

Options paper by the European Commission and the High Representative of the European Union for Foreign Affairs and Security Policy on ensuring full accountability of individuals responsible for international crimes in Ukraine

I. Introduction

When Russia launched its war of aggression against Ukraine in February 2022, it began the largest international armed conflict in Europe since WWII. The European Council, in its conclusions of 21-22 October 2022, acknowledged Ukraine's efforts to secure accountability, including for the crime of aggression. It invited the High Representative and the Commission to explore options so that full accountability can be ensured.

This options paper aims at identifying the possible avenues to ensure full accountability of individuals, including the Russian leadership, for international crimes, taking a number of key considerations into account. First, existing accountability initiatives concerning the investigation and prosecution of international crimes should continue to be supported, most clearly the International Criminal Court (ICC). The war crimes and crimes against humanity committed in the wake of the Russian invasion of Ukraine are clearly a primary consideration. Second, the EU should respond in a credible and united way to the Ukrainian proposal to establish a Special Tribunal to deal with the crime of aggression. To this end, the presented options take into account the need for broadest possible international legitimacy for action, including, to the extent possible, due involvement of the UN. The EU will continue to work with Ukraine and partners, including the G7, with the view to building international understanding and support for ensuring accountability. Finally, although addressed to the specific ongoing Russian aggression in Ukraine, the options also reflect the EU's longstanding support to universal principles and reflect EU's commitment to the ICC.

The definitions of war crimes, crimes against humanity and the crime of genocide are detailed in Articles 6 to 8 of the Rome Statute of the International Criminal Court of 1998 (with subsequent amendments). These provisions rely not only on the Nuremberg Charter of 1945 but also on the more recent precedents of the *ad hoc* tribunals¹. The crime of aggression is defined in Article 8bis of the Rome Statute *inter alia* by incorporating the 1974 United Nations General Assembly Resolution 3314 (XXV), without, however, criminalising all violations of the prohibition of the

¹ International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda.

use of force as mentioned therein². Aggression is the most controversial international crime given its highly political nature, namely the criminalisation of certain forms of the use of force in international relations (*jus ad bellum*), which historically is a prerogative of the State's sovereignty, and for the interplay with the United Nations Security Council's (UNSC) and International Court of Justice's (ICJ) prerogatives. On 16 March 2022, the ICJ ordered Russia to "immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine", but Russia failed to comply with this binding order of the Court.³ In this interim order, the ICJ already held that it had no evidence before it which could even remotely justify the Russian aggression against Ukraine⁴.

War crimes, crimes against humanity and the crime of genocide can be prosecuted in those EU Member States that have instituted in their national legal systems the principle of universal jurisdiction for those crimes. Under universal jurisdiction, those acts are punishable irrespective of the nationality of the perpetrator and the victim, and irrespective of the place of the crime. It is up to each EU Member State to decide if it provides such universal jurisdiction and, if it does so, to define the precise conditions under which it enables its courts to exercise universal jurisdiction for those crimes. The crime of aggression is usually not covered, or only covered in a very restrictive manner by the national criminal laws of EU Member States that provide for universal jurisdiction.

² Article 8bis: For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations. 2. For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression: (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof; (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State; (c) The blockade of the ports or coasts of a State by the armed forces of another State; (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State; (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement; (f) The 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; (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein".

³ Order of the International Court of Justice of 16 March 2022, in case *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*.

⁴ The International Court of Justice stated at para. 59: "At the present stage of the proceedings, it suffices to observe that the Court is not in possession of evidence substantiating the allegation of the Russian Federation that genocide has been committed on Ukrainian territory. Moreover, it is doubtful that the Convention, in light of its object and purpose, authorizes a Contracting Party's unilateral use of force in the territory of another State for the purpose of preventing or punishing an alleged genocide." The case is pending.

For the highest representative of a foreign State (Heads of State and Government, Foreign Minister), a likely defense before any national court is the principle of immunity. That principle forms part of customary international law and prevents the exercise of criminal investigation and jurisdiction against Heads of State, Heads of Government and Ministers of Foreign Affairs of States in their official capacity (i.e. throughout the duration of their term of office)⁵, except for proceedings before the ICC for those States that are parties to it⁶. Other officials may benefit from functional immunity as well.

II. Use of existing accountability frameworks concerning investigation and prosecution of international crimes

A) Accountability through the International Criminal Court (ICC)

The ICC can be expected to prosecute the highest-level suspects against whom the Prosecutor is able to build strong cases for war crimes, crimes against humanity and genocide and who could ultimately be surrendered to the ICC upon issuance of arrest warrants. The ICC cannot exercise jurisdiction for the crime of aggression because according to Article 15bis of the Rome Statute, the ICC does not have jurisdiction over the crime of aggression if the aggressor State is not a State Party.⁷ The only exception to that rule would be where the UN Security Council refers the case to the International Criminal Court.⁸ However, given the international character of the present armed conflict, there could be easily an overlap in conduct between underlying offences of war crimes (that can be prosecuted) and acts of aggression, even if defendants are not also charged with the latter.⁹

⁵ International Court of Justice, “Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)”, Merits, Judgment of 14 February 2002, [2002] ICJ Reports 3, para. 51.

⁶ See Article 27(2) of the Rome Statute.

⁷ This limitation has been introduced during the negotiations of this so-called Kampala amendment to the Rome Statute.

⁸ In accordance with Article 13(b) of the Rome Statute, a crime of aggression may be referred to the ICC Office of the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.

⁹ For example, between Art. 8, paragraph 2, (b), (v) of the Rome Statute and Art. 8bis, paragraph 2, (b) and (d) of the Rome Statute. Art. 8, paragraph 2, (b), (v) of the Rome Statute reads ‘*Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives*’; and Art. 8bis, paragraph 2, (b) reads ‘*Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State*’; and (d) ‘*An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State*’.

At any rate, in present circumstances, the ICC could not prosecute the top Russian leaders throughout the duration of office, due to States Parties' obligation under customary international law to respect the principle of immunity of officials of other States combined with the requirement that the trials before the ICC are conducted in the presence of the accused (Article 63 of the Rome Statute). The exclusion ("irrelevance") of immunities based on official capacity with respect to proceedings before the ICC, as enshrined in Article 27(2) of the Rome Statute, only applies to States Parties that have ratified the Rome Statute. Conversely, with respect to States that are not parties to the Statute, as the Russian Federation, the ICC cannot make a request for surrender or assistance without first obtaining the cooperation of that third State for the waiver of immunity.¹⁰ An exception is when the jurisdiction of the ICC with respect to a State which is not party to the Rome Statute is triggered by a Security Council referral under Art. 13 (b) of the Statute.¹¹ After the end of the term of their office, the ICC may proceed with a request for surrender of top Russian leaders charged with war crimes and crimes against humanity.

However, while the ICC cannot exercise jurisdiction over the crime of aggression in the present situation, ICC indictments and judgements can make reference to aggression (even to specific acts) as the political and military context in which other international crimes occurred. Indeed, the evaluation of state action is not new to the ICC, which is mandated to examine, as part of the contextual elements of international crimes, State 'policy' in the context of the crime against humanity, or a 'plan or policy' in the context of war crimes. Such assessment would be reinforced, *a fortiori*, if a prior judgment of the ICJ would ascertain Russia's unlawful use of force.¹²

It should also be noted that firm and long-term States' cooperation is absolutely necessary for the ICC to be effective in ensuring that suspects are arrested, its decisions enforced, victims and witnesses protected, and voluntary agreements are in place. All EU Member States are States Parties to the Rome Statute, hence have an obligation to cooperate fully with the ICC (Article 86 of the Statute) and to ensure that there are procedures available under their national law to execute all cooperation requests from the Court (Article 88 of the Statute). Based on its declaration of acceptance Ukraine, which has not (yet) become party to the Rome Statute, is also obliged to cooperate. Since the beginning of the Russian aggression against Ukraine, the support

¹⁰The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity' (Article 98 of the Rome Statute).

¹¹ See ICC, Situation in Darfur, Sudan, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, 6 July 2017.

¹² More prudent references could be made by the ICC to UNGA Resolutions A/RES/ES - 11/1 of 2 March 2022, and A/RES/ES - 11/5 of 12 October 2022. On 2 March 2022, 141 States came to the conclusion that Russia committed aggression against Ukraine in violation of Article 2 (4) of the UN Charter. 143 States reiterated that assessment more recently in view of the purported annexation of parts of the territory of Ukraine.

by State Parties, including the EU Member States, has increased significantly. For a succinct overview on EU support to the ICC in the situation of Ukraine, see Annex I.

B) Accountability through EU Member States' investigations

The prosecuting authorities of 14 EU Member States have already opened investigations based either on personal or universal jurisdiction. Some of those EU Member States conducting investigations have also referred the case to Eurojust. In case an EU Member State exercises criminal jurisdiction over crimes against humanity and war crimes committed by Russian forces in Ukraine, national procedural rules apply. In order to prevent “*overreach*”, these rules may require a “*link*” to the territory of the EU Member State in question. It follows that Russian leaders present on the territory of an EU Member State exercising universal jurisdiction may be indicted for crimes of universal jurisdiction if they were to occur in the conflict. The EU Member States that have implemented the crime of aggression into national law can prosecute this crime where their legislation authorises the exercise of universal jurisdiction (but not the top Russian leaders, because they enjoy immunity, see above).¹³

C) Accountability ensured by Ukraine's judicial authorities with relevant international and EU support

As recalled in the Preamble of the Rome Statute, effective prosecution of the most serious crimes of concern to the international community must be ensured by taking measures at the national level and by enhancing international cooperation.¹⁴ The Office of the Prosecutor General of Ukraine has initiated investigations of international crimes committed in Ukraine shortly after the beginning of the Russian aggression against Ukraine. Over 49,000 incidents of alleged international crimes have been reported thus far. The Office of the Prosecutor General of Ukraine is investigating and prosecuting several hundred cases of war crimes, genocide, and the crime of aggression,¹⁵ although the definition of the latter criminal offence under Ukrainian national law

¹³ In the EU, the crime of aggression has been implemented into the domestic law of Austria, the Czech Republic, Estonia, Germany, Latvia, Lithuania, Luxembourg, Malta, Poland, Slovakia and Slovenia. Among them, only Austria, the Czech Republic, Estonia, Lithuania, Malta, Poland, Slovakia and Slovenia can exercise universal jurisdiction – under certain conditions – over this crime. To note that two EU Member States are reportedly investigating the crime of aggression.

¹⁴ Preamble of the Rome Statute, paragraph 4.

¹⁵ Almost the totality of suspects, except for prisoners of war, are at large (in the Russian territory) and some proceedings started *in absentia*.

differs from the definition of the crime of aggression under international law.¹⁶ There is no crime against humanity in Ukrainian law. In 10 cases, trials already ended with convictions.

International and European support to enforce international justice in the present conflict situation is unprecedented, particularly in respect of joint investigation efforts. For a succinct overview of existing direct EU support for, as well as international coordination to, Ukrainian judicial authorities, see Annex I.

III. Accountability for the crime of aggression

A) Exercise of jurisdiction over the crime of aggression by the ICC

The compromise reached at international level regarding the exercise of jurisdiction over the crime of aggression is the voluntary acceptance of the jurisdiction of the ICC for this crime by States Parties to the Rome Statute. Only 44 States Parties to the ICC out of 123 have ratified the Kampala amendments, which provide a definition of the crime of aggression and a procedure for the exercise of jurisdiction of the ICC over this crime. The fact that the crime of aggression can only be committed by definition by the highest political and military leadership (i.e. those '*in a position effectively to exercise control over or to direct the political or military action of a State*'), defines the jurisdiction *ratione personae* in relation to this crime. The EU will continue to give its full support to the ICC in the ongoing investigations concerning war crimes and crimes against humanity, and puts the necessary resources at the disposal of the ICC. Ukraine should be encouraged to ratify the Rome Statute as part of its ongoing efforts to provide full accountability; this would also be an important political signal to the rest of the world and consistent with EU outreach to third countries who are not yet signatories.

In the present situation, the Court can exercise jurisdiction over the crime of aggression only upon a Resolution of the Security Council under Chapter VII of the UN Charter (Art. 15*ter* Rome Statute) or if Russia ratifies the Rome Statute without objecting to the jurisdiction over the crime of aggression.

B) Investigations of the crime of aggression

As long as the ICC is not competent to investigate the crime of aggression, an alternative investigation mechanism could be considered. The Netherlands have proposed the establishment of a Ukrainian Interim Prosecution Office in The Hague. The EU, its Member States and non-EU

¹⁶ In particular, the scope of application extends far beyond the top leadership of the country committing the aggression.

Member States could support its establishment on the basis of a bilateral agreement between the Netherlands and Ukraine, tasked with the investigations on the crime of aggression (not the indictments) subject to a number of pre-conditions.

The Interim Prosecution Office could be enhanced by having an international composition, and by working together with prosecutorial authorities from Member States that exercise universal jurisdiction over the crime of aggression. Moreover, the EU Advisory Mission (EUAM) Ukraine, which is already providing support to the Office of the Prosecutor General of Ukraine, could also provide support. The investigation of the crime of aggression could then lead to the set-up of an accountability mechanism at a later stage, which could take any of the forms explored in sections C.1 and C.2 below.

C) Trials for the crime of aggression

To avoid that the establishment of any new trial mechanism would lead to a conflict of jurisdiction with the ICC, it would be important to ensure that the instruments setting up that tribunal take account of the mandate of the ICC and establish its primacy over certain cases throughout the entire procedure (in which suspects are likely to be arrested and surrendered).

C.1) *Ad hoc* international tribunal

Under certain conditions, an *ad hoc* international tribunal for the crime of aggression may allow for the prosecution of the top Russian leaders who would otherwise enjoy immunity. It could be based on a multinational treaty among supporting States, and its international character could be strengthened further with a UN mandate calling for its establishment. Its legitimacy vis-à-vis the relinquishing of immunities of the top leadership would depend on sufficient international support within the international community. The applicable substantive and procedural law would be enshrined in an international instrument independent of national law and the tribunal would be composed of international staff only.

Under customary international law, a tribunal set up to prosecute the crime of aggression would need to have a sufficiently international character to legitimately relinquish immunities and to act in the international community's name. In this respect, tabling a draft Security Council resolution aiming at referring the situation to the ICC or the establishment of an accountability mechanism is a necessary first step. Even if vetoed by one of its Members, this step could pave the path for alternative avenues of actions within the UN. In cases where the UN Security Council has failed to exercise its 'primary responsibility' for maintaining peace, this does not prevent the United Nations General Assembly under the "Uniting for Peace Resolution" from issuing appropriate

recommendations to UN members for collective measures, in order to maintain or restore international security and peace, if a resolution were to attract the necessary support¹⁷.

C.2) Hybrid tribunal or internationalised domestic court

A tribunal may be “hybrid” in its origins (national and international processes), its applicable law (international and national law) or its composition (national and international members). That means that a special court established by a national law is integrated in the national judicial system, with international judges¹⁸, and applies both national substantive law and international procedural rules. In the Ukrainian case, the tribunal could apply Article 437 of the Ukrainian Criminal Code¹⁹, combined with a provision enshrined in the national law on the establishment of the hybrid tribunal that limits its jurisdiction *ratione personae* to the individuals within the meaning of Article 8bis of the Rome Statute (i.e. leadership clause). It could also apply international rules of procedure and evidence. This internationalised domestic court thus replaces ordinary domestic judges. There are precedents from the past, following internal conflicts within a State, where criminal prosecution has been “internationalised” in order to increase its legitimacy²⁰.

In order to ensure the international legitimacy of such a hybrid tribunal, it has to be based either on a UN Security Council resolution or a UN General Assembly resolution. Depending on the scope of international support received during negotiations on a draft, such a resolution could

¹⁷ UNGA Resolution 377A of 3 November 1950. A two-third majority of States present and voting would be required under Article 18(2) of the UN Charter. The resolution would not establish an accountability mechanism, but rather to call on its set up, based on a subsequent international agreement. That agreement should be ratified by the States having called for the establishment of the accountability mechanism.

¹⁸ As regards the appointment of the international judges, to be done in accordance with the relevant rules, the expertise of staff of relevant existing accountability mechanisms, such as the UN International Residual Mechanism, would be a source of experience to be considered.

¹⁹ The relevant provision can be found in Article 437 Ukrainian Criminal Code: Planning, preparation and waging of an aggressive war. 1. Planning, preparation or waging of an aggressive war or armed conflict, or conspiring for any such purposes shall be punishable by imprisonment for a term of seven to twelve years. 2. Conducting an aggressive war or aggressive military operations shall be punishable by imprisonment for a term of ten to fifteen years. The application of this substantive provision would need to be complemented with a provision enshrined in the national law on the establishment of the hybrid tribunal that limits its jurisdiction *ratione personae* to the individuals within the meaning of Article 8bis of the Rome Statute (i.e. leadership clause) and by international rules of procedure and evidence (to be drafted).

²⁰ Creation following a request by the UN Security Council to the UN Secretary General to engage (Sierra Leone); creation following an UN General Assembly Resolution inviting the UN Secretary General to engage (Cambodia); creation on the initiative of the EU (Kosovo Special Chambers). None of those hybrid tribunals had jurisdiction for the crime of aggression. In all past experiences of hybrid tribunals, it was possible to relinquish immunities because the new regimes of States afflicted by internal conflicts (war crimes and crimes against humanity) expressed their consent to founding instruments of tribunals in order to ensure prosecution of previous regimes/leaders. However, the diversity of the origin and the composition of these past hybrid tribunals remain important sources of inspiration.

either (a) empower the UN Secretary-General to conclude an agreement with Ukraine so that the UN takes a leading role in the set-up and administration of the hybrid tribunal, or; (b) call upon the UN Secretary-General to act as nominating authority for the international judges; or (c) call upon UN States and regional organisations to provide help to Ukraine in the set-up and administration of the hybrid tribunal²¹.

²¹ Inspiration can be sought from the recent UNGA resolution of 11 November 2022 on the furtherance of remedy and reparation for aggression against Ukraine. In para 4, the UN General Assembly recommended the creation by Member States, in cooperation with Ukraine, of an international register of damage to serve as a record, in documentary form, of evidence and claims information on damage, loss or injury to all natural and legal persons concerned, as well as the State of Ukraine, caused by internationally wrongful acts of the Russian Federation in or against Ukraine, as well as to promote and coordinate evidence-gathering.

Annex: EU support to existing accountability mechanism in UA

I. EU support to the UA Prosecutor General's Office (not exhaustive)

Member States	MS provide expert-level support to Ukraine's investigation-related needs. Five MS have sent experts in various fields including arms, explosives, forensic medicine and ballistics. Two MS out of those five have also sent police / security experts to accompany the expert teams.
JIT	As a coordinated European response, on 25 March 2022, PL, LT and UA, supported by Eurojust, set up a Joint Investigation Team (JIT), as one of the most advanced tools to facilitate international coordination on national investigations of core international crimes committed in Ukraine. On 25 April 2022, the International Criminal Court (ICC) joined as a participant. On 31 May 22, EE, LV and SK joined. RO joined on 13 October.
Eurojust	Eurojust supports through i) coordination of investigations; ii) secure storage and analysis of evidence (notably via setting up of the Core International Crime Evidence Database – CICED, which will be operational by the end of 2022; Eurojust implemented a short-term solution to allow national authorities to transmit CIC evidence using already existing); iii) supports the JIT including via coordination meetings and by providing encrypted mobile phones and laptops. [Example: The overall amount so far awarded to the JIT is EUR 87,670.90, excluding the equipment that has been lent to the JIT members. Equipment provided so far: 58 phones, 57 laptops, 20 printers and 20 scanners.]
Genocide Network (GN)	GN held two extraordinary network meetings on Ukraine and organised an in-person training in spring 2022. It is currently planning a series of peer-to-peer workshops for Ukrainian professionals to take place in autumn 2022. On 21 September, GN, Eurojust and ICC-OTP jointly published two guidelines, one on the identification of victims and witnesses of core international crimes and one on documenting international crimes and human rights violations for accountability purposes for civil society organisations.
Europol	Europol supports MS through i) providing support to MS' investigations; ii) analysing the data received from MS and UA in its Analytical Project Core International Crimes and Analysis Project Dolphin; iii) developing a dedicated OSINT (Open Source Intelligence) operational task force with volunteering MS.
EUAM	Currently there are 14 international Mission members involved in the international crimes work strand, having an expertise in the area of investigation and prosecution of international crimes, forensic investigation, forensic crime scene analysis, victims' rights, open source intelligence and others. More experts are to be recruited in ongoing regular Call for Contribution. Supports warcrimes.gov.ua for civilian reporting of crimes worth 120,000 EUR. Supports PGO with assessment of its business processes to establish best IT solutions for the development of its e-case management system.

DG NEAR/ EUDEL	EUDEL will fund (via DG NEAR budget) servers for warcrimes.gov.ua, pre-trial register and technical assistance for the implementation of the e-case management system.
FPI	FPI provides support for evidence collection worth 9 million EUR, including via DNA analysis and IT solutions for gathering and preserving evidence admissible in future national and international proceedings. FPI is also supporting targeted investigation of conflict related sexual violence through the Office of the Prosecutor General and is preparing to fund equipment for UA's regional prosecution offices on Oblast level via its Crisis Response Mechanism.

II. EU support to the ICC (not exhaustive)

Member States	Financial support: MS support to the ICC amounts to 7.7 million EUR.
Member States	Operational support: MS support ICC by seconding experts via the forensic rotational model
DG INTPA	DG INTPA signed a contract in August 2022 to provide 3 million EUR to the ICC for activities including capacity building, outreach, exchange programmes and legal tools database.
FPI	Financial support to ICC of 7.25 million EUR to increase its investigation and prosecution capacities