

IN-DEPTH ANALYSIS

Requested by the DROI Subcommittee



Tribunal for the crime of aggression against Ukraine - a legal assessment



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ABSTRACT

After examining the innovative character of the proposed tribunal, the paper analyses three main interconnected elements linked to the establishment and functioning of the tribunal: the legal basis for its creation; problems of immunity; and questions of enforcement and implementation of its decisions. In the end, taking into account legitimacy considerations which are of crucial importance in this case, the authors evoke two possibilities. A first option would be to ground the tribunal's creation in Ukrainian domestic law and on its right to self-defence, which would open the door to prosecute foreign nationals for the crime of aggression, complementing it with an agreement with the United Nations (UN) or another (regional) organisation: the tribunal would thus be 'established by law.' A second option, more legitimate as it would be based on the UN Charter, would be to interpret broadly existing legal mechanisms, especially the 'Uniting for Peace' resolution. Given the UN Security Council's inability to discharge its duties due to the veto of one of its permanent members (Russia), the UN General Assembly could exceptionally defer the crime of aggression against Ukraine to the International Criminal Court. In both cases, however, it must be kept in mind that significant problems of legality remain.

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List of abbreviations

EAC	Extraordinary African Chambers
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Court of Human Rights
EP	European Parliament
EU	European Union
EULEX Kosovo	European Union Rule of Law Mission in Kosovo
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
IMTFE	International Military Tribunal for the Far East
NATO	North Atlantic Treaty Organization
NIMT	Nuremberg International Military Tribunal
OSCE	Organisation of Security and Cooperation in Europe
SCSL	Special Court for Sierra Leone
STL	Special Tribunal for Lebanon
UN	United Nations
UNAT	United Nations Appeals Tribunal
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
USA	United States of America

1 Introduction

Since the beginning of the Russian armed military intervention launched on 24 February 2022, a number of proposals have been made to establish a special Tribunal for Russia's Crime of Aggression against Ukraine. The first can be found in an article written by Professor Philippe Sands in the Financial Times on 28 February 2022¹. A statement dated 4 March 2022 was then adopted by high-level politicians and international lawyers, which refers to the precedents of Nuremberg and Tokyo to assert that the 'Special Tribunal should be constituted – on the same principles that guided the allies in 1942' and that it could be 'set up with speed'². The signatories proposed a 'Declaration on a Special Tribunal for the Punishment of the Crime of Aggression against Ukraine' designed to be signed by governments³. Other similar initiatives have subsequently been taken, as illustrated by the 'Draft law for a Ukrainian High War Crimes Court' (including the crime of aggression) prepared by a United States of America (USA) private organisation⁴ or by the 'Considerations for the setting up of the Special Tribunal for Ukraine on the Crime of Aggression' published by the Global Accountability Network⁵. This idea has also generated comments and suggestions in academic legal literature⁶. On a political level, it has been supported by Ukrainian officials⁷, by other

¹ P. Sands, '[Putin's use of military force is a crime of aggression](#)', *Financial Times*, 28 February 2022.

² G. Brown, D. Akande, et al., '[Statement calling for the Creation of a Special Tribunal for the Punishment of the Crime of Aggression against Ukraine](#)', 4 March 2022; Justice for Ukraine, '[Updated List of Signatories](#)', 2022 (retrieved 24 October 2022).

³ According to the Declaration, the said governments would 'in a spirit of international solidarity, [...] grant jurisdiction arising under national criminal codes and general international law to a dedicated international criminal tribunal that should be established to investigate and prosecute individuals who have committed the crime of aggression in respect of the territory of Ukraine'.

⁴ This proposal concerns an Ukrainian domestic law rather than an international law instrument as such: Public International Law & Policy Group, '[Draft Law for a Ukrainian High War Court](#)', *PILPG*, 22 July 2022.

⁵ Global Accountability Network, '[Considerations for the setting up of the Special Tribunal for Ukraine on the Crime of Aggression](#)', Global Accountability Network, July 2022.

⁶ See e.g. in a chronological order, L. D. Johnson, '[United Nations Response Options to Russia's Aggression: Opportunities and Rabbit Holes](#)', *Just Security*, 1 March 2022; S. Vasiliev, '[Aggression against Ukraine: Avenues for Accountability for Core Crimes](#)', *EJIL:Talk!*, 3 March 2022; Chatham House, '[A criminal tribunal for aggression in Ukraine](#)', Research Event Recording, 4 March 2022; P. Sands, '[Why we need a new Nuremberg trial to make Putin pay: From Britain's leading expert on crimes against humanity Philippe Sands, a powerful personal plea for the world to hold a tribunal like the one which condemned Hitler's henchmen](#)', *Daily Mail*, 4 March 2022; K. Jon Heller, '[Creating a Special Tribunal for Aggression Against Ukraine is a Bad Idea](#)', *Opinio Juris*, 7 March 2022; J. Trahan, '[U.N. General Assembly Should Recommend Creation of Crime of Aggression Tribunal For Ukraine: Nuremberg Is Not The Model](#)', *Just Security*, 7 March 2022; C. McDougall, '[Prosecuting Putin for his Crime of Aggression Against Ukraine: Part Two](#)', *Oxford Human Rights Hub*, 8 March 2022; E. Chang, '[Why Ukraine is Calling for a Special Tribunal to prosecute Putin](#)', *Lawfare*, 10 March 2022; T. Dannenbaum, '[Mechanisms for Criminal Prosecution of Russia's Aggression Against Ukraine](#)', *Just Security*, 10 March 2022; C. McDougall, '[Why Creating a Special Tribunal for Aggression Against Ukraine is the Best Available Option: A Reply to Kevin Jon Heller and Other Critics](#)', *Opinio Juris*, 15 March 2022; K. Jon Heller, '[The Best Option: An Extraordinary Ukrainian Chamber for Aggression](#)', *Opinio Juris*, 16 March 2022; D. Akande, '[Use of force under international law – The case of Ukraine](#)', 62nd meeting of the Committee of Legal Advisers on Public International Law (CAHDI), Strasbourg, France, 25 March 2022, pp. 6-7, §28; O. Owiso, '[An Aggression Chamber for Ukraine Supported by the Council of Europe](#)', *Opinio Juris*, 30 March 2022; J. Anderson, '[Ukraine: "The momentum is there for a tribunal on aggression"](#)', Interview of Mykola Gnatovsky, professor of international law at the University of Kyiv and special advisor to Ukraine's Ministry of Foreign Affairs, *JusticeInfo.net*, 12 April 2022; J. H. Anderson, '[A Nuremberg for Russia's Crime of Aggression?](#)', *JusticeInfo.net*, 22 April 2022; United Nations General Assembly, '[Letter dated 12 August 2022 from the representatives of Latvia, Liechtenstein and Ukraine to the United Nations addressed to the Secretary-General](#)', Chair's summary of an event organized by the permanent missions of Latvia and Liechtenstein to the United Nations in June 2022, reported in UN General Assembly – UN Security Council, UN Doc. A/ES-11/7 – S/2022/616, 17 August 2022, p. 3; O. Hathaway, '[The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine \(Part I\), An agreement between the United Nations and Ukraine can pave the way](#)', *Just Security*, 20 September 2022; A. Reisinger Coracini, '[The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine \(Part II\), Jurisdiction and Composition](#)', *Just Security*, 23 September 2022; J. Trahan, '[The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine \(Part III\), How Many to Prosecute, Immunity, Amnesty and More](#)', *Just Security*, 26 September 2022; D. Scheffer, '[The Case for Creating a Special Tribunal to prosecute the Crime of Aggression Committed Against Ukraine \(Part IV\), Information Sharing, Victim participation, Outreach and More](#)', *Just Security*, 28 September 2022.

⁷ Ministry of Foreign Affairs of Ukraine, '[Statement by Minister of Foreign Affairs of Ukraine at the SC Meeting on Russia's Aggression against Ukraine](#)', M. Dmytro Kuleba, 22 September 2022; President of Ukraine Volodymyr Zelenskyy, '[We must create a Special Tribunal on the crime of aggression against Ukraine](#)', Address by president Volodymyr Zelenskyy to the participants of the public debate "War and Law", Paris, 5 October 2022.

States like, for example, Estonia, Latvia and Lithuania⁸, by the North Atlantic Treaty Organization (NATO) Parliamentary Assembly⁹, the Organisation for Security and Cooperation in Europe (OSCE) Parliamentary Assembly¹⁰ as well as the Parliamentary Assembly¹¹ and the Committee of Ministers¹² of the Council of Europe. Finally, the European Parliament (EP) adopted a resolution in which it:

'Call[ed] on the EU Member States and the international community, in close cooperation with Ukraine, to urgently set up a special ad hoc international criminal tribunal to investigate and prosecute the crime of aggression committed by the political and military leadership of the Russian Federation and to provide the necessary financial support to the tribunal'¹³.

In sum, the idea of creating a special international tribunal for the crime of aggression has gained support from a wide range of observers, academics and institutions.

This in-depth analysis aims to present a legal opinion reflecting the state of existing positive international law with respect to legal issues relating to the creation and functioning of an *ad hoc* international tribunal for the crime of aggression committed against Ukraine (hereafter: 'Ukraine aggression tribunal' or '*ad hoc* tribunal' or 'special tribunal'). It contains a legal analysis of the different possibilities evoked (such as an agreement between States, or between States and the United Nations General Assembly (UNGA) or not evoked (such as a creation by the UNGA itself) in the proposals mentioned above. On this basis, a series of proposals and suggestions in relation to the creation of this tribunal will be formulated, addressed especially to the European Union (EU) and its Member States.

Before going into further detail, some preliminary remarks about the scope and limits of this contribution are in order.

- Firstly, although policy considerations and questions of legitimacy will be taken into account in the analysis, any opinion submitted is **primarily of a legal nature**. The objective is to determine the international legal framework regulating the creation of a tribunal and identify its limitations, while leaving the political choices on the best way forward to be made by political actors. The in-depth analysis will result in the formulation of recommendations on the role of the EU and its Member States with respect to the tribunal's creation but any decision to follow (or not) those recommendations will depend on political choices.
- Secondly, it must be noted that the creation of such a tribunal touches upon rules of international law whose interpretation is neither uniform nor universally accepted. A survey of existing literature reveals different - and sometimes opposed - opinions about the possibility of creating such a judicial body. Moreover, even among those who support such a creation, there is no unanimity about the modalities of its creation or the exercise of its jurisdiction. As will be understood in the following sections, questions relating, for example, to the immunity of Russian State officials or the enforcement and

⁸ Ministry of Foreign Affairs of Lithuania, ['The Ministers of Estonia, Latvia and Lithuania call to establish a Special Tribunal to investigate the crime of Russia's aggression'](#), Joint Statement, 16 October 2022; United Nations, ['Law not War: A Special Tribunal for the Crime of Aggression'](#), side event organized in the margins of the International Law Week at the UN exploring relevant aspects of the creation of a Special Tribunal on the Crime of Aggression on the recommendation of the UN General Assembly, 25 October 2022.

⁹ NATO Parliamentary Assembly, [Declaration Standing with Ukraine](#), 111 SESP 22 E rev.1 fin, Plenary, 30 May 2022, urging member governments and parliaments of the Alliance to support the initiatives aiming at establishing an ad hoc tribunal to investigate and prosecute the crime of aggression (§18j).

¹⁰ OSCE Parliamentary Assembly, [Resolution on the Russian's Federation war of aggression against Ukraine and its People, and its threat to Security across the OSCE region](#), Birmingham, 2-6 July 2022, pp. 22-27, §35-36.

¹¹ Council of Europe Parliamentary Assembly, [The Russian's Federation's aggression against Ukraine: ensuring accountability for serious violations of international humanitarian law and other international crimes](#), Resolution 2436 (2022), 28 April 2022.

¹² Council of Europe, [Consequences of the aggression of Russian Federation against Ukraine – Accountability for international crimes](#), Committee of Ministers, 1442nd meeting, CM/Del/Dec(2022)1442/2.3, 14-15 September 2022.

¹³ European Parliament, [Resolution of 19 May 2022 on the fight against impunity for war crimes in Ukraine](#), P9_TA(2022)0218, 19 May 2022.

implementation of the tribunal's decisions have given rise to various legal arguments. The authors will propose their own views on those debates while recognising from the outset that these are not the only views conceivable in law. Hence, it is with the necessary prudence that this legal opinion will examine the different legal options available, discuss their advantages and drawbacks, identify the positions considered as being more plausible or convincing under existing international law and present available options to the EU and its Member States.

- Thirdly, the opinion will be limited to analysing general aspects of the tribunal's creation. It will not at this stage deal with more technical questions relating, for example, to the statute and rules of procedure for the tribunal. Indeed, the treatment of all those questions depends on the choices that must first be made about the modalities of such a tribunal's creation and subsequent functioning.

Taking all those considerations into account, this in-depth analysis will address the following questions in turn. First, it is necessary to reflect on the innovative character of this proposed tribunal (Section 2), as this element predetermines the legal options that will be studied thereafter. Specifically, this includes the legal basis for the tribunal's creation (Section 3), the problems of immunity (Section 4) as well as questions of enforcement and implementation (Section 5). Finally, after some thoughts on the decisive question of legitimacy (Section 6), a number of conclusions and recommendations will be made to the EU and its Member States (Section 7).

2 The creation of an ad hoc tribunal for the crime of aggression in Ukraine: a sui generis situation?

The main difficulty with the situation in Ukraine is that, at least ostensibly, it appears entirely new and thus classical legal tools seem insufficient. In this context, it has been asserted that the so-called Russian 'special military operation' launched on 24 February 2022 was an unprecedented act of aggression (Section 2.1) that would justify an unprecedented creation of an *ad hoc* tribunal (Section 2.2). Those general questions will be addressed from the start, as they 'irrigate' debates concerning specific problems regarding the legality of such a tribunal's creation and functioning.

2.1 An unprecedented act of aggression?

The Russian military intervention in Ukraine has overwhelmingly been condemned as an act of aggression, inside and outside the United Nations (UN).

A vast majority of States has strongly denounced the unlawful character of this intervention, insisting on the necessity to defend the integrity of the most basic rules of international law. On 25 February 2022, a draft United Nations Security Council (UNSC) resolution deploring the 'Russian Federation's aggression against Ukraine in violation of Article 2, paragraph 4 of the United Nations Charter' obtained 11 votes in favour, 1 against and 3 abstentions¹⁴. Due to Russia's veto and the UNSC's inability to discharge its duties, the question was transferred to the UNGA¹⁵. On 2 March 2022, the Assembly adopted a resolution entitled 'Aggression against Ukraine' in which it '[d]eplore[d] in the strongest terms the aggression by the Russian

¹⁴ United Nations Security Council, 'Draft resolution', UN Doc S/2022/155, 25 February 2022; United Nations Security Council, [Letter dated 28 February 2014 from the Permanent Representative of Ukraine to the United Nations addressed to the President of the Security Council \(S/2014/136\) - Verbatim Record](#), UN Doc S/PV.8979, 25 February 2022, p. 6.

¹⁵ United Nations Security Council, [Resolution 2623 on Emergency Special Session of the General Assembly on Ukraine](#), UN Doc S/RES/2623(2022), 27 February 2022; adopted by 11 votes in favour, 1 vote against (Russia) and 3 abstentions (China, India and United Arab Emirates), see United Nations Security Council, [Letter dated 28 February 2014 from the Permanent Representative of Ukraine to the United Nations addressed to the President of the Security Council \(S/2014/136\) - Verbatim Record](#), UN Doc S/PV.8980, 27 February 2022, p. 2.

Federation against Ukraine in violation of Article 2(4) of the Charter'¹⁶. The resolution passed with 141 votes in favour, 5 against and 35 abstentions¹⁷. Beyond those condemnations inside the UN, Russia's intervention was regretted or denounced by representatives of various States and international organisations, such as the Council of Europe¹⁸, the EU¹⁹, the OSCE²⁰, NATO²¹, the African Union²², the Economic Cooperation Organisation of Western African States²³, the Pacific Islands Forum²⁴, the Organization of American States²⁵, the Caribbean Community²⁶ and the Nordic Council²⁷. Finally, it must be noted that the Russian military intervention was condemned as a violation of international law by various specialists of international law, either individually²⁸ or through numerous academic societies such as the Institute of International Law²⁹. All in all, condemnation of the February 2022 intervention as illegal has been almost universal, with notable exceptions like, for example, China and India³⁰.

¹⁶ United Nations General Assembly, [Resolution ES-11/1 on Aggression against Ukraine](#), UN Doc A/RES/ES-11/1, 18 March 2022. The discussions at the eleventh emergency special session of the UNGA relating to the intervention in Ukraine can be found in the following documents: United Nations General Assembly, [Aggression against Ukraine – Verbatim Record](#), 11th emergency special session: 1st plenary meeting, UN Doc A/ES-11/PV.1, 28 February 2022; United Nations General Assembly, [Aggression against Ukraine – Verbatim Record](#), 11th emergency special session: 2nd plenary meeting, UN Doc A/ES-11/PV.2, 28 February 2022; United Nations General Assembly, [Aggression against Ukraine – Verbatim Record](#), 11th emergency special session: 3rd plenary meeting, UN Doc A/ES-11/PV.3, 1 March 2022; United Nations General Assembly, [Aggression against Ukraine – Verbatim Record](#), 11th emergency special session: 4th plenary meeting, UN Doc A/ES-11/PV.4, 1 March 2022; United Nations General Assembly, [Aggression against Ukraine – Verbatim Record](#), 11th emergency special session: 5th plenary meeting, UN Doc A/ES-11/PV.5, 2 March 2022.

¹⁷ United Nations General Assembly, [Aggression against Ukraine – Verbatim Record](#), 11th emergency special session: 5th plenary meeting, UN Doc A/ES-11/PV.5, 2 March 2022, pp. 14-15.

¹⁸ Council of Europe Committee of Ministers, [Decision 2.3 Situation in Ukraine](#), Doc CM/Del/Dec(2022)1426bis/2.3, 24 February 2022.

¹⁹ European External Action Service, [Russia's aggression against Ukraine: Press Statement by High Representative/Vice-President Josep Borrell](#), Press Statement, 24 February 2022.

²⁰ OSCE, [Joint statement by OSCE Chairman-in-Office Rau and Secretary General Schmid on Russia's launch of a military operation in Ukraine](#), Press Release, 24 February 2022.

²¹ NATO, [Statement by NATO Heads of State and Government on Russia's attack on Ukraine](#), Press Release (2022) 046, 25 February 2022; NATO, [Statement by NATO Heads of State and Government](#), Press Release (2022) 061, 24 March 2022.

²² African Union, [Statement from Chair of the African Union, H.E President Macky Sall and Chairperson of the AU Commission H.E Moussa Faki Mahamat, on the situation in Ukraine](#), 24 February 2022.

²³ ECOWAS Commission, [Communique on the War in Ukraine](#), Press Release, 27 February 2022.

²⁴ Pacific Islands Forum, [Remarks: Pacific Islands Forum Secretary General Puna-Statement on Ukraine](#), 28 February 2022.

²⁵ Organization of American States, [Statement from the OAS General Secretariat on the Russian Attack on Ukraine](#), Press Release, Doc E-008/22, 24 February 2022.

²⁶ CARICOM, [CARICOM Statement on the situation in Ukraine](#), 24 February 2022; CARICOM, [Statement of the Conference of CARICOM heads of Government on the war and humanitarian crisis in Ukraine](#), 3 March 2022.

²⁷ Nordic Council, [President of the Nordic Council condemns Russia's attack on Ukraine](#), 24 February 2022.

²⁸ See, among many, J.A. Green, C. Henderson and T. Ruys, [Russia's attack on Ukraine and the jus ad bellum](#), *Journal on the Use of Force and International Law*, Vol 9, No 1, 2022, pp. 4-30; G. Blum and N. Modirzadeh, [The war in Ukraine and international law – Harvard Law professors Gabriella Blum and Naz Modirzadeh analyze the Russian invasion and the global response](#), *Harvard Law Today*, 2 March 2022; C.F.J. Doebbler, [Russia's Use of Force Against Ukraine: An International Law Perspective](#), *Jurist*, 2 March 2022; T.D. Gill, [Remarks on the law relating to the use of force in the Ukraine conflict](#), *Articles of War, Lieber Institute*, 9 March 2022; J. Kleffner, et al., [Perspective: This is why the Russian invasion of Ukraine is unlawful](#), *Swedish Defense University*, 9 March 2022; M.N. Schmitt, [Russia's "Special Military Operation" and the \(claimed\) right of self-defense](#), *Articles of War, Lieber Institute*, 28 February 2022; M. Sterio, [Russia v. Ukraine: The Limits of International Law](#), *IntLawGrrls*, 28 February 2022.

²⁹ Institute of International Law, [Declaration of the Institute of International Law on Aggression in Ukraine](#), 1 March 2022. See also, the International Law Association, [ILA Statement on the Ongoing and Evolving Aggression In and Against Ukraine](#), 3 March 2022; the [statements adopted by numerous ILA branches](#) condemning the Russian attack against Ukraine; the American Society of International Law, [Statement of ASIL President Catherine Amirfar Regarding the Situation in Ukraine](#), 23 February 2022; the European Society of International Law, [Statement by the President and the Board of ESIL on the Russian Aggression against Ukraine](#), 24 February 2022; the Société française pour le droit international, [Communiqué de la SFDI sur l'agression de l'Ukraine par la Fédération de Russie](#), 25 February 2022; the German Society of International Law, [Statement of the Board and Council of the German Society of International Law \(DGIR\) on the Russian Attack on Ukraine](#), 24 February 2022; the Belgian Society of International Law, [Statement About the Situation in Ukraine](#), n.d.

³⁰ Even in the case of the Iraqi war of 2003, the condemnations were not so numerous; see the various texts listed in (2003) 36 RBDI 248 ff.

It is not the first time that an act of aggression has been widely condemned by States, international organisations, international lawyers and, in some cases, even by an international court. The war launched by the USA and its allies against Iraq in 2003 is symbolic in this regard. It has been firmly criticised by States and jurists from all regions of the world and continues to be recognised as a major violation of the UN Charter and a threat to fundamental rules of the international legal order³¹. Other similar examples can be evoked, such as the Iraqi invasion and annexation of Kuwait in 1990³² or, more recently, the invasion and annexation of Ukrainian Crimea by Russian forces in 2014³³. Grave breaches of the prohibition on the use of force, such as acts of occupation or annexation, have also been condemned in the past, some of which are still ongoing, such as the occupation of Northern Cyprus by Turkey, Nagorno Karabakh by Armenia, Western Sahara by Morocco or Palestine by Israel³⁴. The International Court of Justice (ICJ) has condemned the USA for an illegal use of force in Nicaragua in 1986 and Uganda for a grave breach of the UN Charter against the Democratic Republic of the Congo in 2005³⁵. As illustrated by this last precedent, some of those conflicts have generated an incalculable number of victims and untold damage³⁶. In short, given that the situation in Ukraine is continuing to evolve, it would be excessive at this stage to state that it is unprecedented in relation either to the gravity of violations perpetrated (aggression, occupation, annexation, etc.) or to the number of victims (at least based on current information).

At the same time, given the number, the repetition and the severity of condemnations for the Russian war in Ukraine, it could indeed be argued that we are confronted with an unprecedented situation. In all the precedents just evoked, condemnations have sometimes been numerous (in particular after the invasion of Kuwait by Iraq in 1990 and the invasion of Iraq by the USA in 2003). But the scale of condemnations either by States or scholars is undoubtedly even larger in regard to Russia's invasion of Ukraine, with the case of the Institute of International Law being particularly telling in this regard. As the most widely recognised group of qualified publicists from various nations, this organisation is traditionally extremely prudent in the formulation of its resolutions and statements. Hence, it has previously explicitly chosen *not* to condemn past military interventions even with regard to blatant UN Charter violations³⁷. Yet, with Russia's 2022 invasion of Ukraine, the Institute quickly adopted a statement condemning the aggression following a particularly strong majority of votes³⁸. In conclusion, the situation in Ukraine, while not

³¹ See e.g. the Non-aligned Movement, composed by the majority of the UN Members; United Nations Security Council, [The situation between Iraq and Kuwait – Verbatim Record](#), 58th year: 4726th meeting, UN Doc S_PV.4726, 27 March 2003, p. 7; United Nations General Assembly, [Follow-up to and implementation of the Monterrey Consensus and Doha Declaration on Financing for Development - Report of the Secretary-General](#), Sixty-eighth session Follow-up to and implementation of the outcome of the 2002 International Conference on Financing for Development and the 2008 Review Conference, UN Doc A/58/68-S/2003/357, 3 September 2013. See also others sources quoted in O. Corten, '[Opération Iraqi Freedom: peut-on admettre l'argument de l'autorisation implicite' du Conseil de sécurité?](#)', *Revue Belge de Droit International*, No 1, 2003, pp. 205-247; O. Corten, *The Law against War*, 2nd ed., Hart Pub, Oxford, 2021, pp. 370-371.

³² United Nations Security Council, [Resolution 678 on authorizing Member States to use all necessary means to implement Security Council resolution 660 \(1990\) and all relevant resolutions](#), UN Doc S/Res/678(1990), 29 November 1990; E. de Wet, 'The Gulf War — 1990-1991', in T. Ruys, O. Corten and A. Hofer (eds), *The Use of Force in International Law. A Case-Based Approach*, Oxford University Press, Oxford, 2018, pp. 459-463.

³³ United Nations General Assembly, [Resolution 68/282 on Triennial review of the rates and standards for reimbursement to Member States for contingent-owned equipment](#), UN Doc A/Res/68/282, 27 March 2014; M.E. O'Connell, '[The Crisis in Ukraine](#)', in T. Ruys, O. Corten and A. Hofer (eds), *The Use of Force in International Law. A Case-Based Approach*, Oxford University Press, Oxford, 2018, pp. 857-860; O. Corten, '[The Russian Intervention in the Ukrainian Crisis: was jus contra bellum 'confirmed rather than weakened'?](#)', *Journal on the Use of Force and International Law*, Vol 2, No 1, 2015, pp. 17-41.

³⁴ A. Lagerwall, *Le principe ex injuria jus non oritur en droit international*, Bruylant, Bruxelles, 2016.

³⁵ International Court of Justice, [Military and Paramilitary Activities in and against Nicaragua \(Nicaragua v. United States\)](#), Judgement, ICJ Rep 1986, 14ff, 27 June 1986; International Court of Justice, [Armed Activities on the territory of the Congo \(DRC v. Uganda\)](#), Judgement, ICJ Rep 2005, 168ff, 19 December 2005.

³⁶ International Court of Justice, [Armed Activities on the territory of the Congo. Reparations \(DRC v. Uganda\)](#), Judgement, ICJ Rep 2022, 9 February 2022.

³⁷ See e.g. the prudent [Declaration on the use of force](#) of 2 September 2003 commented by J. Salmon, '[La déclaration de Bruges sur le recours à la force](#)', *Revue Belge de Droit International*, Vol 36, No 2, 2003 pp. 566-572.

³⁸ *Supra* note 29.

unprecedented in the nature and extent of the violation of the UN Charter, has met with an unprecedented reaction. Against this background, it is not surprising that the creation of an *ad hoc* tribunal has been justified as a *sui generis* solution adapted to a *sui generis* situation.

2.2 The unprecedented creation of a tribunal?

Those in favour of creating a Ukraine aggression tribunal are not always very explicit as to the legal basis of its creation or its jurisdictional basis for prosecuting members of the leadership of Russia and its allies. For example, the joint statement issued on 16 October 2022 by the Ministers of Foreign Affairs of Estonia, Latvia and Lithuania, refers to the need to fill the 'jurisdictional loophole' and bring to justice those responsible for the crime of aggression committed against Ukraine. However, it says nothing concrete as to how this special tribunal will be created, stating rather elusively that '[t]he EU together with our partners must be at the center of this effort'³⁹. Nevertheless, there have been several models for the creation of the special tribunal that have been suggested, most of which are inspired by precedents relating to similar international and internationalised or hybrid tribunals having been created in the past. These precedents inform not only the creation process but also several substantive questions such as those relating to immunities and the obligation of cooperation. It is thus important to examine the following tribunals in some detail in order to have a better understanding of the circumstances surrounding their creation and jurisdiction and to conclude whether each of them is indeed as useful a precedent as it has been claimed to be: the military tribunals of Nuremberg and Tokyo (Section 2.2.1); the international criminal tribunals for the former Yugoslavia and Rwanda (Section 2.2.2); the Special Court for Sierra Leone; the Extraordinary Chambers in the Courts of Cambodia (Section 2.2.3); the Special Tribunal for Lebanon (Section 2.2.4); the Extraordinary African Chambers (Section 2.2.5); and finally the Kosovo Specialist Chambers (Section 2.2.6)⁴⁰. A comparative table with a brief overview of the key characteristics of these tribunals is annexed to this in-depth analysis.

2.2.1 The international military tribunals for Nuremberg and Tokyo

The two first international military tribunals were created after the Second World War in Nuremberg and Tokyo. Following Germany's unconditional surrender at the end of the Second World War, the USA, the Union of Soviet Socialist Republics, France and the United Kingdom occupied the country by assuming 'supreme authority with respect to Germany, including all the powers possessed by the German government'⁴¹. On 8 August 1945, 'acting in the interests of all the United Nations', the four occupying powers adopted an agreement for the prosecution and punishment of major war criminals from the European axis, whose article 1 provided for the establishment of this tribunal 'after consultation with the Control Council for Germany'⁴² - the body comprising commanders-in-chief from the four occupying powers⁴³.

The International Military Tribunal for the Far East (IMTFE) was established in Tokyo a few months later. In the Instrument of Surrender concluded on 2 September 1945, Japan had accepted that 'the authority of the Emperor and the Japanese Government to rule the State [of Japan] shall be subject to the Supreme

³⁹ Ministry of Foreign Affairs of Lithuania, '[The Ministers of Estonia, Latvia and Lithuania call to establish a Special Tribunal to investigate the crime of Russia's aggression](#)', Joint Statement, 16 October 2022.

⁴⁰ For more information on all these precedents, see generally E. David, *Éléments de droit pénal international et européen*, 2^e édition, Vol 2, Bruylant, Bruxelles, 2018, pp. 884 ff.

⁴¹ Allies of World War II, Berlin Declaration, 5 June 1945.

⁴² Allies of World War II, [Charter of the International Military Tribunal – London Agreement for the prosecution and punishment of the major war criminals of the European Axis](#), 8 August 1945.

⁴³ Allies of World War II, [Statement by the Governments of the United Kingdom, the United States of America, the Union of Soviet Socialist Republics and the Provisional Government of the French Republic on Control Machinery in Germany](#), 5 June 1945.

Commander for the Allied Powers⁴⁴ and that all war criminals should be brought to justice⁴⁵. By virtue of the powers conferred on him and making specific reference to the acceptance by Japan of bringing war criminals to justice, the Supreme Commander for the Allied Powers in Japan, US General Douglas MacArthur, issued on 19 January 1946 a special proclamation establishing the IMTFE⁴⁶.

Both tribunals had jurisdiction over the three following crimes: crimes against peace (the equivalent of the crime of aggression), war crimes and crimes against humanity⁴⁷. It should be noted that jurisdiction over crimes against peace is highly exceptional: the Nuremberg International Military Tribunal (NIMT) and IMTFE are the only tribunals among those examined here whose jurisdiction covers such crimes. This is probably one of the reasons why the NIMT was mentioned as being 'the closest analogy in terms of a multinational tribunal' to the situation in Ukraine⁴⁸.

Many of the scholars advocating for the creation of an *ad hoc* tribunal for the crime of aggression against Ukraine have pointed especially to the NIMT as a relevant precedent⁴⁹. There are however substantial differences between the two situations. As explained above, the creation of the NIMT and IMTFE was the act of States exercising authority in the name of Germany and Japan respectively⁵⁰, whose nationals were going to be tried by the tribunals. No such authority is exercised over Russia and its allies and this is of crucial importance for the question of immunities of the persons that are likely to be brought before the Ukraine aggression tribunal. Moreover, at the time no permanent international criminal court existed. When the creation of the NIMT was decided upon (August 1945), the UN did not even exist either⁵¹. None of these elements apply to Ukraine. In conclusion, in the authors' view, the NIMT is not as helpful a precedent for the creation of the Ukraine aggression tribunal as some stakeholders make it out to be.

2.2.2 The international criminal tribunals for the former Yugoslavia and Rwanda

Decades later, in 1993, the UNSC created the International Criminal Tribunal for the former Yugoslavia (ICTY) and one year later, following an explicit request from the Government of Rwanda⁵², the International Criminal Tribunal for Rwanda (ICTR). Both tribunals were established by a resolution adopted under Chapter VII of the UN Charter⁵³ and were binding on all UN Member States by virtue of article 25 of the UN

⁴⁴ U.S. Joint Chiefs of Staff, [Instruments of Japanese Surrender](#), 2 September 1945.

⁴⁵ D. MacArthur, General of the US Army, [Supreme Commander for the Allied Powers, Special proclamation: Establishment of an International Military Tribunal for the Far East](#), 19 January 1946.

⁴⁶ D. MacArthur, General of the US Army, [Supreme Commander for the Allied Powers, Special proclamation: Establishment of an International Military Tribunal for the Far East](#), 19 January 1946.

⁴⁷ United Nations, [Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis \("London Agreement"\)](#), 8 August 1945, Article 6; International Military Tribunal for the Far East, [Statute](#), 19 January 1946, article 5.

⁴⁸ J. Anderson, ["Ukraine: "The momentum is there for a tribunal on aggression"'](#), 'Interview of Mykola Gnatovsky, professor of international law at the University of Kyiv and special advisor to Ukraine's Ministry of Foreign Affairs, [JusticeInfo.net](#), 12 April 2022.

⁴⁹ See, among many, *ibidem*; G. Brown, D. Akande, et al., [Statement calling for the Creation of a Special Tribunal for the Punishment of the Crime of Aggression against Ukraine](#), 4 March 2022; P. Sands, ["Why we need a new Nuremberg trial to make Putin pay: From Britain's leading expert on crimes against humanity Philippe Sands, a powerful personal plea for the world to hold a tribunal like the one which condemned Hitler's henchmen"](#), [Daily Mail](#), 4 March 2022; see some of the scholars interviewed in J. H. Anderson, ["A Nuremberg for Russia's Crime of Aggression?"](#), [JusticeInfo.net](#), 22 April 2002; United Nations Security Council, [Speech made by President of Ukraine Volodymyr Zelenskyy – Verbatim Record](#), UN Doc. S/PV.9011, 5 April 2022, p. 9.

⁵⁰ See along the same lines, T. Dannenbaum, ["Mechanisms for Criminal Prosecution of Russia's Aggression Against Ukraine"](#), [Just Security](#), 10 March 2022; ; S. Vasiliev, ["Aggression against Ukraine: Avenues for Accountability for Core Crimes"](#), [EJIL:Talk!](#), 3 March 2022.

⁵¹ United Nations, [Charter of the United Nations](#), 1 UNTS XVI, 24 October 1945.

⁵² United Nations Security Council, [Letter dated 28 September 1994 from the Permanent Representative of Rwanda to the United Nations addressed to the president of the Security Council](#), UN Doc. S/1994/1115, 29 September 1994, p. 4.

⁵³ United Nations Security Council, [Resolution 827 \(1993\) on establishment of the International Tribunal for Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991](#), UN Doc S/RES/827(1993), 25 May 1993, §2; United Nations Security Council, [Resolution 955 \(1994\) on establishment of an International Tribunal for Rwanda and adoption of the Statute of the Tribunal](#), UN Doc S/RES/955(1994), 8 November 1994, §1.

Charter⁵⁴. Accordingly, all States had an obligation to cooperate with the two tribunals, an obligation which was explicitly spelt out in the respective resolutions⁵⁵. Both tribunals were subsidiary organs of the UNSC. Their jurisdiction was limited to the crime of genocide, crimes against humanity and war crimes⁵⁶ and did not include the crime of aggression, even if such inclusion could have been envisaged, especially for the ICTY whose jurisdiction explicitly covers war crimes committed during an international armed conflict⁵⁷, thereby recognising that such conflict(s) did take place in the context of wars in the former Yugoslavia. It may also be useful to indicate that the budget of the two tribunals was extremely high, each tribunal surpassing USD one billion⁵⁸.

Since the creation of a Ukraine aggression tribunal by means of a binding UNSC resolution adopted under Chapter VII is, to say the least, highly improbable, the ICTY and ICTR are not of direct relevance here. They are however useful in identifying the differences between these tribunals and the envisaged models for the creation of an *ad hoc* tribunal for Ukraine.

2.2.3 The Special Court for Sierra Leone

In the context of the non-international armed conflict opposing the government of Sierra Leone and the rebels of the Revolutionary United Front, Sierra Leone asked from the UNSC to create a third international criminal tribunal, similar to the ICTY and ICTR⁵⁹. The UNSC decided instead to request 'the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court'⁶⁰. Negotiations were ultimately successful, with a formal agreement between the UN and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone (SCSL) being concluded on 16 January 2002⁶¹. This Court had jurisdiction over crimes against humanity, war crimes as well as a limited list of crimes under Sierra Leonean law⁶². Moreover, it had the power to prosecute persons, including leaders, responsible for such crimes⁶³, except for peacekeepers and related personnel who remained under the primary jurisdiction of the sending State⁶⁴. Contrary to the ICTY and the ICTR, the SCSL

⁵⁴ United Nations, [Charter of the United Nations](#), 1 UNTS XVI, 24 October 1945, article 25: 'The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'.

⁵⁵ United Nations Security Council, [Resolution 827 \(1993\) on establishment of the International Tribunal for Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991](#), Un Doc S/RES/827(1993), 25 May 1993, §4; United Nations Security Council, [Resolution 955 \(1994\) on establishment of an International Tribunal for Rwanda and adoption of the Statute of the Tribunal](#), Un Doc S/RES/955(1994), 8 November 1994, §2.

⁵⁶ United Nations Security Council, [Resolution 827 \(1993\) on establishment of the International Tribunal for Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991](#), Un Doc S/RES/827(1993), 25 May 1993, articles 2-5; United Nations Security Council, [Resolution 955 \(1994\) on establishment of an International Tribunal for Rwanda and adoption of the Statute of the Tribunal](#), Un Doc S/RES/955(1994), 8 November 1994, articles 2-4.

⁵⁷ United Nations Security Council, [Resolution 827 \(1993\) on establishment of the International Tribunal for Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991](#), Un Doc S/RES/827(1993), 25 May 1993, articles 2: 'Grave breaches to the Geneva Conventions of 1949'.

⁵⁸ In 2008, the total budget of the ICTR since its creation was at USD 1.1 billion: Hirondelle News Agency, [ICTR/Budget – UN Approves 267 million dollars ICRT budget](#), *JusticeInfo.net*, 17 January 2008; only for the years 2010-2016, the ICTY budget was approximately USD 716 million, ICTY, [About the ICTY: The Cost of Justice](#).

⁵⁹ United Nations Security Council, [Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council](#), S/2000/786, 10 August 2000, Annex.

⁶⁰ United Nations Security Council, [Resolution 1315 \(2000\) on the situation in Sierra Leone](#), Un Doc S/RES/1315 (2000), 14 August 2000, §1.

⁶¹ Special Court for Sierra Leone, [Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone](#), 16 January 2002, p. 138 ss.

⁶² Special Court for Sierra Leone, [Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone](#), 16 January 2002, articles 2-5.

⁶³ Special Court for Sierra Leone, [Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone](#), 16 January 2002, article 1§1.

⁶⁴ Special Court for Sierra Leone, [Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone](#), 16 January 2002, article 1§2-3.

was not a subsidiary organ of the UNSC. According to the late international criminal law judge and expert Antonio Cassese, it was a 'unique institution', an 'international judicial institution' that was 'not part of the national legal system of Sierra Leone'⁶⁵. The Court's total budget from 2002 to 2010 was calculated to be approximately USD 210 million⁶⁶ and is believed to have reached USD 300 million by 2013 when the SCSL ended its work⁶⁷.

The SCSL has been mentioned as a precedent that can be relevant to the creation of a Ukraine aggression tribunal⁶⁸. Although in some cases it has been linked to the possibility of creating the tribunal through the action of the UNGA⁶⁹, it is evident from the short presentation above that it was the UNSC, not the Assembly, that was involved in the creation of the SCSL. Since it is highly improbable that the Council will request the UN Secretary-General to spearhead negotiations for creating an aggression tribunal in the case of Ukraine, the two situations can be clearly distinguished. It seems therefore highly unlikely that the SCSL will serve as a model for the creation of a Ukraine aggression tribunal.

2.2.4 The Extraordinary Chambers in the Courts of Cambodia

The Extraordinary Chambers in the Courts of Cambodia (ECCC) provide the second example of an agreement between the UN and a State member of the organisation aiming at ensuring the fight against impunity for international crimes. This time, it was Cambodia that had requested the 'assistance of the United Nations and the international community in bringing to justice those persons responsible for the genocide and crimes against humanity committed during the rule of the Khmer Rouge from 1975 to 1979'⁷⁰. Negotiations ensued and Cambodia, which wished to be involved in the setting up of the criminal proceedings, passed a law in 2001 establishing the ECCC as part of the existing Cambodian court structure⁷¹. The ECCC's jurisdiction covered genocide, crimes against humanity, war crimes, violations of the 1961 Vienna Convention on Diplomatic Relations, as well as a list of crimes under Cambodian penal law⁷². Following a request by the UNGA⁷³, the UN Secretary-General concluded an agreement with Cambodia recognising establishment of the Extraordinary Chambers by the Law of 2001 and regulating the cooperation between the UN and Cambodia with respect to these Chambers⁷⁴. The budget of the ECCC

⁶⁵ A. Cassese, [Report on the Special Court for Sierra Leone Submitted by the Independent Expert](#), 12 December 2006, p. 8§26.

⁶⁶ Cherner Jalloh, C., '[Special Court for Sierra Leone: Achieving Justice?](#)', *Michigan Journal of International Law*, Vol 32, No 3, 2011, p. 432.

⁶⁷ Gberie, L., '[The Special Court for Sierra Leone rests – for good](#)', *Africa Renewal*, April 2014.

⁶⁸ See comments by Yale Law School Professor Oona Hathaway reported in: United Nations General Assembly, [Letter dated 12 August 2022 from the representatives of Latvia, Liechtenstein and Ukraine to the United Nations addressed to the Secretary-General](#), Chair's summary of an event organized by the permanent missions of Latvia and Liechtenstein to the United Nations in June 2022, reported in UN General Assembly – UN Security Council, UN Doc. A/ES-11/7 – S/2022/616, 17 August 2022, p. 3.

⁶⁹ C. McDougall, '[Prosecuting Putin for his Crime of Aggression Against Ukraine: Part Two](#)', *Oxford Human Rights Hub*, 8 March 2022; D. Scheffer, '[The Case for Creating a Special Tribunal to prosecute the Crime of Aggression Committed Against Ukraine \(Part IV\), Information Sharing, Victim participation, Outreach and More](#)', *Just Security*, 28 September 2002.

⁷⁰ United Nations, [Identical letters dated 23 June 1997 from the Secretary-general addressed to the president of the General Assembly and to the President of the Security Council, Annex: Letter dated 21 June 1997 from the First and Second Prime Ministers of Cambodia addressed to the Secretary-General](#), UN Doc. A/51/930 – S/1997/488, 24 June 1997.

⁷¹ King of Cambodia, [Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea](#), NS/RKM/0801/12, 10 August 2001, article 2.

⁷² King of Cambodia, [Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea](#), NS/RKM/0801/12, 10 August 2001, articles 3-8.

⁷³ United Nations General Assembly, [Resolution 57/228. Khmer Rouge trials](#), UN Doc A/RES/57/228, 22 May 2003, §1.

⁷⁴ Extraordinary Chambers in the Court of Cambodia, [Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes committed during the Period of Democratic Kampuchea](#), 6 June 2003, UNTS, Vol 2329, no 41723. The UN General Assembly had approved the draft of the agreement, [Resolution 57/228. Khmer Rouge trials](#), UN Doc A/RES/57/228, 22 May 2003.

from 2006, when the Chambers became operational, until 2022, is reported to be of about USD 330 million⁷⁵.

Looking at the situation today, it is conceivable that the UNGA request the Secretary-General to work towards concluding an agreement for setting up a similar body charged with responsibility for dealing with Russia's aggression towards Ukraine. This has been suggested by several proponents of the creation of the tribunal, some of them making an explicit reference to the ECCC as a useful precedent in this respect⁷⁶. However, as it has been correctly observed, 'such a tribunal would not be rooted in the General Assembly's coercive or other legal authority. Ultimately, [its] authority [...] would be derivative of the underlying jurisdictional authority of the States involved'⁷⁷. Moreover, the Cambodian precedent cannot be of much help with the question of immunities and cooperation. In the ECCC's case, the suspects' own State of nationality - Cambodia - asked for the ECCC's creation, adopted the necessary national legislation and was a party to the relevant agreement with the UN. This situation is of course not applicable in Ukraine.

2.2.5 The Special Tribunal for Lebanon

This Special Tribunal for Lebanon (STL) is relevant for the in-depth analysis because it was also established by an agreement between the UN and Lebanon. Nevertheless, it should be noted that its jurisdiction extends only to crimes committed in relation to one specific incident, namely 'the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons'⁷⁸. The process of establishment was similar to that for the SCSL, in that Lebanon asked the UNSC to set up an international tribunal in order to bring to justice those responsible for the attack⁷⁹. Hence, the UNSC requested that the Secretary-General look into the situation⁸⁰ and 'negotiate an agreement with the Government of Lebanon aimed at establishing a tribunal of an international character'⁸¹ and, finally, the two parties concluded an agreement on the establishment of the STL, which was signed by Lebanon on 23 January and by the UN on 6 February 2007⁸². The agreement entered into

⁷⁵ United Nations, '[Cambodia: UN-backed tribunal ends with conviction upheld for last living Khmer Rouge leader](#)', *UN News*, 22 September 2022.

⁷⁶ See United Nations General Assembly, '[Letter dated 12 August 2022 from the representatives of Latvia, Liechtenstein and Ukraine to the United Nations addressed to the Secretary-General](#)', Chair's summary of an event organized by the permanent missions of Latvia and Liechtenstein to the United Nations in June 2022, reported in UN General Assembly – UN Security Council, UN Doc. A/ES-11/7 – S/2022/616, 17 August 2022, p. 3; O. Hathaway, '[The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine \(Part I\). An agreement between the United Nations and Ukraine can pave the way](#)', *Just Security*, 20 September 2022; D. Scheffer, '[The Case for Creating a Special Tribunal to prosecute the Crime of Aggression Committed Against Ukraine \(Part IV\), Information Sharing, Victim participation, Outreach and More](#)', *Just Security*, 28 September 2022; L. D. Johnson, '[United Nations Response Options to Russia's Aggression: Opportunities and Rabbit Holes](#)', *Just Security*, 1 March 2022; J. Trahan, '[U.N. General Assembly Should Recommend Creation of Crime of Aggression Tribunal For Ukraine: Nuremberg Is Not The Model](#)', *Just Security*, 7 March 2022; T. Dannenbaum, '[Mechanisms for Criminal Prosecution of Russia's Aggression Against Ukraine](#)', *Just Security*, 10 March 2022; C. McDougall, '[Prosecuting Putin for his Crime of Aggression Against Ukraine: Part Two](#)', *Oxford Human Rights Hub*, 8 March 2022.

⁷⁷ T. Dannenbaum, '[Mechanisms for Criminal Prosecution of Russia's Aggression Against Ukraine](#)', *Just Security*, 10 March 2022.

⁷⁸ United Nations Security Council, '[Resolution 1757 \(2007\) on the establishment of a Special Tribunal for Lebanon](#)', UN Doc S/RES/1757 (2007), 30 May 2007, article 1.

⁷⁹ United Nations Security Council, '[Letter dated 13 December 2005 from the Chargé d'affaires a.i. of the Permanent Mission of Lebanon to the United Nations addressed to the Secretary-General](#)', UN Doc. S/2005/783, 13 December 2005, p. 2.

⁸⁰ United Nations Security Council, '[Resolution 1644 \(2005\) on extension of the mandate of the UN International Independent Investigation Commission in Lebanon](#)', UN Doc S/RES/1644(2005), 15 December 2005, §6: 'to help the Lebanese Government identify the nature and scope of international assistance needed in this regard'.

⁸¹ United Nations Security Council, '[Resolution 1664 \(2006\) on negotiation of an agreement with the Government of Lebanon aimed at establishing a tribunal of international character](#)', UN Doc S/RES/1664(2006), 29 March 2006, §1.

⁸² United Nations Security Council, '[Resolution 1757 \(2007\) on the establishment of a Special Tribunal for Lebanon](#)', UN Doc S/RES/1757 (2007), 30 May 2007, preambular paragraph 7, Annex: Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon, Attachment: Statute of the Special Tribunal for Lebanon.

force on 10 June 2007 by virtue of paragraph 1(a) of UNSC resolution 1757 (2007)⁸³. Contrary to the ECCC, the STL is not part of the Lebanese court structure; its status is similar to that of the SCSL. Its budget from 2009 to 2020 has been calculated at approximately USD 800 million⁸⁴.

As it is obvious from the above, the UNSC was directly and closely involved in setting up the STL. Reproducing a remark made for previous tribunals, such involvement is not to be expected in the case of Ukraine. So, the STL precedent does not seem directly relevant, even though it has occasionally been mentioned by scholars in relation to the setting up of an *ad hoc* tribunal by virtue of a treaty between Ukraine and an international organisation⁸⁵.

2.2.6 The Extraordinary African Chambers

Outside the UN context, the practice of establishing international criminal tribunals has so far been extremely scarce. Two precedents have been cited as relevant in this respect: the Extraordinary African Chambers (EAC) as well as the Kosovo Specialist Chambers and Specialist Prosecutor's Office.

The EAC were created so that Senegal could prosecute Hissène Habré for international crimes committed in Chad during the time when he was acting president between 1982 and 1990⁸⁶. After he had been overthrown, Hissène Habré had fled and was residing in Senegal but, despite actions filed against him by victims both in Senegal and in Belgium, he had not been brought to justice. Following repeated but ultimately unsuccessful extradition requests, Belgium instituted proceedings before the ICJ against Senegal. In a judgment handed down on 20 July 2012, the Court found that Senegal had violated its obligations under the UN Convention against Torture by failing to bring Hissène Habré to justice⁸⁷. The Court concluded that Senegal 'must, without further delay, submit the case of Mr. Hissène Habré to its competent authorities for the purpose of prosecution, if it does not extradite him'⁸⁸. Following this judgment and after extensive consultations in which the African Union had already been involved with all interested parties⁸⁹, an agreement was concluded between the African Union and Senegal establishing the EAC as part of the national court system in Senegal⁹⁰, similar to the ECCC. The jurisdiction of the EAC covers

⁸³ United Nations Security Council, [Resolution 1757 \(2007\) on the establishment of a Special Tribunal for Lebanon](#), UN Doc S/RES/1757 (2007), 30 May 2007, §1(a).

⁸⁴ T. Lingsma, '[Special Tribunal for Lebanon: Billion Dollar Trial](#)', *JusticeInfo.net*, 7 July 2020.

⁸⁵ D. Akande, '[Use of force under international law – The case of Ukraine](#)', 62nd meeting of the Committee of Legal Advisers on Public International Law (CAHDI), Strasbourg, France, 25 March 2022, pp. 6-7, §28.

⁸⁶ Agreement on the Establishment of the Extraordinary African Chambers within the Senegalese Judicial System between the Government of the Republic of Senegal and the African Union and the Statute of the Chambers, [Annex: Statute of the Extraordinary African Chambers within the courts of Senegal created to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990](#), 22 August 2012, article 1.

⁸⁷ International Court of Justice, [Questions relating to the obligation to prosecute or extradite \(Belgium v. Senegal\)](#), Judgment, *ICJ Reports 2012*, 20 July 2012, pp. 462-463, §122(4) and (5).

⁸⁸ International Court of Justice, [Questions relating to the obligation to prosecute or extradite \(Belgium v. Senegal\)](#), Judgment, *ICJ Reports 2012*, 20 July 2012, pp. 463, §122(6).

⁸⁹ African Union Assembly, [Decision on the Hissène Habré Case](#), Doc. Assembly/AU/Dec.401(XVIII), 31 January 2012.

⁹⁰ Agreement on the Establishment of the Extraordinary African Chambers within the Senegalese Judicial System between the Government of the Republic of Senegal and the African Union and the Statute of the Chambers, [Annex: Statute of the Extraordinary African Chambers within the courts of Senegal created to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990](#), 22 August 2012.

the crime of genocide, crimes against humanity, war crimes and torture⁹¹. The agreed budget for the Chambers was USD 11.4 million⁹².

Although the EAC has been proposed as a model for the creation of a Ukraine aggression tribunal⁹³, the two situations have substantial differences. In the Habré case, the State whose former President was tried by the tribunal - Chad - was a member to the international organisation that concluded the agreement with Senegal and had consented both to the tribunal's creation and to the waiver of any immunities that could apply⁹⁴. Russia is no longer a member of the Council of Europe, nor is it of course a member of the EU, and has expressed no consent with respect to the creation of an *ad hoc* tribunal or to waiving the immunities of any of its officials. Moreover, a UN organ (the ICJ) through its finding on the necessity to judge Hissène Habré had contributed to the tribunal's creation. Again, no such pronouncement exists in the case of Russia. Modelling the creation of a Ukraine aggression tribunal on the EAC will therefore not be as easy as it is sometimes thought of.

2.2.7 The Kosovo Specialist Chambers

Creation of the Kosovo Specialist Chambers and Specialist Prosecutor's Office was triggered by a report published on 7 January 2011 by the Committee on Legal Affairs and Human Rights of the Council of Europe Parliamentary Assembly on 'Inhuman treatment of people and illicit trafficking in human organs in Kosovo'⁹⁵. In accordance with its mandate, the European Union Rule of Law Mission in Kosovo (EULEX Kosovo)⁹⁶ opened a preliminary investigation directly after publication of the report⁹⁷ and set up a Special Investigative Task Force in order to 'further the investigation into the allegations contained in the Council of Europe report'⁹⁸. On 14 April 2014, the Republic of Kosovo's President sent a letter to the High Representative of the EU for Foreign Affairs and Security Policy indicating Kosovo's intention to set up separate judicial chambers within the Kosovo court system, staffed with and operated by EULEX international staff. The President asked for EULEX Kosovo's assistance in operating these structures⁹⁹ and

⁹¹ Agreement on the Establishment of the Extraordinary African Chambers within the Senegalese Judicial System between the Government of the Republic of Senegal and the African Union and the Statute of the Chambers, [Annex: Statute of the Extraordinary African Chambers within the courts of Senegal created to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990](#), 22 August 2012, article 4.

⁹² *Chambres Extraordinaires Africaines*, [Le Financement des Chambres](#), 12 June 2013; C. Hicks, '[The Trial of Hissène Habré and What it Could Mean for Justice in Africa](#)', *LSE blogs*, 23 April 2018.

⁹³ K. Jon Heller, '[The Best Option: An Extraordinary Ukrainian Chamber for Aggression](#)', *Opinio Juris*, 16 March 2022; Global Accountability Network, '[Considerations for the setting up of the Special Tribunal for Ukraine on the Crime of Aggression](#)', Global Accountability Network, July 2022, p. 7.

⁹⁴ Ministry of Justice of the Republic of Chad, [Letter from the Cabinet of the Ministry of Justice of the Republic of Chad to the Belgian judge investigating the charges against Hissène Habré](#), 7 October 2002; see also Human Rights Watch, [Chad Lifts Immunity of Ex-Dictator - Green Light to Prosecute Hissène Habré in Belgium](#), 5 December 2002.

⁹⁵ Council of Europe Parliamentary Assembly, Committee on Legal Affairs and Human Rights, [Inhuman treatment of people and illicit trafficking in human organs in Kosovo](#), Doc. 12462, 7 January 2011.

⁹⁶ Council of the European Union, [Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo. EULEX Kosovo](#), Official Journal of the EU, L. 42/92, 16 February 2008, Article 2 'Mission Statement': 'EULEX KOSOVO shall assist the Kosovo institutions, judicial authorities and law enforcement agencies in their progress towards sustainability and accountability and in further developing and strengthening an independent multi-ethnic justice system (...) and Article 3 'Tasks': 'In order to fulfill the Mission Statement set out in Article 2, EULEX KOSOVO shall: (...) (d) ensure that cases of war crimes, terrorism, organized crime, corruption, inter-ethnic crimes, financial/economic crimes and other serious crimes are properly investigated, prosecuted, adjudicated and enforced, according to the applicable law, including, where appropriate, by international investigators, prosecutors and judges jointly with Kosovo investigators, prosecutors and judges or independently, and by measures including, as appropriate, the creation of cooperation and coordination structures between police and prosecution authorities'.

⁹⁷ EULEX, [EULEX statement on Council of Europe report into human organ trafficking](#), Press Release, 28 January 2011.

⁹⁸ EULEX, [John Clint Williamson appointed as lead prosecutor for the Special Investigative task Force](#), Press Release, 29 August 2011.

⁹⁹ President of the Republic of Kosovo, [Letter from the President of the Republic of Kosovo to H.E. Baroness Catherine Ashton, High Representative of the Union for Foreign Affairs and Security Policy](#), 14 April 2014.

the EU High Representative replied positively to this invitation¹⁰⁰. On 23 April 2014, the Assembly of the Republic of Kosovo passed a law ratifying the international agreement contained in the letters exchanged¹⁰¹. Subsequently, on 3 August 2015 Kosovo's constitution was amended and a law was adopted effectively sanctioning the creation of the specialist chambers and the specialist prosecutor's office, with jurisdiction for crimes against humanity, war crimes as well as other crimes and offences under Kosovo law¹⁰². Since they became operational in 2015 and until 2021, the Chambers' budget has been of approximately USD 160 million¹⁰³.

Inspired by the Kosovo Specialist Chambers, some scholars have advocated for the creation of a special chamber within Ukraine's judicial system with the support of the Council of Europe¹⁰⁴. However, the involvement of EULEX Kosovo is more aptly qualified as assistance in the context of criminal cooperation. The same qualification would apply to any similar involvement by the Council of Europe in the 'special chamber on aggression' option identified above. Both cases are thus directly linked to the exercise of domestic criminal jurisdiction and seem to be quite distinct from the option envisaged by the majority, i.e. setting up a special or *ad hoc* international tribunal for handling Russia's aggression in Ukraine.

2.2.8 Concluding remarks

In conclusion, two main points deserve to be highlighted. Firstly, aside from the NIMT and IMTFE, none of the other existing international or internationalised *ad hoc* criminal tribunals have been vested with jurisdiction over the crime of aggression. Secondly, as indicated above, none of the precedents can be transposed as such to the situation in Ukraine. On the contrary, as we have shown, there are differences so substantial between the situation at hand and all the precedents invoked that even drawing analogies requires much caution. Nevertheless, these precedents can offer some guidance as to the possible legal basis for creating the Ukraine aggression tribunal, bearing in mind four general conclusions that can already be drawn:

- (i) Although a tribunal exercising criminal jurisdiction over a person allegedly responsible for international crimes did not exist when the relevant acts were committed, this does not violate any rights of the accused and more specifically his/her right to be tried by a tribunal 'established by law'¹⁰⁵;
- (ii) More generally, international law is sufficiently flexible to accommodate unprecedented solutions with respect to the fight against impunity for international crimes;
- (iii) The legal basis for setting up an *ad hoc* tribunal and the legal basis for the jurisdiction that this tribunal will have to prosecute individuals for specific crimes, although linked are not necessarily identical. In most of the cases examined above, even if the international or internationalised criminal tribunals were created by an international agreement, the legal basis for their jurisdiction is to be found in the domestic criminal jurisdiction of the States involved: Germany's jurisdiction for the NIMT, Sierra Leone's jurisdiction for the SCSL, Cambodia's jurisdiction for the ECCC, Lebanon's jurisdiction for the STL, Senegal's jurisdiction for the EAC, Kosovo's jurisdiction for the specialist

¹⁰⁰ High Representative of the Union for Foreign Affairs and Security Policy, [Letter from Catherine Ashton, High Representative, Vice-president of the European Commission to the President of the Republic of Kosovo](#), 14 April 2014.

¹⁰¹ Republic of Kosovo Assembly, [Law No. 04/L-274 On Ratification of the International Agreement Between the Republic of Kosovo and the European Union on the European Union Rule of Law Mission in Kosovo](#), 23 April 2014.

¹⁰² Republic of Kosovo Assembly, [Amendment of the Constitution of the Republic of Kosovo](#), Amendment no. 24, No.05-D-139, 3 August 2015; Republic of Kosovo Assembly, [Law No.05/L-053 On Specialist Chambers and Specialist Prosecutor's Office](#), 3 August 2015.

¹⁰³ Kosovo Specialist Chambers & Specialist Prosecutor's Office, [2020 Report](#), Kosovo Specialist Chambers (KSC), 2021; European Parliament, [Kosovo Specialist Chambers](#), Parliamentary Question E-001577/2021, 23 March 2021.

¹⁰⁴ O. Owiso, '[An Aggression Chamber for Ukraine Supported by the Council of Europe](#)', *Opinio Juris*, 30 March 2022.

¹⁰⁵ See and relevant text: United Nations General Assembly, [International Covenant on Civil and Political Rights](#), 23 March 1976, article 9; Council of Europe, [Convention for the Protection of Human Rights and Fundamental Freedoms \(European Convention on Human Rights, as amended\) \(ECHR\)](#), 4 November 1950, entry into force 3 September 1953, article 6.

chambers. The ICTY and ICTR are the only exception: the binding UNSC resolutions serve as the legal basis both for the creation of the tribunals and for the jurisdiction that these tribunals exercise;

- (iv) The cost of establishing an international or internationalised *ad hoc* tribunal is an additional factor to be taken into account in conjunction with the concrete outcome of each *ad hoc* tribunal. As it has been shown above, such tribunals are costly; as a reminder, in the less expensive precedent, the trial of one single person, Hissène Habré, cost more than USD 11 million; aside from this, approximately USD 160 million have been spent in the Kosovo Chambers during the last seven years with one first instance judgment being pronounced so far and three cases ongoing; the SCSL has convicted nine persons for a total budget of USD 300 million while, for approximately USD 330 million, the ECCC have convicted three; and finally after more than ten years of functioning and with a budget of approximately USD 800 million, the STL is yet to pronounce a judgment on a case.

3 Legal basis for the creation of the Ukraine aggression tribunal and the tribunal's jurisdiction

Determining the legal basis for creation of this tribunal and its jurisdiction is a crucial question in two respects. Firstly, it predetermines certain questions linked to the sovereign rights of Russia as a third party to the tribunal's creation, such as any immunities or difficulties in enforcement. Secondly, it is crucial for the rights of a future accused person before the tribunal. Conventional and customary human rights law recognises for every person the right not to be 'deprived of his liberty except on such grounds and in accordance with such procedure as are *established by law*', a right implying that everyone is 'entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal *established by law*'¹⁰⁶. In those instruments, the term 'law' must be interpreted broadly as covering both domestic and international regulations. Here, it must thus be determined under which circumstances international law can provide a legal basis for criminal prosecution of the act of aggression committed by Russia against Ukraine.

Three possibilities will be explored in this regard. The first two have been suggested by many of those in favour of creating a new *ad hoc* tribunal for the crime of aggression against Ukraine: the establishment of such a tribunal will be based either on the powers of the UN (Section 3.1) or on the conclusion of an agreement between Ukraine and an international organisation or between Ukraine and other States (Section 3.2). As will be shown, both options are legally problematic. Thus, a third, usually neglected, option will be explored: the ICC (Section 3.3). However, it must be noted that even this option is not without legal obstacles.

3.1 Creation by the United Nations?

As mentioned above, the UNSC has the power to create international tribunals according to chapter VII of the UN Charter and it has done so in the past. The advantage of this formula lies in the binding character of decisions adopted by the tribunal, the uncontested setting aside of any applicable immunities and the ensuing obligation of all UN Member States to cooperate accordingly.

However, for obvious political reasons, the creation of a tribunal with jurisdiction over the Russian aggression is highly improbable, if not impossible. An alternative could though be found in UNGA's powers. In this regard, resolution 377 ('Uniting for Peace') could be of some interest, particularly the following passage:

¹⁰⁶ Emphasis added; United Nations General Assembly, [International Covenant on Civil and Political Rights](#), 23 March 1976, article 9; Council of Europe, [Convention for the Protection of Human Rights and Fundamental Freedoms \(European Convention on Human Rights, as amended\) \(ECHR\)](#), 4 November 1950, entry into force 3 September 1953, article 6.

‘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*’¹⁰⁷.

This provision has been applied in several cases since the Korean war and its content is considered as reflecting a customary norm¹⁰⁸. It is precisely on this basis that UNGA has condemned Russia for its aggression on 2 March 2022, given that UNSC cannot exercise its primary responsibility¹⁰⁹. Similarly, it could be envisaged that a draft resolution proposing the establishment of a special tribunal would be put to a vote in the Council. Given the lack of unanimity between permanent members that would follow, the question could be transmitted to UNGA which would be entitled to make ‘appropriate recommendations to Members for collective measures’. But if UNGA could ‘recommend’ the creation of a tribunal, could it create the tribunal itself? The question is decisive since it is only in the second hypothesis that the tribunal would be legally created by the UN.

UNGA has in fact already created a tribunal in the past. On 24 November 1949, the UN Administrative Tribunal was established by UNGA¹¹⁰. The legality and powers of this tribunal were subsequently challenged but the ICJ ultimately recognised the legality of its creation. According to the Court, ‘[T]he Charter does not confer judicial functions on the General Assembly’. However, ‘by establishing the Administrative Tribunal, the General Assembly [...] was exercising a power which it had under the Charter to regulate staff relations’¹¹¹. The same assessment was made by the ICTY in considering the legal basis of its creation:

‘The General Assembly did not need to have military and police functions and powers in order to be able to establish the United Nations Emergency Force in the Middle East (“UNEF”) in 1956. Nor did the General Assembly have to be a judicial organ possessed of judicial functions and powers in order to be able to establish UNAT’¹¹².

It has thus been recognised that, even in the absence of specific provision in the UN Charter, UNGA is entitled to establish a ‘an independent and truly judicial body pronouncing final judgments without appeal within the limited field of its functions’¹¹³. Accordingly, the creation of a special tribunal would not as such be problematic for the rights of the accused enshrined in the instruments protecting human rights. At the same time, it is clear that the United Nations Appeals Tribunal (UNAT) is a tribunal judging UN civil servants and its creation could be considered as one of UNGA’s modalities in exercising its specific competences to

¹⁰⁷ Emphasis added; United Nations General Assembly, [Resolution 377 \(V\) – Uniting for Peace](#), UN Doc A/RES/5/377, 3 November 1950; L.H. Woolsey, ‘The ‘[Uniting for Peace](#)’ Resolution of the United Nations’, *American Journal of International Law*, Vol 45, No 1, 1951, pp. 129-137.

¹⁰⁸ O. Corten, *The Law against War*, 2nd ed., Hart Pub, Oxford, 2021, pp. 335-341; N.D. White, ‘The Relationship between the UNSC and General Assembly in Matters of International Peace and Security’, in M. Weller (ed), *The Oxford Handbook of the Use of Force in International Law*, Oxford University Press, Oxford, 2015, pp. 308-313.

¹⁰⁹ United Nations General Assembly, [Resolution ES-11/1 on Aggression against Ukraine](#), UN Doc A/RES/ES-11/1, 2 March 2022.

¹¹⁰ United Nations General Assembly, [Resolution 351 A\(IV\) on Establishment of an United Nations Administrative Tribunal](#), UN Doc A/RES/351(IV)A, 24 November 1949.

¹¹¹ International Court of Justice, [Effect of Awards of Compensation by the United Nations Administrative Tribunal](#), Advisory opinion, *ICJ Reports 1954*, 13 July 1954, p. 61.

¹¹² ICTY, [Prosecutor v. Dusko Tadic - Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction](#), Appeals Chamber, 2 October 1995, §38.

¹¹³ International Court of Justice, [Effect of Awards of Compensation by the United Nations Administrative Tribunal](#), Advisory opinion, *ICJ Reports 1954*, 13 July 1954, p. 53.

regulate the organisation's administration. By contrast, a special tribunal for Ukraine would be dedicated to the judgements of a UN Member State's citizens, which is clearly something different.

Indeed, the legality of creating such a tribunal *vis-à-vis* Russia would be more doubtful. According to article 25 of the UN Charter, Member States are obliged to apply the decisions adopted by UNSC. However, no similar provision provides such a power to UNGA. This body cannot therefore adopt 'decisions' binding States, as revealed by article 11 of the UN Charter which only refers to 'recommendations'. Adoption of the resolution 'Uniting for Peace' (and the practice that followed) did not alter the state of the law. At this stage, it only paved the way for the adoption of 'recommendations' and, in its 1962 advisory opinion of *Certain Expenses of the United Nations*, the ICJ confirmed that UNGA could not adopt 'coercive or enforcement action'¹¹⁴. In sum, the Charter does not prevent UNGA from organising the operation or creation of a judicial body with the consent of the interested State¹¹⁵. In this later case, we remain in the domain of 'recommendation' and not of a 'decision'. The UNGA resolution will not be the legal basis for the creation of the tribunal (like with the ECCC precedent examined above). It will not be the legal basis for the jurisdiction that will be exercised by this tribunal either: this jurisdiction will be grounded on the domestic criminal jurisdiction of Ukraine (like the ECCC's jurisdiction was grounded on Cambodia's domestic criminal jurisdiction). All those elements go against the argument that UNGA could create a tribunal binding on the UN Member States, which is probably why this option is generally dismissed by studies examining the creation of such a tribunal.

At the same time, we cannot definitively exclude this possibility, at least as a means of evolving international law. After all, UNGA's history reveals an extension of its prerogatives in many domains including the creation of a tribunal, as seen above. Creating a special tribunal for Ukraine by adopting a binding UNGA 'Uniting for peace' resolution would undoubtedly represent a step further but even in this scenario UNGA would still respect the core of UNSC's prerogatives in maintaining peace and security. To establish a judicial body designed to fight impunity for the most serious crimes of international law is one thing, to authorise military action is quite another. This later hypothesis would still clearly be excluded by this evolutive interpretation of the 'Uniting for Peace' resolution. By contrast, a dynamic interpretation of the Charter supporting its power to create exceptionally a special tribunal for the crime of aggression by adopting a binding UNGA resolution appears at least conceivable. In such a scenario, the status of the special tribunal would be similar to the one of the ICTY and ICTR: the legal basis for the creation and jurisdiction exercised by the tribunal would be the binding UNGA resolution and, consequently, such a resolution would be able to impose both the setting aside of any applicable immunities and an obligation to cooperate with the tribunal to all UN Member States.

3.2 Creation by an agreement between Ukraine and an international organisation or between States?

In view of the legal difficulties inherent in the tribunal's creation directly by the UN, the option that has gained the broadest support is setting up the special tribunal by virtue of an agreement¹¹⁶. As our overview

¹¹⁴ International Court of Justice, [Certain Expenses of the United Nations \(Article 17, paragraph 2 of the Charter\)](#), Advisory Opinion, *ICJ Reports 1962*, 20 July 1962, p. 164.

¹¹⁵ International Court of Justice, [Certain Expenses of the United Nations \(Article 17, paragraph 2 of the Charter\)](#), Advisory Opinion, *ICJ Reports 1962*, 20 July 1962, p. 164.

¹¹⁶ See among many: Ministry of Foreign Affairs of Ukraine, [Statement by Minister of Foreign Affairs of Ukraine at the SC Meeting on Russia's Aggression against Ukraine](#), M. Dmytro Kuleba, 22 September 2022; President of Ukraine, ['We must create a Special Tribunal on the crime of aggression against Ukraine'](#), Address by president Volodymyr Zelenskyy to the participants of the public debate "War and Law", Paris, 5 October 2022; President of Ukraine, ['President's Office presented the project of a special tribunal on the crime of aggression against Ukraine to the ambassadors of 30 countries'](#), 26 September 2022; United Nations, ['Law not War: A Special Tribunal for the Crime of Aggression'](#), side event organized in the margins of the International Law Week at the UN

of the international and internationalised *ad hoc* criminal tribunals above indicates, establishing a criminal tribunal by way of agreement between Ukraine and an international organisation or between Ukraine and other States willing to support such an endeavour is possible under international law.

It should be noted from the outset that Ukrainian criminal law already contains provisions covering acts of aggression. Indeed, the Ukrainian Criminal Code makes punishable the 'illegal crossing of the state border of Ukraine' (article 332-2) and the 'planning, preparation and waging of an aggressive war' (article 437)¹¹⁷. These provisions will be confirmed by and combined with an agreement that can be concluded by Ukraine (with the UN, with another international organisation or with other States). In short, instead of exercising this jurisdiction alone through its domestic courts, Ukraine may sovereignly decide that it wishes to delegate the exercise of jurisdiction to a tribunal that will be established by an international treaty. In any case, as was indicated earlier, the tribunal can be considered as having been 'established by law' and, hence, respectful of the rights of the accused.

We will now examine the possibility of creating the Ukraine aggression tribunal by agreement between: Ukraine and the UN (Section 3.2.1), Ukraine and the Council of Europe (Section 3.2.2), Ukraine and the EU (Section 3.2.3) and Ukraine and other States (Section 3.2.4).

3.2.1 Creation by an agreement between Ukraine and the UN

Precedents of the SCSL, the STL, and the ECCC reveal that it is possible to create an *ad hoc* tribunal by agreement between the interested State and the UN. In all the above-mentioned cases, the States concerned, namely Sierra Leone, Lebanon and Cambodia respectively, each formally expressed a wish to set up such a tribunal and in doing so requested the UN's participation. In all cases, the UN Secretary-General was mandated either by the UNSC (in the case of Sierra Leone and Lebanon) or by the UNGA (in the case of Cambodia) to conduct the relevant negotiations and thus concluded this agreement on behalf of the UN. The agreement then entered into force when the legal requirements for its entry into force had been complied with in accordance with the relevant provisions¹¹⁸. This is usually when the State's internal procedure for the ratification of the agreement has been concluded. The STL is an exception in this regard: failure to ensure ratification of this agreement by the Lebanese parliament led to the UNSC's adoption of resolution 1757 (2007), whereby the UNSC, acting under Chapter VII of the UN Charter, decided that the agreement 'shall enter into force on 10 June 2005'¹¹⁹.

Since this is one of the options highly advocated for in the Ukrainian context¹²⁰, it is useful to indicate that, in the case of Russia's aggression, there seems to be no difficulty in having a request for the establishment of an *ad hoc* tribunal addressed to the UN by Ukraine. The fact that any UNSC involvement can be excluded for obvious reasons does not condemn the UN to inaction. As the precedent of the ECCC's establishment

exploring relevant aspects of the creation of a Special Tribunal on the Crime of Aggression on the recommendation of the UN General Assembly, 25 October 2022.

¹¹⁷ Ukraine legislation, [The Criminal Code of Ukraine](#), Law of 5 April 2001, No 2341-III, 2001.

¹¹⁸ Special Court for Sierra Leone, [Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone](#), 16 January 2002, Article 21; Extraordinary Chambers in the Court of Cambodia, [Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes committed during the Period of Democratic Kampuchea](#), 6 June 2003, UNTS, Vol 2329, no 41723, Article 32; United Nations Security Council, [Resolution 1757 \(2007\) on the establishment of a Special Tribunal for Lebanon](#), UN Doc S/RES/1757 (2007), 30 May 2007, Article 19§1.

¹¹⁹ United Nations Security Council, [Resolution 1757 \(2007\) on the establishment of a Special Tribunal for Lebanon](#), UN Doc S/RES/1757 (2007), 30 May 2007, §1(a).

¹²⁰ See, among many: United Nations, '[Law not War: A Special Tribunal for the Crime of Aggression](#)', side event organized in the margins of the International Law Week at the UN exploring relevant aspects of the creation of a Special Tribunal on the Crime of Aggression on the recommendation of the UN General Assembly, 25 October 2022; O. Hathaway, '[The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine \(Part I\), An agreement between the United Nations and Ukraine can pave the way](#)', *Just Security*, 20 September 2022.

shows, it is clearly within the powers of UNGA to trigger the process of setting up a tribunal and request the UN Secretary-General to undertake the necessary steps to this effect.

Aside from the UN, would it be possible to set up an *ad hoc* tribunal by virtue of agreement between Ukraine and a regional organisation, such as the Council of Europe or the EU? These are the options that we will now explore below.

3.2.2 Creation by an agreement between Ukraine and the Council of Europe

Creation of the EAC by agreement between Senegal and the African Union certainly seems to constitute a precedent in favour of establishing an *ad hoc* tribunal by agreement between Ukraine and an organisation such as the Council of Europe. The process is similar to that described above regarding creation of the tribunal by virtue of an agreement with the UN: an agreement needs to be concluded between Ukraine and the organisation and Ukraine will then enact the relevant legislation in its domestic law. The possibility of such an agreement depends not only on Ukraine's consent (which, for the purposes of this in-depth analysis, is taken for granted) but also on the powers of the regional organisation in question. The African Union is an organisation whose objectives and principles are sufficiently broad to cover participation in an agreement establishing an *ad hoc* tribunal¹²¹ and the Assembly - the organ that had adopted the decision that led to the creation of the EAC - is the 'supreme organ of the Union', with powers which are equally broad¹²². The aim of the Council of Europe is, rather vaguely, 'to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress'¹²³ and it should be noted that '[m]atters relating to national defence do not fall within the scope of the Council of Europe'¹²⁴. However, these provisions have not been interpreted as preventing the Council of Europe from expressing itself on any aggression against Ukraine. Thus, with a decision adopted in September 2022, the Committee of Ministers:

1. 'reaffirmed the need for a strong and unequivocal international legal response to the aggression against Ukraine, permitting no place for impunity for serious violations of international law [...]';
2. stressed the urgent need to ensure a comprehensive system of accountability for serious violations of international law arising out of the Russian aggression against Ukraine in order to avoid impunity and to prevent further violations;
3. noted with interest the Ukrainian proposals to establish an *ad hoc* special tribunal for the crime of aggression against Ukraine [...]
4. welcomed ongoing efforts, in co-operation with Ukraine, to secure accountability for the crime of aggression against Ukraine and to secure full reparation for the damage, loss or injury caused by Russia's violations of international law in Ukraine; [...]¹²⁵.

Accordingly, seen under the prism of accountability for the commission of an international crime, the fight against impunity and the need to ensure full reparation for the damage caused by the crime, the establishment of a tribunal with jurisdiction to judge those responsible for a crime of aggression does not seem to lie outside the Council of Europe's scope of powers. In turn, this means that the Council would not be acting *ultra vires* in concluding an agreement with Ukraine for the creation of such a tribunal¹²⁶.

¹²¹ Organization of African Unity, [Constitutive act of the African Union](#), Lomé, 11 July 2000, Article 3 'Objectives' and Article 4 'Principles'.

¹²² Organization of African Unity, [Constitutive act of the African Union](#), Lomé, 11 July 2000, Article 6 §2 and Article 9 'Powers and Functions of the Assembly'.

¹²³ Council of Europe, [Statute of the Council of Europe](#), European Treaty Series - No. 1, 5.V.1949, London, 5 May 1949, Article 1(a).

¹²⁴ Council of Europe, [Statute of the Council of Europe](#), European Treaty Series - No. 1, 5.V.1949, London, 5 May 1949, Article 1(d).

¹²⁵ Council of Europe, [Consequences of the aggression of Russian Federation against Ukraine – Accountability for international crimes](#), Committee of Ministers, 1442nd meeting, CM/Del/Dec(2022)1442/2.3, 14-15 September 2022.

¹²⁶ See also O. Owiso, ['An Aggression Chamber for Ukraine Supported by the Council of Europe'](#), *Opinio Juris*, 30 March 2022.

3.2.3 Creation by an agreement between Ukraine and the EU

The possibility for creating an *ad hoc* tribunal by agreement with the EU would depend on whether or not the conclusion of such an agreement would come under its powers. As a precedent, establishment of the Kosovo Specialist Chambers is valuable here in that it confirms that the EU has already been involved in the establishment of similar organs. The fact that the Chambers' jurisdiction does not extend to the crime of aggression as such is not decisive in this respect: this question of aggression comes under the scope of the Union's foreign and security policy where the powers of the Union are sufficiently broad and flexible to be adapted to the circumstances of a specific situation, as the precedent of creating EULEX Kosovo itself shows. However, adopting this option entails a significant reduction in the number of States that would be involved in a tribunal's establishment. Perhaps this explains why the EP appears to advocate a more multilateral means of creating such a tribunal, with support from the UN and the Council of Europe¹²⁷, instead of an agreement simply between the EU and Ukraine.

3.2.4 Creation by agreement between Ukraine and other States

Creation of an *ad hoc* tribunal by agreement between Ukraine and other States would be predicated upon the precedent of the NIMT. This is indeed possible under international law and this avenue has been advocated by Ukraine's Minister of Foreign Affairs and by several scholars¹²⁸. As indicated above, the Ukrainian Criminal Code already includes crimes that cover aggression committed against Ukraine¹²⁹ and Ukraine has the sovereign right to delegate the exercise of this jurisdiction to a tribunal established by treaty. The same would apply to States that provide for the universal jurisdiction over the crime of aggression which may participate in the creation of such a tribunal, as it has been suggested¹³⁰. A UNGA resolution recommending the conclusion of such an agreement may offer additional legitimacy to the enterprise but it will not alter the legal status of the agreement.

3.2.5 Concluding remarks

It is useful to repeat here a crucial point which has already been stated above: in all the above-mentioned scenarios, the legal basis for the creation of the tribunal may be the agreement concluded by Ukraine (with the UN, with another organisation or with other States) complemented probably by the adoption of the necessary legislation in Ukraine, but the jurisdiction of the tribunal for prosecuting individuals for the crime of aggression will be grounded on the domestic criminal jurisdiction of Ukraine (or, in case of an agreement between States, of other States whose national legislation may provide for universal jurisdiction for the crime of aggression). This raises the difficult questions of immunities and obligation of cooperation with the *ad hoc* tribunal. Before moving on to these questions, it is worth examining an option that is discarded perhaps too quickly: instead of creating a new *ad hoc* tribunal, could an existing judicial mechanism - that of the ICC - be used?

¹²⁷ European Parliament, [Resolution of 19 May 2022 on the fight against impunity for war crimes in Ukraine](#), P9_TA(2022)0218, 19 May 2022, §12-13.

¹²⁸ C. McDougall, '[Why Creating a Special Tribunal for Aggression Against Ukraine is the Best Available Option: A Reply to Kevin Jon Heller and Other Critics](#)', *Opinio Juris*, 15 March 2022.

¹²⁹ See and relevant texts: Special Court for Sierra Leone, [Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone](#), 16 January 2002, Article 21; Extraordinary Chambers in the Court of Cambodia, [Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes committed during the Period of Democratic Kampuchea](#), 6 June 2003, UNTS, Vol 2329, no 41723, Article 32; United Nations Security Council, [Resolution 1757 \(2007\) on the establishment of a Special Tribunal for Lebanon](#), UN Doc S/RES/1757 (2007), 30 May 2007, Article 19§1.

¹³⁰ S. Vasiliev, '[Aggression against Ukraine: Avenues for Accountability for Core Crimes](#)', *EJIL:Talk!*, 3 March 2022.

3.3 Can the ICC exercise its jurisdiction over the crime of aggression in Ukraine?

Ukraine is not a party to the ICC Statute but has lodged two declarations accepting the jurisdiction of the Court for crimes committed on its territory from 21 November 2013 onwards¹³¹. On 2 March 2022, following referral of the situation in Ukraine to the ICC by several States, the Office of the Prosecutor announced the opening of an investigation on crimes falling within the jurisdiction of the Court committed on the territory of Ukraine¹³². These crimes include war crimes, crimes against humanity and genocide but not the crime of aggression. Indeed, for the other crimes it is sufficient for the State on whose territory the alleged crime took place to have ratified the Statute or to have accepted the jurisdiction of the Court¹³³. However, the exercise of jurisdiction by the Court over the crime of aggression is subject to additional conditions: both the State in whose territory the act of aggression is committed and the State whose nationals are the authors of the aggression must be parties to the Statute and must also have ratified Statute amendment relating to the crime of aggression¹³⁴. Since Russia and Ukraine have not done so, the ICC does not have jurisdiction over the act of aggression committed by Russian nationals in Ukraine.

The Statute foresees one alternative: the exercise of jurisdiction by the ICC by virtue of a referral by the UNSC¹³⁵. In this case, the limitation identified above does not apply. In other words, the Council can refer to the ICC an act of aggression committed by a State against another State irrespective of whether both the States concerned have accepted the jurisdiction of the ICC. However, according to the ICC Statute, this referral is to be made 'by the Security Council acting under Chapter VII of the Charter of the United Nations'¹³⁶. As mentioned above, the adoption of such a resolution being improbable if not impossible, one last option may be explored: can UNGA, *in lieu* of UNSC, refer a situation to the ICC? The discussion above relating to UNGA's powers is equally valid here. Given the limits of UNGA's powers, it is doubtful whether it can refer a situation to the ICC and give the Court jurisdiction over a situation against the will of the States involved. This is confirmed by the discussions within the International Law Commission (ILC) on the draft ICC Statute: while some ILC members had proposed to confer to UNGA the power to refer situations to the ICC, especially when UNSC is blocked by a veto, '[o]n further consideration, [...], it was felt that such a provision should not be included as the General Assembly lacked authority under the Charter of the United Nations to affect directly the rights of States against their will, especially in respect of issues of criminal jurisdiction'¹³⁷.

If one follows the evolutive interpretation according to which the UNGA could have the power to create a tribunal binding on Member States by virtue of the 'Uniting for Peace' resolution, then it is conceivable that this power could be exercised in order to refer a situation to the ICC. In both cases, UNGA would be exercising an authority to 'affect directly the rights of States against their will'. The ICC would of course also have to accept that the Statute - which explicitly refers to the UNSC - is read according to the evolution of powers of the UN organs under the UN Charter. In any case, in this scenario we would not be talking about

¹³¹ Embassy of Ukraine to the Kingdom of the Netherlands, [Declaration of 9 April 2014, covering acts committed between 21 November 2013 and 22 February 2014](#), 9 April 2014; Ministry of Foreign Affairs of Ukraine, [Declaration of 8 September 2015, covering acts committed since 20 February 2014](#), M. Dmytro Kuleba, 8 September 2015.

¹³² International Criminal Court, [Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation](#), 2 March 2022.

¹³³ United Nations General Assembly, [Rome Statute of the International Criminal Court \(last amended 2010\)](#), 17 July 1998, Article 12§2 and 12§3.

¹³⁴ United Nations General Assembly, [Rome Statute of the International Criminal Court \(last amended 2010\)](#), 17 July 1998, Article 15*bis* §2.

¹³⁵ United Nations General Assembly, [Rome Statute of the International Criminal Court \(last amended 2010\)](#), 17 July 1998, Article 15*ter* and Article 13(b).

¹³⁶ United Nations General Assembly, [Rome Statute of the International Criminal Court \(last amended 2010\)](#), 17 July 1998, Article 13(b).

¹³⁷ United Nations, [Report of the International Law Commission on the work of its forty-sixth session](#), UN Doc A/49/10, 2 May – 22 July 1994, p. 44, commentary of Article 23 §5.

the creation of a new tribunal but about using existing legal mechanisms, such as the ICC, to carry out the function for which they were created: fighting impunity for international crimes. This option therefore appears less radical than the creation of a new tribunal.

Nonetheless, the option poses difficulties and uncertainties as it requires a dynamic interpretation of international law, in a geopolitical climate which may not be conducive for such developments. In view of these difficulties, the most feasible way for creating an *ad hoc* tribunal for the crime of aggression seems to be the conclusion of an agreement. However, what does the creation of a tribunal by virtue of an international treaty mean for Russia? Would it have any legal consequences for Russian nationals that would in all likelihood be the object of prosecution by this tribunal? More specifically, would Russian nationals enjoy immunity before such a tribunal and would Russia be bound to cooperate with it? We will first address the question of immunity before moving on to cooperation later.

4 Problems of immunity

The crime of aggression has always been qualified as a 'leadership crime', because, to take up the words of the ICC Statute, 'only [...] persons in a position effectively to exercise control over or to direct the political or military action of a State' will have individual criminal responsibility for the crime of aggression¹³⁸. This highlights one of the most important obstacles to the exercise of jurisdiction over individuals committing international crimes: immunity. While the question is not new in international criminal law, it is rendered particularly acute by the nature of the crime of aggression. Indeed, due to the position they occupy, any persons responsible for this crime will almost certainly benefit from immunity for their actions. In order to bypass this obstacle, both the nature of the crime and the nature of the tribunal wishing to exercise jurisdiction over those responsible have been invoked. It has thus been argued that immunities do not apply to a specific list of most serious international crimes (Section 4.2) and even if they do apply, this application concerns only prosecutions before domestic courts not before an international tribunal (Section 4.3). We will examine these arguments and then turn to a further possible way of setting aside immunities in this specific case: self-defence (Section 4.4). But in order to understand the problem in all its complexity, it is necessary first to outline the general characteristics of immunities of State officials from criminal prosecution (Section 4.1).

4.1 General characteristics of immunities of State officials

For State officials, customary international law establishes two types of immunities from criminal jurisdiction: immunity *ratione personae* (personal immunity) (Section 4.1.1); and immunity *ratione materiae* (subject-matter immunity) (Section 4.1.2). These immunities are closely linked to sovereign equality among States (Section 4.1.3).

4.1.1 Immunity *ratione personae*

Which acts does this immunity cover? The scope of personal immunity is extremely broad. It covers all acts, both official and private, committed during the time when the State official is in office as well as private acts committed before this time.

Who benefits from this immunity? Only a limited number of State officials of the highest rank: Heads of State, Heads of Government, Ministers of Foreign Affairs. In this respect, the very broad scope in terms of acts covered by personal immunity is counterbalanced by the very limited number of persons entitled to it.

¹³⁸ United Nations General Assembly, [Rome Statute of the International Criminal Court \(last amended 2010\)](#), 17 July 1998, Article 25§3*bis*.

When does this immunity apply? Only during the time when the persons entitled to immunity are in office. When they leave office, these persons are treated like every other State official and are covered only by immunity *ratione materiae*.

To give a concrete example: since launching a war (even a war of aggression) is an official act of the State, Ukraine and any other State will be barred from exercising their criminal jurisdiction over President Putin or Minister Lavrov as long as they are in office, due to personal immunity.

4.1.2 Immunity *ratione materiae*

Which acts does this immunity cover? Only official acts committed during the time when the State official is in office. Acts committed in a private capacity are not covered.

Who benefits from this immunity? All State officials of every rank. Thus, immunity *ratione materiae* covers less acts but more persons than personal immunity.

When does this immunity apply? There is no temporal limitation for the application of this immunity. In other words, a State official will not be liable for criminal prosecution for acts committed in his/her official capacity both during the time when he/she is in office and after his/her service has ended.

To give a concrete example, assuming that Minister Lavrov leaves office, his involvement in the war of aggression against Ukraine remains an act committed in his official capacity; hence, Ukraine and any other State will still be barred from exercising their criminal jurisdiction over him even after he has ceased being a Minister of Foreign Affairs.

4.1.3 Immunities as a manifestation of sovereign equality among States

The existence of immunities is grounded on sovereign equality among States. Since all States are equal according to public international law and no state has primacy over another¹³⁹, their relationships are 'horizontal' not 'vertical' and one State cannot have jurisdiction over another. This means that the tribunals of a State cannot exercise jurisdiction over (i) another State¹⁴⁰ and (ii) a person which represents another State and through which that other State acts. It is in this latter case that immunities from criminal jurisdiction of State officials are relevant: they prevent a State from exercising criminal jurisdiction over foreign State officials. For the vast majority of State officials, this immunity does not cover private acts and is limited to acts committed in their official capacity since it is these acts that are linked to the activities of the State they represent and therefore to State sovereignty (immunity *ratione materiae*). But in the case of Heads of State, Heads of Government and Ministers of Foreign Affairs, their function is so closely linked to the State itself and it is so important for international relations that, when they are in office, they operate unhindered from the threat of any foreign prosecutions: customary international law vests them with a much broader immunity covering both acts committed in an official capacity and private acts (immunity *ratione personae*)¹⁴¹.

In general, two main exceptions have been invoked with respect to the application of these immunities. According to the first, immunities *ratione materiae* cannot be invoked when the relevant act constitutes an international crime. For the proponents of this view, if an international crime is committed, the person responsible will not be able to argue that he/she committed the act in his/her official capacity and thus

¹³⁹ United Nations, [Charter of the United Nations](#), 1 UNTS XVI, 24 October 1945, article 2§1; United Nations General Assembly, [Resolutions adopted on the Reports of the Sixth Committee - Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations \(A/8082\)](#), UN Doc A/RES/2625 (XXV), 24 October 1970, p. 121.

¹⁴⁰ International Court of Justice, [Jurisdictional Immunities of the State \(Germany v. Italy; Greece intervening\)](#), Judgment, *ICJ Reports* 2012, 3 February 2012, pp. 99-102.

¹⁴¹ Although, as the ICJ has stated, this immunity does not mean impunity; International Court of Justice, [Case concerning the Arrest warrant of 11 April 2000 \(Democratic Republic of the Congo v. Belgium\)](#), Judgment, *ICJ Reports* 2002, 14 February 2002, p. 25, §61.

invoke his/her immunity in order to escape prosecution. As we will see, the problem with this exception is that it is not firmly established in international law. Moreover, this exception does not apply to personal immunities. According to the second exception, all immunities (both *ratione personae* and *ratione materiae*) cannot be invoked if the person is to be judged by an international tribunal. In other words, even if Heads of State, Heads of Government and Ministers of Foreign Affairs of Russia and its allies are normally completely exempt from prosecution, they will not be able to invoke their immunity *ratione personae* before an international tribunal. Although this exception is firmly established in international law, the problem is in identifying which tribunals can be considered as 'international'.

4.2 Is there an exception to immunity for the most serious international crimes?

One of the most frequently invoked arguments with respect to immunities is that they do not apply to specific categories of international crimes. In a resolution adopted in 2009, the Institute of International Law asserted that, with regard to international crimes, a person acting on behalf of a State does not benefit from immunity from jurisdiction before the domestic courts of another State, except in case of personal immunity¹⁴². The 'international crimes' concerned are defined in the resolution as 'serious crimes under international law such as genocide, crimes against humanity, torture and war crimes, as reflected in relevant treaties and the statutes and jurisprudence of international courts and tribunals'¹⁴³. The ILC, which has been working on the immunity of State officials from foreign criminal jurisdiction since 2008, has also followed this approach. Draft article 7 adopted on first reading in 2022 provides that:

'1. Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law:

- (a) crime of genocide;
- (b) crimes against humanity;
- (c) war crimes;
- (d) crime of apartheid;
- (e) torture;
- (f) enforced disappearance'¹⁴⁴.

Whether or not this draft article corresponds to the existing state of international law is debatable and indeed being debated. The ILC itself in its commentary to this provision indicates that it reflects a 'discernible trend' in State practice 'towards limiting the applicability of immunity from jurisdiction *ratione materiae* in regard to certain types of behaviour that constitute crimes under international law'¹⁴⁵. Several members of the ILC disagreed with this provision asserting that, in international law, there was neither an established rule nor even a discernible trend towards the establishment of such exceptions to immunity

¹⁴² Institute of International Law, [Resolution on the Immunity from Jurisdiction of the State and of persons Who Act on behalf of the State in case of International Crimes](#), Napoli Session, 2009, Article III, §1-2.

¹⁴³ Institute of International Law, [Resolution on the Immunity from Jurisdiction of the State and of persons Who Act on behalf of the State in case of International Crimes](#), Napoli Session, 2009, Article I, §1.

¹⁴⁴ United Nations International Law Commission, [Immunity of State officials from foreign criminal jurisdiction, Texts and titles of the draft articles adopted by the Drafting Committee on first reading](#), UN Doc A/CN.4/L.969, 31 May 2022, p. 2.

¹⁴⁵ United Nations, [Report of the International Law Commission](#), Sixty-ninth session, UN Doc. A/72/10, 1 May - 2 June and 3 July - 4 August 2017, pp. 178-179, commentary to article 7§5.

from jurisdiction¹⁴⁶. Several States within the Sixth Committee of the UNGA also shared this view, while others supported the article¹⁴⁷.

In view of the above, unless one adopts a very flexible reading as to the State practice and *opinio juris* required for the identification of a rule of customary international law, it is difficult to assert that the exceptions to immunity *ratione materiae* reflect existing international law. Reference to a 'discernible trend' by the ILC itself indicates that the practice in support of the rule set down in draft article 7 is not sufficiently widespread, representative and consistent for a rule of customary international law to be established¹⁴⁸.

Although this point is frequently raised in discussions relating to the exercise of jurisdiction for international crimes, for the purposes of the analysis, it may actually not be necessary to take a definitive position on the aforementioned debate. Two elements must be mentioned in this regard.

First, the crime of aggression is *not* listed among the crimes to which the exception of immunity *ratione materiae* applies. Although its inclusion was supported by some of its members, the Commission explains that it decided *not* to include the crime of aggression on the list:

'in view of the nature of the crime of aggression, which would require national courts to determine the existence of a prior act of aggression by the foreign State, as well as the special political dimension of this type of crime, given that it constitutes a "crime of leaders"; and also in view of the fact that the Assembly of States Parties to the Rome Statute of the International Criminal Court has not taken a decision to activate the Court's jurisdiction over this crime'¹⁴⁹.

It should be noted though that the decision to activate the ICC's jurisdiction over the crime of aggression has since been adopted by the Assembly of States Parties to the ICC¹⁵⁰. Moreover, in the case of Ukraine, UNGA has qualified Russia's military intervention in Ukraine as an act of aggression¹⁵¹. This qualification certainly must be taken into account when assessing the difficulty identified by the ILC of having a national court determine whether or not an act of aggression exists. At the same time, such a qualification made by the UNGA cannot be considered as a legal statement that would bind any judicial body in the event it would exercise its jurisdiction in the case at hand. It is thus not sufficient to observe that a qualification of aggression has been made by the UNGA to avoid the difficulty raised by the ILC. Among those difficulties is the 'special political dimension' of the crime of aggression. Whilst it is not clear what exactly the ILC has in mind, this may refer to personal immunities that apply to persons more directly associated with committing the crime of aggression. Finally, even if there is some support for a view that the exception to immunity for serious international crimes reflects existing international law and covers the crime of aggression, it should be noted that this does not seem to be shared by all EU Member States. Indeed, opposing views have been expressed on this question by EU Member States before the UNGA. This makes it implausible that all EU Member States would wish to support a broad reading as to what an exception to existing international law on immunities should cover.

¹⁴⁶ United Nations International Law Commission, [Provisional summary record of the 3378th meeting](#), UN Doc A/CN.4/SR.3378, 18 August 2017, pp. 9-13.

¹⁴⁷ United Nations General Assembly, International Law Commission, [Report of the International Law Commission on the work of its sixty-ninth session \(2017\) - Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-second session, prepared by the Secretariat](#), UN Doc A/CN.4/713, 26 February 2018, pp. 10-11, §§29-37.

¹⁴⁸ United Nations International Law Commission, [Draft conclusions on identification of customary international law](#), annexed to UN Doc A/RES/73/203, 20 December 2018, p. 3, conclusion 8.

¹⁴⁹ United Nations, [Report of the International Law Commission](#), Sixty-ninth session, UN Doc. A/72/10, 1 May - 2 June and 3 July - 4 August 2017, pp. 185-186, commentary to article 7, §18.

¹⁵⁰ International Criminal Court – Assembly of States Parties to the Rome Statute, [Resolution ICC-ASP/16/Res.5, Activation on the jurisdiction of the Court over the crime of aggression](#), 14 December 2017.

¹⁵¹ United Nations General Assembly, [Resolution ES-11/1 on Aggression against Ukraine](#), UN Doc A/RES/ES-11/1, 18 March 2022.

Secondly, and this element is particularly decisive in the case of Ukraine, it is clear that **any exceptions to the immunity of State officials do not apply to the personal immunity that acting Heads of State, Heads of Government and Ministers of Foreign Affairs enjoy during their time in office**¹⁵². As specified by the ILC, this kind of immunity 'covers all acts performed, whether in a private or official capacity [...] during or prior to their term of office'¹⁵³. The ICJ clearly and strongly rejected any exception to personal immunities in the *Yerodia* Case. Referring to the Pinochet and Qadhafi cases that were invoked by Belgium as sufficient to establish a customary practice, the Court stated that it had:

[...] carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. *It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity*¹⁵⁴.

Thus, as indicated above, the acting Head of State, Head of Government and Minister of Foreign Affairs of the Russian Federation benefit from such a personal immunity as long as they are in office. Ultimately, the exception to immunities discussed here applies only with respect to the criminal jurisdiction of another State¹⁵⁵. Rules are different when it comes to the exercise of jurisdiction by an international criminal tribunal and it has been argued that immunities of State officials - either *ratione personae* or *ratione materiae* - do not apply at all to prosecutions before international tribunals.

4.3 Is there an exception to immunity for international tribunals?

It is the ICJ, in its 2002 judgment on the *Arrest Warrant* case, that identified a list of circumstances where 'the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution'. Among these circumstances, the ICJ asserted that:

'an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the [...] International Criminal Court created by the 1998 Rome Convention'¹⁵⁶.

Aside from the ICTY, the ICTR and the ICC which are mentioned in the *Arrest Warrant* judgment, one may be inclined to add to the list the NIMT, IMTFE, SCSL, ECCC, EAC, and the Kosovo Specialist Chambers, since the statutes of all these jurisdictions have provisions which set aside immunities, both *ratione personae* and

¹⁵² United Nations International Law Commission, [Immunity of State officials from foreign criminal jurisdiction, Texts and titles of the draft articles adopted by the Drafting Committee on first reading](#), UN Doc A/CN.4/L.969, 31 May 2022, p. 2, draft articles 3 and 4§1.

¹⁵³ United Nations International Law Commission, [Immunity of State officials from foreign criminal jurisdiction, Texts and titles of the draft articles adopted by the Drafting Committee on first reading](#), UN Doc A/CN.4/L.969, 31 May 2022, p. 2, draft article 4§2.

¹⁵⁴ Emphasis added by the authors. International Court of Justice, [Case concerning the Arrest warrant of 11 April 2000 \(Democratic Republic of the Congo v. Belgium\)](#), Judgment, *ICJ Reports 2002*, 14 February 2002, p. 24, §58.

¹⁵⁵ United Nations International Law Commission, [Immunity of State officials from foreign criminal jurisdiction, Texts and titles of the draft articles adopted by the Drafting Committee on first reading](#), UN Doc A/CN.4/L.969, 31 May 2022, p. 1, draft article 1§1.

¹⁵⁶ International Court of Justice, [Case concerning the Arrest warrant of 11 April 2000 \(Democratic Republic of the Congo v. Belgium\)](#), Judgment, *ICJ Reports 2002*, 14 February 2002, p. 25, §61. See generally E. David, *Éléments de droit pénal international et européen*, 2^e édition, Vol 2, Bruylant, Bruxelles, 2018, pp. 130-136.

*ratione materiae*¹⁵⁷. The SCSL offers a concrete precedent here in the case against Charles Taylor. When the SCSL confirmed his indictment and issued a warrant for his arrest, Taylor was acting President of Liberia. Yet, despite Liberia's explicit invocation of Taylor's immunity before the Court¹⁵⁸, the SCSL refused to grant him any personal immunity on the basis that (i) the SCSL is an international criminal court and (ii) that 'the principle seems now established that sovereign equality of States does not prevent a Head of State from being prosecuted before an international criminal tribunal or court'¹⁵⁹. Along the same lines, in a judgment handed down in 2019 relating to the non-execution of the arrest warrant issued by the Court against Al-Bashir, then acting President of Sudan, the ICC Appeals Chamber also found that Head of State immunity 'has never been recognised in international law as a bar to the jurisdiction of an international court', holding consequently that there is no 'rule of customary international law recognising Head of State immunity before international courts in the exercise of jurisdiction'¹⁶⁰. On the basis of these elements, it can thus be argued that if an international criminal tribunal is set up for the crime of aggression in Ukraine, immunities cannot bar the prosecution of foreign State officials, even if they are acting Heads of State. Indeed, this is one of the arguments often cited in favour of creating the Ukraine aggression tribunal by virtue of a treaty with the UN: a tribunal thus created would be international and, as such, it will not be bound to respect the immunities normally attached to the persons that will be subject to its jurisdiction¹⁶¹.

However, this conclusion must be nuanced further. Firstly, it is difficult to read the statutes and practice of the relevant international and internationalised tribunals as confirming that immunities do not apply before them simply due to their 'international' character. In the overwhelming majority of cases, any lifting of State officials' immunities can be considered as having been accepted, directly or indirectly, by the State concerned, as detailed below:

- (i) for the ICTY and the ICTR, the setting aside of immunities is the result of a binding resolution adopted by the UNSC, whose decisions all Member States have accepted to carry out by ratifying the UN Charter;
- (ii) States that set up the NIMT assumed 'supreme authority with respect to Germany' and exercised 'all the powers possessed by the German government'¹⁶²; they could thus set aside the immunities attached to German State officials; a similar reasoning can be applied in the case of Japanese officials' immunity before the IMTFE since the authority of the Supreme Commander for the Allied Powers

¹⁵⁷ MacArthur, General of the US Army, [Supreme Commander for the Allied Powers, Special proclamation: Establishment of an International Military Tribunal for the Far East](#), 19 January 1946, article 6; Special Court for Sierra Leone, [Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone](#), 16 January 2002, Article 6§2; Extraordinary Chambers in the Court of Cambodia, [Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes committed during the Period of Democratic Kampuchea](#), 6 June 2003, UNTS, Vol 2329, no 41723, , p. 11, Article 29§2; Agreement on the Establishment of the Extraordinary African Chambers within the Senegalese Judicial System between the Government of the Republic of Senegal and the African Union and the Statute of the Chambers, [Annex: Statute of the Extraordinary African Chambers within the courts of Senegal created to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990](#), 22 August 2012, Article 10§3; Assembly of Republic of Kosovo, [Law on Specialist Chambers and Specialist Prosecutor's Office](#), 3 August 2015, Article 16§1(b).

¹⁵⁸ Special Court for Sierra Leone, [The Prosecutor v. Charles Ghankay Taylor, Motion filed by the Government of the Republic of Liberia and President Charles Taylor \(under protest and without waiving of immunity accorded to the latter as Head of State of the Republic of Liberia\)](#), Case No SCSL-2003-01-0, 23 July 2003.

¹⁵⁹ Special Court for Sierra Leone, [The Prosecutor v. Charles Taylor - Decision on Immunity from Jurisdiction, Appeals Chamber](#), Case No SCSL-2003-01-1, 31 May 2004, pp. 18-25, §§37-54.

¹⁶⁰ International Criminal Court, [The Prosecutor v. Omar Hassan Ahmad Al-Bashir - Judgment in the Jordan Referral re Al-Bashir Appeal, Appeals Chamber](#), No ICC-02/05-01/09 OAA, 6 May 2019, p. 58, §113 (and more generally, pp 25-60, §§100-119).

¹⁶¹ J. Trahan, 'The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part III), How Many to Prosecute, Immunity, Amnesty and More', *Just Security*, 26 September 2022; L. D. Johnson, 'United Nations Response Options to Russia's Aggression: Opportunities and Rabbit Holes', *Just Security*, 1 March 2022.

¹⁶² Allies of World War II, Berlin Declaration, 5 June 1945.

who set up the tribunal was superior even to that of the Emperor and Japanese Government; in any event, Japan had accepted that war criminals should be brought to justice¹⁶³;

- (iii) for tribunals established by international agreements, States accept that the immunities of their officials will not be invoked by ratifying the agreement; thus, States that are parties to the ICC Statute have accepted that the immunities attached to their officials cannot bar the ICC's jurisdiction; similarly, Sierra Leone, Cambodia and Kosovo can set aside any immunity that may be attached to their own officials by concluding agreements that constitute the legal basis for creating the respective criminal courts and chambers;
- (iv) although the judgment of Hissène Habré by a court established in an agreement between Senegal and the African Union may at first sight appear problematic, this is not really the case; firstly Chad, in belonging to the Assembly of the African Union, can be considered as having consented to the creation of the EAC; secondly, Chad had in any case waived any immunity from jurisdiction that could have benefited Habré long before his trial by the Chambers¹⁶⁴;
- (v) the trial of Charles Taylor by the SCSL is a precedent where the immunities of a Head of State were set aside despite the explicit will of the State concerned; however, the reasoning employed in order to establish the international character of this Court relies heavily on the UNSC's involvement in creating this Court, considering that, in initiating creation of the tribunal by resolution 1315, the Council was acting under Chapter VII, more specifically articles 39 and 41¹⁶⁵;
- (vi) the judgment of the ICC Appeals Chamber in the Al-Bashir case clearly asserts that immunities cannot be invoked before an international tribunal because, as a manifestation of sovereign equality, immunities apply only 'horizontally', between States and not 'vertically' between an international tribunal and a State¹⁶⁶; it is worth noting though that the Court's case-law has been inconsistent with respect to this question, even though the 2019 pronouncement by the Appeals Chamber should be considered as the current ICC view on this topic. Ultimately, similarities between the ICC and the new Ukraine aggression tribunal will determine how plausible the transposition of the ICC's reasoning will be.

Draft article 1§3 of the ILC draft articles on immunity of State officials confirms that the consent of the official's state of nationality remains central to the question of immunities even before international criminal tribunals: '[t]he present draft articles do not affect the rights and obligations of States Parties under international agreements establishing international criminal courts and tribunals *as between the parties to those agreements*'¹⁶⁷.

Secondly, even if it is accepted that, as a matter of principle, immunities cannot be invoked before international courts, we still need to identify which courts and tribunals can be considered as being 'international'. As a reminder, in its *Arrest Warrant* judgment, the ICJ referred to the possibility of setting

¹⁶³ U.S. Joint Chiefs of Staff, [Instruments of Japanese Surrender](#), 2 September 1945.

¹⁶⁴ Ministry of Justice of the Republic of Chad, [Letter from the Cabinet of the Ministry of Justice of the Republic of Chad to the Belgian judge investigating the charges against Hissène Habré](#), 7 October 2002; see also Human Rights Watch, [Chad Lifts Immunity of Ex-Dictator - Green Light to Prosecute Hissène Habré in Belgium](#), 5 December 2002.

¹⁶⁵ Special Court for Sierra Leone, [The Prosecutor v. Charles Taylor - Decision on Immunity from Jurisdiction, Appeals Chamber](#), Case No SCSL-2003-01-I, 31 May 2004, pp. 18-20, §§37-39.

¹⁶⁶ International Criminal Court, [The Prosecutor v. Omar Hassan Ahmad Al-Bashir - Judgment in the Jordan Referral re Al-Bashir Appeal, Appeals Chamber](#), No ICC-02/05-01/09 OA2, 6 May 2019, pp. 58-59, §115.

¹⁶⁷ Emphasis added by the authors. United Nations International Law Commission, [Immunity of State officials from foreign criminal jurisdiction, Texts and titles of the draft articles adopted by the Drafting Committee on first reading](#), Seventy-third Session, A/CN.4/L.969, 31 May 2022, p. 1; see also the commentary of this provision: United Nations, [Report of the International Law Commission, Seventy-third session](#), Seventy-seventh Session, Supplement No 10, A/77/10, 18 April – 3 June and 4 July – 5 August 2022, p. 203, commentary to article 1, §26.

immunities aside 'before *certain* international criminal courts'¹⁶⁸. The SCSL considered that it can qualify as an 'international' court by insisting, *inter alia*, on the fact that it was established following action undertaken by the UNSC operating under Chapter VII of the UN Charter, by an agreement between the UN and Sierra Leone - agreement which, in the eyes of the SCSL is the 'expression of the will of the international community' - and that it is not part of Sierra Leone's judicial system¹⁶⁹. Interestingly, in the practice cited by the ICC Appeals Chamber in support of the conclusion that immunities cannot be invoked before international courts, the ECCC, STL, EAC and Kosovo Chambers are not mentioned. Aside from the NIMT, IMTFE, ICTY and ICTR, only the SCSL is mentioned as 'a court established pursuant to a UNSC resolution by an agreement between the Government of Sierra Leone and the UN Secretary-General'¹⁷⁰. According to the Appeals Chamber, immunities cannot be invoked before international courts such as the ICC because 'when adjudicating international crimes, [they] do not act on behalf of a particular State or States. Rather, international courts act on behalf of the international community as a whole'¹⁷¹.

This argument is not entirely convincing, given the conventional way in which the ICC and SCSL were created. The UN has a legal personality which is distinct from that of its Member States. An agreement between a State and the UN cannot be equated to an agreement between a State and all the other States members to the UN. Liberia is thus a third State with respect to the agreement creating the SCSL and, as such, not bound by its provisions, including the one setting immunities aside. Similarly, States that have not ratified the ICC Statute cannot be considered as having accepted the rule set down in article 27§2 of the Statute which excludes the possibility of invoking immunities before the Court. The reason put forward by the ICC for disregarding this absence of consent is the fact that, unlike national courts, international courts are not acting 'on behalf of a particular State or States' but 'on behalf of the international community as a whole'. Even if this point were to be accepted, one can easily appreciate the difficulty of identifying when a tribunal established by an agreement between States stops acting 'on behalf of States' and starts acting 'on behalf of the international community as a whole'.

The abovementioned elements lead to the conclusion that any legal basis chosen for creating the Ukraine aggression tribunal and whether or not it will be part of the national judicial system of Ukraine, will probably affect the invocation of immunities before the tribunal:

- (i) a tribunal of a nature similar to the SCSL will be able to invoke existing precedents in setting aside immunities stemming from the official position of the persons that will be the subject of criminal prosecution;
- (ii) a tribunal integrated into the national judicial system of Ukraine (along the lines of the ECCC, the EAC, or the Kosovo Specialist Chambers) will have more difficulty in establishing its international character and thus invoking the exception to immunities recognised by the ICJ, SCSL and ICC. This is also the case, contrary to what has been suggested¹⁷², for a tribunal established by a treaty among a few States. Even some of the scholars in favour of the creation of the Ukraine aggression tribunal

¹⁶⁸ Emphasis added by the authors. International Court of Justice, [Case concerning the Arrest warrant of 11 April 2000 \(Democratic Republic of the Congo v. Belgium\)](#), Judgment, *ICJ Reports 2002*, 14 February 2002, p. 25, §61.

¹⁶⁹ Special Court for Sierra Leone, [The Prosecutor v. Charles Taylor - Decision on Immunity from Jurisdiction](#), Appeals Chamber, Case No SCSL-2003-01-I, 31 May 2004, pp. 19-20, §§38-40.

¹⁷⁰ International Criminal Court, [The Prosecutor v. Omar Hassan Ahmad Al-Bashir - Judgment in the Jordan Referral re Al-Bashir Appeal](#), Appeals Chamber, No ICC-02/05-01/09 OA2, 6 May 2019, p. 55, §108.

¹⁷¹ International Criminal Court, [The Prosecutor v. Omar Hassan Ahmad Al-Bashir - Judgment in the Jordan Referral re Al-Bashir Appeal](#), Appeals Chamber, No ICC-02/05-01/09 OA2, 6 May 2019, p. 58, §115.

¹⁷² C. McDougall, 'Why Creating a Special Tribunal for Aggression Against Ukraine is the Best Available Option: A Reply to Kevin Jon Heller and Other Critics', *Opinio Juris*, 15 March 2022.

admit that it remains uncertain ‘whether a tribunal with some degree of “hybridity” established regionally or nationally’ would escape immunities difficulties¹⁷³.

Aside from obvious legitimacy considerations, establishing that the tribunal is acting ‘on behalf of the international community as a whole’ may prove important for the question of immunities. This pleads in favour of choosing a means of creating the tribunal whose reach is as multilateral as possible. In this respect, it has been correctly asserted that ‘a court created by the General Assembly would have the strongest claim to th[e] status’ of an international court acting in the name of the international community¹⁷⁴.

4.4 Can immunities be disregarded on the basis of self-defence?

A last possibility to overrule the respect of Russian immunities is based on the existence, in customary international law, of circumstances precluding wrongfulness¹⁷⁵. The ILC codified those circumstances in its 2001 Articles on States responsibility, which refer to self-defence, counter-measures, *force majeure*, distress and necessity as exceptional situations in which would justify what would *a priori* constitute an illicit act. In our case, Article 21 seems particularly relevant. Its text reads as follows:

‘The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations’¹⁷⁶.

In its commentary, the ILC explains that self-defence here can be the basis for the legality of non-military measures:

‘Self-defence may justify non-performance of certain obligations other than that under Article 2, paragraph 4, of the Charter of the United Nations, provided that such non-performance is related to the breach of that provision’¹⁷⁷.

In sum, when an aggressed State retaliates in self-defence, two ranges of measures must be distinguished. On the one hand, military measures taken against the aggressor are justified by article 51 of the UN Charter and are therefore not considered as a breach of article 2§4 which prohibits any use of force in violation of the Charter’s principles¹⁷⁸. On the other hand, non-military measures, such as the suspension of treaties or other obligations normally applicable in time of peace, can be justified on the basis of the rule codified in article 21 of the ILC Articles on responsibility of States¹⁷⁹.

Is article 21 really reflecting customary international law? An affirmative answer can be deduced from various elements. The ILC notes that traditional international law instituted a special regime applicable in times of war. Indeed, in this later situation, practice reveals that many of the obligations generally

¹⁷³ J. Trahan, ‘[The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine \(Part III\). How Many to Prosecute, Immunity, Amnesty and More](#)’, *Just Security*, 26 September 2022.

¹⁷⁴ T. Dannenbaum, ‘[Mechanisms for Criminal Prosecution of Russia’s Aggression Against Ukraine](#)’, *Just Security*, 10 March 2022. See also, C. McDougall, ‘[Prosecuting Putin for his Crime of Aggression Against Ukraine: Part Two](#)’, *Oxford Human Rights Hub*, 8 March 2022.

¹⁷⁵ J. Crawford, *State Responsibility*, Cambridge University Press, Cambridge, 2013, p. 174 ff.

¹⁷⁶ United Nations International Law Commission, [Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries](#), *Yearbook of the ILC*, 2001, article 21.

¹⁷⁷ United Nations International Law Commission, [Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries](#), *Yearbook of the ILC*, Vol 2, Part 2, 2001, article 21.

¹⁷⁸ O. Corten, *The Law against War*, 2nd ed., Hart Pub, Oxford, 2021, pp. 398 ff.

¹⁷⁹ F. I. Paddeu, ‘[Self-Defence as a Circumstance Precluding Wrongfulness: Understanding Article 21 of the Articles on State Responsibility](#)’, *British Yearbook of International Law*, Vol 85, 2015, pp. 90-132; D. Alland, « Légitime défense et les contre-mesures dans la codification du droit international de la responsabilité », *Journal de droit international*, 1983, pp. 728-762; K. Bannelier and T. Christakis, ‘La légitime défense comme circonstance excluant l’illicite’ in R., Kherad (ed), *Les légitimes défenses*, LGDJ, Paris, 2007, pp. 233-256.

applicable in peace time are suspended¹⁸⁰. In the same vein, article 7 of the Helsinki resolution adopted by the Institute of International Law in 1985 stipulates that:

'A State exercising its rights of individual or collective self-defence in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty incompatible with the exercise of that right, subject to any consequences resulting from a later determination by the Security Council of that State as an aggressor'¹⁸¹.

In 2011, the same principle was reaffirmed by the ILC in its 'Draft Articles on the effects of armed conflicts on treaties', whose article 14 reads:

'A State exercising its inherent right of individual or collective self-defence in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty to which it is a party insofar as that operation is incompatible with the exercise of that right'¹⁸².

The customary character of such a rule can also be indirectly deduced from article 73 of the 1969 Vienna Convention on the Law of Treaties that does not prejudice 'any question that may arise in regard to a treaty [...] from the outbreak of hostilities between States'¹⁸³.

Of course, certain principles of international law must be respected in all circumstances, even by a State acting in self-defence¹⁸⁴. The examples generally given are the respect of international humanitarian law and human rights obligations. But some treaties are also generally considered as applicable even in times of war, like boundary treaties, treaties relating to the international protection of environment, treaties relating to international watercourses and related installations and facilities, treaties establishing an international organisation, treaties relating to the international settlement of disputes or treaties relating to diplomatic and consular relations¹⁸⁵. In this latter category, the respect of diplomatic immunities has been evoked, notably in the US Diplomatic and Consular Staff in Tehran Case¹⁸⁶. However, this famous case did not concern the mere judgement of a foreign State official for crimes of international law. It more specifically referred to the forceful capture and the hostage-taking of diplomats, acts which are obviously incompatible with the 1961 Vienna Convention on Diplomatic Relations, considered by the ICJ as a 'self-contained' regime¹⁸⁷. By contrast, the setting aside of State officials' immunities on the basis of self-defence as a circumstance precluding wrongfulness under customary international law, in view of exercising the jurisdiction of a special tribunal for Russia's crime of aggression, would remain in conformity with obligations that must be respected even in times of war. Moreover, to the extent that its aim would be to establish criminal responsibility for a crime of aggression, it could be considered a lawful measure 'related to the breach' of article 2§4 of the Charter.

¹⁸⁰ United Nations International Law Commission, [Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries](#), *Yearbook of the ILC*, Vol 2, Part 2, 2001, p. 74.

¹⁸¹ Institute of International Law, ['The Effects of Armed Conflicts on Treaties'](#), 28 August 1985.

¹⁸² United Nations International Law Commission, [Draft Articles on the effects of armed conflicts on treaties](#), *Yearbook of the ILC*, Vol 2, Part 2, 2011.

¹⁸³ R. Provost, 'Article 73 (1969)' in O. Corten and P. Klein (eds), *The Vienna Conventions on the Law of Treaties*, Oxford University Press, Oxford, 2011, pp. 1654-1659.

¹⁸⁴ United Nations International Law Commission, [Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries](#), *Yearbook of the ILC*, Vol 2, Part 2, 2001, p. 74.

¹⁸⁵ United Nations International Law Commission, [Draft Articles on the effects of armed conflicts on treaties](#), *Yearbook of the ILC*, Vol 2, Part 2, 2011, Annex; see also Institute of International Law, ['The Effects of Armed Conflicts on Treaties'](#), 28 August 1985, articles 4 and 7.

¹⁸⁶ United Nations International Law Commission, [Draft Articles on the effects of armed conflicts on treaties](#), *Yearbook of the ILC*, Vol 2, Part 2, 2011, pp. 129-130.

¹⁸⁷ International Court of Justice, [Case concerning United States Diplomatic and Consular Staff in Tehran \(United States of America v. Iran\)](#), Judgment, *ICJ Reports 1980*, 24 May 1980, p. 3 and 40, §86.

Of course, as confirmed by the ILC, the measure taken must remain in 'compliance with the requirements of proportionality and of necessity inherent in the notion of self-defence'¹⁸⁸. The tribunal should therefore limit its jurisdiction to the crime of aggression perpetrated against Ukraine. In this respect, it must be borne in mind that Russian aggression represents one of the most serious violations of article 254 observed in international relations after the Second World War. Beyond the 'special military operation' launched on 24 February 2022, this aggression had begun in 2014 with the invasion, occupation and annexation of Crimea¹⁸⁹. It later led Russia to annex other parts of Ukrainian territory, namely the regions of Donetsk, Luhansk, Kherson and Zaporizhzhia. In the presence of such a serious and continuous violation of the prohibition to use force, the creation of a tribunal appears as a necessary and proportionate measure.

In conclusion, the problem of immunities for Russian and/or other foreign nationals can be addressed appropriately by combining different legal rules and principles. Among them, the possibility of invoking self-defence as a circumstance precluding wrongfulness probably appears to be a credible option, even if this argument would be unprecedented and would imply a flexible interpretation of customary international law. As an aggressor State, Russia cannot require full respect of its sovereign rights. It is precisely the object of self-defence which justifies the measures taken by the aggressed State to put an end to the aggression. Furthermore, what is true for military measures is, *a fortiori*, true for peaceful measures such as the creation of a judicial body, as suggested by Dapo Akande, professor at the University of Oxford¹⁹⁰.

5 Questions of enforcement and implementation

The enforcement and implementation of decisions reached by the Ukraine aggression tribunal, especially as far as the execution of arrest warrants is concerned, present distinct legal challenges. We will first examine the question of whether Russia and other States will have an obligation to cooperate with the tribunal (Section 5.1), before turning to other possibilities for ensuring enforcement of an arrest warrant issued by the tribunal (Section 5.2). Finally, we will discuss whether or not it is possible for the tribunal to bypass the problem regarding the execution of its arrest warrants by providing for trials *in absentia* (Section 5.3).

5.1 Will Russia and other States have a formal obligation to cooperate with the Ukraine aggression tribunal?

Asserting that the tribunal will not be barred from exercising its jurisdiction over Russian or other State officials due to immunities is one issue. Establishing that Russia and other States will have the obligation to cooperate with the tribunal in executing the arrest warrants issued by it and handing over Russian nationals in order to stand trial before the tribunal is quite another.

Here again, how the tribunal is created will prove decisive. As the ICTY and ICTR precedents demonstrate, the UNSC ability to impose such an obligation by means of a Chapter VII resolution is uncontested¹⁹¹. This scenario however is not likely to occur in the present situation. A similar result can be obtained only by an

¹⁸⁸ International Court of Justice, [Case concerning United States Diplomatic and Consular Staff in Tehran \(United States of America v. Iran\)](#), Judgment, *ICJ Reports 1980*, 24 May 1980, p. 75.

¹⁸⁹ O. Corten, ['The Russian Intervention in the Ukrainian Crisis: was *jus contra bellum* 'confirmed rather than weakened'?](#), *Journal on the Use of Force and International Law*, Vol 2, No 1, 2015, pp. 17-41.

¹⁹⁰ Chatham House, ['A criminal tribunal for aggression in Ukraine'](#), Research Event Recording, 4 March 2022, from 39:25 onwards.

¹⁹¹ United Nations Security Council, [Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 \(International Tribunal for the Former Yugoslavia\)](#), 25 May 1993, article 29; United Nations Security Council, [Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994](#), 8 November 1994, article 28.

evolutive and dynamic interpretation which would allow the UNGA the power to adopt binding decisions based on the 'Uniting for Peace' resolution. In this scenario, the UNGA resolution could impose on all UN Member States an obligation to cooperate with the tribunal.

If the tribunal is established based on agreement between Ukraine and the UN or another regional organisation, Russia will be a third party to this agreement. According to well established rules of international law, '[a] treaty does not create either obligations or rights for a third State without its consent'¹⁹² and hence Russia will not be bound by the provisions of the agreement set down therein, including any obligation to cooperate with the tribunal. The fact that there may be a UN resolution providing for, urging towards, or generally recommending the establishment of the tribunal does not change this situation. As an example, agreements establishing the SCSL, ECCC and STL limit the obligation of cooperation only to the government of States parties to these agreements (respectively Sierra Leone, Cambodia, Lebanon) and do not impose any obligations on third States¹⁹³. In this scenario, neither Russia nor any other State will have an obligation to cooperate with the special tribunal since such an obligation can be imposed neither by the agreement itself nor by the non-binding UN resolution that will accompany the creation of the tribunal. So, any cooperation by third States will necessarily take place on a purely voluntary basis.

Things are slightly different if the tribunal is established by an agreement among States. In this scenario, States that are not party to the agreement - such as, for example, Russia, any allied State whose nationals risk being brought before the tribunal, and other third States - will not be bound by any obligation to cooperate along the lines of what has been explained above. States that are parties to the agreement may however decide to include in the agreement an obligation to cooperate with the tribunal. This would create a situation similar to the one of the ICC, where states parties will have the obligation to execute arrest warrants and transfer wanted individuals to the Ukraine aggression tribunal while States non-parties will not. But State practice in the Al-Bashir case indicates that some ICC States parties were not willing to comply with their obligation of cooperation and execute arrest warrants issued by the ICC against an acting President of a State that was not a party to the ICC Statute¹⁹⁴. So, cooperation may not be without problems even among States parties to the agreement establishing the special tribunal. From a practical perspective, an arrest warrant issued by a Ukraine aggression tribunal may somewhat limit the destinations to which State officials wanted by the tribunal will be able to travel unhindered. But, aside from that, as the Al-Bashir precedent shows, the enforcement of the tribunal's decisions is not guaranteed. Since Russia and States non-parties to the agreement setting up the Ukraine aggression tribunal will not only be free from any obligation to cooperate with the tribunal but will also in all likelihood categorically refuse any kind of cooperation, we must turn to other possible means of enforcement.

¹⁹² United Nations, [Vienna Convention on the Law of Treaties](#), Treaty Series, Vol 1155, 23 May 1969, article 34. E. David, *Éléments de droit pénal international et européen*, 2^e édition, Vol 2, Bruylant, Bruxelles, 2018, p. 1115 who, while accepting that States non-parties to the ICC have no conventional obligation to cooperate with the Court, suggests that customary international law could be used as the legal basis for such an obligation. However, this view has not been corroborated by State practice or by the jurisprudence of the ICC.

¹⁹³ See Special Court for Sierra Leone, [Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone](#), 16 January 2002, article 17; and Extraordinary Chambers in the Court of Cambodia, [Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes committed during the Period of Democratic Kampuchea](#), 6 June 2003, UNTS, Vol 2329, no 41723, article 25; United Nations Security Council, [Resolution 1757 \(2007\) on the establishment of a Special Tribunal for Lebanon](#), UN Doc S/RES/1757 (2007), 30 May 2007, article 15.

¹⁹⁴ After the arrest warrants against him had been issued, Omar Al-Bashir travelled, among others, to the following States parties to the ICC Statute: Chad, the Democratic Republic of the Congo, Djibouti, Jordan, Malawi, South Africa, Uganda. None of these States executed the arrest warrant issued by the ICC.

5.2 Can self-defence be invoked as an enforcement mechanism?

As mentioned above, being the victim of an armed attack, Ukraine is entitled to exercise its right to self-defence in conformity with article 51 of the UN Charter. Basically, this right consists in military measures deployed on the Ukrainian soil and designed to put an end to the continuing attacks and persistent territorial occupation perpetrated by Russia. However, nothing precludes Ukraine from adopting additional necessary measures designed to put an end to such aggression. In particular, the forcible capture of Russian authorities responsible for acts of aggression could be imagined, either on Ukrainian territory, or even on the territory of Russia itself. Following this scenario, any Russian national for example could be captured and brought to the special tribunal to face a charge of aggression.

However, it must be pointed out that there is no comparable precedent in the history of international law. In Nuremberg and Tokyo, the accused were not captured and detained during the conflict but as a result of the defeat of Germany and Japan. An interesting case which may be of relevance is the abduction of Adolf Eichmann by Israeli agents in Argentina, in 1962. Eichmann was forcibly brought to justice and faced a special tribunal in Jerusalem for crimes committed during the Second World War. He was eventually convicted and sentenced to death¹⁹⁵. At international level, the forcible abduction was condemned by the UNSC as a breach of Argentinian sovereignty¹⁹⁶. In this sense, the precedent can be read as condemning any forcible capture of a person even if the purpose of the capture is to bring to justice a person accused of having committed one of the most serious crimes in international law. Yet, after due consideration, the relevance of this precedent to the case under examination is limited. When it launched its special operation in Argentinian territory, Israel was *not* in a situation of self-defence¹⁹⁷. By contrast, Ukraine is and can therefore be considered entitled to take forcible measures against the aggressor State. Accordingly, arresting Russian officials responsible for acts of aggression could hardly be criticised.

In conclusion, here again self-defence provides a legal basis to overcome difficulties in enforcing the tribunal's decisions. However, three additional considerations mitigate the positive aspects of this option. Firstly, for the reasons exposed above, this unprecedented argument implies a flexible interpretation of positive international law. Secondly, it must be recognised that forcible capture appears, at least at the time of the writing, rather improbable. It seems difficult to imagine how a Ukrainian force could capture a 'person in a position effectively to exercise control over or to direct the political military action of a State'¹⁹⁸. As indicated above, whereas the other serious international crimes (genocide, crimes against humanity and war crimes) can be perpetrated by any State official or even by a private person, the crime of aggression can be perpetrated only by a high-ranking official¹⁹⁹. In other words, at least in the current situation, capturing an accused would imply a special operation in the Russian territory and even probably in Moscow. The least we can say is that this scenario does not seem very credible. Thirdly, even if such an operation were conducted, a judgement based on Ukraine's right to self-defence could be problematic in terms of legitimacy. Indeed, the tribunal would appear as a means for Ukraine to defend itself, not as a judicial body representing the international community. This question will be explored later, but it must

¹⁹⁵ Keesing's Contemporary Archives, *Weekly Digest of World Events*, Vol XII, Keesing's Publications, Bristol, 1960, pp. 17489-17491 and J.E.S Fawcett, 'The Eichmann Case', *British Yearbook of International Law*, Vol 38, 1962, p. 197.

¹⁹⁶ United Nations Security Council, '[Resolution 138 on questions relating to the case of Adolf Eichmann](#)', UN Doc S/RES/138(1960), 23 June 1960.

¹⁹⁷ See H. Silving, '[In Re Eichmann : A Dilemma of Law and Morality](#)', *The American Journal of International Law*, Cambridge University Press, Vol 55, No 2, 1961, pp. 307-358; L. Green, '[Aspects juridiques du procès Eichmann](#)', in *Annuaire français de droit international*, Vol 9, 32, 1963, pp. 150-190.

¹⁹⁸ United Nations General Assembly, '[Rome Statute of the International Criminal Court \(last amended 2010\)](#)', 17 July 1998, Article article 8bis, §1; O. Corten, *The Law against War*, 2nd ed., Hart Pub, Oxford, 2021, pp. 64-65.

¹⁹⁹ C. Kreß and S. Barriga (eds.), *The Crime of Aggression. A Commentary*, Cambridge University Press, Cambridge, 2017; S. Sayapin, *The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State*, Springer, Asser Press, Berlin, 2014.

be already evoked at this stage to nuance the advantage that represents the invocation of self-defence as an enforcement mechanism.

5.3 Would a trial *in absentia* be possible?

Given that the perspectives of cooperation and enforcement of the special tribunal's decisions do not seem very promising, one way to circumvent the problem would be to allow for proceedings to be held *in absentia*²⁰⁰. To the extent that existing international and internationalised criminal jurisdictions can offer guidance on this question, the rules applicable to the overwhelming majority of such jurisdictions do *not* foresee the possibility of trials *in absentia*. On the contrary, for the trial proceedings before the ICTY, ICTR, ICC, SCSL, ECCC, EAC and Kosovo Specialist Chambers, the right for an accused to be tried in his or her presence is listed among the minimum guarantees to which the accused is entitled²⁰¹. Only the STL explicitly allows for *in absentia* trials²⁰².

The right of a person accused of criminal charges to be tried in his or her presence is explicitly mentioned as part of the minimum fair trial guarantees in article 14 of the 1966 International Covenant on Civil and Political Rights²⁰³. It is actually this provision that has been copied into the statutes of the criminal jurisdictions mentioned above. The European Court of Human Rights (ECHR) has also asserted that article 6 of the European Convention on Human Rights 'guarantees the right of an accused to participate effectively in a criminal trial, which includes, *inter alia*, not only his or her right to be present, but also to hear and follow the proceedings'²⁰⁴. However, these provisions have not been interpreted as precluding *in absentia* trials completely. Indeed, the ECHR has confirmed that a hearing held in the accused's absence does not violate article 6 of the Convention, if the accused has waived the right to be present at the hearing²⁰⁵. Along the same lines, according to the Human Rights Committee's General Comment on article 14 of the Covenant, 'proceedings in the absence of the accused may in some circumstances be permissible

²⁰⁰ D. Scheffer, ['The Case for Creating a Special Tribunal to prosecute the Crime of Aggression Committed Against Ukraine \(Part IV\). Information Sharing, Victim participation, Outreach and More'](#), *Just Security*, 28 September 2002; see also J. Anderson, ['Ukraine: "The momentum is there for a tribunal on aggression"'](#), 'Interview of Mykola Gnatovsky, professor of international law at the University of Kyiv and special advisor to Ukraine's Ministry of Foreign Affairs, *JusticeInfo.net*, 12 April 2022.

²⁰¹ United Nations Security Council, [Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 \(International Tribunal for the Former Yugoslavia\)](#), 25 May 1993, article 21§4(d); United Nations Security Council, [Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994](#), 8 November 1994, article 20§4(d); United Nations General Assembly, [Rome Statute of the International Criminal Court \(last amended 2010\)](#), 17 July 1998, Article 63§1 and 67§1(d); Special Court for Sierra Leone, [Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone](#), 16 January 2002, Article 17§4; King of Cambodia, [Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea](#), NS/RKM/0801/12, 10 August 2001, Article 35§2(d); Agreement on the Establishment of the Extraordinary African Chambers within the Senegalese Judicial System between the Government of the Republic of Senegal and the African Union and the Statute of the Chambers, [Annex: Statute of the Extraordinary African Chambers within the courts of Senegal created to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990](#), 22 August 2012, Article 21§4(d); Kosovo Specialist Chambers, [Rules of Procedure and Evidence before the Kosovo Specialist Chambers including Rules of Procedure for the Specialist Chamber of the Constitutional Court](#), KSC-BD-03/Rev3/2002, 2 June 2020, Rule 68.

²⁰² United Nations Security Council, [Resolution 1757 \(2007\) on the establishment of a Special Tribunal for Lebanon](#), UN Doc S/RES/1757 (2007), 30 May 2007, article 22.

²⁰³ United Nations General Assembly, [International Covenant on Civil and Political Rights](#), 23 March 1976, article 14§3(d).

²⁰⁴ The emphasis is in the original. European Court of Human Rights, [Murtazaliyeva v. Russia](#), appeal No. 36658/05, Grand Chamber, Judgment, 18 December 2018, §91.

²⁰⁵ European Court of Human Rights, [Judgment Lena Atanasova v. Bulgaria – waiver of the right to appear in person before the courts](#), Press Release, Chamber Judgments, 26 January 2017, §52; European Court of Human Rights, [Affaire Chong Coronado v. Andorre](#), Requête No 37368/15, Arrêt, 23 July 2020, §42-45.

in the interest of the proper administration of justice, i.e. when accused persons, although informed of the proceedings sufficiently in advance, decline to exercise their right to be present'²⁰⁶.

In view of the above, allowing for the possibility of holding criminal proceedings before the Ukraine aggression tribunal *in absentia* is not precluded under international law. The symbolic nature of a judgment by an *ad hoc* tribunal - even *in absentia* - should not of course be underestimated. However, as it has been suggested, 'trials *in absentia* in such high-profile cases would be of negligible value and legitimacy'²⁰⁷. Indeed, is the objective of fighting against impunity for the crime of aggression that lies at the heart of the creation of the tribunal effectively served by:

- (i) unexecuted arrest warrants?
- (ii) images of the accused walking, or riding, free, whilst at the same time in some distant courtroom his trial is taking place?
- (iii) evidence and testimony presented before an empty accused box, or by convictions handed down without the person having been found guilty ever serving one day of a prison sentence?

These considerations are of course intimately linked to the more general question of the tribunal's legitimacy, to which we will now turn.

6 The creation of an *ad hoc* tribunal for crimes of aggression in Ukraine: problems of legitimacy

Legitimacy is a crucial issue in the domain of international criminal law, whose functions include reaffirmation of the international community's most fundamental values²⁰⁸. This issue will largely be governed by modalities concerning the tribunal's creation, as examined earlier. Moreover, of course the same question will be addressed differently depending on the criteria of legitimacy that are privileged. In this section, we will expose the problems we perceive as threatening the legitimacy of a special tribunal for Russia's aggression in Ukraine and suggest some ways of addressing them.

Before going into further details, it must be borne in mind that the creation of a 'special' or *ad hoc* court or tribunal is always problematic in terms of legitimacy. Due to the requirements of predictability and stability that are present to characterise criminal law, every person can expect to know at any given moment not only what criminal offenses apply but also the competencies of criminal courts or tribunals to rule on them²⁰⁹. Historically, the creation of special courts has often been denounced as signifying a victor's style of justice²¹⁰. This is why it is always preferable to create competent judicial bodies on an institutional and permanent level and, when such bodies exist, to prefer resorting to them instead of creating special tribunals. To a certain extent, creating an *ad hoc* tribunal with jurisdiction over a crime over which the ICC already has jurisdiction, even if it cannot be exercised, risks undermining the ICC, despite assurances to the contrary.

²⁰⁶ United Nations Human Rights Committee, [General Comment No. 32, Article 14, Right to equality before courts and tribunals and to a fair trial](#), UN Document CCPR/C/GC/32, 23 August 2007, p. 11, §36.

²⁰⁷ S. Vasiliev, '[Aggression against Ukraine: Avenues for Accountability for Core Crimes](#)', *EJIL:Talk!*

²⁰⁸ I. Tallgren, '[The Durkheimian Spell of International Criminal Law?](#)', *Revue interdisciplinaire d'études juridiques*, Vol 71, 2013, pp. 137-169; O. Corten, F. Dubuisson, V. Koutroulis and A. Lagerwall, *A Critical Introduction to International Law*, Éditions de l'Université de Bruxelles, Brussels, 2019, pp. 257 ff.

²⁰⁹ J.L. Corsi, '[An Argument for Strict Legality in International Criminal Law](#)', *Georgetown Journal of International Law*, Vol 49, 2019, pp. 1321-1381.

²¹⁰ See R. Minear, *Victor's Justice. The Tokyo War Crime's trial*, Princeton University Press, Princeton, 1971; V. Peskin, '[Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda](#)', *Journal of Human Rights*, Vol 4, No 2, 2005, pp. 213-231; R. Maison, *Pouvoir et génocide dans l'œuvre du tribunal pénal pour le Rwanda*, Dalloz, Paris, 2017.

Regrettably, as observed above, the current legal and institutional landscape does not permit any judgement on crimes of aggression in Ukraine. Given the specificities of this situation, in particular the force of the reaction generated by this violation, an exceptional creation could be envisaged. In this case, though, we submit that all should be done to avoid the impression of a tribunal created by (some) States acting on their own capacity. On the contrary, to the greatest possible extent a strong implication of universal international organisations should be sought. Given this general objective, the reasoning that will be developed below is based on the following distinction: if the tribunal represents the international community (particularly when it is the result of a decision made by the UN or the ICC), the legitimacy will be high; if, by contrast, the tribunal is the mere result of an agreement between States or an agreement between Ukraine and a regional organisation to which Russia is not a member, like the Council of Europe or the EU, the legitimacy will be low. Thus, the legitimacy of a tribunal created by States is relative (Section 6.1) and should be strengthened by recourse to international institutions (Section 6.2).

6.1 A special tribunal created by States: a fragile legitimacy

It is difficult to affirm the legitimacy of an international tribunal solely on the basis of an agreement between States, at least if universality and representativeness of the international community are recognised as decisive criteria.

In terms of potential impact on the wider political and legal landscape, the main problem with this option is that, by virtue of the principle of equality of States, it would open the door to the possible creation of multiple special courts or tribunals by other States, anywhere in the world. Following that line of reasoning, every State could create a tribunal with its allies to judge persons it considers to be responsible of an act of aggression (or possibly of another international crime). In this hypothesis, Russia could also initiate the creation of a tribunal to judge the alleged crimes committed by Ukraine authorities, with the cooperation of other States (such as Syria or Belarus). Given that risk, it is difficult to accept the legitimacy of a tribunal that would *not* be created by or at least under the umbrella of an international organisation.

Of course, a response could be to ground the legitimacy of this tribunal on the democratic character of the States that would create it. Accordingly, Western States could legitimately create such a tribunal, whereas Russia, Syria or Belarus could not. This argument is particularly weak, especially in the case of a tribunal dedicated to passing judgment on an act of aggression. In the recent past, some Western States have been accused by a vast array of other States of having committed acts of aggression, particularly against Yugoslavia (in 1999) and in Iraq (2003)²¹¹. As we know, those States have refused to accept the jurisdiction of any international tribunal in relation to their actions and no domestic criminal proceeding has ever been initiated²¹². Similarly, it should be noted that some Western States were particularly eager to reduce the ICC's ability to judge an act of aggression by imposing additional conditions on the exercise of its jurisdiction²¹³. In this context, the legitimacy of their implication in creating a tribunal to judge Russia's aggression in Ukraine is highly debatable.

Moreover, it must be stated once more that the precedents of Nuremberg and Tokyo are difficult to transpose. At the time of their creation, there was no 'international criminal court' and the UN was not yet fully functioning. The legitimacy of those tribunals must thus be understood in this particular context. Another difference with the present situation, as mentioned earlier, is that Germany and Japan had

²¹¹ O. Corten, *The Law against War*, 2nd ed., Hart Pub, Oxford, 2021, pp. 359-363 and 372.

²¹² Other non-judicial initiatives have been taken but without genuine judicial consequences. See the 'Chilcot Report' published on 6 July 2016 and available on this [Archived] [webpage](#) of *The Iraq Inquiry*.

²¹³ M. Kersten, '[States that Neutered the Crime of Aggression have a Special Responsibility to Address War Crimes in Ukraine](#)', *Justice in Conflict*, 8 March 2022; N., Weisbord, *The Crime of Aggression. The Quest for Justice in an Age of Drones, Cyberattacks, Insurgents and Autocrats*, Princeton University Press, Princeton, 2019.

(through the Allied powers that exercised their powers) accepted the jurisdiction of the tribunals²¹⁴. All those characteristics render such precedents irrelevant in assessing the Ukraine situation during the 21st century. It should also be noted that, all the precedents of international or internationalised criminal tribunals that are cited as relevant for the establishment of the special tribunal (NITM, SCSL, ECCC, Kosovo Specialist Chambers) were set up *after* the end of the relevant conflicts. Therefore, not only can they not offer any concrete guidance as to the impact of creating a special tribunal on the ongoing war and possible peace negotiations but they underline the highly exceptional character of such a project. Setting up an *ad hoc* tribunal may further radicalise the position of the States whose nationals would be targeted by its jurisdiction. Or, on the contrary, it may foster internal frictions within those States, potentially driving part of the elite to distance themselves from the leaders and government officials targeted by the tribunal. Such outcomes are of course speculative at this stage. Their evaluation - more concretely, the assessment of the chances of their realisation - requires expertise which goes beyond that of the authors of this analysis.

Ultimately, the creation of a 'special' tribunal' is highly problematic as far as it is based only on an agreement between States or regional organisations, whether they be European or not. It appears thus crucial to involve universal international organisations or institutions, taking into account the legitimacy they embody.

6.2 An involvement of universal international organisations or institutions

There are a number of complementary ways to associate universal international organisations or institutions to the creation and functioning of the tribunal. More specifically, the following possibilities warrant serious consideration: an involvement of UNGA; reform of the ICC Statute; and an advisory opinion sought from the ICJ.

The first option has already been mentioned but bears repeating here. As explained earlier, UNGA's powers could be interpreted broadly, on the basis of the 'Uniting for Peace' resolution. This dynamic interpretation could in itself justify the tribunal's creation, as a substitute for UNSC. Nevertheless, if it would provide strong legitimacy to the special tribunal, it would also be difficult to obtain from legal and political perspectives. As already explained, this solution would imply convincing a large group of States to depart from the classical and widely recognised vision of UNGA's limited powers. Alternatively, UNGA could simply 'recommend' the tribunal's creation. However, this would leave unresolved questions about the exercise of the tribunal's jurisdiction over Russian or other States' nationals, which by definition a recommendation cannot provide. A UNGA resolution recommending the creation of a tribunal would however at least bring some additional legitimacy to the tribunal. In such a case, the accusation of a Western biased tribunal would become difficult to maintain, should the resolution be voted for by a large majority of States from different regions of the world.

But to be legitimate, the creation of a tribunal should probably be articulated with other initiatives, in particular *vis-à-vis* the ICC, which to date has only limited jurisdiction in regard to aggression²¹⁵. States have chosen to distinguish between genocide, crimes against humanity and war crimes, on the one hand and acts of aggression on the other. In the former case, jurisdiction can be exercised on a crime committed either on the territory of a State party or by a national of such a State²¹⁶. In the latter case, the consent of the State responsible for the alleged act of aggression is always required. As just mentioned, certain States

²¹⁴ See *and relevant text*: Allies of World War II, Berlin Declaration, 5 June 1945; D. MacArthur, General of the US Army, [Supreme Commander for the Allied Powers, Special proclamation: Establishment of an International Military Tribunal for the Far East](#), 19 January 1946.

²¹⁵ United Nations, [Rome Statute of the International Criminal Court](#), Treaty Series, Vol 2187, No 38544, 17 July 1998, article 8*bis*.

²¹⁶ United Nations, [Rome Statute of the International Criminal Court](#), Treaty Series, Vol 2187, No 38544, 17 July 1998, article 12.

that seem now open to the possibility of creating an international tribunal for Ukraine have prevented the Court from having a broad jurisdiction on the crime of aggression. In terms of legitimacy, it goes without saying that such a position should be changed to show that judging acts of aggression is from now on considered imperative, universally and not only in the Ukrainian case²¹⁷. Thus, all States that support the creation of a tribunal should propose an amendment to the ICC statute to align the status of the crime of aggression with the other crimes enounced in the Statute. In this case, the tribunal's creation could be presented with some credibility as an exceptional precedent pending the ICC's extension of competence.

Finally, the ICJ's blessing would offer an excellent argument supporting the legitimacy of creating a special tribunal. As put forward in this assessment, the creation of an international tribunal raises numerous legal questions that are not easy to resolve. Of course, the EU could support this creation by using a range of convincing arguments that have been evoked above. However, strong opposition from Russia and possibly other States can be expected. An appropriate solution for avoiding this situation could be asking UNGA to refer this question to the ICJ. As it has done in the past for many sensitive issues (apartheid in South Africa, status of Western Sahara, Wall in Palestine and so on), the Court could give its legal opinion about the legal possibilities for this case²¹⁸. Such an advisory opinion would not be mandatory but it would bring a particularly strong legitimacy to any proposed solution. The ICJ is the UN's superior judicial body and as such cannot be reduced to the position of a particular group of States. Nevertheless, as a direct consequence of this legitimacy it is difficult to predict what exactly the Court's position would be. Additionally, the procedure would last at least a couple of years, which could be considered as a long period. At the same time, it would offer the advantage of presenting the tribunal as a credible institution established after due reflection. This tribunal could indeed judge the accused once the war is over, which would give the image of independent, impartial and dispassionate justice. After all, what is at stake here is to affirm decisively and symbolically the rule of law rather than to condemn one single individual.

7 Conclusions and recommendations

In conclusion, all the elements presented above show that the establishment of a special tribunal for the crime of aggression against Ukraine would be legally problematic. It would imply a broad and even extensive interpretation of existing positive international law. If this latter option is chosen, it is difficult to avoid a certain dilemma, which can be explained by highlighting the two following alternatives. As will readily be understood, while both are legally innovative, the second is much more legitimate than the first.

- (i) The first alternative is to favour a rigorous conception of legality, based on respect for the rule of law - a crucial element in all criminal cases. Following this path, the tribunal's creation and jurisdiction could be grounded in Ukrainian domestic law, which would open the door to prosecute Russian nationals for the crime of aggression. This legal basis could be completed by an agreement with the UN or another (regional) organisation and hence the tribunal could be considered as having been 'established by law' in conformity with the relevant human rights law instruments. In so far as respect for the sovereignty of Russia is concerned, it would be legally excluded to invoke any exception to immunities *ratione personae*, such an exception having been strongly rejected by the ILC and the ICJ on the basis of existing practice and *opinio juris*. The Russian President, Prime minister and Minister of Foreign Affairs are thus legally protected by immunities as long as they remain in office. However, using a broad interpretation of international law, self-defence could arguably be interpreted as justifying suspension of immunities for high-ranking Russian authorities accused of the crime of

²¹⁷ See, along similar lines, the comments made at the statements made in the context of in the margins of the International Law Week at the UN exploring relevant aspects of the creation of a Special Tribunal on the Crime of Aggression on the recommendation of the UN General Assembly, 25 October 2022. United Nations, '[Law not War: A Special Tribunal for the Crime of Aggression](#)', 2022.

²¹⁸ United Nations, '[Statute of the International Court of Justice](#)', 18 April 1946, article 65; United Nations, '[Charter of the United Nations](#)', 1945 (last updated 23 August 2016), article 96.

aggression. The same argument could also - albeit not without difficulty - exceptionally serve as a legal basis for (Ukrainian) coercive action to capture and detain the accused. Considering the highly improbable character of this scenario, the most likely result in this case is a judgement *in absentia*. Conversely, even if it is justifiable in law, this alternative would present serious flaws in terms of legitimacy. To the extent that it would be based on Ukrainian law and on individual self-defence, this tribunal would appear more as a national instrument of reaction to Russia's armed attack than as an organ representing the international community in the fight against impunity.

- (ii) To address this drawback adequately, it would be tempting to propose the second alternative, implying a broad interpretation of UNGA's powers, based on the 'Uniting for Peace' resolution. Given UNSC's inability to discharge its duties due to the veto of one of its permanent members, namely Russia, the UNGA could exceptionally either create itself a special tribunal similar to the ICTY and ICTR or defer the situation in Ukraine to the ICC according to article 13(b) of the Statute. The prosecution and judgement of the crime of aggression would then be made not by a group of States but by virtue of the decision of a body representing the international community, which would give a maximum legitimacy to the entire process. In case of a deferral to the ICC, this legitimacy would also result from the choice not to create an *ad hoc* special tribunal but to use the ICC as the only existing appropriate organ of the international community in the domain of international criminal law. In other words, since extending the UNGA powers opens up the door to two options (creating an *ad hoc* tribunal or deferring the situation to the ICC), the authors recommend the option which further strengthens, instead of undermining, the existing permanent international judicial bodies available, and which is less costly since it avoids the significant expenses resulting from the creation of a new criminal jurisdiction. However, this dynamic interpretation of international law (especially in relation to UNGA's powers) is certainly debatable in terms of legality. A potential, additional challenging factor with respect to the deferral of the situation to the ICC may be that the Court itself must also adhere to the extensive reading of article 13(b) of its Statute.

A delicate choice must, therefore, be made taking into account the precedent-value of the present situation. The opinion of the two authors can be summarised as follows. First and foremost, it must be repeated that, following an orthodox conception of legality, in order to derogate from applicable immunities and to impose an obligation of cooperation on the relevant States, the creation of a special tribunal for the crime of aggression against Ukraine would require a resolution adopted by the UNSC according to Chapter VII of the Charter. All the other options mentioned above are only conceived as a means to bypass this legal requirement and would be probably denounced as such by a significant number of States and specialists of international law.

In this respect, two main extensive interpretations can be identified. The first, relevant to any court established in line with alternative (i) as presented above, concerns interpreting extensively the applicable rules on immunities. It asserts that there is an exception to immunities for international crimes, including the crime of aggression, applicable even to high-ranking State officials (Heads of State, heads of Government, Ministers of Foreign Affairs) in office, at least before international courts. This option seems problematic to the authors on several accounts, namely (i) its unilateral character; (ii) the risk of abuse it entails (any number of States can create an international tribunal by concluding a treaty among themselves which would claim to bypass immunities and exercise jurisdiction on any incumbent or past Head of State for international crimes allegedly committed); and (iii) even if immunities can be bypassed, the problem with the obligation of cooperation remains intact. The second extensive interpretation (related to alternative (ii) above) concerns the powers of the UNGA. This option is preferred by the authors since it entails a strong legitimacy. This legitimacy would be obtained because the creation of the tribunal would be supported by the majority of States in both the UNSC and the UNGA. Indeed, under this option, the proposal to create such a tribunal - or even better to exceptionally give jurisdiction to the ICC - would need to be presented first to the UNSC and be accepted by a clear-cut majority which would force Russia to

exercise its right to veto. If, due to the Russian veto, the draft resolution cannot be adopted by the UNSC, the 'Uniting for Peace' resolution can be invoked and the powers of the UNGA interpreted extensively in order to allow for the creation of a tribunal which would be binding on all UN Member States. That would imply, however, to gain a support from a majority of two thirds of the voting members. This scenario is certainly difficult to accomplish. Still, a failure to obtain the requisite majority in the UNGA or in the UNSC would mean a lack of support and thus of legitimacy for the creation of the special tribunal that should probably dictate to renounce its establishment.

Considering the policy that would be required so as to follow this latter option, two additional recommendations can be formulated.

- (i) Firstly, even if the ICJ's blessing would be preferable legally speaking, to require an advisory opinion about the legal aspects mentioned above would, in our view, prove too risky. The ICJ comprises judges who are elected by States and is traditionally rather conservative in its interpretations. Even if the ICJ has ratified certain dynamic interpretations of the Charter in its past jurisprudence, it is probable that some (or many) of its judges would be reluctant to accept such a broad interpretation of UNGA's powers. Accordingly, it is therefore preferable not to ask the ICJ for its legal opinion on the tribunal's creation through an extensive interpretation of the 'Uniting for Peace' resolution, especially since the procedure would be particularly long (between one and three years).
- (ii) Secondly, in view of enhancing legitimacy, the authors strongly advocate that EU Member States propose an amendment to the ICC Statute in order to broaden its jurisdiction in relation to the crime of aggression. Triggering an exceptional procedure for aggression committed in Ukraine without accepting a structural modification of the Statute in order to allow for similar future aggressions to be tried would obviously discredit the initiative, depriving it of much needed legitimacy. Thus, to appear credible, this initiative should be coupled with a long-term will to vest the main permanent criminal jurisdiction of the international community with the jurisdiction necessary to prosecute the crime of aggression in exactly the same way as for other international crimes.

Finally, two additional elements must be highlighted. First, as just mentioned, it will be extremely important to gain support from a large variety of States to be able to reach the two-third majority required to vote a UNGA resolution based on 'Uniting for Peace'. This possibility will depend on diplomatic strategies lead by State representatives within the UN. However, the determination of such a strategy goes far beyond the authors' legal expertise. Nevertheless, it should be noted that the recent resolution on reparations for the aggression against Ukraine which recognises that Russia 'must bear the legal consequences of all its internationally wrongful acts, including making reparation for the injury, including any damage, caused by such acts', and recommends the creation 'of an international register of damage to serve as a record, in documentary form, of evidence and claims information of damage, loss or injury to all natural and legal persons concerned, as well as the State of Ukraine [...]'²¹⁹ was adopted on 14 November 2022 with 94 votes in favour, 14 against and 73 abstentions²²⁰. When compared to the voting record of the resolution condemning Russia's aggression against Ukraine (141 in favour, 5 against, 35 abstentions), this voting record suggests that gaining the support necessary within the UNGA for the creation of the tribunal may prove challenging. Second, a reflection should be made about the effects of the creation of a tribunal (or of a jurisdiction conferred to the ICC) on the issue of war and the perspectives of reaching a peace agreement. Would such a creation lead to an aggravation of the conflict or, on the contrary, would it lead Russian authorities to negotiate a general settlement including the scope and the limits of this judicial avenue? Here again, those questions should be addressed carefully before engaging in such a path. But this kind of problem has little to do with a strict legal analysis; it is rather closely

²¹⁹ United Nations General Assembly, [Draft Resolution on Furtherance of remedy and reparation for aggression against Ukraine](#), UN Doc A/RES/ES-11/L.6, 7 November 2022.

²²⁰ United Nations News, [General Assembly adopts resolution on Russian reparations for Ukraine](#), 14 November 2022.

connected with a military assessment of the situation on the battlefield and of the diplomatic dimension of the conflict.

Of course, any means of avoiding all those difficult choices could be tantamount to renouncing any form of judgement for Russian aggression in Ukraine. All developments proposed for today's circumstances have been imagined in the opposite hypothesis but, as for all the choices to be made in this difficult situation, it once again obviously remains a matter of politics rather than law.

8 Annex

INTERNATIONAL AND INTERNATIONALISED CRIMINAL TRIBUNALS COMPARATIVE TABLE					
	Means of Establishment	Jurisdiction on crime of aggression	Obligation of cooperation by third States	Number of individuals tried	Cost
Nuremberg International Military Tribunal (NIMT)	Agreement of Allied powers after unconditional surrender of Germany	Yes	No	22	N/A
International Military Tribunal for the Far East (IMTFE)	Special proclamation by Allied Powers' Supreme Commander after unconditional surrender of Japan	Yes	No	26	N/A
International Criminal Tribunal for the former Yugoslavia (ICTY)	UNSC binding resolution – S/RES/827 (1993)	No	Yes (by virtue of S/RES/827)	> 110	> USD 1 billion
International Criminal Tribunal for Rwanda (ICTR)	UNSC binding resolution – S/RES/955 (1994)	No	Yes (by virtue of S/RES/955)	> 80	> USD 1 billion
Special Court for Sierra Leone (SCSL)	Agreement between UN and Sierra Leone (following UNSC resolution)	No	No	9	+/- USD 300 million
Extraordinary Chambers in the Courts of Cambodia (ECCC)	Agreement between UN and Cambodia (following UNGA resolution)	No	No	3	+/- USD 330 million
Special Tribunal for Lebanon (STL)	Agreement between UN and Lebanon (following UNSC resolution)	No	No	0	+/- USD 800 million
Extraordinary African Chambers (EAC)	Agreement between African Union and Senegal	No	No	1	USD 11.4 million
Kosovo Specialist Chambers (KSC)	Agreement between EULEX KOSOVO and Kosovo	No	No	1	+/- USD 160 million

Source: Authors' own compilation.

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