

A Special Tribunal for Ukraine on the Crime of Aggression – The Role of the U.N. General Assembly

by [Hans Corell](#)

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(Ця стаття також доступна українською мовою [mym](#). This article is also available in Ukrainian [here](#).)

I have learned that some UN Member States believe that only the UN Security Council can “create” an international criminal tribunal in the United Nations. However, with respect to Ukraine, a legally available and advisable solution is an agreement between the United Nations and Ukraine through the General Assembly.

Let me first refer to the following proposal:

[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](#)

As one of the lead authors of this proposal, I based my reasoning on my experiences negotiating the agreement between the United Nations and Sierra Leone for the Special Court for Sierra Leone (SCSL) at the request of the Security Council and my negotiations with Cambodia for the Extraordinary Chambers in the Courts of Cambodia (ECCC) at the request of the General Assembly.

The Special Court for Sierra Leone was created by an agreement between the UN and Sierra Leone on 16 January 2002. See [Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone \(rscsl.org\)](#).

After a request from Cambodia and the establishment of a Group of Experts to study the issue of a tribunal, the promulgation of the Law on the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) was “[w]elcome[d]” by the General Assembly. *See* GA Res. 56/169, para. IV.2 (2002); *see also* GA Res. 57/228 (requesting resumption of negotiations and “recommending” various features); GA Res. 57/228B (approving draft agreement on cooperation). While the Special Court for Sierra Leone was a freestanding new institution, the ECCC became chambers within the Cambodian court system. *See* Government of Cambodia, Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), at [NS/RKM/0801/12 \(eccc.gov.kh\)](#).

This means that the ECCC were created upon a recommendation by the UN General Assembly. Importantly, when the ECCC’s creation was first contemplated, it was not envisioned to be a tribunal within the Cambodian Court system. The original version as well as the final one did not affect the assessment that either could be established with resort to the General Assembly.

Against this background, the model for the structure of the Ukraine tribunal should be the internationalized SCSL. But what about the authorizing action through the United Nations? Ukraine cannot go to the Security Council as Sierra Leone did for the simple reason that Russia will veto such a proposal. That is why I believe that the process when I negotiated the agreement between the United Nations and Cambodia should be applied. Cambodia did not turn to the Security Council. Instead, it turned to the General Assembly and asked for an agreement. Ukraine should therefore turn to the General Assembly requesting a resolution for a Ukraine tribunal. While the model for the tribunal itself should be Sierra Leone.

With respect to the competence of the General Assembly it is highly important to note that in this particular case the Assembly is acting under the “Uniting for Peace” system, in which the [fundamental provision](#) reads:

“Resolves that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to

the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view **to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.** If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request therefor. Such emergency special session shall be called if requested by the Security Council on the vote of any seven members, or by a majority of the Members of the United Nations.” (emphasis added)

Surely, if the General Assembly can make recommendations to use armed force in the case of a breach of the peace or act of aggression, the General Assembly can make a recommendation or direct a request to the Secretary-General to negotiate an agreement with Ukraine on a Special Court for the Crime of Aggression, if Ukraine so wishes.

It is against this background the following two paragraphs in the preamble of our proposal of 7 September 2022 for a UN General Assembly resolution are formulated as follows:

“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,”

“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.”

In sum, the General Assembly is an appropriate and well-advised option for establishing a Special Tribunal for Ukraine on the Crime of Aggression, and such a path would be well grounded in the practices and law of the United Nations.

IMAGE: Permanent Representative of Russia to the United Nations Vasily Nebenzya speaks during a United Nations General Assembly special session at the United Nations headquarters on October 10, 2022 in New York City.

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