

Special Tribunal for the political leadership of Russia: Just Punishment for War Crimes

By Iuliia Osmolovska, Director, GLOBSEC Kyiv Office, Senior Fellow, Ukraine and Eastern Europe Program

The unprovoked and unjustifiable war that Russia waged against Ukraine in February 2022 has become a litmus test for many things deemed unshakeable, such as the solidarity of nations, the defence of democracy, and the supremacy of values over interests. Whereas in the mentioned categories, the Western countries have successfully survived this ‘crash test’, international legal order is still facing a challenge from Russia’s brutal ignorance of international commitments and norms of peaceful co-existence. Unless there is adequate international legal accountability for all destructive actions Russia has been doing in Ukraine, we cannot discuss the international legal environment as an ‘order’ because impunity severely distorts the established system and induces voluntarism in interpretations to justify illegal unilateral actions. Without due punishment to a rule-breaker, the legal system is weak to discipline other states to obey the internationally agreed norms and principles, thus, potentially leading to chaos and the spiralling of conflicts on a global scale. But it is not merely about legal order. It is also about a human feeling of fair justice.

When talking about fair justice for Ukrainians currently living through the horrors of the Russian invasion, it is not enough to speak about **compensations** and **reparations** from Russia. Money will not help bring back murdered loved ones or heal internal wounds from suffering and torture. A strong moral component needs to be present – just punishment for those who launched the war and authorized Russian butchers to kill and torture Ukrainians in their homeland. Polls conducted in September 2022 by the Kyiv International Institute of Sociology show that the impunity of Russia for its war crimes in Ukraine will be the biggest **disappointment** after the war is over for 65,8% of Ukrainians, above corruption (36,3%) and poverty (34,6%).

But speaking of due punishment, it is not enough to see ordinary Russian soldiers and their commanders prosecuted for their war crimes in Ukraine. The origin of this evil, i.e. Russian political leadership, who decided to invade Ukraine and exterminate the Ukrainian nation, should be duly punished. Without this call for invasion, which is **qualified** as a crime of aggression¹, there would not have been all these war crimes, crimes

against humanity, nor genocide conducted by Russian troops in Ukraine. We must tackle the root of the problem, not just its consequences.

Existing loopholes in the punishment of main perpetrators: The limited competencies of the ICC

Whereas the International Criminal Court (ICC) has been good at considering war crimes, crimes against humanity, and genocide in Ukraine, it falls short in addressing the issue of Russian political leadership’s crime of aggression as neither Russia nor Ukraine are full-pledged ICC members. Potentially, the ICC could get such authorization, provided the UN Security Council orders it to do so. But the **veto** prospect of Russia, who is, paradoxically, an instigator of this international armed conflict of genocidal nature in Ukraine, completely excludes this option. The ICC also does **not permit** trials *in absentia*, which will definitely

¹ Article 8 bis of the **ICC Rome Statute** qualifies under crime of aggression “the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations”.

be the case with Russian political leadership never showing up to a trial. On top of that, the individual responsibility of Russian political leadership could be neutralized by a **state immunity status** that top Russian officials have. Also, it will be challenging to prove under the existing ICC system of collecting and verifying evidence that Putin gave direct orders to bomb children in the Mariupol Drama Theatre or rape toddlers in Bucha. In the following years, several Russian soldiers, including high-ranking ones, will be brought to justice by the ICC for their crimes in Ukraine. Yet, the main figures might still be enjoying impunity and planning their next atrocities in other countries they consider illegal to exist.

Special Tribunal as a solution

In demand for a **just punishment** for a broken international legal order, Ukrainian political leadership almost immediately came up with a **proposal**: to set up a Special Tribunal on Crime of Aggression (STCA) in which Putin and members of the National Security Council of Russia could be personally indicted for the war waged in Ukraine. This call coincided with a **response** from **internationally renowned politicians and lawyers**, who condemned Russia's actions and qualified them as an act of aggression, which **deserves** due punishment. Since then, Ukrainian political leaders and **officials** have been very active on the issue. Ukrainian civil societies and the expert community vigorously supported the government in this campaign. The President of Ukraine, Volodymyr Zelensky, **addressed** the United Nations General Assembly (UNGA) on the issue in September 2022. To date, there have been a lot of **professional debates** on the **pros** and **cons** of such a tribunal, its statute, structure, costs, and relationship with ICC, which help fine-tune technical details but do not deny the idea that Russia and its political leadership must be justifiably punished for its war in Ukraine.

Under international law, if found guilty, Russian political and military leadership members may be sentenced to different terms in prison or life imprisonment. The Special Tribunal shall be able to issue indictments to Russian political and military leadership, followed by arrest warrants. Should any person with arrest warrant appear on their territory, all countries which have acceded to the treaty shall arrest them and hand them over to the Special Tribunal.

Even if members of Russian political and military leadership never leave Russian territory again after their indictments and arrest warrant are announced,

the STCA will still be of enormous significance in three ways. First, Russian political leadership will become pariahs trapped within the confines of their country. Second, Russia will face higher costs in resolving any issues internationally. Third, Russian citizens will be frustrated to see their 'praised' leaders being considered by a respectable international community and institutions as those responsible for committing international war crimes. This might evoke a growing understanding among Russian society that something is not correct with the propaganda to which they are being subjected. Also, some political experts agree that the very prospect for Russian high political decision-makers to get personally indicted in an international trial might serve as a strong disincentive to align themselves further with the ongoing war in Ukraine, thus potentially creating pressure to step down within Putin's inner circle.

Political support and constraints

Notably, there is almost an overwhelming condemnation of Russia's aggression against Ukraine, expressed by 143 votes in the respective UNGA **Res. ES-11/1** of March 2, 2022. Yet, given a lesser number of countries (94) that supported UNGA **Res. L.6/2022** in November on reparations for aggression against Ukraine, more work must be done to get wider approval to the idea that Russian political leadership should bear personal responsibility for the war in Ukraine and be prosecuted for its actions. Even within the countries that support the idea of Russia's accountability, there is a divergence in views of how it could be achieved and who should be charged. This task becomes even more imperative given the **ongoing work** on the draft of a respective UN resolution, which is being **circulated** these days in the Assembly. The challenge of the work ahead had been clearly demonstrated by recent **debates** in the UN Security Council on how to take action to ensure international peace and security through the promotion of the rule of law, initiated by the Japanese Presidency and conducted on January 12, 2023.

Most of those engaged in promoting the case for an STCA on Russia, both at the official and second-track diplomacy levels, agree that the main stumbling block to creating an STCA is not legal capacity but a political will to support it. The reasons/arguments for reluctance, which are not being publicly discussed, are various: **selective international justice**, 'pure regional European affair', traditional negative position on universal justice, fear to create a 'boomerang effect', Russia's political leverage over certain countries, 'shut door to a communication' with current Russian political

leadership, which will block a diplomatic solution to the war. Russia has already expressed its hostile **reaction** to the call on a tribunal.

Some of Ukraine's western partners would like to see the movement for an STCA be more international, which requires significant work with Global South countries. As Ukraine's **recent** diplomatic activity shows it has already started working on it, the notion has been well taken. But Ukrainian diplomats, officials, and responsible expert communities, alongside civil society organizations, still have limited resources to accomplish the task alone. Those partners, who share Ukraine's view on an STCA, namely the co-authors of the draft UN resolution, should align their efforts toward this shared task of getting wider international support for Russia's accountability.

Supporting countries and institutions

According to the Prosecutor General of Ukraine, between 10 to 16 countries have already expressed their support for establishing an STCA on Russia. To date, some have been explicitly concrete, exemplified by their adoption of respective resolutions by their national parliaments and even **joint statements** (**Lithuania**, Latvia, **Estonia**, Poland, **Czech Republic**, **France**, and **the Netherlands**). Some of them have only launched similar procedures (**US**, Germany, and the **UK**) or entered expert discussions like the January **meeting** in Prague hosted by the Czech minister of foreign affairs, Jan Lipavsky. **The Netherlands** already considers an option of **placing** the STCA in the Hague.

The call for STCA was also supported by PACE Resolutions 2433 (2022), **2436 (2022)** and **2463 (2022)**; EP resolutions **2022/3017(RSP)**, **2022/2655 (RSP)**, 2022/2825 (RSP) and 2022/2851 (RSP); NATO **PA Declaration** "Standing with Ukraine"; **PA OSCE Resolution** "The Russian Federation's war of aggression against Ukraine and its people, and its threat to security across the OSCE region". The list is non-exclusive as more countries and institutions will be making their voices on the issue heard and as Ukraine works hard to get more and more supporters around the globe.

On October 2022, the European Commission came up with its **view** on how to make Russian political leadership accountable for the atrocities and crimes committed during the war in Ukraine, which mostly reflects the options above, but advised that any solution would require strong backing from the UN.

The recent Ukraine-EU Summit **Joint Statement** also references Russia's accountability for war crimes in Ukraine, including establishing an appropriate mechanism for the crime of aggression. The EU leaders stated that they "support the development of an international center for the prosecution of the crime of aggression in Ukraine (ICPA) in the Hague".

Options on STCA forms and suggested structure

Currently, there are three options on the table that Ukraine and its allies are considering. An STCA may be established: (1) by an agreement between Ukraine and an international organization, such as the UN, the EU, or the Council of Europe); (2) on the basis of a multilateral treaty between States which will be open to accession and to making endorsements; (3) with the Ukrainian court holding international elements, such as international judges and prosecutors, location in Europe, and international support. Ukraine **favours** the first two options, as it sees hybrid form "risks of narrowing the legal assessment of the ongoing aggression to the level of "international conflict" in the third option, whereas there should be a "territorially vast international institution of responsibility for aggression with the highest legitimacy and recognition level".

For the time being, there are intense diplomatic consultations among the partners as to the most appropriate mode. The first practical step in addressing Russia's crime of aggression in Ukraine, which the EU supports, is to establish an Interim Prosecutor's Office in the Hague staffed with prosecutors from Ukraine dealing with procedural investigation management of the crime of aggression. Ukraine considers this to be the first practical step on the way to establishing a Special Tribunal.

Ukrainian authorities suggest that the jurisdiction and functions of the Special Tribunal are to be defined in the Statute of the Special Tribunal, which will be annexed to the multilateral agreement with an international organization. As to the structure of the future STCA, it should consist of the following organs: (1) Judicial Chambers, comprising a Trial and an Appeals Chambers; (2) a Prosecutor; and (3) a Registry, for the Chambers, the Office of the Prosecutor and Defence. The Trial Chamber is expected to be composed of three judges, whereas an Appeals Chamber is to be composed of five judges. The judges shall be appointed by an Advisory Panel on the Appointment of Judges consisting of three judges currently sitting on, or retired from, an international criminal tribunal.

Concerns about ICC-STCA interaction: no reason to worry about

Some countries, and even ICC Prosecutor **Karim Khan**, have expressed their concerns about possible duplication of the ICC and STCA. However, these worries are groundless. The STCA will exclusively tackle the crime of aggression, which is not covered by the ICC competence in Ukraine's case, and will not impede further investigations on Russia's war crimes and crimes against humanity conducted by the ICC. For Ukraine, the ICC remains a key body of international criminal justice. The establishment of the Special Tribunal will be based on the norms and approaches applied by the International Criminal Court and set out in its Rome Statute.

Next Steps and Priority Tasks

Obviously, there is a need to **generate more explicit support to the STCA from the individual countries of the EU, UK, USA, and** the wider international community. This could come from respective resolutions of national parliaments and/or official statements from government offices. At least, a principal issue to getting the political leadership of Russia personally liable for war in Ukraine through a special tribunal must be supported by as many countries as possible.

A particular focus should be given to **multilateral diplomacy within the UN in its outreach to the Global South**. Here, Ukraine and its partners should multiply their efforts and make the right arguments to the countries of Africa, Asia, and Latin America. Special attention should be given to the issue of countering Russian narratives and propaganda, focused on the sources of the war and its global implications, such as food and energy crises and disrupted supply chains. This work could be done at the levels of EU institutions and individual member states.

A crucial task is finally getting **settled with the optimal form of an STCA**. Here, a lot will also depend on the results of consideration of a respective UNGA resolution and on the position of the EU, its individual member states, the US and UK. An extraordinary Council of Europe (CoE) summit in Ireland, scheduled for February 2023, can also become a valuable benchmark, as the CoE is currently considered to be one of the potential parties of an agreement for establishing STCA.

However, having more international support for STCA is very much desirable. **European countries** are to take a **definite lead in the process** because the war is happening on their continent, thus, shaking the entire security network built up in decades. Europeans have to show their resolution not to tolerate this aggressive behaviour by Russia and be decisive in punishing the security breaker to prevent anything similar from happening again. This just punishment will strongly discourage other assertive states from brutally challenging international legal order through abusive unilateral actions in the future.