

ENGAGING THE EXPERT CAPACITY OF THE COUNCIL OF EUROPE TO ESTABLISH A SPECIAL INTERNATIONAL TRIBUNAL FOR THE CRIME OF AGGRESSION AGAINST UKRAINE. RELEVANT EXPERIENCE OF THE WESTERN BALKANS.

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The invasion of Ukraine by Russian troops, which became the largest crime against humanity in Europe after World War II, gave the international community an imperative to bring the aggressor to justice. On an international scale, an incentive to step up the search for a format to hold the Kremlin clique and high-ranking Russian military officials accountable was the exposure of the occupiers' atrocities in the Kyiv region after it was de-occupied. Since then, the thesis of crimes against humanity and genocide of the Ukrainian people committed by the Russian army and the Kremlin during the armed aggression has been steadily asserted in the public space of Western countries. On this basis, a discussion has arisen about the optimal format of the legal mechanism that should ensure the responsibility of the Russian Federation and its military and political leadership, including the president. Three formats are in focus: the International Criminal Court, the special international tribunal, and a national court with universal jurisdiction.

This paper also considers the project of a hybrid tribunal that would function as part of the Ukrainian judicial system with the support of the Council of Europe (the Extraordinary Ukrainian Chamber for Aggression). This format is considered by the authors to be the most optimal in view of the idea of attracting the expert potential of the Council of Europe to bring to justice the top military and political leadership of the aggressor state. In this context, the experience of the Western Balkans, in particular the activities of the International Criminal Tribunal for the former Yugoslavia and the Kosovo Specialist Chambers and Specialist Prosecutor's Office, deserves special attention. Taking into account the peculiarities of the participation of international institutions in the investigation and organization of prosecution

of persons involved in crimes against humanity and war crimes committed in the territory of the former Yugoslavia will help Ukraine at the current stage of preparation for the international tribunal to avoid procedural errors and speed up the start of the proceedings.

Situation assessment

From the first days of the full-scale intervention, Kyiv, in cooperation with its Western partners, has been working to create a legal mechanism to bring Russia to justice, both individually and as a state, for planning and committing crimes against our country. Back in April, President Volodymyr Zelenskyi decided to create a special justice mechanism in Ukraine to investigate and prosecute every crime committed by the Russian occupiers. It is based on the idea of joint work of national and international experts: investigators, prosecutors and judges. The creation of a special tribunal against Russia is also one of the elements of the “peace formula” proposed by the President of Ukraine in September.

As of today, we may regard the Ukrainian parliament’s appeal to the international community to establish a special international tribunal charged with investigating the crime of Russian aggression against Ukraine as an interim result of the development of the Ukrainian position. International organizations that unite Western countries, including the European Parliament, the Parliamentary Assembly of the Council of Europe, the NATO Parliamentary Assembly, and the OSCE Parliamentary Assembly, joined the initiative to create such an institution to bring the Kremlin regime to justice for war crimes. As of today, national parliaments of a number of EU countries have adopted resolutions in support of an international tribunal for Russia.

A cascade of statements by Western officials, politicians, lawyers, and experts on the draft of the future tribunal is continuously pouring into the news flow. At the end of November, European Commission President Ursula von der Leyen stated that the European Commission proposed to create a specialized court with the support of the UN to investigate and prosecute Russian crimes¹. On December 1, France began work on creating a special tribunal for Russia’s crimes against Ukraine. German Foreign Minister Annalena Baerbock called it “absolutely necessary” to prosecute Russia’s crimes in connection with the war of aggression against Ukraine. “... We support the International Criminal Court, as well as the collection of evidence by various legal agencies of certain crimes that are on the list of acts that violate international law, such as war crimes and crimes against humanity”, Baerbock said in a statement². Meanwhile, Washington has not yet taken a firm position on the format of the special tribunal. Nevertheless, the White House’s unconditional support for the process is evidenced by the fact that, according to Ambassador-at-Large for Global Criminal Justice

¹ Von der Leyen: EU proposes to establish a special court to investigate the crime of Russian aggression (in Ukrainian), URL: <https://www.eurointegration.com.ua/news/2022/11/30/7151566/>

² Baerbock: Germany considers it “absolutely necessary” to prosecute Russia for crimes against Ukraine (in Ukrainian), URL: <https://www.radiosvoboda.org/a/news-nimechchyna-peresliduvannya-rosiji/32159485.html>

Beth Van Schaack, the United States may declassify intelligence to help identify those most responsible for the preparation and conduct of the war. Van Schaack noted two options for justice that are currently being considered. The first is a bilateral treaty between Ukraine and the UN on the setting up of an ad-hoc tribunal, approved by a vote of the General Assembly. The second option is a national (domestic) court established by Ukraine, with the addition of an international element from the EU or the Council of Europe, if possible, approved by a vote at the UN General Assembly³.

Naturally, as part of the search for the best tools to bring to justice those responsible for war crimes, the public debate is unfolding. For example, the chief prosecutor of the International Criminal Court (ICC), Karim Khan, opposes the initiative to create a special tribunal with the support of the UN. “We should avoid fragmentation and instead prefer consolidation”, Khan called for, addressing the Assembly of States Parties, the annual meeting of the ICC’s supervisory body⁴.

Summarizing the proposals of international actors regarding the format of justice, the following possible (though not mutually exclusive) mechanisms can be identified: The International Criminal Court, the special international tribunal (under a General Assembly resolution), and a national court exercising universal jurisdiction.

The ICC has already been involved in the examination of the circumstances of Russian aggression, as Prosecutor K. Khan has already initiated an investigation into war crimes and crimes against humanity committed in Ukraine at the request of 41 states parties, including the EU, as well as Australia, Canada, and the United Kingdom. The ICC investigation covers the situation in Ukraine from November 21, 2013 to the present day, which, according to K. Khan, allows to “encompass any past and present allegations of war crimes, crimes against humanity or genocide committed on any part of the territory of Ukraine by any person”⁵. It is worth noting that the ICC has already been considering the “Situation in Ukraine” case since April 2014, which concerns three issues: the killings during the Maidan protests, as well as the situation in Crimea and Donbas.

An investigation by the ICC would also reduce the problem of selectivity, given that this institution is permanent and has jurisdiction over the categories of international crimes that are relevant to the case of the Russian invasion: war crimes, crimes against humanity,

³ Media: Draft resolution on the establishment of an international tribunal is circulating in the UN (in Ukrainian), URL: <https://www.eurointegration.com.ua/news/2022/12/4/7151850/>

⁴ Karim Khan stated that the ICC is authorized to prosecute war crimes (in Ukrainian), URL: <https://zn.ua/ukr/UKRAINE/karim-khan-zajaviv-shcho-mks-povnovazhnij-pritjahuвати-do-vidpovidalnosti-za-vijskovi-zlochiny-skojeni-v-ukrajini.html>

⁵ The Hague Tribunal launched an investigation into Russia’s war crimes in Ukraine (in Ukrainian), URL: <http://www.golos.com.ua/article/356704>

genocide and the crime of aggression (for the past two decades, the court's activities have been focused mainly on prosecuting war crimes committed in Africa).

However, there are substantial reservations about the exclusive role of the ICC. The fact is that the ICC is actually deprived of the opportunity to prosecute Russian officials, as Moscow has not signed a treaty to participate in this court. This limitation on the sanity of the top officials of the Russian state can be overcome only under two conditions: the Russian Federation must ratify the Rome Statute and the Kampala Amendments to it on the crime of aggression, or the case must be referred to the ICC by the UN Security Council. Obviously, such scenarios can be expected only after the political collapse of Putinism.

Another format that is being actively discussed is the special international tribunal (SIT), established by a General Assembly resolution or by a group of states that have concluded an agreement on the establishment of such a tribunal. The advantage of the SIT is that it will be set up for the specific purpose of investigating and prosecuting Russia's aggression against Ukraine. This practice was applied after World War II, when the Nuremberg and Tokyo tribunals were established. Nevertheless, a special tribunal may be subject to accusations of selectivity. Therefore, to strengthen the authority and legitimacy of the SIT, it is necessary to have a decision of the UN General Assembly. But at the same time, the question remains as to how many developing countries would support such a tribunal. If the initiative of the SIT at the UN platform is defended mainly by the countries of the political West, this will only strengthen the arguments of pro-Russian critics about the "bias" of such justice.

We should point out that in world practice, the creation of the ad-hoc tribunals was based on a UN Security Council resolution. Such examples are the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL) and the Special Tribunal for Lebanon (STL). The ICTY, for example, had the right to consider four categories of crimes: serious violations of the Geneva Conventions of 1949; violations of the laws or customs of war; genocide, conspiracy to commit genocide, incitement to genocide, complicity in the commission of genocide; crimes against humanity⁶. Thus, crimes against peace and crimes of aggression remained outside the jurisdiction of the ICTY. The International Court of Justice is authorized to consider these violations.

The third possible format for bringing the Russian leadership to justice is a national court exercising universal jurisdiction. In accordance with this principle, law enforcement agencies in each individual country that exercises universal jurisdiction over aggression can open and investigate cases, as well as cooperate with the ICC. It is worth noting that the April 2022 PACE resolution calls on countries to use universal jurisdiction to prosecute criminals involved in the Russian armed aggression against Ukraine. So far, 12 countries have launched

⁶ Updated Statute of the International Criminal Tribunal for the former Yugoslavia, URL: https://www.icty.org > Statute > statute_sept09_en

investigations under universal jurisdiction into crimes committed in Ukraine.

The role of the Council of Europe in the project of the Extraordinary Ukrainian Chamber for Aggression

Overall, there are a number of challenges that may be faced by the institutions that will carry out international justice against Russia and its leadership, including accusations of partiality, organizational difficulties (establishing cooperation between Ukrainian and international experts), and the jurisdictional competence of the tribunal.

In this context, the involvement of regional international organizations, particularly the Council of Europe, may be a productive way to overcome these obstacles. Optimization of the judicial procedure is possible within the framework of the so-called hybrid tribunal, created as part of the Ukrainian judicial system with the support and direct participation of the Council of Europe. This idea has been circulating in the publications of European international lawyers since spring. The initiative is publicly supported by David Crane, Chief Prosecutor of the Special Court for Sierra Leone⁷, while Kevin Jon Heller, Professor of International Law and Security at the Centre for Military Studies at the University of Copenhagen, even proposes a specific name—the Extraordinary Ukrainian Chamber for Aggression (EUCA)⁸.

Although the Council of Europe does not have the authority to establish a tribunal, Ukraine could ask the Committee of Ministers to recommend, in accordance with Article 15(a) of the Statute, that member governments agree on a common policy to support such a tribunal⁹. Given that Russia was expelled from the Council of Europe and none of the other 46 member states publicly supported Russia's invasion of Ukraine, it can be assumed that such a consensus is quite possible. However, it will hardly be complete even within the Council of Europe. Azerbaijan and Armenia have consistently failed to vote for UN General Assembly resolutions in support of Ukraine (apparently prioritizing Moscow's role in resolving the bilateral conflict over Karabakh), and Türkiye seeks to play the role of mediator and dialogue platform, so it is unlikely to support a tribunal over Russia.

The establishment of the EUCA and the definition of its structure can be adopted in accordance with the usual procedures of the Council of Europe: discussion of the text of the

⁷ Experts: Ad hoc tribunal for the crime of aggression against Ukraine: when and how it will be established (in Ukrainian), URL: <https://ukrainian.voanews.com/a/oon-resolutsia-trybunal-agressia/6892413.html>

⁸ The Best Option: An Extraordinary Ukrainian Chamber for Aggression, URL: <https://opiniojuris.org/2022/03/16/the-best-option-an-extraordinary-ukrainian-chamber-for-aggression/>

⁹ Statute of the Council of Europe, URL: https://assembly.coe.int/rop/statut_ce_2015-en

treaty within the institutional framework of the Council of Europe; approval of the treaty by the Committee of Ministers of the Council of Europe, after which it can be submitted to the member states for signature. It is envisaged that under the agreement, the EUCA will be part of the Ukrainian judicial system and will have jurisdiction over aggression; judges and prosecutors will be drawn from Ukraine and CoE member states; Ukraine and CoE member states will jointly finance the work of the EUCA and conduct investigations. A hybrid tribunal (EUCA project) with the participation of the CoE's expert capacity could be established in a fairly short time, given that it would be part of the Ukrainian judicial system. Such a tribunal could begin its work before the end of the war, physically located outside Ukraine. The support and participation of Council of Europe members would compensate for the legal, technical, and financial constraints. After all, a number of CoE members, such as Germany and France, have considerable experience in investigating, prosecuting, and trying international crimes committed during the conflict. In addition, given that all EU members are members of the Council of Europe, such a hybrid tribunal could take advantage of the joint investigation teams of Eurojust, which played an important role in the MH17 investigation.

According to K.J. Heller, unlike national prosecution based on universal jurisdiction, the authority of the EUCA will not cause controversy, as it will rely on the territorial jurisdiction of Ukraine¹⁰. Also, created with the help of the Council of Europe, a hybrid tribunal would almost certainly have a more legitimate basis than the special international tribunal, which would inevitably face accusations of selectivity given that it would almost certainly be headed by representatives of Western powers.

It is worth mentioning that between February 24 and early December, the Office of the Prosecutor General registered more than 68,000 crimes against Ukraine, 47,000 of which were war crimes¹¹. Thus, due to the extremely large volume of offenses, the main burden of investigation and trial will fall on the shoulders of Ukrainian law enforcement agencies. Only a small part of the episodes will be considered by the ICC and under universal jurisdiction in various countries. Therefore, the creation of additional structures, such as the EUCA, can effectively relieve the national justice system. Both Ukrainian and international judges will work in the hybrid format, and an exchange of experience will be facilitated.

Strengthening the role of the Council of Europe in the institutional architecture of Europe through participation in a hybrid tribunal

For many years, the Council of Europe has played a prominent role in the construction of the political and legal architecture of the European continent. In the face of Russia's invasion, the

¹⁰ The Best Option: An Extraordinary Ukrainian Chamber for Aggression, URL: <https://opiniojuris.org/2022/03/16/the-best-option-an-extraordinary-ukrainian-chamber-for-aggression/>

¹¹ The Prosecutor General's Office has already recorded more than 68 thousand Russian crimes against Ukraine (in Ukrainian), URL: <https://detector.media/infospace/article/205330/2022-11-25-genprokuratura-zafiksuvala-vzhe-ponad-68-tysyach-zlochyniv-rosii-proty-ukrainy/>

Council of Europe has taken on an unprecedented task of supporting Ukraine, as it defends on the battlefield the principles on which the organization was founded shortly after World War II—the protection of pluralistic democracy and the rule of law, the preservation of respect for human rights and fundamental freedoms on the European continent.

On April 28, the PACE adopted a resolution proposing to “urgently set up an ad hoc international criminal tribunal to investigate and prosecute the crime of aggression allegedly committed by the political and military leadership of the Russian Federation”. The explanatory note by Alexander Pocij, rapporteur of the resolution “Aggression of the Russian Federation against Ukraine...” 2436 (2022), states that the competence of the Council of Europe to assist Ukraine in establishing a criminal accountability mechanism can be justified by the fact that the Russian invasion is a serious violation of the Council of Europe Statute¹². In the event of a large-scale human rights violation committed on the territory of one of the CoE members, member states have a collective responsibility to promote the purposes of the Organization and to defend their common ideals and principles in accordance with Article 1 of the Statute. Furthermore, the preamble to the Statute establishes a clear link between the pursuit of peace and justice, supporting the idea that justice and accountability for gross human rights violations are key preconditions for restoring peace¹³.

The Council of Europe cannot stay away from the process of punishing war criminals in order to enhance the organization’s role in the European institutional architecture, which is being transformed by the results of the Russian-Ukrainian war. The involvement of the Council of Europe in restoring justice and bringing to account the main perpetrators of the war is equally important for “purging” the institutional memory of the organization, given that the Kremlin has been using the CoE institutions, in particular the PACE, for many years to transmit its information narratives, influence Western elites, and level all initiatives aimed at improving the human rights situation in the Russian Federation itself. An illustrative episode occurred in June 2019, when the PACE returned voting rights to Russia, which it had been deprived of after the annexation of Crimea.

Currently, the role of the Council of Europe is to provide advisory assistance to Ukrainian law enforcement agencies (the Council of Europe’s Directorate General for Human Rights and Rule of Law has appointed an advisory group of experts to help Ukraine investigate war crimes and gross human rights violations¹⁴), develop legal mechanisms for compensation for

¹² The Russian Federation’s aggression against Ukraine: ensuring accountability for serious violations of international humanitarian law and other international crimes, URL: https://pace.coe.int/en/files/29995/html#_TOC_d185e547

¹³ Ibid.

¹⁴ Council of Europe expert advisory group starts its work supporting Ukraine’s Prosecutor General Office, URL: <https://www.coe.int/en/web/portal/-/council-of-europe-expert-advisory-group-starts-its-work-supporting-ukraine-s-prosecutor-general-office>

damage caused to Ukraine, and provide political support, which is reflected in PACE resolutions.

Further, in the process of establishing a tribunal on Russian aggression, given that the path through the Council of Europe is not blocked by Moscow, the role of the Council of Europe may be to form a Commission of Experts to collect and analyze information on war crimes committed on the territory of Ukraine (similar to the Commission of Experts of the UN and European Community missions, whose work allowed the UN Security Council to establish the ICTY in 1993 (UN Resolutions 808¹⁵ and 827¹⁶). Another potential format for engaging this institution is the creation of a so-called hybrid tribunal (the project of the Extraordinary Ukrainian Chamber for Aggression) based on an agreement between Ukraine and the Council of Europe.

Kosovo Specialist Chambers as a model for a hybrid tribunal

When drafting a hybrid tribunal, it is advisable to take into account the experience of a mixed model of judicial institutions investigating crimes during the war for Kosovo's independence. Founded in 2015 to prosecute suspects of war crimes committed in 1998–2000 on the territory of Kosovo by citizens of Kosovo or citizens of the Federal Republic of Yugoslavia, the Kosovo Specialist Chambers and Specialist Prosecutor's Office form part of the national judicial system, but are located outside the self-proclaimed republic—in The Hague. All staff and judges are international.

The following factors led to the establishment of the Specialist Chambers in Kosovo:

- Not all suspects have been brought to trial due to the lack of conclusive evidence and testimony collected by the ICTY Prosecutor's Office.
- Reports by international human rights and humanitarian organizations about mass crimes committed in Kosovo by Serbs and the Kosovo Liberation Army.

In 2014–2016, the process of agreeing on the details of the future tribunal, its jurisdiction, and location was ongoing. The details were discussed in letters between the EU and Kosovo judicial institutions, as well as in letters between the EU High Representative for Foreign Affairs and Security Policy and the President of Kosovo. Only in 2016 did the Assembly of Kosovo (parliament) vote to include provisions on the Specialist Chambers and Specialist Prosecutor's Office in the Constitution of Kosovo. Thus, the judicial institutions became the first such hybrid EU mechanism to investigate massive human rights violations and bring perpetrators to justice.

¹⁵ Resolution 808 (1993) / adopted by the Security Council at its 3175th meeting, on 22 February 1993, URL: <https://digitallibrary.un.org/record/243008?ln=en>

¹⁶ Resolution 827 (1993) / adopted by the Security Council at its 3217th meeting, on 25 May 1993, URL: <https://digitallibrary.un.org/record/166567?ln=en>

The affiliation with the national judicial system of Kosovo distinguishes the Specialist Chambers and Specialist Prosecutor's Office from the ICTY, which was a purely international judicial body. The main features of the Specialist Chambers of Kosovo are:

- They are funded by international contributions from the United States, the EU, Canada, Türkiye, and Switzerland.
- The judges working in the Chambers and the Prosecutor's Office are international.
- Clear time frames.

Citizens of Kosovo or citizens of the Federal Republic of Yugoslavia suspected of involvement in crimes can be prosecuted. So far, eight high-ranking Kosovo officials who were former commanders of the Kosovo Liberation Army (KLA) have been indicted. Among them is former President of Kosovo Hashim Thaçi.

In the process of setting up an international tribunal for Russian war criminals, the experience of the ICTY and the Specialist Chambers of Kosovo should be considered in the following aspects: funding of the tribunal's activities by Western stakeholder countries; participation of international experts (investigators, judges, prosecutors), that increases the legitimacy of the trial; determining the time frame during which war crimes were committed.

CONCLUSION

As of today, the discussion of the future trial for the crime of aggression against Ukraine focuses on three formats: the International Criminal Court, the special international tribunal, and a national court with universal jurisdiction. A practical mechanism for establishing a tribunal may include the creation of a tribunal on the basis of a multilateral treaty between states (the Nuremberg model) or an agreement between Ukraine and the UN. However, the implementation of these formats is likely to face a number of obstacles. First, there is a crisis of confidence on the part of developing countries, accusations of selectivity and bias (since the active participants in the Special Tribunal will be Western countries). Secondly, at the level of the UN General Assembly, full support for the initiative of the international tribunal is also not guaranteed, given that such a position contradicts the current line of "neutrality" held by most countries in Asia, Africa and Latin America.

This paper also examines the project of a hybrid tribunal that would function as part of the Ukrainian judicial system with the support of the Council of Europe on the basis of an agreement between Ukraine and this institution (the project of the Extraordinary Ukrainian Chamber for Aggression). The authors conclude that a hybrid tribunal, which is part of the

Ukrainian judicial system and supported by the Council of Europe, will have a broader toolkit for prosecuting Russian war criminals than a special international tribunal or national prosecution conducted by a single state. The architecture of a mixed (hybrid) tribunal is capable of providing a mechanism for bringing to justice the top military and political leadership of the Russian Federation. At the same time, in order to avoid accusations of partiality, it is advisable to ensure support for this initiative in the UN.

In these circumstances, it is reasonable to involve the Council of Europe as a regional organization focused on the Russian-Ukrainian war in the drafting of the future tribunal. Another advantage of the Council of Europe is its broad representation—the organization unites all European countries, except for two that are perpetrating aggression against Ukraine. Additionally, in the course of establishing a tribunal on Russian aggression, given that the Security Council’s instrument is blocked by Moscow, the role of the Council of Europe may be to form a Commission of Experts to collect and analyze information on war crimes committed on the territory of Ukraine.

In the context of cooperation with the Council of Europe within the framework of the international tribunal initiative, we recommend taking into account the experience of the Western Balkans, particularly the functional support of the Kosovo Specialist Chambers. According to the authors, this institution can be studied by the Ukrainian side as a model of a hybrid tribunal.

The history of the prosecution of war criminals of the Yugoslav wars shows that in the eyes of the international Themis, jurisdictional immunities will not apply to the current top leadership of the Russian Federation. At the same time, the direct prosecution of such persons depends on the outcome of the war and further political transformations in the Russian Federation.

RECOMMENDATIONS

- Encourage active involvement of the Council of Europe in the process of preparing the international tribunal. The platforms at the disposal of this institution should become hubs for the exchange of expert opinions and coordination of a common position on the format of the international tribunal.
- A special expert commission of the Council of Europe can work with the Ukrainian authorities, the Ministry of Foreign Affairs and law enforcement agencies to develop a draft of a mixed (hybrid) tribunal and determine the scope of the Council of Europe’s participation. The idea of launching a hybrid tribunal on the basis of an agreement between Ukraine and the Council of Europe requires discussion of the text of the agreement within the institutional framework of the Council of Europe; approval of the agreement by the Committee of Ministers of the Council of Europe, after which it

can be submitted to member states for signature. It is envisaged that, according to the agreement, such a tribunal will be part of the Ukrainian judicial system and will have jurisdiction over aggression; judges and prosecutors will be drawn from Ukraine and the CoE member states.

- The Council of Europe’s expert assistance should be provided at the preparatory stage of the international tribunal’s establishment. First of all, there should be a detailed verification of the facts of the crimes. The next step, which requires the participation of the Council of Europe, is to categorize violations of international humanitarian law into specific categories, thereby determining the directions of the future tribunal’s work.
- It is advisable to adopt a resolution of the Council of Europe that would declare political support for the initiative of the international tribunal on Russian aggression against Ukraine. In the future, the relevant document may be recommended for approval at the level of national parliaments of the CoE member states. The next step should be to secure support for the tribunal from the UN General Assembly.
- Choosing a single date of the beginning of the Russian aggression against Ukraine will help to avoid problems with the timeframe of the tribunal’s jurisdiction. Applying the experience of the ICTY, the Statute of the future tribunal should include the powers of investigators to consider crimes that go beyond the defined geographical and temporal limits, if the specifics of the criminal case require it.
- It is vital to create a donor fund to finance the tribunal’s operations. For example, the work of the ICTY was paid for by the membership fees of UN member states.

Annex 1

RECOMMENDATIONS ON THE PROCEDURAL ASPECTS OF THE ORGANIZATION OF THE INTERNATIONAL SPECIAL TRIBUNAL FOR THE CRIME OF AGGRESSION AGAINST UKRAINE BASED ON THE EXPERIENCE OF THE WESTERN BALKANS

- **Consolidation of trials by type of crime and time of commission.**

In 1999, the new ICTY Prosecutor General, Carla Del Ponte, decided to make the tribunal’s functioning more effective. She reorganized the work of the ICTY: each case was handled by a separate prosecutor; charges in one trial could be combined by the place of the crime, by

the involvement of perpetrators in the organization of mass violations, by types of crimes, and by chronological order. In particular, this is how Del Ponte combined the trials against Slobodan Milošević into separate Croatian-Bosnian and Kosovo trials. The same approach was applied to such war crimes as the siege of Sarajevo, Dubrovnik and Vukovar; the shelling of the Markale market in Sarajevo; and the genocide in Srebrenica.

– **Transferring cases involving lower and middle ranking military personnel to Ukrainian courts. To do this, it is necessary to bring the legislation in line with the Statute of the future tribunal.**

It was decided to transfer cases of police officers, concentration camp guards, ordinary soldiers, officers, etc. to Bosnia and Herzegovina, Croatia, Montenegro, Serbia, Kosovo, and the former Yugoslav Republic of Macedonia. This strengthened both cooperation with the tribunal and the countries' accountability to the ICTY.

– **Following the example of the Western Balkan countries, special war crimes institutions can be created, as was the case in Croatia, Bosnia and Herzegovina, Serbia, and Kosovo.**

In the early 2000s, the UN Office of the Prosecutor General developed a special Outreach Program Activity, which provided assistance in the development of legal and judicial systems. In this context, in 2003, a war crimes investigation department was opened in Belgrade (Serbia) at the Belgrade District Court (investigating crimes committed by Serbian army soldiers and officers in the Bosnian cities of Zvornik, Sarajevo, Srebrenica and in Croatian settlements, in particular, in Vukovar and Ovčar).

In October 2003, the Croatian parliament adopted the Law on the Annex to the Statute of the International Criminal Court and on the Prosecution of Acts Against the Violation of the International Laws and Customs of War and International Humanitarian Law. The document allowed for the establishment of military chambers at the courts in Zagreb, Osijek, Rijeka and Split to investigate war crimes during the Yugoslav conflict of the 1990s. In Bosnia and Herzegovina, the War Crimes Division of the State Court was organized in 2005 to operate as a state specialized institution on a permanent basis in Sarajevo. In Kosovo, war crimes investigations were carried out by the prosecutors of the tribunal.

– **Adoption of laws that would protect witnesses and victims of crimes.**

The Croatian parliament approved such a law in the early 2000s, and a separate department for assisting witnesses and victims of war crimes was instituted at the Ministry of Justice.

– **Enshrining the level of responsibility for the committed crimes—either collective or individual—in the Statute.**

Article 7 of the ICTY Statute establishes individual responsibility for crimes committed, while Article 6 stipulates that the ICTY could only prosecute individuals. With regard to individual responsibility, the ICTY Statute stipulates that persons who planned, ordered, instigated, or personally committed a crime, or otherwise contributed to the commission of a crime, shall be held personally responsible. A subordinate who committed a crime or intended to do so is punished in the same way as his or her superior/commander. There was no exemption from criminal liability in this case, because the commander could have known about the actions of his subordinate, but did not prevent him from committing the crime. If the subordinate acted on the order of his commander, then both the subordinate and the commander were held individually liable.

Annex 2

HOW TO DEPRIVE THE AGGRESSOR STATE OF JURISDICTIONAL IMMUNITIES? THE EXPERIENCE OF THE WESTERN BALKANS.

One of the biggest challenges in the process of establishing an international tribunal for Russian aggression is the issue of immunity of the Kremlin's top leadership, including President Putin, from prosecution for war crimes. In this context, the relevant experience of the Western Balkans is also useful for Ukraine.

The ICTY Statute provides that persons who planned, ordered, instigated, or personally committed a crime, or otherwise contributed to its commission, may be held personally responsible. A subordinate who commits a crime or intends to do so is punished in the same way as his or her superior/commander. If a subordinate acted on the order of his/her superior, both the subordinate and the superior were held individually liable. Article 7 of the Statute states that the official position of the accused persons does not exempt them from criminal liability or reduce their guilt¹⁷. This meant that the tribunal had the right to indict heads of state or government.

The Tribunal for the former Yugoslavia had the right to sentence war criminals to various terms of imprisonment, but not to the death penalty. The defendants served their sentences in various European countries with which the ICTY had concluded relevant agreements. That

¹⁷ Updated Statute of the International Criminal Tribunal for the former Yugoslavia, URL: https://www.icty.org > Statute > statute_sept09_en

is, the tribunal was authorized to conclude such agreements with different countries or to request their assistance in finding suspects in The Hague.

In 1994, the ICTY Prosecutor's Office received a specially created database on crimes committed in the territory of the former Yugoslavia from the members of the UN Commission of Experts. Separate databases were created for different types of crimes—concentration camps and detention centers; ethnic cleansing; sexual crimes; forced deportation of civilians and refugees; mass executions and burials. Cases against suspects were already being formed with the use of these databases¹⁸.

In the first years of its work, the Office of the Chief Prosecutor of the ICTY tried to process the huge amount of information received. It was not possible to build cases against each suspect, so the ICTY decided to combine cases, if possible, into one trial. Also, to increase the efficiency of the proceedings, the suspects were divided into several categories that included organizers and direct perpetrators.

Since 1999, the Office of the Main Tribunal of the ICTY has been applying a new approach to court cases. The crimes committed by the high command of the armies, political figures, police chiefs and concentration camp supervisors (direct organizers) were tried in The Hague. It was decided to transfer to national courts cases related to crimes committed by lower and mid-level military personnel, paramilitaries, police officers, etc. (perpetrators). This allowed the ICTY to focus on the most important trials against the President of the Federal Republic of Yugoslavia (FRY), the President of Serbia, the commanders of the Army of the Republika Srpska, the President of the self-proclaimed Republika Srpska, the President of Republic of Serbian Krajina, the generals of the Croatian Army, the Prime Minister of Kosovo, etc¹⁹.

The UN War Crimes Prosecutor General, Louise Arbour, called on the suspects to surrender themselves. The arrest warrants were sent to all UN countries, which were to freeze any assets of the accused, as well as to facilitate their search and extradition to the Hague Tribunal. The countries to which the ICTY sent the arrest warrants, representatives of peacekeeping missions in Croatia, Kosovo, Bosnia and Herzegovina, and the former Yugoslav Republic of Macedonia, as well as local police²⁰, could search for war criminals. The ICTY investigators constantly cooperated with all law enforcement agencies to find and extradite potential war criminals. For example, this resulted in the detention and transfer to the ICTY of Croatian military leader Ante Golovina by the Spanish police. On the other hand, the extradition of the President of the Federal Republika Srpska Slobodan Milošević took place only in 2001, which

¹⁸ K. Shymkevych, Participation of Intergovernmental and Non-Governmental Organizations in Overcoming the Consequences of War Crimes in the Countries of the Former Yugoslavia (1991-2008) (in Ukrainian), URL: <https://elibrary.kubg.edu.ua/id/eprint/14905/1/diser-shymkevych.pdf>

¹⁹ K. Shymkevych, Nuremberg and Hague Military Tribunals: Common and Special (in Ukrainian) / K. Shymkevych // Slavic Herald: a collection of scientific papers / Rivne Institute of Slavic Studies of Kyiv Slavonic University - Rivne: RIS KSU, 2010. Issue 10. - P. 263-268.

²⁰ K. Shymkevych, Cooperation of the International Criminal Tribunal for the former Yugoslav Republics with the Governments of the Former Yugoslav Republics (in Ukrainian) / K. Shymkevych // Slavic Herald: a collection of scientific papers / Rivne Institute of Slavic Studies of Kyiv Slavonic University. - Rivne: RIS KSU, 2010. - Issue 9. - P. 168-175.

was a political decision of the Serbian government. There were those who surrendered to The Hague on their own, including the former commander of the Kosovo Liberation Army, Ramush Haradinaj. He was subsequently fully acquitted by the tribunal, which allowed Haradinaj to return to public politics and lead the Kosovo government again.

Obviously, the search for Russian war criminals can be a lengthy process. The main obstacle is not the issue of jurisdictional accountability, but the resistance of the Russian authorities, who will hide the suspects. In fact, the current Kremlin leaders will be handed over to the international Themis only in the event of a radical change in the political system of the Russian Federation as a result of a military defeat. The next regime in the Kremlin may take such a step as extraditing war criminals recognized by an international tribunal as part of an agreement to lift sanctions. Also, given the experience of some Albanian and Kosovar figures (Hashim Thaçi, Ramush Haradinaj), some politicians may be personally motivated to surrender to the tribunal, hoping to get a new ticket to politics through an acquittal. Still, the liberalization of the political regime in Russia is only one of many hypothetical scenarios that is not the subject of this article.

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