

**The Imperative Need to Prosecute the Crime of Aggression
In the Situation of Ukraine**

Testimony of David J. Scheffer

Before the Tom Lantos Human Rights Commission

Hearing on Ukraine: Abducted Children and Mechanisms for Accountability

2255 Rayburn House Office Building

Washington, DC

Thank you to Co-Chairs and Congressmen James P. McGovern and Chris Smith, and to all other members of the Commission for this opportunity to address the imperative need to prosecute the crime of aggression that has been committed against Ukraine. I am David Scheffer and served from 1997 to 2001 as the first U.S. Ambassador at Large for War Crimes Issues. I am currently a Senior Fellow of the Council on Foreign Relations and a Professor of Practice at Arizona State University's Barbara Barrett and Sandra Day O'Connor Center in Washington. On a personal note, in the late 1980's I was a lawyer with the Committee on Foreign Affairs and knew and consulted often with Congressman Tom Lantos. It is an honor to appear once again before the Tom Lantos Human Rights Commission.

I was deeply involved representing the United States in the creation of five war crimes tribunals during my government service in the 1990's. When the February 24, 2022, invasion of Ukraine by Russian forces was launched, I immediately began to collaborate with many colleagues, including my co-panelist David Crane, to strategize the creation of a special tribunal that would investigate and prosecute the acts of aggression committed by Russia against Ukraine. That task proved to be a long and winding road towards establishment of a mechanism for accountability, but the Special Tribunal finally reached take-off in June 2025 when the Council of Europe entered into an agreement with Ukraine to establish it.

I want to use my allotted time to emphasize that the Special Tribunal for the Crime of Aggression Against Ukraine is a natural and entirely predictable consequence of the Russian invasion of and continued armed attacks against Ukraine. There is no surprise in the establishment of the Special Tribunal other than the precise character of its origins and

constitutional framework. Each modern war crimes tribunal has had its novel characteristics. In this instance, it is inconceivable that a war of aggression like that conducted by Russia against Ukraine for more than four years would escape accountability under principles of international law and international criminal law. If the leading perpetrators of the crime of aggression against Ukraine face no accountability, then there will be little prospect of this international crime being enforced in the future.

Acts of aggression and the crime of aggression have an 80-year history of codification and prosecution under law. The United Nations Charter, completed in June 1945 and ratified by the United States a month later, set forth as its very first Purpose “to take effective collective measures...for the suppression of acts of aggression or other breaches of peace...” The Charter vested in the UN Security Council, of which the United States is a permanent member, the power to “determine the existence of ...an act of aggression...” and to make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, namely, the non-military and military enforcement provisions of the UN Charter, to maintain or restore international peace and security.

Also in August 1945 and January 1946, the Nuremberg and Tokyo International Military Tribunals, respectively, were established under American leadership with the primary objective to prosecute the wars of aggression committed by Germany and Japan against other nations, including the United States. A significant number of the political and military leaders from those two enemy nations of World War II who stood trial were convicted of conspiracy to wage aggressive war and of crimes against peace, or aggression, and were sentenced to death or to imprisonment.

In 1974, the United States actively negotiated and joined in the UN General Assembly’s adoption of Resolution 3314 defining acts of aggression, which later became the basis for the definition of the crime of aggression under Article 8bis of the Rome Statute of the International Criminal Court following a review conference of the Rome Statute in Kampala, Uganda, in 2010. Article 8b of the Rome Statute is now mirrored in Article 2 of the Statute of the Special Tribunal for the Crime of Aggression Against Ukraine.

The hard work of criminalizing acts of aggression in recent decades began in the early 1990’s. In developing an early draft of a statute designed to govern the law and practice of a

proposed international criminal court, the UN's International Law Commission in 1994 included the crime of aggression under conditions in Article 23 of that draft that required the UN Security Council first to determine that an act of aggression had occurred and, if the Council was dealing with an act of aggression, to consent to the court gaining jurisdiction over that act of aggression. But once those procedural steps were taken, the court could proceed with prosecution of the crime of aggression. Remnants of this procedure are reflected in the Rome Statute of the International Criminal Court, but with greater leeway for investigations and prosecutions in the absence of Security Council action.

During the negotiations leading to the 1998 Rome Statute, there were persistent efforts to include in the ICC's subject-matter jurisdiction the crime of aggression alongside genocide, crimes against humanity, and war crimes. As head of the U.S. delegation to the U.N. talks on an international criminal court, I stressed that a war of aggression akin to the German invasion of Poland in 1939 should be the context for inclusion of the crime of aggression in the Rome Statute. Russia's massive invasion of Ukraine in 2022 obviously would meet that requirement. Negotiators, however, were not able to find an acceptable comprehensive definition of the crime of aggression by the end of the final round of negotiations in July 1998. Thus the inclusion of the crime of aggression in Article 5 the Rome Statute was a placeholder until the treaty could be amended in the future with a workable definition that would be essential in order to investigate and prosecute the crime. That was achieved in Kampala in 2010 and the Rome Statute now includes the detailed provisions that have operationalized the court's jurisdiction over aggression. But the crime cannot be prosecuted by the International Criminal Court with respect to the Ukraine situation for reasons I can explain later if you wish. Hence, the need for the Special Tribunal.

My point is that prosecution of the crime of aggression became deeply entrenched in historical precedents immediately following World War II, in modern legal theory, and in judicial bodies created by the collective will of sovereign nations. The Special Tribunal fills a jurisdictional gap in order to ensure that the crime of aggression, which is a leadership crime, can be investigated and prosecuted against Russian leaders.

When the Special Tribunal ultimately adjudicates cases on the crime of aggression committed against Ukraine by individual Russian political, military, and perhaps business leaders, as well as

accomplices of such aggression that may be identified by the prosecutor in the leadership ranks of Iran, Belarus, North Korea, and China, those cases can proceed toward trial even in the absence of the indicted fugitive under Article 28 of the Statute. There is one exception: Article 23(5) of the Special Tribunal Statute reads, “Where the indictment concerns a head of State, head of government or minister of foreign affairs, the Pre-Trial Judge shall not confirm the indictment and shall order the proceedings be suspended until that person no longer holds that office or an appropriate waiver has been presented to the Special Tribunal. During the suspension, the Pre-Trial Judge shall not otherwise act upon the indictment.” Vladimir Putin thus avoids trial, even in absentia, as long as he holds onto supreme power in Russia. But foreign minister Sergey Lavrov, for example, may step down from his duties sooner. The Russian defense minister and all Russian military leaders involved in planning, preparing, initiating or executing acts of aggression against Ukraine would not qualify for suspended treatment under Article 23(5) and thus could be prosecuted in absentia or in person if successfully arrested as soon as cases are developed and indictments rendered against them.

I think it is very important to understand, particularly in the context of who would be targets of investigation and prosecution by the Special Tribunal, that Ukraine has endured *rolling aggression* on a massive scale since February 24, 2022, not to mention Russia’s earlier aggressive actions that commenced in February 2014 on the territory of Crimea, a part of Ukraine. By “rolling aggression,” I mean that a war of aggression and acts of aggression do not necessarily occur on only a single day. There have been daily aggressive cross-border and in-territory assaults against Ukrainian military and civilian targets by Russian forces, artillery bombardments, powerful missiles, and autonomous weapons like drones for more than four continuous years. As a consequence, there is an enormous amount of evidence, much of it already collected, to substantiate charges of the crime of aggression against the Russian leadership, and fresh evidence accumulates every single day as a consequence of rolling aggression.

Further, given the obvious conduct of aggressive warfare by Russia against Ukraine for so many years, the Special Tribunal probably will take judicial notice of the aggressive war early in its jurisprudential record. This is a step similar to what occurred before the International Criminal Tribunal for Rwanda in 2006 when it took judicial notice of the 1994 genocide in Rwanda as an event that no longer needed to be proven in each individual genocide case before

the tribunal. The genocide in Rwanda had become an obvious fact for purposes of criminal prosecutions. The conclusion that aggression occurred against Ukraine will become, I predict, a judicially recognized fact that no longer would need to be proven in the courtroom. The Special Tribunal cases thereafter would center exclusively on whether the indicted individual being tried in person or in absentia participated in a leadership role in the commission of acts of aggression against Ukraine.

The Special Tribunal still requires a lot of preliminary spadework to become functional. This is clear in Article 6 of the Agreement between the Council of Europe and Ukraine on the Establishment of the Special Tribunal for the Crime of Aggression Against Ukraine. Financially, the Special Tribunal needs rapid infusion of funds to build the staff and support the administrative and managerial requirements of an investigative and prosecutorial judicial tribunal. It also needs diplomatic support so that more nations join the Enlarged Partial Agreement and then the Management Committee of the Special Tribunal. Funding and in-kind support can be sought from governments as well as the private sector. In the United States, I have to imagine there are sources within the private sector, particularly among the diaspora of Ukrainians living and working—many quite successfully—here, who might find good reason to support the cause of international justice for their native land and people.

Thank you.