

**PROPOSAL FOR A RESOLUTION BY THE
UNITED NATIONS GENERAL ASSEMBLY
&
ACCOMPANYING PROPOSAL FOR A STATUTE
OF A SPECIAL TRIBUNAL FOR UKRAINE
ON THE CRIME OF AGGRESSION**



Ukraine Task Force of the Global Accountability Network

7 September 2022



The Ukraine Task Force of The Global Accountability Network Presents:

**PROPOSAL FOR A RESOLUTION BY THE UNITED NATIONS GENERAL ASSEMBLY AND
ACCOMPANYING PROPOSAL FOR A STATUTE OF A SPECIAL TRIBUNAL FOR UKRAINE ON THE
CRIME OF AGGRESSION**

7 September 2022

LEAD WRITERS: Ambassador (Ret.) Hans Corell, The Honorable Irwin Cotler, P.C., O.C, O.Q.,
Ad.E., Professor David M. Crane, Lotta Lampela

EDITORS: Rohan Bhattacharjee, Mia Bonardi, Aaron Ernst, Lotta Lampela

THE GLOBAL ACCOUNTABILITY NETWORK: UKRAINE TASK FORCE, 2022

PROJECT LEADER: Professor David M. Crane, Former Chief Prosecutor, Special Court of Sierra Leone

EXECUTIVE DIRECTOR: Christopher Martz

DIRECTORS: Kelly Adams, Kanalya Arivalagan, Mia Bonardi, Matthew McCartin

The Ukraine Task Force (UKTF) aims to produce non-partisan, high-quality analysis of open-source materials and to catalogue that information relative to applicable bodies of law; including the Geneva Conventions, the Rome Statute of the International Criminal Court, and the Criminal Code of Ukraine.

The UKTF primarily creates documentation products in a narrative and graphical format, as well as a quarterly and annual trend analysis of ongoing crimes. Furthermore, the UKTF publishes issue-specific white papers. Its clients include Transnational NGOs, the United Nations, the U.S. Department of State, and the Public Interest International Law & Policy Group (PILPG). The UKTF is working closely with Ukrainian partners, including the Ukraine Bar Association (UBA), which has graciously provided volunteers for our investigative efforts.

TABLE OF CONTENTS

I. A Critical Moment in Modern History: Countering Aggression.....	1
II. Proposal for a Resolution by the United Nations General Assembly	3
III. Proposal for a Statute of a Special Tribunal for Ukraine on the Crime of Aggression	7
Annex A. The Second Chautauqua Principles	15

I. A Critical Moment in Modern History: Countering Aggression

This past February there was a paradigm shift in the geopolitical balance of the global community. A paradigm, put together almost eighty years ago under a United Nations (UN) to resolve disputes peaceably with resort to force as a last measure, was brushed aside by a permanent member of the UN Security Council. The invasion by the Russian Federation into Ukraine, a fellow Member State, was a singular assault on a rules-based world order where strongmen act, not to maintain international peace and security, but in their own national interests. This approach to world order has not been seen since the 1930s. We have gone back to the future, and it augurs poorly for the UN and the rule of law unless action under the rule of law happens to counter the threat.

Decisions made by Member States of the UN in the next several weeks will determine the type of world order that will take shape for the rest of this century. Since, the world's democracies came together, took appropriate steps to sanction Russian actions, and began an accountability process for the many international crimes perpetrated by the Russian Federation. The International Criminal Court (ICC) is investigating allegations of war crimes and crimes against humanity as it was set up to do according to its international mandate. At many levels, discussions of creating a justice mechanism for the crime of aggression are taking place in Europe and North America. The ICC lacks jurisdiction in this matter regarding the crime of aggression, but the need for a tribunal or court to account for that aggression by the Russian Federation is critical.

The crime of aggression perpetrated by the Russian Federation must be dealt with under the rule of law. The invasion by the Russian Federation is not a European problem, but an international one. This aggression challenges the very idea of the UN Charter, and an appropriate response should be led by the UN to hold President Putin and his inner circle accountable for the invasion and successive criminality. The UN was created to deal with aggression of the kind that the Russian Federation has now committed. If the UN chooses to do little or nothing now, then the question arises: Why have a United Nations?

Despite all this, there is a clear and legally appropriate path to maintaining the rule of law and protecting the UN paradigm. Since the invasion in February of 2022, the UN General Assembly has condemned the invasion, as well as the violations of international humanitarian law by the Russian Federation by significant majorities. This is an appropriate cornerstone for further action to create a Special Tribunal for Ukraine on the Crime of Aggression to account for the Russian Federation's invasion into Ukraine.

This white paper contains a sample UN General Assembly Resolution recommending to the UN Secretary-General that he enter into a bilateral treaty with Ukraine to establish a Special Tribunal for Ukraine on the Crime of Aggression, as well as a creative statute for that tribunal. It is important to note that a similar effort by the UN happened in 2001-2002 when it created the Special Court for Sierra Leone, the world's first hybrid international tribunal. Asked by Sierra Leone to help create a justice mechanism to account for international crimes, the UN Secretary-General entered into a bilateral treaty to create the Special Court for Sierra Leone.

The materials in this white paper build upon important lessons learned in Sierra Leone to create a model by which the UN can once again use to set up a Special Tribunal for Ukraine on the Crime

of Aggression. We have done this before, and we can do it again. The three drafters of this model contained in this white paper were instrumental in creating the Special Court for Sierra Leone. This white paper shows the international community a practical and real-world model to seek justice for the people of Ukraine and accountability for their violators.

A Special Tribunal for Ukraine on the Crime of Aggression should be designed to work closely with the ICC, working in coordination in all investigatory efforts, sharing expertise, and seeking a common purpose. Providing efficiencies, the two justice mechanisms must work together.

We would in this context like to mention that we have read with great respect the letter dated 12 August 2022 from the representatives of Latvia, Liechtenstein and Ukraine to the United Nations addressed to the Secretary-General (UN document A/ES-11/7-S/2022/616). It contains very important information and proposals. Against this background, we concluded – based in particular on our experiences from the Special Court for Sierra Leone – that it would be of assistance to Ukraine, other UN Member States, and the Secretary-General to present this white paper.

We would also like to refer to the result of the Fourteenth International Humanitarian Law Roundtable, organized by the Robert H. Jackson Center on 29 and 30 August 2022. An important part of the discussions focused on the creation of a Special Tribunal for the crime of aggression against Ukraine. During the discussions, several speakers emphasized the need for urgent action here. The following is a quote from the Principles Document reflecting the debates among the participating present and former prosecutors in international criminal tribunals as well as legal practitioners, experts, academics, and stakeholders:

There is an urgent need for a viable proposal for the creation of a competent international tribunal with appropriate jurisdiction to prosecute those bearing the greatest responsibility for the crimes of aggression against the people of Ukraine. With that said, any domestic or international tribunals' work, including those exercising extraterritorial jurisdiction, should not diminish but enhance the work of the ICC.¹

The time to act is now. Vladimir Putin's ultimate weapon is time, distraction, and distortion. As time goes on, the world moves on as well. After a long hard and cold winter with fuel rationing, the international community, particularly Europe, may have less resolve in 2023 in dealing with accountability for domestic and international crimes committed in Ukraine by the Russian Federation. It happened in Syria and it can happen with Ukraine.

If we appease our way out of the Ukraine crisis with little to no accountability for Russian aggression, it will be a signal to the rest of the world's tyrants, strongmen, and dictators that the United Nation's paradigm based on the rule of law is a sham. Democracies around the world must remain strong in holding the Russian Federation accountable. The content of this white paper is a part of this accountability and gives the UN the opportunity to hold strong.

Ambassador (Ret.) Hans Corell

The Hon. Irwin Cotler

Dr. David M. Crane

¹ The Second Chautauqua Principles, August 30, 2022 (see Annex A).

II. Proposal for a Resolution by the United Nations General Assembly²

77/ __. Special Tribunal for Ukraine on the Crime of Aggression³

The General Assembly,

Reaffirming the paramount importance of the Charter of the United Nations in the promotion of the rule of law among nations,⁴

Recalling the obligation of all States under Article 2 of the Charter to 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, and to settle their international disputes by peaceful means,⁵

Recalling also the obligation under Article 2 (2) of the Charter, that all Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the Charter,⁶

Determined to establish conditions under which justice and respect for the obligations arising from the Charter, treaties, and other sources of international law can be maintained,⁷

Recalling General Assembly resolution 377 A (V) of 3 November 1950, entitled “Uniting for peace”, and taking into account that the lack of unanimity of the permanent members of the Security Council at its 8979th meeting has prevented it from exercising its primary responsibility for the maintenance of international peace and security,⁸

Taking note of Security Council resolution 2623 (2022) of 27 February 2022, in which the Council called for an emergency special session of the General Assembly to examine the question contained in document S/Agenda/8979,⁹

Reaffirming its resolutions A/ES-11/1 of 2 March 2022 and A/ES-11/2 of 24 March 2022,

Deeply concerned about the very serious crimes committed within the territory of Ukraine against the people of Ukraine and at the prevailing situation of impunity,¹⁰

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures

² The footnotes are not for inclusion in the final document but to facilitate the analysis of the formulations in the draft.

³ The document number is intentionally left blank.

⁴ UNGA Res. A/ES-11/1, preambular paragraph 1.

⁵ *Id.*, preambular paragraph 2.

⁶ *Id.*, preambular paragraph 3.

⁷ Adapted from the preambular paragraph 3 of the Charter of the United Nations.

⁸ UNGA Res. A/ES-11/1, preambular paragraph 5.

⁹ *Id.*, preambular paragraph 4.

¹⁰ Adapted from S/RES/1315 (2000), preambular paragraph 1.

at the national level and by enhancing international cooperation,¹¹

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,¹²

Reaffirming the importance of compliance with international humanitarian law, and *reaffirming further* that persons who commit or authorize serious violations of international humanitarian law are individually responsible and accountable for those violations and that the international community will exert every effort to bring those responsible to justice in accordance with international standards of justice, fairness and due process of law,¹³

Taking note in this regard of the letter dated dd mm 2022 from the President of Ukraine to the Secretary-General (S/2022/____, annex),¹⁴

Recognizing the desire of the Government of Ukraine for assistance from the United Nations in establishing a strong and credible tribunal that will meet the objectives of bringing justice and ensuring lasting peace,¹⁵

Noting with appreciation the steps already taken by the Prosecutor of the International Criminal Court in response to the referrals by States Parties to open an investigation into the Situation in Ukraine,

Noting further the negative impact of the security situation on the administration of justice in Ukraine and the pressing need for international cooperation to assist in strengthening the judicial system of Ukraine,¹⁶

Acknowledging the important contribution that can be made to this effort by qualified persons from other Member States of the United Nations, international organizations, and non-profit organizations to expedite the process of bringing justice and reconciliation to Ukraine and the region,¹⁷

Reiterating that the situation in Ukraine continues to constitute a threat to international peace and security in the region,¹⁸

Resolved to guarantee lasting respect for and the enforcement of international justice,¹⁹

¹¹ Rome Statute, preambular paragraph 4.

¹² *Id.*, preambular paragraph 5.

¹³ S/RES/1315 (2000), preambular paragraph 6.

¹⁴ Date and document number are intentionally left blank.

¹⁵ S/RES/1315 (2000), preambular paragraph 9.

¹⁶ *Id.*, preambular paragraph 11.

¹⁷ *Id.*, preambular paragraph 12, with “non-profit organizations” added.

¹⁸ *Id.*, preambular paragraph 13.

¹⁹ Rome Statute, preambular paragraph 11.

1. *Reiterates* the need for the full implementation of resolutions A/ES-11/1 of 2 March 2022, entitled “Aggression against Ukraine”, and A/ES-11/2 of 24 March, 2022, entitled “Humanitarian consequences of the aggression against Ukraine”,
2. *Requests* the Secretary-General to negotiate an agreement with the Government of Ukraine to create an independent Special Tribunal consistent with this resolution, and *expresses* its readiness to take further steps expeditiously upon receiving and reviewing the report of the Secretary-General referred to in paragraph 8 below,²⁰
3. *Recommends* that the subject matter jurisdiction of the Special Tribunal should cover the crime of aggression, including the planning, preparation, initiation or execution, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations, committed within the territory of Ukraine,²¹
4. *Recommends further* that the Special Tribunal should have personal jurisdiction over persons in a position effectively to exercise control over or to direct the political or military action of a State,²²
5. *Underlines* that official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility for the crime of aggression,²³
6. *Expresses appreciation* for the efforts of the Prosecutor of the International Criminal Court, noting that the Special Tribunal shall be complementary to its jurisdiction, and *urges* the Special Tribunal to develop liaison and coordination offices with the Office of the Prosecutor of the International Criminal Court,
7. *Emphasizes* the importance of ensuring the impartiality, independence and credibility of the process, in particular with regard to the status of the judges and the prosecutors,²⁴
8. *Requests* the Secretary-General to submit a report to the General Assembly on the implementation of this resolution, in particular on his consultations and negotiations with the Government of Ukraine concerning the establishment of the Special Tribunal, including recommendations, no later than 30 days from the date of this resolution,²⁵
9. *Invites* the Secretary-General to include recommendations on the following:
 - (a) any additional agreements that may be required for the provision of the international assistance which will be necessary for the establishment and functioning of the Special Tribunal;
 - (b) the level of participation, support and technical assistance of qualified persons from Member States of the United Nations that will be necessary for the efficient, independent and impartial

²⁰ Adapted from S/RES/1315 (2000), operative paragraph 1.

²¹ *Id.*, operative paragraph 2.

²² *Id.*, operative paragraph 3.

²³ Adapted from the Rome Statute, Art. 27(1).

²⁴ Adapted from S/RES/1315 (2000), operative paragraph 4.

²⁵ *Id.*, operative paragraph 6.

functioning of the Special Tribunal;

(c) the amount of voluntary contributions, as appropriate, of funds, equipment and services to the Special Tribunal, including through the offer of expert personnel that may be needed from States, intergovernmental organizations and non-governmental organizations,²⁶

10. *Decides* to remain actively seized of the matter.²⁷

²⁶ *Id.*, operative paragraph 8.

²⁷ *Id.*, operative paragraph 9.

III. Proposal for a Statute of a Special Tribunal for Ukraine on the Crime of Aggression²⁸

Having been established by an Agreement between the United Nations and the Government of Ukraine pursuant to General Assembly resolution ____ (2022) of dd mm yyyy,²⁹ the Special Tribunal for Ukraine on the Crime of Aggression (hereinafter "The Special Tribunal") shall function in accordance with the provisions of the present Statute.

Article 1 **Competence of the Special Tribunal**

1. The Special Tribunal shall have the power to prosecute persons responsible for the crime of aggression against Ukraine, committed in the territory of Ukraine since 20 February 2014.

Article 2 **Crime of Aggression³⁰**

1. 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

²⁸ Unless otherwise indicated, this Statute mirrors the general structure and language of the Statute of the Special Court for Sierra Leone, accessible at <http://www.rscsl.org/Documents/scsl-statute.pdf>. The footnotes are not for inclusion in the final document but to facilitate the analysis of the formulations in the draft.

²⁹ The document number and date are intentionally left blank.

³⁰ Definition as in the Rome Statute, Art. 8*bis*.

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.

Article 3

Individual Criminal Responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in article 2 of the present Statute shall be individually responsible for the crime.
2. The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in article 2 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Tribunal determines that justice so requires.

Article 4

Concurrent Jurisdiction

1. The Special Tribunal and the national courts of Ukraine shall have concurrent jurisdiction.
2. The Special Tribunal shall have primacy over the crime of aggression over the national courts of Ukraine. At any stage of the procedure, the Special Tribunal may formally request a national court to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence.
3. The Special Tribunal shall act in coordination with the International Criminal Court. In the event of the same individuals being prosecuted by the Special Tribunal and the International Criminal Court, the Special Tribunal shall have primacy over the crime of aggression.

Article 5

Non bis in idem

1. No person shall be tried before a national court of Ukraine for the crime of aggression referred

to in article 2 of the present Statute for which he or she has already been tried by the Special Tribunal.

2. A person who has been tried by a national court for the crime of aggression referred to in article 2 of the present Statute may be subsequently tried by the Special Tribunal if:

- a. The act for which he or she was tried was characterized as an ordinary crime; or
- b. The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the Special Tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 6 **Amnesty**

An amnesty or any other types of immunity granted to any person falling within the jurisdiction of the Special Tribunal in respect of the crime of aggression referred to in article 2 of the present Statute shall not be a bar to prosecution.

Article 7 **Organization of the Special Tribunal**

The Special Tribunal shall consist of the following organs:

- a. The Chambers, comprising of two Trial Chambers and an Appeals Chamber;
- b. The Prosecutor; and
- c. The Registry.

Article 8 **Composition of the Chambers**

1. The Chambers shall be composed of eleven (11) independent judges, who shall serve as follows:

- a. Six judges shall serve in the Trial Chambers, of whom two shall be judges appointed by the Government of Ukraine with the concurrence of the Secretary-General of the United Nations (hereinafter “the Secretary-General”), and four judges appointed by the Secretary-General;³¹

³¹ Alternatively: Six judges shall serve in the Trial Chambers, appointed by the Secretary-General of the United Nations (hereinafter “the Secretary-General”).

b. Five judges shall serve in the Appeals Chamber, of whom two shall be judges appointed by the Government of Ukraine with the concurrence of the Secretary-General, and three judges appointed by the Secretary-General.³²

2. Each judge shall serve only in the Chamber to which he or she has been appointed.
3. The judges of the Appeals Chamber and the judges of the Trial Chamber, respectively, shall elect a presiding judge who shall conduct the proceedings in the Chamber to which he or she was elected. The presiding judge of the Appeals Chamber shall be the President of the Special Tribunal.
4. If, at the request of the President of the Special Tribunal, an alternate judge or judges have been appointed by the Government of Ukraine or the Secretary-General, the presiding judge of a Trial Chamber or the Appeals Chamber shall designate such an alternate judge to be present at each stage of the trial and to replace a judge if that judge is unable to continue sitting.

Article 9

Qualification and Appointment of Judges

1. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. They shall be independent in the performance of their functions, and shall not accept or seek instructions from any Government or any other source.
2. In the overall composition of the Chambers, due account shall be taken of the experience of the judges in international law at the international criminal law level, including international humanitarian law and human rights law, and criminal law. To be considered as a judge, they must have prior trial experience at the international level.
3. The judges shall be appointed for a three-year period and shall be eligible for reappointment.

Article 10

Rules of Procedure and Evidence

1. The Rules of Procedure and Evidence of the Special Court for Sierra Leone obtaining at the time of the establishment of the Special Tribunal shall be applicable *mutatis mutandis* to the conduct of the legal proceedings before the Special Tribunal.
2. The judges of the Special Tribunal as a whole may amend the Rules of Procedure and Evidence or adopt additional rules where the applicable Rules do not, or do not adequately, provide for a specific situation.

³² Alternatively: Five judges shall serve in the Appeals Chamber, appointed by the Secretary-General.

Article 11

The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for the crime of aggression against Ukraine, committed in the territory of Ukraine since 20 February 2014. The Prosecutor shall act independently as a separate organ of the Special Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.
2. The Office of the Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor shall, as appropriate, be assisted by the Ukrainian authorities concerned.
3. The Prosecutor shall be appointed by the Secretary-General for a three-year term and shall be eligible for re-appointment. He or she shall be of high moral character and possess the highest level of professional competence, and have extensive experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor must have prior prosecutorial experience as a prosecutor at the international level.
4. The Prosecutor shall be assisted by a Ukrainian Deputy Prosecutor, and by such other Ukrainian and international staff as may be required to perform the functions assigned to him or her effectively and efficiently.

Article 12

The Registry

1. The Registry shall be responsible for the administration and servicing of the Special Tribunal.
2. The Registry shall consist of a Registrar and such other staff as may be required.
3. The Registrar shall be appointed by the Secretary-General and shall have prior international registry experience. He or she shall serve for a three-year term and be eligible for re-appointment.
4. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Tribunal and others who are at risk on account of testimony given by such witnesses.

Article 13

Rights of the Accused

1. All accused shall be equal before the Special Tribunal.
2. The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Tribunal for the protection of victims and witnesses.

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:

- a. To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;
- b. To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;
- c. To be tried without undue delay;
- d. To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;
- e. To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;
- f. To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Tribunal;
- g. Not to be compelled to testify against himself or herself or to confess guilt.

Article 14 **Judgement**

The judgement shall be rendered by a majority of the judges of the Trial Chamber or of the Appeals Chamber, and shall be delivered in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 15 **Penalties**

1. The Trial Chamber shall impose upon a convicted person imprisonment for a specified number of years. In determining the terms of imprisonment, the Trial Chamber shall, as appropriate, have recourse to the practice regarding prison sentences similar to those practices in the Special Court for Sierra Leone.

2. In imposing the sentences, the Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chamber may order the forfeiture of the property, proceeds and any assets acquired unlawfully or by criminal conduct, and their return to their rightful owner or to the State of Ukraine.

Article 16
Appellate Proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chamber or from the Prosecutor on the following grounds:

- a. A procedural error;
- b. An error on a question of law invalidating the decision;
- c. An error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chamber.

3. The judges of the Appeals Chamber of the Special Tribunal shall be guided by the decisions of other international criminal courts and tribunals.

Article 17
Review Proceedings

1. Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chamber or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit an application for review of the judgement.

2. An application for review shall be submitted to the Appeals Chamber. The Appeals Chamber may reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate:

- a. Reconvene the Trial Chamber;
- b. Retain jurisdiction over the matter.

Article 18
Enforcement of Sentences

1. Imprisonment shall be served per agreement with appropriate State Parties. If circumstances so require, imprisonment may also be served in any of the States which have concluded with the International Criminal Court an agreement for the enforcement of sentences, and which have indicated to the Registrar of the Special Tribunal their willingness to accept convicted persons. The Special Tribunal may conclude similar agreements for the enforcement of sentences with other States.

2. Conditions of imprisonment shall be governed by the law of the State of enforcement subject to the supervision of the Special Tribunal. The State of enforcement shall be bound by the duration of the sentence, subject to article 19 of the present Statute.

Article 19
Pardon or Commutation of Sentences

1. If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the Special Tribunal accordingly. There shall only be pardon or commutation of sentence if the President of the Special Tribunal, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.
2. The Special Tribunal will have the final decision on any pardon or commutation of sentence.

Article 20
Working Language

The working language of the Special Tribunal shall be English, with due regard for the importance of the Russian and Ukrainian languages to the proceedings.

Article 21
Annual Report

The President of the Special Tribunal shall submit an annual report on the operation and activities of the Tribunal to the Secretary-General and to the Government of Ukraine.

Annex A. The Second Chautauqua Principles
(Continue to next page)



The Second Chautauqua Principles

August 30, 2022

In the spirit of humanity and peace, we who assembled here at the Chautauqua Institution recognize the prevailing impunity enjoyed by atrocity criminals around the world compels the international criminal justice system and individual practitioners to renew our commitment to a global vision of the rule of law and to develop and refine practical responses to atrocity crimes and to secure justice for victims and accountability for perpetrators.

To that end, after presiding over robust debates driven by legal practitioners, experts, academics, and stakeholders, I offer the following principles to practitioners, diplomats, and politicians grappling with these realities:

I. Atrocity Prevention is the Foundation of Accountability.

Atrocities rarely appear suddenly. Instead, the commission of human rights abuses often involving the targeting of the judiciary and the rule of law, the narrowing of space for civil society, and the commission of torture and other abuses typically precede atrocities. International human rights bodies and other global stakeholders should heed these warning signs and employ best practices in addressing looming crises. This may help to avert an atrocity cascade in which human rights abuses become endemic and a situation devolves into massive and systemic violations, war becomes more likely, and the commission of crimes against humanity near inevitability.

II. The Future of Accountability Presents New Challenges to Combating Impunity.

A commitment to prosecuting atrocities at the state and international level is essential to the principle of accountability and to combat impunity. States should incorporate the International Criminal Court (ICC) crimes of genocide, war crimes, crimes against humanity and aggression in their national legislation to be able to prosecute core crimes. The ICC and other global actors should continue to enhance the universal reach of the Rome Statute by encouraging ratification by States, and by entering into cooperative arrangements with non-State Parties who may support the goals of the Court.

In considering the future of accountability, global stakeholders should consider developing new institutions at the national or regional level including hybrid tribunals or internationalized national courts. International courts with jurisdiction over transnational crimes may be a useful addition as well. These should incorporate Rome Statute crimes and modes of liability should be based upon customary international law. There is a legal duty to prevent genocide under the Genocide Convention if there is a likelihood of its commission. There is also a duty codified in common article I of the 1949 Geneva Conventions to respect and ensure all obligations under the Conventions including the prohibition of war crimes are respected. States should negotiate and adopt a treaty on crimes against humanity that contains a similar obligation.

Criminal prosecutions should also be paired with other transitional justice mechanisms supporting local needs including, for example, established truth and reconciliation commissions. Global stakeholders should look to empower local communities to address human rights abuses, address atrocity crimes, and intervene in a context-sensitive and inclusive manner. The international community should consider the adoption of new crimes to address new or ongoing harms. These could include developing a model law on Ecocide, accounting for cyber-attacks, and other new modalities of war in existing legal frameworks. Additionally, a global investigative mechanism must be established with adequate support from the international community to ensure quality fact-finding missions can be completed in a timely and efficient manner to inform judicial proceedings and ensure due process.

III. Current Law and Existing Judicial Mechanisms are Insufficient to Adequately Secure Justice for the Crime of Aggression.

In the judgment of the International Military Tribunal at Nuremberg, the Tribunal the crime of aggression was recognized as “the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.” While the crime of aggression is defined in Article 8bis of the Rome Statute and represents customary international law, no competent judicial institutions have jurisdiction to prosecute those most responsible for this crime. States should consider fixing this jurisdictional gap at the ICC.

On February 24, 2022, nearly seventy-six years after the IMT’s landmark judgment, Russia launched an unlawful invasion of Ukraine. Both national and international judicial systems need to prosecute those most responsible for the crimes of aggression committed in Ukraine. International tribunal jurisprudence, which renders head of state immunity inapplicable regarding international crimes, including the crime of aggression, should inform their prosecution strategies. It is also essential that, in the event of its establishment, any tribunal or court addressing the unlawful invasion into Ukraine is fair, impartial, and not directed at any particular party or State. Any new tribunal or court must adhere to a clear evidentiary standard of proof of guilt beyond a reasonable doubt.

There is an urgent need for a viable proposal for the creation of a competent international tribunal with appropriate jurisdiction to prosecute those bearing the greatest responsibility for the crimes of aggression against the people of Ukraine. With that said, any domestic or international tribunals’ work, including those exercising extraterritorial jurisdiction, should not diminish, but enhance the work of the ICC.

IV. New Legal and Practical Approaches are Required to Curtail Unlawful Acts Perpetrated by Mercenaries and other Irregular Forces Engaged and Directed by States.

As States continue to engage in the use of mercenaries and irregular forces, the legal definition of a mercenary must reflect the common characteristics of modern mercenaries. To wit, the nationality limitations codified in Article 47 of Additional Protocol 1 to the Geneva Conventions should be removed in order to ensure that malignant State actors cannot use loopholes in the existing definition to insulate themselves from criminal liability. All other appropriate practical and legal measures should also be taken to ensure mercenaries and irregular forces act as lawful combatants and all high contracting parties remain in compliance with the duties

international humanitarian law requires. Finally, because States bear responsibility for the unlawful acts of their agents, States engaging in the use of mercenaries and irregular forces should provide those forces the same international humanitarian law training they would to armed forces.

As chair of the Fourteenth International Humanitarian Law Roundtable, I call upon the international community to keep the spirit of the Nuremberg Principles alive by calling to attention and putting into action the Principles included herein.



Fatou Bensouda

Chair, 14th International Humanitarian Law Roundtable