

FREQUENTLY ASKED QUESTIONS

A Special Tribunal for the Crime of Aggression against Ukraine

1. Why is accountability for the crime of aggression necessary?

The aggression committed by the Russian Federation is much more than an attack on Ukraine. It is an attack on the rules-based international order, which is grounded in core provisions of the Charter of the United Nations. Ensuring accountability for the crime of aggression committed against Ukraine would signal that waging blatantly unlawful and colonizing wars will not go unpunished—whether in Ukraine or elsewhere. The response of the international community against this brazen aggression, including through the prosecution of the crime of aggression, is therefore of crucial importance for the future of the international legal order.

2. Can the ICC prosecute the crime of aggression committed against Ukraine?

The International Criminal Court (ICC) can prosecute genocide, war crimes and crimes against humanity committed on the territory of Ukraine because Ukraine submitted to its jurisdiction.¹ The Rome Statute of the ICC established *four* core international crimes: genocide, crimes against humanity, war crimes, and the *crime of aggression*. However, the ICC’s jurisdiction over the crime of aggression is limited to States that are party to the Rome Statute. Because the Russian Federation is not a party, its nationals cannot be held responsible for the crime of aggression before the ICC.² While the United Nations Security Council could enable the ICC to exercise jurisdiction over the crime of aggression in the situation in Ukraine by referring it to the Court, such a proposal would face the Russian Federation’s veto power as a permanent member of the UN Security Council.

3. Can the ICC’s Statute be amended to prosecute the crime of aggression against Ukraine?

Suggestions have been made to amend the Rome Statute of the ICC to allow for the future prosecution of the crime of aggression committed by nationals of States not party to it. However, no formal amendment to this effect has been tabled. Moreover, if such an amendment were to be formally submitted, it would take years for it to be adopted and to enter into force.³ The question of retroactive application would also have to be addressed. Thus, the only way to ensure accountability for the crime of aggression against Ukraine in a reasonable timeframe is an approach outside of the ICC system, while complemented by parallel efforts to amend the ICC’s Rome Statute in order to avoid similar accountability gaps in the future.

4. Why prosecute the crime of aggression when war crimes, crimes against humanity, and genocide can be prosecuted by the ICC in the situation in Ukraine?

The crime of aggression is at the origin of all the other crimes committed in Ukraine. Without the aggression against Ukraine, the other Rome Statute crimes would not have been and continue to be committed. Thus, the crime of aggression is the “supreme international crime” in this situation, and those who are most responsible—the persons in senior political and military leadership positions that decided to commit the aggression—must be held to account.⁴

¹ In 2014, Ukraine lodged a first declaration under article 12(3) of the Rome Statute, which enables a State not party to the Statute to accept the exercise of jurisdiction of the ICC. This was followed by a second declaration in 2015.

² The same applies to nationals of Belarus in this situation. Belarus’ territory was used as a staging ground for Russia’s war of aggression, which is itself an act of aggression under international criminal law. Art. 8 *bis* of the Rome Statute.

³ The adoption of the Kampala Amendments on the Crime of Aggression to the Rome Statute in 2010 took place after more than a decade of negotiation. And Art. 121 (4) of the Rome Statute states: “[...] an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.” The ICC has 123 States Parties; thus 108 States would need to ratify the relevant amendment before it would apply.

⁴ In its judgment, the International Military Tribunal at Nuremberg declared, “*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.*” IMT, judgment of 1 October 1946, in *The Trial of German Major War Criminals*.

5. Are there alternatives to ensure accountability for the crime of aggression against Ukraine?

Various proposals have been made for how to ensure accountability for the crime of aggression against Ukraine. There is one proposal that has the distinct advantage of providing maximum legitimacy and efficiency while avoiding the possible legal pitfalls related to the nature of the crime of aggression as a leadership crime: a special tribunal for the crime of aggression created through an agreement between Ukraine and the United Nations, on the recommendation of the UN General Assembly.

6. Why create a special tribunal for the crime of aggression through an agreement between Ukraine and the United Nations, on the recommendation of the UN General Assembly?

Legitimacy: Proceeding through the UN General Assembly allows the international community as a whole to participate in and reaffirm the post-war international legal order. The aggression against Ukraine has been condemned by an overwhelming majority of States in the UN General Assembly in both March and October 2022. A General Assembly resolution recommending the creation of a special tribunal for the crime of aggression would be the logical next step to the General Assembly's aggression determinations.

Efficiency: Negotiations between the United Nations and Ukraine to create a special tribunal for the crime of aggression could proceed immediately after a successful vote on the recommending resolution in the UN General Assembly, and be accomplished expeditiously.⁵ And the special tribunal would be a very lean court given its jurisdiction over just one crime – the crime of aggression – and the limited number of persons who could be prosecuted before it, as criminal responsibility for this crime is limited to political or military leaders.

Immunities: The definition of the crime of aggression limits criminal responsibility to individuals in leadership positions, defined as persons “in a position effectively to exercise control over or to direct the political or military action of a State.”⁶ In order to ensure effective prosecutions, it is therefore essential to overcome personal immunities granted under international law for sitting heads of State, heads of government, and ministers for foreign affairs before foreign domestic criminal courts. This is possible, in particular, due to international law jurisprudence that personal immunities do not represent a bar to the prosecution of senior leaders for international crimes before *international* criminal courts and tribunals *acting on behalf of the international community as a whole*, which clearly includes the proposed special tribunal for the crime of aggression on the recommendation of the UN General Assembly.⁷

7. Can the UN General Assembly authorize the UN Secretary-General to conclude an agreement with Ukraine to establish a special tribunal for the crime of aggression?

Such an authorization would fall within the UN General Assembly's powers as clarified by the International Court of Justice.⁸ Furthermore, the UN General Assembly has previously authorized the UN Secretary-General to negotiate an agreement with the Government of Cambodia with the view of establishing a criminal tribunal. While the Extraordinary Chambers in the Courts of Cambodia, established as a result, are not the model for the special tribunal for the crime of aggression, the precedent of the General Assembly authorizing negotiations between the United Nations and a UN Member State to establish a court or tribunal is firmly established. The Special Court for Sierra Leone was also created through an agreement between a UN Member State and the United Nations. While in that case, the UN Security Council mandated the UN Secretary-General to act, the Security Council, importantly, in so doing did not act under its Chapter VII authority. These precedents make it clear that an international tribunal for the crime of aggression can be established through an agreement between the United Nations and Ukraine, on the recommendation of the UN General Assembly.

⁵ The International Criminal Tribunals for the former Yugoslavia and Rwanda were negotiated and created over a period of three months in 1993 and 1994, respectively.

⁶ Art. 8 *bis* of the Rome Statute.

⁷ ICJ Judgment, *Yerodia*; ICC Judgement, *Jordan Referral re Al-Bashir Appeal*; SCSL Decision on Immunity from Jurisdiction, *Prosecutor v. Taylor*; ICTY Decision on Review of the Indictment and Application for Consequential Order, *Prosecutor v. Milošević*; Art. 27 of the Rome Statute.

⁸ ICJ Advisory Opinion, *Certain Expenses*.