justify the aggression falls short of the required threshold that the inherent right (*droit naturel*) of "individual or collective self-defense" has to meet. In this sense, as the above mentioned article acknowledges, a state is entitled to defending itself "if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures to maintain international peace and security."²⁸ By employing military force against Ukraine in a "manner inconsistent with the purposes of the United Nations," the Russian leadership is culpable of having breached Article 2, part 4 of the UN Charter which imposes on the members of the international community the obligation to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state."²⁹

3 An inquiry into the Russian crime of aggression

Article 8 *bis*(1) from the Rome Statute provides that the crime of aggression entails "the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political 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."³⁰ After an introductory definition, the Rome Statute provides the scope of the crime of aggression by exhaustively presenting what qualifies as acts of aggression. As such, the list includes "invasion or attack by the armed by the armed forces of a State of the territory of another State" military occupation, annexation by use of force, bombardments or blockades. Under the guise of an unjustified right to self-defense and an undisputed lack of *iusta causa* to wage war, the Russian military forces transgressed Ukraine's sovereignty and territorial integrity. This fact alone serves as a reasonable basis to indicate Putin's misconduct and breach of international law. Furthermore, Russia's formal annexation of occupied areas in and around the four Ukrainian oblasts, Donetsk, Kherson, Luhansk and Zaporizhzhia in September 2022 represents an illustrative act of aggression that meets the definition of the State act element of the crime.³¹

As expected, the condemnation of the Russian military operation has been overwhelmingly denounced both inside and outside the UN. At the UN level, in its draft resolution on 25 February 2022, the UNSC expressed its strong disapproval of the "Russian Federation's

²⁷ „We are acting to defend ourselves from the threats created for us and from a worse peril than what is happening now.” Excerpt from his speech prior to the invasion, *supra* note 24.

²⁸ UN, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Article 51

²⁹Id. at Article 2 (4)

³⁰ UN General Assembly, *Rome Statute of the International Criminal Court (last amended on 6th December 2019)*, 17 July 1998.

³¹ Carrie McDougall, *The imperative of prosecuting crimes of aggression committed against Ukraine*, *Journal of Conflict & Security Law*, Oxford University Press 2023, p.p. 2-3.

aggression against Ukraine in violation of Article 2(4) of the United Nations Charter." The draft resolution has also deplored the "Russian Federation's 21 February 2022 decision related to the status of certain areas of Donetsk and Luhansk regions of Ukraine as a violation of the territorial integrity and sovereignty of Ukraine."³² Following this failure to adopt the resolution, on 2 March 2022, the UNGA adopted the resolution *Aggression against Ukraine*, deploring "in the strongest terms the aggression by the Russian Federation" and denouncing it as a clear violation of the prohibition of the use of force.³³

Beyond the UN, there has also been a wide and almost universal consensus³⁴ that the Russian aggression is an unlawful use of force that infringes the norms of international law. The firm condemnation of Russia's war of aggression has been expressed, among others, by NATO,³⁵ the OSCE,³⁶ the Economic Organization of Western African States, the EU,³⁷ and the Council of Europe.³⁸

Waging the war of aggression against Ukraine was just the dark impetus that engendered all the other subsequent crimes. War crimes, crimes against humanity and genocide are the three core transgressions that complement the established realm of international crimes and that represent alongside the crime of aggression "the most serious crimes of concern to the international community as a whole."³⁹ Although, a circumstantial analysis of the atrocities that the Russian aggression engendered falls outside the scope of this thesis, it is important to point out that the Russian aggression gave rise to a humanitarian crisis and marked the beginning of a continuum of human suffering and civilian harm. In the months following the invasion, numerous allegations concerning the commission of an array of war crimes, human rights and humanitarian law violations abounded.⁴⁰ An interminable string of indiscriminate attacks on civilian, unlawful killings and executions that the Russian special military operation caused. Thus, the crime of aggression gave birth to all the atrocities committed in Ukraine since the

³² United Nations Security Council, *Draft Resolution*, UN Doc S/2022/155, 25 February 2022; The UNSC rejected the resolution. As expected, Russia wielded veto, China, India and United Arab Emirates abstained while 11 countries expressed their support for the resolution.

³³ UN General Assembly, *Aggression against Ukraine*, A/RES/ES-11/1, 2 March 2022.

³⁴ China and India are the exceptions.

³⁵ NATO, *Statement by NATO Heads of State and Government on Russia's attack on Ukraine*, Press release February 2022.

³⁶ OSCE, *Joint Statement by OSCE Chairman-in-Office Rau and Secretary General Schmid on Russia's launch of a military operation in Ukraine*, Press release, 24 February 2022.

³⁷ *Russia's aggression against Ukraine: Press Statement* by High representative/ Vice-President Joseph Borrell, 24 February 2022.

³⁸ Council of Europe Committee of Ministers, *Decision 2.3 Situation in Ukraine*, 24 February 2022.

³⁹ The Preamble of the RS.

⁴⁰ Through the resolution S-34/1 the UN Human Rights Council established, in March 2022, an Independent Commission of Inquiry entitled to investigate allegations of war crimes in Sumy and Chernihiv, Kyiv and Kharkiv. The report presented in October confirmed the initial claims and found a wide range of violations that amount to War crimes and other human rights and humanitarian law violations committed by the Russian armed forces. The report has showed that Ukraine was also liable for a smaller spectrum of violations and two war crimes. The Ukrainian Prosecutor General announced in March 2023 that there were already over 76.000 documented criminal Cases. However, the full scale of the war crimes is far from being known.

beginning of the war. As the Independent Commission of Inquiry on Ukraine has highlighted in its report, the Russian military has committed "a wide range of violations of human rights law and international humanitarian law (...) that amount to war crimes and include willful killings, attacks on civilians, unlawful confinement, torture, rape and forced deportations of children."⁴¹

3.1 The scope of individual criminal responsibility for aggression

The specificity of the crime of aggression consists in the leadership clause, which entails that the crime has to be carried out by someone from the highest echelon of the state authority, the highest political and military leadership of the aggressor state. Unlike the other crimes under the ICC's jurisdiction, the existence of state involvement in the act of aggression constitutes a requisite for substantiating the individual criminal responsibility for the crime of aggression.⁴² It is equally uncontroversial that this leadership requirement is met since Putin is the current president and the Supreme Commander-in-Chief of the Armed Forces of the Russian Federation. By virtue of his role, Putin is, therefore, in a position to effectively exercise control over politics and the armed forces.

The aggression also incurs criminal responsibility for the members of the Russian leadership as, for instance for the Minister of Defense (and the second in the chain of command), Sergei Shoigu, the Chief of the General Staff of the Russian Armed Forces and First Deputy Minister of Defense (and the third in the chain of command), Valery Gerasimov and the Director of the Foreign Intelligence Service, Sergey Naryshkin.⁴³ As part of the Russian "ruling elite", these individuals are referred to as *siloviki*, a term which implies that they hold decision-making power by dint of their relationship with Putin and consequently are also culpable for the Russian invasion of Ukraine.⁴⁴ In light of this, it is indubitable that the Russian transgression falls under the ambit of what the crime of aggression presupposes and that it satisfies its elements. By launching the invasion of Ukraine in his position as the head of the Russian Federation, followed by the subsequent commission of war crimes, crimes against humanity (and possibly

⁴¹ Human Rights Council, Report of the Independent International Commission of Inquiry on Ukraine, A/HRC/52/62, 15 March 2023.

⁴² See *infra* note 46 at p. 307.

⁴³ Other persons from the Russian leadership that can be held accountable for committing the aggression against Ukraine are the Secretary of the Russian Federation Security Council, Nikolai Patrushev, the Chairwoman of the Council of Federation, Valentina Matviyenko, the Head of the 5th Service of the FSB (Service of Operational Information and International Relations) Sergei Beseda, the Minister of Foreign Affairs, Sergei Lavrov. See more at <https://structure.mil.ru/management/deputy.htm>

⁴⁴ On 25 February 2022, the U.S. Department of Treasury imposed sanctions on Russian Federation President Vladimir Putin, and three other officials from the Government and Russia's Security Council: Sergei Shoigu, Valery Gerasimov and Sergei Lavrov and referred to them as being a part of the Russian "ruling elite." <https://home.treasury.gov/news/press-releases/jy0610> ; The term *siloviki* translates into "men of force", (in the language of political science called *securocrats*), members of Putin's inner circle, the key players of his regime political and his most trusted advisors. <https://russiapedia.rt.com/of-russian-origin/siloviki/>

genocide)⁴⁵ Putin incurs individual criminal responsibility. The inherent nature of the crime of aggression also implies that the individual perpetrating the crime participates in a collective act since the act of aggression is attributable to a state.⁴⁶ In this sense, the leadership clause from Article 8 *bis*(2) provides that "an act of aggression means the use of armed force by a State." The state involvement is reinforced throughout the subsequent list of the acts of aggressions in Article 8 *bis*(2) (a)-(g).⁴⁷

Furthermore, Putin's speech prior to the invasion is a viable testimony that confirms the fact that he was in charge of orchestrating the commission of the crime of aggression:

«We have been left no other option to protect Russia and our people, but for the one that we will be forced to use today. (...) In this regard, in accordance with Article 51 of Part 7 of the UN Charter, with the approval of the Federation Council of Russia and in pursuance of the treaties of friendship and mutual assistance (...), I decided to launch a special military operation.»⁴⁸

Thus, this could fall under the ambit of planning, preparing, or initiating the war of aggression as the definition of the crime states.⁴⁹ His speech adds to the evidentiary basis and contributes to concluding that by all objective measures, Putin is guilty of waging an aggressive war. Based on the above, it is thus unquestionable that the so-called *special military operation* against Ukraine is tantamount to an illicit use of force that translates into an act of aggression. By orchestrating the commission of the attack, Putin is liable to answer the demands of individual accountability. But is it legally possible to prosecute Putin and hold him criminally liable for his transgression, and if so, what would this imply?

4 The law on immunity and the prosecution of Putin

"Immunity builds on a fundamental international legal principle: states are equal and horizontally organized and cannot act as each other's judges."⁵⁰

⁴⁵ There is no consensus on whether Russia has committed genocide in Ukraine. There are voices who contend that the Russian aggression meets the elements of the genocide as defined by the Genocide Convention. In this regard, see further <https://www.csce.gov/international-impact/press-and-media/press-releases/helsinki-commission-briefing-russias-genocide> . As it has been pointed out, the term genocide is often used in "a political rather

than in a legal sense." See more <https://www.bbc.com/news/world-europe-61017352>.

⁴⁶ Astrid R. Coracini, Pål Wange, *The specificity of the crime of aggression*, p.312, in Kress C. & Barriga S. (Eds). .2016, *The crime of aggression: A commentary*. Cambridge University Press.

⁴⁷ Article 8 *bis*(2), RS.

⁴⁸ Excerpt from Vladimir Putin's speech on 24th February 2022, translated by Al Jazeera, available on <https://www.aljazeera.com/news/2022/2/24/putins-speech-declaring-war-on-ukraine-translated-excerpts>

⁴⁹ Article 8 *bis* (1) RS

⁵⁰ Stigen Jo, "40. Which immunity for human rights atrocities?" In *Protecting humanity*. Leiden, The Netherlands: Brill, Nijhoff, 2010, p. 753

Thus far, as the discussion has shown, the Russian aggression represents an unlawful use of force that transgresses the norms of international law and that gives rise to the individual criminal responsibility of Putin and those from the top-state leadership. Based on this, the current chapter is an excursus into the law on immunity and its interrelation with accountability. In the discussion about accountability for the crime of aggression, international criminal law interacts with the international law on immunities. In simple words, immunity is a doctrine of international law connoting a legal privilege applied to State officials to be exempted from criminal liability. The immunity of State officials for crimes of international concern is a matter that engenders a serious bone of contention that mainly revolves around whether an international criminal forum can exercise jurisdiction over individuals that act on behalf of their States.⁵¹

Immunity is a legal concept connoting the "non-existence of power or non-amenability to the jurisdiction of the national authorities of a territorial State."⁵² In line with the customary norms of international law, the legitimacy of the Head of State immunity for the above-mentioned crimes is accepted before the national and foreign domestic courts. Although the issues of immunity for current and former state officials from foreign criminal jurisdiction are not comprehensively governed by any universal international treaty, customary law represents the source of international law in this realm.⁵³ Or as articulated by Hazel Fox "in the absence of any general convention on the status and immunities of a Head of State, the rules are provided by customary international law."⁵⁴

As pointed out by the ICJ in the Arrest Warrant case, the immunities granted to state officials are not justified by their personal benefit, but their rationale encompasses a way to "ensure the effective performance of their functions on behalf of their respective States."⁵⁵ Under international law, the concept of immunity has a twofold nature: immunity *rationae personae* and immunity *rationae materiae*. The first type of immunity, also called personal immunity relates to the position of the official to whom the immunity is granted. The second type, the functional immunity, is attached to the functions of the State official that performs certain acts on behalf of the State. Immunity *rationae materiae* does not encompass personal acts but represents a corollary of the functions pertaining to a state official.

⁵¹ Galand, Alexandre Skander. Chapter 4 Article 13(b) vs. Immunity of State Officials. In *UN Security Council Referrals to the International Criminal Court*. Leiden, The Netherlands: Brill, Nijhoff, 2019), p. 153

⁵²International Law Commission, *Second report on jurisdictional immunities of States and their property*, Mr. Sompong Sucharitkul, 1980, para. 17.

⁵³ International Law Commission, *Preliminary report on immunity of State officials from foreign criminal jurisdiction* (Special Rapporteur, Roman Anatolevich Kolodkin), A/CN.4/601, May 2008;

There are some international treaties that govern the matter of immunity, but not all of them have entered into force like, for instance, the 1975 Vienna Convention on the Representation of States in their relations with international organizations of a universal character or the 2004 UN Convention on Jurisdictional Immunities of States and their property. With regard to the existing treaties regulating immunity that have entered into force, the State participation is weak (the 1969 Convention on special missions counts a number of 39 states parties).

⁵⁴ Hazel Fox, *The Law of State Immunity*, New York, Oxford University Press, 2002, p. 426

⁵⁵*Case concerning the Arrest Warrant of 11 April 2000 (Democratic republic of the Congo v. Belgium)*, ICJ, para. 53

Putin serves as the current president of the Russian Federation and the designated Head of State (this is his fourth presidential time).⁵⁶ In his position as the head of state, Putin enjoys both immunity *rationae personae* and immunity *rationae materiae*. Since this thesis focus on avenues to hold Putin accountable for the crime of aggression, the focus is thus on the personal immunity as he is the sitting president of the Russian Federation, the aggressor state.

4.2 The Arrest Warrant Case

The ICJ *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium*, hereinafter *Arrest Warrant Case* or the *Yerodia case*) is an indispensable reference in the discussion about immunity and universal jurisdiction. The case concerned Mr. Yerodia, who was at that time the Minister of the Foreign Affairs of the Democratic Republic of Congo. The Belgian judicial authorities issued an *in absentia* arrest warrant against him, as the incumbent minister for foreign affairs on the grounds of committing grave breaches of the Geneva Conventions and their additional protocols and for committing crimes against humanity in 1998 prior to his tenure as Minister of Foreign Affairs.⁵⁷ The core legal question that the case dealt with was whether the arrest warrant that Belgium issued inflicted the international law concerning the absolute immunity and inviolability from the criminal jurisdiction of Mr. Yerodia.⁵⁸ The ICJ concluded that he was immune before the Belgian domestic courts and that the *issuance* and *circulation* of the "disputed arrest warrant (...) effectively infringed Mr. Yerodia's immunity as the Congo incumbent Minister for Foreign Affairs." Furthermore, by infringing the "immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law," Belgium violated an obligation towards Congo.⁵⁹

For the discussion on immunity, the judgement, in this case, is significant in two respects. Firstly, the ICJ ruling asserted the customary nature of the personal immunities that the *troika* (head of state, head of government, or minister of foreign affairs) enjoys before foreign jurisdictions.⁶⁰ Secondly, the ruling confirmed that under customary law, personal immunities do not apply before international courts and tribunals. In this sense, by distinguishing between immunity from criminal jurisdiction and individual criminal responsibility, the Court

⁵⁶ The Constitution of the Russian Federation, (1993, as amended 2020), Article 80 (1). Putin has been in power since 2012 and prior to this he has served another term in office from 2000-2008. His successor was Dmitry Medvedev and during his presidency he served as the country's prime minister. In 2020, Putin initiated an amendment designed to extend the presidential term limit in Russia despite the constitutional provision, Article 81(3), according to which „one and the same person may not be elected President(...) for more than two years.” In 2021, the president signed into law the constitutional change which entails that he can run for two more six years presidential terms; hence a potential extension to 2036.

⁵⁷ Steffen Wirth, *Immunity for Core Crimes? ICJ's judgement in the Congo v. Belgium case*, EJIL, 2002, pp. 877-878

⁵⁸ For a more comprehensive summary of the *Arrest warrant case*, see

<https://www.internationalcrimesdatabase.org/Case/3266/Case-concerning-the-Arrest-Warrant-of-11-April-2002-/>

⁵⁹ *Case concerning the Arrest Warrant of 11 April 2000 (Democratic republic of the Congo v. Belgium)*, paras. 70-71

⁶⁰ Id. para.51

emphasized that immunity does not mean impunity and that although jurisdictional immunity precludes the prosecution for a while, it "cannot exonerate the person to whom it applies from all criminal responsibility."⁶¹ Based on this, accountability of a sitting head of state, head of government, or minister of foreign affairs before domestic courts is contingent upon the ending of their time in office or the waiving of personal immunity by their own government. In this respect, the Court has pointed out that the immunity from foreign jurisdiction will cease to apply if the "state which they represent or have represented decides to waive the immunity."⁶² In Putin's case, it is clear that none of these options is realistic since he prolonged his time in office, and the reality of his government waiving his immunity is highly improbable. Further, the Court made it clear that immunity does not attach to sitting heads of state, heads of government and ministers for foreign affairs before certain international courts where jurisdiction is in place.⁶³ It could thus be inferred that Putin's personal immunity will not preclude his indictment by an international court while he is a sitting Head of State. However, as the discussion will show, things may not be so straightforward in practice.⁶⁴

5. A new court to prosecute Putin: a *sui generis* situation?

5.1 Introductory remarks

"I emphasize that none of the Russian crimes in Ukraine would have been possible without the crime of aggression against Ukraine committed by the Russian leadership. It cannot go unpunished. And the only feasible way to put President Putin and his entourage to trial is to establish a Special Tribunal for the Crime of Aggression against Ukraine."⁶⁵

Since Russia invaded Ukraine, the echoes of Nuremberg engulfed Ukraine and the international community. In this sense, there has been a wide consensus regarding the establishment of a Nuremberg-style tribunal or a specialized court incorporated into the Ukraine justice system with international elements *i.e.*, a hybrid tribunal where Putin and his henchmen could be held liable for the crime of aggression.⁶⁶ It is essentially the principle of non-impunity and the deterrent effect that lie at the heart of this new tribunal. Consequently, the proponents of this

⁶¹ Id. para. 60

⁶² Id. para 60

⁶³ Id. para 61, This is also explicitly laid down in the RS, Article 27; The ICC judgement in the Jordan Referral re Al Bashir Appeal confirms the inapplicability of personal immunity before an international court: „There is neither State practice nor *opinio juris* that would support the existence of Head of State immunity under customary international law *vis-à-vis* an international court. To the contrary, such immunity has never been recognized in international law as a bar to the jurisdiction of an international court” See para. 1

⁶⁴ Art. 27(2) RS provides that neither personal immunity nor functional immunity can be claimed before the ICC. However, Russia is not a state party to the Statute; hence not bound by this provision.

⁶⁵ Ministry of Foreign Affairs of Ukraine, *Statement by Minister of foreign affairs of Ukraine at the SC Meeting on Russia's aggression against Ukraine*, Dmytro Kuleba, 22 September 2022.

⁶⁶ See Philips Sands *Putin's use of military force is a crime of aggression* in Financial Times, 28 February 2022

new international forum consider this one of the viable avenues to hold Russia's top political and military leaders accountable.⁶⁷ In an attempt to close the loophole in the accountability scheme at the European level, the European Commission proposed in November 2022 different options to ensure that the Russian crime of aggression will not go unpunished. As such, this proposal had in view the establishment of either a specialized hybrid court "integrated in a national justice with international judges" or an ad hoc tribunal.⁶⁸ This current section will focus on analyzing the latter alternative by looking into the specifics of this court and the qualms related to it.

5.2 Legal basis

A new tribunal requires international legitimacy both for its operation and its creation. For this reason, the point of departure in the discussion about the establishment of an *ad hoc* tribunal, the Special Tribunal on the Crime of Aggression (hereinafter the STCoA),⁶⁹ is the issue of legitimacy. It is undoubtedly that the legal framework for an international tribunal stems from the international law apparatus. This is the nucleus that provides the legal basis for the new court that could prosecute the Russian crime of aggression. However, there are several substantive issues arising from the creation of an *ad hoc tribunal*, such as, for instance, asserting jurisdiction, immunity, enforcement, and implementation. Moreover, the creation of a new tribunal would imply that Russia would become subject to its jurisdictional scope. In addition to this, it is imperative for the independent tribunal to be "established by law" and anchored in the "duly established procedures of the legal process."⁷⁰ This is closely related to the protection of the basic principles concerning individual rights that must be cemented during criminal proceedings.⁷¹

5.3 Could the United Nations create the special aggression tribunal?

Despite the lack of an explicit idea of how the legal framework for the new tribunal should look like, the main alternative that is being put forward is the establishment under the aegis of the United Nations. The ICTY and the ICTR represent viable examples of courts created by the UN Security Council (UNSC) through resolutions adopted under Chapter VII of the UN Charter.⁷² Consequently, the creation of a special tribunal to prosecute Putin would

⁶⁷ In February 2023, Ukrainian foreign minister Dmytro Kuleba announced that a core group working on creating a special tribunal for the crime of aggression has been established. There are currently 34 countries that have joined the group and that are backing the idea of establishing a new tribunal.

⁶⁸ Ukraine: Commission presents options to make sure that Russia pays for its crime, Brussels, 30 November 2022, Press Release, at https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7311

⁶⁹ The creation of the STCoA has also been endorsed by President Zelenskyy who announced on the 31st Mars that the text for the relevant UN resolution is being worked on. See more on <https://www.msn.com/en-us/news/world/zelenskyy-we-want-to-set-up-tribunal-regarding-russia-via-un-resolution/ar-AA19kC2c>

⁷⁰ United Nations Human Rights, Office of the High Commissioner, *Basic Principles on the independence of the Judiciary*, 6 September 1985, Article 5.

⁷¹ See Article 9 from the International Covenant on Civil and Political Rights, 23 March 1976 Article 6 from the European Convention on Human Rights (ECHR), 3 September 1953.

⁷² Un Doc S/RES/827 (1993), 25 May 1993, Un Doc S/RES/995 (1994), 8 November 1994

theoretically imply the participation of the UN, more specifically, the UNSC that has the powers to do so. This alternative would have a series of advantages, such as the hard law character of the tribunals' decisions, the deriving obligation of cooperation from all UN Member States, and, most and foremost, the non-disputed overruling of immunities.⁷³ However, given the fact that Russia is a member of the Permanent Five (P5) and holds a veto right, this alternative is definitely not feasible since it is held hostage to obvious political factors and interests that surpass the functions of the most *powerful* body of the UN. As such, legally speaking, the establishment of a tribunal with the involvement of the SC is not a realistic option since this organ does not have any legal coercion in this case.

The UN General Assembly (UNGA) could potentially provide another avenue for the creation of the tribunal. In this sense, the Uniting for Peace GA resolution 377 could be pertinent in the current discussion because it states the following:

"if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, *the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary to restore international peace and security.*"⁷⁴

The UNGA had already exercised its powers based on the above provision on March 2022 when it condemned the "24 February 2022 declaration by the Russian Federation of a *special military operation* in Ukraine."⁷⁵ But would it be legally conceivable to create this tribunal under the UNGA authority?

The ICJ has previously recognized that the UNGA has this power, albeit not expressly provided by the Charter, but conferred by "necessary implications."⁷⁶ Consequently, the UNGA is endowed with the legal power to establish "an independent and truly judicial body pronouncing final judgements without appeal within the limited fields of its functions."⁷⁷ There is already a precedent, although substantially different in the sense that this was a tribunal created to judge UN civil servants: the UN Administrative Tribunal that the UNGA established on 24 November 1949.⁷⁸ In contrast, the focal point of a special tribunal and its endeavors would be the

⁷³ Olivier Corten, Vaios Koutroulis, *Tribunal for the crime of aggression against Ukraine-a legal assessment*. European Parliament, Policy Department for External Relations, Directorate General for External Policies of the Union, PE 702.574, December 2022, p. 14.

⁷⁴ United Nations General Assembly, *Resolution 377 (V)-Uniting for peace*, 3 November 1950

⁷⁵ United Nations General Assembly, *Resolution ES-11/1 on Aggression against Ukraine*, UN Doc A/RES/ES-11/1, 2 March 2022.

⁷⁶ International Court of Justice, *Effects of Awards of Compensation by the United Nations Administrative Tribunal* Advisory opinion, ICJ Reports 1954, 13 July 1954, p. 32.

⁷⁷ *Idem*

⁷⁸ United Nations General Assembly, *Resolution 351 A(IV) on Establishment of an United Nations Administrative Tribunal*, UN Doc A/RES/351 (IV) A, 24 November 1949.

prosecution of Putin (and also the rest of the Russian leadership), *i.e.*, a citizen of a UN Member State. The ICTY has also assessed the legal authority of the UNGA to establish a tribunal under its realm. In this sense it has pointed out that:

"The General Assembly did not need to have military and police functions and power in order to be able to establish the United Nations Emergency Force in the Middle East (UNEF) in 1956. Nor did the general Assembly have to be a judicial organ possessed of judicial powers and in order to be able to establish UNAT."⁷⁹

Given all these considerations, it is highly implausible if not impossible that the UNGA will have the authority to provide the legal basis for establishing a special tribunal for the Russian crime of aggression.⁸⁰ According to the UN Charter, Article 25, the UN Members are bound to "accept and carry out the decisions of the Security Council."⁸¹ Conversely, in light of Article 11 from the UN Charter, the UNGA does not possess the power to adopt decisions with binding character, but can only "call the attention of the Security Council on situations that are likely to endanger international peace and security."⁸² In February 2023, the UNGA adopted a resolution where it called for a cessation of hostilities and it reiterated its demand that Russia "immediately, completely and unconditionally withdraw all of its military forces from the territory of Ukraine within its internationally recognized borders."⁸³ Despite the obvious *soft law* character of this resolution, the UNGA remains the most important and vociferous UN body to address the situation in Ukraine since the organ that should be the most entitled to act, the SC, is paralyzed and unable to come to grips with Putin's challenge to the international order. Notwithstanding the UN's shortcomings in providing a fertile ground for the establishment of a special tribunal, the organization utters the almost ubiquitous opinion of the international community: Russia is the aggressor state and Putin has to legally answer for his misconduct.

5.4 What about the establishment by virtue of a treaty?

Given the fact that the creation of the tribunal for the Russian crime of aggression under the UN realm is embroiled in legal and procedural intricacies, another option that has been proposed is by virtue of a treaty. The President of Ukraine has been among the proponents of this initiative that represents, in his view, a viable option to "punish those who, unfortunately,

⁷⁹ ICTY, *Prosecutor v. Dusko Tadic-Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Appeals Chamber, 2 October 1995, para. 38

⁸⁰ Instead, it could also be based on state consent.

⁸¹ UN Charter of the United Nations, 24 October 1945, Article 25.

⁸² *Id.*, Article 11.

⁸³ UN General Assembly, Resolution on the Principles of the Charter of the United Nations underlying a comprehensive, just and lasting peace in Ukraine, 16 February 2023, A/ES-11/L.7, para. 5. 141 Member States voted in favor, 7 against: Belarus, the Democratic People's Republic of Korea, Eritrea, Mali, Nicaragua, Russia and Syria and 32 states who abstained among which India and China.

cannot be reached by the ICC and all other available judicial institutions of the world."⁸⁴ In the discussion about the creation of the special tribunal through a treaty, there are several options that Ukraine can avail itself of. Ukraine can, for instance, conclude an agreement with the UN, with other States that are backing the idea of a new court to prosecute aggression or with other international organizations such as the Council of Europe or the European Union. Consequently, the legal basis for the STCoA created under this paradigm is the agreement *per se* between Ukraine as the country delegating the jurisdiction to the tribunal and the three indicated options.

An eventual creation of a special tribunal by virtue of a treaty between the UN and Ukraine would not represent a *sui generis* situation. This approach has been previously employed to create the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC) or the Special Tribunal for Lebanon (STL).⁸⁵ Despite the fact that none of these tribunals had jurisdiction over the crime of aggression, these precedents are pertinent in showing the possible avenues in creating a tribunal by agreement Ukraine and the UN.

The establishment of the tribunal through an agreement would imply a request from Ukraine addressed to the UN. Although, the UNSC will not have the powers to get involved in this process due to obvious reasons already stated above, as the precedent has shown (the ECC), the UNGA has the authority to prompt the process by requesting the UN-Secretary General to undertake the required measures to bring about the establishment of the tribunal.⁸⁶

Another option that has been put forward under the current scenario is the establishment by a multilateral agreement between Ukraine and other States according to the lead example of Nuremberg International Military Tribunal (NIMT), the International Military Tribunal for the Far East (IMTFE) or the ICC.⁸⁷

5.5 Jurisdictional basis and the scope of the special international tribunal

The issue of asserting jurisdiction represents another point of concern when considering the establishment of the special international tribunal. Jurisdiction connotes "the limits of the legal competence of a State or other regulatory authority (such as the European Community) to make,

⁸⁴ President of Ukraine, "We must create a Special Tribunal on the crime of aggression against Ukraine". Address by president Volodymyr Zelensky at the public debate "War and Law", Paris, 5 October 2022.

⁸⁵ Special Court for Sierra Leone, Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002, See Article 21; Extraordinary Chambers in the Court of Cambodia, Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea, 6 June 2003, See Article 32; United Nations Security Council, Resolution 1757 on the Establishment of a Special Tribunal for Lebanon, 30 May 2007, See Article 19(1).

⁸⁶ *Supra* note 73, p.p. 17-18

⁸⁷ Council of Europe, Accountability for human rights violations as a result of the aggression of the Russian Federation against Ukraine: role of the international community, including the Council of Europe, SG/Inf(2023) 7 31 January 2023, p.13. However, unlike the situation in Ukraine, the NIMT and IMTFE were substantially different in the sense that they were convened by States in the name of Germany and Japan, something that is undoubtedly not an option in the present case.

apply, and enforce rules of conduct upon persons."⁸⁸ Criminal jurisdiction is, as articulated by Berman, an authority to "prescribe and to punish."⁸⁹ It is equally uncontroversial that in order to answer the demands of individual criminal accountability, the special tribunal has to be vested with jurisdictional powers focused explicitly on the crime of aggression. In other words, a judicial tribunal having prosecutorial powers and capable to enforce its *ius puniendi* (authority to punish) over the crime of aggression based on the pre-existing customary international law prohibition of the use of armed force.

Under the Ukrainian criminal code, the "illegal crossing of the state border of Ukraine" (Article 332-2) and the "planning, preparation and waging of aggressive war" (Article 437) are punishable.⁹⁰ In case of an agreement between Ukraine and the UN, Ukraine and European Union or the Council of Europe or Ukraine and other States, the provisions in the Ukrainian law will be corroborated with the terms of the respective agreement forming the special tribunal. In practice, this would imply that Ukraine will be able to delegate the exercise of jurisdiction (a right that Ukraine is entitled to as a sovereign state) to the tribunal established through an international treaty rather than exercising this jurisdiction through its national courts.⁹¹

The definition of the crime of aggression from the Rome Statute of the ICC, Article 8 *bis*, should fall under the ambit of the STCoA, But there is also the option to adopt a new definition. However, as it has been proved by earlier attempts, defining aggression is not the most easiest task so it is unclear whether assuming a new definition is beneficial to the scope of the STCoA. Regardless of the chosen variant, the tribunal, as the proposed name suggests should be solely vested with jurisdiction over the crime of aggression; hence its prosecutorial powers should be confined to the codified definition of aggression, but it should also conform with customary international law and reflect the underlying principle *nullum crimen, nullum poena sine lege*.⁹²

5.6 Immunity

As the ICJ has made clear in the *Arrest Warrant Case*, personal immunities attached to the so-called *troika*-the sitting heads of State, heads of government and ministers for foreign affairs do not preclude certain international tribunals from prosecuting the crimes of international concern. The condition is for these tribunals to have jurisdiction under the crime of aggression.⁹³ Consequently, the fact that Putin enjoys personal immunity as the sitting president of Russia

⁸⁸ Vaughan Lowe, *Jurisdiction* in Evans ed. *International Law*, 2nd edition, 2006, p. 335.

⁸⁹ Berman Franklin, *Jurisdiction: The State* in P. Capps, M. Evans and S. Konstadinidis (eds), *Asserting Jurisdiction, International and European Legal Approaches* (2003), p.5.

⁹⁰ Ukraine legislation, The Criminal Code of Ukraine, September 2001.

⁹¹Supra note 73, p. 17.

⁹²"No crime without law, no punishment without law." This is also to avoid problems related to retroactivity. See more Council of Europe, Accountability for human rights violations as a result of the aggression of the Russian Federation against Ukraine: role of the international community, including the Council of Europe, SG/Inf(2023) 7 31 January 2023, p. 13.

⁹³ *Case concerning the Arrest Warrant of 11 April 2000 (Democratic republic of the Congo v. Belgium)*, para.61.

would not preclude the STCoA from prosecuting him for the crime of aggression. This idea has also been reinforced by the International Law Commission (ILC), which noted:

"The fact that a person who committed an act which constitutes a crime under international law acted as a Head of State or responsible official does not relieve him from responsibility under international law."⁹⁴ But, as pointed out in the scholarly, whether immunities can be a bar to prosecution before certain international courts has to be expressly stated in the statute creating that court.⁹⁵ Following this line of thought it can thus be implied that the STCoA has to explicitly or implicitly state in the instrument establishing the court that immunities cannot be relied upon.

6 Universal jurisdiction

6.1 Introductory remarks

"Universal jurisdiction holds out the promise of greater justice, but the jurisprudence of universal jurisdiction is disparate, disjointed, and poorly understood. So long as that is so, this weapon against impunity is potentially beset by incoherence, confusion, and at, times uneven justice."⁹⁶

Universal jurisdiction constitutes another alternative approach to provide accountability for the crime of aggression. At the heart of the universal jurisdiction lies the idea that the perpetrators of the most serious crimes of international concern are *hostes humani generis*.⁹⁷ The four Geneva Conventions (GC) of 1949 constitute the first treaty basis for the assertion of universal jurisdiction, each article of the conventions proscribing the duty of each party to prosecute the persons who have committed "grave breaches" before its own courts.⁹⁸

As the ICJ held in its Barcelona Traction judgement, the obligations that emerge from "outlawing of acts of aggression" represent the "concern of all States" and are thus obligations *erga omnes*.⁹⁹ The prohibition of aggression is generally deemed to be of *jus cogens* nature both at the international and national levels, and the legal implications pertaining to it are those within the scope of *obligatio erga omnes, i.e.*, towards all. In light of this, proscribing the crime of aggression constitutes a duty that all the states have an interest in fulfilling since the crime

⁹⁴ Yearbook of the International Law Commission, Vol II, 1950 *Report of the International Law Commission on its Second session*, 375.

⁹⁵ There are several statutes of international criminal tribunals that expressly provide that immunity cannot be used as a defense in criminal proceedings. For instance, the Statute of the ICTY, 1993, Article 7 (2), the Statute of the International Criminal Tribunal for Rwanda, 1994, Article 6 (2), Statute of the Special Court for Sierra Leone, 2002, Article 6 (2) and of course the ICC Statute, Article 27 (1).

⁹⁶ The Princeton Principles on Universal Jurisdiction, 2001, p. 24.

⁹⁷ Enemies of mankind.

⁹⁸ GC I Article 49, GC II Article 50, GC III Article 129, GC IV Article 146

⁹⁹ Case concerning the Barcelona Traction, light and power company, limited, *Belgium v. Spain*, ICJ, Judgement of 5 February 1970, p. 32. The decision in this case marked the first time the ICJ referred to the concept of *obligatio erga omnes*.

against peace is a transgression of international concern, a *delicta juris gentium*,¹⁰⁰ the biggest affront to peace and to the international community as a whole. This was reinforced by the ILC which designated the prohibition of aggression as a *peremptory norm of general international law*.¹⁰¹

6.2 Could this avenue enable States to prosecute the Russian crime of aggression?

The universal jurisdiction doctrine entails that the criminal jurisdiction disregards the nationality of both the perpetrator (either alleged or convicted) and the victim, or any other link to the state exercising this jurisdiction and is only based on the nature of the crime, on the most serious crimes of international concern.¹⁰² In other words, if applied, universal jurisdiction will cover the crime of aggression committed in Ukraine and disregard the contact factors aspects like nationality, national security interests or territoriality.¹⁰³ The undeniable lack of an established practice to assert universal jurisdiction, as pointed out in the joint separate opinion in the *Arrest warrant case*, does not indicate that "such an exercise would be unlawful."¹⁰⁴ However, as it has been pointed out, despite the national legislations and state practice's lack of conclusiveness regarding the matter of universal criminal jurisdiction, "the contemporary trends" reflect that there is indeed a shift towards other jurisdictional bases than territoriality.¹⁰⁵

Ukraine's Criminal Code has the principle of universal jurisdiction incorporated as a norm in Article 8. According to this provision, the offenses committed by "foreign nationals or stateless persons not residing permanently in Ukraine" are covered by the Ukrainian law on criminal liability under the criminal code "in cases stipulated by international treaties."¹⁰⁶ It is, however, unclear what treaties is the provision referring to. In the current case, a form of universal jurisdiction would entail the assertion of jurisdiction of one state with the consent of

¹⁰⁰ A grave offence to the law of nations itself. In *Attorney General of the Government of Israel v. Eichmann*, 1961, the Supreme Court of Israel held that „international law is, in the absence of an international criminal court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring the criminals to trial. The jurisdiction to try crimes under international law is universal.” p.12.

¹⁰¹ International Law Commission, *Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), with commentaries*, A/77/10, 2022, Conclusion 23, p.87; See further the report of the Study group on the fragmentation of international law: difficulties arising from the diversification and expansion of international law (Martti Koskenniemi), 2006. The report included the prohibition of aggressive force on the list of the „most frequently cited candidates for the status of *jus cogens*.” p.189.

¹⁰² The Princeton Principles on Universal Jurisdiction, 2001, p. 28; Principle 2 lists the serious crimes under international law that trigger the universal jurisdiction: piracy, slavery, war crimes, crimes against peace, crimes against humanity and torture.

¹⁰³ Under international law there are five jurisdictional bases: territorial, national, passive personality, protective and universal. See Kenneth C. Randall *Universal Jurisdiction under international law*, 66, Texas Law Review, No. 66, 1988, p. 786.

¹⁰⁴ ICJ, *Arrest Warrant Case*, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, 14 February 2002, para. 45.

¹⁰⁵ Id., para 46.

¹⁰⁶ Ukraine legislation, The Criminal Code of Ukraine, September 2001.

Ukraine as a territorial state.¹⁰⁷ Based on this, in March 2022, Poland announced that it opened an investigation over the Russian invasion of Ukraine.¹⁰⁸ In addition to this, Poland is also relying on the protective principle when asserting jurisdiction on the grounds that Russia has committed an offence against the "internal or external security of the Republic of Poland" pursuant to Article 112(1) of the Polish Penal Code.¹⁰⁹ In reality, a domestic trial of Putin in Poland or any other court outside Russia will not be able to override one major challenge: the immunities he enjoys and can claim before any court.

Universal jurisdiction is a legally controversial¹¹⁰ and contentious matter, particularly concerning the crime of aggression; the hence their convergence is a "combustible combination with the potential to profoundly affect the international legal order."¹¹¹ Moreover, the exercise of universal jurisdiction for the crime of aggression is not regulated by an explicit set of rules and there is no precedent in this direction.¹¹² As it was contended in the scholarly context, the major drawback of prosecuting the crime of aggression in domestic courts under universal jurisdiction is the politically sensitive dimension of such a prosecution and the risk that even the well-intended prosecutions can have "deleterious effects on international diplomacy."¹¹³ Based on this, there is a sufficiently firm ground to believe that universal jurisdiction is rather a futile instrument, far from being the viable mechanism needed to prosecute Putin. This is mainly due to the jurisdictional challenges that would arise when prosecuting the crime of aggression outside Ukraine in any other state that asserts universal jurisdiction over the crime of aggression.

7 Prosecution at the domestic Ukrainian level

Another potential accountability mechanism to prosecute Putin and his henchmen for the crime of aggression is through a domestic trial in Ukraine. The Ukrainian domestic courts do not lack jurisdiction over the crime of aggression *stricto sensu*. For this reason, in line with the principle

¹⁰⁷ Currently, there are at least 18 countries who have assumed universal jurisdiction over the crime of aggression, see further Carrie McDougall, *The imperative of prosecuting crimes of aggression committed against Ukraine*, Journal of Conflict & Security Law, Oxford University Press 2023, p. 12. Among the states that have established universal jurisdiction over the crime of aggression are Austria, Cyprus, Georgia, Liechtenstein, The Netherlands, see also <https://crimeofaggression.info/role-of-the-icc/faq/>

¹⁰⁸ See further <https://www.thefirstnews.com/article/polish-prosecutors-launch-investigation-into-russias-attack-on-ukraine-28331>; Lithuania has also initiated relevant domestic prosecutions related to the Russian crime of aggression, see further <https://www.lrt.lt/en/news-in-english/19/1633685/lithuania-opens-probe-into-crimes-against-humanity-in-ukraine-attacked-by-russia>

¹⁰⁹ The Polish Penal Code, 6 June 1997 available at https://www.imolin.org/doc/amlid/Poland_Penal_Code1.pdf; See also Article 117 that proscribes the initiating or waging a war of aggression.

¹¹⁰ Dapo Akande, *Prosecuting Aggression: The Consent Problem and the role of the Security Council*, Paper No.10/21, University of Oxford, p.p. 32-35

¹¹¹ Michael P. Scharf, *Universal Jurisdiction and the Crime of Aggression*, Harvard International Law Journal, Vol.53, 2012, p. 358.

¹¹² Supra note 110, at p. 35.

¹¹³ Supra note 111, at p. 381.

of territorial jurisdiction, Ukraine is entitled to exercise jurisdiction for the crime of aggression committed upon its territory. The option of prosecuting the crime at the domestic level could also extend to Russia and Belarus,¹¹⁴ countries that could theoretically exercise territorial jurisdiction. This is because the crime of aggression was planned and prepared on the Russian territory while the acts of abetting were carried out from the Belarusian territory.¹¹⁵ A change of regime could make the domestic aggression trials in Russia and Belarus practically conceivable. However, the chances of this happening are exceedingly rare.

The Ukrainian Criminal Code deems the crime of aggression as a grave offence subject to a judicial punishment and it explicitly criminalizes it under Chapter XX called *Criminal offences against peace, security of mankind and international legal order*, Article 437 that stipulates:

- 1.Planning, preparation or waging of an aggressive war or armed conflict or conspiring for any such purposes shall be punishable by imprisonment for a term of seven to twelve years.
- 2.Conducting an aggressive war or aggressive military or aggressive military operations shall be punishable by imprisonment for a term of ten to fifteen years.

Pursuant to Article 6, the commission of offences on the Ukrainian territory shall incur criminal liability. Moreover, Article 8 makes clear that foreign nationals, including Russians can be held criminally liable for perpetrating this offence on the Ukrainian territory.¹¹⁶ Since the crime of aggression has been committed on its territory and is included under the Ukrainian domestic law, the principle of territorial jurisdiction is automatically applicable. In light of this, as the territorial state and the victim of Russia's aggression, Ukraine has territorial jurisdiction over the crime of aggression committed from and against its national territory.¹¹⁷ In an attempt to sustain the ongoing accountability efforts and to enable the Ukrainian prosecutors to investigate the crime of aggression, on 2 February 2023, the European Commission announced the establishment of the International Centre for Prosecution of the Crime of Aggression (ICPA) in Hague.¹¹⁸ This marks an essential step in the ongoing accountability efforts and contributes to

¹¹⁴ Article 353 from the Russian Criminal Code proscribes the planning, preparation or the waging of the crime of Aggression, see further https://www.imolin.org/doc/amlid/Russian_Federation_Criminal_Code.pdf. Article 122 From the Criminal Code of Belarus proscribes the crime of preparing or planning an aggressive war, see further <https://cis-legislation.com/document.fwx?rgn=1977#A000000163>

¹¹⁵ Annegret Hartig, *Domestic criminal courts as gap-fillers?: Avoiding impunity for the commission of the crime of aggression against Ukraine*, *Völkerrechtsblog*, 12.04.2022, p.1, available at <https://voelkerrechtsblog.org/domestic-criminal-courts-as-gap-fillers/>

¹¹⁶ Ukraine legislation, The Criminal Code of Ukraine, September 2001, Article 6. Article 8 provides that: Foreign nationals or stateless persons not residing permanently in Ukraine who have committed criminal offences outside Ukraine, shall be held criminally liable in Ukraine under this code in such cases as provided for by the international treaties, or if they have committed any of the special grave offences against rights and freedoms of Ukrainian citizens or Ukraine as prescribed by this code.

¹¹⁷ The Global Campaign for ratification and implementation of the Kampala Amendments on the crime of Aggression, *The role of the ICC*, <https://crimeofaggression.info/role-of-the-icc/faq/>

¹¹⁸ European Commission-Statement by President von der Leyen on the establishment of the International Centre for the Prosecution of Crimes of Aggression in Ukraine, Brussels 4 March 2023, available at

preserving evidence for the crime of aggression by enabling the Ukrainian prosecutors to investigate the crime of aggression from outside Ukraine.

At the Ukrainian domestic level, there already exists a precedent of trying the crime of aggression. In 2019, in the context of the Russian intervention, the former president Victor Yanukovich was tried *in absentia* and found guilty by the *Obolonsky* District Court in Kiev for high treason (Article 111 of the Ukrainian Criminal Code) and abetting in waging the Russian war of aggression against Ukraine (Articles 27(5) and 437 (2)). The court sentenced him to thirteen years imprisonment.¹¹⁹ From a domestic criminal law perspective, this case is representative in showing that the Ukrainian judiciary could constitute a mechanism for prosecuting the crime of aggression. Thus, a national trial is theoretically a way of achieving criminal accountability for the crime of aggression. But is it legally possible for the Ukrainian domestic courts to prosecute Putin given that he is Russia's president and enjoys immunity? The answer is no due to the Head of State's immunity that Putin enjoys and that he can avail himself of to elude prosecution in Ukraine, a foreign jurisdiction. It is unequivocally true that a domestic trial in Ukraine with Putin in the defendant's posture does not represent a plausible scenario; hence this does not constitute a legally effective avenue to prosecute him since the Ukrainian courts will face significant legal difficulties regarding immunity.

7.1. Problems of immunity

Immunity is the most intricate legal issue that arises when prosecuting Putin for the crime of aggression at the national level. A court anchored in the Ukrainian judiciary is unable to overcome the issue of immunities, and for the court to be able to prosecute, personal immunities cannot act as a procedural defense. What underpins this view is the ICJ's decision in the *Arrest Warrant case* that, despite the strong criticism it attracted, relied on customary law when it upheld immunities in national courts (in relation to war crimes and crimes against humanity).¹²⁰ By examining the "State practice, including national legislation and those few decisions of national higher courts such as the House of Lords or the French Court of Cassation" and the "rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals," the Court held that even though states are required under several international instruments to extend their criminal jurisdiction to prosecute and extradite serious crime of international this "extension of jurisdiction in no way affects immunities under customary law." Thus, the ICJ's decision, in this case, made clear that immunities „including those of Ministers for Foreign Affairs (...) remain opposable before the courts of a foreign State, even where those courts exercise such

https://ec.europa.eu/commission/presscorner/detail/en/statement_23_1363

¹¹⁹ According to judge Vladyslav Deviatko, Yanukovich committed a „crime against the sovereignty of Ukraine, namely state treason (...) with his deliberate illegal actions, Moreover, „with his deliberate actions he committed a crime against peace, namely aiding in the conduct of an aggressive war.” See further,

<https://www.rferl.org/a/kyiv-judge-says-yanukovich-s-guilt-proven-in-treason-trial-no-verdict-yet/29728084.html>

¹²⁰ *Case concerning the Arrest Warrant of 11 April 2000 (Democratic republic of the Congo v. Belgium)*, ICJ, para. 58.

jurisdiction under these conventions.”¹²¹ Based on this, Putin’s personal immunity will take legal predominance over any attempt to prosecute him before a national court in Ukraine. It is thus supposed that an internationalized tribunal is the most viable option and the most legally effective in terms of overcoming the issue of immunity, the greatest impediment to prosecution.

7.1 A hybrid tribunal anchored in the Ukrainian judiciary?

Along with establishing the STCoA, the advocates of an internationalized tribunal as a mechanism to prosecute the aggression in the situation of Ukraine have also propounded the alternative of creating a so-called *hybrid tribunal* integrated into the Ukrainian judicial system with international components.¹²² The ECCC represents a viable example of this type of tribunal, albeit the crime of aggression was not under its jurisdiction. This type of court presupposes a blend between the Ukrainian legal system and elements of international and the endorsement by the UNGA.¹²³ It is unclear whether this type of tribunal would stand a better chance of success than the special international tribunal. As it was contended in the scholarly context, unlike an international tribunal, a hybrid one is prone to be incapacitated *ab initio* and thus unable to prosecute Putin and the other people from the Russian leadership due to issues pertaining to the immunity regime.¹²⁴

Moreover, the creation of a hybrid tribunal anchored in the Ukrainian judiciary would most probably run afoul of Ukrainian constitutional law because pursuant to Article 125, the "establishment of extraordinary and special courts shall not be permitted."¹²⁵ As expressed in the scholarly context, Article 125 precludes the creation of a hybrid court incorporated in the Ukrainian judiciary since this type of mechanism does not comply with the above mentioned constitutional provisions.¹²⁶ And as provided by Article 157, the current state of emergency and martial law do not allow any amendment.¹²⁷

¹²¹Id., paras. 58-59.

¹²² Accountability for human right violations as a result of the aggression of the Russian Federation against Ukraine: role of the international community, including the Council of Europe, SG/Inf(2023) 7, 31 January 2023, p. 14.

¹²³ The U.K. Government has been a supporter of this accountability mechanism and on 20 January 2023 has announced that it will join the core group dedicated to achieving accountability for Russia’s aggression against Ukraine. Assessing the practicality of a new hybrid tribunal constitutes an important part of the group’s *raison d’être*. See more

<https://www.gov.uk/government/news/ukraine-uk-joins-core-group-dedicated-to-achieving-accountability-for-russias-aggression-against-ukraine>

¹²⁴ Jennifer Trahan, *Why a „Hybrid” Ukrainian Tribunal on the crime of Aggression is not the Answer*, 6 February 2023 in Just Security, See more

<https://www.justsecurity.org/85019/why-hybrid-ukrainian-tribunal-on-crime-of-agresion-is-not-the-answer/>

¹²⁵ Constitution of Ukraine, adopted on June 1996, last amended in 2019, Article 125.

¹²⁶ Alexander Komarov, Oona A. Hathaway, *Ukraine’s Constitutional Constraints: How to achieve accountability for the crime of aggression*, 5 April 2022, in Just Security, See more

<https://www.justsecurity.org/80958/ukraines-constitutional-constraints-how-to-achieve-accountability-for-the-crime-of-aggression/>

¹²⁷ Supra note 125, Article 157.

It is thus highly improbable that this type of tribunal will be established as it cannot provide a viable avenue to prosecute Putin for the crime of aggression. Or, as the Office of President Zelenskyy has articulated:

"A new risk is that some countries are speaking out in favor of a hybrid tribunal, which is unacceptable. Why is a hybrid tribunal unacceptable? Because it does not guarantee that it will lead to the lifting of immunity from Putin, Lavrov and (Prime Minister Mikhail) Mishustin. This is the main problem with the hybrid project."¹²⁸

Based on these limitations, a hybrid tribunal anchored in the Ukrainian judiciary is arguably not able to provide a sufficiently convenient ground to answer the imperative of prosecuting Putin for the crime of aggression. Having discussed these three possible accountable avenues that can be used to prosecute Putin for the crime of aggression, it is now time to turn to the existing judicial instrument and assess its viability in dealing with the crime against peace and ending impunity.

8 Fighting impunity in Ukraine and the ICC-a toothless (or toothed) tiger?

"Retributive justice is valued by people and the ICC is making an effort to address the concerns of victims. The ICC brings the idea of justice into local and national politics in the places where it is known by people."¹²⁹

Justice is often regarded as a *conditio sine qua non* for peace. Since justice and peace are quintessential components entrenched in the ICC's mandate, this subtlety illustrates how the two concepts coalesce. Or, as the Latin precept expresses *Si vis pacem, cole justitiam*- if we want peace, we ought to cultivate justice.¹³⁰ The world's first permanent criminal court is no exception from the promise of maintaining international peace and security because, as stated in the preamble of the ICC Statute, the peace, security and the well-being of the world represent the essence of the Court's endeavors.¹³¹ The ICC Statute confirms the validity of the purposes and principles of the Charter of the United Nations and indicates that the ICC operates under the auspices of the same guiding values. Although this is where the fight against impunity should start, this is where the Russian crime of aggression comes to a standstill. The so-called

¹²⁸ Andrii Yermak, head of the Office of the President, during the opening ceremony of the War crimes of Russia Exhibition at the Munich Security Conference, 17 February 2023, European Pravda, See more <https://www.pravda.com.ua/eng/news/2023/02/17/7389799/>

¹²⁹ Catherine Gegout (2013), *The International Criminal Court: limits, potential and conditions for the promotion of justice and peace*, Third world Quarterly, 34:5, 800-818, p.811.

¹³⁰ This is the International Labor Organization (ILO) motto, engraved at the ILO building in Geneva.

¹³¹ See the preamble of the Rome Statute; see also Resolution ICC-ASP/16/Res.6, Strengthening the International criminal court and the Assembly of states Parties Adopted at the 13th plenary meeting (by consensus), 14 December, 2017 .

court of the last resort, *complementary to national criminal jurisdictions* has its hands tied when it comes to the aggression against Ukraine.¹³²

However, despite its deficiencies, on the 23rd of March 2023 the ICC took the first step forward in ending the "pervading toxic culture of impunity"¹³³ related to the situation in Ukraine. In this sense, the ICC sent a strong message against impunity when it issued an arrest warrant for Putin. The Court considered that there are "reasonable grounds to believe" that the acts of the indicted fall under the scope of the war crime of unlawfully deporting children from the occupied areas in Ukraine to the Russian territory (Articles 8(2)(a)(ii) and 8(2)(b)(viii) and that the "the public awareness of the warrants may contribute to the prevention of further commission of crimes."¹³⁴ This is a symbolic way to ensure the abolishment of the climate of impunity and perhaps to contribute to the deterrence of future international crimes from being committed. Moreover, the arrest warrant shows that the ICC's role in fighting impunity for the crime of aggression albeit inconsiderable and characterized by jurisdictional ailments does not obviate the ICC from prosecuting the other core crimes allegedly committed in Ukraine.

In the current jurisdictional framework, the Russian crime of aggression does not have a spot at the ICC accountability table. The current situation in Ukraine depicts a sad reality that confirms some states' hostility to ICC and impugns the international law's attempts to outlaw the use of force. Indeed, including the crime of aggression under the ICC's jurisdictional mantle can undoubtedly be considered a milestone. Nevertheless, one cannot help but wonder how the accountability discourse regarding the war in Ukraine would have looked like had the ICC been a toothed tiger and had the prosecution of crime of aggression not entailed so many limitations. A great exercise to visualize how a peace and accountability loving world would look like. And yet this will not be a panacea against impunity for the crime of aggression since there would still be real obstacles that would impede the prosecution of Putin even if the ICC had jurisdiction over the crime, as for instance, the question of immunity.

8.1 Jurisdictional hurdles

There is an overall inclination to assume that "once a legal regime acquires a court, it has teeth."¹³⁵ However, the ICC lacks both teeth and sufficient legitimacy to live up to the expectations imposed by its own Statute and the international community itself: ending impunity through accountability for the crime of aggression. The prospects of the ICC

¹³² See Article 1, RS; Complementarity represents a cornerstone of the ICC. In light of this principle, the ICC solely complements the national criminal justice system, and does not replace it. The ICC steps in only if the States are unwilling, unable or oblivious to investigate, prosecute and try individuals for the most serious crimes. See Art.17, Art. 53 of the RS.

¹³³ Fatou Bensouda, twenty-fifth report on the situation in Darfur, pursuant to Council Resolution 1593 (2005), SC/12863, 8 June 2017.

¹³⁴ An arrest warrant was also issued for Maria Alekseyevna Lvova-Belova, the Presidential Commissioner for Children's Rights in Russia; for more information see the press release from the ICC website <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>

¹³⁵ Huneus, Alexandra, *Compliance with Judgements and Decisions* in C. Romano et al. *The Oxford Book of International Adjudication*, Oxford 2015, p.442.

prosecuting the Russian president is a prevalent topic in the current debate surrounding the war. However, the fourth crime within the ICC's jurisdiction encapsulates features that are different from the other three crimes core crimes. Its state-centric nature entails that the protected legal value of the crime of aggression centered on the "protection from the use of force against the sovereignty, territorial integrity and political independence of another State."¹³⁶

As pointed out by the IMT for 77 years ago, the crime of aggression is "the supreme international crime" because it carries within itself "the accumulated evil of the whole."¹³⁷ The contemporary legal status quo of the crime of aggression under the ICC's ambit subjects the Nuremberg legacy to ridicule. This is mainly because the ICC's jurisdictional architecture generates this situation where the prosecution is limited to cases alleging the commission of crimes that derive from an act of aggression, such as war crimes, crimes against humanity or genocide; hence its jurisdictional scope does not cover the prosecution of the act of aggression *per se*.¹³⁸

At first glance, the ICC could prosecute the crime of aggression as it represents one of the core crimes under its jurisdiction. However, this impetuous belief dissipates when jurisdictional hurdles come into the picture. Its main judicial disability¹³⁹ entails that even if the crime is under the ICC jurisdiction, the Court does not have the competency to prosecute it if the countries in question have not accepted its jurisdiction in relation to the crime. In this case, since Russia has not accepted the jurisdiction of the ICC,¹⁴⁰ the Court is not able to intervene in Ukraine and exercise its jurisdiction over the crime of aggression.¹⁴¹ Ukraine has adhered to the ICC's jurisdiction pursuant to article 12(3) of the Rome Statute, albeit without having the State party status.¹⁴² However, this lends authority to the Court's jurisdiction only in relation to the alleged war crimes and crimes against humanity committed in Ukraine; hence this acceptance of jurisdiction is not sufficient for the ICC to exercise jurisdiction over the crime of aggression. The crime of aggression committed in Ukraine is thus out of the ICC's reach since

¹³⁶ Robert Heinsch: *The crime of aggression after Kampala: Success or burden for the future?*, Goettingen Journal of International Law 2(2010) 2, 713-743, p. 722.

¹³⁷ International Military Tribunal (Nuremberg), Judgment of 1 October 1946, {421}

¹³⁸ Kevin Jon Heller, *Who is afraid of the aggression?*, Journal of International Criminal Justice 19 (2021), 999-1016, Oxford University Press, p. 1001.

¹³⁹ Claus Kress, *The crime of aggression before the first review of the ICC Statute*, Leiden Journal of International Law, 20(2007), p.p.851-865, p.852.

¹⁴⁰ There are currently 123 States parties to the RS. Even if it signed the ICC Statute in 2000, Russia never ratified it. In 2016, Russia decided to withdraw its signature from the RS.

¹⁴¹ To close this legitimacy gap, in November 2022, the European Commission has presented a set of different options to Member States to ensure that Russia is held accountable for the crimes committed in Ukraine. The establishment of a special tribunal in charge of prosecuting the crime of aggression is among the options. See further *Ukraine: Commission presents options to make sure that Russia pays for its crimes*, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7311

¹⁴² Ukraine is a signatory to the RS which entails that the Statute is not legally binding. However, Ukraine has the obligation under customary international law to respect and act in accordance with the purpose of the treaty. The relationship between Ukraine and ICC was strengthened on the 23rd of March when the agreement on the establishment of an ICC country office in Ukraine was concluded in the Hague. See further <https://www.icc-cpi.int/news/ukraine-and-international-criminal-court-sign-agreement-establishment-country-office>

neither Russia nor Ukraine have acceded to the Rome Statute. According to the final version of Article 15 *bis* (5), "the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory."¹⁴³

As such, Russia's dereliction is shielded by paragraph 5's "blanket and automatic impunity of nationals of non-state parties."¹⁴⁴ Theoretically, according to Article 15 *ter* in conjunction with Article 13 (b) the only avenue that the ICC Statute offers in this case is that of a referral from the Security Council. Russia's permanent seat in the Security Council precludes this from happening due to the power of veto that would make such a referral inconceivable as any other referrals that are not in the country's favor. From a *lege lata* perspective, there is a loophole in the current accountability framework that does not support the unconstrained jurisdiction over the crime of aggression. Seen through the lenses of a *de lege ferenda* perspective, the jurisdictional architecture of the crime of aggression can become more coherent if, for instance, "the Statute's most prominent lacuna"¹⁴⁵ will get revised to allow ICC to investigate it regardless of the aggressor nationality. The ideal jurisdictional architecture of the crime of aggression should not obviate the ICC from "the effective and expeditious prosecution"¹⁴⁶ of one the most serious crime of international concern. Nevertheless, this paradigm is far from being applicable at the moment. But would it ever be?

8.2 The jurisdictional gap and the situation in Ukraine

The prerequisite of State consent for the ICC to exercise jurisdiction over the crime of aggression corroborated with the States' option to opt out of its jurisdictional regime sets its prosecution to failure without any right of appeal. From an international criminal law angle, this represents the main deficiency that characterizes the crime of aggression as regulated in the ICC Statute, and that obviates the ICC from prosecuting the Russian unlawful use of force against Ukraine.

The crime of aggression is the biggest affront to safeguarding the *highest good*.¹⁴⁷ However, the idiosyncrasies pertaining to it lead to the difficulties of prosecuting the crime of aggression and suggest one of the biggest paradoxes in the emergence of the *supreme international crime*. The fact that the crime of aggression did not have a place in the ICC equation is a rather conspicuous incongruity of what the Nuremberg and Tokyo trials had in mind when prosecuting the crime that breeds all evil.

¹⁴³ Article 15 *bis* (5) RS.

¹⁴⁴ At the Kampala Conference, Japan was among the countries that was against Article 15 *ter* (5) because in its view this represented a "clear departure from the basic tenet of Article 12." See Andreas Zimmerman, *Amending the Amendment provisions of the Rome Statute*, Journal of International Criminal Justice, 2012, p. 221

¹⁴⁵ Claus Kress, *The crime of aggression before the first review of the ICC Statute*, Leiden Journal of International Law, 20(2007), p.p.851-865, p.865.

¹⁴⁶ Resolution ICC-ASP/16/Res.2, *Adopted at the 12th plenary meeting, on 14 December 2017*.

¹⁴⁷ *Pax optima rerum-peace is the highest good*, A Latin maxim written in the Hall of peace in the Münster Town Hall where the Westphalian Peace was concluded.

It is thus unquestionable that the ICC's powerlessness to prosecute the crime of aggression in Ukraine and the general absence of a mechanism from the international framework of accountability render the prospects of prosecuting *the most brutal human endeavor*¹⁴⁸ caused by Russia unattainable. The jurisdictional architecture of the crime of aggression and the fact that the ICC has not yet prosecuted it induces the idea that the Russian aggression against Ukraine will go unpunished.¹⁴⁹ However, despite the jurisdictional hurdles that characterize the crime against peace, as the previous discussion has shown, there are other potential avenues in the realm of global justice that could be employed.

Despite the momentous inclusion of the fourth crime under the jurisdictional veil of the ICC, the crime of aggression, as it was adopted in 2017, entails only a feeble umbra of the type of criminal prohibition able to convince the would-be aggressors of the legal repercussions that come with the deviation from the rules of international law.¹⁵⁰ The ideal jurisdictional regime of the crime of aggression would imply that by resorting to the illicit use of force, the aggressors-in this case-Russia's president "will be held accountable by an International Criminal Court acting in the name of all peace-loving nations."¹⁵¹

The *accumulated evil of the whole*¹⁵² that Russia engendered is indeed a gross violation of international law. No one (except for Putin and his supporters) is questioning the validity of this postulation.¹⁵³ The problem is, however, elsewhere: can any of the four available accountability mechanism preclude the Russian crime of aggression from falling again into the abyss of impunity?

8.3 ICC and the Head of State immunity

The prospect of Putin being tried for the crime of aggression before the ICC cannot be separated from the issue of immunity. At the ICC level, personal immunity did not fall outside the scope of the Rome Statute; hence there is no lacuna in the statute regarding immunity. The Rome Statute takes legal predominance over personal immunities, and reflects the position of the Court regarding the exemption of the state officials from answering before the law for the most heinous crimes: no impunity for the crimes of international concern. Immunity is not recognized as a bar to prosecution under the Rome Statute which technically would imply that

¹⁴⁸ Dinstein Yoram, *War, Aggression and Self-Defense*, New York: Cambridge University Press, 1994, p. xii

¹⁴⁹ As of 2018 prosecuting individuals for the crime of aggression falls within the jurisdiction of the ICC under the following circumstances: when the UNSC has referred the situation to the ICC, at the prosecutor's own initiative, or pursuant to a request from a State Party. Pursuant to Art. 15 *bis*, a State that "is not party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory."

¹⁵⁰ Kevin Jon Heller, *Who is afraid of the aggression?*, *Journal of International Criminal Justice* 19 (2021), 999-1016, Oxford University Press, p. 1000.

¹⁵¹ *Id.*, at p. 1000; See also Benjamin Ferencz, *Enabling the International court to punish Aggression*, 6 *Washington University Global Study Review* (2007), 551-556, p. 566.

¹⁵² International Military Tribunal (Nuremberg), Judgment of 1 October 1946, {421}.

¹⁵³ On the 2nd March 2022, through Resolution A/RES/ES/11/1 the General Assembly characterized the Russian Invasion as an act of aggression.

Putin could be prosecuted. However, as the analysis will show in the following lines, the state of affairs of the immunity regime for the crime of aggression under the Rome Statute indicates a vexed legal issue that is far from being settled.

In the words of the Rome Statute, the Head of State immunity is *irrelevant*; hence not recognized under its jurisdiction. Under the heading of *irrelevance of official capacity*, Article 27(1) establishes that immunities do not "constitute a ground for reduction of sentence" and cannot be used to "exempt a person from criminal responsibility."¹⁵⁴

As pointed out by the ICC Appeals Chamber in the Al-Bashir case, this provision is a reflection of customary international law.¹⁵⁵ The Statute is clear in indicating who are the three top representatives to whom these exceptions to personal immunity of Heads of State apply, what is referred to as troika. Since personal immunity arises from customary international law, a status that was recognized by the ICJ,¹⁵⁶ the aforementioned provisions from the Rome Statute are thus a derogation.

Article 27(2) stipulates that "immunities or special procedural rules which may attach to the official capacity of a person" either under national or international law do not preclude the Court from exercising its jurisdiction.¹⁵⁷ Consequently, under the Rome Statute, the jurisdiction of the Court covers everyone incurring criminal responsibility irrespective of whether these persons are Heads of State or other state officials.

As reiterated in the ICC Appeals Chamber in the Al-Bashir case, the most "direct effect" of Article 27(2) is that "a Head of State cannot claim head of state immunity (...) before the ICC."¹⁵⁸ In the *Arrest Warrant case*, the ICJ has recognized that immunity does not hinder the ICC (or "certain international criminal courts, where they have jurisdiction") from prosecuting regardless of "immunities or special procedures which may attach to the official capacity of a person."¹⁵⁹

In light of this provision, neither personal immunity nor functional immunity can be claimed before the ICC. However, as the fundamental principle of international law of treaties provides, a treaty cannot impose obligations on a "third state without its consent;"¹⁶⁰ hence Russia is not bound by Article 27 (2) and by the rules and obligations under the Rome Statute since it is not a state party to the statute.¹⁶¹ In other words, despite the irrelevance of immunity under the Rome Statute, the aforementioned provision cannot take legal predominance over Putin's personal immunity because he is the president of a country that is a non-party.

¹⁵⁴ Article 27(1) RS.

¹⁵⁵ *Prosecutor v. Omar Hassan Ahmad Al-Bashir*, The Appeals Chamber, Judgement in the Jordan referral re Al-Bashir Appeal, ICC, 6 may 2019, para. 103.

¹⁵⁶ *Case concerning the Arrest Warrant of 11 April 2000 (Democratic republic of the Congo v. Belgium)*, ICJ, para. 51-57.

¹⁵⁷ Article 27 RS.

¹⁵⁸ *Supra* note 155, at para 102.

¹⁵⁹ *Supra* note 156, at para 61.

¹⁶⁰ UN, *Vienna Convention on the Law of Treaties*, 23 may 1969, Article 34.

¹⁶¹ Article 27 has to be considered in conjunction with Article 86 that stipulates the obligation to cooperate. However this obligation is only imposable to state parties: hence Russia is not bound by this provision either.

Article 98 (1) from the Rome Statute contains another relevant provision for the current immunity conundrum. In this sense, it states:

"The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of immunity."¹⁶²

Consequently, while Article 27 removes immunities in proceedings before the ICC, Article 98 imposes on states the obligation of not proceeding with a request for arrest or surrender if this would imply that the requested state is acting in a way that inflicts the immunities granted to foreign officials.¹⁶³ These provisions apply in Putin's case because he is the Head of a State that is a non-state party to the Rome Statute.

9 Ways forward-Will Putin be prosecuted?

The efforts to secure accountability for the crime of aggression committed against Ukraine represent an indispensable way to quell Russia's hostility and uncompromising intransigence in respecting the norms of international law. As the Nuremberg War crimes prosecutor, Benjamin B. Ferencz pointed out, in the discussion about accountability for the most heinous crimes, the law plays a significant role. By building on the words of the US Secretary of State Elihu Root,¹⁶⁴ he further emphasizes that law is a means to achieving justice, peace and freedom worldwide. Despite the imperfections, only the law apparatus can remain the main deterrence for the crime of aggression.¹⁶⁵

It is unequivocally true that prosecuting Putin for the crime of aggression will create the deterrent effect and send a strong message against impunity: that as a Head of State, he cannot get away with aggression, that immunity does not lead to impunity. Conversely, suppose Putin will manage to escape once again the tenets of accountability, as it previously happened. This will only illustrate that, before the law, "all(...) are equals, but some are more equals than others."¹⁶⁶ When it comes to Putin facing prosecution for the crime of aggression, there are several possible scenarios. Yet it should be borne in mind though that the bar is high. One available option in the legal landscape could be the domestic prosecution in Russia. However, in December 2020, Putin signed a bill that granted lifetime immunity to former Russian presidents. This implies that once he finishes his mandate he will be exempted from criminal prosecution in Russia for crimes committed during his lifetime. Hypothetically speaking, one possible route could be the fall of the Russian regime. This would imply that Russia would choose to ratify the Rome Statute and then Putin could be handed over for trial. It is however

¹⁶² Article 98 (1) RS.

¹⁶³ Dapo Akande, *International law immunities and the international Criminal Court*, The American Journal of International Law, July 2004, Vol.98, No.3, pp. 407-433, pp.409-415.

¹⁶⁴ "Makes us effective for the cause of peace and justice and liberty in the world."

¹⁶⁵ Benjamin B.Ferencz, *A Nuremberg legacy: The crime of aggression*, Washington University Global Studies Law Review, Volume 15, Issue 4 Symposium: Seventy years after Nuremberg, p. 558

¹⁶⁶ George Orwell, *Animal Farm*, 1945, p. 10.

unlikely that this would happen in reality as the chances for a future Kremlin leader to actually put this into practice are de minimis.

The arrest warrant that ICC issued in March 2023 over Putin's alleged involvement in deporting children from the occupied areas in Ukraine to Russian territory¹⁶⁷ could theoretically mean that if Putin travels to any of the countries that are parties to the Rome Statute, then he could be extradited and handed to the ICC. The Rome Statute imposes an obligation for the State Parties to cooperate with the "Court in its investigation and prosecution of crimes."¹⁶⁸ In August 2023, Putin is planning to take part in the BRICS¹⁶⁹ summit in South Africa, an ICC member. As such, Putin could theoretically face a possible arrest since South Africa is under the obligation to enforce the war crimes warrant. However, as the precedent shows, South Africa can ignore the arrest warrant and refuse to arrest Putin as it did in the Omar Al-Bashir case when the South African government refused to hand the Sudanese President to the ICC.¹⁷⁰

A forum with prosecutorial powers where he can be held accountable for the crime of aggression could provide a more fertile ground to secure justice. However, as good as this mechanism looks in theory, one cannot disregard the legitimacy flaws and the various practical issues that come into play with a potential establishment of a such tribunal. It is only reasonable to assume that an internationalized tribunal might override what seems to be an insurmountable legal issue when discussing the prosecution of Putin for the crime of aggression: the immunity he can claim in any court. In this sense, the statute of the STCoA could clearly state that immunities cannot be pleaded before the new tribunal. And, as the discussion has shown, this view has been reinforced by various voices in the scholarly context and the international legal practice. It is unclear how this would play out in practice as it obvious that Putin will not accept the new judicial system created by the STCoA. What could lend more authority is the establishment through the UN system. However, Russia's right of veto as a permanent member of the Security Council will impede any resolution that has the scope of creating a tribunal against the crime of aggression in Ukraine. As such, the only option left is the creation through UNGA resolution. It is also worth mentioning that the proposals to create a special tribunal for the crime of aggression have been met with skepticism and accusations of double standard, the main bone of contention being that the tribunal promotes the idea of selective justice. The time will show whether the STCoA will materialize and whether it will provide an avenue to answer the demands of accountability by prosecuting him for the crime of aggression.

For these reasons, the attempts to create the tailor made tribunal should not neglect another possible course of action: changing the jurisdictional regime for the crime of aggression. In this sense, the efforts to create the new tribunal should be undertaken in parallel with the

¹⁶⁷ Articles 8(2)(a)(ii) and 8(2)(b)(viii) RS.

¹⁶⁸ Article 86 RS.

¹⁶⁹ BRICS is the acronym encompassing 5 countries: Brazil, Russia, India, China and South Africa; See further <https://www.investopedia.com/terms/b/brics.asp>

¹⁷⁰ The real problem behind South Africa's refusal to arrest Al-Bashir, 10 July 2017 available at <https://issafrica.org/iss-today/the-real-problem-behind-south-africas-refusal-to-arrest-al-bashir>

procedurally complex process of amending the Rome Statute¹⁷¹ to end the Court's selective exercise of jurisdiction over the crime against peace; hence to fill impunity gaps and to create the deterrent effect. The stakes in this case are high and it is about time that the international community takes a decisive step in changing the accountability framework for the crime of aggression. Perhaps, the current impossibility to prosecute the *mother of all crimes* is the fuel that is needed to restore the credibility in the international criminal law system. Until this happens, it is peremptory not to limit the fight against impunity solely to the situation in Ukraine. More than ever, it is paramount not to pretermitt to align the ubiquitous outcry for accountability in Ukraine with the unaddressed demands for accountability around the world.

10 Concluding remarks

As this thesis has sought to show, under international law *de lege lata*, the current legal landscape regarding the crime of aggression is insufficient in upholding the imperative of prosecuting Putin. This undermines the credibility of the only existing mechanism that could hold him to account (if it had jurisdiction over this crime of aggression): the ICC, and the credibility of the international law apparatus, in general. Seen from a *de lege ferenda* stance, the ICC should entail the epitome of justice and a robust accountability mechanism; hence the effective prosecution of the crime of aggression should be the sacred and peremptory rule and not the holy grail as it currently is. Under the existing accountability scheme, individual criminal responsibility is on the edge of a precipice, ready to leap irrevocably into the abyss of impunity. For this reason, the need to prosecute Putin for the crime of aggression acts as a catalyst for finding pathways to prevent this.

The alternatives that have been put forward are, arguably, what is required to *pierce the veil of impunity* for the Russian crime of aggression. In this sense, universal jurisdiction, prosecution at the domestic Ukrainian level, a hybrid tribunal, and the STCoA constitute the alternative mechanisms that could contribute to closing the loophole in the accountability framework for the crime of aggression. However, the latter avenue is, potentially, the one that is more liable to provide sufficient fertile ground for the imperative of prosecuting Russia's president. This is mainly because of the immunity that Putin enjoys as the Head of State takes legal predominance over any domestic prosecution of the crime of aggression. Consequently, it is implied that creating an international prosecutorial venue to try Putin for the crime of aggression would mean a collective reinforcement of the Nuremberg legacy.

¹⁷¹ The amendment process is a lengthy one (the Kampala Amendments on the crime of aggression happened after more than 10 years of negotiations). According to Article 121(4) of the RS „an amendment shall enter into force for all States one year after the instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.” Since 123 States are parties to the ICC it would imply that 108 would have to ratify the amendment in order for it to be applicable. There is also the non-retroactivity that has to be considered, a principle the RS is based on.

It is unequivocally true that the reverberations of the aggression surpassed the Ukrainian borders and embroiled the world's geopolitics and security. Through its egregious act of aggression, Putin has not only shattered Ukraine's peace and security but has put the security of the entire European continent and international peace in peril. In this sense, for the sake of justice, it is imperative to hold Putin to account for the most brazen violation of international law and morality he perpetrated against Ukraine. Accountability constitutes an indispensable part of the healing process, and despite the impossibility of undoing the heinous act that gave rise to all the other crimes committed in Ukraine, ensuring justice by holding Putin to account is paramount not only for Ukraine as the victim state but for the whole world. For this reason, the route to prosecution, albeit not void of legitimacy flaws and practical issues, has to sustain the imperative of prosecuting Putin for the crime of aggression. It is hard to predict whether we will see Putin in a defendant posture in a future trial for the crime of aggression anytime soon. Still, despite this uncertainty, one thing is for sure: Putin has to answer the demands of the rule of law for the crime of aggression, tantamount to waging an illegal war in Ukraine. The time to prosecute the crime of aggression has come, and Putin has to be put on trial for his *special military operation*. Thus, *fiat justitia, ruat caelum*- let the justice be done though heavens fall.

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