CRIMES OF AGGRESSION: INTERNATIONAL MECHANISMS, RUSSIA'S WAR AGAINST UKRAINE, AND JOHN LOCKE'S PHILOSOPHY

ANDRII PRYLUTSKYI

The Faculty of Government and Political Economy, Ukrainian Free University, Germany
E-mail: andrii.prylutskyi@gmail.com

Abstract - The international community stands united in its commitment to upholding justice and protecting human rights. Yet, the persistence of crimes of aggression remains a daunting challenge, demanding urgent attention and effective solutions. In my study, I emphasize the urgent need to address the crimes of aggression committed by the Russian Federation in Ukraine and propose the creation of a Permanent Special Tribunal as an effective solution to combat impunity in international law for crimes of aggression. Aligned with international practice and based on the philosophical principles of John Locke, the Tribunal should seek to ensure accountability, uphold the principles of justice and initiate discussion of the complex relationship between state sovereignty and international lawacross the whole world.

The study assesses the limitations of existing mechanisms, including universal jurisdiction, ad hoc tribunals, and the International Criminal Court (ICC), to highlight the need for a dedicated tribunal. In addition, it highlights the need for effective enforcement mechanisms to ensure the Tribunal's success in bringing perpetrators to justice for their actions.

This Tribunal represents a significant step towards deterring future crimes against humanity and establishing a more just and accountable international order. By fighting impunity and protecting the lives of innocent people, the Tribunal seeks to promote global peace and stability by ensuring that those responsible for crimes of aggression are punished for the consequences of their actions.

Keywords - Impunity, Special Tribunal, Crimes of Aggression, International Law, Accountability, John Locke, Russia's War against Ukraine

I. INTRODUCTION

On February 24, 2022, the Russian Federation invaded Ukraine [1,2]. This was triggered by the escalation of the Russian-Ukrainian conflict, which began with the Russian annexation of Ukrainian Crimea in 2014 [3]. Russia's impunity in 2014 for aggressive behavior on the international stage, which can be interpreted as a crime of aggression according to UN General Assembly Resolution 3314 and Article 8 of the Rome Statute of the International Criminal Court (where any annexation of territory or part thereof of one state by another through the use of force is considered an act of aggression), demonstrated the international community's inability to protect imperative norms of international law.

The gaps in the current system of international criminal law necessitated the establishment of a Special Tribunal for crimes of aggression against Ukraine [4], the project of which is currently under development [5]. The question of holding Russia accountable for its crimes opened the way to another question: how to prevent the recurrence of such a conflict in the future? To answer this, it is necessary not only to review current international practices and understand the reasons for their inefficiency but also to return to the theoretical foundation of such practices, which was laid by eminent thinkers of the past, including John Locke, the English philosopher who advocated self-defense against wrongdoers as a law of self-preservation, inherent in the law of nature [6].

The goal of this work is to assess the mechanisms of international criminal justice and justify the need for the creation of a Special Permanent Tribunal for crimes of aggression, using the example of the intention to establish a Special Tribunal for crimes of aggression against Ukraine and the ideas of John Locke.

II. MECHANISMS OF INTERNATIONAL CRIMINAL JUSTICE

Various mechanisms have been developed in the field of international law to hold individuals accountable for international criminal offenses, known as "the most serious crimes of concern to the international community as a whole" (hereafter "fourmain crimes"), which include genocide, crimes against humanity, crimes of aggression, and war crimes[7].

2.1. Universal jurisdiction

States employ a mechanism known as universal jurisdiction, which implies the competence of states to prosecute individuals for the four main crimes and to punish them irrespective of the place where the crime was committed or the nationality of the accused or victim [8]. This concept involves reforming a state's legislation to meet international standards. It is founded on legislative acts of numerous countries and various treaties, such as the 1948 Genocide Convention, the 1949 Geneva Conventions and their Additional Protocols, as well as the 1984 Convention against Torture. As a testament to this, Articles 49 (Geneva Convention I), 50 (Geneva Convention II),

129 (Geneva Convention III), and 146 (Geneva Convention IV) entail the obligation for states to seek out and prosecute individuals who have violated the law, regardless of their nationality, or to extradite them for trial to another state if there are grounds for it [9]. According to the report of the International Committee of the Red Cross, more than 110 states have partially or fully changed their legislation in this way [10].

The disadvantage of universal jurisdiction is the inability to prosecute individuals with personal immunity 'ratione personae' (including heads of government, foreign ministers, and heads of state) and functional immunity 'rationemateriae' (immunity based on the person's activities, such as their government job, which remains when they leave office) [11,12]. Although there have been cases where states with universal jurisdiction have disregarded immunities, such as the case of ErodiaAboulayeNdombasi, the former Minister of Foreign Affairs of the Democratic Republic of the Congo, who was imprisoned in Belgium for inciting genocide, the International Court of Justice prohibited such actions[13].

2.2. Ad hoc tribunals and The International Criminal Court

Based on UN Security Council Resolutions 827 of May 25, 1993, and 955 of November 8, 1994, other mechanisms were created, namely the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, respectively. The activities of these ad hoc tribunals were limited in terms of their jurisdiction and temporal scope. Their temporal constraints were overcome by the UN Security Council on December 22, 2010, through the establishment of the International Residual Mechanism for Criminal Tribunals, which assumed the jurisdiction of its predecessors[14]. As military conflicts and various crimes against humanity were not confined solely to the territories of Rwanda and the former Yugoslavia, there arose a need for the creation of an international judicial body encompassing more countries. The International Criminal Court, founded based on the Rome Statute, became such an institution[15].

Ad hoc tribunals, along with the International Criminal Court (hereafter 'ICC'), disregard personal and functional immunities according to their statutes [7]. However, until recently, the ICC could not considerthe crime of aggression due to the inability of the states parties to the Rome Statute to agree on the definition of such a crime. Only with the entry into force of the Kampala amendments on July 17, 2018, adopted during the 2010 Review Conference in Kampala, Uganda, did the ICC expand its jurisdiction to include the crime of aggression. The jurisdiction over such crime is rooted in Article 8 of the Rome Statute, which defines the parameters of aggression that fall under its purview [16].Unfortunately, the problem is that, in order to initiate an investigation of aggression, it is necessary for each party (state) involved, whether as the aggressor or victim, to ratify the Rome Statute and the Kampala Amendments [17]. Even if this requirement is met, it should be emphasized that the International Criminal Court does not retroactively consider crimes committed before the entry into force of the Kampala Amendments. This underscores the need for the establishment of a specialized mechanism to address the prosecution of the Russian crime of aggression.

Additionally, the jurisdiction of the ICC over genocide, crimes against humanity, and war crimes may also be limited as a state must ratify the Rome Statute or at least recognize the ICC's jurisdiction. With such recognition, the ICC will be authorized to prosecutethe listed crimes on the territory of the member state and bring its citizens to justice.Unfortunately, some countries, including the United States [18], impose sanctions against the ICC, denounce the Rome Statute on which the ICC is based, or outright refuse to ratify it, due to fears that their own citizens, except for citizens of other countries, could be imprisoned.

Theissue of holding states accountable for the four main crimes despite their reluctance to ratify the Rome Statute or the Kampala amendments can be addressed through UN Security Council resolutions on a case-by-case basis. Nevertheless, achieving this is challenging due to the veto power. To overcome the veto, the General Assembly Resolution 377 'Uniting for Peace' can be used, allowing the issue to be referred to the General Assembly if it concerns peace and security and is significant. However, this approach presents challenges and uncertainties since it demands a flexible interpretation of international law, within a geopolitical context that might not be favorable for such advancements [19]. Thus, General Assembly resolutions are primarily advisory in nature and mostly have the force of soft law (non-binding). For example, UN General Assembly Resolution ES-11/1, UN General Assembly Resolution ES-11/2, and UN General Assembly Resolution ES-11/3 regarding Russia's invasion of Ukraine in 2022 mostly resemble recommendations.

III. AD HOC TRIBUNAL FOR CRIMES OF AGGRESSION AGAINST UKRAINE

3.1. Ukraine and the International Criminal Court

Ukraine has recognized the jurisdiction of the ICC but has not ratified the Rome Statute [20].This prevents Ukraine from going to court directly and limits Russian soldiers' ability to be held accountable for crimes of genocide, war crimes, and crimes against humanity.Although, Ukraine's position is clear: in May 2022, Ukrainian parliament adopted the draft law "Cooperation with the International Criminal Court," which emphasizes that the state itself chooses the persons who fall under the ICC's

jurisdiction. This was done to prevent the prosecution of the Ukrainian military, but it is not necessary, as the ICC already has extended jurisdiction in Ukraine since 2014 [21].

3.2. Calls for a Special Tribunal: Holding Russia Accountable for Aggression Against Ukraine

As Russia and Ukraine have not ratified the Kampala amendments, in addition to the Rome Statute, the ICC does not have the authority to consider Russia's crime of aggression against Ukraine. It is also important to highlight that the United Nations International Law Commission has concluded that the General Assembly does not have the power under the UN Charter to directly affect the rights of states against their will, particularly concerning matters of criminal jurisdiction, even with the existence of the 'Uniting for Peace' resolution [19]. Due to the non-application of the 'Uniting for Peace' resolution, which could have granted the General Assembly the authority of the Security Council to refer Russia's crime of aggression to the ICC, there arises a need for the creation of a special ad hoc tribunal to address Russia's aggression against Ukraine, which should be “based on an agreement between Ukraine and the UN or a multilateral treaty between Kyiv and other states [22].” The need for such a tribunal was raised in the European Parliament Resolution c9-0063/2023, emphasizing the importance of holding those responsible for the four main crimes accountable [23].

Therefore, the International Centre for the Prosecution of Aggression against Ukraine (ICPA) has commenced its operations in The Hague, under the auspices of the European Union Agency for Criminal Justice Cooperation (Eurojust). This newly established Centre is currently investigating Russia's crime of aggression against Ukraine and aiding in the development of cases for future judicial proceedings in both national and international courts, including the potential establishment of a Special ad hoc Tribunal to address Russian aggression or involve the ICC [24].

IV. LOCKE ON THE MORAL BASIS OF INTERNATIONAL PROCEDURES

4.1. Defending the innocent

John Locke, in his work "Two Treatises of Government," writes, "Every individual has the natural right to acquire and possess property, and it is within their rights to defend and protect their property from unjust encroachments [25]." The philosopher emphasizes the need to protect one's land and property. Additionally, according to his ideas, the natural condition is "a State of perfect Freedom" and "a State of Equality, wherein all Power and Jurisdiction are reciprocal, with no one having more than another." Locke asserts, "Being all equal and independent, no one ought to harm another in their life, health, liberty, or possessions [6]." This quote underscores the principle that individuals, and consequently states composed of individuals, should not unlawfully inflict harm, especially concerning someone else's property, emphasizing the importance of protecting innocent lives and their rights to life, liberty, and property.

4.2. Punishing the guilty

Locke argues that everyone in the state of nature has the right to preserve themselves and others by enforcing natural law. He states, "The power to execute the natural law is given to every person," granting them the authority to punish those who threaten self-preservation or harm others in life, liberty, or possessions. While self-defense and punishment should be proportional to the crime, they do not exclude the possibility of punishment for aggressors, including death. Locke asserts that anyone who poses a threat to another's life or demonstrates "enmity to their existence" can be punished or even killed. Moreover, he confers the right upon "every individual" and "any other person" to intervene against an aggressor who endangers another [6]. The philosopher highlights that the law of nature would "be in vain if there were nobody in the state of nature who had the power to execute it, thereby preserving the innocent and restraining offenders." Furthermore, Locke also addresses states as entities within the state of nature that are governed by reason. In simpler terms, since states represent the will of individuals who are their citizens, they become tools for maintaining the state of nature. States must protect themselves and others, safeguard the innocent, and punish wrongdoers, including both regular individuals and other states that are associations of wrongdoers.

V. PERMANENT SPECIAL TRIBUNAL FOR CRIMES OF AGGRESSION

5.1. Impact of the intention to establish a Special Tribunal on Russia

The desire to establish a Special Tribunal for Russia's aggression against Ukraine during the functioning of the International Criminal Court, which has the competence to address aggression crimes itself, is remarkable. The need for such a tribunal reflects the inefficiency of current international justice mechanisms, often hindered by influential states like Russia, China, or the USA, particularly through the UN Security Council. The potential problem arises: what if China attacks Taiwan in the future, or another nuclear-armed state follows Russia's example? Will we need to create another ad hoc tribunal? Alternatively, a new permanent tribunal could be established, incorporating the best practices from the past to prevent future tragedies. This tribunal should be created through an international treaty that cannot be denounced, as stated in its statute. It should also

include provisions requiring member states of the mechanism to impose sanctions on non-participating states, compelling them to recognize the tribunal's jurisdiction and join the treaty. Additionally, the treaty should address nuclear disarmament and the creation of peacekeeping forces for apprehending criminals. While these recommendations may seem futuristic, the possibility of creating a new ad hoc tribunal during the ICC's existence was once deemed unlikely as well.

5.2. John Locke's ideas

Locke's views extend beyond individuals. The law of nature, which grants the right of self-preservation, also emphasizes the preservation of society. However, in the context of international society, there arises a tension between preserving one's own society and preserving all of humanity. Locke stresses that the moral duty of universal preservation holds true when it doesn't conflict with the interests of communal or individual preservation [26].

Therefore, according to the philosophy of John Locke, the urgency of holding the Russian Federation accountable reflects the importance of ending impunity, which undermines the entire legal system. The fact that other countries are unwilling to help Ukraine by engaging their armed forces in accordance with Article 51 of the UN Charter and General Assembly Resolution 377 proves that the UN is not aligned with the law of nature, undermining its credibility as a universal international organization seeking to maintain peace and order in the world.Since the international community needs an effective mechanism of self-preservation, the creation of a permanent and specialized tribunal for aggression crimes, founded on principles of equality among participants and equipped with efficient punishment mechanisms, becomes a top priority.

John Locke is an excellent fit for this research, not only as an intellectual who advocated self-preservation and self-defense but also as a person whose ideas were incorporated into the Declaration of Independence of the United States [27], particularly regarding the uprising against British economic 'tyranny' during the struggle for independence. However, the USA now stands as one of the countries blocking the mechanism of self-defense for the international community against the most serious crimes of society (specifically concerning the ICC).

VI. CONCLUSION

The study highlights the necessity for a robust mechanism of self-preservation in the international community. The urgency to hold Russia accountable for its aggression against Ukraine underscores the importance of ending impunity and strengthening global justice systems. John Locke's principles of equality and preservation of innocent lives resonate with the need for a specialized tribunal to address aggression crimes effectively.

REFERENCES

[1] Lister, Tim; Kesa, Julia "Ukraine says it was attacked through Russian, Belarus and Crimea borders", CNN, accessedFebruary24, 2022, <https://edition.cnn.com/europe/live-news/ukraine-russia-news-02-23-22/h_82bf44af2f01ad57f81c0760c6cb697c>

[2] Murphy, Palu "Troops and military vehicles have entered Ukraine from Belarus", CNN, accessed February 24, 2022, <https://edition.cnn.com/europe/live-news/ukraine-russia-news-02-23-22#h_d115a65e9b6348752422ad427fa83b95>

[3] Alexander Zadorozhny. “The Annexation of Crimea - an International Crime: Monograph”, - Kyiv: K.I.S., p. 576,2015.

[4] Olivier CORTEN and Vaios KOUTROULIS, Université libre de Bruxelles. “Tribunal for the crime ofaggression against Ukraine -a legal assessment”, pp. 1-60, December 2022, <https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702574/EXPO_IDA(2022)702574_EN.pdf>

[5] Anna Murashko "Zelensky instructed to develop a draft resolution of the UN General Assembly on the establishment of a special tribunal," UNN, accessed June 13, 2023, <https://www.unn.com.ua/uk/news/2032100-zelenskiy-doruchiv-napratsyuvati-proekt-rezolyutsiyi-genasambleyi-oon-schodo-stvorennya-spetstribunalu>

[6] Locke, John. “Second Treatise of Government”, Edited by C. B. Macpherson, Hackett Publishing, pp. 14-18, 1980.

[7] UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, accessed 29 July 2023,<https://www.refworld.org/docid/3ae6b3a84.html>

[8] The Princeton Project on Universal Jurisdiction 28–36, 1 principle, (Princeton, NJ: Princeton University Program in Law and Public Affairs, S. Macedo ed., May 2001), pp. 28-29, accessed 5 March 2011, <http://lapa.princeton.edu/hosteddocs/unive_jur.pdf>

[9] Xavier P., « The principles of universal jurisdiction and complementarity : how do the two principles intermesh », Revue internationale de la Croix-Rouge, Volume 88, n°862, pp. 375-398,Juin 2006.

[10] International Committee of the Red Cross. “The scope and application of the principle of universal jurisdiction: ICRC statement to the United Nations, 2017”, accessed 13 October 2017, <https://www.icrc.org/en/document/scope-and-application-principle-universal-jurisdiction-icrc-statement-united-nations-unga-2017>

[11] Vedernikova O.N. “"The Rome Statute of the International Criminal Court: A Critical Analysis", State and Law, № 5, pp. 71-79, 2009.

[12] Rusinova V.N. “International Immunities of High Officials and Criminal Prosecution of International Crimes”, International Public and Private Law, № 3. pp. 38–45, 2006

[13] D. Akande and S. Shah, ‘Immunities of State Officials, International Crimes, and Foreign Domestic Courts’, (2011) 21 EJIL 815; R. van Alebeek, ‘National Courts, International Crimes and the Functional Immunities of State Officials’, (2012) 59 NILR 5; A. Cassese, ‘When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case’, (2002) 13 EJIL 853; M. Frulli, ‘On the Existence of A Customary Rule Granting Functional Immunity to State Officials and Its Exceptions: Back to Square One’, (2015) 26 Duke Journal of Comparative and International Law 479.

[14] Biryukov P. N., Pronin A. V. “The International Residual Mechanism for Criminal Tribunals. Occam's Razor in Reverse”, International Criminal Law and International Justice, No. 2,pp. 11-14. 2014.

[15] Fisenko I.V. “Combating International Crimes in International Criminal Law”, Minsk: Tesei, p. 109, 2000.

[16] William A. Schabas, “An Introduction to the International Criminal Court”, Cambridge University Press, p. 481,2004.
[17] Parliamentarians for Global Action, “Amendments to the Rome Statute”, <https://www.pgaction.org/ilhr/rome-statute/amendments.html#:~:text=The%20Kampala%20Amendments%20to%20the%20Rome%20Statute%20on%20the%20crime,State%20Party%20(territorial%20jurisdiction)%20and>
[18] Graig Graziosi, “US imposes sanctions on officials at International Criminal Court, claiming it continues to target Americans”, INDEPENDENT, accessed September 3, 2020, <https://www.independent.co.uk/news/world/americas/us-politics/us-sanctions-international-criminal-court-icc-mike-pompeo-a9702231.html>
[19] United Nations, Report of the International Law Commission on the work of its forty-sixth session, UN Doc A/49/10, p. 44,2 May – 22July 1994, commentary of Article 23 §5
[20] Tonya Tumanova, "Ukraine Recognizes the Jurisdiction of the ICC Over War Crimes Committed Since the Start of Russian Aggression - P. Klimkin", UNN, accessed September 8, 2015, <https://www.unn.com.ua/uk/news/1498974-ukrayina-viznala-yurisdiktsiyu-mks-schodo-voyennikh-zlochiniv-vchinenikh-z-momentu-pochatku-agresiyi-rf-p-klimkin>
[21] Eurointegration, “What does Ukraine lose by delaying its accession to the International Criminal Court in The Hague”, accessed August 22, 2022, <https://www.eurointegration.com.ua/news/2022/08/22/7145346/>
[22] Dr. GlebBogush and Dr. Sergei Golubok, “Why the World Needs a Special Tribunal to Prosecute Russia's Aggression Against Ukraine”, TheMoscowTimes, accessed June 26, 2023, <https://www.themoscowtimes.com/2023/06/23/russia-held-bridge-unusable-for-movement-after-ukraine-strike-pro-kremlin-official-a81613>
[23] The Sofia Globe staff, “European Parliament calls for special tribunal on Russia’s crime of aggression against Ukraine”, TheSofiaGlobe, assecced January 19, 2023, <https://sofiaglobe.com/2023/01/19/european-parliament-calls-for-special-tribunal-on-russias-crime-of-aggression-against-ukraine/>
[24] Directorate-General for Neighbourhood and Enlargement Negotiations, “Ukraine: International Centre for the prosecution of Russia's crime of aggression against Ukraine starts operations today”, European Neighbourhood Policy and Enlargement Negotiations (DG NEAR), assecced July 3, 2023, <https://neighbourhood-enlargement.ec.europa.eu/news/ukraine-international-centre-prosecution-russias-crime-aggression-against-ukraine-starts-operations-2023-07-03_en>
[25] Locke, John. “Second Treatise of Government”, Edited by C. B. Macpherson, Hackett Publishing, pp. 17-30, 1980.
[26] Grant, Ruth,“John Locke's Liberalism”, Chicago: University of Chicago Press, p.128, 1987.
[27] Kenneth D. Stern, “John Locke and the Declaration of Independence”, 15 Clev.-Marshall L. Rev., pp. 186-195, 1966.

★★★