

Andriy Kostin, Prosecutor General of Ukraine – 10 April 2024
CAHDI Seminar on the Special Tribunal for the Crime of Aggression against Ukraine

Investigation and prosecution of the crime of aggression by domestic jurisdictions

Dear Ms. Coracini and members of the Panel, your excellencies, friends and colleagues,

I am pleased to be able to contribute to the seminar that addresses the issue of the Special Tribunal for the Crime of Aggression against Ukraine.

I would like to express gratitude to the hosts of the event — Presidency of the Council of Europe — Liechtenstein, Council of Europe and Permanent Representation of Ukraine — for their kind invitation and for letting me address you from afar, as unfortunately my duties keep me in Kyiv.

With your permission, I would like to focus on three issues:

- First, the national proceedings in Ukraine;
- Second, Ukraine's position on the Special Tribunal for the Crime of Aggression and some of the standing issues;
- Third, the mandate and progress made with the establishment of the International Center for Prosecution of the Crime of Aggression (ICPA) under the Joint Investigation Team.

Prosecuting Crime of Aggression before domestic court in Ukraine

I believe, we would all agree that with domestic prosecution of the crime of aggression – Ukraine is setting a precedent for how the crime of aggression can be handled at the national level. Similarly, we all know that the Crime of Aggression is a leadership crime encompassing both political and military elite, so called master-minds of Kremlin regime. This criminal elite has been involved in various stages of the crime: planning, preparation, initiation and execution. We are guided by the very little practice existing from the Nuremberg Trials as well as take due note of the formulation provided for in Article 8bis of the Rome Statute while interpreting the crime of aggression. We are also aligning our national proceedings with the developments within the International Center for Prosecution of the Crime of Aggression.

Currently, the criminal proceeding pertaining to the crime of aggression encompasses episodes involving political and military leadership of the Russian Federation with 243 identified suspects including high level army commanders under article 437 of the Criminal Code of Ukraine. This list does not include incumbent President, Prime Minister and Minister of Foreign Affairs of the Russian Federation as we fully recognize the personal immunities of Troika before the national courts. I would return to this issue in short-while.

In February this year, the Grand Chamber of the Supreme Court of Ukraine has further clarified the crime of aggression. Namely, the Supreme Court has expressly noted that the concept of the act of aggression stems from the United Nations General Assembly Resolution 3314 on the Definition of Aggression, through recognizing that the content of domestic provision benefits from certain level of autonomy from interpretation in international law. I believe there are two important takeaways from the Courts decision:

- It defines the **planning, preparation, initiation and waging of aggressive war along with participation on conspiracy;**
- Second, it defines the subjects of the criminal offence – persons who **play a decisive role in the formation or implementation of a certain direction of state policy regarding the commission of aggression against another state.** That is persons who, by virtue of their official authority or actual social position, are able to exercise **effective control over or manage political or military actions**

Andriy Kostin, Prosecutor General of Ukraine – 10 April 2024
CAHDI Seminar on the Special Tribunal for the Crime of Aggression against Ukraine

and/or significantly influence political, military, economic, financial, informational and other processes in their own state or abroad, and/or manage specific areas of political or military actions.

This decision further clarifies the position of the national judiciary and sets guidance for future proceedings as Ukraine develops national case-law on the crime of aggression.

Special Tribunal for the Crime of Aggression

This leads me to the discussion as to why the Special Tribunal for the Crime of Aggression is the only viable option for Ukraine and the international community:

- The prohibition of aggression is a peremptory norm of general international law which is accepted and recognized by the international community of states as a whole;
- Russia's unprovoked and unjustified full-scale invasion of Ukraine is a manifest violation of UN Charter and act of aggression that is being committed by that state repeatedly. There has been no such precedent since the Second World War;
- This act of aggression had a triggering affect – generating atrocity crimes by Russia's armed forces and proxies under its control with underlying Kremlin policy: deny Ukraine its statehood and Ukrainians – identity.
- Most importantly, it's a leadership crime that is being initiated, planned and waged with active involvement of Troika members – who are immune from prosecution before the national courts, but this procedure could be trumped before the international tribunals as evidenced from the practice of the International Criminal Court and Special Court of Sierra Leone.

In our understanding, it follows the prevailing logic of international criminal law, whereas the international courts and tribunals while adjudicating international crimes, do not act on behalf of a particular state or states, but on behalf of the international community as a whole. Therefore, prosecuting the crime of aggression on international level is not only linked to **ensuring accountability for the core international crime** but **also for upholding fundamentals of the international legal order**.

Therefore, while discussing the different options for establishment of the Special Tribunal, we need to recognize and secure the **international character** of the Special Tribunal that would allow it to act on behalf of the international community - fulfilling international mandate and being part of the machinery of the international justice rather than acting on behalf of single state - Ukraine or being limited by domestic jurisdictional constraints.

These are all the arguments pertaining to legitimacy and immunities. But let's be also frank with each other – it's closely linked to the political will of multiplicity of states to establish such a Special Tribunal – create a first precedent after Nuremberg and Tokyo. And we understand that it could be both complicated and sensitive, though not impossible if the international community is willing. I firmly believe that lawyers will be able to craft exemplary statute of the Special Tribunal in line with the international law – **a proper solution rather than a fast-track fix**.

Let me also address two other issues being often raised in relation to the Special Tribunal:

First, the definition of the crime:

Andriy Kostin, Prosecutor General of Ukraine – 10 April 2024
CAHDI Seminar on the Special Tribunal for the Crime of Aggression against Ukraine

- I propose to define the “crime of aggression” as an act of aggression in manifest violation of prohibition of use of force under the UN Charter. We think one of the options could be to link it to “annexation of the part/s of a territory of another state,” in order to adapt the offence within the jurisdiction of the Special Tribunal to the particularities of Russia’s aggression against Ukraine.
- Furthermore, the definition shall cover four stages of the crime of aggression, i.e. modes of conduct similar to the Statutes of the International Criminal Court and the International Military Tribunals for Nuremberg and Tokyo: planning, preparation, initiation and execution.
- The Special Tribunal shall focus on the “leaders” capable of directing their State’s military efforts in line with the wording used in the Rome Statute;

Second, Ukraine’s position to allow trials in absentia before the Special Tribunal does not prejudice the legitimacy and effectiveness of the mechanism: trials in absentia are not prohibited under international criminal law or human rights law, provided that the fair trial guarantees are not compromised. That is why, the statute of the Special Tribunal shall secure unconditional right of appeal before the Appeal Chambers along with relevant procedural guarantees.

The other nuanced difference of Ukraine situation lies in the fact that we need the legal appraisal of Russia’s actions on international level in parallel to justice being served for victims and survivors through multiple fora that act in complimentary manner. Therefore, it can also have a positive element and tangible effect.

We believe the Special Tribunal for the Crime of Aggression is not only a justice avenue for Ukraine, but a necessity for a global accountability regime. It’s a momentum for the international community to uphold a rule based international order.

International Center for Prosecution of the Crime of Aggression (ICPA)

Lastly let me also address the International Center for Prosecution of the Crime of Aggression (the ICPA) - a first and crucial step towards administration of justice against the supreme international crime – crime of aggression.

In short, the Center is a platform embedded in EUROJUST that aims to support national judicial investigations into the crime of aggression committed by Russia against Ukraine. It became operational in July last year.

It’s truly unique by nature: it is a first judicial hub on international level since Nuremberg and Tokyo, with specific mandate to secure crucial evidence related to the crime of aggression and facilitate the process of case-building at an early stage. Currently, the ICPA team is composed of Ukrainian, Lithuanian, Latvian, Estonian, Polish and Romanian prosecutors. We are pleased that the United States also seconded Special Prosecutor. In total, there are 16 prosecutors and 4 investigators along with 7 participants from the International Criminal Court. ICPA benefits from the ICC’s expertise in relation to the legal definition of the crime of aggression.

Since last September, the ICPA representatives have conducted operational monthly meetings in the Hague at Eurojust premises with permanent online communication between in-person gatherings.

Andriy Kostin, Prosecutor General of Ukraine – 10 April 2024
CAHDI Seminar on the Special Tribunal for the Crime of Aggression against Ukraine

So far, the ICPA has agreed on common – coordinated prosecutorial approach and its currently working on common product – an ICPA report with timeline of Russian aggression as well as Register of Evidence. Notably, the evidence already submitted to CICED may also be relevant for investigation of the crime of aggression.

So, what we aim to achieve within the ICPA: the most important aspect is documenting the evidence as well as agreeing on investigative and prosecution strategy. As I have noted, we are not naïve with our aspiration to establish the Special Tribunal for the Crime of Aggression – it takes time, resources and political will of the international community. Meanwhile, we must preserve the evidence and prepare for case. So basically, the Center is a back-office in action for national jurisdictions and much awaited Special Tribunal for the Crime of Aggression.

I will stop here and gladly engage with the audience.

I am grateful to the number of politicians, policy makers, legal experts and prosecutors supporting Ukraine, backing the idea of Special Tribunal - working hand-in-hand within the Core Group of States and making the ICPA up and running.