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The Feasibility of a Ukraine Tribunal for the Crime of Aggression

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Abstract

This article discusses the political initiatives of certain states to establish a special tribunal for the prosecution of the crime of aggression which was allegedly committed within the Ukraine situation. The article raises questions about the feasibility of establishing such a court, given that the International Criminal Court (ICC) has within its mandate the possibility to try an aggression case. However, in this article it will be explained why the ICC is not a viable option in this regard, while a new Ukraine tribunal also creates various legal obstacles. The article suggests that the political motivations behind this proposal should be balanced against these legal obstacles, including procedural obstacles related to the crime of aggression and functional immunities, and how proceedings should be conducted in the presence or absence of the accused. The article concludes that a thorough assessment of these legal and procedural considerations must be made before deciding to establish a special Ukraine tribunal.

Keywords

Feasibility, Ukraine, Russia, Crime of Aggression, Tribunal

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Introduction

In July 2023, during an international summit hold in the Hague in relation to the investigation and prosecution of war crimes allegedly committed within the Ukraine situation, the ministers of fifty states ventilated the intention to prosecute the crimes while also considering setting up a special Ukraine tribunal. In particular, the Ukrainian government expressed its desire to establish such a special court. On the 20th of March 2023, this intention was reiterated at a conference in London of European member States (Balduk, 2022).

The Dutch Minister of Foreign Affairs indicated to be willing to consider this option, although with his concern that the establishment of such a court would not be easy (Balduk, 2022).

At the time of this conference in July 2023, the justice department of Ukraine reported to have received around 23.000 war crimes complaints. The Ukrainian Chief Prosecutor Ms. Iryna Venediktova reported that each day this figure would increase with 200-300 new cases, while more than 600 suspects were identified, 127 of which were already subjected to a criminal investigation (Balduk, 2022).

Preceding this conference, a so-called Joint Investigation Team (JIT) was established by Ukraine and five European countries which receives support from the International Criminal Court (ICC) and Eurojust as regards the collection of evidence (Balduk, 2022).

A first question which stems from these political initiatives is whether the potential advent of a special Ukraine tribunal, is realistic bearing in mind that Russia nor the Ukraine are ratifying parties of the ICC and Russia most likely with not consent to such a court?

A second question which arises from the advent of a potential Ukraine Tribunal is how it could interfere with the jurisdiction of the ICC, which court is also imbued with the mandate to investigate and prosecute war crimes. In the event of the establishment of a Ukraine tribunal, the jurisdictional

interrelationship will be of concern.

A third question pertains to the procedural contours of such a tribunal, in particular in case the Russian federation would not tent its cooperation to the criminal proceedings.

This article discerns these three questions while in its conclusion it makes a suggestion what would be the best way forward.

1. The applicability of the crime of aggression under international law

The government of Ukraine seems to be inspired to set up a special tribunal for the crime of aggression based on the precedent, which was set by the Nuremberg Tribunal, which Court set up after the World War II (International Military Tribunal, 1946). In the Charter of the International Military Tribunal (IMT) in 1945, under article 6a, it is stated that one of the aims of the established tribunal was to hold individuals accountable who were responsible for crimes against peace, which includes the planning, preparation, initiating of a war of aggression (United Nations, 1951: 286-287). In 1946 the IMT ruled that to initiate a war of aggression, is not only an international crime; "it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole" (International Military Tribunal, 1946). Since 1946, there have been no national or international trials for alleged acts of aggression, notwithstanding the fact that the Security Council has concluded that in some instances such acts were committed by states (Cassese, 2003: 111).

Would a Ukraine Tribunal fulfil in this regard a complementary function?

The crime of aggression was not included in the Statutes of the various ad hoc international war crimes tribunals, such as the International Tribunal for the Former Yugoslavia, the International Tribunal for Rwanda, and the Special Court for Sierra Leone. Yet in those instances, the underlying conflict has little to do with the invasion by one country into the territory of another state.

Although the Statute of the ICC enacted in 1998 anticipated the crime of aggression in article 5(1) of the ICC Statute, it was not until 2010 when this new crime received a definition during a conference at Kampala, which definition found its way in article 8 bis (International Criminal Court, 2021: 10-11).

The main elements of this definition read as follows:

"1. (…) 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."

"2. (...)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. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression (…)"

Section one of article 8 bis refers to "a manifest violation of the Charter of the United Nations ". This requirement raises the question whether, once the Security Council of the UN would adopt a resolution that a certain state committed an act of aggression, this would be binding to the judges of the International Criminal Court.

As an example, article 8 bis mentions acts of invasion, annexation with the use of force, bombardments, blockades of harbors and/or beaches and the deployment of armed groups and/or mercenaries. The jurisdiction applicability of this crime of aggression is though limited; only when a State Party has specifically accepted the jurisdiction of the ICC for this crime, the prosecutor can initiate an investigation to this end. Moreover, both the alleged "aggressor State" and the alleged "victim State" should be a State Party to the ICC Statute as meant under article 15 bis and 15 ter (Idem: 13-14).

Additionally, the crime of aggression would only be activated, one year after ratification of these new provisions by 30 State Parties. As per September 2016, 32 State Parties, among which the Netherlands, had deposited such ratifications. In light of the fact that the ICC has 125 State Parties, the figure of 32 implies that the majority of State Parties have legal political reservations to accept this newly established crime.

Considering the fact that, as mentioned earlier, both the Russian Federation and Ukraine are not ratifying State Parties of the ICC and therefore as a result have not accepted the applicability of the articles 15bis and 15ter of the ICC Statute, this means that the ICC prosecutor can not investigate nor prosecute the Ukrainian situation for purposes of the crime of aggression.

From this perspective, a special Ukraine Tribunal imbued with the mandate to prosecute the crime of aggression – apart from its definitional contours – could perhaps anticipate this lacune which currently exists within the ICC framework. Yet, the advent of such a court will take considerable time which bears the possible implication that a potential prosecution for the crime of aggression, which would only become possible for events or acts after the entry into force of a Statute of a future Ukraine Tribunal cannot cover the start of the military operations by Russia as of March 2022. The prohibition to retro-actively apply a newly created crime which, prior to its codification, was not part of customary international law might constitute an obstacle.

It is debatable whether the crime of aggression, at this moment, is part and parcel of customary international law. The mere fact that this crime in 1946 was incorporated in the Nuremberg Charter, while no other international courts after 1946 were empowered to try this crime, seems insufficient. It is important to note that the "crime of aggression" is not explicitly included in the ECHR.

Therefore, from a strict interpretation of the principle of legality, as endorsed by the ECHR within the context of article 7 of the, the creation of a Ukraine

Tribunal to remedy the existing ICC procedural gap will most likely not countervail this problem. The first part of article 7 states that no person may be convicted for an act or omission that was not defined as a criminal offence under the laws of the country or international laws at the time it was committed. In other words, a person can only be punished for something that was considered a crime at the time it was committed (European Court of Human Rights, 2022: 5-7). From this perspective, the start of the Russian operation in February-March 2022 and military actions which followed until the potential enactment of "Aggression" Statute (which would codify the crime of aggression) could not be subsumed under the jurisdictional ambit of the crime of aggression.

Although Article 7(1) of the ECHR states that no one can be convicted of an act or omission that was not defined as a criminal offence under the laws of the country or international laws at the time of the act or omission, there are exceptions.

Article 7(2) of the ECHR acknowledges that there are some acts that are considered crimes under the general principles of international law "recognised by civilised nations", even if these acts are not specifically listed as crimes under national law. In these cases, a person may be convicted and punished for these crimes retroactively (European Court of Human Rights, 2022: 5-7).

An example of the application of this principle can be found in the Kononov v. Latvia case, which came before the ECHR on 17 May 2010, in which the complainant was convicted of war crimes committed during World War II. The ECHR held that the complainant could have known that these acts would be considered war crimes because of their punishable nature under international law. The Court concluded that Article 7(1) of the ECHR had not been violated and therefore an assessment of the complaint under Article 7(2) was not necessary (European Court of Human Rights, 2010). A similar reasoning was adopted by the ECHR with respect to the crime of genocide in the case of

Vasiliauskas v. Lithuania. The Grand Chamber of the ECHR held that "Genocide had been clearly recognised as a crime under international law in 1953. It was codified in the Genocide Convention, which was approved unanimously by the United Nations General Assembly in 1948 and signed by the Soviet Union in 1949. Even before then, genocide had been acknowledged and condemned by the United Nations in 1946" (European Court of Human Rights, 2015).

Contrary to the nature of war crimes and genocide, it can be said that there is no international legal consensus whether the crime of aggression is to be qualified as "recognised by civilised nations". Even more so, now that only 32 State Parties of the ICC have supported ratification of the act of aggression as mentioned in article 8 bis. Therefore, the exception provided by Article 7(2) does would not remedy the mentioned legal obstacle in the context of a newly established Ukraine Tribunal.

2. Functional immunities as a procedure obstacle

Apart from the mentioned ramifications pertaining to the crime of aggression, a second important procedure obstacle arises. A potential Ukraine Tribunal is most likely not be set up by the UN Security Council in view of the Russian Federation having a veto within this council. Such a court could be established by the General Assembly of the UN whereby a two-third majority of states is required. In case this threshold would be met, the Russian Federation would highly likely not be amongst these two-third majority. Furthermore, it is questionable of many states have an incentive to create a new crime of aggression since this could have adverse legal-political effects on their own political leadership.

Accordingly, a potential Ukraine seems only be vested on the basis of a special agreement between those states who favor the inclusion of the crime of aggression via a special 'aggression' tribunal.

From this observation follows the question whether such a court set up by some states could interfere with potential immunities which the political leaders of the alleged 'aggressor' state enjoy under their own constitution?

The International Court of Justice (ICJ) in the Arrest Warrant of 11 April 2000 case (Democratic Republic of Congo v. Belgium) provided a negative answer on the basis of its interpretation of international law. This case related to an arrest warrant issued by Belgium against the then Minister of Foreign Affairs of Congo, Mr. Yerodia, for alleged incitement to hatred against part of the local population. Congo challenged this arrest warrant at the ICJ on the basis of functional immunities a minister enjoys during his office. The ICJ held in its judgement that Belgium indeed violated these immunities, ruling on 14 February 2002 that:

The Court found that the issue and international circulation by Belgium of the arrest warrant of 11 April 2000 against Abdulaye Yerodia Ndombasi failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Congo enjoyed under international law; and that Belgium must cancel the arrest warrant.

In its Judgment, which is final, without appeal and binding for the Parties, the Court found, by 13 votes to 3, "that the issue against Mr. Abdulaye Yerodia Ndombasi of the arrest warrant of 11 April 2000, and its international circulation, constituted violations of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law"; and, by 10 votes to 6, "that the Kingdom of Belgium must, by means of its own choosing, cancel the arrest warrant of 11 April 2000 and so inform the authorities to whom that warrant was circulated" (The International Court of Justice, 2002).

Within the framework of the ICC, article 27 of the Statute provides for an exclusion of the defense of official capacity, meaning that Heads of State or Government can be prosecuted before the ICC, despite their official capacity (International Criminal Court, 2021: 21). This provision had its roots in article 7 of the Nuremberg Charter, which texts are almost identical to article 27 (International Criminal Court, 2021: 21);(United Nations, 1951: 288). The implications of article 27 of the ICC Statute were reflected in the case of Prosecutor v. Al Bashir, the former President of Sudan. In that case, the ICC Appeals Chamber held that the doctrine of State Immunity only applies in the relation between States and thus not within the relation of a State versus an International Tribunal (Appeals Chamber, 2019). As a result, Mr Al Bashir could not resort to State immunity to be exempted from prosecution for international crimes at the ICC. One must bear in mind that Sudan is not a State Party to the ICC, and that the Al Bashir case was submitted to the jurisdiction of the ICC in 2015 by a resolution of the Security Council of the UN. This implies that Sudan was obliged to cooperate with the ICC and therefore the defence of State immunity was moot. In the event of Russia, this situation does not arise, Russia not being a State Party nor that a Security Council Resolution lies before the Court.

Although the ICC procedural framework allows for a trial against heads of state (despite their national immunity), third states cannot simply set aside immunities of other states which are constitutionally guaranteed to heads of state and minister of these latter states, except when a tribunal is set up in accordance with Chapter VII of the UN Charter, such as the former ICTY and ICTR which constituted mandatory powers for these courts and absolute obligations for the states to cooperate with these tribunals.

Moreover, with international law, the ICC approach has generated criticism. One of the most recent comments on this view can be found in the article of the

Dutch Commission for international Public Law affairs (CAVV), which disagrees with the view of the ICC, saying: “The core of this criticism is that international law does not allow a group of states to impose obligations on third states without the consent of the latter. This is known as the principle of the relative effect of treaties. Thus, states cannot simply determine among themselves that the immunity of (a representative) of a third state no longer applies without the consent of that third state. Even if it is recognised that a group of like-minded states can establish a tribunal of aggression (notably on the basis of delegation of jurisdiction), these states cannot, in principle, waive the immunity of a third state not involved in the establishment of this tribunal - and over whose authority the tribunal will exercise jurisdiction, if any. Ultimately, states can only delegate to an international tribunal power that they themselves initially possess. States themselves do not have the power to disregard personal immunity. Therefore, in principle, they cannot delegate that power to an international tribunal either. Another major criticism concerns the concept of 'international tribunal'. Not every international tribunal act on behalf of 'the international community as a whole', and it is unclear what makes a tribunal 'truly international'. Without a well-defined definition of the characteristics that make a tribunal sufficiently 'international' not to have to recognise personal immunity, the Special Court and Criminal Court's reasoning makes persons entitled to claim personal immunity vulnerable.” (Commissie van advies inzake volkenrechtelijke vraagstukken, 2022: 14).

The issue of functional immunities remains therefore also a serious obstacle for a potential Ukraine Tribunal.

3. The potentiality of trials in absence before a Ukraine Tribunal

A third procedural hurdle emerges from the advent of a Ukraine Tribunal. One of the main characteristics of the ICC proceedings is the impossibility to try an accused before this court in absentia. As a result, suspects may be unable to

be brought before the ICC and convicted in absentia (Cassese, 2003: 111-113). Without the presence of the accused in the ICC-courtroom (see Article 63 (II)), a trial at the ICC cannot take place (International Criminal Court, 2021: 45).

This was a principal choice of the State parties when they enacted the ICC Statute in 1998. The rationale behind this principle pertains to the notion that considering the severity of crimes within subject-matter jurisdiction of the ICC, one cannot legitimize a potential conviction without the accused being heard in court (International Criminal Court, 2021: 45).

This implies that – apart from the discussion revolving around the crime of aggression – a future Ukraine Tribunal only would have a legal value, additional to the role of the ICC, in the event such a tribunal would be empowered to try accused persons of the crime of aggression in absentia. Such a procedure contravenes the mentioned ICC-principle of trials in presence of the accused. The justification to deviate from the view of the drafters of the ICC seems not apparent.

Apart from a possible symbolic value of judgments in absentia to be rendered by such a court, the enforceability of a judgement in absentia in terms of its legitimacy, and its effect within the world community, creates not only a procedural but also a legal-political obstacle.

With the exception from the Special Tribunal for Lebanon (STL), to set up to try the responsible individuals for the assassination of the state Prime Minister of Lebanon (Mr Rafic Hariri) no other international or internationalized criminal tribunal until so far opted for the admissibility of trials in absentia. This observation reinforces the notion that trials for international crimes, considering their magnitude and impact for both the accused and society, distinct from national criminal trials, can only be justified if they are performed in presence of the accused persons.

In case a Ukraine Tribunal would – similar to the ICC - exclude trials in

absentia, one should really weigh the benefits of this tribunal alongside the ICC, against the investment to establish such an institute as well as against its legal-political effects. Moreover, even in the event a Ukraine tribunal would allow for a trial in absentia, and such Court would not be based on a Security Council resolution of the UN, the enforceability of an arrest warrant for, for instance, President Putin of the Russian Federation seems to be illusory. After all, a Ukraine tribunal not based on such a resolution will have no power to intervene within the territory of the Russian Federation. Accordingly, it will still be the question how affective a Ukraine tribunal would be from this perspective.

Conclusions

The incentive of certain states to create a special tribunal for the Ukraine seems fueled by mere pollical motives and not so much by thorough legal-doctrinal notions. The politicians who come up with this proposal should at first reflect on the procedural obstacles which were identified in this article among which the implications of the principle of legality on the potential crime of aggression to be tried by such a Ukraine Tribunal. Furthermore, one should contemplate the effects of the doctrine of functional immunities on the jurisdiction 'ratione materiae' of a future Ukraine Tribunal as well as the way proceedings before such tribunal should and could be conducted, in absentia of in presence of the accused. Only after having thoroughly determined and appraised these fundamentals, a decision to set up such an 'aggression' tribunal is to be taken.

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