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A Brief Exploration of the Need for a Special International Criminal Tribunal on the Crime of Aggression

JENNIFER TRAHAN†

This reflection piece will address: (1) the historical background of the crime of aggression; (2) the reasons for establishing a special tribunal on the crime of aggression (STCoA) to address the invasion of Ukraine; and (3) some key features of such a proposed tribunal.

I. HISTORICAL BACKGROUND

Oona Hathaway and Scott Shapiro, in their book *The Internationalists*,¹ trace some of the historical background that led to the development of the crime of aggression. As early as 1917, individuals in the United States were working on the idea of the prohibition of aggressive war (essentially, outlawing war) and debating the even more difficult question of how to enforce such a prohibition.² A similar motivation was behind the opening of the Peace Palace in 1913 in The Hague, Netherlands: the hope that states would

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1. OONA HATHAWAY & SCOTT SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* (2017).

2. *Id.* at 108.

arbitrate³ and, later, litigate⁴ their disputes instead of using recourse to force. The US and France took a further important step in renouncing use of force when they concluded, with other states, the Kellogg-Briand Pact in 1928.⁵ Of course, that did not prevent the cataclysmic catastrophe of World War II.

Yet, it was not until the negotiations of the London Charter that established the International Military Tribunal at Nuremberg⁶ that the historic decision was made to prosecute “crimes against peace,” which we now term the crime of aggression. Indeed, Counts 1 and 2 of the Indictment⁷ were devoted to that crime. In fact, contrary to popular perception, aggressive war was the central focus of the Nuremberg prosecutions.⁸

It was in the Nuremberg Judgment that the crime was deemed: “the supreme international crime, differing only from other war crimes in that it contains within itself the accumulated evil of the whole.”⁹ Thus, if there were not the initial aggression, there would be none of the ensuing war crimes or crimes against humanity. One also would have none of the civilian deaths, nor even military fatalities on either side. In this way, the victim base of the crime of aggression is far broader than the victim base of the other core crimes that the International Criminal Court (ICC) prosecutes—genocide, war crimes,

3. Int’l Ct. Just., *History*, <https://www.icj-cij.org/en/history> (last visited Feb. 26, 2023). The Permanent Court of Arbitration was established in 1900 and began operating in 1902. *Id.*

4. Int’l Ct. Just., *Permanent Court of International Justice*, <https://www.icj-cij.org/en/pcij> (last visited Feb. 26, 2023). The Permanent Court of International Justice was established there in 1922. *Id.*

5. *See generally* General Treaty of Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57, available at https://avalon.law.yale.edu/20th_century/kbpact.asp [hereinafter, “Kellogg-Briand Pact”]. *See* HATHAWAY & SHAPIRO, *supra* note 1, at 121–30 (on the negotiation of the Pact).

6. Charter of the International Military Tribunal, Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 279 [hereinafter, “London Charter”].

7. 1 Trials of War Criminals Before Nuremberg Military Tribunals Under Control Council Law No. 10, 1–12 (1946), available at <https://www.loc.gov/item/2011525463>.

8. *See* GARY J. BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS*, 147–205 (2000).

9. *Int’l Mil. Tribunal, Judgment of 1 October 1946*, in *THE TRIAL OF GERMAN MAJOR WAR CRIMINALS, PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG, GERMANY*, Pt. 22, at 421 (Aug. 22, 1946 to Oct. 1, 1946).

and crimes against humanity.¹⁰ The crime of aggression causes the totality of the harm that ensues.

States attempted to reinforce the same prohibition against the use of force in 1945 with Article 2(4) of the UN Charter.¹¹ Yet, that provision lacks any automatic enforcement.¹² The Security Council may be able to utilize its Chapter VII powers in some situations,¹³ but certainly not when a permanent member of the UN Security Council (which possesses veto power)¹⁴ is the aggressor. In any event, there is no accompanying individual criminal responsibility.¹⁵

In 1974, the UN General Assembly took another significant step forward in defining aggression in Resolution 3314.¹⁶

Importantly, by the 1998 negotiations to develop the ICC's Rome Statute, the delegates agreed that there would be *four* crimes within the jurisdiction of the Court.¹⁷ However, agreement on the definition and conditions for the exercise of jurisdiction vis-à-vis the crime of aggression was not possible to conclude at Rome.¹⁸ These topics went into separate negotiations from 2003–2009, primarily before the Special Working Group on the Crime of Aggression (SWGCA).¹⁹

These negotiations culminated in agreement on the definition of the crime; however, what was adopted in 2010 at the ICC Review

10. See Rome Statute of the International Criminal Court, art. 6 (genocide), art. 7 (crimes against humanity), art. 8 (war crimes), 17 July 1998, entry into force July 1, 2002, 2187 U.N.T.S. 90 [hereinafter, "Rome Statute"].

11. U.N. Charter art. 2(4). It states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." *Id.* Article 2(4), along with the Security Council's Chapter VII powers and the right of states to individual and collective self-defense enshrined in Article 51, create the trifecta arrangement that is designed to protect international peace and security. See U.N. Charter arts. 39, 51.

12. U.N. Charter art. 2(4).

13. See U.N. Charter Ch. VII.

14. U.N. Charter art. 27(3) (veto power). On the harm of vetoes cast while there is ongoing genocide, crimes against humanity, or war crimes, see JENNIFER TRAHAN, *EXISTING LEGAL LIMITS TO SECURITY COUNCIL VETO POWER IN THE FACE OF ATROCITY CRIMES* (2020); on veto use in the face of aggression, see Jennifer Trahan, *Legal Issues Surrounding Veto Use and Aggression*, CASE W. RES. J. INT'L L. (forthcoming 2023).

15. U.N. Charter Ch. VII.

16. G.A. Res. 3314 (Dec. 14, 1974).

17. Rome Statute, *supra* note 10, art. 5(1) (jurisdiction over four crimes).

18. See *id.* at art. 5(2) (original, unamended version of the Rome Statute).

19. For details of the negotiations, see STEFAN BARRIGA ET AL., *THE PRINCETON PROCESS ON THE CRIME OF AGGRESSION: MATERIALS OF THE SPECIAL WORKING GROUP ON THE CRIME OF AGGRESSION, 2003–2009* (2009).

Conference in Kampala, Uganda, unfortunately was a dramatically more limited jurisdictional regime than exists vis-à-vis the ICC's other core crimes.²⁰ The US and other states at the Review Conference insisted on the exclusion of the nationals of non-States Parties and crimes committed on their territories from the ICC's jurisdiction regarding the crime of aggression.²¹ The UK and France then further narrowed,²² or arguably narrowed,²³ jurisdiction related to ICC States Parties in a 2017 resolution of the ICC's Assembly of States Parties that activated the ICC's jurisdiction regarding the crime.²⁴ Both steps were massively ironic, in that three of the four Allies at Nuremberg limited the jurisdiction of the crime of aggression. Thus, when Russia—a large part of what had been the USSR—which was the fourth Ally at Nuremberg, has committed the crime of aggression, the ICC lacks the jurisdiction to investigate and prosecute it.²⁵

In the long run, States Parties need to amend the ICC's jurisdictional regime over the crime of aggression so that the ICC has broader jurisdiction.²⁶ The crime was always intended to be prosecuted

20. See Res. RC/Res.6, art. 8*bis* Annex I. (June 11, 2010).

21. Article 15*bis*, paragraph 5, provides: "In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime when committed by that State's nationals or on its territory." Rome Statute, *supra* note 10, art. 15*bis*(5). See Jennifer Trahan, *The Rome Statute's Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference*, 11 INT'L CRIM. L. REV. 49, 84, 93 (2011) (detailing the 2010 negotiations).

22. See Jennifer Trahan, *From Kampala to New York—The Final Negotiations to Activate the Jurisdiction of the International Criminal Court Over the Crime of Aggression*, 18 INT'L CRIM. L. REV. 197, 205–06 (2018) (detailing the 2017 negotiations).

23. There is an argument that a mere resolution was ineffective to modify a statutory amendment—i.e., the Kampala crime of aggression amendment's jurisdictional regime. See *id.*

24. Res. ICC-ASP/16/Res.5, Activation of the Jurisdiction of the Court Over the Crime of Aggression (Dec. 14, 2017) [hereinafter, "Activating Resolution"].

25. Neither the Russian Federation nor Belarus (whose territory was used to launch the invasion) is a party to the ICC's Rome Statute. See United Nations Treaty Collection, Chapter XVIII: Penal Matters, 10, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en (status of ratification of the Rome Statute as of Jan. 20, 2022). This precludes ICC prosecution of their nationals and crimes committed on their territories for the crime of aggression. See Rome Statute, *supra* note 10, art. 15*bis*(5). The leaders of Belarus are implicated because they permitted the territory of Belarus to be used as a staging ground for the invasion. See *id.* art. 8*bis*(2)(f) (including as an "act of aggression," "[t]he action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State").

26. Statement by the Global Institute for the Prevention of Aggression, *Russia's Invasion of Ukraine: A Crime of Aggression. The Need to Amend the Crime of Aggression's Jurisdictional Regime* (Mar. 24, 2022), available at https://crimeofaggression.info/wp-content/uploads/GIPA-Statement_24-March-2022-7.pdf (calling for amendment of the crime of aggression's jurisdiction regime).

before the ICC and there is no sound reason to truncate the ICC's jurisdiction so significantly.²⁷ An amendment is necessary if states really stand behind the imperative of enforcing Article 2(4) of the UN Charter—as they should—through the regime of individual criminal responsibility.²⁸

II. THE IMPORTANCE OF ESTABLISHING A STCoA

As a gap filler, to address the current situation, what is needed is a STCoA established through the United Nations. To put it starkly, nothing less than the global order is at stake. Every state has an interest in protecting its borders from invasion by a neighboring country. One will never know whether it was too tepid of a response to the illegal annexation of Crimea²⁹ (with really no legal ramifications) that tempted Russia's invasion. Moreover, too tepid of a response now could fuel China's aspiration in the South China Sea and particularly, as it relates to Taiwan.³⁰

The most legitimate, internationally supported way of creating a STCoA would be through the UN. As to the process, Ukraine could request a tribunal. Indeed, the Ukrainian Parliament has already endorsed establishing a tribunal.³¹ The UN General Assembly would then need to recommend the creation of the Tribunal. This would set in motion the UN and Ukraine negotiating the Tribunal's statute, the terms of which would be memorialized in a bilateral agreement between the UN and Ukraine.

27. If one wants to avoid the potential critique of selective enforcement, the clear path is amending the Rome Statute and creating more extensive jurisdiction of the ICC over the crime of aggression. That there have been instances where the crime has been committed in the past—before the Rome Statute's definition of the crime was finalized and adopted in 2010—is no reason, however, to fail to enforce the crime presently.

28. A review of the crime of aggression is scheduled for seven years after the activation of jurisdiction, which occurred in 2018, meaning the review is to occur in 2025. See Resolution RC/Res.6*, para. 4 (June 11, 2010) (“[f]urther decides to review the amendments on the crime of aggression seven years after the beginning of the Court's exercise of jurisdiction”); Activating Resolution, *supra* note 24 (activating jurisdiction effective in 2018).

29. See Fred Dews, *NATO Secretary-General: Russia's Annexation of Crimea Is Illegal and Illegitimate*, THE BROOKINGS INST. (Mar. 19, 2014), <https://www.brookings.edu/blog/brookings-now/2014/03/19/nato-secretary-general-russias-annexation-of-crimea-is-illegal-and-illegitimate/>.

30. *Is China Preparing to Invade Taiwan? Key Questions Answered*, AL-JAZEERA (Aug. 4, 2022), <https://www.aljazeera.com/news/2022/8/4/is-china-preparing-to-invade-taiwan-key-questions-answered>.

31. *Ukrainian Parliament Appeals to UN, EU and Council of Europe with Call to Create Special Tribunal for Russia*, EURO. PRAVDA (Oct. 7, 2022), <https://www.eurointegration.com.ua/eng/news/2022/10/7/7148268/>.

While there are potentially other ways to establish such a tribunal, the best approach is to establish an international criminal tribunal through the UN General Assembly. First, as mentioned, the international order is at stake; the issue is one that demands a global response. Second, given that a Security-Council-supported tribunal is off the table due to Russia's involvement,³² a UN-General-Assembly-supported tribunal would express the strongest international support. Third, there are impediments under Ukraine's Constitution with establishing a hybrid tribunal, at least within the Ukrainian system.³³ Fourth, the strongest position in terms of heading off immunities impediments is by utilizing an international tribunal.³⁴

The crime of aggression—at least as formulated in the definition in Article 8*bis* of the Rome Statute—is a “leadership crime.” That is, it only applies to certain high level political and military leaders.³⁵ Yet, immunity for heads of state and government officials can attach at the national level.³⁶ If those leaders have immunity, then the very persons one might seek to prosecute for the crime could escape accountability.

Such immunity could prove a significant impediment to prosecutions within the courts of Ukraine, prosecutions before other domestic courts, and likely would be an impediment to a regional approach.³⁷ Important rulings from the ICJ,³⁸ the Special Court for

32. See U.N. Charter art. 27(3) (veto power).

33. See Alexander Komarov & Oona A. Hathaway, *Ukraine's Constitutional Constraints: How to Achieve Accountability for the Crime of Aggression*, JUST SECURITY (Apr. 5, 2022), <https://www.justsecurity.org/80958/ukraines-constitutional-constraints-how-to-achieve-accountability-for-the-crime-of-aggression/>.

34. See Astrid Reisinger Coracini & Jennifer Trahan, *The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine (Part VI): On the Non-Applicability of Personal Immunities*, JUST SECURITY (Nov. 8, 2022), <https://www.justsecurity.org/84017/the-case-for-creating-a-special-tribunal-to-prosecute-the-crime-of-aggression-committed-against-ukraine-part-vi-on-the-non-applicability-of-personal-immunities/>.

35. See Rome Statute, *supra* note 10, at art. 8*bis*(1) (The crime encompasses “a person in a position effectively to exercise control over or to direct the political or military action of a State . . .”).

36. See Arrest Warrant of 11 April 2000 (Dem. Rep. of Congo v. Belg.), 2002 ICJ Rep. 121 (Feb. 14), <http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm> (differentiating between foreign domestic courts where immunities attach, and “international criminal courts” before which immunity for heads of state, heads of government, and ministers for foreign affairs do not attach) [hereinafter, “Arrest Warrant”].

37. See Coracini & Trahan, *supra* note 34.

38. See Arrest Warrant, *supra* note 36.

Sierra Leone (SCSL),³⁹ and the ICC⁴⁰ establish that immunity would not be an impediment to prosecutions before an international tribunal. Establishing a fully international tribunal through the General Assembly would best ensure the ability to draw on this precedent.

III. SOME KEY FEATURES OF THE PROPOSED STCoA

The author had the privilege of presenting a proposal for a STCoA at the Yale Club in June 2022, along with other scholars.⁴¹ Some of the key features of the proposal are highlighted below, while the ultimate details would be left to the UN and Ukraine to negotiate.

- The proposal is for a fully international tribunal, about the size of the SCSL, *not* the size of the International Criminal Tribunal for the former Yugoslavia (ICTY) or the International Criminal Tribunal for Rwanda (ICTR). Because the crime is, as mentioned, a “leadership crime,”⁴² there is only a limited subset of individuals who would need to be tried. Also, the tribunal would have jurisdiction over only one crime, the crime of aggression, as the ICC already has jurisdiction over the crimes of genocide, crimes against humanity, and war crimes committed in the territory of Ukraine.⁴³

39. Prosecutor v. Charles Taylor, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, para. 52 (Mar. 31, 2005) (holding Charles Taylor not immune from prosecution before the SCSL even though indicted while a sitting head of state; the Appeals Chamber explained that “the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court”); *see also* Coracini & Trahan, *supra* note 34 (explaining why the Appeals Chamber deemed the SCSL to constitute an international criminal court or tribunal).

40. Prosecutor v. Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09 OA2, Judgment in the Jordan Referral re Al-Bashir Appeal, para. 162 (May 6, 2019), https://www.iccpi.int/sites/default/files/CourtRecords/CR2019_02856.PDF (“there was no Head of State immunity that would have prevented Jordan from executing the [ICC] warrant for the arrest and surrender” of then-President Al-Bashir of Sudan).

41. *See* Permanent Rep. of Ukraine, Letter dated Aug. 12, 2022, from the Rep. of Latvia, Liechtenstein and Ukraine to the United Nations Addressed to the Secretary-General, U.N. Doc. A/ES-11/7 (Aug. 17, 2022) (Chair’s summary of meeting); *Blog Series: The Case for Creating and International Tribunal to Prosecute the Crime of Aggression Against Ukraine (Parts I-VI)*, JUST SECURITY, <https://www.justsecurity.org/tag/u-n-general-assembly-and-international-criminal-tribunal-for-aggression-against-ukraine/>.

42. *See* Rome Statute, *supra* note 10, at art. 8*bis*(1) (leadership clause).

43. *See* International Criminal Court, *Situation in Ukraine*, ICC-01/22, <https://www.icc-cpi.int/ukraine> (Ukraine’s two Article 12(3) declarations accepting ICC jurisdiction).

- The proposal is for internationally appointed judges. This would ensure both the required impartiality and appearance of impartiality. Even the most skilled Ukrainian judges likely would not be seen as impartial in the present circumstances.
- The Tribunal should use the definition of the crime contained in Article 8*bis* of the ICC’s Rome Statute.⁴⁴ This definition was negotiated within the SWGCA,⁴⁵ and the Russian delegation attended these negotiations and agreed on the definition.⁴⁶ That definition was then adopted by consensus decision of all States Parties to the ICC’s Rome Statute—110 states as of 2010.⁴⁷ The definition is acknowledged to represent customary international law.⁴⁸
- Temporal jurisdiction could start in 2014 when the aggression commenced with the illegal annexation of Crimea and incursions into Eastern Ukraine.⁴⁹ However, if states, influenced by budget constraints, so demand, one could alternatively commence jurisdiction in 2022. Utilization of the latter date would not cover the totality of the harm but would cover the 2022 invasion. There should be no temporal ending date because the crime, as of this writing, is still ongoing.

44. See Rome Statute, *supra* note 10, art. 8*bis*.

45. See BARRIGA ET AL., *supra* note 19.

46. Gennady Kuzmin & Igor Panin, *Russia*, in THE CRIME OF AGGRESSION: A COMMENTARY, VOL. 2, 1264 (Claus Kreß & Stefan Barriga eds., 2016) (statement by Russian diplomats).

47. Int’l Crim. Ct., *State Parties - Chronological List*, <https://asp.icc-cpi.int/states-parties/states-parties-chronological-list> (last visited Mar. 21, 2023); *Chapter XVIII 10 B. Penal Matters*, U.N. TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-b&chapter=18&clang=_en (last visited Mar. 4, 2023).

48. See Astrid Reisinger Coracini, *The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part II)*, JUST SEC. (Sept. 23, 2022) (explaining that “[t]he prohibition and criminalization of aggression involve rules that are beyond any doubt part of customary international law. This is true for the customary nature of the prohibition on the use of force, the principle of individual criminal responsibility for serious violations of international law, and the crime of aggression.”) (citing FUTURE PERSPECTIVES ON INTERNATIONAL CRIMINAL JUSTICE, Ch.18 (Carsten Stahn & Larissa van den Herik eds., 2010); Kuzmin & Panin, *supra* note 46, Ch. 14).

49. See Dews, *supra* note 29.

- The crime of aggression is committed in two states—the “aggressor” state and the “victim” state. Accordingly, it would suffice for the Tribunal to have jurisdiction over aggression committed within the territory of Ukraine.⁵⁰
- The statute would need to provide for the creation of rules of procedure and evidence,⁵¹ and would need to contain the full panoply of fair trial/due process protections to ensure fair trials.⁵²
- As to immunities, the statute could simply provide that there would be no head of state or government official immunity.⁵³ The statute could additionally provide that any amnesty would be ineffective before the Tribunal.⁵⁴
- The statute would need to provide for the creation of a witness protection program.⁵⁵ One could well imagine, for example, the security risk to any regime insider who chooses to testify.

50. See Request Under Regulation 46(3) of the Regulations of the Court, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute,” ICC-RoC46(3)-01 (Sept. 6, 2018) (ruling related to Bangladesh/Myanmar requiring one element of the crime to occur on the territory of a Rome Statute State Party). Element 3 of the elements of the crime of aggression requires that aggression be committed. See Int’l Crim. Ct., *Elements of Crimes*, Art. 8bis, <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>. The crime is being committed partly on the territory of Ukraine.

51. See Statute of the International Criminal Tribunal for the former Yugoslavia, art. 15, May 25, 1993 [hereinafter, “ICTY Statute”]; Statute of the International Criminal Tribunal for Rwanda, art. 14, Nov. 8, 1994 [hereinafter, “ICTR Statute”]; Statute of the Special Court for Sierra Leone, art. 14, Jan. 16, 2002 (providing for tribunal judges to negotiate rules of procedure and evidence) [hereinafter, “SCSL Statute”].

52. See ICTY Statute, *supra* note 51, art. 21; ICTR Statute, *supra* note 51, art. 20; SCSL Statute, *supra* note 51, art. 17; Rome Statute, *supra* note 10, at arts. 55, 66–67 (fair trial rights).

53. See, e.g., ICTY Statute, *supra* note 51, art. 7.2; ICTR Statute, *supra* note 51, art. 6.2; SCSL Statute, *supra* note 51, art. 6.2. See also London Charter, *supra* note 6, art. 7 (“The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.”); Rome Statute, *supra* note 10, art. 27.

54. See, e.g., SCSL Statute, *supra* note 51, art. 10 (“An amnesty granted to any person falling within the jurisdiction of the [court] in respect of the crimes referred to in . . . the present Statute shall not be a bar to prosecution.”).

55. See David J. Scheffer, *The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine (Part IV)*, JUST SECURITY (Sept. 28, 2022), <https://www.justsecurity.org/83201/tribunal-crime-of-aggression-part-two/> (discussing witness protection).

- The Tribunal should be located in The Hague, Netherlands, to facilitate building a cooperative working relationship with the ICC, as the Tribunal would be complementing the ICC's important work.⁵⁶
- In terms of victim participation, the victims of the crime of aggression are all of the people of Ukraine. As mentioned, the victims even include Ukrainian and Russian soldiers—none of whom should have had to fight or die in an unjust war. It would be important to give victims a voice in the proceedings, but at the same time have an efficient process that can be streamlined.⁵⁷

IV. CONCLUSION

The international community has significant experience establishing international (and hybrid) criminal tribunals. The question is whether states have the political will to do so—and to strengthen the ICC's ability to prosecute the crime of aggression for the future. While an ad hoc solution is hardly ideal (hence the need in the long-run for a Rome Statute amendment to the crime's jurisdiction), an ad hoc response is necessary in the instant situation. More than 140 states stood behind Ukraine in the UN General Assembly in condemning the Russian invasion,⁵⁸ and, later, in condemning the attempt at annexation.⁵⁹ They will now be put to the test not to make hollow promises. States need to enforce international law and protect the sanctity of the borders of all states by enforcing the core norm in Article 2(4) of the UN Charter and ensuring individual criminal responsibility for the crime of aggression.

56. On the need for a cooperative working relationship between the ICC and STCoA, see David J. Scheffer, *Forging a Cooperative Relationship Between Int'l Crim. Court and a Special Tribunal for Aggression Against Ukraine*, JUST SECURITY (Oct. 25, 2022), <https://www.justsecurity.org/83757/forging-a-cooperative-relationship-between-intl-crim-court-and-a-special-tribunal-for-russian-aggression-against-ukraine/>.

57. See Scheffer, *supra* note 55 (discussing victim participation).

58. G.A. Res. ES-11/1 (141 in favor); G.A. Res. ES-11/2 (140 in favor); G.A. Res. ES-11/L.7 (141 in favor).

59. G.A. Res. ES-11/4 (143 in favor).