

The crime of aggression in the national laws of EU Member States, Genocide Network Observer States and Ukraine

Date: September 2023

Executive summary

Since the very first days of the full-scale Russian invasion of Ukraine in February 2022, calls have mounted for the establishment of a special tribunal for the crime of aggression, either in an international or hybrid form (incorporating mixed international and national features). The initial proposal of this kind, brought forward by Professor Philippe Sands on 28 February 2022 ⁽¹⁾, was soon relayed by numerous international lawyers, diplomats and politicians ⁽²⁾.

These proposals stemmed from the fact that the most readily available international judicial institution, the International Criminal Court (ICC), is currently unable to exercise its jurisdiction over the crime of aggression in Ukraine. Under the Rome Statute, the ICC's exercise of jurisdiction over this crime is subject to stringent conditions: both the State in whose territory the act of aggression is committed and the State whose nationals are the authors of the aggression must be parties to the Statute and must also have ratified the 2010 Rome Statute amendment relating to the crime of aggression (the 'Kampala amendments') ⁽³⁾. Since neither Russia nor Ukraine have done so, the ICC cannot exercise its jurisdiction over the crime of aggression allegedly committed by Russian nationals in Ukraine.

Towards the end of 2022, the prospect of a special tribunal for the crime of aggression, possibly backed by the United Nations, gained support at the intergovernmental level and within the EU institutions ⁽⁴⁾. In January 2023, the European Parliament issued a resolution wherein it underscored: 'the urgent need for the EU and its Member States, in close cooperation with Ukraine and the international community, preferably through the UN, to push for the creation of a special international tribunal to prosecute the crime of aggression against Ukraine perpetrated by the political and military leadership of the Russian Federation and its allies and to find a legally sound, common way forward on this matter' ⁽⁵⁾.

Shortly after, President von der Leyen announced the establishment of an International Centre for the Prosecution of the Crime of Aggression against Ukraine (ICPA), to be set up in The Hague,

⁽¹⁾ P. Sands, ['Putin's use of military force is a crime of aggression'](#), *Financial Times*, 28 February 2022.

⁽²⁾ For an overview, see O. Corten and V. Koutroulis, 'International Tribunal for Russia's Crime of Aggression against Ukraine – A legal assessment', European Parliament, December 2022.

⁽³⁾ Rome Statute, Art. 15*bis* §2.

⁽⁴⁾ ['Statement by President von der Leyen on Russian accountability and the use of Russian frozen assets'](#), 30 November 2022.

⁽⁵⁾ European Parliament, [Resolution of 19 January 2023 on the establishment of a tribunal on the crime of aggression against Ukraine \(2022/3017\(RSP\)\)](#).

in the Netherlands, embedded within the joint investigation team (JIT) constituted between Estonia, Latvia, Lithuania, Poland, Romania, Slovakia and Ukraine with the support of Eurojust ⁽⁶⁾.

On 5 March 2023, JIT members amended the JIT's constitutive agreement in order to reflect the future role of the ICPA, which was formally launched on 3 July 2023 ⁽⁷⁾. The ICPA is not a standalone structure, but a 'judicial hub' forming part of the existing support structure for the JIT, with a specific focus on supporting and enhancing investigations into the crime of aggression by securing key evidence and facilitating the case-building process. Dedicated prosecutors from different countries will be able to work together at Eurojust and agree on a common investigative and prosecution strategy, irrespective of the jurisdiction which will ultimately prosecute perpetrators. The ICPA receives legal, operational, technical and logistical support from Eurojust.

It is still too early to expect potential developments in the direction of a full-fledged special tribunal for the crime of aggression. Nonetheless, the investigative work to be led by the ICPA is certainly intended to pave the way for such an institution to be established in the future. In the meantime, six of the JIT members (Ukraine, Lithuania, Poland, Estonia, Latvia and Romania) will lead and contribute to that work. In doing so, they will act not as an international investigative mechanism, tribunal or court, but within the parameters set by their own national legislations.

Naturally, a number of issues arise when considering the investigation and prosecution of the crime of aggression by domestic jurisdictions. The crime of aggression is considered to be a 'leadership crime', meaning that, according to the Rome Statute definition, only persons in a position to effectively control or direct the political or military action of a State may incur individual criminal responsibility for this crime ⁽⁸⁾. In most cases, this would concern State officials, who generally benefit from personal (*ratione personae*) or functional (*ratione materiae*) immunity, preventing criminal prosecution before domestic courts.

However, this paper does not aim to further discuss the issue of immunity or other obstacles that may arise as to the exercise of (domestic) jurisdiction over the crime of aggression. The purpose of this paper is to provide a comparative overview of the way in which EU Member States, Genocide Network Observer States and Ukraine have implemented the crime of aggression in their domestic laws. How is the crime of aggression defined in national criminal codes? Have the majority of states adopted the definition provided by Article 8*bis* of the Rome Statute? Do they exercise universal jurisdiction over this crime, similar to war crimes, crimes against humanity and genocide?

The first part of the paper briefly presents the historical evolution of the crime of aggression under international law, looking at how its main components have been shaped from the aftermath of the Second World War up until the adoption of the 2010 Kampala amendments to

⁽⁶⁾ ['Statement by President von der Leyen at the joint press conference with Ukrainian President Zelenskyy'](#), 2 February 2023.

⁽⁷⁾ For more information, consult <https://www.eurojust.europa.eu/international-centre-for-the-prosecution-of-the-crime-of-aggression-against-ukraine>.

⁽⁸⁾ Rome Statute, Art. 8*bis* §1 and Art. 25§3 *bis*.



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EXECUTIVE SUMMARY EN

the Rome Statute. The second part of the paper provides an overview of the national criminal laws of EU Member States, Genocide Network Observer States and Ukraine and takes a look at the English translations of domestic provisions defining the crime of aggression, highlighting common features and main differences.