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ANALYSIS OF THE LEGAL OPTIONS FOR ESTABLISHING A TRIBUNAL FOR THE CRIME OF AGGRESSION UNDER THE AUSPICES OF THE COUNCIL OF EUROPE AND THE EUROPEAN UNION

*Prepared by the
Public International Law & Policy Group
June 2023*

EXECUTIVE SUMMARY

There are multiple options and avenues through which Ukraine and/or the international community could establish a tribunal for prosecuting the crime of aggression. A PILPG memorandum titled *Comparative Analysis Of the Legal Implications For The Creation of A Special Tribunal For Prosecution Of The Crime Of Aggression Against Ukraine* considers other options at a glance. Many authors have analyzed the possibility of creating an aggression tribunal through the UN, however, less attention has been afforded to the possibility of pursuing this option through European institutions. For this reason, this memorandum examines the legal options for establishing a hybrid or international criminal tribunal under the auspices of the Council of Europe (COE) and the European Union (EU) to prosecute the crime of aggression committed against Ukraine by the political leaders and military commanders of Russia and its allies. As detailed in this memorandum and summarized here, both the COE and the EU include within their legal frameworks mechanisms that could be used to establish a Crime of Aggression Tribunal. The EU is a supranational organization of 27 member states governing common economic, social, and security policies. The COE is an international organization of 46 member states established to uphold human rights, democracy and the rule of law in Europe. The Council of Europe is not an EU organization and shall not be confused with the Council of the EU, which is an EU institution.

Taking measures to support the creation of a Crime of Aggression Tribunal in the present circumstances likely falls within the COE's permitted scope of activities. At present, it also appears that there would be minimal opposition among its member states should the COE take action on these issues. There are two pathways for establishing a Crime of Aggression Tribunal within the COE:

The first is to use the COE's well-established powers to elaborate and adopt a multilateral treaty that provides for the establishment of a Crime of Aggression Tribunal. This requires approval by a two-thirds majority of the representatives on the COE's decision-making organ, the Committee of Ministers, casting a vote and a majority of the representatives entitled to sit on the Committee, which would allow for a margin of opposition by some COE member States without defeating the adoption of the treaty. A multilateral treaty could be acceded to by members of the international community (in addition to the COE member states), which could help achieve the critical mass of international adherence required to express the

will of the international community and thereby help overcome potential immunity defenses (see below).

The second is for the member states to empower the COE (a distinct legal entity) to enter into a treaty that provides for a Crime of Aggression Tribunal. This pathway has been followed only in respect of bilateral treaties with France concerning the operation of the COE, and further study may be warranted to understand the advantages and disadvantages of the potential bilateral treaty route. Similarly, the EU's common foreign and security policy can serve as a basis for the conclusion of a multilateral treaty establishing a Crime of Aggression Tribunal. Creating a multilateral treaty would require the High Representative of the Union for Foreign Affairs and Security Policy to submit a recommendation to the Council of the EU, which would have to adopt such recommendation unanimously (which can be achieved even where one third (or less) of the EU member states abstain from voting), nominating an EU negotiator and, following receipt of the negotiator's proposal, authorizing the signing of the agreement.

The creation of the Kosovo Specialist Chambers (KSC) is a helpful albeit exceptional precedent of a tribunal created under the auspices of the EU. The KSC is a hybrid criminal court created under Kosovo law, located in the Netherlands, and funded and staffed by nationals of the EU and five other contributing states.¹ The KSC was established pursuant to an international agreement achieved through an exchange of letters between Kosovo and the EU. The agreement was ratified by the Kosovo Assembly and enacted through an amendment to Kosovo's Constitution and the passing of a special law. A similar treaty between Ukraine and the EU creating a Crime of Aggression Tribunal could be executed. It should be noted, however, that the Council of the EU never authorized or officially confirmed the letters exchanged with Kosovo. Following the same procedure for the creation of a Crime of Aggression Tribunal with Ukraine could potentially be challenged by the Council of the EU and/or an EU Member State. Complying with the proper procedure for the conclusion of international agreements by the EU would mitigate this risk.

There are several challenges to the creation of a Crime of Aggression Tribunal under the auspices of the EU and the COE as summarized below:

Constitution of Ukraine: Ukraine's involvement and participation in the establishment of a Crime of Aggression Tribunal is likely to be essential, both in

¹ The other contributing states are the United States, Norway, Switzerland, Canada, and Turkey.

order to ensure the legitimacy of the tribunal and because Ukraine's territorial jurisdiction is likely to supply the strongest legal basis for the tribunal's jurisdiction. Thus, regard must be had to the Constitution of Ukraine. Taking into account Article 124 of the Constitution and case law interpreting it, a Crime of Aggression Tribunal's jurisdiction should be "*auxiliary*" rather than "*complementary*" to that of Ukrainian domestic courts. Further, a Crime of Aggression Tribunal created under the auspices of the COE or the EU should be designed as an international court. This is because a hybrid tribunal that is part of Ukraine's judicial system would likely be viewed as an "*extraordinary*" or "*special*" court that violates Article 125 of the Constitution of Ukraine. A specialized court that operates entirely within the Ukrainian domestic legal system would not violate the Constitution so long as it follows domestic procedures established by Ukrainian law and does not replace Ukrainian ordinary courts. However, the ability of the international community to participate in such a court's activities would be limited, which in turn might reduce the credibility of such a body. Finally, depending on the structure pursued, it may be advisable to seek an opinion from the Constitutional Court of Ukraine prior to establishing a Crime of Aggression Tribunal to mitigate any constitutional concerns.

Jurisdiction: The legal basis for a Crime of Aggression Tribunal depends in large part on whether Russia consents to its jurisdiction. If Russia consents to a tribunal's jurisdiction to hear cases concerning the alleged commission of crimes of aggression by Russian officials, such a tribunal's jurisdiction would be relatively easy to establish regardless of whether it was a domestic, hybrid, or international tribunal. Russia might provide its consent, for example, as a condition of an armistice. By contrast, if Russia does not consent, which is the most likely scenario, the legal basis for the tribunal's jurisdiction over Russian officials is likely to be more difficult to establish. The same is true with respect to any other relevant third State, such as Belarus, in relation to an international tribunal's jurisdiction to hear cases concerning the alleged commission of the crime of aggression by officials of that State. As there is no jurisdictional impediment to the prosecution of the crime of aggression in Ukrainian domestic courts, which would apply the well-established principle of territorial jurisdiction, an option in principle is to create a hybrid tribunal established as part of Ukraine's judicial system. But, since a hybrid tribunal established as part of Ukraine's judicial system would risk running afoul of Article 125 and Section VIII of the Constitution of Ukraine, a hybrid tribunal may not be a viable option in practice. Ukraine could likely also delegate its territorial jurisdiction to a treaty-based international tribunal which sits outside of Ukraine's judicial system, and therefore would not run afoul of Article 125. However, in the absence of consent by Russia

or any other relevant third State, there is a risk that the exercise of jurisdiction by an international tribunal over the nationals of the non-consenting third State may be challenged under the *Monetary Gold* principle, under which the International Court of Justice (ICJ) and other international tribunals cannot exercise jurisdiction over a case where determining the rights and obligations of a non-consenting third State is a necessary prerequisite to adjudicating the claims before it. Nevertheless, there is a strong argument that the *Monetary Gold* principle would not be applicable to a Crime of Aggression Tribunal, and thus not present an obstacle to its exercise of jurisdiction.

Immunities: Overcoming the immunity of high-ranking Russian and Belarusian officials is a significant challenge to establishing a Crime of Aggression Tribunal. This is because the existing precedents for overcoming immunity do not apply directly to tribunals established outside the United Nations (UN) framework. Two types of immunity are relevant: *ratione personae* (personal immunity) and *ratione materiae* (functional immunity or subject matter immunity). Regarding immunity *ratione personae*, the ICJ and the International Criminal Court (ICC) agree that it does not bar prosecution for crimes under international law before “*certain international*” tribunals, though neither court has provided a clear definition of what constitutes “*certain international*” tribunals. Existing precedent and scholarly commentaries suggest that a multilateral treaty with an open treaty-making process, accession to the treaty by non-member states (of either the COE or EU), and a critical mass of at least 60 states parties and at least 40 more states that intend to adhere to the treaty would provide the Crime of Aggression Tribunal a more persuasive – though not conclusive – basis upon which to circumvent personal immunities. Regarding immunity *ratione materiae*, a constitutive treaty for a Crime of Aggression Tribunal should substantially reflect the exception provided for in Nuremberg Principle No. 3 and the statutes of contemporary international criminal tribunals. However, this view has arguably not yet crystallized into a customary rule of international law, such that any treaty would – as with immunity *ratione personae* – have to reflect the will of the international community to overcome functional immunity defenses.

Trials *in Absentia*: Under international and EU law, trials *in absentia* are permitted only where certain safeguards are in place, namely the right to a retrial. In practice, international criminal tribunals do not conduct trials *in absentia*. In fact, the only international criminal tribunals that allowed this practice were the Special Tribunal for Lebanon (STL), and, in limited circumstances not applicable here, the Special Court for Sierra Leone (SCSL).

Retroactivity: The principle of non-retroactivity is unlikely to bar the prosecution of Russian (or Belarusian) officials by a Crime of Aggression Tribunal that is created after the alleged crimes were committed as there appears to be an emerging consensus that the crime of aggression has obtained the status of customary international law.

Political Landscape: Significant support presently exists in Europe for the creation of a Crime of Aggression Tribunal. Nevertheless, economic and political factors (*e.g.*, global economic headwinds, energy security, and opposition by certain EU and COE states) could give rise to some resistance to attempts to establish such a tribunal. From the point of view of legitimacy, an international or a hybrid tribunal would be seen as more legitimate than a domestic tribunal, while a hybrid tribunal may be seen as a somewhat more attractive option than an *ad hoc* international tribunal.

Some of these factors are potential obstacles to the creation of a Crime of Aggression Tribunal in Europe, while others are potential obstacles to the ability of the tribunal, once created, to reach final judgments against the political leaders and military commanders of Russia and its allies. As such, they should be considered when taking decisions as to the form, mandate, and legal basis of the proposed tribunal and the procedures used to create it. Taken together, these factors suggest that creating a Crime of Aggression Tribunal as an international tribunal pursuant to a multilateral treaty under the auspices of the COE or the EU with the participation of Ukraine as well as a sizeable portion of the international community may prove to be a more attractive option than creating it as a hybrid (or fully domestic) tribunal, as a means of maximizing the tribunal's political legitimacy and minimizing legal risks under Ukrainian and international law.

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Statement of Purpose

This memorandum aims to examine the legal options for establishing a hybrid or international criminal tribunal under the auspices of the Council of Europe (COE) and the European Union (EU) to prosecute the crime of aggression committed against Ukraine by the political leaders and military commanders of Russia and its allies. The analysis also addresses issues and challenges connected with both options for establishing the tribunal. The purpose of this memorandum is not to set forth a best option or advocate for establishing the tribunal with the support of or through the COE or EU but rather to look at the possible benefits and drawbacks of pursuing these options. PILPG memorandum *Comparative Analysis Of the Legal Implications For The Creation of A Special Tribunal For Prosecution Of The Crime Of Aggression Against Ukraine* briefly touches upon all or nearly all options to provide a comparative perspective.

Introduction

On March 17, 2023, the ICC issued a historic arrest warrant against sitting Russian President Vladimir Putin.² The ICC accuses President Putin of unlawfully deporting and transferring children from Russian-occupied areas of Ukraine, war crimes under the Rome Statute to the ICC.³ Ukraine previously accepted the ICC's jurisdiction over crimes committed on its territory.⁴ The warrant against Putin marks the first time that a sitting president of a permanent member of the UN Security Council or a nuclear power has been called to account before the ICC,

² INTERNATIONAL CRIMINAL COURT, *Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova* (Mar. 17, 2023), available at <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>.

³ INTERNATIONAL CRIMINAL COURT, *Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova* (Mar. 17, 2023), available at <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>.

⁴ Although Ukraine has not yet ratified the Rome Statute, it accepted the ICC's jurisdiction over alleged crimes under the Rome Statute occurring on its territory pursuant to Article 12(3) of the Statute. INTERNATIONAL CRIMINAL COURT, *Ukraine*, available at <https://www.icc-cpi.int/situations/ukraine> (last visited May 1, 2023).

signaling a new era of accountability for war crimes.⁵ Yet, there is currently no forum that could provide accountability for crimes of aggression against Ukraine.

President Zelenskyy has called for the establishment of a Crime of Aggression Tribunal “*so that it can punish those who, unfortunately, cannot be reached by the International Criminal Court.*”⁶ As President Zelenskyy’s comments suggest, the impetus for the creation of a Crime of Aggression Tribunal in Europe (or elsewhere) is the ICC’s lack of jurisdiction over Russia’s crimes of aggression in Ukraine. Absent a UN Security Council referral, the ICC may not exercise jurisdiction over the crime of aggression committed by the nationals of a State that is not a Party to the Rome Statute.⁷ Russia has not ratified the Rome Statute, and its veto power on the UN Security Council would prevent that body from taking action.⁸

The establishment of a Crime of Aggression Tribunal has gained support internationally and within Europe. Media reports in December 2022 indicated that a draft resolution calling for the creation of a special tribunal was circulating at the UN, and that it was gaining support from critical parties, including the United States.⁹ The text of one such draft resolution, which we understand has been watered down since its introduction, calls on UN member states to “*consider appropriate actions to pursue comprehensive accountability*” for crimes committed

⁵ See, e.g., Daniel Michaels, Jess Bravin, Isabel Coles, *Russia’s Vladimir Putin Faces Arrest Warrant by International Court*, WSJ, Mar. 17, 2023, available at <https://www.wsj.com/articles/u-n-court-issues-arrest-warrant-for-russias-putin-and-another-kremlin-official-d3b9cb8e>

⁶ See Office of the 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” in Paris* (Oct. 5, 2022), available at <https://www.president.gov.ua/en/news/mayemo-stvoriti-specialnij-tribunal-shodo-zlochynu-agresiyi-78285>.

⁷ See *Rome Statute of the International Criminal Court* arts. 13 and 15bis (1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

⁸ See Celeste Kmiotek, *How Ukraine’s Proposed Special Tribunal for Russian Aggression Would Work*, ATLANTIC COUNCIL (Dec. 6, 2022), available at <https://www.atlanticcouncil.org/blogs/new-atlanticist/how-ukraines-proposed-special-tribunal-for-russian-aggression-would-work/>.

⁹ See Patrick Wintour, *Russian War Crimes Draft Resolution Being Circulated at the UN*, THE GUARDIAN, Dec. 4, 2022, available at <https://www.theguardian.com/law/2022/dec/04/russian-war-crimes-draft-resolution-circulated-un-ukraine-zelenskiy>.

against Ukraine.¹⁰ It remains unclear whether this draft resolution will be adopted in its current form. While the UN General Assembly was willing to support a resolution calling for reparations, an earlier resolution calling the war an act of aggression received 141 votes in favor, while 47 other states abstained or did not vote.¹¹ Russia, which disputes that the war violates international law, voted against the resolution along with Belarus, Iran, Syria, and North Korea.¹²

The European Union has also signaled support for the creation of a tribunal to prosecute crimes of aggression by Russian leadership. Ursula von der Leyen, the President of the European Commission, has called for a specialized, UN-backed court to investigate and prosecute Russia's crimes of aggression.¹³ The Commission has suggested that either a special independent international tribunal based on a multilateral treaty or a specialized court integrated into a national justice system, e.g., that of Ukraine, could be the basis for such an investigative effort.¹⁴ The European Parliament, meanwhile, adopted a resolution in May 2022 in support of “*setting up a special international tribunal, which would be mandated to investigate and prosecute the alleged crimes of aggression committed against Ukraine by the political leaders and military commanders of Russia and its allies.*”¹⁵ In January 2023, the European Parliament adopted a further resolution re-affirming its support for the creation of a special international tribunal to prosecute the crime of

¹⁰ Ukraine Task Force of the Global Accountability Network, *Proposal for a Resolution by the United Nations General Assembly and Accompanying Proposal for a Statute for a Special Tribunal for Ukraine on the Crime of Aggression* (Sept. 7, 2022), available at https://2022.uba.ua/wp-content/uploads/2022/09/uktf_unproposal_specialtribunal_resolutionandstatute_7sep2022.pdf; Dawn Clancy, *UN Diplomats Negotiate First Steps to Try Russia for Crimes of Aggression*, PASS BLUE (Dec. 20, 2022), available at https://www.passblue.com/2022/12/20/diplomats-at-the-un-negotiate-the-first-steps-to-prosecute-russia-for-crimes-of-aggression/?utm_source=PassBlue+List&utm_campaign=ef5beaf9cc-RSS_PassBlue&utm_medium=email&utm_term=0_4795f55662-ef5beaf9cc-55075693.

¹¹ See General Assembly Resolution on Aggression against Ukraine, U.N. Doc. A/Res/ES-11/1 (Mar. 2, 2022), available at <https://digitallibrary.un.org/record/3965290?ln=en>.

¹² Russia has claimed that it was acting in preemptive self-defense. See Michael N. Schmitt, *Russia's "Special Military Operation" and the (Claimed) Right of Self-Defense*, ARTICLES OF WAR (Feb. 28, 2022), available at <https://lieber.westpoint.edu/russia-special-military-operation-claimed-right-self-defense/>.

¹³ See European Commission, *Statement by President Von der Leyen on Russian Accountability and the Use of Russian Frozen Assets* (Nov. 30, 2022), available at https://ec.europa.eu/commission/presscorner/detail/en/statement_22_7307.

¹⁴ European Commission, *Ukraine: Commission Presents Options to Make Sure That Russia Pays for its Crimes* (Nov. 30, 2022), available at https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7311.

¹⁵ European Parliament, *Resolution on the fight against impunity for war crimes in Ukraine* (May 19, 2022), available at https://www.europarl.europa.eu/doceo/document/TA-9-2022-0218_EN.html. In addition, the European Parliament's Subcommittee on Human Rights commissioned a legal assessment on the legal considerations related to the creation of an *ad hoc* tribunal. See Olivier Corten and Vaios Koutroulis, *Tribunal for the Crime of Aggression Against Ukraine – a Legal Assessment*, EUROPEAN PARLIAMENT DIRECTORATE-GENERAL FOR EXTERNAL POLICIES (Dec. 2022), available at [https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702574/EXPO_IDA\(2022\)702574_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702574/EXPO_IDA(2022)702574_EN.pdf).

aggression. The resolution primarily envisions a political role for the EU, recommending that EU member states push for the creation of a special international tribunal through the auspices of the UN. The COE's Committee of Ministers has also indicated its support for the creation of a specialized international tribunal and has "*noted with interest*" Ukraine's proposals with respect to the establishment of an *ad hoc* tribunal. The Parliamentary Assemblies of the COE, the Organization for Security and Cooperation in Europe, and NATO have also endorsed the creation of a special tribunal, as have a number of European parliaments.¹⁶

Recently, in March 2023, the United States announced its support for the creation of a hybrid tribunal to prosecute the crime of aggression against Ukraine.¹⁷ Beth Van Schaack, the United States' Ambassador-At-Large For Global Criminal Justice, stated that the United States had closely analyzed "*a number of models*" and concluded that "*an internationalized court that is rooted in Ukraine's judicial system, but that also includes international elements, will provide the clearest path to establishing a new Tribunal and maximizing our chances of achieving meaningful accountability.*"¹⁸ Ambassador Van Schaack added that the United States envisions such a court as "*having significant international elements—in the form of substantive law, personnel, information sources, and structure.*"¹⁹

These developments indicate relatively broad support from the international community, and in particular in Europe, for the creation of some form of a special tribunal for the crime of aggression against Ukraine. Nevertheless, as the rest of this memorandum details, there are a number of factors to consider in forming a Crime of Aggression Tribunal under the auspices of the EU or the COE, many of

¹⁶ See Parliamentary Assembly for the Council of Europe, *PACE Calls for the Setting Up of an Ad Hoc International Criminal Tribunal to Hold to Account Perpetrators of the Crime of Aggression Against Ukraine* (Apr. 28, 2022), available at

<https://pace.coe.int/en/news/8699/pace-calls-for-the-setting-up-of-an-ad-hoc-international-criminal-tribunal-to-hold-to-account-perpetrators-of-the-crime-of-aggression-against-ukraine>; Office of the President of Ukraine, *Only a Special International Tribunal for the Crime of Aggression by the Russian Federation Against Ukraine Will Make it Possible to Restore Justice and Punish All the Guilty – Andriy Yermak* (Nov. 28, 2022), available at <https://www.president.gov.ua/en/news/lishe-specialnij-mizhnarodnij-tribunal-shodo-zlochynu-agresi-79505>; French Ministère de l'Europe et des Affaires Étrangères, *Ukraine – Special Tribunal on Russian Crimes of Aggression* (Nov. 30 2022), available at

<https://www.diplomatie.gouv.fr/en/country-files/ukraine/news/article/ukraine-special-tribunal-on-russian-crimes-of-aggression-30-nov-22>.

¹⁷ U.S. DEPARTMENT OF STATE, *Ambassador Van Schaack's Remarks* (Mar. 27. 2023), available at <https://www.state.gov/ambassador-van-schaacks-remarks/>.

¹⁸ U.S. DEPARTMENT OF STATE, *Ambassador Van Schaack's Remarks* (Mar. 27. 2023), available at <https://www.state.gov/ambassador-van-schaacks-remarks/>.

¹⁹ U.S. DEPARTMENT OF STATE, *Ambassador Van Schaack's Remarks* (Mar. 27. 2023), available at <https://www.state.gov/ambassador-van-schaacks-remarks/>.

which would have significant consequences for the tribunal's political and legal legitimacy.

After briefly setting out the relevant context, this memorandum analyzes the legal framework for establishing hybrid or international criminal tribunals under the auspices of the Council of Europe and the European Union. This memorandum then identifies and considers issues and challenges other factors (e.g., Ukrainian constitutional constraints, immunities, jurisdiction, and legitimacy) that may affect the establishment in Europe of a tribunal to prosecute the crimes of aggression.

Legal Framework

The Legal Framework for Establishing a Crime of Aggression Tribunal Under the Auspices of the Council of Europe

The Council of Europe, established by treaty in May 1949,²⁰ has 46 member states, including all 27 EU member states and Ukraine. The COE thus has a wider membership than the EU, comprising all European countries save for Belarus, the Holy See, Kosovo, and Russia. The COE is an important forum for pan-European co-operation in various fields.²¹ For example, the adoption of the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights or ECHR) and the creation of the European Court of Human Rights (ECtHR). The COE has also adopted over 220 multilateral treaties in fields including international law, criminal law, and civil law.²²

This section considers whether and on what basis the COE could establish a Crime of Aggression Tribunal. As detailed below, we find that the COE is likely to be a viable forum through which to establish such a tribunal, and that there are two alternative pathways through which this may be done.

²⁰ *Statute of the Council of Europe* (1949), available at <https://rm.coe.int/1680306052>; see also Jörg Polakiewicz, *Council of Europe*, in MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW (2019), available at <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e607>. The Statute was signed by Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, and the United Kingdom.

²¹ Jörg Polakiewicz, *Council of Europe*, in MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW (2019), available at <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e607>.

²² Jörg Polakiewicz, *Council of Europe*, in MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW (2019), available at <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e607>; Treaty Office of the Council of Europe, *Practical Guide*, 8 (Sept. 2020), available at <https://rm.coe.int/16809fce94>; Council of Europe, *Complete list of the Council of Europe's treaties*, available at <https://www.coe.int/en/web/conventions/full-list>.

First, the COE could adopt a multilateral treaty that provides for the establishment of a Crime of Aggression Tribunal. Member states, as well as non-member states and international organizations, could join such a treaty. This would provide the advantage that the treaty could be acceded to by a sizeable portion of the international community, which could help achieve the critical mass of international adherence required to express the will of the international community and thereby help overcome potential immunity defenses that could be asserted by the officials of Russia and its allies.

Alternatively, member states could empower the COE, as a distinct legal entity, to enter into a treaty for the creation of a Crime of Aggression Tribunal. This approach is untested in the present circumstances but finds support in the COE's early practice.

Regardless of the pathway chosen, acting to support the creation of a Crime of Aggression Tribunal falls within the COE's permitted scope of activities. At present, it also appears that there would be minimal opposition among its member states should the COE choose to do so.

The COE Derives its Powers from its Statute and Practice

The COE may only exercise the powers expressly or impliedly bestowed upon it by its constituent treaty, the Statute of the Council of Europe (the "Statute").²³

The Statute is to be interpreted flexibly, based on a teleological approach with due regard for the COE's practices over the last seventy years.²⁴ Article 31 of the 1969 Vienna Convention on the Law of Treaties confirms that a treaty must be interpreted taking into account "*any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.*"²⁵

The Statute is also to be interpreted in light of the COE's objectives and the imperatives associated with the effective performance of its functions.²⁶ In *Nuclear*

²³ James Crawford, BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 180, 184, 188 (8th ed. 2012).

²⁴ James Crawford, BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 187 (8th ed. 2012).

²⁵ Vienna Convention on the Law of Treaties, art. 31(3)(b), May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969), available at https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

²⁶ James Crawford, BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 187 (8th ed. 2012); *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, 1996 I.C.J. Rep. 66, 75 (July 8), available at <https://www.icj-cij.org/en/case/93>. See also *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. Rep. 174, 180 (Apr. 11), available at <https://www.icj-cij.org/en/case/4> ("Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the

Weapons in Armed Conflict, the ICJ recognized that the object of an organization's constituent treaty is to create a new organization endowed with a certain degree of autonomy, and that its character is not only conventional, *i.e.*, a treaty "to which the well-established rules of treaty interpretation apply," but also institutional, which "can raise specific problems of interpretation."²⁷

Further, under international law, an international organization has implied powers. As the ICJ stated in *Reparation for Injuries*, such an organization "must be deemed to have those powers which, though not expressly provided in [its constituent treaty], are conferred upon it by necessary implication as being essential to the performance of its duties."²⁸ Such implied powers, however, have limits: they may not contradict the express provisions of the constituent treaty, must be essential or indispensable for the organization to perform its functions, must not violate fundamental rules of international law, and must not change the distribution of power between organs of the organization.²⁹

The COE Has the Power to Adopt Multilateral Treaties

The COE's powers to adopt treaties are derived from the Statute as well as "resolutions of a statutory character," which the Committee of Ministers³⁰ has been used since 1951 to supplement the Statute.³¹

Article 15 of the Statute provides that the Committee of Ministers "shall consider the action required to further the aim of the Council of Europe, including the conclusion of conventions or agreements."³² The aim of the COE, set out in Article 1 of the Statute, is "to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their

Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.").

²⁷ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, 1996 I.C.J. Rep. 66, 74-75 (July 8), available at <https://www.icj-cij.org/en/case/93>.

²⁸ *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. Rep. 174, 182 (Apr. 11), available at <https://www.icj-cij.org/en/case/4>.

²⁹ James Crawford, BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 188 (8th ed. 2012); Niels M. Blokker, *International Organizations or Institutions, Implied Powers*, in MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW § D (2021), available at <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e467>.

³⁰ The Committee of Ministers is the COE's decision-making organ, on which each member State has one representative and one vote. Jörg Polakiewicz, *Council of Europe*, in MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW (2019), available at <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e607>

³¹ Jörg Polakiewicz, *Council of Europe*, in MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW (2019), available at <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e607>. Polakiewicz observes that "the COE's Statute only roughly reflects the reality of the organization's rather complex institutional structure and decision-making."

³² *Statute of the Council of Europe* art. 15(a) (1949), available at <https://rm.coe.int/1680306052>.

*common heritage [i.e., individual freedom, political liberty, the rule of law, and democracy] and facilitating their economic and social progress.*³³ Article 1 further provides that this aim “*shall be pursued through the organs of the Council by ... agreements ... in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms.*”³⁴ Resolution (51)30, adopted by the Committee of Ministers in 1951, confirms that “[t]he conclusions of the Committee may, where appropriate, take the form of a convention or agreement.”³⁵

In light of these powers, the COE has an established treaty-making practice. The process for the elaboration and adoption of treaties by the COE “*is governed by a rather flexible procedure based on the Organisation’s practice.*”³⁶ The contemporary treaty-making practice typically involves the following steps:

- (1) Any of the Committee of Ministers, the Parliamentary Assembly,³⁷ the Congress of Local and Regional Authorities of Europe,³⁸ a conference of specialized ministers,³⁹ or a steering committee⁴⁰ may initiate a new treaty. Such an initiative must be approved by the Committee of Ministers, which requires, at a minimum, support in principle for the initiative from the member states.

³³ *Statute of the Council of Europe* art. 1(a) (1949), available at <https://rm.coe.int/1680306052>.

³⁴ *Statute of the Council of Europe* art. 1(b) (1949), available at <https://rm.coe.int/1680306052>.

³⁵ Resolution (51)30, quoted in Treaty Office of the Council of Europe, *Practical Guide*, 111 (Sept. 2020), available at <https://rm.coe.int/16809fce94>; see also Jörg Polakiewicz, TREATY-MAKING IN THE COUNCIL OF EUROPE 205 (1999), available at <https://rm.coe.int/16809fceb1>.

³⁶ Jörg Polakiewicz, TREATY-MAKING IN THE COUNCIL OF EUROPE 19 (1999), available at <https://rm.coe.int/16809fceb1>.

³⁷ The Parliamentary Assembly is the COE’s deliberative organ, on which the size of member State delegations vary from two representatives for the smallest States to 18 representatives for major States such as France, Germany, Turkey, and the United Kingdom. Jörg Polakiewicz, *Council of Europe*, in MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW (2019), available at

<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e607>

³⁸ The Congress of Local and Regional Authorities of Europe is a COE organ that represents over 130,000 local and regional authorities in the COE’s 46 member States. Council of Europe, *A European Assembly of local and regional elected representatives*, available at <https://www.coe.int/en/web/congress/overview> (last visited May 1, 2023). It was set up on the basis of Statutory Resolution (94)3 adopted in 1994. See Guy De Vel, THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE 113-16 (1995).

³⁹ Conferences of specialized ministers which cover the various areas of the COE’s activities are held regularly, pursuant to Resolution 71(44) on the conferences of specialized ministers adopted in 1971. Jörg Polakiewicz, TREATY-MAKING IN THE COUNCIL OF EUROPE 19 (1999), available at <https://rm.coe.int/16809fceb1>. See also Guy De Vel, THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE 117-22 (1995).

⁴⁰ Steering committees responsible for implementing the various areas of the COE’s activities may be set up under Art. 17 of the Statute. See *Statute of the Council of Europe* art. 17 (1949), available at <https://rm.coe.int/1680306052> (“The Committee of Ministers may set up advisory and technical committees or commissions for such specific purposes as it may deem desirable.”); see also Guy De Vel, THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE 44 (1995).

- (2) The Committee of Ministers usually entrusts the task of drafting a new treaty to a steering committee, or a committee of experts acting under the authority of one of the steering committees.
- (3) Once the draft treaty text is finalized, the competent steering committee votes on the text and, upon approval, submits it to the Committee of Ministers for adoption.⁴¹
- (4) The Committee of Ministers typically invites the Parliamentary Assembly to express an opinion on the draft treaty. This allows the political acceptance of the draft treaty to be gauged, so as to avoid the COE adopting treaties which may not be ratified by national legislatures. The Parliamentary Assembly may also provide comments on the draft treaty text.⁴²
- (5) The Committee of Ministers then decides whether to adopt the text and open it up to all COE member states for ratification.⁴³ In accordance with Article 20.d of the Statute and Resolution (93)27, this requires a two-thirds majority of the representatives casting a vote and a majority of the representatives entitled to sit on the Committee.⁴⁴ Adoption means that the text of the treaty becomes definitive,⁴⁵ not that the COE has entered or will enter into the treaty as an organization.
- (6) After the date of opening for signature, COE member states may then sign and ratify the treaty.⁴⁶ The treaty comes into force once it is ratified by a certain number of member states, as provided in the treaty's clauses.⁴⁷ As

⁴¹ Jörg Polakiewicz, TREATY-MAKING IN THE COUNCIL OF EUROPE 19-22 (1999), available at <https://rm.coe.int/16809fceb1>. See also Treaty Office of the Council of Europe, *Practical Guide*, 9 (Sept. 2020), available at <https://rm.coe.int/16809fceb1>.

⁴² Jörg Polakiewicz, TREATY-MAKING IN THE COUNCIL OF EUROPE 22-24 (1999), available at <https://rm.coe.int/16809fceb1>.

⁴³ Resolution (51)30, quoted in Treaty Office of the Council of Europe, *Practical Guide*, 111 (Sept. 2020), available at <https://rm.coe.int/16809fceb1>; see also Jörg Polakiewicz, TREATY-MAKING IN THE COUNCIL OF EUROPE 205 (1999), available at <https://rm.coe.int/16809fceb1>.

⁴⁴ Jörg Polakiewicz, TREATY-MAKING IN THE COUNCIL OF EUROPE 24-26 (1999), available at <https://rm.coe.int/16809fceb1>.

⁴⁵ Treaty Office of the Council of Europe, *Practical Guide*, 109 (Sept. 2020), available at <https://rm.coe.int/16809fceb1>.

⁴⁶ Treaty Office of the Council of Europe, *Practical Guide*, 109 (Sept. 2020), available at <https://rm.coe.int/16809fceb1>.

⁴⁷ Treaty Office of the Council of Europe, *Practical Guide*, 28 (Sept. 2020), available at <https://rm.coe.int/16809fceb1>. See, e.g., *European Convention on Extradition* art. 29.2 (1957), available at <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=024> (“The Convention shall come into force 90 days after the date of deposit of the third instrument of ratification.”).

confirmed in Resolution (51)30, a treaty only binds the member states that have ratified it.⁴⁸

(7) A COE treaty can also be acceded to by non-member states or the EU. The modalities of accession are set up in the final clauses of each treaty; typically, the unanimous agreement of the parties is required for non-member states to be invited to accede.⁴⁹ It is customary for non-member states to request an invitation to accede in a letter to the Secretary General of the COE.⁵⁰ The Committee of Ministers makes a formal decision on inviting a non-member state, sometimes after consultation with a committee of experts.⁵¹ For example, in October 2019, Guatemala requested an invitation from the COE to accede to the Convention on Cybercrime.⁵²

(8) After a committee of experts favorably reviewed the proposal,⁵³ the Committee of Ministers in March 2020 decided to invite Guatemala to accede to the treaty.⁵⁴

This process can take from a couple of months to several years, depending in part on the nature and complexity of the issues.⁵⁵ With sufficient political will,

⁴⁸ Resolution (51)30, *quoted in* Treaty Office of the Council of Europe, *Practical Guide*, 111 (Sept. 2020), *available at* <https://rm.coe.int/16809f94>; Jörg Polakiewicz, *TREATY-MAKING IN THE COUNCIL OF EUROPE* 205 (1999), *available at* <https://rm.coe.int/16809f94>. *See also* Jörg Polakiewicz, *Council of Europe*, in *MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW* (2019), *available at* <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e607> (“The ‘conventions and agreements’ are multilateral international treaties which derive their legal force from the consent of those Member States that wish to be bound by them. Their elaboration and adoption by the COE does not create an obligation for Member States to sign or ratify them.”); Jörg Polakiewicz, *TREATY-MAKING IN THE COUNCIL OF EUROPE* 14 (1999), *available at* <https://rm.coe.int/16809f94>.

⁴⁹ Treaty Office of the Council of Europe, *Practical Guide*, 30 (Sept. 2020), *available at* <https://rm.coe.int/16809f94>. *See, e.g.,* *European Convention on Extradition* art. 30.1 (1957), *available at* <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=024> (“Article 30 – Accession. 1. The Committee of Ministers of the Council of Europe may invite any State not a member of the [COE] to accede to this Convention, provided that the resolution containing such invitation receives the unanimous agreement of the members of the [COE] who have ratified the Convention.”).

⁵⁰ Jörg Polakiewicz, *TREATY-MAKING IN THE COUNCIL OF EUROPE* 35 (1999), *available at* <https://rm.coe.int/16809f94>.

⁵¹ Jörg Polakiewicz, *TREATY-MAKING IN THE COUNCIL OF EUROPE* 35-36 (1999), *available at* <https://rm.coe.int/16809f94>; Treaty Office of the Council of Europe, *Practical Guide*, 30 (Sept. 2020), *available at* <https://rm.coe.int/16809f94>.

⁵² Mission of Guatemala to the European Union, *Note Verbale to Council of Europe* (Oct. 7, 2019), *quoted in* Treaty Office of the Council of Europe, *Practical Guide*, 34 (Sept. 2020), *available at* <https://rm.coe.int/16809f94>.

⁵³ Secretariat of the Cybercrime Convention Committee, *Note on the co-operation with Guatemala in the field of cybercrime*, (Oct. 21, 2019), *quoted in* Treaty Office of the Council of Europe, *Practical Guide*, 35 (Sept. 2020), *available at* <https://rm.coe.int/16809f94> (finding that following the expected adoption by Guatemala of a draft law on cybercrime its domestic legislation would be largely in line with the Cybercrime Convention).

⁵⁴ Decision by the Committee of Ministers, *quoted in* Treaty Office of the Council of Europe, *Practical Guide*, 40 (Sept. 2020), *available at* <https://rm.coe.int/16809f94>.

⁵⁵ Jörg Polakiewicz, *TREATY-MAKING IN THE COUNCIL OF EUROPE* 19 (1999), *available at* <https://rm.coe.int/16809f94>.

however, the process can be relatively swift. For example, in the wake of the 1985 Heysel Stadium disaster, the European Convention on Spectator Violence and Misbehaviour at Sport Events and in particular at Football Matches (ETS No. 120, 1985) took only three months to draw up, adopt, and be opened for signature. This treaty entered into force within another three months.⁵⁶

Notably, the COE created the ECtHR pursuant to Article 15 of the Statute. In August 1949, the COE's Consultative Assembly (now the Parliamentary Assembly)⁵⁷ considered a draft convention submitted by the European Movement⁵⁸ and adopted a Resolution on Human Rights.⁵⁹ The Resolution was taken up by the Committee of Ministers and, in turn, the Committee on Legal and Administrative Questions adopted the draft convention as the basis for its work.⁶⁰ The draft convention was the subject of a series of debates held by the Consultative Assembly, including as to the mechanism to be used to enforce the guaranteed rights.⁶¹ Ultimately, the Assembly unanimously acknowledged the need for a system of judicial review and recommended the establishment of the ECtHR.⁶²

The ECHR entered into force on September 3, 1953,⁶³ and is now in force in 46 states.⁶⁴ Section II of the ECHR establishes the ECtHR as a permanent court⁶⁵ with jurisdiction over “*all matters concerning the interpretation and application of*

⁵⁶ Jörg Polakiewicz, TREATY-MAKING IN THE COUNCIL OF EUROPE 19 (1999), available at <https://rm.coe.int/16809fceb1>.

⁵⁷ Jörg Polakiewicz, TREATY-MAKING IN THE COUNCIL OF EUROPE 9 (1999), available at <https://rm.coe.int/16809fceb1>.

⁵⁸ A private organization created in 1948 comprising 26 national councils, the European Movement aimed to coordinate the activities of the various existing international organizations and represent them in their relations with governments and to mobilize public opinion in favor of European integration. CVCE, *The European Movement*, available at

<https://www.cvce.eu/en/education/unit-content/-/unit/7b137b71-6010-4621-83b4-b0ca06a6b2cb/f5a8f4f1-1388-4824-88a9-8a8c50904a15>.

⁵⁹ CVCE, *The establishment of the European Convention for the Protection of Human Rights*, available at <https://www.cvce.eu/en/education/unit-content/-/unit/026961fe-0d57-4314-a40a-a4ac066a1801/e5143a50-1a43-4a26-8ffd-7a5aaa12ecf7>.

⁶⁰ CVCE, *The establishment of the European Convention for the Protection of Human Rights*, available at <https://www.cvce.eu/en/education/unit-content/-/unit/026961fe-0d57-4314-a40a-a4ac066a1801/e5143a50-1a43-4a26-8ffd-7a5aaa12ecf7>.

⁶¹ CVCE, *The establishment of the European Convention for the Protection of Human Rights*, available at <https://www.cvce.eu/en/education/unit-content/-/unit/026961fe-0d57-4314-a40a-a4ac066a1801/e5143a50-1a43-4a26-8ffd-7a5aaa12ecf7>.

⁶² CVCE, *The establishment of the European Convention for the Protection of Human Rights*, available at <https://www.cvce.eu/en/education/unit-content/-/unit/026961fe-0d57-4314-a40a-a4ac066a1801/e5143a50-1a43-4a26-8ffd-7a5aaa12ecf7>.

⁶³ CVCE, *The establishment of the European Convention for the Protection of Human Rights*, available at <https://www.cvce.eu/en/education/unit-content/-/unit/026961fe-0d57-4314-a40a-a4ac066a1801/e5143a50-1a43-4a26-8ffd-7a5aaa12ecf7>.

⁶⁴ Council of Europe, *Chart of signatures and ratifications of Treaty 005*, available at <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=005>.

⁶⁵ *Convention for the Protection of Human Rights and Fundamental Freedoms* art. 19 (1950), available at <https://rm.coe.int/1680a2353d>.

the Convention” referred to it by individuals or State Parties.⁶⁶ The ECtHR is a judicial organ of the COE,⁶⁷ supervised by the COE Committee of Ministers.⁶⁸ Judges are elected by the COE Parliamentary Assembly for a non-renewable period of nine years and serve in their individual capacities despite being nominated by States Parties.⁶⁹ Between 1952 and 2013, amendments to the ECHR, *inter alia*, conferred on the ECtHR the competence to give advisory opinions, enlarged the court, and allowed applications alleging the violation of human rights to be referred directly to the ECtHR.⁷⁰ Prior to 1998, individuals did not have direct access to the ECtHR, but had to apply to the European Commission of Human Rights, which decided the admissibility of cases.⁷¹

The COE May Also Be Granted Authority to Enter into Treaties

In principle, being an international legal organization, the COE has the legal capacity to enter into treaties.⁷² However, as the Statute does not expressly confer on the COE a general power to enter into treaties in its own right, it is not evident that the COE currently has the authority to enter into a treaty establishing a Crime of Aggression Tribunal. Nevertheless, there is a good argument that member states may grant the COE such authority stemming from the COE’s early practice and Resolution 51(30).

The COE is party to two bilateral treaties with France.⁷³ The first, entered into in 1949, concerns the COE’s headquarters in Strasbourg,⁷⁴ and the second, entered into in 1950, concerns the privileges and immunities of COE officials.⁷⁵ The COE’s authority to enter into these treaties was expressly provided by Article

⁶⁶ *Convention for the Protection of Human Rights and Fundamental Freedoms* arts. 32-34 (1950), available at <https://rm.coe.int/1680a2353d>.

⁶⁷ Council of Europe, *The European Convention on Human Rights, A living instrument*, 5 (Sept. 2022), available at https://echr.coe.int/Documents/Convention_Instrument_ENG.pdf.

⁶⁸ Council of Europe, *The European Convention on Human Rights, A living instrument*, 7 (Sept. 2022), available at https://echr.coe.int/Documents/Convention_Instrument_ENG.pdf.

⁶⁹ *Convention for the Protection of Human Rights and Fundamental Freedoms* art. 21-23 (1950), available at <https://rm.coe.int/1680a2353d>.

⁷⁰ Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms (Protocols)*, available at <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=005>.

⁷¹ Council of Europe, *Details of Treaty No. 155*, available at

<https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=155>.

⁷² James Crawford, *BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 179-80 (8th ed. 2012).

⁷³ Council of Europe, *Glossary*, available at <https://www.coe.int/en/web/conventions/glossary> (last visited May 15, 2023) (“Only two bilateral treaties were concluded within the Council of Europe. They were concluded between the Council of Europe and France, hosting State of the Organisation ...”). See also Jörg Polakiewicz, *TREATY-MAKING IN THE COUNCIL OF EUROPE* 203 n.1 (1999), available at <https://rm.coe.int/16809fceb1>.

⁷⁴ *Special Agreement relating to the Seat of the Council of Europe* (1949), available at <https://rm.coe.int/168006373b>.

⁷⁵ *Supplementary Agreement amending certain provisions of the General Agreement on Privileges and Immunities of the Council of Europe* (1950), available at <https://rm.coe.int/168006373e>.

40(b) of the Statute and Article 20 of the 1949 General Agreement on Privileges and Immunities of the Council of Europe.⁷⁶ The COE Secretary General signed both treaties on behalf of the COE. The Secretary General was authorized by a resolution of the COE Committee of Ministers to bring the 1949 treaty into force by an exchange of notes with a representative of the French Government.⁷⁷ The Secretary General was also designated and duly authorized by the COE to sign the 1950 treaty.⁷⁸ This practice indicates that the COE may enter into bilateral (or multilateral) treaties where expressly empowered to do so by member states, and that specific organs of the COE may be granted the authority by the COE's organs to sign such treaties on the COE's behalf. Of course, it remains uncertain whether the member states and the COE's organs would be willing to grant the COE the necessary authorizations and authority in the present, and very distinct, circumstances.

In addition, Resolution (51) 30 provides the COE with authority to conclude “*agreements*” concerning the COE's relationships with “*European specialized authorities*” and “*intergovernmental organizations*.”⁷⁹ In particular, the COE “*may take the initiative of instituting negotiations between members with a view to the creation of European specialised authorities, each with its own competence in the economic, social, cultural, legal, administrative or other related fields*.”⁸⁰ Special agreements may be concluded to define the conditions according to which the specialized authority may be brought into the relationship, and the Committee of Ministers is empowered to negotiate and conclude such special agreements on behalf of the COE after an opinion has been given by the Parliamentary Assembly.⁸¹ Further, the “*Committee of Ministers may, on behalf of the Council of Europe, conclude with any intergovernmental organisation agreements on matters which are*

⁷⁶ *Statute of the Council of Europe* art. 40(b) (1949), available at <https://rm.coe.int/1680306052> (“[A] special agreement shall be concluded with the Government of the French Republic defining the privileges and immunities which the [COE] shall enjoy at its seat[.]”); *General Agreement on Privileges and Immunities of the Council of Europe* art. 20 (1949), available at <https://rm.coe.int/1680063729> (“The [COE] may conclude with any member or members supplementary agreements modifying the provisions of this General Agreement, so far as that member or those members are concerned.”).

⁷⁷ *Special Agreement relating to the Seat of the Council of Europe* art. 11 (1949), available at <https://rm.coe.int/168006373b>.

⁷⁸ *Supplementary Agreement amending certain provisions of the General Agreement on Privileges and Immunities of the Council of Europe* (1950), available at <https://rm.coe.int/168006373e>.

⁷⁹ Resolution (51)30, quoted in Jörg Polakiewicz, TREATY-MAKING IN THE COUNCIL OF EUROPE 207-08 (1999), available at <https://rm.coe.int/16809fceb1>.

⁸⁰ Resolution (51)30, quoted in Jörg Polakiewicz, TREATY-MAKING IN THE COUNCIL OF EUROPE 207 (1999), available at <https://rm.coe.int/16809fceb1>.

⁸¹ Resolution (51)30, quoted in Jörg Polakiewicz, TREATY-MAKING IN THE COUNCIL OF EUROPE 207 (1999), available at <https://rm.coe.int/16809fceb1>.

*within the competence of the Council [of Europe].*⁸² Such agreements “*shall, in particular, define the terms on which such an organisation shall be brought into relationship with the Council of Europe.*”⁸³ The term “*European specialised authorities*” appears to include supra-national entities such as the then-contemplated European Coal and Steel Community, a precursor to the EU,⁸⁴ and the term “*international organisation*” would likely also today encompass the EU.⁸⁵ Resolution (51)30, therefore, arguably provides the Committee of Ministers of the COE with broad authority to enter into treaties governing the COE’s relations with the EU or other international legal organizations.⁸⁶ This seems to be of limited practical relevance here, as the creation of a new Crime of Aggression Tribunal is beyond the scope of defining the terms of the COE’s relationships with the EU or other international legal organizations. Nevertheless, Resolution (51)30 appears to further affirm that member states may grant the COE the power to enter into treaties for specified purposes, and that specific organs of the COE may be granted the authority to sign such treaties on the COE’s behalf.

In sum, the Statute of the COE does not expressly confer on the COE, as a distinct legal entity, the power to enter into a bilateral or multilateral treaty concerning any matter. However, being an international organization, the COE does in principle have legal capacity to enter treaties, and such capacity has been exercised in the past. The early practice of the COE and Resolution (51)30 suggest that member states may grant the COE express authority to enter into treaties for

⁸² Resolution (51)30, *quoted in* Jörg Polakiewicz, TREATY-MAKING IN THE COUNCIL OF EUROPE 208 (1999), *available at* <https://rm.coe.int/16809fceb1>.

⁸³ Resolution (51)30, *quoted in* Jörg Polakiewicz, TREATY-MAKING IN THE COUNCIL OF EUROPE 208 (1999), *available at* <https://rm.coe.int/16809fceb1>.

⁸⁴ See Council of Europe Committee on General Affairs, *Nature, Characteristics and Structure of Specialised Authorities*, 1, 4 (Mar. 3, 1951), *available at* <https://rm.coe.int/09000016807afd29> (indicating that “specialized authorities” contemplated “supra-national organizations,” and providing as an example “the European Coal/Steel Pool (Schuman Plan)”); Council of Europe Committee on General Affairs, *Possible Structure of Specialised Authorities* (Feb. 9, 1951), *available at* <https://rm.coe.int/09000016807afd31>. The European Coal and Steel Community (ECSC) was an international organization established in 1951 by the Treaty of Paris, signed by Belgium, France, Germany, Italy, Luxembourg, and the Netherlands, to organize the free movement of coal and steel and to free up access to sources of production. The ECSC is generally considered a precursor of the EU. See *Treaty establishing the European Coal and Steel Community, ECSC Treaty* (1951), *available at* <https://eur-lex.europa.eu/EN/legal-content/summary/treaty-establishing-the-european-coal-and-steel-community-ecsc-treaty.html>.

⁸⁵ During the Council of Europe’s early years, ambitious proposals for deeper European integration were discussed but did not gain traction among all members; a smaller group of like-minded States pursued such proposals further within the framework of the European Communities. Jörg Polakiewicz, *Council of Europe*, in MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW (2019), *available at* <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e607>.

⁸⁶ See Council of Europe Committee on General Affairs, *Nature, Characteristics and Structure of Specialised Authorities*, 20 (Mar. 3, 1951), *available at* <https://rm.coe.int/09000016807afd29> (suggesting that the provision on “specialized authorities” was introduced “for the purpose of establishing relations between the European Pool for Coal and Steel and the Council of Europe”).

specified purposes, and that the COE Secretary General or the COE Committee of Ministers may be empowered to sign such treaties on behalf of the COE as an organization. Further study may be warranted to understand the advantages and disadvantages of attempting to establish a Crime of Aggression Tribunal by empowering the COE to conclude a treaty for this purpose.

The COE's Competence in the Field of International Criminal Responsibility

As an international legal organization, the COE may only act within the limits of the purposes it has been empowered to pursue.⁸⁷ The Statute neither expressly excludes, nor expressly bestows upon the COE the competence to act in the field of international criminal responsibility (*i.e.*, by establishing and operating a Crime of Aggression Tribunal). Only matters related to the national defense of member states are explicitly excluded from the scope of activities of the COE,⁸⁸ suggesting that the Statute provides the COE with “*a potentially almost unlimited remit*,” as noted by Jörg Polakiewicz, Director of Legal Advice and Public International Law of the COE.⁸⁹ In light of this, there is a good argument that the COE's competence to act in this area can be implied from the provisions of the Statute.

The Statute identifies relevant principles, the pursuit of which define the object and purpose of the COE. In particular, Article 1 of the Statute specifies the aim of the COE,⁹⁰ while Article 15 empowers the Committee of Ministers to adopt

⁸⁷ See Markus Benzig, *International Organizations or Institutions, Secondary Law*, in MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW (2007), available at <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e508> (“Every international organization only enjoys international legal capacity insofar as it is necessary to achieve its purpose ... This functional limitation constitutes the outer limit of the competence of international organizations to adopt secondary law.”); *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, 1996 I.C.J. Rep. 66, 78 (July 8), available at <https://www.icj-cij.org/en/case/93> (“International organizations are governed by the ‘principle of speciality’, that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.”).

⁸⁸ *Statute of the Council of Europe* art. 1(d) (1949), available at <https://rm.coe.int/1680306052>. See also Jörg Polakiewicz, *Council of Europe*, in MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW (2019), available at <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e607> (“The COE Statute hardly limits the remit for COE action, which can be explained by the fact that it was the first political organization in post-war Europe . . . Only matters relating to ‘national defence’ are expressly excluded from the competence of the COE (Art. 1 (d) COE Statute; the North Atlantic Treaty had been signed in 1949 just a month before the COE’s Statute.”); Jörg Polakiewicz, *TREATY-MAKING IN THE COUNCIL OF EUROPE* 13 (1999), available at <https://rm.coe.int/16809fceb1> (“Only matters related to national defense are explicitly excluded from the scope of activities of the Council of Europe (Article 1.d).”).

⁸⁹ Jörg Polakiewicz, *Council of Europe*, in MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW (2019), available at <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e607>.

⁹⁰ *Statute of the Council of Europe* art. 1 (1949), available at <https://rm.coe.int/1680306052> (providing that the aim of the COE is “to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage [*i.e.*, individual freedom, political liberty, the rule of law, and democracy] and facilitating their economic and social progress,” and further providing that this aim “shall be pursued

treaties for the purpose of fulfilling the COE's aim.⁹¹ Although the issue is not expressly settled in the Statute, our interpretation of the treaty based on its object and purpose leads us to conclude that there is a good argument that the COE is competent to support the creation of a Crime of Aggression Tribunal in the present circumstances.

First, Russia's aggression against Ukraine threatens human rights and fundamental freedoms in Europe. On that basis, the COE could assist member states in concluding a treaty with Ukraine's participation⁹² to ensure common action to respond to this threat in furtherance of its pursuit of the "*realization of human rights and fundamental freedoms*," which is a part of the COE's aim as specified in Article 1 of the Statute.⁹³

Second, Russia's aggression against Ukraine is a violation of the UN Charter and the foundational prohibition against the use of force as well as a fundamental challenge to the rule of law. This is a legal matter arguably falling within the COE's mandate to pursue "*agreements and common action in ... legal ... matters*," pursuant to Article 1 of the Statute.⁹⁴ Preventing such aggression is also consistent with the COE's aim to safeguard its members' shared commitment to "*the rule of law*," which is reflected in the Preamble to the Statute.⁹⁵ In fact, the COE has adopted and its member states have entered into a treaty in furtherance of these aims. The European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes refers to such crimes as "*a serious infraction of human dignity*" giving rise to an interest in "*ensur[ing] ... the punishment of those crimes*" and "*promoting a common criminal policy in this*

through the organs of the Council [of Europe] by ... agreements ... in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms").

⁹¹ *Statute of the Council of Europe* art. 15(a) (1949), available at <https://rm.coe.int/1680306052> (providing that the Committee of Ministers "shall consider the action required to further the aim of the Council of Europe, including the conclusion of conventions or agreements"). See also Resolution (51)30, quoted in Treaty Office of the Council of Europe, *Practical Guide*, 111 (Sept. 2020), available at <https://rm.coe.int/16809fce94> (confirming that that "[t]he conclusions of the Committee [of Ministers] may, where appropriate, take the form of a convention or agreement").

⁹² Unlike other COE member States, Ukraine is anticipated to be a necessary treaty party.

⁹³ *Statute of the Council of Europe* art. 1(b) (1949), available at <https://rm.coe.int/1680306052>. See also Owiso Owiso, *An Aggression Chamber for Ukraine Supported by the Council of Europe*, OPINIO JURIS (Mar. 30, 2022), available at

<https://opiniojuris.org/2022/03/30/an-aggression-chamber-for-ukraine-supported-by-the-council-of-europe/> (developing this argument).

⁹⁴ *Statute of the Council of Europe* art. 1(b) (1949), available at <https://rm.coe.int/1680306052>.

⁹⁵ *Statute of the Council of Europe* Preamble (1949), available at <https://rm.coe.int/1680306052>. The Committee of Ministers has reiterated the COE's commitment to the rule of law by noting in certain of its recommendations that "the essential mission of the Council of Europe is the promotion of human rights, democracy and the rule of law." See Council of Europe, *Recommendation CM/Rec(2021)7 of the Committee of Ministers to member States on measures aimed at protecting children against radicalization for the purpose of terrorism* Preamble (Oct. 20, 2021), available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a4397d (emphasis added).

field,” and hence implicating the Statute Article 1 “*aim ... to achieve a greater unity between [Council of Europe] members.*”⁹⁶ This treaty shows that the COE member states consider the promotion of European integration with respect to the criminalization of international crimes to be among the purposes the Statute empowers the COE to pursue.

Lastly, Russia’s aggression against Ukraine implicates economic matters in Europe. As such, the COE could assist member states in concluding a treaty with Ukraine’s participation to ensure common action to respond to the economic threat created by Russia, in furtherance of the COE’s mandate to pursue its members’ “*economic and social progress,*” pursuant to Article 1 of the Statute.⁹⁷ To the extent a Crime of Aggression Tribunal is viewed as a tool, among others, to put pressure on Russian decision-makers to cease hostilities, it could contribute to the prevention of further European expenditures on defense, budgetary, and humanitarian assistance. For example, the actual or anticipated existence of such a tribunal could dissuade Russian officials (and officials of Russian allies such as Belarus and Iran) from lending their support to future acts of aggression in order to limit their liability. The precise temporal and subject-matter jurisdiction of such a tribunal could also potentially be the subject of armistice negotiations between Ukraine and Russia,⁹⁸ *i.e.*, the tribunal’s temporal jurisdiction could be forward-looking and include a carve-out for past acts of aggression,⁹⁹ or the tribunal’s mandate could be to apply a more restrictive definition of the crime of aggression.¹⁰⁰ A Crime of Aggression Tribunal, by working to prevent impunity for the crime of aggression, could also contribute to the prevention of future acts of aggression,¹⁰¹ such as Belarus’ full-fledged participation alongside Russia in the war against Ukraine, or further

⁹⁶ *European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes* Preamble (1974), available at

<https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=082>.

⁹⁷ *Statute of the Council of Europe* art. 1(a) (1949), available at <https://rm.coe.int/1680306052>.

⁹⁸ See, e.g., PILPG, *Ceasefire Preparation for Ukraine: Russia Red Team Initiative* (Feb. 2023), p. 8, available at <https://www.publicinternationallawandpolicygroup.org/policy-planning-ukraine-ceasefire> (predicting that as part of cease-fire negotiations, “Russia will seek to receive amnesty for its soldiers and all its political and military leaders, and anyone associated with the regime”).

⁹⁹ See, e.g., *Rome Statute of the International Criminal Court* art. 11(1) (1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf> (“The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.”).

¹⁰⁰ See, e.g., Dapo Akande, *Prosecuting Aggression: The Consent Problem and the Role of the Security Council*, UNIVERSITY OF OXFORD LEGAL RESEARCH PAPER SERIES, 6-7 (Feb. 16, 2011), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1762806 (criticizing Draft Article 8 *bis* of the Rome Statute for employing a restrictive definition of the acts which would amount to the crime of aggression under the Statute).

¹⁰¹ See *Rome Statute of the International Criminal Court* Preamble (1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf> (stating that the States Parties to the Rome Statute are “[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”).

attacks by Azerbaijan on COE member state Armenia.¹⁰² It could thus further the goal of preventing future acts that may threaten economic and social progress within the COE region.

Although there are strong textual arguments for an implied competence in the field of international criminal responsibility, there are nevertheless arguments to the contrary – the most formidable of which is rooted in the text of Article 1(d) of the Statute.¹⁰³ If Russia’s aggression against Ukraine is understood to be a security threat to the European region, the creation of a tribunal in response to this threat could be viewed as a “*matter relating to national defence*.”¹⁰⁴ As indicated above, the COE is not competent to act in the field of national defense. For the avoidance of doubt, the Committee of Ministers could grant the COE express authority to assist with creating a Crime of Aggression Tribunal through the adoption of a resolution that explicitly characterizes the aim fostered by the resolution as one unrelated to national defense.¹⁰⁵ Resolution (52)9, for example, authorized “*the Secretary-General to enter into communication with the Interim Commission of the International Trade Organisation for the purpose of studying the form of cooperation to be established between this Organisation and the Council of Europe*.”¹⁰⁶ The Committee of Ministers could similarly adopt a resolution authorizing the Secretary-General to enter into communication with Ukraine to study the form of cooperation to be established between Ukraine and the COE and subsequently to work with COE bodies in order to draft a treaty to create a tribunal. Such a resolution is subject to Article 20(d) of the Statute and thus requires a two-thirds majority of the representatives casting a vote and of a majority of the representatives entitled to sit on the Committee.¹⁰⁷ This vote threshold would allow for a margin of opposition or abstention on the part of wary states, without defeating the resolution altogether. The COE could then proceed with its established treaty-making process pursuant to Article 15, or, alternatively, member states could grant the COE authority to enter into a treaty for establishing and operating a Crime of Aggression Tribunal.

¹⁰² See, e.g., *French Senate Calls For Sanctions Against Azerbaijan Over Attacks On Armenia, Karabakh*, RADIO FREE EUROPE/RADIO LIBERTY (Nov. 16, 2022), available at <https://www.rferl.org/a/azerbaijan-armenia-france-sanctions-karabakh/32133024.html>.

¹⁰³ *Statute of the Council of Europe* art. 1(d) (1949), available at <https://rm.coe.int/1680306052> (“Matters relating to national defence do not fall within the scope of the Council of Europe.”).

¹⁰⁴ *Statute of the Council of Europe* art. 1(d) (1949), available at <https://rm.coe.int/1680306052>.

¹⁰⁵ Owiso Owiso, *An Aggression Chamber for Ukraine Supported by the Council of Europe*, OPINIO JURIS (Mar. 30, 2022), available at <https://opiniojuris.org/2022/03/30/an-aggression-chamber-for-ukraine-supported-by-the-council-of-europe/>.

¹⁰⁶ Council of Europe Committee of Ministers, *Resolution (52) 9 on Common Policy of lowering tariff barriers in Europe* (Mar. 19 1952), available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805e3910.

¹⁰⁷ *Statute of the Council of Europe* art. 20(d) (1949), available at <https://rm.coe.int/1680306052>.

Conclusion: A Crime of Aggression Tribunal for Ukraine

The above discussion demonstrates that the COE is likely to be a viable forum through which to create a Crime of Aggression Tribunal. There are two ways in which such a Tribunal could be created.

First, the COE, acting pursuant to Article 15 of the Statute, could elaborate and adopt a multilateral treaty that member states, as well as non-member states and international organizations, could join. This option has the advantage of involving the use of a well-established procedure that is familiar to COE member states and institutional bodies alike. Also, a multilateral treaty could be opened up to accession by the international community, which could help achieve the critical mass of international adherence required to express the will of the international community and thereby help overcome potential immunity defenses (see further below).¹⁰⁸

Alternatively, member states could empower the COE, as a distinct legal entity, to enter into a treaty for the creation of a Crime of Aggression Tribunal. This approach is untested in the present circumstances. Employing this alternate pathway could be desirable if it were considered advantageous to conclude a bilateral treaty between the COE and Ukraine, instead of concluding a multilateral agreement between the COE member states and/or third states.¹⁰⁹ Further study may be warranted to understand the advantages and disadvantages of a bilateral treaty route and the procedural mechanisms through which it might be authorized (e.g., the adoption of a statutory resolution).

When considering these two alternatives, it is necessary to bear in mind the constraints provided by Articles 124 and 125 of the Constitution of Ukraine. As elaborated below, a Crime of Aggression Tribunal must have an “auxiliary” jurisdiction to the jurisdiction of the Ukrainian national courts and, for the international community to participate in its creation, likely would need to take the form of an international court that sits outside of Ukraine’s judicial system.

¹⁰⁸ See Carrie McDougall, *Why Creating a Special Tribunal for Aggression Against Ukraine is the Best Available Option: A Reply to Kevin Jon Heller and Other Critics*, OPINIOJURIS (Mar. 15, 2022), available at <https://opiniojuris.org/2022/03/15/why-creating-a-special-tribunal-for-aggression-against-ukraine-is-the-best-available-option-a-reply-to-kevin-jon-heller-and-other-critics/> (opining that there is a “good argument to be made” that a treaty creating a special tribunal for aggression “is at least potentially capable of being sufficiently international in nature to exclude the applicability of immunities for a prosecution of a serious international crime”).

¹⁰⁹ The Special Court for Sierra Leone, for example, was created on the basis of an agreement between the government of Sierra Leone and the UN.

Whichever of the two alternatives is chosen, strong textual arguments, rooted in Articles 1 and 15 of the Statute, support the conclusion that participating in the establishment and organization of a Crime of Aggression Tribunal is within the COE's permitted scope of activities. While there remains the possibility that certain member states do not agree with such an interpretation, Russia's departure from the COE in March 2022¹¹⁰ and the COE's subsequent actions suggest there will be minimal opposition to the COE assisting with the creation of a Crime of Aggression Tribunal. For example, in April 2022, the Parliamentary Assembly of the COE adopted a unanimous resolution calling on all member and observer states urgently to set up an *ad hoc* international criminal tribunal, with a mandate to “investigate and prosecute the crime of aggression allegedly committed by the political and military leadership of the Russian Federation.”¹¹¹ Further, in September 2022 the Committee of Ministers issued a decision that reaffirmed the need for a strong and unequivocal international legal response to the aggression against Ukraine, stressed the urgent need to ensure accountability for the serious violations of international law arising from Russian aggression against Ukraine, and noted with interest proposals for establishing an *ad hoc* tribunal.¹¹²

Irrespective of the legal pathway chosen, Ukraine's territorial jurisdiction would likely supply the legal basis for a Crime of Aggression Tribunal's exercise of jurisdiction over the crime of aggression committed by the nationals of Russia and other states in Ukraine. As such, Ukraine is anticipated to be a necessary party to any bilateral or multilateral treaty creating a Crime of Aggression Tribunal. Such a

¹¹⁰ Russia has ceased to be a member of the COE as of March 16, 2022, pursuant to a Committee of Ministers Resolution. Council of Europe Committee of Ministers, *Resolution CM/Res(2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe* (Mar. 16, 2022), available at <https://rm.coe.int/0900001680a5da51>. In a subsequent Resolution, the Committee of Ministers made clear that Russia “is no longer able to lay claim to any right nor be regarded as bound by any obligation deriving from the Statute of the Council of Europe or connected with membership thereof” and “no longer has any rights of representation in the Committee of Ministers and in the Parliamentary Assembly nor in any subsidiary organs or bodies thereof.” Council of Europe Committee of Ministers, *Resolution CM/Res(2022)3 on legal and financial consequences of the cessation of membership of the Russian Federation in the Council of Europe* (Mar. 23, 2022), available at <https://rm.coe.int/resolution-cm-res-2022-3-legal-and-financial-conss-cessation-membershi/1680a5ee99?msclid=60a33447ab8d11ec9c8f9bc54d5831c1>. As such, Russia's participation in COE activities and programs is governed by the provisions and practices applicable to participation by non-member States. See also Council of Europe Secretariat, *Legal and financial consequences of the cessation of membership in the Council of Europe under Article 8 of its Statute* (Mar. 15, 2022), available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a5d7d3.

¹¹¹ Council of Europe, *PACE calls for an ad hoc international criminal tribunal to hold to account perpetrators of the crime of aggression against Ukraine* (Apr. 28, 2022), available at <https://www.coe.int/en/web/portal/-/pace-calls-for-an-ad-hoc-international-criminal-tribunal-to-investigate-war-crimes-in-ukraine>

¹¹² Council of Europe Committee of Ministers, *Decision CM(2022)1442/2.3* (Sept. 15, 2022), available at https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a8135a; see also Council of Europe, *No impunity for Russia's crimes against Ukraine*, (Sept. 15, 2022), available at <https://www.coe.int/en/web/portal/-/no-impunity-for-russian-aggression-against-ukraine>.

treaty could formalize Ukraine's consent to the delegation of its territorial jurisdiction to the new international tribunal, though as discussed below the creation of a hybrid tribunal needs to be carefully considered in light of the limitations imposed by Article 125 and Section VIII of the Ukrainian Constitution.

While it does not appear that a formal invitation from Ukraine to the COE is a legal prerequisite to the tribunal's creation, one may be advisable to prevent any contestation of the legitimacy of the tribunal's origins.¹¹³ The invitation may take the form of a letter by the Ukrainian president addressed to the Secretary General of the Council of Europe, similarly to how requests to establish a special tribunal were made to the UN by Sierra Leone,¹¹⁴ Cambodia,¹¹⁵ and Lebanon.¹¹⁶ Such an invitation may also provide Ukraine an opportunity to propose its own view on the tribunal's framework, as was done by the president of Sierra Leone.¹¹⁷

Ukraine may also propose its views through COE institutional bodies on which it is represented, *e.g.*, the Committee of Ministers, the Parliamentary Assembly, the Congress of Local and Regional Authorities of Europe, a conference of specialized ministers, or a steering committee. Ukraine may continue to play an important role in shaping and negotiating the key provisions of the treaty to be adopted by the COE through its representatives in the Committee of Ministers and in the Parliamentary Assembly. And, of course, Ukraine would play a central role in working with its international partners within and outside of the COE to build the political will needed not only for the adoption of a treaty by the COE but also for its subsequent ratification by member states and, if applicable, also by non-member states.

¹¹³ Owiso Owiso, *An Aggression Chamber for Ukraine Supported by the Council of Europe*, OPINIO JURIS (Mar. 30, 2022), available at

<https://opiniojuris.org/2022/03/30/an-aggression-chamber-for-ukraine-supported-by-the-council-of-europe/>.

¹¹⁴ Letter dated August 9, 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council, U.N. Doc S/2000/786 (Aug. 10, 2000), available at <http://www.rscsl.org/Documents/Establishment/S-2000-786.pdf>.

¹¹⁵ Letter dated 21 June 1997 from the First and Second Prime Ministers of Cambodia addressed to the Secretary-General, U.N. Doc A/51/930 and S/1997/488 (June 24, 1997) at 2, available at https://www.eccc.gov.kh/sites/default/files/June_21_1997_letters_from_PMs-2.pdf. The letter notes, however, that there had been a prior resolution on Cambodia, in which the Commission on Human Rights requested the Secretary-General "to examine any request by Cambodia for assistance in responding to past serious violations of Cambodian and international law."

¹¹⁶ 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, U.N. Doc. S/2005/783 (Dec. 13, 2005), available at <https://digitallibrary.un.org/record/562663?ln=en>.

¹¹⁷ See Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council, U.N. Doc S/2000/786 (Aug. 10, 2000), available at <http://www.rscsl.org/Documents/Establishment/S-2000-786.pdf>.

Finally, we note that non-governmental organizations (NGO) could also play a role in the creation of a Crime of Aggression Tribunal through the COE, which could supplement the leading role that would be played by COE member states including Ukraine. There has been an increasing role for NGOs and professional organizations in the work of the COE as observers to expert committees.¹¹⁸ An NGO may request admission as an observer to the committee tasked with drafting.¹¹⁹ Observers have no right to vote, but with the chairperson's permission they may make oral or written statements, and their proposals may be put to a vote if sponsored by a committee member.¹²⁰ NGO members could also assist the committee tasked with drafting in the role of a consultant expert, if engaged under a service contract to perform a clearly defined task.¹²¹ Lastly, an NGO can be consulted by the committee tasked with drafting, in writing or by means of a hearing, on "*questions of mutual interest*," but such consultation can only be done with organizations that already have consultative status within the COE (*i.e.*, a separate approval process).¹²²

In sum, there appear to be neither legal nor political impediments to the conclusion of a treaty creating a Crime of Aggression Tribunal under the auspices of the COE. The COE provides a viable legal forum through which to establish the Tribunal and existing political support suggests there will be little, if any, opposition from member states. Ukraine can play a leading role in both advocating for the creation of the tribunal and helping formulate its framework within the treaty-making bodies of the COE. Ukraine's territorial jurisdiction could supply the legal basis for the Crime of Aggression Tribunal's exercise of jurisdiction.¹²³

¹¹⁸ Jörg Polakiewicz, *TREATY-MAKING IN THE COUNCIL OF EUROPE* 21 (1999), available at <https://rm.coe.int/16809fceb1>.

¹¹⁹ Any steering committee may, by a unanimous decision, admit observers from non-member States, intergovernmental, or non-governmental international organizations, provided that: (i) the request for admission is forwarded to the Permanent Representatives of member States and to the members of the steering committee concerned, and (ii) the Committee of Ministers approves of the admission by a 2/3 majority if a member State refers the matter to the Committee for a vote. Council of Europe Committee of Ministers, *Resolution (76) 3 on committee structures, terms of reference and working methods* para. 5 (Feb. 18, 1976), available at <https://rm.coe.int/09000016804f9e36>.

¹²⁰ Council of Europe Committee of Ministers, *Resolution (76)3 on committee structures, terms of reference and working methods* Appendix II, Art. 9 (Feb. 18, 1976), available at <https://rm.coe.int/09000016804f9e36>.

¹²¹ Council of Europe Committee of Ministers, *Resolution 76(4) on consultants* Art. I(1) (Feb. 18, 1976), available at <https://rm.coe.int/native/09000016804f74a1>.

¹²² Council of Europe Committee of Ministers, *Resolution (93) 38 on relations between the Council of Europe and international non-governmental organisations* Appendix, Arts. 2-4 (Oct. 18, 1993), available at <https://rm.coe.int/native/09000016804d21f8>.

¹²³ The adoption by the COE Committee of Ministers of a "common policy" under Article 15 of the Statute has been suggested as an alternative approach for granting the COE competence to support the creation of a Crime of Aggression Tribunal. This memorandum concludes that the COE already has this competence, such that adopting a common policy would be unnecessary.

The Legal Basis for a Crime of Aggression Tribunal Under the Auspices of the European Union

The EU's Common Foreign and Security Policy

Action by the EU to address Russia's crimes of aggression in Ukraine appears to fall within the EU's common foreign and security policy. Article 21 of the Treaty on European Union (TEU) provides that the EU's "*action on the international scene shall be guided by the principles which have inspired its own creation, development, and enlargement,*" including "*the rule of law ... and respect for the principles of the United Nations Charter and international law.*"¹²⁴ Article 21 further provides that the EU shall pursue its foreign policy by developing relations and building partnerships with third countries, including regional organizations, in order to "*preserve peace, prevent conflicts and strengthen international security.*"¹²⁵ Article 24 of the TEU provides that the EU's competence in matters of common foreign and security policy (CFSP) covers "*all areas of foreign policy.*"¹²⁶

Given this broad scope of its foreign and security policy,¹²⁷ the EU has exercised its competence in a wide variety of areas including, for example:

- (a) implementing a rule of law operation in Iraq;¹²⁸
- (b) providing advice and assistance in the context of security sector reforms in the Democratic Republic of Congo;¹²⁹

¹²⁴ *Consolidated Version of the Treaty on European Union* art. 21(1) (2016), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12016M/TXT&from=EN>.

¹²⁵ *Consolidated Version of the Treaty on European Union* art. 21(2) (2016), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12016M/TXT&from=EN>.

¹²⁶ *Consolidated Version of the Treaty on European Union* art. 24(1) (2016), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12016M/TXT&from=EN>.

¹²⁷ In *Ezz*, the European Court of Justice took note of the "broad scope of the aims and objectives of the CFSP" and affirmed the General Court's holding that the contested decision of the Council of the EU, which formed part of a "policy of supporting the new Egyptian authorities, intended to promote both the economic and political stability of Egypt," was "fully based on the CFSP." *Ezz v. Council of the European Union*, Case No. C-220/14, Judgment, para. 46 (Mar. 5, 2015), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62014CJ0220>.

¹²⁸ See *Council Joint Action 2005/190/CFSP on the European Union Integrated Rule of Law Mission for Iraq*, *EUJUST LEX* (Mar. 7, 2015), available at

<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2005E0190:20080623:EN:PDF>.

¹²⁹ See *Council Joint Action 2005/355/CFSP on the European Union mission to provide advice and assistance for security sector reform in the Democratic Republic of the Congo (DRC)* (May 2, 2005), available at https://eur-lex.europa.eu/eli/joint_action/2005/355/oj.

- (c) fighting human trafficking in the Mediterranean,¹³⁰
- (d) promoting global nuclear non-proliferation,¹³¹
- (e) creating the Kosovo Specialist Chambers (discussed in greater detail below);¹³² and
- (f) cooperating with non-EU countries on addressing energy, security, and environmental challenges.¹³³

On this basis, there is a good argument that the war in Ukraine falls within the EU's common foreign and security policy. The European Parliament has referred to Russia's aggression against Ukraine as a matter falling within the EU's common foreign and security policy in a number of resolutions.¹³⁴ The European Council has also cited the EU's common foreign and security policy as a basis for adopting Council Regulation 269/2014, which, as subsequently amended, imposed sanctions on Russian individuals.¹³⁵

The Procedure for the Creation of an International Agreement

¹³⁰ See *Council Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA)* (May 18, 2005), available at <https://eur-lex.europa.eu/eli/dec/2015/778>.

¹³¹ See *Communication from the Commission to the Council and the European Parliament on nuclear non-proliferation* (Mar. 26, 2009), available at [https://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com\(2009\)0143_/com_com\(2009\)0143_en.pdf](https://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2009)0143_/com_com(2009)0143_en.pdf).

¹³² *KS v. Council and Others*, Case T-840/16, Order of the General Court, para. 10, available at <https://curia.europa.eu/juris/document/document.jsf?text=&docid=217021&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=15900>.

¹³³ See *Regulation (EU) No 234/2014 of the European Parliament and of the Council establishing a Partnership Instrument for cooperation with third countries* (Mar. 11, 2014), available at <https://eur-lex.europa.eu/eli/reg/2014/234>.

¹³⁴ See *Resolution on Russian aggression against Ukraine* (Mar. 1 2022), available at https://www.europarl.europa.eu/doceo/document/TA-9-2022-0052_EN.html; *Recommendation 2022/2039(INI) to the Council and the Vice-President of the Commission / High Representative of the Union for Foreign Affairs and Security Policy on the EU's Foreign, Security and Defence Policy after the Russian war of aggression against Ukraine* Preamble (June 8, 2022), available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOC_2022_493_R_0016&from=EN; *Resolution on Russia's escalation of its war of aggression against Ukraine* (Oct. 6, 2022), available at https://www.europarl.europa.eu/doceo/document/TA-9-2022-0353_EN.html (citing previous resolutions on Ukraine and Russia).

¹³⁵ See *Council Implementing Regulation (EU) 2022/1274 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine* (July 21, 2022), available at <https://eur-lex.europa.eu/eli/reg/2022/1274>.

Article 37 of the TEU empowers the EU to enter into international agreements with one or more states or international organizations.¹³⁶ Article 216 of the Treaty on the Functioning of the European Union (TFEU, and together with the TEU, the Treaties), codifying the *ERTA* doctrine,¹³⁷ recognizes that the EU has the competence to enter into international agreements pursuing the objectives defined in the Treaties, including the EU's common foreign and security policy.¹³⁸

As the EU's common foreign and security policy is a special form of non-preemptive shared competence,¹³⁹ member states are not required to enter into, in parallel with the EU, international agreements in order for a treaty concluded by the EU to be valid.¹⁴⁰ The EU can therefore invoke its common foreign and security policy as a basis for establishing a Crime of Aggression Tribunal, through an international agreement.

The Treaties provide that EU action further to its common foreign and security policy is subject to the unanimity of member states. Article 24 of the TEU provides that the common foreign and security policy is to be “*defined and implemented by the European Council and the Council [of the EU] acting unanimously, except where the Treaties provide otherwise.*”¹⁴¹ The adoption of legislative acts shall be excluded.¹⁴² Rather, the common foreign and security policy is to be put into effect by the High Representative of the Union for Foreign Affairs and Security Policy (the High Representative) and by member states.¹⁴³

¹³⁶ *Consolidated Version of the Treaty on European Union* art. 37 (2016), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12016M/TXT&from=EN>.

¹³⁷ *Commission of the European Communities v. Counsel of the European Communities*, Case No. C-22/70, Judgment (Mar. 31, 1971), available at <https://curia.europa.eu/juris/showPdf.jsf?text=&docid=88062&pageIndex=0&doclang=EN&mode=lst&dir=&occ=fir st&part=1&cid=443201>.

¹³⁸ Article 216 of the TFEU provides that the EU “may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.” *The Treaty on the Functioning of the European Union* art. 216 (2008), available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E216:EN:HTML>.

¹³⁹ Graham Butler, CONSTITUTIONAL LAW OF THE EU’S COMMON FOREIGN AND SECURITY POLICY 41 (2019).

¹⁴⁰ In *Parliament v. Council*, the European Court of Justice noted that, in the field of development aid (which is another form of EU external competence), the EU’s competence “is not exclusive. The Member States are accordingly entitled to enter into commitments themselves *vis-à-vis* non-member States, either collectively or individually, or even jointly with the [EU].” *Parliament v. Council*, Case No. C-316/91, Judgment, para. 26 (Mar. 2, 1994), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61991CJ0316&from=EN>.

¹⁴¹ *Consolidated Version of the Treaty on European Union* art. 24(1) (2016), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12016M/TXT&from=EN>.

¹⁴² *Consolidated Version of the Treaty on European Union* art. 24(1) (2016), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12016M/TXT&from=EN>.

¹⁴³ *Consolidated Version of the Treaty on European Union* art. 24(1) (2016), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12016M/TXT&from=EN>. Article 31 TEU also

Article 218 of the TFEU lays down the procedure for the EU to enter into international agreements, and contains specific provisions relating to agreements concerning its foreign and security policy.¹⁴⁴ Entering into an international agreement requires:

- (a) the High Representative to submit a recommendation to the Council of the EU;
- (b) the Council of the EU to then adopt a unanimous decision (including by way of “*constructive abstention*”) authorizing the opening of negotiations, nominating an EU negotiator (usually, the Commission¹⁴⁵ or the High Representative), a negotiating team, and/or a special committee for the negotiator to consult; and
- (c) the Council of the EU, upon receipt of the negotiator’s proposal, to authorize the signing and the conclusion of the agreement.¹⁴⁶

The Kosovo Specialist Chambers: A Case Study

The Kosovo Specialist Chambers is a hybrid criminal court¹⁴⁷ created under Kosovo law, located in the Netherlands, and funded and staffed by EU member states and five other contributing states.¹⁴⁸ As described below, the KSC and its corresponding prosecution unit – the Specialist Prosecutor’s Office (SPO) – were

enables the European Council and the Council of the EU to proceed on the basis of unanimity achieved through ‘constructive abstention,’ even when one third (or less) of Member States abstain from acting. The Council of the EU may also decide by qualified majority in CFSP matters, provided it acts following a European Council decision, or the High Representative’s proposal issued by virtue of a specific request from the European Council.

¹⁴⁴ *The Treaty on the Functioning of the European Union* art. 218 (2008), available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E218:EN:HTML>.

¹⁴⁵ It is argued that the Commission is constitutionally entitled to be the Union negotiator for all Union agreements that ‘exclusively or principally’ fall into the TFEU (thus including CFSP agreements). See Robert Schültze, *FOREIGN AFFAIRS AND THE EU CONSTITUTION: SELECTED ESSAYS* 325 (2014).

¹⁴⁶ See *Council Decision 2012/768/CFSP on the signing and conclusion of the Agreement between the European Union and the former Yugoslav Republic of Macedonia establishing a framework for the participation of the former Yugoslav Republic of Macedonia in European Union crisis management operations* recital (2) (Mar. 9, 2012), available at <https://eur-lex.europa.eu/eli/dec/2012/768> (“Having regard to the proposal of the High Representative of the Union for Foreign Affairs and Security Policy” and “[f]ollowing the adoption of a Decision by the Council on 26 April 2010 authorising the opening of negotiations, the HR negotiated an agreement between the European Union and the former Yugoslav Republic of Macedonia establishing a framework for the participation of the former Yugoslav Republic of Macedonia in European Union crisis management operations.”).

¹⁴⁷ Although the KSC is referred to as a hybrid criminal court, by function and design it operates more like an international tribunal. See Robert Muharremi, *The Kosovo Specialist Chambers and Specialist Prosecutor’s Office*, 76 *ZÄÖRV* 967, 969 (2016), available at https://www.zaoerv.de/76_2016/76_2016_4_a_967_992.pdf.

¹⁴⁸ The other contributing States are the United States, Norway, Switzerland, Canada, and Turkey.

established pursuant to an international agreement achieved through an exchange of letters between Kosovo and the EU. The agreement was ratified by the Kosovo Assembly in 2014 and enacted in 2015 through an amendment to Kosovo's Constitution (Article 162) and Law No. 05/L-053 on the Specialist Chambers and the Specialist Prosecutor's Office. As provided for in its legal framework, the KSC and the SPO are separate institutions that function independently from Kosovo's domestic institutions.¹⁴⁹

a) The Establishment of the KSC

Following an insurgency against Serbian rule in Kosovo by ethnic Albanians and the Kosovo Liberation Army, and a NATO air campaign against Serbian targets in 1999, Serbia agreed to withdraw from Kosovo and the UN provided transitional civil administration and security.¹⁵⁰

In February 2008 through a Joint Action, and acting pursuant to the EU's common security and defense policy,¹⁵¹ the Council of the EU launched the European Union Rule of Law Mission in Kosovo (EULEX).¹⁵² To create EULEX, the Council of the EU relied in part on Articles 14¹⁵³ and 25¹⁵⁴ of the TEU. EULEX's mission is to support the development of rule of law institutions in Kosovo.¹⁵⁵ Once the KSC and SPO were established, EULEX also became responsible for assisting them “*with logistic and operational support in line with relevant Kosovo legislation.*”¹⁵⁶ EULEX's mandate is periodically extended through

¹⁴⁹ See Kosovo Specialist Chambers & Specialist Prosecutor's Office, *Frequently Asked Questions*, available at <https://www.scp-ks.org/en/frequently-asked-questions>.

¹⁵⁰ See Sarah E. Garding, *Kosovo: Background and U.S. Policy*, CONGRESSIONAL RESEARCH SERVICE (Apr. 8, 2021), available at <https://crsreports.congress.gov/product/pdf/R/R46175/7>.

¹⁵¹ The common security and defense policy is an integral part of the EU's common foreign and security policy.

¹⁵² EULEX-KOSOVO, *What is EULEX?*, available at <https://www.eulex-kosovo.eu/?page=2,16>.

¹⁵³ Article 14 states: “The European Parliament shall, jointly with the Council [of the EU], exercise legislative and budgetary functions. It shall exercise functions of political control and consultation as laid down in the Treaties. It shall elect the President of the Commission.” *Consolidated Version of the Treaty on European Union* art. 14 (2016), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12016M/TXT&from=EN>.

¹⁵⁴ Article 25 states: “The Union shall conduct the common foreign and security policy by: (a) defining the general guidelines; (b) adopting decisions defining: (i) actions to be undertaken by the Union; (ii) positions to be taken by the Union; and (iii) arrangements for the implementation of the decisions referred to in points (i) and (ii); and by (c) strengthening systematic cooperation between Member States in the conduct of policy.” *Consolidated Version of the Treaty on European Union* art. 14 (2016), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12016M/TXT&from=EN>.

¹⁵⁵ EULEX-KOSOVO, *What is EULEX?*, available at <https://www.eulex-kosovo.eu/?page=2,16>. EULEX is supported by all 27 EU Member States and five contributing States: Canada, the United States, Norway, Switzerland, and Turkey.

¹⁵⁶ EULEX-KOSOVO, *What is EULEX?*, available at <https://www.eulex-kosovo.eu/?page=2,16>.

the Council of the EU decisions and, as of this writing, is in force until June 14, 2023.¹⁵⁷

After a 2010 report on Inhuman Treatment of People and Illicit Trafficking in Human Organs in Kosovo (the Martyr Report) was released,¹⁵⁸ the Parliamentary Assembly of the COE called on EULEX to conduct an impartial investigation into the alleged crimes.¹⁵⁹ EULEX began investigations and established a Special Investigative Task Force (SITF) that derived its legal authority from the same Council of the EU decision establishing EULEX.¹⁶⁰

In September 2012, Kosovo became fully independent. In a letter dated September 4, 2012, Kosovo's President invited the EU High Representative for Foreign Affairs and Security Policy to continue EULEX's operations.¹⁶¹ The letter also "*formally recognized and legitimized the existence and operations of the SITF.*"¹⁶² The EU High Representative responded positively. Thereafter, Kosovo's Assembly ratified the exchange of letters between Kosovo and the EU as an international agreement that formally endorsed the extension of EULEX's mandate and preserved a special status for the SITF, outside the authority and control of Kosovo's prosecutorial system.¹⁶³

When EULEX's mandate was set to expire in June 2014, the President of Kosovo sent a new invitation to the EU High Representative requesting that EULEX's mandate be extended until June 2016.¹⁶⁴ The invitation also "*referred to*

¹⁵⁷ EULEX-KOSOVO, *What is EULEX?*, available at <https://www.eulex-kosovo.eu/?page=2>, 16.

¹⁵⁸ Europe Parliament Assembly Committee on Legal Affairs and Human Rights, *Report on Inhuman Treatment of People and Illicit Trafficking in Human Organs in Kosovo* (Dec. 12, 2010), available at <http://www.assembly.coe.int/CommitteeDocs/2010/ajdoc462010prov.pdf>.

¹⁵⁹ See Robert Muharremi, *The Kosovo Specialist Chambers and Specialist Prosecutor's Office*, AMERICAN SOCIETY OF INTERNATIONAL LAW (2016), available at <https://www.asil.org/insights/volume/20/issue/11/kosovo-specialist-chambers-and-specialist-prosecutors-office>; see also Parliamentary Assembly of the Council of Europe Committee on Legal Affairs and Human Rights, *Inhuman treatment of people and illicit trafficking in human organs in Kosovo* (Jan. 7, 2011), available at <https://www.scp-ks.org/sites/default/files/public/coe.pdf>.

¹⁶⁰ Robert Muharremi, *The Kosovo Specialist Chambers and Specialist Prosecutor's Office*, 76 ZAÖRV 967, 972 (2016), available at https://www.zaoerv.de/76_2016/76_2016_4_a_967_992.pdf.

¹⁶¹ Robert Muharremi, *The Kosovo Specialist Chambers and Specialist Prosecutor's Office*, 76 ZAÖRV 967, 972 (2016), available at https://www.zaoerv.de/76_2016/76_2016_4_a_967_992.pdf.

¹⁶² Robert Muharremi, *The Kosovo Specialist Chambers and Specialist Prosecutor's Office*, 76 ZAÖRV 967, 972 (2016), available at https://www.zaoerv.de/76_2016/76_2016_4_a_967_992.pdf.

¹⁶³ See *Law 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* (Kosovo, 2012), available at <http://old.kuvendikosoves.org/common/docs/ligjet/Law%2004-L-148.pdf>.

¹⁶⁴ See Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, U.N. Doc. S/2014/305 (Apr. 29, 2014), available at https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_305.pdf.

the establishment, if required, of a specialist court within the Kosovo court system and a specialist prosecutor's office with seats within and outside Kosovo, for any trial and appellate proceedings arising from” the SITF’s investigations.¹⁶⁵ The EU High Representative accepted the invitation, and the Kosovo Assembly ultimately ratified this second exchange of letters as another international agreement between Kosovo and the EU.¹⁶⁶

In September 2014, once the SITF was ready to file indictments, the EU Council mandated EULEX to “*support re-located judicial proceedings within [an EU] Member State, in order to prosecute and adjudicate criminal charges arising from*” the SITF’s investigations.¹⁶⁷ In preparation, Kosovo’s government adopted amendments to the Constitution – which were affirmed by the Constitutional Court – to create the legal basis for Kosovo’s Assembly to pass the law on the KSC and SPO.¹⁶⁸ On August 3, 2015, the Assembly of Kosovo approved the constitutional amendment and passed the Law on the Specialist Chambers and the Specialist Prosecutor’s Office in order to create the KSC and SPO.¹⁶⁹ The Kosovo Constitution permits the establishment of “*specialized courts,*” but prohibits the establishment of “*extraordinary courts,*” and further provides that the Supreme Court of Kosovo is the highest judicial authority and that the Constitutional Court of Kosovo is the final authority for the interpretation of the Constitution.¹⁷⁰ To avoid the risk of the KSC being held to be “*extraordinary*” rather than “*specialized,*” the new Article 162 of the Constitution expressly authorized the creation of the KSC in accordance with subsequent legislation.¹⁷¹ To insulate the KSC from possible interference by other arms of the Kosovo judiciary, the Law on the Specialist

¹⁶⁵ Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, U.N. Doc. S/2014/305 (Apr. 29, 2014), available at https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_305.pdf.

¹⁶⁶ *Law 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* (Kosovo, 2014), available at https://www.scp-ks.org/sites/default/files/public/04-l-274_a.pdf.

¹⁶⁷ See Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, U.N. Doc. S/2014/773 (Oct. 31 2014), available at <https://unmik.unmissions.org/sites/default/files/s-2014-773.pdf>.

¹⁶⁸ Robert Muharremi, *The Kosovo Specialist Chambers and Specialist Prosecutor’s Office*, 76 ZAÖRV 967, 976 (2016), available at https://www.zaoerv.de/76_2016/76_2016_4_a_967_992.pdf; *Assessment of an Amendment to the Constitution of the Republic of Kosovo proposed by the Government of the Republic of Kosovo and referred by the President of the Assembly of the Republic of Kosovo on 9 March 2015 by Letter No. 05-433/DO-318*, Case No. KO26/15, Judgment (Apr. 15, 2015), available at https://gjk-ks.org/wp-content/uploads/vendimet/KO26-15_ANG.pdf.

¹⁶⁹ Robert Muharremi, *The Kosovo Specialist Chambers and Specialist Prosecutor’s Office*, 76 ZAÖRV 967, 977 (2016), available at https://www.zaoerv.de/76_2016/76_2016_4_a_967_992.pdf.

¹⁷⁰ Sarah Williams, *The Specialist Chambers of Kosovo: The Limits of Internationalization*, 14 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 25, 33-34 (2016), available at <https://doi.org/10.1093/jicj/mqv081>.

¹⁷¹ Sarah Williams, *The Specialist Chambers of Kosovo: The Limits of Internationalization*, 14 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 25, 33-34 (2016), available at <https://doi.org/10.1093/jicj/mqv081>.

Chambers and the Specialist Prosecutor's Office provides that the KSC will have primacy over all other courts in Kosovo as to matters within its jurisdiction and created self-contained KSC Supreme Court panels and Constitutional Court panels.¹⁷²

The KSC and the SPO were thus established within the justice system of Kosovo, but were to operate outside of Kosovo and with features distinct from other Kosovo judicial institutions, to investigate, prosecute, and try “*international crimes committed during and in the aftermath of the conflict in Kosovo, which relate to those reported in the [Marty Report]*” and investigated by the SITF.¹⁷³ While the KSC is a hybrid court, it is significantly more internationalized and operates more as an international tribunal than many other hybrid courts.¹⁷⁴ This approach was likely chosen in part because of domestic resistance to the KSC in Kosovo, due to the nature of the crimes being investigated and the identity of the primary perpetrators, and also because of possible diplomatic pressure from other states.¹⁷⁵ For example, in January 2015, Kosovo's then-Minister of Justice “*publicly stated that the establishment of the [KSC] was a political compromise to prevent Russia from raising the prosecution of the allegations made in the Marty Report in the UN Security Council.*”¹⁷⁶

In sum, the legal instruments that established the KSC and SPO are: (i) the 2014 exchange of letters between the President of Kosovo and the EU High Representative, ratified by Kosovo as an international agreement between it and the EU, (ii) Kosovo's Constitution, as amended, and (iii) Kosovo's Law on the Specialist Chambers and the Specialist Prosecutor's Office. Although the exchange of letters outlined most of the key features of the KSC, they cannot be considered self-executing because, as stated by the President of Kosovo, “*all legal measures undertaken ... to establish a specialist court ... will need be adopted in accordance*

¹⁷² Sarah Williams, *The Specialist Chambers of Kosovo: The Limits of Internationalization*, 14 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 25, 34 (2016), available at <https://doi.org/10.1093/jicj/mqv081>.

¹⁷³ Robert Muharremi, *The Kosovo Specialist Chambers and Specialist Prosecutor's Office*, AMERICAN SOCIETY OF INTERNATIONAL LAW (2016), available at <https://www.asil.org/insights/volume/20/issue/11/kosovo-specialist-chambers-and-specialist-prosecutors-office>.

¹⁷⁴ Robert Muharremi, *The Kosovo Specialist Chambers and Specialist Prosecutor's Office*, 76 ZAÖRV 967, 969-70 (2016), available at https://www.zaoerv.de/76_2016/76_2016_4_a_967_992.pdf.

¹⁷⁵ Robert Muharremi, *The Kosovo Specialist Chambers and Specialist Prosecutor's Office*, 76 ZAÖRV 967, 975 (2016), available at https://www.zaoerv.de/76_2016/76_2016_4_a_967_992.pdf.

¹⁷⁶ Robert Muharremi, *The Kosovo Specialist Chambers and Specialist Prosecutor's Office*, 76 ZAÖRV 967, 975 (2016), available at https://www.zaoerv.de/76_2016/76_2016_4_a_967_992.pdf; see also Hajredin Kuçi, *Gjykata Speciale, rezultat i politikës ndërkombëtare [Special Court, result of international politics]*, KOSOVOHABER (Jan. 22, 2015), available at <https://www.kosovahaber.net/?page=1,9,28307>.

with Kosovo law and subject to Constitutional Court review.”¹⁷⁷ Thus, the exchange of letters between Kosovo and the EU High Representative arguably only created an international obligation for Kosovo to establish the KSC and SPO.

b) The Operation of the KSC

The Law on the Specialist Chambers and the Specialist Prosecutor’s Office states that the KSC “*shall have a seat in Kosovo*” and authorizes an additional seat in a host state outside Kosovo pursuant to an agreement with that state.¹⁷⁸ Once the legal instruments establishing the KSC and SPO were adopted, Kosovo and the Netherlands signed a “*Host State Agreement*” on February 15, 2016, authorizing the Dutch authorities to start preparations for the establishment of a seat of the KSC and the SPO in The Hague.¹⁷⁹

As an illustration of the KSC’s “*internationalized*” character, the budgets for the KSC and SPO come from the EU’s budget, and not Kosovo’s.¹⁸⁰ The EU Council allocated a budget of EUR 150 million to the KSC between 2016 and 2020, in addition to financial support from Switzerland and Norway, which paid for the EUR 8 million complex in The Hague that seats the KSC.¹⁸¹ The judges in the KSC are not Kosovar and are appointed by the head of EULEX.¹⁸² The KSC is also

¹⁷⁷ Robert Muharremi, *The Kosovo Specialist Chambers and Specialist Prosecutor’s Office*, 76 ZAÖRV 967, 980 (2016), available at https://www.zaoerv.de/76_2016/76_2016_4_a_967_992.pdf (translating from the Albanian the exchange of letters available in *Law 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* (Kosovo, 2014), available at https://www.scp-ks.org/sites/default/files/public/04-l-274_a.pdf).

¹⁷⁸ *Law On Specialist Chambers and Specialist Prosecutor’s Office* art. 3(6) (Kosovo, 2015), available at https://balkaninsight.com/wp-content/uploads/2019/01/Kosovo_Law_on_Specialist_Chambers.pdf.

¹⁷⁹ Robert Muharremi, *The Kosovo Specialist Chambers and Specialist Prosecutor’s Office*, AMERICAN SOCIETY OF INTERNATIONAL LAW (2016), available at <https://www.asil.org/insights/volume/20/issue/11/kosovo-specialist-chambers-and-specialist-prosecutors-office; Agreement between the Kingdom of the Netherlands and the Republic of Kosovo concerning the Hosting of the Kosovo Relocated Specialist Judicial Institution in the Netherlands> (The Kingdom of the Netherlands and the Republic of Kosovo, 2016), available at <http://wetten.overheid.nl/BWBV0006581/2016-02-15>.

¹⁸⁰ Robert Muharremi, *The Kosovo Specialist Chambers and Specialist Prosecutor’s Office*, AMERICAN SOCIETY OF INTERNATIONAL LAW (2016), available at <https://www.asil.org/insights/volume/20/issue/11/kosovo-specialist-chambers-and-specialist-prosecutors-office>.

¹⁸¹ Orlando Crowcroft, *In Kosovo, an uncertain future for the war crimes court nobody wanted*, EURONEWS. Feb. 25, 2021, available at <https://www.euronews.com/my-europe/2021/02/24/in-kosovo-an-uncertain-future-for-the-war-crimes-court-nobody-wanted>; see also Marija Ristic, *EU Cash Brings Kosovo War Crimes Court Closer*, BALKAN TRANSITIONAL JUSTICE (June 15, 2016), available at <https://balkaninsight.com/2016/06/15/eu-cash-brings-kosovo-war-crimes-court-closer-06-15-2016/>.

¹⁸² *Law On Specialist Chambers and Specialist Prosecutor’s Office* art. 28 (Kosovo, 2015), available at https://balkaninsight.com/wp-content/uploads/2019/01/Kosovo_Law_on_Specialist_Chambers.pdf.

required to apply “*customary international law and the substantive criminal law of Kosovo insofar as it is in compliance with customary international law.*”¹⁸³

There are two main departments within the KSC – the chamber and the registry. The chamber includes a basic court, a court of appeals, a Supreme Court chamber and a Constitutional Court chamber, and the registry includes a defense office, a victims’ participation office to represent victims’ interests, a witness protection and support office, a detention management unit, and an ombudsman’s office.¹⁸⁴ The official languages of the KSC are Albanian, Serbian, and English.¹⁸⁵ The SPO is an independent entity that was initially headed by the former lead prosecutor of the SITF (a United States national), and subsequently by two different prosecutors, also of US nationality.¹⁸⁶

The KSC’s subject matter jurisdiction covers the crimes related to the Marty Report, which include crimes against humanity, war crimes, and other crimes under Kosovo law.¹⁸⁷ The KSC has personal jurisdiction over natural persons “*of Kosovo/FRY [Federal Republic of Yugoslavia] citizenship or over persons who committed crimes within its subject matter jurisdiction against persons of Kosovo/FRY citizenship wherever those crimes were committed.*”¹⁸⁸ Thus, the law establishing the KSC contemplates jurisdiction over non-Kosovars who committed certain war crimes against Kosovo/FRY citizens. However, it does not address potential immunities defenses that could be raised. This is likely because its focus is on crimes that were committed by members of a non-state militia who are not sitting officials and thus do not benefit from functional or personal immunity. In the absence of textual immunity provisions, whether the KSC could circumvent the personal or functional immunity of individuals largely depends on whether it is an “*international*” court, as understood by international jurisprudence and customary international law. These issues are explored below and are, in any event, of no

¹⁸³ *Law On Specialist Chambers and Specialist Prosecutor’s Office* art. 12 (Kosovo, 2015), available at https://balkaninsight.com/wp-content/uploads/2019/01/Kosovo_Law_on_Specialist_Chambers.pdf.

¹⁸⁴ Marija Ristic, *EU Cash Brings Kosovo War Crimes Court Closer*, BALKAN TRANSITIONAL JUSTICE (June 15, 2016), available at <https://balkaninsight.com/2016/06/15/eu-cash-brings-kosovo-war-crimes-court-closer-06-15-2016/>.

¹⁸⁵ Marija Ristic, *EU Cash Brings Kosovo War Crimes Court Closer*, BALKAN TRANSITIONAL JUSTICE (June 15, 2016), available at <https://balkaninsight.com/2016/06/15/eu-cash-brings-kosovo-war-crimes-court-closer-06-15-2016/>.

¹⁸⁶ See Kosovo Specialist Chambers & Specialist Prosecutor’s Office, *Specialist Prosecutor’s Office (SPO)*, available at <https://www.scp-ks.org/en/spo/former-specialist-prosecutors>.

¹⁸⁷ *Law On Specialist Chambers and Specialist Prosecutor’s Office* art. 6 (Kosovo, 2015), available at https://balkaninsight.com/wp-content/uploads/2019/01/Kosovo_Law_on_Specialist_Chambers.pdf.

¹⁸⁸ *Law On Specialist Chambers and Specialist Prosecutor’s Office* art. 9(2) (Kosovo, 2015), available at https://balkaninsight.com/wp-content/uploads/2019/01/Kosovo_Law_on_Specialist_Chambers.pdf.

moment for the KSC as all cases, to date, have only involved former members of the Kosovo Liberation Army, like former president Hashim Thaci.¹⁸⁹

c) Conclusion: A Model for Ukraine

The KSC's creation occurred through the exchange of letters between the High Representative and Kosovo. However, the High Representative's power to bind the EU, by virtue of these letters, is questionable, given that the Council of the EU never authorized or officially confirmed them.¹⁹⁰ Therefore, it constitutes an exceptional precedent in the development of the EU's common foreign and security policy, which was made possible due to tacit approval or acquiescence by the Council of the EU and member states. If the High Representative were to act in a similar manner for the purposes of creating a Crime of Aggression Tribunal with Ukraine, his action would not be immune to an *ultra vires* challenge by the Council of the EU and/or a member state.¹⁹¹

As discussed below, the ability to create a specialized court like the KSC is possible under the Ukrainian Constitution, with certain limitations. A specialized court that operates entirely within the Ukrainian domestic legal system would not violate the Ukrainian constitution so long as it follows domestic procedures established by law and does not replace ordinary domestic courts, but the ability of the international community to participate in such court's activities would be limited. Notably, the establishment of the KSC was preceded by an amendment to Kosovo's Constitution, which eliminated constitutional concerns in case of the KSC, but, as noted below, the amendment of Ukraine's Constitution is not possible in Ukraine while martial law is in effect. Thus, there is greater flexibility for tribunals that are predominantly international and formed outside of the Ukrainian judicial system. An international court established under international law with Ukrainian involvement will not only be permissible under current interpretations of Article 125 of the Constitution of Ukraine but will also more likely be able to sidestep immunities issues.

¹⁸⁹ See Kosovo Specialist Chambers & Specialist Prosecutor's Office, *Cases*, available at <https://www.scp-ks.org/en/cases> (last visited May 1, 2023). Note that former president Hashim Thaci was head of state at the time of his indictment but resigned just before his arrest. Kathelijne Schenkel, *The Kosovo Specialist Court and Transitional Justice, Public perceptions on the KSC and the need for a comprehensive TJ approach*, PAX AND INTEGRA (Mar. 2021), available at

https://paxforpeace.nl/media/download/The_Kosovo_Specialist_Court_and_Transitional_Justice_PAX_Integra.pdf.

¹⁹⁰ See Robert Muharremi, *The Kosovo Specialist Chambers and Specialist Prosecutor's Office*, 76 ZAÖRV 967, 977-980 (2016), available at https://www.zaoerv.de/76_2016/76_2016_4_a_967_992.pdf.

¹⁹¹ *Consolidated Version of the Treaty on the Functioning of the European Union* art. 263 (2016), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12016E/TXT&from=EN>.

Issues and Challenges to the Establishment of the Crime of Aggression Tribunal under the auspices of the COE or the EU

This section of the memorandum details other factors to be taken into account when contemplating the creation of a Crime of Aggression Tribunal under the auspices of the COE or the EU.

Ukrainian Constitutional Constraints

Article 124 – The Exclusivity of Ukrainian Courts

Article 124 of the Constitution of Ukraine provides, in relevant part, that “[j]ustice in Ukraine shall be administered exclusively by the courts” and that “[d]elegation of the functions of courts or appropriation of such functions by other bodies or officials shall be prohibited.”¹⁹² These provisions, in conjunction with several others, were intended to ensure the establishment and functioning of the system of checks and balances and separation of powers in Ukraine.¹⁹³ Scholars opine that paragraph 1 of Article 124 “was created to outlaw the previously existing practice of serving justice through courts delegating their powers to agencies or commissions.”¹⁹⁴ Put simply, Article 124 forbids the legislative or executive branches of the Ukrainian government and their officials from administering justice and establishes courts as the only governmental body authorized to perform those functions.¹⁹⁵

Despite its seemingly domestic underlying purpose, Article 124 served as an impediment to the ratification of the Rome Statute by Ukraine in 2001 when the Constitutional Court of Ukraine (the CCU) concluded that the provisions of the Rome Statute creating the ICC as a court “*complementary to national criminal*

¹⁹² UKRAINE CONST. art. 124, paras. 1-2 (1996), available at <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80?lang=en#Text>. It must be noted, and as will be discussed further, Article 124 has been amended several times over the past two decades. However, these provisions remained substantively unchanged.

¹⁹³ V. Tatsii, KONSTYTUTSIIA UKRAINY. NAUKOVO-PRAKTYCHNYI KOMENTAR [COMMENTARY TO THE CONSTITUTION OF UKRAINE] 860 (2011), available in *Ukrainian at* https://library.nlu.edu.ua/POLN_TEXT/KNIGI-2012/Konst_Ukr_2011.pdf.

¹⁹⁴ Alexander Komarov and Oona Hathaway, *Ukraine’s Constitutional Constraints: How to Achieve Accountability for the Crime of Aggression*, JUST SECURITY (Apr. 5, 2022), available at <https://www.justsecurity.org/80958/ukraines-constitutional-constraints-how-to-achieve-accountability-for-the-crime-of-aggression/>.

¹⁹⁵ V. Tatsii, KONSTYTUTSIIA UKRAINY. NAUKOVO-PRAKTYCHNYI KOMENTAR [COMMENTARY TO THE CONSTITUTION OF UKRAINE] 861 (2011), available in *Ukrainian at* https://library.nlu.edu.ua/POLN_TEXT/KNIGI-2012/Konst_Ukr_2011.pdf.

jurisdictions” were inconsistent with several provisions¹⁹⁶ of Article 124.¹⁹⁷ The CCU noted that unlike the international judicial institutions referenced in Article 55 of the Constitution,¹⁹⁸ which by their nature are auxiliary means of protection of a person’s rights and freedoms, the ICC would complement the domestic judicial system.¹⁹⁹ The CCU found that such an addition to the domestic system contradicted the relevant provisions of the Constitution. Observing that Articles 4(2) and 17(1)(a) of the Rome Statute authorized the ICC to exercise its functions and powers on the territory of any State Party and to accept cases for review on its own initiative if the State is “*unwilling or unable genuinely to carry out the investigation or prosecution*,”²⁰⁰ the CCU further concluded that such supplementing of the domestic judicial system was not contemplated by the Constitution and that accession of Ukraine to the Rome Statute was, thus, only possible after making necessary amendments to the Constitution.²⁰¹ In this context, the CCU also distinguished the ICC from other international judicial institutions referred to in Article 55 of the Constitution, *e.g.*, the ECtHR, as those institutions initiate cases only at the request of individuals (*i.e.*, not on their own initiative), and the request can only be made after exhausting all domestic legal remedies.²⁰²

Although the Ukrainian Constitution has since been amended to explicitly authorize Ukraine to recognize the ICC’s jurisdiction,²⁰³ the provision stating that

¹⁹⁶ The provisions at issue were: “Justice in Ukraine shall be administered exclusively by the courts,” and “Judicial proceedings shall be carried out by the Constitutional Court of Ukraine and courts of general jurisdiction.” The latter provision was repealed in 2016, while the former remains valid. Compare UKRAINE CONST. art. 124 (1996), available at <https://zakon.rada.gov.ua/laws/show/en/254%D0%BA/96-%D0%B2%D1%80/ed19960628#Text>, with UKRAINE CONST. art. 124 (amendment of 2016), available at

<https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80?lang=en#Text>.

¹⁹⁷ Opinion of the Constitutional Court on the Conformity of the Rome Statute with the Constitution of Ukraine, Case No. 1-35/2001 (July 11, 2001), available in *Ukrainian at*

<https://zakon.rada.gov.ua/laws/show/v003v710-01?lang=en#Text>.

¹⁹⁸ Article 55 of the Ukrainian Constitution provides, in relevant part, that “[a]fter exhausting all domestic legal instruments, everyone shall have the right to appeal for the protection of his/her rights and freedoms to the relevant international judicial institutions or to the relevant bodies of international organisations of which Ukraine is a member or participant.” UKRAINE CONST. art. 55, para. 5 (amendment of 2016).

¹⁹⁹ Opinion of the Constitutional Court on the Conformity of the Rome Statute with the Constitution of Ukraine, Case No. 1-35/2001, sec. 2.1, para. 5 (July 11, 2001), available in *Ukrainian at*

<https://zakon.rada.gov.ua/laws/show/v003v710-01?lang=en#Text>.

²⁰⁰ Opinion of the Constitutional Court on the Conformity of the Rome Statute with the Constitution of Ukraine, Case No. 1-35/2001, sec. 2.1, para. 3 (July 11, 2001), available in *Ukrainian at*

<https://zakon.rada.gov.ua/laws/show/v003v710-01?lang=en#Text>.

²⁰¹ Opinion of the Constitutional Court on the Conformity of the Rome Statute with the Constitution of Ukraine, Case No. 1-35/2001, sec. 2.1, para. 6 (July 11, 2001), available in *Ukrainian at*

<https://zakon.rada.gov.ua/laws/show/v003v710-01?lang=en#Text>.

²⁰² Opinion of the Constitutional Court on the Conformity of the Rome Statute with the Constitution of Ukraine, Case No. 1-35/2001, sec. 2.1, para. 4 (July 11, 2001), available in *Ukrainian at*

<https://zakon.rada.gov.ua/laws/show/v003v710-01?lang=en#Text>.

²⁰³ Article 124 was supplemented with a new provision stating: “Ukraine may recognise the jurisdiction of the International Criminal Court subject to the conditions determined by the Rome Statute of the International Criminal

“[j]ustice in Ukraine shall be administered exclusively by the courts”²⁰⁴ and the CCU’s 2001 opinion interpreting it remains valid and binding and, thus, should be considered when creating a Crime of Aggression Tribunal.

The CCU stated that to satisfy the Constitution, the tribunal must be “auxiliary” rather than “complementary,”²⁰⁵ but this issue has not been developed by the CCU either in the 2001 opinion or in its subsequent opinions, leaving it open to interpretation.²⁰⁶ Moreover, the CCU’s ruling was heavily criticized.²⁰⁷ Scholars opine that the CCU misinterpreted the principle of complementarity, which, at the time of the CCU’s 2001 ruling, was not well developed in the ICC’s jurisprudence.²⁰⁸ The principle of complementarity provides that the ICC’s jurisdiction complements, rather than substitutes, domestic criminal jurisdiction.²⁰⁹ This means that states bear the primary responsibility for criminal prosecution, and the ICC does not replace them but rather may provide assistance only if the prosecution is impossible due to the State’s unwillingness or inability to do so.²¹⁰ This principle was included in the Rome Statute to ensure that a State Party’s right

Court.” UKRAINE CONST. art. 124, para. 6 (amendment of 2016). Additionally, as noted above, the provision stating that “[j]udicial proceedings shall be carried out by the Constitutional Court of Ukraine and courts of general jurisdiction” was repealed. See UKRAINE CONST. art. 124 (amendment of 2016).

²⁰⁴ UKRAINE CONST. art. 124, para. 1 (amendment of 2016).

²⁰⁵ Opinion of the Constitutional Court on the Conformity of the Rome Statute with the Constitution of Ukraine, Case No. 1-35/2001, sec. 2.1, para. 5 (July 11, 2001), available in Ukrainian at <https://zakon.rada.gov.ua/laws/show/v003v710-01?lang=en#Text>.

²⁰⁶ See Dr. Iryna Marchuk, *Ukraine and the International Criminal Court: Implications of the Ad Hoc Jurisdiction Acceptance and Beyond*, 49 VANDERBILT LAW REVIEW 323, 331 (2021), available at <https://scholarship.law.vanderbilt.edu/vjtl/vol49/iss2/2> (“The distinction made by the judges between the [ECtHR] and ICC is not entirely clear.”).

²⁰⁷ Andrii Andreikiv, *Osoblyvosti Vykonnannya Mizhnarodno-Pravovykh Zobov’язan Ukrainy [Certain Aspects of Implementation of Ukraine’s International Legal Obligations]*, YURYDYCHNA HAZETA ONLINE (Sept. 10, 2021), available in Ukrainian at <https://jur-gazeta.com/publications/practice/mizhnarodne-pravo-investiciyi/osoblivosti-vikonannya-mizhnarodnopravovih-zobov’язan-ukrayini-.html>.

²⁰⁸ The principle was construed for the first time in the context of the admissibility proceedings involving Libya and Kenya. See Dr. Iryna Marchuk, *Ukraine and the International Criminal Court: Implications of the Ad Hoc Jurisdiction Acceptance and Beyond*, 49 VANDERBILT LAW REVIEW 323, 331 (2021), available at <https://scholarship.law.vanderbilt.edu/vjtl/vol49/iss2/2>. See also Pashkovskyy M.I., *Response to the Inquiry of the Ministry of Justice of Ukraine Regarding the Conformity of the Rome Statute with the Constitution of Ukraine*, available in Ukrainian at http://dspace.onua.edu.ua/bitstream/handle/11300/1849/2014_%d0%9f%d0%b0%d1%88%d0%ba%d0%be%d0%b2%d1%81%d1%8c%d0%ba%d0%b8%d0%b9_%d0%9c.%d0%86._%d0%92%d0%b8%d1%81%d0%bd%d0%be%d0%b2%d0%be%d0%ba_.pdf (last visited May 1, 2023).

²⁰⁹ Dr. Iryna Marchuk, *Ukraine and the International Criminal Court: Implications of the Ad Hoc Jurisdiction Acceptance and Beyond*, 49 VANDERBILT LAW REVIEW 323, 331 (2021), available at <https://scholarship.law.vanderbilt.edu/vjtl/vol49/iss2/2>.

²¹⁰ Dr. Iryna Marchuk, *Ukraine and the International Criminal Court: Implications of the Ad Hoc Jurisdiction Acceptance and Beyond*, 49 VANDERBILT LAW REVIEW 323, 331-332 (2021), available at <https://scholarship.law.vanderbilt.edu/vjtl/vol49/iss2/2>.

to try crimes on its territory is not undermined.²¹¹ Thus, some commentators suggest the CCU may have misconstrued the complementarity principle when concluding that the ICC's jurisdiction does not align with the Constitution, which considers the administration of justice to be the exclusive prerogative of the Ukrainian courts.²¹² The CCU's efforts to distinguish between the ECtHR and the ICC have also faced criticism as both courts can only assume jurisdiction after domestic legal remedies have been exhausted.²¹³

Scholars have also argued that Article 124 of the Constitution, which provides that “[j]ustice in Ukraine shall be administered exclusively by the courts,”²¹⁴ only applies to Ukraine's internal affairs and has no relationship to the international legal system or to international judicial bodies. Therefore, they have argued, it should not have been considered by the CCU in 2001.²¹⁵ In that respect, an argument can be made that the CCU improperly understood the nature of the ICC's complementarity principle to be institutional rather than jurisdictional: the CCU might have presumed that if the Rome Statute were to be ratified, the ICC would have become part of the Ukrainian judicial system, which is clearly not what the Rome Statute contemplates.²¹⁶ Such a misunderstanding may have stemmed from the CCU interpreting the principle of complementarity without regard to the ordinary meaning of the term in the context and in the light of the object and purpose of the Rome Statute.²¹⁷

²¹¹ Dr. Iryna Marchuk, *Ukraine and the International Criminal Court: Implications of the Ad Hoc Jurisdiction Acceptance and Beyond*, 49 VANDERBILT LAW REVIEW 323, 330 (2021), available at <https://scholarship.law.vanderbilt.edu/vjtl/vol49/iss2/2>.

²¹² Dr. Iryna Marchuk, *Ukraine and the International Criminal Court: Implications of the Ad Hoc Jurisdiction Acceptance and Beyond*, 49 VANDERBILT LAW REVIEW 323, 330 (2021), available at <https://scholarship.law.vanderbilt.edu/vjtl/vol49/iss2/2>.

²¹³ Dr. Iryna Marchuk, *Ukraine and the International Criminal Court: Implications of the Ad Hoc Jurisdiction Acceptance and Beyond*, 49 VANDERBILT LAW REVIEW 323, 330 (2021), available at <https://scholarship.law.vanderbilt.edu/vjtl/vol49/iss2/2>.

²¹⁴ UKRAINE CONST. art. 124, para. 1 (amendment of 2016).

²¹⁵ Andrii Andreikiv, *Osoblyvosti Vykonannia Mizhnarodno-Pravovykh Zoboviazan Ukrainy* [Certain Aspects of Implementation of Ukraine's International Legal Obligations], YURYDYCHNA HAZETA ONLINE (Sept. 10, 2021), available in Ukrainian at <https://yur-gazeta.com/publications/practice/mizhnarodne-pravo-investiciyi/osoblivosti-vikonannya-mizhnarodnopravovih-zobovyzan-ukrayini-.html>.

²¹⁶ Andrii Andreikiv, *Osoblyvosti Vykonannia Mizhnarodno-Pravovykh Zoboviazan Ukrainy* [Certain Aspects of Implementation of Ukraine's International Legal Obligations], YURYDYCHNA HAZETA ONLINE (Sept. 10, 2021), available in Ukrainian at <https://yur-gazeta.com/publications/practice/mizhnarodne-pravo-investiciyi/osoblivosti-vikonannya-mizhnarodnopravovih-zobovyzan-ukrayini-.html>.

²¹⁷ Andrii Andreikiv, *Osoblyvosti Vykonannia Mizhnarodno-Pravovykh Zoboviazan Ukrainy* [Certain Aspects of Implementation of Ukraine's International Legal Obligations], YURYDYCHNA HAZETA ONLINE (Sept. 10, 2021), available in Ukrainian at <https://yur-gazeta.com/publications/practice/mizhnarodne-pravo-investiciyi/osoblivosti-vikonannya-mizhnarodnopravovih-zobovyzan-ukrayini-.html> (citing Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155

The CCU has not addressed the question of the “*complementary*” vs. “*auxiliary*” nature of a tribunal since 2001 and, in fact, has not been tasked with determining the constitutionality of any other international or hybrid tribunal. This fact, together with the development of the international criminal justice jurisprudence and the evolution of the Ukrainian legal system in the last two decades, makes it difficult to ascertain what features make a tribunal auxiliary rather than complementary from the CCU’s perspective. Given the criticism of the 2001 opinion and the recent commentary on the complementarity principle, it is possible that the CCU’s understanding of the principle and its interplay with Article 124 of the Constitution has changed. However, there still remains a risk that the CCU may find a Crime of Aggression Tribunal inconsistent with Article 124 of the Constitution, especially if the tribunal undermines Ukraine’s sovereignty and the national courts’ ability to adjudicate crimes committed within its jurisdiction without interference by the tribunal. To address this concern, and considering that the restrictions of Article 124 of the Constitution would be equally applicable to tribunals created under the auspices of the COE or the EU, it may be advisable to seek an *ex ante* determination of the constitutionality of the anticipated Crime of Aggression Tribunal, as discussed further below.

Article 125 – The Establishment of Extraordinary and Special Courts

Article 125 of the Constitution prohibits “[t]he establishment of extraordinary and special courts.”²¹⁸ The same prohibition is found in Article 3 of the Law of Ukraine “*On the Judiciary and the Status of Judges*”²¹⁹ and Article 26 of the Law of Ukraine “*On the Legal Status of Martial Law*.”²²⁰

Neither the Constitution nor the relevant Laws define the terms “*extraordinary court*” and “*special court*.”²²¹ In 2001, the CCU held that

U.N.T.S. 331, 8 I.L.M. 679 (1969), available at https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

²¹⁸ UKRAINE CONST. art. 125, para. 6 (amendment of 2016).

²¹⁹ *Law of Ukraine On the Judiciary and the Status of Judges* art. 3 (Ukraine, 2016), available at <https://zakon.rada.gov.ua/laws/show/1402-19?lang=en#Text>.

²²⁰ *Law of Ukraine On the Legal Status of Martial Law* art. 26 (Ukraine, 2015), available in Ukrainian at <https://zakon.rada.gov.ua/laws/show/en/389-19?lang=en#Text>.

²²¹ V. Tatsii, KONSTYTUTSIIA UKRAINY. NAUKOVO-PRAKTYCHNYI KOMENTAR [COMMENTARY TO THE CONSTITUTION OF UKRAINE] 873 (2011), available in Ukrainian at

https://library.nlu.edu.ua/POLN_TEXT/KNIGI-2012/Konst_Ukr_2011.pdf. See also Tetiana Podorozhna and Andrii Khudyk, *Vyshchyi Antykoruptsiinyi Sud Ukrainy Yak Vyshchyi Spetsializovanyi Sud v Ukraini: Problema Konstytutsiino-Pravovoho Statusu* [The High Anti-Corruption Court of Ukraine as the Highest Specialized Court in Ukraine: The Problem of Constitutional and Legal Status] 2 UJCL 42, 49 (2021), available in Ukrainian at <https://www.constjournal.com/wp-content/uploads/issues/2021-2/pdfs/5-tetiana-podorozhna-andrii-khudyk-vyshchyi->

“*[e]xtraordinary and special courts within the meaning of [Article 125] are, first, not international but national courts, and second, are courts that do not properly follow the procedures established by law and are established to replace ordinary courts.*”²²² The CCU explained that, by its nature, the ICC is an international judicial body created by agreement between states, and its regulations are based on the principle of respect for human rights and freedoms, which is ensured, in part, through the creation of appropriate jurisdictional mechanisms to ensure delivery of fair justice.²²³ Having determined that the ICC is an international court and that the “*extraordinary and special courts*” restriction applies only to domestic courts, the CCU concluded that the Rome Statute does not violate Article 125 of the Constitution.²²⁴

The Constitution and the decisions of the CCU also do not explain the distinction between an “*extraordinary*” and a “*special*” court.²²⁵ Scholars have defined an “*extraordinary court*” as a domestic court formed *ad hoc* by a special act of the government to consider a specific, typically criminal, case.²²⁶ Such “*extraordinary*” courts are typically formed under extraordinary circumstances—such as war, revolution, *coup d’état*, or state of emergency—and as

antikoruptsiinyi-sud-ukrainy-yak-vyshchyi-spetsializovanyi-sud-ukraini.pdf (“[N]either the Constitution of Ukraine nor the practice of the Constitutional Court of Ukraine clarify the distinction between extraordinary and special courts.”).

²²² Opinion of the Constitutional Court on the Conformity of the Rome Statute with the Constitution of Ukraine, Case No. 1-35/2001, sec. 2.1, para. 7 (July 11, 2001), available in Ukrainian at <https://zakon.rada.gov.ua/laws/show/v003v710-01?lang=en#Text>.

²²³ Opinion of the Constitutional Court on the Conformity of the Rome Statute with the Constitution of Ukraine, Case No. 1-35/2001, sec. 2.1, para. 7 (July 11, 2001), available in Ukrainian at <https://zakon.rada.gov.ua/laws/show/v003v710-01?lang=en#Text>.

²²⁴ Opinion of the Constitutional Court on the Conformity of the Rome Statute with the Constitution of Ukraine, Case No. 1-35/2001, sec. 2.1, para. 8 (July 11, 2001), available in Ukrainian at <https://zakon.rada.gov.ua/laws/show/v003v710-01?lang=en#Text>.

²²⁵ Tetiana Podorozhna and Andrii Khudyk, *Vyshchyi Antikoruptsiinyi Sud Ukrainy Yak Vyshchyi Spetsializovanyi Sud v Ukraini: Problema Konstytutsiino-Pravovoho Statusu* [The High Anti-Corruption Court of Ukraine as the Highest Specialized Court in Ukraine: The Problem of Constitutional and Legal Status] 2 UJCL 42, 49 (2021), available in Ukrainian at

<https://www.constjournal.com/wp-content/uploads/issues/2021-2/pdfs/5-tetiana-podorozhna-andrii-khudyk-vyshchyi-antikoruptsiinyi-sud-ukrainy-yak-vyshchyi-spetsializovanyi-sud-ukraini.pdf>.

²²⁶ V. Tatsii, KONSTYTUTSIIA UKRAINY. NAUKOVO-PRAKTYCHNYI KOMENTAR [COMMENTARY TO THE CONSTITUTION OF UKRAINE] 873 (2011), available in Ukrainian at

https://library.nlu.edu.ua/POLN_TEXT/KNIGI-2012/Konst_Ukr_2011.pdf. Others define “extraordinary courts” as courts created by a special order of the supreme state authority or a person authorized by it to consider a specific case or type of cases, as well as a permanent special court to which specific cases have been transferred which are generally not within its jurisdiction. See Serhii Volodymyrovych Overchuk, *Poniattia ta Vydy Pidsudnosti v Kryminalnomu Protsezi Ukrainy* [Concepts and Types of Jurisdiction in the Criminal Process of Ukraine] 3 (2005), available in Ukrainian at <http://mego.info/>.

a result tend to lack independence from political influence.²²⁷ Existing procedural laws do not apply to their operations; rather, the process is simplified, the proceedings are often closed, and the decisions cannot be appealed, which arguably disregards the principles of equality and access to justice.²²⁸ “*Special courts*,” on the other hand, have been defined as separate domestic judicial institutions formed to consider certain categories of cases (usually only criminal ones) with their own system of instances (*i.e.*, trial, appellate, *etc.*) and with no mechanism to appeal to courts of general jurisdiction.²²⁹

While special courts are prohibited in Ukraine, specialized courts are expressly authorized.²³⁰ Specialized courts are domestic courts that have a defined subject matter jurisdiction, are formed within the unitary judicial system of Ukraine in compliance with the applicable provisions of the Constitution, and follow the existing procedural rules.²³¹ The Constitution authorizes “*high specialized*” courts, including, for example, the High Anti-Corruption Court of Ukraine and a proposed High Intellectual Property Court.²³² The Constitution and the laws of Ukraine also authorize the specialization of judges within an ordinary court (*e.g.*, some judges

²²⁷ Tetiana Podorozhna and Andrii Khudyk, *Vyshchyi Antykoruptsiinyi Sud Ukrainy Yak Vyshchyi Spetsializovanyi Sud v Ukraini: Problema Konstytutsiino-Pravovoho Statusu* [The High Anti-Corruption Court of Ukraine as the Highest Specialized Court in Ukraine: The Problem of Constitutional and Legal Status] 2 UJCL 42, 50 (2021), available in Ukrainian at

<https://www.constjournal.com/wp-content/uploads/issues/2021-2/pdfs/5-tetiana-podorozhna-andrii-khudyk-vyshchyi-antykoruptsiinyi-sud-ukrainy-yak-vyshchyi-spetsializovanyi-sud-ukraini.pdf>.

²²⁸ Tetiana Podorozhna and Andrii Khudyk, *Vyshchyi Antykoruptsiinyi Sud Ukrainy Yak Vyshchyi Spetsializovanyi Sud v Ukraini: Problema Konstytutsiino-Pravovoho Statusu* [The High Anti-Corruption Court of Ukraine as the Highest Specialized Court in Ukraine: The Problem of Constitutional and Legal Status] 2 UJCL 42, 50 (2021), available in Ukrainian at

<https://www.constjournal.com/wp-content/uploads/issues/2021-2/pdfs/5-tetiana-podorozhna-andrii-khudyk-vyshchyi-antykoruptsiinyi-sud-ukrainy-yak-vyshchyi-spetsializovanyi-sud-ukraini.pdf>. See also Serhii Volodymyrovych Overchuk, *Poniattia ta Vidy Pidsudnosti v Kryminalnomu Protsesi Ukrainy* [Concepts and Types of Jurisdiction in the Criminal Process of Ukraine] 3 (2005), available in Ukrainian at <http://mego.info/>.

²²⁹ V. Tatsii, KONSTYTUTSIIA UKRAINY. NAUKOVO-PRAKTYCHNYI KOMENTAR [COMMENTARY TO THE CONSTITUTION OF UKRAINE] 873 (2011), available in Ukrainian at

https://library.nlu.edu.ua/POLN_TEXT/KNIGI-2012/Konst_Ukr_2011.pdf. See also Tetiana Podorozhna and Andrii Khudyk, *Vyshchyi Antykoruptsiinyi Sud Ukrainy Yak Vyshchyi Spetsializovanyi Sud v Ukraini: Problema Konstytutsiino-Pravovoho Statusu* [The High Anti-Corruption Court of Ukraine as the Highest Specialized Court in Ukraine: The Problem of Constitutional and Legal Status] 2 UJCL 42, 50 (2021), available in Ukrainian at <https://www.constjournal.com/wp-content/uploads/issues/2021-2/pdfs/5-tetiana-podorozhna-andrii-khudyk-vyshchyi-antykoruptsiinyi-sud-ukrainy-yak-vyshchyi-spetsializovanyi-sud-ukraini.pdf>.

²³⁰ UKRAINE CONST. art. 125, paras. 1, 4 (amendment of 2016) (“The judicial system in Ukraine shall be based on the principles of territoriality and specialization”) (emphasis added).

²³¹ *Joint Report of the International Technical Assistance Projects (Anti-Corruption Initiative of the EU in Ukraine, the USAID “New Justice” Program, and IDLO) as Amicus Curiae within the Framework of General Support Anti-Corruption and Judicial Reforms in Ukraine* 9-10 (Oct. 1, 2020), available in Ukrainian at https://rpr.org.ua/wp-content/uploads/2020/10/AmicusCuriae-VAKS-final-style_01_102.pdf.

²³² *Law of Ukraine On the Judiciary and the Status of Judges* arts. 21, 26, 31 (Ukraine, 2016), available at <https://zakon.rada.gov.ua/laws/show/1402-19?lang=en#Text>.

within a general jurisdiction trial or appellate court can be designated as judges that would only hear specific categories of cases).²³³

Since the Constitution authorizes specialized courts, it is unlikely that a domestic specialized court, even with some international involvement (such as the High War Crimes Court proposed by the PILPG and modeled on the High Anti-Corruption Court of Ukraine²³⁴), would violate Article 125 of the Constitution, so long as such a specialized court tries cases based on the existing Ukrainian procedural laws.²³⁵

A hybrid tribunal, on the other hand, may violate Article 125, depending on the tribunal's design.²³⁶ If the Crime of Aggression Tribunal is created by an international treaty as an *ad hoc* tribunal and contemplates adjudication by foreign judges but is placed within Ukraine's judicial system, the tribunal would likely be considered an "*extraordinary*" or "*special*" court based on the CCU's 2001 decision. The procedural rules of such a tribunal would likely differ from Ukraine's domestic procedural rules, and the tribunal's jurisdiction would likely supplant that of domestic courts.²³⁷

For example, if the Crime of Aggression Tribunal is modeled after the Extraordinary Chambers in the Court of Cambodia (ECCC), which is considered a hybrid tribunal,²³⁸ it would run the risk of violating Article 125 of the Ukrainian Constitution as being an "*extraordinary*" or "*special*" court. The ECCC's creation

²³³ *Law of Ukraine On the Judiciary and the Status of Judges* art. 18 (Ukraine, 2016), available at <https://zakon.rada.gov.ua/laws/show/1402-19?lang=en#Text>.

²³⁴ PILPG, *Policy Planning: Draft Law for a Ukrainian High War Crimes Court*, available at <https://www.publicinternationallawandpolicygroup.org/draft-law-ukrainian-high-war-crimes-court> (last visited May 1, 2023).

²³⁵ As discussed in Part IV.A.3.a. below, the international community's participation in such a domestic tribunal may be limited. It must be noted also that the High Anti-Corruption Court of Ukraine is facing a constitutional challenge before the CCU. See Constitutional Court of Ukraine, *A Constitutional Petition Regarding Constitutionality of the Law of Ukraine On the High Anti-Corruption Court was Filed to the Court*, available at <https://ccu.gov.ua/en/novina/constitutional-petition-regarding-constitutionality-law-ukraine-high-anti-corruption-court> (last visited May 1, 2023).

²³⁶ Alexander Komarov and Oona Hathaway, *The Best Path for Accountability for the Crime of Aggression Under Ukrainian and International Law*, JUST SECURITY (Apr. 11, 2022), available at <https://www.justsecurity.org/81063/the-best-path-for-accountability-for-the-crime-of-aggression-under-ukrainian-and-international-law/> ("[D]epending on how it is designed, a hybrid court might violate Article 125 of the Ukrainian Constitution.").

²³⁷ Alexander Komarov and Oona Hathaway, *Ukraine's Constitutional Constraints: How to Achieve Accountability for the Crime of Aggression*, JUST SECURITY (Apr. 5, 2022), available at <https://www.justsecurity.org/80958/ukraines-constitutional-constraints-how-to-achieve-accountability-for-the-crime-of-aggression/>.

²³⁸ See John D. Ciorciari and Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia*, THE UNIVERSITY OF MICHIGAN PRESS, 4 (2014), available at <https://library.oapen.org/bitstream/id/4338bda6-660c-44d2-b436-24bc3fbee67/9780472901319.pdf>.

was kicked off by an agreement between the UN and Cambodia and subsequently implemented by Cambodian law.²³⁹ Despite having been placed within the existing judicial system of Cambodia,²⁴⁰ the ECCC “*fuses local and international laws, procedures, and personnel*” and has been described as “*special internationalized tribunal*” because “[f]or all practical and legal purposes . . . [it] is, and operates as, an independent entity within the Cambodian court structure.”²⁴¹ Commentators observe that the relationship between the ECCC and other Cambodian courts is uncertain, considering that it has an independent structure and specialized jurisdiction, is functionally autonomous, and incorporates foreign judges and staff, even though it is part of the Cambodian judiciary.²⁴² Moreover, although the law establishing the ECCC provided that the tribunal’s procedure had to accord with Cambodian law, supplemented by international procedural rules only where the existing procedures were uncertain or nonexistent,²⁴³ in practice, the ECCC implemented its own internal rules, which it generally interpreted and applied in conformity with international precedent.²⁴⁴ This resulted in the ECCC applying a “*mixture of both civil and common law procedures, as well as procedures specific to mass crimes courts,*” primarily due to lack of existing Cambodian procedures, which often led to procedural uncertainty and drew sharp criticism from scholars and lawyers alike.²⁴⁵ In sum, the independent structure, functional autonomy, *ad hoc* status,²⁴⁶ foreign composition, and inconsistent application of different

²³⁹ John D. Ciorciari and Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia*, THE UNIVERSITY OF MICHIGAN PRESS, 7 (2014), available at <https://library.oapen.org/bitstream/id/4338bda6-660c-44d2-b436-24bc3fbeece67/9780472901319.pdf>.

²⁴⁰ See *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*, as amended and promulgated on October 27, 2004, NS/RKM/1004/006, art. 2 new (Cambodia, 2004), available at https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf.

²⁴¹ John D. Ciorciari and Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia*, THE UNIVERSITY OF MICHIGAN PRESS, 4, 42 (2014), available at <https://library.oapen.org/bitstream/id/4338bda6-660c-44d2-b436-24bc3fbeece67/9780472901319.pdf>.

²⁴² John D. Ciorciari and Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia*, THE UNIVERSITY OF MICHIGAN PRESS, 42 (2014), available at <https://library.oapen.org/bitstream/id/4338bda6-660c-44d2-b436-24bc3fbeece67/9780472901319.pdf>.

²⁴³ *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*, as amended and promulgated on October 27, 2004, NS/RKM/1004/006, art. 33 new (Cambodia, 2004), available at https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf.

²⁴⁴ John D. Ciorciari and Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia*, THE UNIVERSITY OF MICHIGAN PRESS, 60 (2014), available at <https://library.oapen.org/bitstream/id/4338bda6-660c-44d2-b436-24bc3fbeece67/9780472901319.pdf>.

²⁴⁵ John D. Ciorciari and Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia*, THE UNIVERSITY OF MICHIGAN PRESS, 60-61 (2014), available at <https://library.oapen.org/bitstream/id/4338bda6-660c-44d2-b436-24bc3fbeece67/9780472901319.pdf>.

²⁴⁶ The ECCC was created with the specific purpose of bringing to trial a targeted group of individuals and shall cease to exist following the definitive conclusion of those proceedings. See *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*, as amended and promulgated on October 27, 2004, NS/RKM/1004/006, arts. 1, 47 (Cambodia, 2004),

procedures—all despite being established as part of the domestic judicial system—make the ECCC an example of a hybrid tribunal model that may violate Article 125 of the Ukrainian Constitution.

On the other hand, a tribunal akin to the War Crimes Chamber in Bosnia and Herzegovina (BWCC) might be found to be consistent with Article 125.²⁴⁷ The BWCC was originally created as a hybrid tribunal as part of the Court of Bosnia and Herzegovina (also known as “*State Court*”).²⁴⁸ Although the chamber has an international element—such as the presence of international judges, prosecutors and staff and international funding—its structure, jurisdiction, and basic procedural rules are defined by the Law on the Court of Bosnia and Herzegovina, Bosnia and Herzegovina’s Penal Code and Criminal Procedure Code, and other domestic laws.²⁴⁹ Further, the BWCC’s judgments can be appealed to the Appellate Chamber, and although the Appellate Chamber is part of the same court, which was criticized, it is also possible to challenge decisions before the Constitutional Court of Bosnia and Herzegovina, albeit in limited circumstances.²⁵⁰ Such procedural features would likely allow the tribunal to be considered “*specialized*” rather than “*special*” or “*extraordinary*” under Article 125. Nonetheless, because the BWCC employed international judges, a tribunal modeled on the BWCC would likely violate other provisions of the Ukrainian Constitution, as discussed below.²⁵¹

The SCSL can be one of the examples of a model that may work within these Ukrainian constitutional constraints. Although sometimes characterized as a hybrid tribunal,²⁵² the SCSL is an “*autonomous and independent institution*” existing outside of Sierra Leone’s domestic judicial system.²⁵³ As noted above, the

available at

https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf.

²⁴⁷ The presence of non-Ukrainian judges might or might not violate Article 125 of the Ukrainian Constitution. However, it would in any event violate Article 127, as discussed in Part IV.A.3.a.

²⁴⁸ Bogdan Ivanišević, *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, 1, 5 (2008), available at <http://ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Domestic-Court-2008-English.pdf>.

²⁴⁹ Bogdan Ivanišević, *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, 7, 13, 22 (2008), available at <http://ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Domestic-Court-2008-English.pdf>.

²⁵⁰ Bogdan Ivanišević, *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, 30, 32 (2008), available at <http://ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Domestic-Court-2008-English.pdf>.

²⁵¹ See Part IV.A.3.a.

²⁵² See The Residual Special Court for Sierra Leone and the SCSL Public Archives, Freetown and the Hague, <http://www.rscsl.org/> (referring to the SCSL as “the world’s first ‘hybrid’ international criminal tribunal”).

²⁵³ The court itself held that it was not a domestic court but rather had characteristics of a classical international organization. See *Prosecutor v. Taylor*, Case No. SCSL 2003-01-1, Decision on Immunity from Jurisdiction, p. 20 (May 31, 2004), available at http://www.worldcourts.com/scsl/eng/decisions/2004.05.31_Prosecutor_v_Taylor.htm.

limitations of Article 125 do not apply to international courts. Similar placement of the Crime of Aggression Tribunal outside of the Ukrainian judiciary would ensure that Article 125 of the Constitution, prohibiting extraordinary and special courts, is not implicated.

Therefore, it would be beneficial to design a Crime of Aggression Tribunal created under the auspices of the COE or the EU as an international court outside of Ukraine's domestic court system rather than as an internationalized domestic court. Nonetheless, as discussed above, care must be taken to ensure that such a body is consistent with Article 124 of the Constitution of Ukraine.

Other Possible Constitutional Constraints

The following provisions of the Ukrainian Constitution may also impact the formation of a Crime of Aggression Tribunal.

a) Section VIII

If the Crime of Aggression Tribunal becomes a part of the Ukrainian judiciary, certain provisions of Section VIII of the Constitution and other Ukrainian laws setting out the requirements for judges, funding, and the appeals process may apply.

Article 127 of the Ukrainian Constitution and Article 52 of the Law of Ukraine “*On the Judiciary and the Status of Judges*” require any judge to be a citizen of Ukraine and possess knowledge of the Ukrainian language.²⁵⁴ Judges are also required not to hold any other paid position (subject to minor exceptions) or to be a member of a political party or a political organization.²⁵⁵ Judges must be nominated by the High Council of Justice and appointed by the President of Ukraine.²⁵⁶ Under Article 126 of the Constitution, judges hold office indefinitely.²⁵⁷ Finally, the judicial system in Ukraine is unitary,²⁵⁸ and the law provides that all judges within the Ukrainian judiciary must have the same status without regard to

²⁵⁴ UKRAINE CONST. art. 127, para. 3 (amendment of 2016); *see also Law of Ukraine On the Judiciary and the Status of Judges* art. 52 (Ukraine, 2016), available at <https://zakon.rada.gov.ua/laws/show/1402-19?lang=en#Text>.

²⁵⁵ UKRAINE CONST. art. 127, para. 2 (amendment of 2016); *see also Law of Ukraine On the Judiciary and the Status of Judges* art. 54 (Ukraine, 2016), available at <https://zakon.rada.gov.ua/laws/show/1402-19?lang=en#Text>.

²⁵⁶ UKRAINE CONST. art. 128, para. 1 (amendment of 2016).

²⁵⁷ UKRAINE CONST. art. 126, para. 5 (amendment of 2016).

²⁵⁸ *Law of Ukraine On the Judiciary and the Status of Judges* art. 17 (Ukraine, 2016), available at <https://zakon.rada.gov.ua/laws/show/1402-19?lang=en#Text>.

the court in which they work.²⁵⁹ The application of these requirements to a Crime of Aggression Tribunal forming part of the Ukrainian judiciary would limit the ability to nominate non-Ukrainian judges, which in turn may impact the perceived legitimacy of the tribunal.

Additionally, all courts in Ukraine must be funded only from the state budget.²⁶⁰ Subpart 57² of part 2 of Article 29 of the Budget Code of Ukraine, which was added in November 2022, provides that the budget of Ukraine may be financed from “*grants for budgetary support from foreign states, foreign financial institutions and international financial organizations.*”²⁶¹ Thus, if the Crime of Aggression Tribunal is created as part of the Ukrainian judiciary, it will have to be funded from the Ukrainian central budget, which, while not fatal, may create an additional obstacle to the extent the tribunal is to be funded with the support of the international community.

Finally, a Crime of Aggression Tribunal created as part of the Ukrainian judicial system would have to be subordinate to the Ukrainian Supreme Court, as Article 125 of the Constitution establishes the Supreme Court as the highest court in the Ukrainian judicial system.²⁶²

Notably, the above Section VIII restrictions would only apply if the Tribunal is established as a domestic court or as a hybrid tribunal placed within the Ukrainian judiciary. An international tribunal would not trigger their application.

b) Article 92

Article 92 of the Constitution of Ukraine states:

*“The following shall be determined exclusively by the laws of Ukraine: [...]
14) the judicial system, judiciary, the status of judges, the principles of judicial expertise, the organisation and operation of the prosecutor’s office, the notary, pre-trial investigation*

²⁵⁹ *Law of Ukraine On the Judiciary and the Status of Judges* art. 52 (Ukraine, 2016), available at <https://zakon.rada.gov.ua/laws/show/1402-19?lang=en#Text>.

²⁶⁰ UKRAINE CONST. art. 130, para. 1 (amendment of 2016); see also Decision of the Constitutional Court of Ukraine No. 44-пп/2010, Case No. 1-3/2010 (Mar. 11, 2010), available in Ukrainian at <https://zakon.rada.gov.ua/laws/show/v007p710-10?lang=en#Text> (holding that Article 130 of the Constitution of Ukraine means that “funding of all courts in Ukraine must be ensured by the state exclusively from the State Budget of Ukraine”) (emphasis added).

²⁶¹ *Budget Code of Ukraine* art. 29 (Ukraine, 2010), available at <https://zakon.rada.gov.ua/laws/show/2456-17#Text>.

²⁶² UKRAINE CONST. art. 125, para. 3 (amendment of 2016).

*bodies, the bodies and institutions for the enforcement of punishments; the procedure of the execution of judgement, the fundamentals of the organisation and activity of advocates; [...] 22) the principles of civil legal liability; acts deemed as crimes, administrative or disciplinary offences, and liability for them.*²⁶³

International treaties ratified by the Ukrainian Parliament constitute Ukrainian legislation.²⁶⁴ Further, the CCU held in 2001 that the laws of Ukraine ratifying international treaties have the same effect as other laws of Ukraine.²⁶⁵ Ratification is required when an international treaty concerns rights, freedoms and obligations of individuals, requires further amendments to Ukrainian laws or passing new ones, or governs mutual assistance and cooperation.²⁶⁶ Accordingly, should a Crime of Aggression Tribunal be established as an international court, Ukraine should accept its jurisdiction by means of treaty ratification.²⁶⁷ The ratification may help mitigate any inconsistency of such a tribunal with Article 92 of the Constitution.²⁶⁸

c) Article 131¹

Article 131¹ of the Constitution provides that the Prosecutor's Office in Ukraine is entitled to perform public prosecution in court, the organization and management of pre-trial investigations, and control over investigative actions.²⁶⁹ This provision was adopted in 2016 and replaced, among others, Article 121 of the

²⁶³ UKRAINE CONST. art. 92, para. 1 (amendment of 2016).

²⁶⁴ UKRAINE CONST. art. 9, para. 1 (1996).

²⁶⁵ Opinion of the Constitutional Court on the Conformity of the Rome Statute with the Constitution of Ukraine, Case No. 1-35/2001, sec. 2.5 (July 11, 2001), available in Ukrainian at <https://zakon.rada.gov.ua/laws/show/v003v710-01?lang=en#Text>.

²⁶⁶ *Law of Ukraine On International Treaties of Ukraine* art. 9, para. 2 (Ukraine, 2004), available at <https://zakon.rada.gov.ua/laws/show/en/1906-15?lang=en#Text>.

²⁶⁷ For instance, if an international treaty is submitted for ratification, the implementation of which requires the adoption of new laws or amendments to existing laws of Ukraine, the drafts of such laws are submitted to the Verkhovna Rada of Ukraine together with the draft law on ratification and are adopted simultaneously. *Law of Ukraine On International Treaties of Ukraine* art. 9, para. 7 (Ukraine, 2004), available at <https://zakon.rada.gov.ua/laws/show/en/1906-15?lang=en#Text>.

²⁶⁸ But note that Ukraine has never ratified the Rome Statute but accepted its jurisdiction with its separate declarations in 2014 and 2015. *The Declaration of the Embassy of Ukraine to the Kingdom of the Netherlands* (Apr. 9, 2014), available at

<https://www.icc-cpi.int/sites/default/files/itemsDocuments/997/declarationRecognitionJurisdiction09-04-2014.pdf>; *The Declaration of the Minister for Foreign Affairs of Ukraine* (Sept. 8, 2015), available at https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf.

²⁶⁹ UKRAINE CONST. art. 131¹, para. 1 (amendment of 2016).

Constitution, which provided for the Prosecutor's Office to perform only the public prosecution function during trials.

In its 2001 ruling, the CCU evaluated the function of the state prosecutor in Ukraine under Article 121 of the Constitution and concluded that that provision concerns Ukraine's domestic prosecutors and not international prosecutors.²⁷⁰ The CCU emphasized that further amendments to Ukrainian legislation as to the powers of the ICC Prosecutor may be introduced.²⁷¹

Therefore, when creating a Crime of Aggression Tribunal and, specifically, defining the details of the prosecutorial role, regard should be given to Article 131¹ of the Constitution of Ukraine.

d) Article 61(1)

Ukrainian courts have jurisdiction over the crime of aggression against Ukraine.²⁷² Article 61 of the Constitution specifies that no one shall be tried twice for the same offense.²⁷³ The Rome Statute contains the *Non Bis In Idem* principle.²⁷⁴ Accordingly, the treaty establishing a Crime of Aggression Tribunal should include a *Non Bis In Idem* principle that corresponds to Article 61 of the Constitution of Ukraine.

e) *Ex Ante* Determination of the Constitutionality of the Tribunal

The Ukrainian President or certain Ukrainian governmental bodies may seek an *ex ante* determination by the CCU of the constitutionality of the proposed Crime of Aggression Tribunal. This can be achieved in two ways.

First, Article 150 of the Constitution authorizes the President, at least 45 Members of Parliament (MPs), or certain other officials to seek an official

²⁷⁰ Opinion of the Constitutional Court on the Conformity of the Rome Statute with the Constitution of Ukraine, Case No. 1-35/2001, sec. 2.8 (July 11, 2001), available in Ukrainian at <https://zakon.rada.gov.ua/laws/show/v003v710-01?lang=en#Text>.

²⁷¹ Opinion of the Constitutional Court on the Conformity of the Rome Statute with the Constitution of Ukraine, Case No. 1-35/2001, sec. 2.8 (July 11, 2001), available in Ukrainian at <https://zakon.rada.gov.ua/laws/show/v003v710-01?lang=en#Text>.

²⁷² *Criminal Code of Ukraine* art. 437 (Ukraine, 2001), available at <https://zakon.rada.gov.ua/laws/show/en/2341-14#Text>.

²⁷³ UKRAINE CONST. art. 61, para. 1 (1996).

²⁷⁴ *Rome Statute of the International Criminal Court* art. 20 (1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

interpretation of the Constitution by the CCU.²⁷⁵ The President, thus, may use this power to seek an interpretation of Article 124 of the Constitution, which became the barrier to the ratification of the Rome Statute in 2001, or the terms “*extraordinary court*” and “*special court*” set forth in Article 125.²⁷⁶

The advantage of this approach is that it can be utilized while a treaty creating a Crime of Aggression Tribunal is being negotiated. Obtaining an official interpretation prior to the finalization of such a treaty would allow the involved parties to reshape the tribunal’s framework accordingly and may also increase the tribunal’s legitimacy.

The disadvantage of this approach is that the CCU’s binding interpretation of general or hypothetical terms could raise issues that are ultimately irrelevant or make the implementation of a Crime of Aggression Tribunal more difficult.²⁷⁷ This concern can be minimized by ensuring that the questions put to the CCU are as narrow as practically possible. For example, to the extent the tribunal is being created as a domestic court (whether internationalized or purely domestic), the interpretation request could be limited to the terms “*extraordinary court*” and “*special court*” set forth in Article 125. To the extent the anticipated tribunal will be international, the interpretation request could be limited to Article 124 and the terms “*auxiliary jurisdiction*” and “*complementary jurisdiction.*” For practical reasons, a working draft of the treaty could be included as part of the request for interpretation to set the factual stage for the CCU’s interpretation.

The CCU may reject the request for the interpretation of the Constitution where such request is unnecessary or improper under Article 62 of the Law of Ukraine “*On the Constitutional Court of Ukraine.*”²⁷⁸ For example, in 2019, the CCU rejected a request by 48 MPs for an interpretation under Article 150 of the Constitution because, in the CCU’s view, the MPs did not sufficiently justify the need for an interpretation.²⁷⁹ In 2020, the CCU rejected a request for interpretation by 45 MPs because the question posed by the MPs required not only interpretation of the Constitution (which is within the CCU’s powers) but also of certain laws of

²⁷⁵ UKRAINE CONST. art. 150 (amendment of 2016); *see also Law of Ukraine On the Constitutional Court of Ukraine*, arts. 51, 52 (Ukraine, 2017), available at <https://zakon.rada.gov.ua/laws/show/en/2136-19?lang=en#Text>.

²⁷⁶ *See* Parts IV.A.1-2 above.

²⁷⁷ UKRAINE CONST. art. 151² (amendment of 2016).

²⁷⁸ *Law of Ukraine On the Constitutional Court of Ukraine* art. 62 (Ukraine, 2017), available at <https://zakon.rada.gov.ua/laws/show/en/2136-19?lang=en#Text>.

²⁷⁹ Ruling of the Grand Chamber of the Constitutional Court of Ukraine No. 25-y/2019, Case No. 1-44/2019(902/19) (June 6, 2019), available in *Ukrainian* at <https://zakon.rada.gov.ua/laws/show/v025u710-19?lang=en#Text>.

Ukraine (which the CCU has no power to do).²⁸⁰ As such, any request made pursuant to Article 150 of the Constitution should be carefully crafted.

Second, pursuant to Article 151 of the Constitution, upon a request of the President, at least 45 MPs, or the Cabinet of Ministers of Ukraine, the CCU “*shall provide opinions on compliance with the Constitution of Ukraine of ... international treaties submitted to the Verkhovna Rada of Ukraine for their ratification.*”²⁸¹ Article 9 of the Law of Ukraine “*On International Treaties of Ukraine*” requires ratification by the Verkhovna Rada of Ukraine of, among others, treaties “*concerning rights, freedoms and duties of a person and citizen*”; treaties “*on Ukraine’s participation in interstate unions and other interstate associations (organisations), collective security systems*”; and “*other international treaties, the ratification of which is provided for by an international treaty or the law of Ukraine.*”²⁸² Thus, should a Crime of Aggression Tribunal be established by treaty and should Ukraine intend to become a state party to that treaty, the above officials may seek from the CCU an *ex ante* determination of the treaty’s constitutionality.

The disadvantage of this approach is that the treaty has to be signed and ready for ratification by the Verkhovna Rada of Ukraine before the CCU may consider it. If the CCU ultimately finds that the treaty violates the Constitution, Ukraine will be unable to ratify it, absent amendments to the treaty or to the Constitution. Constitutional amendments are prohibited while martial law in Ukraine is in effect,²⁸³ as is currently the case, and may not be practical thereafter, considering the complexity of the amendment process.²⁸⁴

In sum, seeking an *ex ante* determination of the constitutionality of any proposed treaty and/or legislation for the creation of a Crime of Aggression Tribunal could serve to streamline the process of the tribunal’s creation and may eliminate any concern regarding the tribunal’s status under Ukrainian laws. A well-founded decision by the CCU may also lend credibility to the tribunal not only in the eyes of

²⁸⁰ Ruling of the Grand Chamber of the Constitutional Court of Ukraine No. 44-y/2020, Case No. 1-17/2020(318/20) (Sept. 8, 2020), available in *Ukrainian* at <https://zakon.rada.gov.ua/laws/show/v044u710-20?lang=en#Text>.

²⁸¹ UKRAINE CONST. art. 151, para. 1 (amendment of 2016); see also V. Tatsii, KONSTYTUTSIIA UKRAINY.

NAUKOVO-PRAKTYCHNYI KOMENTAR [COMMENTARY TO THE CONSTITUTION OF UKRAINE] 1059 (2011), available in *Ukrainian* at https://library.nlu.edu.ua/POLN_TEXT/KNIGI-2012/Konst_Ukr_2011.pdf (noting that the CCU performs *ex ante* control with respect to international treaties that have not yet been ratified by the Verkhovna Rada of Ukraine).

²⁸² *Law of Ukraine On International Treaties of Ukraine* art. 9 (Ukraine, 2004), available at <https://zakon.rada.gov.ua/laws/show/en/1906-15?lang=en#Text>.

²⁸³ UKRAINE CONST. art. 157 (1996).

²⁸⁴ UKRAINE CONST. sec. XIII (1996).

Ukrainian society but also from the perspective of the international community at large.

Cooperation with Ukrainian Authorities

A Crime of Aggression Tribunal may need to cooperate with the Ukrainian state authorities to carry out its functions, *e.g.*, to collect and to corroborate evidence. At the same time, the Constitution of Ukraine requires state officials to act only as explicitly permitted by the laws. Article 6 of the Constitution of Ukraine states: “*Legislative, executive and judicial authorities shall exercise their powers within the limits established by this Constitution and in accordance with the laws of Ukraine.*”²⁸⁵ Article 19 further provides: “*Government authorities and local government and their officials shall be obliged to act only on the grounds, within the powers, and in the manner envisaged by the Constitution and the laws of Ukraine.*”²⁸⁶

Accordingly, further amendments to the Ukrainian legislation could be necessary to ensure the cooperation of Ukrainian authorities.²⁸⁷ For instance, the Criminal Procedure Code of Ukraine was amended to allow for cooperation with the ICC, *i.e.*, by executing ICC requests, transferring files to the ICC, securing evidence for the ICC, permitting the ICC prosecutor and other ICC employees to perform procedural actions on the territory of Ukraine, surrendering persons to the ICC, *etc.*²⁸⁸

The Jurisdiction of a Crime of Aggression Tribunal

In general, as a matter of international law, a tribunal must have a valid basis for its exercise of jurisdiction.²⁸⁹ If Russia consents to a tribunal’s jurisdiction to hear cases concerning the alleged commission of crimes of aggression by Russian

²⁸⁵ UKRAINE CONST. art. 6, para. 2 (1996).

²⁸⁶ UKRAINE CONST. art. 19, para. 2 (1996).

²⁸⁷ If an international treaty is submitted for ratification, the implementation of which requires the adoption of new laws or amendments to existing laws of Ukraine, the drafts of such laws are submitted to the Verkhovna Rada of Ukraine together with the draft law on ratification and are adopted simultaneously. *Law of Ukraine On International Treaties of Ukraine*, art. 9, para. 7 (Ukraine, 2004), available at <https://zakon.rada.gov.ua/laws/show/en/1906-15?lang=en#Text>.

²⁸⁸ *Criminal Procedure Code of Ukraine*, sec. IX² (Ukraine, 2013), available in Ukrainian at <https://zakon.rada.gov.ua/laws/show/en/4651-17?lang=uk#Text>.

²⁸⁹ James Crawford, BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 456 (8th ed. 2012); Sarah Williams, *Hybrid and Internationalized Criminal Tribunals: Jurisdictional Basis*, 6-7 (Mar. 2009) (Ph.D. dissertation, Durham University), available at <https://www.corteidh.or.cr/tablas/r25039.pdf>; Michael P. Scharf, *The ICC’s Jurisdiction over the Nationals of Non-party States: A Critique of the U.S. Position*, 64 LAW & CONTEMPORARY PROBLEMS 67, 71 (2001), available at <https://scholarship.law.duke.edu/lcp/vol64/iss1/4/>.

officials, such a tribunal's jurisdiction would be relatively easy to establish regardless of whether it was a domestic, hybrid, or international tribunal. Russia might provide its consent, for example, as a condition of an armistice. By contrast, if Russia does not consent, the legal basis for the tribunal's jurisdiction over Russian officials could be more difficult to establish. The same is true with respect to any other relevant third State, such as Belarus.

There is no jurisdictional impediment to the prosecution of the crime of aggression in Ukrainian domestic courts, which would apply the well-established principle of territorial jurisdiction. In principle, a hybrid tribunal established as part of Ukraine's judicial system could also rely on Ukraine's territorial jurisdiction, although in practice such a tribunal would risk running afoul of Article 125 of the Constitution of Ukraine and thus may not be a viable option. Ukraine could likely also delegate its territorial jurisdiction to a treaty-based international tribunal, which would not run afoul of Article 125 of the Constitution of Ukraine. However, in the absence of consent by Russia or any other relevant third state, there is a risk that the exercise of jurisdiction by an international tribunal over the nationals of the non-consenting third state may be challenged under the *Monetary Gold* principle, under which the ICJ and other international tribunals cannot exercise jurisdiction over a case where determining the rights and obligations of a non-consenting third state is a necessary prerequisite to adjudicating the claims before it. This section addresses these issues in detail.

Territorial Jurisdiction May Be Exercised by a Ukrainian Court

It is well-established that a state's domestic courts may exercise criminal jurisdiction with respect to events occurring within that state's territory.²⁹⁰ Thus, it is uncontroversial that Ukrainian courts have territorial jurisdiction to adjudicate the

²⁹⁰ James Crawford, *BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 458 (8th ed. 2012) (observing that "[t]he principle that the courts of the place where the crime is committed may exercise jurisdiction is universally recognized" and includes situations in which "any essential constituent of the crime is consummated on the forum state's territory"). See also Sarah Williams, *Hybrid and Internationalized Criminal Tribunals: Jurisdictional Basis*, 116 (Mar. 2009) (Ph.D. dissertation, Durham University), available at <https://www.corteidh.or.cr/tablas/r25039.pdf> ("A state may exercise jurisdiction in respect of criminal conduct drawing upon a number of accepted bases of jurisdiction, of which jurisdiction based on the territorial and nationality principles are the most widely accepted ... Jurisdiction based on the territorial principle is not controversial."); Michael P. Scharf, *The ICC's Jurisdiction over the Nationals of Non-party States: A Critique of the U.S. Position*, 64 *LAW & CONTEMPORARY PROBLEMS* 67, 71 (2001), available at <https://scholarship.law.duke.edu/lcp/vol64/iss1/4/> ("There is nothing novel under international law about a state exercising jurisdiction over the nationals of another state accused of committing an offense ... in the territory of the former state without the consent of the latter."). Professor Morris explains that the "unquestioned place of territorial jurisdiction among internationally recognized bases for jurisdiction is the fact that the state where the crime occurred is presumed to have a legitimate interest in seeing that the crime is punished." Madeleine Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 *LAW & CONTEMPORARY PROBLEMS* 13, 45 (2001), available at <https://scholarship.law.duke.edu/lcp/vol64/iss1/3/>.

criminal responsibility of Russian individuals charged with the crime of aggression committed against Ukraine.²⁹¹ Indeed, commentators agree that Ukraine may exercise territorial jurisdiction over the crime of aggression committed against it by Russian officials.²⁹²

Territorial Jurisdiction May Be Exercised by a Hybrid Tribunal That Sits Within Ukraine's Judicial System

Hybrid tribunals may have a mixed composition, apply both domestic and international law, and operate in relation to or as part of a state's domestic judicial system.²⁹³ For example: The SCSL, created by a treaty concluded between the UN and Sierra Leone, is empowered by its statute to apply both domestic and international law. While seen as a hybrid tribunal by some commentators,²⁹⁴ others view the SCSL as an international tribunal with a delegation of Sierra Leone's territorial jurisdiction as its jurisdictional basis.²⁹⁵

The STL, established pursuant to a UN Security Council resolution, is also seen by some commentators as a hybrid tribunal.²⁹⁶ However, other commentators consider that the jurisdiction of the STL is based on Chapter VII of the UN Charter and that the tribunal therefore is a UN organ like the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).²⁹⁷

²⁹¹ See Dapo Akande, *Prosecuting Aggression: The Consent Problem and the Role of the Security Council*, UNIVERSITY OF OXFORD LEGAL RESEARCH PAPER SERIES, 33 (Feb. 16, 2011), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1762806 (“[I]nternational law would not forbid the prosecution by a victim State of an act of aggression committed against it.”).

²⁹² Kevin Jon Heller, *The Best Option: An Extraordinary Ukrainian Chamber for Aggression*, OPINIOJURIS (Mar. 16, 2022), available at <https://opiniojuris.org/2022/03/16/the-best-option-an-extraordinary-ukrainian-chamber-for-aggression/> (“A domestic court exercising territorial (or nationality) jurisdiction would be undeniably legitimate from a jurisdictional perspective ...”); Carrie McDougall, *Prosecuting Putin for his Crime of Aggression Against Ukraine: Part Two*, OXFORD HUMAN RIGHTS HUB (Mar. 8, 2022), available at <https://ohrh.law.ox.ac.uk/prosecuting-putin-for-his-crime-of-aggression-against-ukraine-part-two/> (“Ukraine has criminalized aggression [and] enjoys territorial jurisdiction.”).

²⁹³ James Crawford, BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 682 (8th ed. 2012).

²⁹⁴ James Crawford, BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 683 (8th ed. 2012).

²⁹⁵ Sarah Williams, *Hybrid and Internationalized Criminal Tribunals: Jurisdictional Basis*, 96-97, 117, 119-20 (Mar. 2009) (Ph.D. dissertation, Durham University), available at <https://www.corteidh.or.cr/tablas/r25039.pdf>. Williams observes that “[t]he most pertinent precedent” for the delegation of jurisdiction to an international tribunal is the establishment of the ICC, while noting that “the legality of the delegation of territorial jurisdiction to an international criminal tribunal is contested by the United States and certain academics.” See also Part IV.B.3 discussing debates as to the jurisdictional basis of the ICC.

²⁹⁶ James Crawford, BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 685-86 (8th ed. 2012).

²⁹⁷ Sarah Williams, *Hybrid and Internationalized Criminal Tribunals: Jurisdictional Basis*, 131-32 (Mar. 2009) (Ph.D. dissertation, Durham University), available at <https://www.corteidh.or.cr/tablas/r25039.pdf>.

The ECCC, created pursuant to an agreement between the UN and Cambodia and established by domestic law, is considered to form part of Cambodia's judicial system.²⁹⁸

The BWCC was established by domestic law and forms part of Bosnia's judicial system.²⁹⁹ The BWCC was created with the support, encouragement, and financial assistance of the international community.³⁰⁰ However, unlike the ECCC, the UN was not formally involved in the creation of the BWCC.³⁰¹

The KSC, discussed above, was created pursuant to an international agreement with the EU but established by domestic law and sits within Kosovo's judicial system.³⁰²

Professor Williams considers that many hybrid or internationalized tribunals, such as the ECCC, the BWCC, and the KSC, exercise the uncontroversial territorial jurisdiction of the affected state.³⁰³ She observes that “[t]he provision of international assistance to an otherwise national institution does not affect the nature of the tribunal or the source of the jurisdiction that has been conferred; it remains based in the jurisdiction of the host state.”³⁰⁴

In principle, a hybrid tribunal established pursuant to a COE treaty and with the technical and financial assistance of the COE could form part of the Ukrainian judicial system and therefore benefit from Ukraine's territorial jurisdiction. Two commentators have recently pointed out that such a tribunal's jurisdiction would be uncontroversial because it would be based on Ukraine's territorial jurisdiction and would avoid a potentially more contested delegation by Ukraine of its jurisdiction to

²⁹⁸ James Crawford, *BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 684 (8th ed. 2012); Sarah Williams, *Hybrid and Internationalized Criminal Tribunals: Jurisdictional Basis*, 100 (Mar. 2009) (Ph.D. dissertation, Durham University), available at <https://www.corteidh.or.cr/tablas/r25039.pdf>.

²⁹⁹ Sarah Williams, *Hybrid and Internationalized Criminal Tribunals: Jurisdictional Basis*, 102-03 (Mar. 2009) (Ph.D. dissertation, Durham University), available at <https://www.corteidh.or.cr/tablas/r25039.pdf>.

³⁰⁰ Bogdan Ivanišević, *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE 5-7, 11, 22-23, 41 (2008), available at <http://ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Domestic-Court-2008-English.pdf>.

³⁰¹ Sarah Williams, *Hybrid and Internationalized Criminal Tribunals: Jurisdictional Basis*, 64-68, 102-03 (Mar. 2009) (Ph.D. dissertation, Durham University), available at <https://www.corteidh.or.cr/tablas/r25039.pdf>.

³⁰² See above Part III.B.3; Sarah Williams, *The Specialist Chambers of Kosovo: The Limits of Internationalization*, 14 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 25, 27-30 (2016).

³⁰³ Sarah Williams, *Hybrid and Internationalized Criminal Tribunals: Jurisdictional Basis*, 116 (Mar. 2009) (Ph.D. dissertation, Durham University), available at <https://www.corteidh.or.cr/tablas/r25039.pdf>; Sarah Williams, *The Specialist Chambers of Kosovo: The Limits of Internationalization*, 14 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 25, 39 (2016).

³⁰⁴ Sarah Williams, *Hybrid and Internationalized Criminal Tribunals: Jurisdictional Basis*, 116 (Mar. 2009) (Ph.D. dissertation, Durham University), available at <https://www.corteidh.or.cr/tablas/r25039.pdf>.

an international tribunal.³⁰⁵ However, as previously noted, a hybrid tribunal that is part of Ukraine’s judicial system could be viewed as an “*extraordinary*” or “*special*” court that violates Article 125 of the Constitution of Ukraine.³⁰⁶ Therefore, in practice it may be helpful to consider instead setting up a Crime of Aggression Tribunal as an international court that sits outside of Ukraine’s judicial system. This potential legal basis for the jurisdiction of such an international Crime of Aggression Tribunal is discussed below.

Ukraine’s Delegated Territorial Jurisdiction is a Potential Primary Basis for the Jurisdiction of an International Tribunal

Ukraine’s delegation of its territorial jurisdiction to an international Crime of Aggression Tribunal, through its participation in a treaty creating the tribunal, is likely to be the strongest potential legal basis for the jurisdiction of such a tribunal. However, this position is not without controversy. It remains contested whether states may delegate their territorial jurisdiction to try an offender before an international court, in particular for the crime of aggression, without the consent of the state of the offender’s nationality.

The Rome Statute confers on the ICC jurisdiction over the nationals of third states where the impugned conduct occurred on the territory of a state party.³⁰⁷ The leading theory is that the basis for the exercise of such jurisdiction by the tribunal is

³⁰⁵ Kevin Jon Heller, *The Best Option: An Extraordinary Ukrainian Chamber for Aggression*, OPINIOJURIS (Mar. 16, 2022), available at <https://opiniojuris.org/2022/03/16/the-best-option-an-extraordinary-ukrainian-chamber-for-aggression/> (arguing that the jurisdiction of a hybrid tribunal for the crime of aggression over Ukraine would be “uncontroversial” because it would “be based on Ukraine’s territorial jurisdiction” and that “[n]o *Monetary Gold* problem would arise because Ukraine would not be delegating its territorial jurisdiction to an international tribunal”); Owiso Owiso, *An Aggression Chamber for Ukraine Supported by the Council of Europe*, OPINIOJURIS (Mar. 20, 2022), available at <https://opiniojuris.org/2022/03/30/an-aggression-chamber-for-ukraine-supported-by-the-council-of-europe/> (“For the avoidance of doubt, Ukraine would neither be delegating the exercise of its territorial jurisdiction to the [COE] nor calling upon the [COE] to intervene. Rather, Ukraine would be inviting the [COE] to assist Ukraine in its efforts to effectively exercise its territorial jurisdiction in respect of the crime of aggression.”). See also Tom Dannenbaum, *Mechanisms for Criminal Prosecution of Russia’s Aggression Against Ukraine*, JUST SECURITY (Mar. 10, 2022), available at <https://www.justsecurity.org/80626/mechanisms-for-criminal-prosecution-of-russias-aggression-against-ukraine/> (a hybrid tribunal for the purpose of trying aggression “could arise from the territorial jurisdiction and consent of Ukraine”); see Part IV.B.3 discussing debates as to the delegation of territorial jurisdiction to the ICC.

³⁰⁶ See Part IV.A.2.

³⁰⁷ James Crawford, BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 679 (8th ed. 2012); *Rome Statute of the International Criminal Court* art. 12(2) (1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>. This territorial jurisdiction applies in cases of State referrals and *proprio motu* investigations by the Prosecutor. The jurisdiction of the ICC may also be triggered when the UN Security Council, acting under Chapter VII of the UN Charter, refers a matter to the Prosecutor. *Rome Statute of the International Criminal Court* art. 13 (1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>. This section does not address the ICC’s jurisdiction in cases of referrals from the UN Security Council.

a treaty-based delegation by states of the criminal jurisdiction that they possess with respect to their nationals or events occurring within their territory.³⁰⁸

However, this is contrary to the position of the United States, which had lobbied during the Rome Conference for requiring the consent of both the territorial state and the state of nationality of the defendant before the ICC could exercise jurisdiction.³⁰⁹ The United States considers that US nationals may not be tried before the ICC if the United States does not ratify the Rome Statute because states may not delegate their territorial jurisdiction to try an offender before a treaty-based international court without the consent of the State of nationality of the offender.³¹⁰ Professor Morris has supported the US position, arguing that there is no basis in customary international law for a state's delegation of its territorial jurisdiction to an international court without the consent of the defendant's state of nationality, and that the delegation of territorial jurisdiction to an international court would not constitute an appropriate legal innovation.³¹¹

Yet, a number of scholars support the view that states may delegate to an international criminal tribunal their territorial jurisdiction to try an offender without the consent of the state of nationality. Professor Scharf, for example, argues that novel jurisdictional arrangements are not presumptively invalid under international law and, as such, states are free to establish an international jurisdiction applicable to the nationals of non-party states in the absence of a relevant rule of international law prohibiting this.³¹² He further opines that there is precedent for the delegation

³⁰⁸ Dapo Akande, *Prosecuting Aggression: The Consent Problem and the Role of the Security Council*, UNIVERSITY OF OXFORD LEGAL RESEARCH PAPER SERIES 33-35 (Feb. 16, 2011), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1762806 (“The leading theory of the legal basis for the exercise of criminal jurisdiction by the ICC is that the tribunal represents a delegation by States of the criminal jurisdiction they possess with respect to their nationals or events which occur within their territory.”). See also Monique Cormier, *Can the ICC Exercise Jurisdiction over US Nationals for Crimes Committed in the Afghanistan Situation?*, 16 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 1043, 1048 (2018) (“The prevailing theory to explain the legal basis for the [ICC]’s jurisdiction is that such jurisdiction is delegated to the Court by States Parties.”); Michael P. Scharf, *The ICC’s Jurisdiction over the Nationals of Non-party States: A Critique of the U.S. Position*, 64 LAW & CONTEMPORARY PROBLEMS 67, 76 (2001), available at <https://scholarship.law.duke.edu/lcp/vol64/iss1/4/> (“Most commentators focus on the territorial basis of the ICC as legitimizing its jurisdiction over the nationals of non-party states under Article 12 of the Rome Treaty.”).

³⁰⁹ Monique Cormier, *Can the ICC Exercise Jurisdiction over US Nationals for Crimes Committed in the Afghanistan Situation?*, 16 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 1043, 1044 (2018).

³¹⁰ Michael P. Scharf, *The ICC’s Jurisdiction over the Nationals of Non-party States: A Critique of the U.S. Position*, 64 LAW & CONTEMPORARY PROBLEMS 67, 69-70 (2001), available at <https://scholarship.law.duke.edu/lcp/vol64/iss1/4/>; Madeleine Morris, *High Crimes And Misconceptions: The ICC And Non-Party States*, 64 LAW & CONTEMPORARY PROBLEMS 13, 14, 26 (2001), available at <https://scholarship.law.duke.edu/lcp/vol64/iss1/3/>.

³¹¹ Madeleine Morris, *High Crimes And Misconceptions: The ICC And Non-Party States*, 64 LAW & CONTEMPORARY PROBLEMS 13, 43-52 (2001), available at <https://scholarship.law.duke.edu/lcp/vol64/iss1/3/>.

³¹² Michael P. Scharf, *The ICC’s Jurisdiction over the Nationals of Non-party States: A Critique of the U.S. Position*, 64 LAW & CONTEMPORARY PROBLEMS 67, 72-75 (2001), available at <https://scholarship.law.duke.edu/lcp/vol64/iss1/4/>.

of territorial jurisdiction to another state as well as to an international tribunal without the consent of the state of nationality of the accused,³¹³ and that “*there are no compelling policy reasons why territorial jurisdiction cannot be delegated to an international criminal court.*”³¹⁴ Professor Akande is in accord, finding that “[t]here are important reasons of principle and sufficient precedents to suggest that delegations of national jurisdiction to international courts, in general, and to the ICC, in particular, are lawful,”³¹⁵ including “*the delegation of jurisdiction over nationals of states not party to the relevant treaty.*”³¹⁶ Williams similarly concludes that “*academic opinion and state practice support the lawfulness of the delegation of territorial jurisdiction from state parties to the ICC.*”³¹⁷

Some scholars have contended that there are limits to this theory of delegation particularly in the case of crimes of aggression. Professor Akande submits that “[t]he principles and precedents supporting the delegation of domestic criminal jurisdiction do not quite extend to aggression.”³¹⁸ He further argues that attempts to delegate territorial jurisdiction to the ICC to adjudicate the crime of aggression represent “*an assault on the Monetary Gold manifestation of the [consent] principle*” and a “*departure from the voluntarist principles that have characterized much of international law to date.*”³¹⁹ This position is consistent with the state practice embodied in the amendments to the Rome Statute, which provide

³¹³ Michael P. Scharf, *The ICC's Jurisdiction over the Nationals of Non-party States: A Critique of the U.S. Position*, 64 LAW & CONTEMPORARY PROBLEMS 67, 116-17 (2001), available at <https://scholarship.law.duke.edu/lcp/vol64/iss1/4/>. Scharf finds that “[c]areful analysis of the European Convention on the Transfer of Proceedings indicates that the consent of the state of nationality of the accused is not a prerequisite for the delegation of territorial jurisdiction under the Convention” and that “the Nuremberg Tribunal provides the precedent for the collective exercise of territorial as well as universal jurisdiction.”

³¹⁴ Michael P. Scharf, *The ICC's Jurisdiction over the Nationals of Non-party States: A Critique of the U.S. Position*, 64 LAW & CONTEMPORARY PROBLEMS 67, 116-17 (2001), available at <https://scholarship.law.duke.edu/lcp/vol64/iss1/4/>.

³¹⁵ Dapo Akande, *The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits*, 1 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 618, 625 (2003), available at <https://doi.org/10.1093/jicj/1.3.618>.

³¹⁶ Dapo Akande, *The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits*, 1 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 618, 628-33 (2003), available at <https://doi.org/10.1093/jicj/1.3.618>. Akande finds that the Nuremberg Tribunal is not a good precedent for the delegation of jurisdiction without the consent of the State of nationality, but points to the ICTY, SCSL, and other international tribunals as “evidence of extensive practice of states delegating part of their criminal jurisdiction over non-nationals either to other states or to tribunals created by international agreements, in circumstances in which no attempt is made to obtain the consent of the state of nationality.”

³¹⁷ Sarah Williams, *Hybrid and Internationalized Criminal Tribunals: Jurisdictional Basis*, 122 (Mar. 2009) (Ph.D. dissertation, Durham University), available at <https://www.corteidh.or.cr/tablas/r25039.pdf>.

³¹⁸ Dapo Akande, *Prosecuting Aggression: The Consent Problem and the Role of the Security Council*, UNIVERSITY OF OXFORD LEGAL RESEARCH PAPER SERIES, 33-35 (Feb. 16, 2011), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1762806.

³¹⁹ Dapo Akande, *Prosecuting Aggression: The Consent Problem and the Role of the Security Council*, UNIVERSITY OF OXFORD LEGAL RESEARCH PAPER SERIES, 40 (Feb. 16, 2011), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1762806. A detailed discussion of the *Monetary Gold* principle is provided below. See Part VI.B.5.

that the ICC may not exercise jurisdiction over the crime of aggression allegedly committed by a national of a state that is not a party to the Rome Statute or, being a party to the Rome Statute, that has lodged a declaration that it does not accept the ICC's jurisdiction over the crime of aggression.³²⁰ Yet, Akande concedes that if states had delegated territorial jurisdiction to the ICC to adjudicate the crime of aggression without the consent of the state of nationality, this would not necessarily have violated international law and could potentially have been considered an “*evolution*” of international law.³²¹

On the other hand, at least one scholar of international criminal law has taken the position that an international tribunal for the crime of aggression against Ukraine could be established by a multilateral treaty based on a delegation of Ukraine's territorial jurisdiction, though regrettably without much analysis.³²² Ukraine could take a similar position. In doing so, Ukraine may emphasize that there is state practice supporting the lawfulness of states delegating their territorial jurisdiction over non-nationals to tribunals created by international agreements, including the ICC. Further, there is no rule of international law that clearly prohibits a state from delegating its territorial jurisdiction to an international tribunal to adjudicate the crime of aggression committed by the national of a non-consenting state.

At the same time, care must be taken to ensure that such delegation of jurisdiction is consistent with the Ukrainian Constitution, even though Ukraine has previously adopted treaties providing for the delegation of its criminal jurisdiction without running into constitutional difficulties. In 2017, the Netherlands and Ukraine signed an agreement concerning the investigation and prosecution of crimes connected to the downing of flight MH17 over Eastern Ukraine in July 2014, through which Ukraine agreed to delegate its national criminal jurisdiction over

³²⁰ *Rome Statute of the International Criminal Court* art. 15 bis (4) and (5) (1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>. See also Dapo Akande and Antonios Tzanakopoulos, *Treaty Law and ICC Jurisdiction over the Crime of Aggression*, 29 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 939, 949, 954 (2018), available at <https://academic.oup.com/ejil/article/29/3/939/5165645> (observing that by excluding the ICC's jurisdiction over aggression committed by nationals of non-parties, Article 15 bis of the Kampala Amendments creates a different ICC jurisdictional regime for the crime of aggression than that which governs other crimes under the Rome Statute).

³²¹ Dapo Akande, *Prosecuting Aggression: The Consent Problem and the Role of the Security Council*, UNIVERSITY OF OXFORD LEGAL RESEARCH PAPER SERIES, 40-41 (Feb. 16, 2011), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1762806.

³²² Carrie McDougall, *Prosecuting Putin for his Crime of Aggression Against Ukraine: Part Two*, OXFORD HUMAN RIGHTS HUB (Mar. 8, 2022), available at <https://ohrh.law.ox.ac.uk/prosecuting-putin-for-his-crime-of-aggression-against-ukraine-part-two/> (arguing that an international tribunal for the crime of aggression “could be established by a multilateral treaty, based on a delegation of Ukraine's territorial jurisdiction”).

those crimes to the Netherlands.³²³ The agreement between the Netherlands and Ukraine, in turn, is based on the European Convention on the Transfer of Proceedings in Criminal Matters (European Transfer Convention), to which Ukraine has been a party since 1995.³²⁴ The European Transfer Convention allows contracting parties to delegate their competence to prosecute criminal offenses to other contracting parties.³²⁵ Ukraine's Criminal Procedure Code likewise establishes procedures and conditions for the "takeover" of criminal proceedings by a foreign state.³²⁶ Neither the two treaties nor the relevant sections of the Criminal Procedure Code have faced a constitutional challenge before the CCU, and unless and until they are challenged and the CCU finds them unconstitutional, they remain a valid part of Ukrainian legislation.³²⁷

Some scholars argue that Article 124 of the Ukrainian Constitution prohibiting the delegation of court functions is applicable only to Ukraine's internal affairs and not to Ukraine's relationship with other states or international organizations.³²⁸ In addition, our research did not reveal any scholarly commentary

³²³ *Agreement between the Kingdom of the Netherlands and Ukraine on international legal cooperation regarding crimes connected with the downing of Malaysia Airlines Flight MH17 on 17 July 2014* art. 5.1 (2017), available at <https://treaties.un.org/doc/Publication/UNTS/No%20Volume/55449/Part/I-55449-080000028052e498.pdf> ("[T]he Kingdom of the Netherlands shall have competence to prosecute crimes to which the law of Ukraine is applicable, following a transfer of proceedings in accordance with Article 6 of this Agreement."). The MH17 trial concerned non-Dutch defendants (one Ukrainian and three Russian nationals) who shot down a non-Dutch civilian aircraft on non-Dutch (Ukrainian) territory, leading to the deaths of many Dutch as well as non-Dutch citizens. Ukraine's delegated jurisdiction gave the Netherlands competence to try the defendants for the killing of the 93 non-Dutch nationals aboard flight MH17. Lachezar Yanev, *Jurisdiction and Combatant's Privilege in the MH17 Trial: Treading the Line Between Domestic and International Criminal Justice*, 68 NETHERLANDS INTERNATIONAL LAW REVIEW 163, 171-74 (2021), available at <https://link.springer.com/article/10.1007/s40802-021-00193-8>.

³²⁴ The MH17 trial is referred to as a first concrete example of a case in which a State party to the European Transfer Convention (Ukraine) has agreed to delegate its criminal jurisdiction over a case to another State party (the Netherlands), without the consent—and, in fact, over the objections—of a non-party State (the Russian Federation), of which three accused are nationals. Lachezar Yanev, *Jurisdiction and Combatant's Privilege in the MH17 Trial: Treading the Line Between Domestic and International Criminal Justice*, 68 NETHERLANDS INTERNATIONAL LAW REVIEW 163, 171-74 (2021), available at <https://link.springer.com/article/10.1007/s40802-021-00193-8>.

³²⁵ See *European Convention on the Transfer of Proceedings in Criminal Matters* art. 2 (1972), available at https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800f1fb9&clang=_en.

³²⁶ *Criminal Procedure Code of Ukraine*, arts. 599, 600 (Ukraine, 2013), available in Ukrainian at <https://zakon.rada.gov.ua/laws/show/en/4651-17?lang=uk#Text>.

³²⁷ Moreover, notwithstanding the CCU's 2001 decision concerning the Rome Statute and before Ukraine amended its Constitution in 2006 to authorize recognition of the ICC's jurisdiction (see Part IV.A.1), Ukraine issued two declarations accepting the jurisdiction of the ICC over acts committed on Ukraine's territory in 2013-2014 and after February 20, 2014 (see *Ukraine's Declaration lodged under article 12(3) of the Rome Statute* (Apr. 9, 2014), available at <https://www.icc-cpi.int/sites/default/files/declarationRecognitionJurisdiction09-04-2014.pdf>; *Ukraine's Declaration lodged under article 12(3) of the Rome Statute* (Sept. 8, 2015), available at https://www.icc-cpi.int/sites/default/files/Ukraine_Art_12-3_declaration_08092015.pdf).

³²⁸ Andrii Andreikiv, *Osoblyvosti Vykonannia Mizhnarodno-Pravovykh Zobov'язan Ukrainy* [Certain Aspects of Implementation of Ukraine's International Legal Obligations], Yurydychna Hazeta Online (Sept. 10, 2021), available in Ukrainian at

on possible constitutional concerns about the above treaties or the delegation of criminal jurisdiction by Ukraine. Nonetheless, it remains a theoretical possibility that, if challenged, the CCU could find Ukraine's delegation of jurisdiction to be inconsistent with Article 124 of the Constitution. Thus, in view of the CCU's case law on Article 124 of the Ukrainian Constitution, a Crime of Aggression Tribunal's jurisdiction should be "*auxiliary*" rather than "*complementary*" to that of Ukrainian domestic courts.³²⁹ It may also be advisable to seek an *ex ante* determination of the constitutionality of the anticipated Crime of Aggression Tribunal.³³⁰ Despite these potential challenges, Ukraine's delegation of its territorial jurisdiction to an international Crime of Aggression Tribunal, through its participation in a treaty creating the tribunal, is likely to be the strongest potential legal basis for the jurisdiction of such a tribunal.

Delegated Universal Jurisdiction is a Potential Secondary Basis for the Jurisdiction of an International Tribunal

An alternative theory as to the legal basis of the jurisdiction exercised by the ICC is that the states parties to the Rome Statute had delegated their universal jurisdiction to the ICC. However, this theory does not appear to be as well-accepted and there are therefore doubts as to whether delegated universal jurisdiction is a potential basis for a Crime of Aggression Tribunal.

Universal jurisdiction provides every state with jurisdiction over a limited category of egregious offenses that states universally have condemned, regardless of any connections between the prosecuting state and the offense, the perpetrator, or the victim.³³¹ Professor Scharf argues that the Nuremberg Tribunal may have applied universal jurisdiction over the crime of aggression and that this precedent provides a "*reasonable*" basis for states to conclude that they may prosecute the crime of aggression under universal jurisdiction.³³² However, Professor Crawford explains, "*it is questionable whether aggression can be considered a crime of universal jurisdiction*" and "[t]he better view may be that it is not."³³³

<https://yur-gazeta.com/publications/practice/mizhnarodne-pravo-investigiyi/osoblivosti-vikonannya-mizhnarodnopravovih-zobovyzan-ukrayini-.html>; see also Part IV.A.1.

³²⁹ See Part IV.A.1.

³³⁰ See Part IV.A.4.

³³¹ Michael P. Scharf, *The ICC's Jurisdiction over the Nationals of Non-party States: A Critique of the U.S. Position*, 64 LAW & CONTEMPORARY PROBLEMS 67, 76 (2001), available at <https://scholarship.law.duke.edu/lcp/vol64/iss1/4/>.

³³² Michael P. Scharf, *Universal Jurisdiction and the Crime of Aggression*, 53 HARVARD INTERNATIONAL LAW JOURNAL 357, 374-375, 379 (2012).

³³³ James Crawford, BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 468 (8th ed. 2012) (further stating that "There are no examples of prosecutions for the crime of aggression under universal jurisdiction"). See also Dapo Akande, *Prosecuting Aggression: The Consent Problem and the Role of the Security Council*, UNIVERSITY OF OXFORD

Assuming that aggression could be considered a crime of universal jurisdiction, it is not well-accepted that states' universal jurisdiction over that crime may be delegated to an international criminal court or tribunal. Some scholars have suggested that as a general matter states may delegate the universal jurisdiction which they possess to an international tribunal and that such a delegation of universal jurisdiction is a possible basis for the jurisdiction of the ICC, in addition to a delegation of territorial jurisdiction.³³⁴ Other scholars have challenged this view, arguing that states may not delegate their universal jurisdiction to an international criminal tribunal either in general,³³⁵ or in the specific case of the crime of aggression.³³⁶ Further, as noted, the Rome Statute precludes the ICC from

LEGAL RESEARCH PAPER SERIES, 35 (Feb. 16, 2011), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1762806 (arguing that “there is no rule (and indeed no precedent) which permits universal domestic jurisdiction for aggression”).

³³⁴ See Michael P. Scharf, *The ICC's Jurisdiction over the Nationals of Non-party States: A Critique of the U.S. Position*, 64 *LAW & CONTEMPORARY PROBLEMS* 67, 76 (2001), *available at*

<https://scholarship.law.duke.edu/lcp/vol64/iss1/4/> (arguing that “the jurisdiction of the ICC can be deemed to be based concurrently on the universal and territorial bases of jurisdiction”); *id.* at 116 (arguing that the Nuremberg Tribunal and the ICTY “provide precedent for the collective delegation of universal jurisdiction to an international criminal court without the consent of the state of the nationality of the accused”); Leila Nadya Sadat and S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 *GEORGETOWN LAW JOURNAL* 381, 412-13 (2000), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3542357 (arguing that “with respect to the establishment of Courts for the trial of international crimes over which there exists universal jurisdiction, States may do together what any one of them could have done separately” and that if the Prosecutor or a State refers a case to the ICC the Court’s jurisdiction is based on “the universality principle ... [and] two additional principles ...: the territorial principle and the nationality principle”); see also Dapo Akande, *The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits*, 1 *JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE* 618, 623, 635 (2003), *available at* <https://doi.org/10.1093/jicj/1.3.618> (arguing that “the ICC Statute is not based on universal jurisdiction” but that there is “a general acceptance of the lawfulness of delegating criminal jurisdiction” to other States or to tribunals created by international agreements and that “[t]his is particularly so in cases of delegation of universal jurisdiction where important principles support the rights of states to act collectively for the protection of interests of the international community as a whole”); Michael Ramsden and Tomas Hamilton, *Uniting Against Impunity: The UN General Assembly as Catalyst for Action at the ICC*, 66 *INTERNATIONAL AND COMPARATIVE LAW QUARTERLY* 893, 915 (2017), *available at* <https://doi.org/10.1017/S0020589317000318> (arguing that “[t]here is ... no principled basis to single out the exercise of universal jurisdiction as a power that States cannot delegate” to the ICC).

³³⁵ See Sarah Williams, *Hybrid and Internationalized Criminal Tribunals: Jurisdictional Basis*, 126-28 (Mar. 2009) (Ph.D. dissertation, Durham University), *available at* <https://www.corteidh.or.cr/tablas/r25039.pdf> (observing that the suggestion that ICC would be exercising universal jurisdiction was “clearly misguided, universal jurisdiction having been explicitly rejected as a basis for jurisdiction in the Rome Statute,” and arguing that “the greatest objection to the delegation of universal jurisdiction from states is the absence of any custom supporting such a delegation ... Arguably, while customary international law has accepted universal jurisdiction existing in some form for states, it has not developed to the point that states may delegate universal jurisdiction to international criminal tribunals.”); Madeleine Morris, *High Crimes And Misconceptions: The ICC And Non-Party States*, 64 *LAW & CONTEMPORARY PROBLEMS* 13, 27-43 (2001), *available at* <https://scholarship.law.duke.edu/lcp/vol64/iss1/3/> (arguing that States’ universal jurisdiction may not be delegated to an international court as a matter of customary international law).

³³⁶ Dapo Akande, *Prosecuting Aggression: The Consent Problem and the Role of the Security Council*, *UNIVERSITY OF OXFORD LEGAL RESEARCH PAPER SERIES*, 35 (Feb. 16, 2011), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1762806 (arguing that “there are no precedents for the transfer of jurisdiction over aggression to an international court”).

exercising jurisdiction over the crime of aggression if it is committed by a national of a state that did not consent to such jurisdiction.³³⁷

Since states' ability to delegate their jurisdiction over the crime of aggression to an international criminal court or tribunal is not yet well-accepted, in order to mitigate the risk of legal challenges to the jurisdiction of an international Crime of Aggression Tribunal, it may be preferable for Ukraine's delegation of its territorial jurisdiction to serve as the primary basis of such a tribunal's jurisdiction. This also underscores the importance of Ukraine's participation in a treaty creating an international Crime of Aggression Tribunal. The delegated universal jurisdiction of other states parties to a treaty creating the tribunal could potentially serve as an additional, secondary legal basis for the tribunal's jurisdiction.

In the Absence of Russian Consent, an International Crime of Aggression Tribunal Might Be Required to Abstain from Exercising Jurisdiction Under the *Monetary Gold* Doctrine

It is a well-established principle of international law that a state cannot, without its consent, be compelled to submit disputes with another state to adjudication by an international tribunal.³³⁸ This consent principle is a corollary of the sovereign equality of states.³³⁹ Under the *Monetary Gold* principle, the ICJ and other international tribunals cannot exercise jurisdiction over a case where determining the rights and obligations of a non-consenting third state is a necessary prerequisite to adjudicating the claims before it.³⁴⁰ Even if an international Crime of Aggression Tribunal possesses a valid legal basis for its jurisdiction over individuals charged with the crime of aggression, if the *Monetary Gold* principle applies, it may

³³⁷ *Rome Statute of the International Criminal Court* art. 15 bis (4) and (5) (1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

³³⁸ Dapo Akande, *Prosecuting Aggression: The Consent Problem and the Role of the Security Council*, UNIVERSITY OF OXFORD LEGAL RESEARCH PAPER SERIES, 19-20 (Feb. 16, 2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1762806; *Status of Eastern Carelia Case*, Advisory Opinion, 1923 P.C.I.J. (Series B) No. 5, at 27 (July 23), available at <https://www.icj-cij.org/en/pcij-series-b> (“It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement.”); *Western Sahara*, Advisory Opinion, 1975 I.C.J. Rep. 12, 23 (Oct. 16), available at <https://www.icj-cij.org/public/files/case-related/61/061-19751016-ADV-01-00-EN.pdf> (referring to “the fundamental rule, repeatedly reaffirmed in the Court’s jurisprudence, that a State cannot, without its consent, be compelled to submit its disputes with other States to the Court’s adjudication”).

³³⁹ James Crawford, BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 723-24 (8th ed. 2012).

³⁴⁰ Noam Zamir, *The Applicability of the Monetary Gold Principle in International Arbitration*, 33 ARBITRATION INTERNATIONAL 523, 524-527 (2017), available at <https://academic.oup.com/arbitration/article/33/4/523/3857770>; Dapo Akande, *Prosecuting Aggression: The Consent Problem and the Role of the Security Council*, UNIVERSITY OF OXFORD LEGAL RESEARCH PAPER SERIES, 12-15, 18-26 (Feb. 16, 2011), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1762806.

prohibit the tribunal from exercising³⁴¹ this jurisdiction over a case concerning the crime of aggression. This section discusses the *Monetary Gold* principle and its applicability to the present circumstances.

a) The *Monetary Gold Principle* and its Applicability to International Criminal Tribunals

The ICJ in the *Monetary Gold* case declined to exercise jurisdiction conferred upon it by the agreement of four states because a non-consenting third state's legal interests "would not only be affected by a decision, but would form the very subject-matter of the decision."³⁴² The ICJ stated that to exercise its jurisdiction "would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent."³⁴³ The ICJ later clarified that this principle only applies when the determination of the responsibility of a third party is "a prerequisite" for the determination of the claims before it,³⁴⁴ and that it is not enough that the "legal interests" of a third state may be affected by an ICJ judgment.³⁴⁵ In the *East Timor* case, the second case in which the ICJ has held that it could not exercise its jurisdiction due to the *Monetary Gold* principle, the ICJ abstained from exercising jurisdiction finding that "the effects of the judgment requested by Portugal would amount to a determination that Indonesia's entry into and continued presence in East Timor are unlawful" and that "Indonesia's rights and obligations would thus constitute the very subject-matter of such a judgment made in the absence of that State's consent."³⁴⁶

³⁴¹ The *Monetary Gold* principle may be understood as an issue of inadmissibility rather than of a lack of jurisdiction. James Crawford, BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 698 (8th ed. 2012); Tobias Thienel, *Third States and the Jurisdiction of the International Court of Justice: The Monetary Gold Principle*, 57 GERMAN YEARBOOK OF INTERNATIONAL LAW 321, 352 (2014); International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts* art. 16 cmt. 11 (2001), available at https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

³⁴² *Monetary Gold Removed from Rome in 1943* (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America), 1954 I.C.J. 19, 32 (June 15), available at <https://www.icj-cij.org/public/files/case-related/19/019-19540615-JUD-01-00-EN.pdf>.

³⁴³ *Monetary Gold Removed from Rome in 1943* (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America), 1954 I.C.J. 19, 32 (June 15), available at <https://www.icj-cij.org/public/files/case-related/19/019-19540615-JUD-01-00-EN.pdf>.

³⁴⁴ *Certain Phosphate Lands in Nauru* (Nauru v. Australia), 1992 I.C.J. 240, 261 (June 26), available at <https://www.icj-cij.org/public/files/case-related/80/080-19920626-JUD-01-00-EN.pdf>.

³⁴⁵ *East Timor* (Portugal v. Australia), 1995 I.C.J. 90, 104 (June 30), available at <https://www.icj-cij.org/public/files/case-related/84/084-19950630-JUD-01-00-EN.pdf>.

³⁴⁶ *East Timor* (Portugal v. Australia), 1995 I.C.J. 90, 105 (June 30), available at <https://www.icj-cij.org/public/files/case-related/84/084-19950630-JUD-01-00-EN.pdf>.

A number of other international tribunals have referred to the *Monetary Gold* principle approvingly, though few have applied it to dismiss a claim. For example, in *Larsen v. Hawaiian Kingdom*, the arbitral tribunal, operating under the auspices of the Permanent Court of Arbitration (PCA), expressly rejected the argument that the *Monetary Gold* principle only applied to disputes before the ICJ, finding that the principle applies with at least as much force to the exercise of jurisdiction in international arbitral proceedings. It found that while it is the consent of the parties which brings an arbitral tribunal into existence, such a tribunal, particularly one conducting an arbitration under the auspices of the PCA, operates within the general confines of public international law and, like the ICJ, cannot exercise jurisdiction over a state which is not a party to its proceedings.³⁴⁷

Applying the *Monetary Gold* principle, the *Larsen* tribunal held that it could not exercise jurisdiction because adjudicating the claimant's claim would have required it to rule on the legality of acts of the United States, which was not a party to and had not consented to the proceedings.³⁴⁸ The *Chevron v. Ecuador* investment tribunal similarly observed that the *Monetary Gold* principle “gives effect to the principle that no international tribunal may exercise jurisdiction over a State without the consent of that State; and, by analogy, no arbitration tribunal has jurisdiction over any person unless they have consented.”³⁴⁹ The *Monetary Gold* doctrine has also been cited approvingly by the International Tribunal for the Law of the Sea³⁵⁰ (ITLOS) and by a dispute settlement panel of the World Trade Organization.³⁵¹ Further support for the broad applicability of the *Monetary Gold*

³⁴⁷ *Larsen v. Hawaiian Kingdom*, Case No. 1999-01, Award, para. 11.17 (Permanent Court of Arbitration Feb. 5, 2001), available at <https://pca-cpa.org/en/cases/35/>.

³⁴⁸ *Larsen v. Hawaiian Kingdom*, Case No. 1999-01, Award, paras. 36-42, 44 (Permanent Court of Arbitration Feb. 5, 2001), available at <https://pca-cpa.org/en/cases/35/>.

³⁴⁹ *Chevron Corporation & Texaco Petroleum Company v. Republic of Ecuador*, Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility, para. 4.61 (Permanent Court of Arbitration Feb. 27, 2012), available at <https://www.italaw.com/sites/default/files/case-documents/ita0175.pdf>.

³⁵⁰ *Dispute Concerning Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean (Mauritius v. Maldives)*, Preliminary Objections, Judgement, paras. 97-100, 247 (International Tribunal for the Law of the Sea, Jan. 28, 2021), available at https://www.itlos.org/fileadmin/itlos/documents/cases/28/preliminary_objections/C28_Judgment_prelimobj_28.01.2021_orig.pdf (acknowledging that “the *Monetary Gold* principle is ‘a well-established procedural rule in international judicial proceedings,’” but finding that third State the United Kingdom did not have sufficient legal interests in the dispute for the principle to be applicable in the case at hand).

³⁵¹ Panel Report, *Turkey-Restrictions on Imports of Textiles and Clothing Productions*, para. 9.10, WTO Doc. WT/DS34/R (adopted May 31, 1999), available at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/34R.pdf&Open=True> (“The practice of the ICJ indicates that if a decision between the parties to the case can be reached without an examination of the position of the third state (*i.e.*, in the WTO context, a Member) the ICJ will exercise its jurisdiction as between the parties. In the present dispute, there are no claims against the European Communities before us that would need to be determined in order for the Panel to assess the compatibility of the Turkish measures with the WTO Agreement.”) (citing *Monetary Gold*).

principle is provided by the commentary to the International Law Commission's (ILC's) Draft Articles on Responsibility of states for Internationally Wrongful Acts, which states generally that “[t]he Monetary Gold principle is concerned with the admissibility of claims in international judicial proceedings” without cabining its applicability to proceedings before the ICJ.³⁵²

In spite of its broad applicability, it is not settled whether the *Monetary Gold* principle would apply to a Crime of Aggression Tribunal. To the contrary, a Pre-Trial Chamber of the ICC rejected the applicability of the *Monetary Gold* principle to the ICC in a decision issued on February 5, 2021 in the *Situation in the State of Palestine*.³⁵³

In 2015 Palestine had lodged a declaration under Article 12(3) of the Rome Statute accepting the jurisdiction of the ICC with respect to alleged crimes “committed in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014.”³⁵⁴ The case was referred to the ICC Office of the Prosecutor, which requested a ruling from the ICC as to its territorial jurisdiction, pursuant to Article 19(3) of the Rome Statute.³⁵⁵ Concerned *amici curiae* and states submitted observations that raised the *Monetary Gold* issue, arguing that the ICC could not examine the subject matter of the Prosecutor's request without the consent of Israel, whose territorial sovereignty would be directly impacted by the ICC's ruling.³⁵⁶

The ICC Pre-Trial Chamber rejected this argument, stating that “the *Monetary Gold principle does not apply to the ICC*.”³⁵⁷ The Chamber observed that the *Monetary Gold* principle had been applied or considered by the ICJ, PCA, and

³⁵² International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts* art. 16 cmt. 11 (2001), available at https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

³⁵³ *Situation in the State of Palestine*, No. ICC-01/18, Pre-Trial Chamber I, Decision on the ‘Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine,’ para. 59 n.228 (Feb. 5, 2021), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.PDF.

³⁵⁴ *Situation in the State of Palestine*, No. ICC-01/18, Pre-Trial Chamber I, Decision on the ‘Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine,’ para. 1 (Feb. 5, 2021), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.PDF.

³⁵⁵ *Situation in the State of Palestine*, No. ICC-01/18, Pre-Trial Chamber I, Decision on the ‘Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine,’ paras. 3, 7, 22 (Feb. 5, 2021), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.PDF.

³⁵⁶ *Situation in the State of Palestine*, No. ICC-01/18, Pre-Trial Chamber I, Decision on the ‘Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine,’ para. 58 (Feb. 5, 2021), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.PDF (citing ICC-01/18-119, paras 8-9, available at <https://www.legal-tools.org/doc/rvaogc/>; ICC-01/18-108-Corr, para. 65, available at <https://www.legal-tools.org/doc/eu5fjw/>; ICC-01/18-93, para. 30, available at <https://www.legal-tools.org/doc/10u07w/>).

³⁵⁷ *Situation in the State of Palestine*, No. ICC-01/18, Pre-Trial Chamber I, Decision on the ‘Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine,’ para. 59 n.228 (Feb. 5, 2021), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.PDF.

ITLOS, “which are entities addressing disputes involving at least one State as a party,” whereas, “[b]y contrast, the ICC’s mandate is to rule on the individual criminal responsibility of persons.”³⁵⁸ The Chamber distinguished the ICJ’s ruling in the *Monetary Gold* case on the basis that the ICC “cannot rule on inter-states disputes as it does not have jurisdiction over States, but exercises its jurisdiction solely over natural persons.”³⁵⁹

This ICC decision provides support for the view that the *Monetary Gold* principle would not be applicable to a Crime of Aggression Tribunal. This appears to be the only ICC decision addressing the *Monetary Gold* principle, and it does not appear that the principle was addressed in the criminal context by any other court.

However, there are scholarly views to the contrary. Professor Akande has argued that the *Monetary Gold* principle is applicable to all international tribunals including the ICC,³⁶⁰ and is not limited to inter-state dispute settlement bodies.³⁶¹ He observes that, regardless of whether the decision is binding on the non-consenting state, the decision of an international tribunal such as the ICC “will be seen as a statement by an authoritative decision maker on the rights or responsibilities of the non-consenting State” and will affect the legal interests of the non-consenting state.³⁶² In an article published several months before the ICC

³⁵⁸ Situation in the State of Palestine, No. ICC-01/18, Pre-Trial Chamber I, Decision on the ‘Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine,’ para. 59 n.228 (Feb. 5 2021), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.PDF (citing *Rome Statute of the International Court*, arts. 1 and 25(1)).

³⁵⁹ Situation in the State of Palestine, No. ICC-01/18, Pre-Trial Chamber I, Decision on the ‘Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine,’ paras. 58-59 n. 228 (Feb. 5, 2021), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.PDF.

³⁶⁰ Dapo Akande, *Prosecuting Aggression: The Consent Problem and the Role of the Security Council*, UNIVERSITY OF OXFORD LEGAL RESEARCH PAPER SERIES, 17-26 (Feb. 16, 2011), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1762806; Dapo Akande, *The Monetary Gold Doctrine and the ICC: Can the ICC determine the Territorial Boundaries of Israel and Palestine?*, EJIL: TALK! (June 16, 2020), available at <https://www.ejiltalk.org/the-monetary-gold-doctrine-and-the-icc-can-the-icc-determine-the-territorial-boundaries-of-israel-and-palestine/>.

³⁶¹ Dapo Akande, *Prosecuting Aggression: The Consent Problem and the Role of the Security Council*, UNIVERSITY OF OXFORD LEGAL RESEARCH PAPER SERIES, 26-27 (Feb. 16, 2011), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1762806 (“The bar on judicial determination by international tribunals of the rights of non-consenting States applies to all international tribunals, *i.e.*, those operating under public international law, and applies even in cases in which determination of the rights or responsibilities of the non-consenting State would take place outside the context of a contentious case between other States ... [I]n principle, the consent principle applies to the ICC as it does to other international tribunals. Were the ICC to make judicial determinations on the legal responsibilities of nonconsenting States with respect to the use of force and aggression, this would violate the *Monetary Gold* principle.”).

³⁶² Dapo Akande, *Prosecuting Aggression: The Consent Problem and the Role of the Security Council*, UNIVERSITY OF OXFORD LEGAL RESEARCH PAPER SERIES, 26 (Feb. 16, 2011), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1762806.

Pre-Trial Chamber's decision in the *Situation in the State of Palestine*, Akande criticized the Prosecutor's arguments (subsequently adopted by the Chamber) that the *Monetary Gold* principle does not apply to the ICC because it only determines the individual criminal responsibility of persons.³⁶³ He questioned whether state parties to the Rome Statute may grant the ICC the authority to "*pronounce with important practical consequences on the legal rights of non-consenting states.*"³⁶⁴ Professor Morris similarly has argued that "*notwithstanding the presence of individual defendants in the dock,*" when the legality of official acts is at issue many ICC cases "*will represent bona fide legal disputes between states,*"³⁶⁵ and "*the question whether the state had a right to take such action or whether it did so ... would 'form the very subject matter of the dispute.'*"³⁶⁶

Although not without controversy, there is a good argument that, like the ICC, a Crime of Aggression Tribunal formally would exercise its jurisdiction only over individual defendants and would be tasked with ruling only on individual criminal responsibility. The jurisdictional mandate of the tribunal could also make clear, as the Rome Statute does, that the tribunal does not purport to exercise jurisdiction over states.³⁶⁷

b) The Adjudication of the Crime of Aggression May Implicate the *Monetary Gold* Principle

Assuming that the *Monetary Gold* principle applies, an international Crime of Aggression Tribunal may be prohibited from exercising jurisdiction over Russian officials absent Russia's consent. The definition of the crime of aggression under Article 8 *bis* of the Rome Statute³⁶⁸ makes the state conduct an element of the crime.

³⁶³ Dapo Akande, *The Monetary Gold Doctrine and the ICC: Can the ICC determine the Territorial Boundaries of Israel and Palestine?*, EJIL: TALK! (June 16, 2020), available at <https://www.ejiltalk.org/the-monetary-gold-doctrine-and-the-icc-can-the-icc-determine-the-territorial-boundaries-of-israel-and-palestine/>.

³⁶⁴ Dapo Akande, *The Monetary Gold Doctrine and the ICC: Can the ICC determine the Territorial Boundaries of Israel and Palestine?*, EJIL: TALK! (June 16, 2020), available at <https://www.ejiltalk.org/the-monetary-gold-doctrine-and-the-icc-can-the-icc-determine-the-territorial-boundaries-of-israel-and-palestine/>.

³⁶⁵ Madeleine Morris, *High Crimes And Misconceptions: The ICC And Non-Party States*, 64 LAW & CONTEMPORARY PROBLEMS 13, 15 (2001), available at <https://scholarship.law.duke.edu/lcp/vol64/iss1/3/>.

³⁶⁶ Madeleine Morris, *High Crimes And Misconceptions: The ICC And Non-Party States*, 64 LAW & CONTEMPORARY PROBLEMS 13, 21 (2001), available at <https://scholarship.law.duke.edu/lcp/vol64/iss1/3/>.

³⁶⁷ See *Rome Statute of the International Criminal Court* art. 25(1) (1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf> ("The Court shall have jurisdiction over natural persons pursuant to this Statute."); *id.* art. 25(4) ("No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.").

³⁶⁸ Article 8 *bis* of the Rome Statute provides as follows: "1. For the purpose of this Statute, 'crime of aggression' means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over

As a result, the prosecution of an individual under Article 8 *bis* of the Rome Statute would necessarily require the ICC to make a predicate determination of state conduct, *i.e.*, whether the alleged aggressor state unlawfully used force in a manner inconsistent with the UN Charter, which would likely also require a determination of whether the State had any available defenses under international law such as the principle of self-defense.³⁶⁹ Thus, a determination that an individual has committed the crime of aggression may potentially require a prior determination that a state has committed an internationally wrongful act of aggression.³⁷⁰

An international Crime of Aggression Tribunal may similarly be prohibited from exercising jurisdiction over the officials of third states, such as Belarus, who stand accused of aiding and abetting the crime of aggression. The commentary to the ILC Draft Articles on State Responsibility provides that the *Monetary Gold* principle may require an international tribunal to refrain from adjudicating on “*the responsibility of the aiding or assisting State in the absence of or without the consent of the aided or assisted State,*” since determining whether the aided or assisted state (here, Russia) itself committed an internationally wrongful act would be a prerequisite to determining whether the alleged aiding or assisting state committed a wrongful act.³⁷¹

The *Larsen v. Hawaiian Kingdom* tribunal recognized an important exception to the *Monetary Gold* principle, namely that the principle will not apply where the legal findings against an absent third party can be taken as a given, *e.g.*, are based

or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations. 2. For the purpose of paragraph 1, ‘act of aggression’ means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.” *Rome Statute of the International Criminal Court* art. 8 *bis* (1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

³⁶⁹ Dapo Akande, *Prosecuting Aggression: The Consent Problem and the Role of the Security Council*, UNIVERSITY OF OXFORD LEGAL RESEARCH PAPER SERIES, 16-17 (Feb. 16, 2011), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1762806. See also Yoram Dinstein, *Aggression*, in MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW (2019), available at <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e236> (“[N]o aggression can take place if, and as long as, a State is acting in lawful self-defense under Art. 51 UN Charter, or pursuant to a binding decision of the UN Security Council.”); Meagan S. Wong, *Aggression and State Responsibility at the International Criminal Court*, 70 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 961, 972 (2021), available at <https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/aggression-and-state-responsibility-at-the-international-criminal-court/AF7732DE9C93AA1E1C8486884EE661ED>.

³⁷⁰ Dapo Akande, *Prosecuting Aggression: The Consent Problem and the Role of the Security Council*, UNIVERSITY OF OXFORD LEGAL RESEARCH PAPER SERIES, 15-17 (Feb. 16, 2011), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1762806.

³⁷¹ International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts* art. 16 cmt. 11 (2001), available at https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

on an authoritative decision of the UN Security Council.³⁷² Professor Akande suggests that the basis for this exception is that “*if the international tribunal is simply applying a legal finding which is already binding or authoritative with respect to the third State there can be no complaint [of] an overreach of competence as the tribunal is not really exercising its own competence but simply accepting a reality already determined by a competent body.*”³⁷³ Akande submits that neither UN General Assembly resolutions nor ICJ advisory opinions making a determination of aggression would be sufficient to circumvent the *Monetary Gold* principle, because they would not have binding effect.³⁷⁴ On the other hand, the UN Security Council has the authority to make findings regarding aggression which would have binding effect on an aggressor state,³⁷⁵ and such a finding by the Security Council could be relied on by an international criminal tribunal in trying the crime of aggression without violating the *Monetary Gold* principle.³⁷⁶

³⁷² *Larsen v. Hawaiian Kingdom*, Case No. 1999-01, Award, para. 11.24 (Permanent Court of Arbitration Feb. 5, 2001), available at <https://pca-cpa.org/en/cases/35/> (stating that “if the legal finding against an absent third party could be taken as a given (for example, by reason of an authoritative decision of the Security Council on the point), the principle may well not apply”).

³⁷³ Dapo Akande, *Prosecuting Aggression: The Consent Problem and the Role of the Security Council*, UNIVERSITY OF OXFORD LEGAL RESEARCH PAPER SERIES, 36 (Feb. 16, 2011), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1762806. See also Dapo Akande, *The Monetary Gold Doctrine and the ICC: Can the ICC determine the Territorial Boundaries of Israel and Palestine?*, EJIL: TALK! (June 16, 2020), available at <https://www.ejiltalk.org/the-monetary-gold-doctrine-and-the-icc-can-the-icc-determine-the-territorial-boundaries-of-israel-and-palestine/>.

³⁷⁴ Dapo Akande, *Prosecuting Aggression: The Consent Problem and the Role of the Security Council*, UNIVERSITY OF OXFORD LEGAL RESEARCH PAPER SERIES, 37 (Feb. 16, 2011), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1762806 (“While the General Assembly has competence to act with respect to international peace and security under Articles 10-14 of the UN Charter, it does not have the authority to make binding decisions on these matters. It is therefore doubtful that the exception would provide a sufficient basis on which to use a General Assembly resolution to circumvent the consent problem. Were the Assembly to make a determination of aggression (as it has done in the past) the alleged aggressor State would still have grounds to complain if the ICC used this (without the consent of that State) as a basis for a finding that the State had committed aggression. Indeed the same complaint would be valid in the context of an advisory opinion of the ICJ.”). While it may be uncontroversial among Western observers that Russia’s invasion violates international law, as noted above, Russia disputes that the war violates international law and has claimed that it is acting in preemptive self-defense, and a number of States have voted against a UN General Assembly resolution calling the war an act of aggression. See Part II. UN General Assembly resolutions are only binding on Member States on certain UN organizational matters, though they may constitute evidence of the opinions of governments in what is the widest forum for the expression of such opinions. James Crawford, *BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 42 (8th ed. 2012). They may thus have a “quasi-judicial potential” to guide and assist an international criminal tribunal in deciding on predicate questions of international law and State responsibility. Michael Ramsden and Tomas Hamilton, *Uniting Against Impunity: The UN General Assembly as Catalyst for Action at the ICC*, 66 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 893, 904-05 (2017), available at <https://doi.org/10.1017/S0020589317000318>.

³⁷⁵ Dapo Akande, *Prosecuting Aggression: The Consent Problem and the Role of the Security Council*, UNIVERSITY OF OXFORD LEGAL RESEARCH PAPER SERIES, 37 (Feb. 16, 2011), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1762806.

³⁷⁶ See Dapo Akande, *The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits*, 1 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 618, 637 (2003) (if there is a decision by the UN Security Council that a State has committed aggression, then “there will be no violation of the [*Monetary Gold*]

Considering that Russia has the power to veto any Security Council resolution, however, this exception may be of limited practical relevance.

In sum, should the *Monetary Gold* principle apply to an international Crime of Aggression Tribunal, the tribunal may be prohibited from exercising jurisdiction. The *Larsen* exception is unlikely in practice to be useful in circumventing this principle.

Overcoming the Immunity Afforded to Russian Officials

Two types of immunity are relevant when prosecuting high-ranking Russian officials for crimes of aggression: *ratione materiae* (functional immunity) and *ratione personae* (personal immunity).³⁷⁷

Under customary international law, immunity *ratione materiae* protects official acts carried out by state agents, on behalf of the state, from scrutiny by foreign courts.³⁷⁸ Immunity *ratione materiae* is a substantive defense that diverts responsibility from the individual to the state and remains after the official vacates their post because the immunity covers the action and not the person.³⁷⁹ Immunity *ratione personae* protects certain high-ranking officials (heads of state, heads of government, and ministers of foreign affairs) from the jurisdiction of foreign courts and covers both official and private acts.³⁸⁰ Immunity *ratione personae* is a procedural bar to jurisdiction that ends as soon as the individual leaves office.³⁸¹ Immunity *ratione materiae* could be thought of as broad but shallow: it can apply to many state agents, but only for their official acts. In contrast, immunity *ratione personae* is narrow but deep: it applies only to the highest-ranking officials, but for both their private and official acts. These rules of customary international law, and

doctrine” by the ICC when exercising jurisdiction over the crime of aggression “as the ICC will, in those circumstances, simply be accepting the responsibility of the state as a ‘given’ without having to determine it itself.”)

³⁷⁷ The terms *ratione materiae* and functional immunity and the terms *ratione personae* and personal immunity are used interchangeably.

³⁷⁸ Prosecutor v. Taylor, Case No. SCSL 2003-01-1, Decision on Immunity from Jurisdiction, para. 18 (May 31, 2004); Prosecutor v. Blaskic, Case IT-95-14-PT, Judgement on the request of the Republic of Croatia for review of the decision of Trial Chamber II of 18 July 1997, paras. 38, 41 (Oct. 29, 1997), available at <https://www.icty.org/x/cases/blaskic/acdec/en/71029JT3.html>; Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes* para. 86 (2015).

³⁷⁹ Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes* para. 307 (2015).

³⁸⁰ See e.g., Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belgium), 2002 I.C.J. 3, paras. 53–54 (Feb. 14), available at <https://www.icj-cij.org/sites/default/files/case-related/121/121-20020214-JUD-01-00-EN.pdf>; Re Bo Xilai, Bow St. Magistrates’ Court, 128 I.L.R. 713, para. 713 (Nov. 8, 2005); see also Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes* 86 (2015).

³⁸¹ Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes* 86 (2015).

their application when considering crimes pursuant to international law,³⁸² have been the subject of much scholarly debate and judicial analysis – as will be discussed in the sections that follow.

Regarding immunity *ratione personae*, the ICJ has established (and the ICC has confirmed) that the personal immunities enjoyed by sitting heads of state, heads of government, and ministers for foreign affairs before foreign domestic courts do not represent a bar to their prosecution for crimes under international law before “*certain international*” courts and tribunals. Neither the ICJ nor the ICC has provided a clear definition of what constitutes “*certain international*” courts or tribunals. Nevertheless, existing precedent and scholarly commentaries suggest that a court or tribunal that is established under international law and which sufficiently reflects the will of the international community as a whole may qualify as such an international court or tribunal.

Regarding immunity *ratione materiae*, there is support for an exception when prosecuting crimes pursuant to international law. Nevertheless, it remains unsettled whether such an exception has crystallized into a customary rule of international law. A Crime of Aggression Tribunal, therefore, will need to derive its power to overcome such a defense from its constitutive treaty. In order to accord with the practice supporting an exception to functional immunity, the relevant treaty provision on immunity should substantially reflect the exception provided for in Nuremberg Principle 3 and the statutes of contemporary international criminal tribunals (*i.e.*, ICTY, ICTR, ICC). Even so, the treaty will still be subject to functional immunity defenses in the absence of Russia’s explicit (*i.e.*, signing the treaty) or imputed (*i.e.*, UN Security Council resolution) waiver. As such, having the treaty reflect the will of the international community as a whole – as discussed in the section on immunity *ratione personae* – may be the best way to overcome functional immunity defenses.

Immunity *Ratione Personae* Does Not Represent a Bar to the Prosecution of High-Ranking Officials for Crimes Under International Law Before *Certain International* Courts and Tribunals

In its February 2002 judgment in the *Arrest Warrant* (also known as the “*Yerodia*”) case, the ICJ considered the question of immunity on the inter-state

³⁸² Crimes pursuant to international law include the four core crimes enshrined in statutes of international criminal courts and tribunals, *i.e.*, genocide, crimes against humanity, war crimes, and the crime of aggression. Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes* 91 (2015) (citing Arts. 5–8 *bis* of the Rome Statute).

level: could the then incumbent Minister of Foreign Affairs of Congo be subject to an international arrest warrant issued by a Belgian judge? The Court concluded that “[i]t has been unable to deduce from [the examined State] practice that there exists under customary international law any form of exception to the rule according to immunity from criminal jurisdiction” even where individuals are “suspected of having committed war crimes or crimes against humanity.”³⁸³ The Court, however, distinguished the application of this rule before foreign domestic courts and international courts, noting that an “incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction.”³⁸⁴ The Court made reference to the ICTY, ICTR, and the soon-to-be-created ICC.³⁸⁵

Applying the *Arrest Warrant* case, the Appeals Chamber of the SCSL in the *Prosecutor v. Taylor* case³⁸⁶ found that no personal immunity attaches in respect of a head of state before an internationally established court such as the SCSL. In supporting the distinction between national and international courts, the SCSL noted that “the principle of state immunity derives from the equality of sovereign states and therefore has no relevance to international criminal tribunals which are not organs of a state but derive their mandate from the international community.”³⁸⁷ The SCSL went on to conclude that “the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court.”³⁸⁸

In the most recent case to take up the question of personal immunity, the ICC Appeals Chamber confirmed the position taken by the SCSL. In the May 2019 Judgment in the Jordan Referral re Al-Bashir Appeal (*Al-Bashir Appeal Judgment*) considering Jordan’s failure to arrest then Sudanese President Omar Al-Bashir, the Appeals Chamber unanimously held that “[t]here is neither State

³⁸³ Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belgium), 2002 I.C.J 3, para. 58 (Feb. 14), available at <https://www.icj-cij.org/sites/default/files/case-related/121/121-20020214-JUD-01-00-EN.pdf>

³⁸⁴ Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belgium), 2002 I.C.J 3, para. 61 (Feb. 14), available at <https://www.icj-cij.org/sites/default/files/case-related/121/121-20020214-JUD-01-00-EN.pdf> (emphasis added).

³⁸⁵ Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belgium), 2002 I.C.J 3, para. 61 (Feb. 14), available at <https://www.icj-cij.org/sites/default/files/case-related/121/121-20020214-JUD-01-00-EN.pdf>.

³⁸⁶ The case involved a challenge by Charles Taylor (the Head of State of Liberia at the time) to an SCSL indictment for crimes under international law committed in Sierra Leone. See *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, paras. 21-33 (May 31, 2004), available at <http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/059/SCSL-03-01-I-059.pdf>.

³⁸⁷ *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, para. 51 (May 31, 2004), available at <http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/059/SCSL-03-01-I-059.pdf>.

³⁸⁸ *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, para. 52 (May 31, 2004), available at <http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/059/SCSL-03-01-I-059.pdf>.

*practice nor opinio juris that would support the existence of Head of State immunity under customary international law vis-à-vis an international court. To the contrary, such immunity has never been recognised in international law as a bar to the jurisdiction of an international court.*³⁸⁹ Importantly, the Appeals Chamber went on to note that Article 27(2) of the Rome Statute “*reflect[s] the status of customary international law.*”³⁹⁰ In support, the Appeals Chamber discussed (in both the Judgment³⁹¹ and Concurring Opinion³⁹²) “*consistent and repeated rejection of immunity (even for Heads of State) in sundry instruments of international law since World War II.*”³⁹³ Among the instruments and state practice referenced was the Nuremberg Charter, the December 11, 1964 UN General Assembly Resolution affirming the “*principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal,*” the ILC’s subsequent formulation of the “*Nuremberg Principles*” (at the direction of the UN General Assembly), the ILC’s draft Code of Offences Against the Peace and Security of Mankind, the Genocide Convention, the statutes of the ICTY, ICTR, and SCSL, and the ICC’s own jurisprudence, including the *Malawi* decision.³⁹⁴

As did the ICJ in the *Arrest Warrant* case and the SCSL in the *Prosecutor v. Taylor* case, the ICC in the *Al-Bashir Appeal* Judgment underscored the distinct “*character of international courts [as] compared with domestic jurisdictions.*”³⁹⁵ Unlike national courts that “*are essentially an expression of a State’s sovereign power, which is necessarily limited by the sovereign power of the other States,*” “*international courts act on behalf of the international community as a whole*” and not “*on behalf of a particular State or States.*”³⁹⁶ This, then, raises a pertinent question: what makes a court or tribunal “*international*”? Moreover, what makes an international court or tribunal the kind of “*certain international criminal court*” that the ICJ had in mind when making the foundational distinction between domestic

³⁸⁹ Judgment in the Jordan Referral re Al-Bashir Appeal, No. ICC-02/05-01/09 OA2, para. 1 (May 6, 2019), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_02593.PDF.

³⁹⁰ Judgment in the Jordan Referral re Al-Bashir Appeal, No. ICC-02/05-01/09 OA2, para. 103 (May 6, 2019), available at

https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_02593.PDF.

³⁹¹ Judgment in the Jordan Referral re Al-Bashir Appeal, No. ICC-02/05-01/09 OA2, paras. 103-119 (May 6, 2019), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_02593.PDF.

³⁹² Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, paras. 65-174 (May 6, 2019), available at https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2019_02595.PDF.

³⁹³ Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, para. 66 (May 6, 2019), available at https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2019_02595.PDF.

³⁹⁴ Judgment in the Jordan Referral re Al-Bashir Appeal, No. ICC-02/05-01/09 OA2, paras. 103-105, 107-114 (May 6, 2019), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_02593.PDF.

³⁹⁵ Judgment in the Jordan Referral re Al-Bashir Appeal, No. ICC-02/05-01/09 OA2, para. 115 (May 6, 2019), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_02593.PDF.

³⁹⁶ Judgment in the Jordan Referral re Al-Bashir Appeal, No. ICC-02/05-01/09 OA2, para. 115 (May 6, 2019), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_02593.PDF.

and international courts in the *Arrest Warrant* case? Scholars and tribunals alike have attempted to answer this.

A Court that is Established Under International Law and Which Sufficiently Reflects the Will of the International Community as a Whole May Qualify as an International Court or Tribunal Not Barred by Immunity *Ratione Personae*

The Joint Concurring Opinion of the *Al-Bashir Appeal* Judgment provides an instructive starting point. Therein, Judges Eboe-Osuji, Morrison, Hofmański, and Bossa noted that an international court “*is an adjudicatory body that exercises jurisdiction at the behest of two or more states. Its jurisdiction may be conferred in one of a variety of ways: such as by treaty; by instrument of promulgation, referral or adhesion made by an international body or functionary empowered to do so; or, ... through an arbitral clause in a treaty.*”³⁹⁷ Further, an international court may be “*regional or universal in orientation*” and is not characterized by either the type or substance of law that is applied.³⁹⁸ In the concurring opinion’s view, “*the ultimate element of its character as an international court*” is the “*source of the jurisdiction that the court is meant to exercise.*”³⁹⁹ Importantly, “[*t*]hat source of jurisdiction is the collective sovereign will of the enabling States, expressed directly or through the legitimate exercise of mandate by an international body (such as the Security Council) or an international functionary (such as the UN Secretary-General, when properly empowered to set up a court of law).”⁴⁰⁰

The source of jurisdiction, as noted by the concurring opinion, bears underscoring. As put succinctly by the ICC, “*immunity and jurisdiction are not the same thing.*”⁴⁰¹ To find that “*there is no immunity before an international criminal court in its exercise of ‘proper jurisdiction’ does not mean the court in question has that ‘proper jurisdiction’ to begin with.*”⁴⁰² The courts and tribunals referenced by both the ICJ and the ICC derive their power to abrogate immunities not only from

³⁹⁷ Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, para. 56 (May 6, 2019), available at https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2019_02595.PDF.

³⁹⁸ Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, para. 57 (May 6, 2019), available at https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2019_02595.PDF.

³⁹⁹ Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, para. 58 (May 6, 2019), available at https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2019_02595.PDF.

⁴⁰⁰ Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, para. 58 (May 6, 2019), available at https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2019_02595.PDF.

⁴⁰¹ International Criminal Court, *Q&A Regarding Appeals Chamber’s 6 May 2019 Judgment In The Jordan Referral Re Al-Bashir Appeal*, at 3 (May 2019), available at <https://www.icc-cpi.int/sites/default/files/itemsDocuments/190515-al-bashir-qa-eng.pdf>.

⁴⁰² International Criminal Court, *Q&A Regarding Appeals Chamber’s 6 May 2019 Judgment In The Jordan Referral Re Al-Bashir Appeal*, at 3 (May 2019), available at <https://www.icc-cpi.int/sites/default/files/itemsDocuments/190515-al-bashir-qa-eng.pdf>.

the express provisions of their constitutive treaties but also from the states that have consented to those legal instruments—albeit in varying ways. Those methods of consent are relevant for the present inquiry. Both the ICTY and ICTR were established pursuant to the UN Security Council’s binding Chapter VII power under the UN Charter.⁴⁰³ Security Council resolutions adopted under Chapter VII of the UN Charter are binding on all UN member states by virtue of Article 25 of the UN Charter – wherein states “agree to accept and carry out the decisions of the Security Council.”⁴⁰⁴ As such, the statutes of such international tribunals, including any potential immunity waivers, are consented to by the affected state (and possibly all UN member states depending on the text of the resolution) when created pursuant to the Security Council’s Chapter VII power. Such was the case for the ICTR, ICTY, STL, and the Serious Crimes Panels of the Dili District Court (East Timor).⁴⁰⁵ In comparison, the ICC and the Nuremberg International Military Tribunal were established pursuant to multilateral treaties that states directly consented to by adhering to the treaties.⁴⁰⁶ The *Al-Bashir Appeal* case presents an interesting hybrid of the two. While the ICC had jurisdiction over Jordan as a state party to the Rome

⁴⁰³ Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belgium), 2002 I.C.J. 3, para. 61 (Feb. 14), available at <https://www.icj-cij.org/sites/default/files/case-related/121/121-20020214-JUD-01-00-EN.pdf>. Note that the ICTY specifically confirmed an indictment of a sitting Head of State. See generally Prosecutor v. Milošević *et al.*, Case No. IT-99-37-PT, Decision on Review of the Indictment and Application for Consequential Orders (May 24, 1999), available at https://www.icty.org/x/cases/slobodan_milosevic/tdec/en/052499rev.htm (confirming the indictment against former President Slobodan Milošević of the Federal Republic of Yugoslavia and transmitting his arrest warrant to all UN Member States at a time when Milošević was still a sitting Head of State).

⁴⁰⁴ U.N. Charter art. 25, available at <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>.

⁴⁰⁵ See generally U.N. Security Council Resolution 827, U.N. Doc. No. S/RES/827 (May 25, 1993), available at <https://digitallibrary.un.org/record/166567?ln=en> (ICTY); U.N. Security Council Resolution 955, U.N. Doc. No. S/RES/955 (Nov. 8, 1994), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N95/140/97/PDF/N9514097.pdf?OpenElement> (ICTR); U.N. Security Council Resolution 1757, U.N. Doc. No. S/RES/1757 (May 30, 2007), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N07/363/57/PDF/N0736357.pdf?OpenElement> (STL); U.N. Security Council Resolution 1272, U.N. Doc. No. S/RES/1272 (Oct. 25, 1999), available at <https://digitallibrary.un.org/record/291410?ln=en> (East Timor) (creating and empowering the UN Transitional Administration in East Timor to “exercise... the administration of justice,” which later created the East Timor court through UNTAET Regulation 2000/15). Note, however, that the STL, unlike the others listed, has a more limited mandate and has only prosecuted members of Hezbollah, to whom immunities defenses do not apply. Reem Salahi and Bachar El-Halabi, *The limits of the Special Tribunal for Lebanon and what Syrians can learn*, ATLANTIC COUNCIL (Sept. 16, 2020), available at <https://www.atlanticcouncil.org/blogs/menasource/the-limits-of-the-special-tribunal-for-lebanon-and-what-syrians-can-learn/>. See also Astrid Reisinger Coracini and Jennifer Trahan, *Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine (Part VI): on the Non-Applicability of Personal Immunities*, JUST SECURITY (Nov. 8, 2022), available at <https://www.justsecurity.org/84017/the-case-for-creating-a-special-tribunal-to-prosecute-the-crime-of-aggression-committed-against-ukraine-part-vi-on-the-non-applicability-of-personal-immunities/>.

⁴⁰⁶ See generally United Nations, *Rome Statute of the International Criminal Court*, UNITED NATIONS TREATY COLLECTION, available at https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtmsg_no=XVIII-10&chapter=18&clang=_en; United Nations, *Agreement for the prosecution and punishment of the major war criminals of the European Axis*, UNITED NATIONS TREATY COLLECTION, available at <https://treaties.un.org/pages/showDetails.aspx?objid=08000002801572a2>.

Statute, the same was not true for Sudan. By referring the situation in Darfur to the ICC in Resolution 1593, the Security Council empowered the ICC to exercise its jurisdiction in accordance with the Rome Statute—including Article 27(2), which provides that immunities are not a bar to the exercise of jurisdiction.⁴⁰⁷ As Sudan was obliged to “*cooperate fully*” with the ICC pursuant to binding Resolution 1593, Sudan could not invoke personal immunity as a non-state party.⁴⁰⁸

The SCSL stands out as an important exception to the trend of creating international criminal tribunals through either a treaty with the relevant state or a binding Security Council resolution. The SCSL was created through a bilateral treaty between the UN and Sierra Leone as a result of Security Council resolution 1315.⁴⁰⁹ In requesting the Secretary-General to negotiate a treaty with Sierra Leone, however, the Security Council did not invoke its Chapter VII power and did not require Liberia to be a party to said treaty.⁴¹⁰ When presented with the personal immunity defense of former Liberian President Charles Taylor, who was President at the time of his indictment, the SCSL rejected it. In doing so, the SCSL underscored its international character, noting it is neither a national court nor part of the Sierra Leone judiciary, it is “*established by treaty and has the characteristics associated with classical international organisations (including legal personality; the capacity to enter into agreements with other international persons governed by international law; privileges and immunities; and an autonomous will distinct from that of its members),*” and its competence and jurisdiction “*are broadly similar to that of ICTY and the ICTR and the ICC, including in relation to the provisions*

⁴⁰⁷ U.N. Security Council Resolution 1593, U.N. Doc. No. S/RES/1593 (Mar. 31, 2005), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/292/73/PDF/N0529273.pdf?OpenElement> (“*Decides to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court... Decides that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court...*”); Judgment in the Jordan Referral re Al-Bashir Appeal, No. ICC-02/05-01/09 OA2, para. 149 (May 6, 2019), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_02593.PDF (“In sum, Resolution 1593 gives the Court power to exercise its jurisdiction over the situation in Darfur, Sudan, which it must exercise ‘in accordance with [the] Statute’. This includes article 27(2), which provides that immunities are not a bar to the exercise of jurisdiction.”).

⁴⁰⁸ Judgment in the Jordan Referral re Al-Bashir Appeal, No. ICC-02/05-01/09 OA2, para. 149 (May 6, 2019), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_02593.PDF.

⁴⁰⁹ U.N. Security Council Resolution 1315, U.N. Doc. No. S/RES/1315 (Aug. 14, 2000), available at <https://digitallibrary.un.org/record/420605?ln=en> (requesting the Secretary-General negotiate an agreement with Sierra Leone to create “an independent special court”); Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (Jan. 16, 2002), available at <http://www.rscsl.org/Documents/scsl-agreement.pdf>.

⁴¹⁰ See generally U.N. Security Council Resolution 1315, U.N. Doc. No. S/RES/1315 (Aug. 14, 2000), available at <https://digitallibrary.un.org/record/420605?ln=en>.

confirming the absence of entitlement of any person to claim of immunity.”⁴¹¹ Further, the SCSL noted that its constitutive treaty was “*an agreement between all members of the United Nations and Sierra Leone,*” and therefore “*an expression of the will of the international community.*”⁴¹²

Existing precedent therefore suggests that, in the absence of state consent or a binding UN Security Council resolution, a treaty—be it bilateral or multilateral—expressing “*the will of the international community as a whole to enforce crimes under customary international law*” is required.⁴¹³ While it can be argued that the Secretary-General, as the chief representative of the UN, represents the international community as a whole in signing a treaty between the UN and Sierra Leone,⁴¹⁴ the same likely cannot be said of a regional organization like the COE or the EU.⁴¹⁵ As noted previously, the COE and the EU are comprised of 46 and 27 member states, respectively.⁴¹⁶ A multilateral treaty with 46 states parties would fall largely short of the 193 countries that are UN member states and are thought to comprise the international community. The establishment of the ICC and the Appeal Chamber’s decision in the *Al-Bashir Appeal* Judgment, however, caution against a conclusion that a multilateral treaty must have nearly 193 states parties in

⁴¹¹ Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, para. 41 (May 31, 2004), *available at* <http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/059/SCSL-03-01-I-059.pdf> (citing and agreeing with *amicus curiae*).

⁴¹² Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, paras. 37-39 (May 31, 2004), *available at* <http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/059/SCSL-03-01-I-059.pdf>.

⁴¹³ Judgment in the Jordan Referral re Al-Bashir Appeal, No. ICC-02/05-01/09 OA2, para. 115 (May 6, 2019), *available at* https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_02593.PDF (“The Appeals Chamber considers that the absence of a rule of customary international law recognising Head of State immunity *vis-à-vis* an international court is also explained by the *different character of international courts* when compared with domestic jurisdictions. . . . While the latter are essentially an expression of a State’s sovereign power. . . *international courts act on behalf of the international community as a whole.*”) (emphasis added); *see also* Astrid Reisinger Coracini and Jennifer Trahan, *Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine (Part VI): on the Non-Applicability of Personal Immunities*, JUST SECURITY (Nov. 8, 2022), *available at* <https://www.justsecurity.org/84017/the-case-for-creating-a-special-tribunal-to-prosecute-the-crime-of-aggression-committed-against-ukraine-part-vi-on-the-non-applicability-of-personal-immunities/>.

⁴¹⁴ Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (Jan. 16, 2002), *available at* <http://www.rscsl.org/Documents/scsl-agreement.pdf>; Astrid Reisinger Coracini and Jennifer Trahan, *Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine (Part VI): on the Non-Applicability of Personal Immunities*, JUST SECURITY (Nov. 8, 2022), *available at* <https://www.justsecurity.org/84017/the-case-for-creating-a-special-tribunal-to-prosecute-the-crime-of-aggression-committed-against-ukraine-part-vi-on-the-non-applicability-of-personal-immunities/>.

⁴¹⁵ Alexandre Skander Galand, *A Special Justice Mechanism for the Crime of Aggression Against Ukraine – For Who, By Who, Against Who?*, OPINIOJURIS (Sept. 5, 2022), *available at* <http://opiniojuris.org/2022/05/09/a-special-justice-mechanism-for-the-crime-of-aggression-against-ukraine-for-who-by-who-against-who/> (“While the Council of Europe does not qualify as such institution, the UN General Assembly (GA) with its universal membership does.”).

⁴¹⁶ *See* Part III.A.

order to represent the will of the international community. While Article 27(2) is a treaty provision by which states that ratify the Rome Statute are thought to have lawfully waived the immunity of their high-ranking officials, Article 27(2) is not only applicable to the nationals of states parties.⁴¹⁷ Article 27(2) is applicable to all individuals before the Court, “including nationals of third States independent of how the jurisdiction of the ICC was triggered in accordance with Article 13.”⁴¹⁸ Further, the Appeals Chamber confirmed that Article 27(2) is a reflection of customary international law.⁴¹⁹ Pursuant to the terms of the Rome Statute, the ICC became operative following the deposit of the sixtieth instrument of ratification, acceptance, approval, or accession.⁴²⁰ Accordingly, as put forth by scholars Astrid Reisinger Coracini and Jennifer Trahan, “[t]he drafters of the Rome Statute—as well as the ICJ in its judgment the Yerodia case and the ICC in its Al-Bashir judgment—thus believed that a joint effort of 60 States to adjudicate crimes rooted in customary international law on the basis of a treaty open to universal accession was sufficient to establish a treaty-based international criminal court, which qualifies as a court that could legitimately apply the rule of the non-applicability of personal immunities.”⁴²¹ Further, when the ICJ referred to the ICC as one of those “certain” international tribunals in the *Arrest Warrant* decision of February 14, 2002, the

⁴¹⁷ Astrid Reisinger Coracini and Jennifer Trahan, *Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine (Part VI): on the Non-Applicability of Personal Immunities*, JUST SECURITY (Nov. 8, 2022), available at

<https://www.justsecurity.org/84017/the-case-for-creating-a-special-tribunal-to-prosecute-the-crime-of-aggression-committed-against-ukraine-part-vi-on-the-non-applicability-of-personal-immunities/>.

⁴¹⁸ Astrid Reisinger Coracini and Jennifer Trahan, *Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine (Part VI): on the Non-Applicability of Personal Immunities*, JUST SECURITY (Nov. 8, 2022), available at

<https://www.justsecurity.org/84017/the-case-for-creating-a-special-tribunal-to-prosecute-the-crime-of-aggression-committed-against-ukraine-part-vi-on-the-non-applicability-of-personal-immunities/>.

⁴¹⁹ Judgment in the Jordan Referral re Al-Bashir Appeal, No. ICC-02/05-01/09 OA2, para. 103 (May 6, 2019), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_02593.PDF; Astrid Reisinger Coracini and Jennifer Trahan, *Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine (Part VI): on the Non-Applicability of Personal Immunities*, JUST SECURITY (Nov. 8, 2022), available at

<https://www.justsecurity.org/84017/the-case-for-creating-a-special-tribunal-to-prosecute-the-crime-of-aggression-committed-against-ukraine-part-vi-on-the-non-applicability-of-personal-immunities/>.

⁴²⁰ See *Rome Statute of the International Criminal Court* art. 126 (1998), available at

<https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>. The sixtieth ratification of the Rome Statute was deposited with the UN on April 11, 2002, and the treaty entered into force on July 1, 2002. See *Ratification ceremony at UN paves way for International Criminal Court*, April 11, 2002, UN NEWS, available at

<https://news.un.org/en/story/2002/04/32172-ratification-ceremony-un-paves-way-international-criminal-court>; United Nations, *Rome Statute of the International Criminal Court*, UNITED NATIONS TREATY COLLECTION, available at https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&clang=_en (last visited May 8, 2023).

⁴²¹ Astrid Reisinger Coracini and Jennifer Trahan, *Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine (Part VI): on the Non-Applicability of Personal Immunities*, JUST SECURITY (Nov. 8, 2022), available at

<https://www.justsecurity.org/84017/the-case-for-creating-a-special-tribunal-to-prosecute-the-crime-of-aggression-committed-against-ukraine-part-vi-on-the-non-applicability-of-personal-immunities/>.

Rome Statute had only 52 states parties (far less than the 123 states parties it has today). Although, at the time, an additional 88 states had expressed an intention to become parties to the Rome Statute in the future by signing (but not yet ratifying or accepting) the treaty.⁴²² This suggests that as few as 60 states parties may satisfy the numerical threshold required to represent the will of the international community, particularly when it is shown that significantly more states intend to adhere to the treaty in the future.

The process of creating a treaty for a Crime of Aggression Tribunal may be just as important as the numbers of states that participate in it in reflecting the will of the international community as a whole. As noted by Claus Kreß, “*the evolution of the conversation since the end of the Great War suggests that States have not come to see a bilateral or a regional criminal court, despite their being international in the technical sense, as capable of giving rise to such a strong perception of objectivity that the traditional customary Head of State immunity ratione personae should not extend to it when adjudicating crimes under international law.*”⁴²³ Accordingly, Coracini and Trahan observe that it is “*a court with jurisdiction over crimes under customary international law based on a multilateral treaty open for universal accession with 60 ratifications*” that “*qualifies as an international criminal court that sufficiently reflects the will of the international community as a whole.*”⁴²⁴ While not adopted by the ICC in such detail, Claus Kreß’s *amicus curiae* brief in the *Al-Bashir Appeal* case provides a helpful approach to creating an international criminal court outside the auspices of the UN that could sufficiently represent the will of the international community:

⁴²² See United Nations, *Rome Statute of the International Criminal Court*, UNITED NATIONS TREATY COLLECTION, available at https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtmsg_no=XVIII-10&chapter=18&clang=_en (last visited May 8, 2023) (as of February 14, 2022 listing 139 signatory States including 51 States that after signature had ratified or accepted the treaty, as well as one State that acceded without having signed the treaty). The act of signing a treaty expresses a State’s interest in a treaty and its intention to become a party to it by subsequent ratification or acceptance, but signing alone usually does not establish consent to be bound by the treaty. A State’s consent to be bound by a treaty is established upon the act of ratification, acceptance, or accession. Accession is the usual method by which a State which has not taken part in the negotiations or signed the treaty may subsequently consent to be bound by it. James Crawford, BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 371-373 (8th ed. 2012); Treaty Office of the Council of Europe, *Practical Guide*, 109-10 (Sept. 2020), available at <https://rm.coe.int/16809fce94>.

⁴²³ Claus Kreß, *Preliminary Observations on the ICC Appeals Chamber’s Judgment of 6 May 2019 in the Jordan Referral re Al-Bashir Appeal*, 16, TOAEP (May 31, 2019), available at <https://www.toaep.org/ops-pdf/8-kress>.

⁴²⁴ Astrid Reisinger Coracini and Jennifer Trahan, *Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine (Part VI): on the Non-Applicability of Personal Immunities*, JUST SECURITY (Nov. 8, 2022), available at <https://www.justsecurity.org/84017/the-case-for-creating-a-special-tribunal-to-prosecute-the-crime-of-aggression-committed-against-ukraine-part-vi-on-the-non-applicability-of-personal-immunities/> (emphasis added).

“In view of criticisms voiced against the distinction between national and international criminal proceedings, it will be important for the [Appeals Chamber] to specify that that distinction only holds if the jurisdiction of the international criminal court in question transcends the delegation of national criminal jurisdiction by a group of States and can instead be convincingly characterized as the direct embodiment of the international community for the purpose of enforcing its ius puniendi. This is [the case] where such a court has been established on the basis of an international treaty which constitutes the legitimate attempt to provide the international community as a whole with a judicial organ to directly enforce its ius puniendi. Such a treaty must have resulted from negotiations within a truly universal format, such a treaty must contain a standing invitation to universal membership, such a treaty must incorporate the internationally applicable fair trial standards and such a treaty must be confined to... crimes under customary international law. If all of these conditions are fulfilled, there can be no question of (a risk of) ‘hegemonic abuse’.”⁴²⁵

While the ICC did not provide such a specific rule, the *Al-Bashir Appeal Judgment* is unlikely to be the Court’s final word on the fundamental issue of personal immunity. Neither may the *Arrest Warrant* case be the last time the ICJ considers this issue, as the African Union’s request for an Advisory Opinion on the

⁴²⁵ Claus Kress, *Preliminary Observations on the ICC Appeals Chamber’s Judgment of 6 May 2019 in the Jordan Referral re Al-Bashir Appeal*, 16, TOAEP (May 31, 2019), available at <https://www.toaep.org/ops-pdf/8-kress> (citing para. 24 of his *Amicus Curiae* brief and noting emphases in the original).

matter remains a possibility (albeit an unlikely one).⁴²⁶ Further, the ICC's current case law is not without controversy among scholars. Critics have pointed to the lack of a “*clear and coherent*” definition of what constitutes an international tribunal,⁴²⁷ while others argue that the ICC has mischaracterized the ability of even obviously “*international*” tribunals like the ICC to bind non-member third states in light of the role of sovereign consent in treaty and public international law.⁴²⁸ A related line of criticism holds that the ICC's decisions overlook Article 98(I) of the Rome Statute, which they view as preventing the ICC from demanding the surrender of a third state official where that state has not waived immunity.⁴²⁹ Nevertheless, there are leading academics on the subject that find the ICC's decision in the *Al-Bashir Appeal Judgment* “*unsurprising, correctly decided, and consistent with the Court's*

⁴²⁶ The African Union's request was included on the agendas of the 73rd (#89) and 74th (#87) sessions of the UN General Assembly, but no resolution was adopted during those sessions and the topic has not been on the agenda of the UNGA since then. See Agenda of the Seventy-fourth Session of the General Assembly, United Nations General Assembly (Sept. 21, 2018), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/296/30/PDF/N1829630.pdf?OpenElement> (agenda item #89 during the 73rd session); Agenda of the Seventy-fourth Session of the General Assembly and the Resolutions and Decisions Adopted Under Each Item, United Nations General Assembly (Sept. 15, 2020), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N20/236/93/PDF/N2023693.pdf?OpenElement> (agenda item #87 during the 74th session); Resolutions of the 73rd Session, United Nations General Assembly, available at <https://www.un.org/en/ga/73/resolutions.shtml> (no related resolution is listed for the results of the 73rd session); Resolutions of the 74th Session, United Nations General Assembly, <https://www.un.org/en/ga/74/resolutions.shtml> (no related resolution is listed for the results of the 74th session). See also Sascha-Dominick Dov Bachmann and Naa A. Sowatey-Adjei, *The African Union-ICC Controversy Before the ICJ: A Way Forward to Strengthen International Criminal Justice*, 29 WASHINGTON INTERNATIONAL LAW JOURNAL 247, 268 (2020), available at <https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=1832&context=wilj> (noting the process of actually obtaining an Advisory Opinion from the ICJ on the matter is extensive as the African Union must first lobby sufficient votes within the UNGA and even if that is achieved, the ICJ still has “the prerogative whether [or not] to offer its opinion”). While the African Union has requested an Advisory Opinion, “[i]t is worthy of note that during the [Al-Bashir] proceedings, the African Union had not contested the customary nature of Article 27, but only its applicability on the horizontal level between state parties and non-state parties to the Rome Statute.” Astrid Reisinger Coracini and Jennifer Trahan, *Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine (Part VI): on the Non-Applicability of Personal Immunities*, JUST SECURITY (Nov. 8, 2022), available at <https://www.justsecurity.org/84017/the-case-for-creating-a-special-tribunal-to-prosecute-the-crime-of-aggression-committed-against-ukraine-part-vi-on-the-non-applicability-of-personal-immunities/>.

⁴²⁷ Claus Kreß, *Preliminary Observations on the ICC Appeals Chamber's Judgment of 6 May 2019 in the Jordan Referral re Al-Bashir Appeal*, 18, TOAEP (May 31, 2019), available at <https://www.toaep.org/ops-pdf/8-kress/>.

⁴²⁸ See, e.g., Dov Jacobs, *You Have Just Entered Narnia: ICC Appeals Chamber Adopts the Worst Possible Solution on Immunities in the Bashir Case*, SPREADING THE JAM (May 6, 2019), available at <https://dovjacobs.com/2019/05/06/you-have-just-entered-narnia-icc-appeals-chamber-adopts-the-worst-possible-solution-on-immunities-in-the-bashir-case/>; Ben Batros, *A Confusing ICC Appeals Judgement on Head-of-State Immunity*, JUST SECURITY (May 7, 2019), available at <https://www.justsecurity.org/63962/a-confusing-icc-appeals-judgment-on-head-of-state-immunity/>.

⁴²⁹ See Dapo Akande, *ICC Appeals Chamber Holds that Heads of State Have No Immunity under Customary International Law before International Tribunals*, EIJIL: TALK! (May 6, 2019), available at <https://www.ejiltalk.org/icc-appeals-chamber-holds-that-heads-of-state-have-no-immunity-under-customary-international-law-before-international-tribunals/>.

*judicial mandate.*⁴³⁰ Irrespective of the legal blogosphere’s reaction to the ICC’s latest pronouncement, the *Al-Bashir Appeal* Judgment and the ICJ’s *Arrest Warrant* decision remain the final word, for now.

In the face of continuing opacity as to what constitutes the type of “international” tribunal contemplated by the ICJ in the *Arrest Warrant* case and the ICC in the *Al-Bashir Appeal* Judgment, following the previously quoted Kreß approach may be the best way for the EU or COE to conduct a process that could represent a “legitimate attempt to provide the international community as a whole with a judicial organ to directly enforce its *ius puniendi*.”⁴³¹ Such a multilateral treaty, with the potential for universal membership, will need to achieve at least 60 states parties in order to rely on arguments like those put forth by Astrid Reisinger Coracini and Jennifer Trahan discussed above. Showing that in total over 100 states ultimately intend to adhere to the treaty, however, may provide a more persuasive basis to argue that such a tribunal sufficiently reflects the will of the international community – as the number of Rome Statute signatory states was almost 140 at the time of the *Arrest Warrant* decision issued on February 14, 2002.⁴³² Even so, immunity *ratione personae* remains a formidable challenge for a Crime of Aggression Tribunal created outside of the auspices of the UN and, as such, future prosecutors should consider the timing of indictments (*i.e.*, after an individual leaves office) in formulating case strategies.

In the Absence of a Customary International Law-Based Exception to Immunity *Ratione Materiae* for Crimes Pursuant to International Law, and Russia’s Explicit or Imputed Waiver, a Treaty Barring Immunity *Ratione Materiae* and Reflecting the Will of the International Community May Be the Best Way to Bar Functional Immunity Defenses

The ICTY in the *Blaskic* case sets out the customary rule on immunity *ratione materiae* with clarity: “State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called ‘functional immunity’. This is a well-established rule of customary international law going back to the eighteenth

⁴³⁰ Leila Nadya Sadat, *Why the ICC’s Judgement in the al-Bashir Case Wasn’t So Surprising*, JUST SECURITY (July 12, 2019), available at <https://www.justsecurity.org/64896/why-the-iccs-judgment-in-the-al-bashir-case-wasnt-so-surprising/> (noting six earlier ICC decisions had already held that al-Bashir could not benefit from head of state immunity and arguing that the ICC correctly read Article 27(1) of the Rome Statute to codify customary international law regarding immunity before the ICC in cases of violations of *jus cogens* norms).

⁴³¹ Claus Kreß, *Preliminary Observations on the ICC Appeals Chamber’s Judgment of 6 May 2019 in the Jordan Referral re Al-Bashir Appeal*, 16, TOAEP (May 31, 2019), available at <https://www.toaep.org/ops-pdf/8-kress>.

⁴³² See *supra* note 433.

and nineteenth centuries, restated many times since.”⁴³³ While this customary rule of international law has long been recognized, there has also been long-standing consensus on an exception to this rule in the case of international crimes, albeit for varying doctrinal reasons.⁴³⁴ The Nuremberg Tribunal first established “*the principle that a person’s official position does not exempt them from individual criminal responsibility for international crimes, including for crimes against peace, the predecessor of the crime of aggression.*”⁴³⁵ Since then, countless national tribunals have denied the functional immunity of officials accused of international crimes, including the crime of aggression.⁴³⁶ Conducting an extensive and contemporary review, Pedretti aptly summarizes this consensus:

“According to the vast majority of the reviewed practice, former Heads of State and other State officials are considered to be individually responsible for the commission of such severe crimes. This conclusion can be drawn from domestic laws, military manuals, laws implementing the Rome Statute, the statutes of internationalised criminal courts forming an integral part of a State’s judicial system, domestic judicial decisions relating to international conventions on the prevention or punishment of certain serious crimes, decisions and views expressed by international organisations[], the doctrine[, and most importantly,] domestic case law.”⁴³⁷

⁴³³ Prosecutor v. Blaskic, Case IT-95-14-PT, Judgement on the request of the Republic of Croatia for review of the decision of Trial Chamber II of 18 July 1997, para. 38 (Oct. 29, 1997), available at <https://www.icty.org/x/cases/blaskic/acdec/en/71029JT3.html>.

⁴³⁴ Generally speaking, there are three main schools of thought regarding the exceptions. The first school of thought views immunity *ratione materiae* as inapplicable to the commission of international crimes because they do not constitute official acts for purposes of individual prosecution. The second school of thought believes that immunities, both *ratione materiae* and *ratione personae*, cannot be invoked before an international tribunal. The third school of thought relies on the *jus cogens* status of international crimes, arguing that the peremptory and supreme nature of such crimes must override any immunity. See generally Dapo Akande and Sangeeta Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, 21 EUROPEAN JOURNAL OF INTERNATIONAL LAW 815 (2010), available at <https://doi.org/10.1093/ejil/chq080>; see also Joanna Foakes, *Immunity for International Crimes? Developments in the Law on Prosecuting Heads of State in Foreign Courts*, CHATHAM HOUSE BRIEFING PAPER (Nov. 2011), available at

https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/bp1111_foakes.pdf.

⁴³⁵ Open Society Just Initiative & International Renaissance Foundation, *Immunities and a Special Tribunal for the Crime of Aggression against Ukraine*, 22-23 (Feb. 2023), available at <https://www.justiceinitiative.org/uploads/eb4acc44-b7f3-4026-8c68-3f677a2c4b24/immunities-and-a-special-tribunal-for-ukraine-en-02012023.pdf>.

⁴³⁶ Open Society Just Initiative & International Renaissance Foundation, *Immunities and a Special Tribunal for the Crime of Aggression against Ukraine*, 23 (Feb. 2023), available at <https://www.justiceinitiative.org/uploads/eb4acc44-b7f3-4026-8c68-3f677a2c4b24/immunities-and-a-special-tribunal-for-ukraine-en-02012023.pdf> (citing, for an overview of national prosecutions, Preparatory Commission for the ICC, *Historical review of developments relating to aggression, delivered to the ICC*, UN Doc. PCNICC/2002/WGCA/L.1 (Jan. 24, 2002)).

⁴³⁷ Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes* 307-08 (2015).

The British House of Lords Judgment in *Pinochet No. 3* and the German Federal Court of Justice’s decision in *BGH Immunity* deserve brief, individual mention as important domestic cases. *Pinochet No. 3*, while subject to debate as to whether it supports a broad proposition that functional immunity cannot excuse international crimes or a limited exception for the crime of torture,⁴³⁸ has influenced the work of numerous domestic cases against state officials for crimes under international law.⁴³⁹ Although the *BGH Immunity* decision was limited to war crimes, this “*landmark*” judgment canvassed the jurisprudence of national and international courts, as well as the writing of scholars, in concluding that “*under customary international law criminal prosecution for the war crime of torture and serious humiliating or degrading treatment ... before a domestic court is not precluded by functional immunity.*”⁴⁴⁰ As the court’s review of relevant jurisprudence includes decisions concerning other international crimes, the decision provides “*an important indicator of state practice regarding the customary international law on immunity of foreign state officials prosecuted for committing core international crimes.*”⁴⁴¹ As this memorandum cannot comprehensively cover

⁴³⁸ Cf. Zhong Yuxiang, *Criminal Immunity of State Officials for Core International Crimes Now and in the Future*, FICHL POLICY BRIEF SERIES NO. 20, at 2 n.14 (2014), available at <https://www.toaep.org/pbs-pdf/20-zhong> (“Mention can be made of the Pinochet case, in which the British House of Lords explicitly took the view that functional immunity cannot excuse international crimes”); Gilbert Sison, *A King No More: The Impact of the Pinochet Decision on the Doctrine of Head of State Immunity*, 78 WASHINGTON UNIVERSITY LAW REVIEW 1583, 1601 (2000), available at https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1461&context=law_lawreview (“The judgment denying Pinochet immunity could be narrowly limited to the specific terms and purposes of the Torture Convention. In fact, a close reading of the decision seems to favor the latter interpretation instead of the view that head of state immunity is abrogated when certain international crimes are involved.”); Ingrid Wuerth, *Pinochet’s Legacy Reassessed*, 106 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 731, 735 (2012) (“This conclusion narrowed the immunity issue to include only conduct that allegedly violated the Convention Against Torture... The basis for the decision is difficult to characterize because the six Law Lords in the majority each employed different reasoning.”).

⁴³⁹ Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes* 308 (2015) (“This ruling has, for its part, strongly influenced subsequent decision-making, as it revived the conviction that (former senior) State officials cannot hide behind the veil of the State in order to escape responsibility for severe crimes.”); Ingrid Wuerth, *Pinochet’s Legacy Reassessed*, 106 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 731, 736 (2012) (“These events have been hailed as pathbreaking and transformative, in part because they unleashed both a wave of important cases against Pinochet in Chile and suits against many other defendants in Latin American and European domestic courts.”).

⁴⁴⁰ Bundesgerichtshof (Federal Court of Justice), judgment of 28 January 2021 – 3 StR 564/19, in *Neue Juristische Wochenschrift* (2021) 1326–1334, key finding (Leitsatz) 1 and para. 13 (unofficial translation provided in Aziz Epik, *No Functional Immunity for Crimes under International Law before Foreign Domestic Courts An Unequivocal Message from the German Federal Court of Justice*, 19 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 1263, 1265 (2021)); Leila Sadat, *New Developments in State Practice on Immunity of State Officials for International Crimes*, 25 ASIL INSIGHTS 1, 1-3 (2021), available at https://www.asil.org/sites/default/files/ASIL_Insights_2021_V25_I18.pdf.

⁴⁴¹ Leila Sadat, *New Developments in State Practice on Immunity of State Officials for International Crimes*, 25 ASIL INSIGHTS 1, 1-3 (2021), available at https://www.asil.org/sites/default/files/ASIL_Insights_2021_V25_I18.pdf.

the various practices quoted above, further details can be found in the work of scholars.⁴⁴²

International instruments and cases also support an exception to functional immunity in the context of crimes pursuant to international law. The statutes creating the ICTY, ICTR, and the ICC all substantially reflect Nuremberg Principle No. 3.⁴⁴³ As previously noted, the Nuremberg Principles were among the ICC's robust discussion of practice supporting the identification of Article 27(2) as reflecting customary international law.⁴⁴⁴ Further, Nuremberg Principle No. 3 has been adopted by the UN General Assembly and reiterated by the UN Security Council as a norm receiving wide support from states in the creation of the ICTY.⁴⁴⁵ It is, therefore, no surprise that in the same *Blaskic* decision quoted above, the ICTY recognized exceptions to the general rule of functional immunity: "*These exceptions arise from the norms of international criminal law prohibiting war crimes, crimes against humanity and genocide. Under these norms, those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity.*"⁴⁴⁶

A clear majority among scholars also support the existence of a functional immunity exception.⁴⁴⁷ The ILC's recent work—adopting a draft article on

⁴⁴² See generally Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes* (2015); C. Escobar Hernández, Fifth Report on Immunity of State Officials from Foreign Criminal Jurisdiction, UN Doc. A/CN.4/701, 14 (June 14, 2016). See also *International Law and the Protection of Humanity: Essays in Honor of Flavia Lattanzi* paras. 530-34, edited by Pia Acconci et al., BRILL (2016) (demonstrating that "prevailing practice shows that the norms regarding the functional immunity of foreign officials from *criminal* jurisdiction suffer an exception in cases of officials accused of international crimes."); Riccardo Pisillo Mazzeschi, *The functional immunity of State officials from foreign jurisdiction: A critique of the traditional theories*, 17 *QUESTIONS OF INTERNATIONAL LAW* 3, 17-18 (2015) (identifying state practice demonstrating foreign national courts' willingness to deny functional immunity in criminal case).

⁴⁴³ Cf. Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, Yearbook of the International Law Commission 1950 II, at 374; Article 7(2) ICTY Statute; Article 6(2) ICTR Statute; Article 27(1) ICC Statute.

⁴⁴⁴ See Judgment in the Jordan Referral re Al-Bashir Appeal, No. ICC-02/05-01/09 OA2, paras. 103-105, 107-114 (May 6, 2019), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_02593.PDF.

⁴⁴⁵ Alexandre Skander Galand, *Chapter 4: Article 13 (b) vs Immunity of State Officials*, in UN SECURITY COUNCIL REFERRALS TO THE INTERNATIONAL CRIMINAL COURT 159 n. 31 (citing Report of the Secretary-General pursuant to para. 2 of Security Council Resolution 808 (1993), UN Doc. S/ 25704 (May 3, 1993)).

⁴⁴⁶ Prosecutor v. Blaskic, Case IT-95-14-PT, Judgement on the request of the Republic of Croatia for review of the decision of Trial Chamber II of 18 July 1997, para. 41 (Oct. 29, 1997), available at <https://www.icty.org/x/cases/blaskic/acdec/en/71029JT3.html>.

⁴⁴⁷ Dapo Akande, *International Law Immunities and the International Criminal Court*, 98 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 407, 413-15 (2004); Dapo Akande and Sangeeta Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, 21 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 815, 839-49 (2010); Kai Ambos, *TREATISE ON INTERNATIONAL CRIMINAL LAW VOLUME I: FOUNDATIONS AND GENERAL PART* 417-18 (2013); Antonio Cassese et al. (eds), *CASSESE'S INTERNATIONAL CRIMINAL LAW* 241-46 (3rd ed. 2013); Antonio Cassese, *When May Senior State Officials be Tried for International Crimes? Some Comments on the Congo v. Belgium Case*, 13 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 853, 864-74 (2002); Micaela Frulli, *Immunity of Persons from Jurisdiction*, in *THE OXFORD*

exceptions to functional immunity—further supports the trend discussed, but is less instructive for the purpose of this memorandum because the draft article did not include the crime of aggression among its list of crimes warranting exception.⁴⁴⁸ Nevertheless, the ILC’s work on immunities and both the state and scholarly comments it has generated suggests there may be a “reexamination [underway] of what was previously considered a core principle of international criminal law.”⁴⁴⁹

Since its inclusion on the ILC’s long-term work program in 2006, the topic of “Immunity of State officials from foreign criminal jurisdiction” has elicited controversial debate within the Commission.⁴⁵⁰ The first special rapporteur assigned to the topic took the categorical position that there was neither an

COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 368 (Antonio Cassese, ed., 2009); Paola Gaeta, *Official Capacity and Immunities*, in *ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 982 (Antonio Cassese, ed., 2002); Claus Kreß and Kimberly Prost, *Article 98*, in *COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* (Otto Triffterer, ed., 2nd ed., 2008), Article 98, paras. 16, 18; Claus Kreß, *Cooperation with respect to waiver of immunity and consent to surrender*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* (K. Ambos, ed., 4th ed., 2021) Article 98, para. 24; G. Werle and F. Jeßberger, *Principles of International Criminal Law* (5th ed., 2020), paras. 828 *et seq.*; Aziz Epik, *No Functional Immunity for Crimes under International Law before Foreign Domestic Courts: An Unequivocal Message from the German Federal Court of Justice*, 19 *JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE* 1263, 1266 (2021), available at <https://doi.org/10.1093/jicj/mqab071>. Some scholars, and States, are of the view that an exception is not even necessary. Instead, crimes pursuant to international law do not even qualify as official acts. See, e.g., Institute of International Law, *Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law*, Resolution of Vancouver Session art. 13(2) (2001) (prepared by Joe Verhoeven), available at https://www.idi-iil.org/app/uploads/2017/06/2001_van_02_en.pdf; Janina Barkholdt and Julian Kulaga, *Analytical Presentation of the Comments and Observations by States on Draft Article 7, Paragraph 1, of the ILC Draft Articles on Immunity of State Officials From Foreign Criminal Jurisdiction*, *United Nations General Assembly, Sixth Committee, 2017*, KFG WORKING PAPER SERIES, 15 n.72 (2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3172104 (“It is the position of the Kingdom of the Netherlands that international crimes fall inherently outside the scope of acts in official capacity and therefore should not be susceptible to the plea of immunity”).

⁴⁴⁸ Chapter VII: Immunity of State Officials from Foreign Criminal Jurisdiction, *Report of the International Law Commission on the Work of its Sixty-Ninth Session*, available at <https://legal.un.org/ilc/reports/2017/english/chp7.pdf> (noting that functional immunity does not apply to, without distinction between domestic and international jurisdiction, the crime of genocide, crimes against humanity, war crimes, apartheid, torture, or enforced disappearances).

⁴⁴⁹ Leila Sadat, *New Developments in State Practice on Immunity of State Officials for International Crimes*, 25 *ASIL INSIGHTS* 1, 3 (2021), available at https://www.asil.org/sites/default/files/ASIL_Insights_2021_V25_I18.pdf; see also Aziz Epik, *No Functional Immunity for Crimes under International Law before Foreign Domestic Courts An Unequivocal Message from the German Federal Court of Justice*, 19 *JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE* 1263, 1263 (2021) (noting that the consensus on the exception to functional immunity for prosecution of crimes under international law has been recently “called into question” by scholars, members of the ILC, and state representatives.). ILC members in the minority voting against Draft Article 7 have thereafter published their views that state practice does not support an exception to this customary rule. See Janina Barkholdt and Julian Kulaga, *Analytical Presentation of the Comments and Observations by States on Draft Article 7, Paragraph 1, of the ILC Draft Articles on Immunity of State Officials From Foreign Criminal Jurisdiction*, *United Nations General Assembly, Sixth Committee, 2017*, KFG WORKING PAPER SERIES, 9 (2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3172104.

⁴⁵⁰ Aziz Epik, *No Functional Immunity for Crimes under International Law before Foreign Domestic Courts An Unequivocal Message from the German Federal Court of Justice*, 19 *JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE* 1263, 1267 (2021).

exception under customary international law, nor a definitive trend toward the establishment of such a norm, regarding functional immunity.⁴⁵¹ However, six years later, the successor special rapporteur concluded the opposite. Special rapporteur Escobar Hernández identified “*a clear trend towards considering the commission of international crimes as a bar to the application of the immunity of State officials from foreign criminal jurisdiction*” and proposed the initial version of Draft Article 7 for the ILC’s consideration.⁴⁵² The ILC’s eventual adoption of Draft Article 7 resulted in a rare roll-call vote that ended in a clear majority (21) in favor, but with 8 members taking a strong stand against it.⁴⁵³ The Draft Article was then considered by 49 states in the General Assembly’s Sixth Committee, resulting in 23 states expressing a predominantly positive attitude, five of which supported the view that Draft Article 7 reflects existing customary international law.⁴⁵⁴ Of course, 49 states is far from the total number of member states of the UN and statements made before the Sixth Committee are only one, among many, forums in which states contribute to the formation of customary international law. Further, there has been continuing state practice in support of the exception since this topic was debated within the Sixth Committee (*i.e.*, the *BGH Immunity* decision).

Nevertheless, the state and scholarly views in opposition to a functional immunity exception are still relevant. The customary international law nature of an exception to functional immunity for prosecutions involving crimes pursuant to international law—for either domestic or international criminal courts—remains unsettled. In the absence of a crystallized customary rule of international law, a special international tribunal for the crime of aggression would have to rely on its constitutive treaty in order to overcome a functional immunity defense. As argued in the Open Society Just Initiative’s most recent report on immunities and the crime of aggression, the “*reasoning of the ICC Appeals Chamber on personal immunity*” also applies to claims of functional immunity before international courts “*because international courts have a distinctive character and are not constrained by the par*

⁴⁵¹ See R.A. Kolodkin, Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction, paras. 90-94, UN Doc. A/CN.4/631, (June 10, 2010).

⁴⁵² C. Escobar Hernández, Fifth Report on Immunity of State Officials from Foreign Criminal Jurisdiction, para. 179, Annex III UN Doc. A/CN.4/701, (June 14, 2016).

⁴⁵³ Provisional Summary Record of the 3378th Meeting, International Law Commission (July 20, 2017), available at https://legal.un.org/ilc/documentation/english/summary_records/a_cn4_sr3378.pdf.

⁴⁵⁴ See Janina Barkholdt and Julian Kulaga, *Analytical Presentation of the Comments and Observations by States on Draft Article 7, Paragraph 1, of the ILC Draft Articles on Immunity of State Officials From Foreign Criminal Jurisdiction, United Nations General Assembly, Sixth Committee, 2017*, KFG WORKING PAPER SERIES, 9 (2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3172104.

in *parem principle*.⁴⁵⁵ The ICJ's *Arrest Warrant* decision leaves room for such an interpretation as the Court's oft-cited passage concerning "*certain international courts*" concerned a former Minister for Foreign Affairs (*i.e.*, an individual with only functional immunity). In emphasizing how immunity does not mean incumbent Ministers enjoy impunity, the ICJ noted that "*an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction.*"⁴⁵⁶ In order to benefit from the arguments already made in favor of a trend towards a rule of customary international law, such a treaty provision should substantially reflect the exception provided for in Nuremberg Principle No. 3 and the statutes of contemporary international criminal tribunals (*i.e.*, ICTY, ICTR, ICC). To state the obvious, however, it is unlikely that this would be signed by Russia or supported by a binding UN Security Council resolution. A Crime of Aggression Tribunal, therefore, will still face functional immunity defenses, even if its treaty provisions accord with those of other international criminal tribunals. As such, having the treaty reflect the will of the international community may provide a future tribunal a stronger basis upon which to overcome functional immunity defenses. As discussed in the preceding section on immunity *ratione personae*, such a treaty should allow for universal membership and achieve at least 60 states parties and at least 40 more states that intend to adhere to the treaty, *e.g.*, signatory states that have not yet consented to be bound by the treaty.

While existing precedent and scholarly commentaries demonstrate there is a legal pathway for establishing a Crime of Aggression Tribunal under the auspices of the COE or EU that reflects the will of the international community and therefore may overcome both types of immunities, there are also non-legal, practical dimensions policymakers should consider in creating a Tribunal outside of the UN framework. As a practical matter, creating a tribunal and bringing a case to its conclusion will take a considerable amount of time – years, if not decades, as is the case with former Sudanese President Omar Al-Bashir who remains in Sudan despite

⁴⁵⁵ Open Society Just Initiative & International Renaissance Foundation, *Immunities and a Special Tribunal for the Crime of Aggression against Ukraine*, 22-23 (Feb. 2023), available at <https://www.justiceinitiative.org/uploads/eb4acc44-b7f3-4026-8c68-3f677a2c4b24/immunities-and-a-special-tribunal-for-ukraine-en-02012023.pdf>.

⁴⁵⁶ *Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belgium)*, 2002 I.C.J 3, para. 61 (Feb. 14), available at <https://www.icj-cij.org/sites/default/files/case-related/121/121-20020214-JUD-01-00-EN.pdf>.

being charged by the ICC for acts of genocide dating back to 2003.⁴⁵⁷ Even if such a tribunal were created, and an arrest warrant was issued, effectuating an arrest will be challenging because it is difficult to predict when high-ranking officials will leave office, let alone travel abroad. Indeed, Russian President Putin and other government officials may now limit their travel abroad following the ICC's issuance of an arrest warrant.⁴⁵⁸ It is likely that during the period of time it takes to establish a tribunal, Russia, Belarus, and possibly other states may attack the tribunal as illegitimate for either lack of consent or for lack of true international character (*i.e.*, if only “Western” states sign on). A Crime of Aggression Tribunal created through either the auspices of the EU or the COE should be able to withstand the inevitable criticisms it will receive over the course of many years and remain viewed as a legitimate legal institution worthy of international cooperation when such cooperation is needed in the future to carry out the process of justice. As such, the greater the number of participating states, the more likely it is that a Crime of Aggression Tribunal would be viewed as an international tribunal akin to those created by the UN framework and as reflecting the will of the international community as a whole.

Finally, the ICC's recent issuance of an arrest warrant for Russian President Vladimir Putin and his Commissioner for Children's Rights, Maria Lvova-Belova will serve as an instrumental test case for policy makers considering a Crime of Aggression Tribunal. Not only will the arrest warrant present an opportunity for the ICC to confirm the *Al-Bashir* holding that “[t]here is neither State practice nor opinio juris that would support the existence of Head of State immunity under customary international law vis-à-vis an international court,”⁴⁵⁹ it will also allow Russia and its allies to put forth international law-based arguments contesting the

⁴⁵⁷ El Fasher, *North Darfur transitional justice workshop: 'Hand Al Bashir and other indictees to ICC'*, DABANGA (Jan. 29, 2023), available at

<https://www.dabangasudan.org/en/all-news/article/north-darfur-transitional-justice-workshop-hand-al-bashir-and-other-indictees-to-icc> (calling for the handing over of Al-Bashir and others); Statement of ICC Prosecutor, Karim A. A. Khan KC, to the United Nations Security Council on the Situation in Darfur, pursuant to Resolution 1593 (2005) (Jan. 26, 2023), available at <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-khan-kc-united-nations-security-council-situation-darfur> (describing Sudan's continued failure to cooperate with the ICC).

⁴⁵⁸ Rebecca Hamilton, *The ICC Goes Straight to the Top: Arrest Warrant Issued for Putin*, JUST SECURITY (Mar. 17, 2023), available at

<https://www.justsecurity.org/85529/the-icc-goes-straight-to-the-top-arrest-warrant-issued-for-putin/> (“While all member states of the ICC are under a legal obligation to arrest Putin should he come onto their territory, Putin is now on notice and unlikely to travel.”).

⁴⁵⁹ Judgment in the Jordan Referral re Al-Bashir Appeal, No. ICC-02/05-01/09 OA2, para. 1 (May 6, 2019), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_02593.PDF.

jurisdiction of the ICC.⁴⁶⁰ While there is little possibility that Putin or Lvova-Beleva will be before the ICC in the near future, the court can use a confirmation of charges hearing to affirm the proposition that truly international courts are not bound to respect head of state immunity, irrespective of state consent. As Russia is not a signatory to the Rome Statute, one can expect arguments contesting the legal basis of the arrest warrant are forthcoming. Indeed China's Foreign Ministry was quick to issue a statement calling for the ICC to “*respect the jurisdictional immunity enjoyed by the head of state in accordance with international law.*”⁴⁶¹ One can expect similar arguments to be made in response to any arrest warrant issued by a Crime of Aggression Tribunal—therefore providing policy makers timely and topical criticisms to consider in creating the Tribunal. Lastly, it is worth noting that this arrest warrant is a significant first: the first time the sitting president of a member of the Permanent Five is indicted by the ICC. As the incoming President of the UN Security Council, Russia could theoretically use its power to propose the use of Rule 16 of the Rome Statute (allowing the Security Council to put any prosecution on hold for a period of 12 months).⁴⁶² Should this occur, the argument in favor of a forum alternative to the UN system would become all the more persuasive.

Prosecuting High-Ranking Russian Officials In Absentia

The fact that Russia is unlikely to be a party to any treaty creating a Crime of Aggression Tribunal or consent to participate before a Crime of Aggression Tribunal raises questions of how such a tribunal will function and exercise its jurisdiction over Russian officials. A possible solution is to permit trials *in absentia*, though as elaborated below, doing so is not without difficulty under international law, and in fact typically prohibited by international criminal tribunals.

a) ICCPR, ECHR, and EU Law

⁴⁶⁰ Rebecca Hamilton, *The ICC Goes Straight to the Top: Arrest Warrant Issued for Putin*, JUST SECURITY (Mar. 17, 2023), available at

<https://www.justsecurity.org/85529/the-icc-goes-straight-to-the-top-arrest-warrant-issued-for-putin/> (“The issue of whether [Putin] can claim the same immunity at the ICC given the way the Court gained jurisdiction in this case is likely to be debated across the legal blogosphere in the coming weeks, but at the very least, an international prosecution of Putin is not the non-starter that a domestic prosecution would be.”)

⁴⁶¹ Hannah Ritchie, *China says ICC should “avoid politicization and double standards” following Putin arrest warrant*, CNN, Mar. 20, 2023, available at

https://edition.cnn.com/europe/live-news/russia-ukraine-war-news-03-20-23/h_cd7cdaa2e62be7938117ffd58cb45d45.

⁴⁶² Rebecca Hamilton, *The ICC Goes Straight to the Top: Arrest Warrant Issued for Putin*, JUST SECURITY (Mar. 17, 2023), available at

<https://www.justsecurity.org/85529/the-icc-goes-straight-to-the-top-arrest-warrant-issued-for-putin/> (discussing Rule 16).

An accused's right to be present at trial is enshrined in international⁴⁶³ and EU law.⁴⁶⁴ However, these same instruments recognize that trials *in absentia* may be carried out under certain circumstances. A trial *in absentia* is one where the accused is not present, although he may be represented by counsel.⁴⁶⁵

For example, the Human Rights Committee (HRC) stated in General Comment No. 13 to Article 14(3)(d) of the ICCPR that trials *in absentia* can be held “exceptionally” and “for justified reasons.”⁴⁶⁶ While General Comment No. 13 does not provide examples of what constitutes “justified reasons,” in the *Mbenge v. Zaire* case, the HRC found that trials *in absentia* are not inherently incompatible with the ICCPR and are permissible where, for example, “the accused person, although informed of the proceedings sufficiently in advance, declines to exercise his right to be present.”⁴⁶⁷ Certain safeguards must be respected in order for trials *in absentia* to

⁴⁶³ See, e.g., *European Convention on Human Rights* art. 6(3) (1950), available at https://www.echr.coe.int/documents/convention_eng.pdf; *International Covenant on Civil and Political Rights* art. 14(3)(d) (1966), available at <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>.

⁴⁶⁴ *Directive of the European Parliament and of the Council [of the EU] of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings*, art. 8(1) (2016), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016L0343>. See also Richard Dicker and Brad Adams, *Comments on the ECCC Draft Internal Rules*, HUMAN RIGHTS WATCH (Nov. 17, 2006), available at https://www.hrw.org/sites/default/files/related_material/Letter%20Cambodia-HRW-ECCC%20Rules%2011.17.06_0.pdf; *Colozza v. Italy*, Eur. Ct. H.R. App. No. 9024/80, para. 27 (1985), available at https://www.juridice.ro/wp-content/uploads/2018/04/CASE_OF_COLOZZA_v_ITALY_08.pdf.

⁴⁶⁵ Some commentators have coined the term “total trial *in absentia*” for instances where an accused is not present and not represented by counsel, while a “partial trial *in absentia*” is a trial where the accused is not present but represented, where the accused is absent for parts of the proceeding, or where the accused has explicitly waived their right to be present. See Mohammad Hadi Zakerhossein and Anne-Marie De Brouwer, *Diverse Approaches to Total and Partial in Absentia Trials by International Criminal Tribunals*, 26 CRIMINAL LAW FORUM 181, 183 (2015). See also European Commission, *Proposal for a Council framework Decision on the European arrest warrant and the surrender procedures between the Member States* (Sept. 19, 2001), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52001PC0522> (defining trials *in absentia* as: “any judgement rendered by a court after criminal proceedings at the hearing of which the sentenced person was not personally present. It shall not include a judgement given in proceedings in which it is clearly established that the person was effectively served with a summons, in time to enable him or her to appear and to prepare his or her defence, but he or she deliberately decided not to be present or represented, unless it is established that his or her absence and the fact that he or she could not inform the judge thereof were due to reasons beyond his or her control[.]”) (emphasis added).

⁴⁶⁶ U.N. Human Rights Comm., CCPR General Comment No. 13: Article 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (Apr. 13, 1984), available at <https://www.refworld.org/docid/453883f90.html>.

⁴⁶⁷ U.N. Human Rights Comm., *Mbenge v. Zaire*, para. 14.1, U.N. Doc. CCPR/C/OP/2 (Mar. 25, 1983), available at http://www.worldcourts.com/hrc/eng/decisions/1983.03.25_Mbenge_v_Zaire.htm (stating: “According to Article 14(3) of the Covenant, everyone is entitled to be tried in his presence and to defend himself in person or through legal assistance. This provision and other requirements of due process enshrined in Article 14 cannot be construed as invariably rendering proceedings in absentia inadmissible, irrespective of the reasons for the accused person’s absence. Indeed, proceedings *in absentia* are in some circumstances (for instance, when the accused person, although informed of the proceedings sufficiently in advance, declines to exercise his right to be present) permissible in the interest of the proper administration of justice”).

be compliant with the ICCPR. In particular, the accused must be timely summoned and informed as to the date and the place of the trial.⁴⁶⁸ In the event that the accused cannot be found and a trial *in absentia* is conducted, the accused generally has a right to a retrial.⁴⁶⁹ Merely exercising due diligence in attempting to notify the accused, in the absence of the right to retrial, is not sufficient.⁴⁷⁰

The jurisprudence of the ECtHR similarly establishes that trials *in absentia* are permissible where:

- The accused has actual knowledge of the indictment and proceedings and voluntarily chooses to be absent, stating so publicly or in writing;
- There is unequivocal evidence that the accused is aware of the indictment and proceedings and has chosen not to be present;
- The accused absconds; or
- The defendant is expelled from the courtroom due to their misconduct or continued interruptions.⁴⁷¹

So, for trials *in absentia* to proceed before the ECtHR, the prosecution must unequivocally show that the accused has waived their right to be present at trial.⁴⁷²

⁴⁶⁸ UN Human Rights Committee, General Comment No. 32, Right to Equality before Courts and Tribunals and to Fair Trial, para. 26, UN Doc. CCPR/C/GC/32 (July 27, 2007), available at <https://digitallibrary.un.org/record/606075?ln=en>.

⁴⁶⁹ U.N. Human Rights Comm., *Maleki v. Italy*, paras. 9.4-9.5, U.N. Doc. CCPR/C/66/D/669/1996 (July 27, 1999), available at <http://hrlibrary.umn.edu/undocs/session66/view699.htm> (stating, “The State party has not denied that Mr. Maleki was tried *in absentia*. However, it has failed to show that the author was summoned in a timely manner and that he was informed of the proceedings against him [...] the violation of the author’s right to be tried in his presence could have been remedied if he had been entitled to a retrial in his presence when he was apprehended in Italy”).

⁴⁷⁰ U. N. Human Rights Comm., *Maleki v. Italy*, para. 9.4, U.N. Doc. CCPR/C/66/D/669/1996 (July 27, 1999), available at <http://hrlibrary.umn.edu/undocs/session66/view699.htm> (“It merely states that it ‘assumes’ that the author was informed by his counsel of the proceedings against him in Italy. This is clearly insufficient to lift the burden placed on the State party if it is to justify trying an accused *in absentia*. It was incumbent on the court that tried the case to verify that the author had been informed of the pending case before proceeding to hold the trial *in absentia*. Failing evidence that the court did so, the Committee is of the opinion that the author’s right to be tried in his presence was violated.”).

⁴⁷¹ Caleb H. Wheeler, *Shifting priorities: are attitudes changing at the International Criminal Court about trials in absentia?*, 21 INTERNATIONAL CRIMINAL LAW REVIEW 11, 12 (2021); *Shkalla v. Albania*, Eur. Ct. H.R. App. No. 26866/05, para. 70 (2011), available at <https://hudoc.echr.coe.int/eng?i=001-104711> (citing *Iavarazzo v. Italy*, Eur. Ct. H.R. App. No. 50489/99 (2001)); Elizabeth Herath, *Trials in Absentia: Jurisprudence and Commentary on the Judgment in Chief Prosecutor v. Abul Kalam Azad in the Bangladesh International Crimes Tribunal*, 55 HARVARD INTERNATIONAL LAW JOURNAL 5, 6 (2014), available at https://harvardilj.org/wp-content/uploads/sites/15/2014/06/HILJ-Online_volume-55_Herath.pdf.

⁴⁷² *Poitrimol v. France*, Eur. Ct. H.R. App. No. 14032/88, para. 31 (1993), available at <https://www.legal-tools.org/doc/480f4d/pdf> (“Such a waiver [of the right to appear and to defend himself] must, if it is

In the event that the prosecution fails to unequivocally establish such a waiver, if it can prove nonetheless that there have been attempts to communicate the indictment and proceedings to the accused (*e.g.*, by announcing them to the public), a trial *in absentia* may be conducted.⁴⁷³ The ECtHR’s jurisprudence further establishes that a defendant has the right to legal representation irrespective of presence during the trial.⁴⁷⁴

Similarly, Directive (EU) 2016/343 of the European Parliament and of the Council [of the EU] of March 9, 2016 allows for trials *in absentia* under Article 8(2) where the accused “*has been informed, in due time, of the trial and of the consequences of non-appearance*” or having been informed “*is represented by a mandated lawyer, who was appointed either by the suspect or accused person or by the State.*”⁴⁷⁵ If the conditions of Article 8(2) cannot be met, Articles 8(4) and 9 provide that a trial *in absentia* can be conducted as long as the accused has “*the right to a new trial, or to another legal remedy, which allows a fresh determination of the merits of the case, including examination of new evidence, and which may lead to the original decision being reversed.*”⁴⁷⁶

In the event of an absence of the accused due to reasons beyond their control (*i.e.*, illness, could not be located), the European Court of Justice has found that a trial *in absentia* would be compliant with the Directive if:

“*following that hearing, he was informed of the steps taken in his absence and, with full knowledge of the situation, decided and stated either that he would not call the lawfulness of those steps into question in reliance on his non-appearance, or that he wished to participate in those steps, leading the national court hearing the case to repeat those steps.*”⁴⁷⁷

to be effective for Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance.”).

⁴⁷³ See generally *Krombach v. France*, Eur. Ct. H.R. App. No. 29731/96 (2001), available at <https://hudoc.echr.coe.int/fre?i=002-5787>.

⁴⁷⁴ *Pelladoah v. The Netherlands*, Eur. Ct. H.R. App. No. 16737/90, para. 40 (1994), available at <http://www.worldlii.org/eu/cases/ECHR/1994/31.html> (stating that “it is also of crucial importance for the fairness of the criminal justice system that the accused be adequately defended, both at first instance and on appeal”).

⁴⁷⁵ Directive of the European Parliament and of the Council [of the EU] of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, Article 8(2) (EU 2016), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016L0343>.

⁴⁷⁶ Directive of the European Parliament and of the Council [of the EU] of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, Articles 8(4) and 9 (EU 2016), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016L0343>.

⁴⁷⁷ Case C-688/18, *Spetsializirana Prokuratura (Hearing in the Absence of the Accused Person)* [2020] ECLI:EU:C:2020:94, para. 49.

Although the accused would in principle have the right to a retrial, that person “*may, however, be denied that right if it is apparent from precise and objective indicia that he or she received sufficient information to know that he or she was going to be brought to trial and, by deliberate acts and with the intention of evading justice, prevented the authorities from informing him or her officially of that trial.*”⁴⁷⁸ Such objective indicia could exist, according to the European Court of Justice, “*where [the accused] person has deliberately communicated an incorrect address to the national authorities having competence in criminal matters or is no longer at the address that he or she has communicated*” as a deliberate step “*to avoid receiving officially the information regarding the date and place of the trial.*”⁴⁷⁹

In sum, the ICCPR, ECHR, and EU law all permit trials *in absentia* subject to certain safeguards. In general, there must be either: (i) an unequivocal waiver of the accused’s right to be present at trial after being properly informed of the charges against them; or (ii) in the event that the accused cannot be informed of the proceedings, a right to a retrial, potentially save where the accused has absconded.

b) The Practice of International Tribunals

International tribunals typically prohibit carrying out trials *in absentia*. This was not always the case. The Nuremberg Tribunal, one of the first international tribunals, allowed for trials *in absentia* where the accused had not been found or “*if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence.*”⁴⁸⁰

However, international tribunals constituted as of the 1990s have not carried out trials *in absentia*. For example, neither the ICTR nor the ICTY permit trials *in absentia*, with the ICTR and ICTY Statutes providing that the accused had the right “*to be tried in his or her presence, and to defend himself or herself in person or*

⁴⁷⁸ Case C-569/20, *Spetsializirana Prokuratura (Trial of an Absconded Accused Person)* [2022] ECLI:EU:C:2022:401, para. 59.

⁴⁷⁹ Case C-569/20, *Spetsializirana Prokuratura (Trial of an Absconded Accused Person)* [2022] ECLI:EU:C:2022:401, paras. 48-49.

⁴⁸⁰ Mohammad Hadi Zakerhossein and Anne-Marie De Brouwer, *Diverse Approaches to Total and Partial in Absentia Trials by International Criminal Tribunals*, 26 CRIMINAL LAW FORUM 181, 185 (2015) (citing the Nuremberg IMT Charter) (emphasis added). See also Mohammad Hadi Zakerhossein and Anne-Marie De Brouwer, *Diverse Approaches to Total and Partial in Absentia Trials by International Criminal Tribunals*, 26 CRIMINAL LAW FORUM 181, 185 (2015) (citing the Rule 2 (b) of the Nuremberg IMT Rules of Procedure, which further established that “any individual defendant not in custody shall be informed of the indictment against him.”).

through legal assistance of his or her own choosing.”⁴⁸¹ The difference in approach when compared to the Nuremberg Tribunal was largely due to a divide between common and civil law countries, with common law countries opposed to, and civil law countries in favor of, trials *in absentia*.⁴⁸² The ICTR and the ICTY provide for what is known as “Rule 61 proceedings.” These proceedings were not trials, but rather “a reconfirmation of the indictment.”⁴⁸³ Where the prosecutor can prove that “reasonable steps have been taken to secure the arrest of the accused and to ascertain his whereabouts,” the indictment and the collected evidence, including witness testimony, are presented in a public court.⁴⁸⁴ If the Trial Chamber is satisfied that “there [were] reasonable grounds to believe that the accused [had] committed all or any of the crimes charged in the indictment,” it would issue an international arrest warrant.⁴⁸⁵ The intent of Rule 61 was not to convict the accused, but rather to provide some form of reprisal to the victims and to publicize the heinous nature of the alleged crimes in an effort to mobilize nations into assisting the tribunal in apprehending the suspects.⁴⁸⁶

⁴⁸¹ Statute of the ICTR, Article 20 (Nov. 4, 1994), available at https://legal.un.org/avl/pdf/ha/ictr_EF.pdf; Statute of the ICTY Article 21 (May 25, 1993), available at https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf (stating with slightly different language that the accused has the right “to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing”).

⁴⁸² Carlo Tiribelli, *Judgment in Absentia in International Criminal Law: Its Admissibility before the Ad Hoc Tribunals, the International Criminal Court and the European Arrest Warrant*, 18 SRI LANKA JOURNAL OF INTERNATIONAL LAW 369, 371 (2006) (“The absence of provision for trial *in absentia* in the Statute of either Tribunal reflects the wishes of countries of common law tradition, which refuse, on account of their requirements in this regard (fair trial, due process of law), to allow a trial to be held in the absence of the accused. The omission has, on the other hand, greatly disappointed civil law experts (trial *in absentia* having been provided for in the French draft.)”); Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, para. 101, delivered to the Security Council and General Assembly, U.N. Doc. 2/25704 (May 3, 1993), available at https://www.securitycouncilreport.org/atf/cf/%7B6B5F9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/ICTY%20S%2025704%20statute_re808_1993_en.pdf (where then UN Security-General Boutros Boutros-Ghali stated that “a trial should not commence until the accused is physically present before the International Tribunal. There is a widespread perception that trials *in absentia* should not be provided for in the [ICTY] statute as this would not be consistent with article 14 of the ICCPR”).

⁴⁸³ Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, Rule 61 (Feb. 11, 1994), available at https://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf; Mohammad Hadi Zakerhossein and Anne-Marie De Brouwer, *Diverse Approaches to Total and Partial in Absentia Trials by International Criminal Tribunals*, 26 CRIMINAL LAW FORUM 181, 189 (2015).

⁴⁸⁴ Mohammad Hadi Zakerhossein and Anne-Marie De Brouwer, *Diverse Approaches to Total and Partial in Absentia Trials by International Criminal Tribunals*, 26 CRIMINAL LAW FORUM 181, 189 (2015).

⁴⁸⁵ Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, Rule 61 (Feb. 11, 1994), available at https://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf.

⁴⁸⁶ Prosecutor v. Rajic (Separate Opinion of Judge Sidhwa, Rule 61 Decision), Case No. IT-95-12-TC, para. 7 (Sept. 13, 1996) (“Rule 61 is basically an apology for this Tribunal’s helplessness in not being able to effectively carry out its duties, because of the attitude of certain states that do not want to arrest or surrender accused persons, or even to recognize or cooperate with the Tribunal. In such circumstances, it is the International Tribunal’s painful and regrettable duty to adopt the next effective procedure to inform the world, through open public hearings, of the terrible crimes with which the accused is charged and the evidence against the accused that would support his conviction at trial.”).

The Rome Statute likewise prohibits carrying out trials *in absentia*, as the Statute provides that the “*accused shall be present during the trial.*”⁴⁸⁷ The Rome Statute, however, provides that the “*confirmation of the charges before trial*” may be held in the absence of the accused when the accused has waived their right to be present or has absconded.⁴⁸⁸ Recently, the ICC has indicated a willingness to conduct trials where the accused is not present throughout the totality of the proceedings. Practical necessities have led to reforms of the Rome Statute to allow for certain proceedings to be held in the absence of the accused (*e.g.*, the defendant is allowed to excuse themselves from certain hearings “*due to extraordinary public duties*”).⁴⁸⁹ Further, in *Prosecutor v. Gbagbo et al.*, the ICC’s Appeals Chamber stated that “[s]hould [the accused] wilfully fail to reappear before the Court for any future proceedings in this case, such proceedings could in principle continue without their physical presence.”⁴⁹⁰ The Appeals Chamber reasoned that “any suspect or accused (or in this case, acquitted person) who has physically appeared before the Court pursuant to article 60, has crossed the threshold of the Court’s effective exercise of jurisdiction.”⁴⁹¹ Article 63 was intended to protect the rights of an accused who cannot be present through no fault of their own and not to “prevent his or her own trial by deliberate absence.”⁴⁹² The Appeals Chamber also stated that this interpretation is consistent with “general principles of international law.”⁴⁹³ This decision has proven to be controversial, with “Judges Kourula and Judge Ušaka [stating] that the ordinary meaning of Article 63(1) demonstrates that trial must take place in the presence of the accused.”⁴⁹⁴

⁴⁸⁷ *Rome Statute of the International Criminal Court* art. 63 (1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>. Similarly to the ICTY and ICTR, the position against trials *in absentia* was led by common law countries. In particular, the United States expressed the view that the ICC “should not be tempted to seek the easier route of hearing cases *in absentia* when the custody of accused persons became difficult to obtain. Rather, every effort should be made to ensure that States complied with obligations to surrender fugitives.” Additionally, there was a concern that the issuance of judgments which could not be enforced by the ICC would bring the ICC into disrepute. See Carlo Tiribelli, *Judgment in Absentia in International Criminal Law: Its Admissibility before the Ad Hoc Tribunals, the International Criminal Court and the European Arrest Warrant*, 18 SRI LANKA JOURNAL OF INTERNATIONAL LAW 369, 374, 379 (2006).

⁴⁸⁸ *Rome Statute of the International Criminal Court* art. 61(2) (1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

⁴⁸⁹ Rules of Procedure and Evidence of the International Criminal Court, Rules 134*bis*, 134*ter*, 134*quarter* (Sept. 30, 2022), available at <https://www.icc-cpi.int/sites/default/files/Publications/Rules-of-Procedure-and-Evidence.pdf>.

⁴⁹⁰ *Prosecutor v. Gbagbo et al.*, Case No. ICC-02/11-01/15, para. 68 (May 28, 2020), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_02169.PDF.

⁴⁹¹ *Prosecutor v. Gbagbo et al.*, Case No. ICC-02/11-01/15, para. 68 (May 28, 2020), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_02169.PDF.

⁴⁹² *Prosecutor v. Gbagbo et al.*, Case No. ICC-02/11-01/15, para. 69 (May 28, 2020), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_02169.PDF.

⁴⁹³ *Prosecutor v. Gbagbo et al.*, Case No. ICC-02/11-01/15, para. 70 (May 28, 2020), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_02169.PDF.

⁴⁹⁴ Caleb H. Wheeler, *Shifting priorities: are attitudes changing at the International Criminal Court about trials in absentia?* INTERNATIONAL CRIMINAL LAW REVIEW, 21 (1), 7, 6 (2021).

Indeed, only two international criminal tribunals have allowed trials *in absentia* in certain circumstances: the SCSL and the STL. For instance, Rule 60(a) of the Rules of Procedure and Evidence of the SCSL provides that trials *in absentia* may be conducted when an accused either waives their right to be present after an initial appearance or absconds.⁴⁹⁵ In practice, the SCSL found, in *Prosecutor v. Sesay et al.*, that the absence of an accused cannot “*impede the administration of justice or frustrate the ends of justice.*”⁴⁹⁶ The ruling came in response to one of the accused’s refusal to attend any further hearings because he did not recognize the legitimacy of the SCSL.⁴⁹⁷ This sentiment was echoed in *Prosecutor v. Norman et al.*, where the SCSL found that it is not “*in the interests of justice to allow the Accused’s deliberate absence from the courtroom to interrupt the trial*” and that any deliberate absence would “*certainly undermine the integrity of the trial and [would] not be in the interests of justice.*”⁴⁹⁸

Moreover, there is one domestic tribunal that tries international crimes, the Bangladeshi International Crimes Tribunal, which is constituted under domestic law,⁴⁹⁹ and conducted a trial *in absentia* in *Prosecutor v. Azad*.⁵⁰⁰ The Tribunal determined that the international law requirements to conduct a trial *in absentia* had been satisfied by giving notice to the accused via public announcements after the accused had absconded as reported by the Dhaka Metropolitan Police.⁵⁰¹ The Tribunal also relied on the practice of the STL. The Statute of the STL allows for trials *in absentia* where the accused (i) “[*h*]as expressly and in writing waived his or her right to be present,” (ii) “[*h*]as not been handed over to the Tribunal by the State authorities concerned,” or (iii) “[*h*]as absconded or otherwise cannot be found and all reasonable steps have been taken to secure his or her appearance

⁴⁹⁵ Rules of Procedure and Evidence of the Residual Special Court for Sierra Leone, Rule 60(a) (Mar. 7, 2003), available at <http://www.rscsl.org/Documents/RSCSL-Rules.pdf> (stating that an accused may be tried in their absence if “(i) the accused has made his initial appearance, has been afforded the right to appear at his own trial, but refuses to do so; or (ii) the accused, having made his initial appearance, is at large and refuses to appear in court”).

⁴⁹⁶ *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Trial Chamber, Ruling on the Issue of the Refusal of the Third Accused, Augustine Gbao, to Attend Hearing of the Special Court of Sierra Leone on 7 July 2004 and Succeeding Days, para. 8 (July 12, 2004).

⁴⁹⁷ Caleb H. Wheeler, *Shifting priorities: are attitudes changing at the International Criminal Court about trials in absentia?* INTERNATIONAL CRIMINAL LAW REVIEW, 21 (1), 25, 26 (2021).

⁴⁹⁸ *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-PT, Trial Chamber, Ruling on the Issue of Non-Appearance of the First Accused, Samuel Hinga Norman, The Second Accused, Moinina Fofana and the Third Accused, Allieu Kondewa at the Trial Proceedings, para. 22 (Oct. 1, 2004).

⁴⁹⁹ See *The International Crimes Tribunal-1, Bangladesh*, ABUT ICT-BD (Sept. 15, 2015), available at <http://www.ict-bd.org/ict1/indexdetails.php>.

⁵⁰⁰ Chief Prosecutor v. Maulana Abul Kalam Azad, alias Bachu (trial *in absentia*), ICT-BD Case No. 05 of 2012 (Jan. 22, 2013), available at <https://www.derechos.org/intlaw/doc/ict2azad.html>.

⁵⁰¹ Chief Prosecutor v. Maulana Abul Kalam Azad, alias Bachu (trial *in absentia*), ICT-BD Case No. 05 of 2012, para. 20 (Jan. 22, 2013), available at <https://www.derechos.org/intlaw/doc/ict2azad.html>.

before the Tribunal and to inform him or her of the charges confirmed by the Pre-Trial Judge.”⁵⁰² In the event that the STL conducts a trial *in absentia*, the accused has the right to be represented in said proceedings, whether they do so by counsel of their choosing or not.⁵⁰³ The International Bar Association found that these protections were in compliance with international law and human rights, in particular the ICCPR.⁵⁰⁴

Some commentators have criticized the STL’s openness to conduct trials *in absentia*.⁵⁰⁵ The criticism is rooted in two concerns. First, the accused is not assured a retrial,⁵⁰⁶ and second, the STL Statute seemingly disposes of the duty to establish actual notice by simply “*notifying*” an accused via public statements. These criticisms are also levied against the Bangladeshi International Crimes Tribunal.⁵⁰⁷

c) Application to a Crime of Aggression Tribunal

If a Crime of Aggression Tribunal were to permit trials *in absentia*, this is likely to give rise to criticisms, as carrying out these types of trials is not consistent with international practice. If the trials nonetheless go forward *in absentia*, special attention must be paid to (i) the way in which the accused is deemed to be aware of the indictment and (ii) the accused’s right to a retrial. As to the first, the practicality of notifying an accused that is at large must be taken into account. While certain international criminal tribunals, such as the Nuremberg Tribunal, the STL, and the Bangladeshi International Crimes Tribunal, have satisfied this requirement by way of public notice, this method has been criticized and there is an argument that it does not comply with the ICCPR, ECHR, or EU law. As to the second, a procedure for the retrial of someone tried *in absentia* must be contemplated, taking into account that the Crime of Aggression Tribunal may not be permanent and that reconvening for a retrial years after its dissolution may not be practical.

⁵⁰² *Statute of the Special Tribunal for Lebanon*, art. 22 (Mar. 29, 2006), available at <https://www.stl-tsl.org/en/documents/legal-documents/statute-of-the-tribunal>.

⁵⁰³ Mohammad Hadi Zakerhossein and Anne-Marie De Brouwer, *Diverse Approaches to Total and Partial in Absentia Trials by International Criminal Tribunals*, 26 CRIMINAL LAW FORUM 181, 196 (2015).

⁵⁰⁴ *Report on the ‘Experts’ Roundtable on trials in absentia in international criminal justice*, IBA INTERNATIONAL CRIMINAL COURT AND INTERNATIONAL CRIMINAL LAW PROGRAMME, 8 (Sept. 2016), available at <https://www.ibanet.org/document?id=Experts-roundtable-trials-in-absentia>.

⁵⁰⁵ Maya Trad, *Trials in Absentia at the Special Tribunal for Lebanon: An Effective Measure of Expediency or an Inconsistency with Fair Trade Standards*, 3 SOAS LAW JOURNAL 38, 42 (2016).

⁵⁰⁶ Maya Trad, *Trials in Absentia at the Special Tribunal for Lebanon: An Effective Measure of Expediency or an Inconsistency with Fair Trade Standards*, 3 SOAS LAW JOURNAL 38, 45 (2016).

⁵⁰⁷ Elizabeth Herath, *Trials in Absentia: Jurisprudence and Commentary on the Judgment in Chief Prosecutor v. Abul Kalam Azad in the Bangladesh International Crimes Tribunal*, 55 HARVARD INTERNATIONAL LAW JOURNAL 5, 9-12 (2014), available at https://harvardilj.org/wp-content/uploads/sites/15/2014/06/HILJ-Online_volume-55_Herath.pdf.

Finally, in the event that the requirements to conduct a trial *in absentia* are not satisfied (e.g., it cannot be ascertained that the accused has waived their right to be present but they are nonetheless at large), an *in absentia* proceeding like the ICTY's Rule 61 proceeding should also be considered. As noted above, such a mechanism would provide a means for the tribunal to expose the reality of crimes of aggression to the international community—in the hopes that there would be more cooperation in apprehending the accused—and would allow for a measure of redress for the victims.

Retroactivity of Applicable Law and Temporal Jurisdiction

Domestic jurisdictions almost universally recognize the principle of non-retroactivity in the context of criminal law.⁵⁰⁸ The principle is also recognized by international human rights treaties,⁵⁰⁹ and by the European Court of Human Rights.⁵¹⁰

In general, criminal laws are applied retroactively only insofar as the laws in question codify crimes that existed under customary international law at the time of the offense.⁵¹¹ The status of the crime of aggression under customary international law is not entirely clear-cut. On the one hand, incomplete ratification of the Kampala Amendments to the Rome Statute suggests that state practice is still far from uniform.⁵¹² Some *opinio juris* also weighs against a clear finding that the

⁵⁰⁸ See, e.g., U.S. CONST. Article I sec. 10 (“No State shall ... pass any Bill of Attainder, *ex post facto* Law....”); Canadian Charter of Rights and Freedoms sec. 11(g); see also Yarik Kryvoi, Shaun Matos, *Non-Retroactivity as a General Principle of Law*, 17 UTRECHT LAW REVIEW 46, 49-51 (2021).

⁵⁰⁹ See, e.g., *European Convention on Human Rights* art. 7 (1950), available at https://www.echr.coe.int/documents/convention_eng.pdf; *International Covenant on Civil and Political Rights* art. 15 (1966), available at <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>; *Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea* art. 99 (1949), available at https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.32_GC-III-EN.pdf.

⁵¹⁰ The ECtHR has found that ECHR Article 7 “unconditionally prohibits the retrospective application of the criminal law where it is to an accused’s disadvantage.” *Del Rio Prada v. Spain*, Eur. Ct. H.R. App. No. 42750/09, para. 116 (2013), available at <https://hudoc.echr.coe.int/eng?i=001-127697>.

⁵¹¹ See, e.g., *War Crimes Act* ch. 13 (U.K. 1991), available at <https://www.legislation.gov.uk/ukpga/1991/13#:~:text=1991%20CHAPTER%2013,War%3B%20and%20for%20connected%20purposes> (giving UK domestic courts jurisdiction over war crimes committed during the Second World War where those offences “constituted a violation of the laws and customs of war”).

⁵¹² As of May 1, 2023, only 45 States have ratified the Kampala Amendment on aggression to the Rome Statute thus far. See 10. b Amendments on the Crime of Aggression to the Rome Statute of the International Criminal Court, United Nations Treaty Collection (June 11, 2010), available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-b&chapter=18&clang=_en.

crime of aggression has obtained the status of customary international law.⁵¹³ On the other hand, however, the Nuremberg and Tokyo Tribunals established after World War II both exercised jurisdiction with respect to “*crimes against peace*,” an analogous charge to the crime of aggression.⁵¹⁴ After a detailed historical review, both Tribunals found that aggressive war had been criminalized since at least the early 20th century.⁵¹⁵ Moreover, the UN General Assembly in 1946 unanimously reaffirmed the principles established in the Nuremberg Tribunal,⁵¹⁶ which undermines the claims that such principles reflect only customary international law espoused by the victorious World War II powers.⁵¹⁷ The UK House of Lords in 2006 similarly found the crime of aggression to be established under customary international law.⁵¹⁸ As a consequence, a number of scholars of international law have concluded that the crime of aggression has obtained the status of customary international law.⁵¹⁹

Thus, the principle of non-retroactivity is unlikely to bar the prosecution of officials by a Crime of Aggression Tribunal that is created after the alleged crimes were committed as there appears to be an emerging consensus that the crime of aggression has obtained the status of customary international law.

⁵¹³ See, e.g., Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 95 AMERICAN JOURNAL OF INTERNATIONAL LAW 387, 400 (2001) (during the course of ICC preparatory meetings in 2000, Theodor Meron of the U.S. State Department Office of the Legal Advisor stated, with respect to UN General Assembly Resolution 3314, “At the time of its adoption, the Resolution did not ... restate already existing customary international law.”). But see Antonio Cassese et al. (eds.), *CASSESE’S INTERNATIONAL CRIMINAL LAW* 143 n. 24 (3rd ed. 2013) (dismissing Meron’s statements as “immaterial to the existence of the customary rules [relating to the crime of aggression], for it is an isolated statement not supported by similar views of other states”).

⁵¹⁴ See Charter of the International Military Tribunal, art. 6(a) (1945), available at https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.2_Charter%20of%20IMT%201945.pdf; Charter of the International Military Tribunal for the Far East, art. 5(a) (1946), available at https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.3_1946%20Tokyo%20Charter.pdf.

⁵¹⁵ See Preparatory Commission for the International Criminal Court, *Historical Review of Developments Relating to Aggression*, paras. 56-57, 169, 288 (2003), available at <https://legal.un.org/cod/books/HistoricalReview-Aggression.pdf>.

⁵¹⁶ See U.N. General Assembly Resolution 95(I) (Dec. 11, 1946), available at https://legal.un.org/avl/pdf/ha/ga_95-I/ga_95-I_ph_e.pdf. Further to a subsequent General Assembly resolution, the ILC formulated the principles of international law recognized in the Nuremberg Tribunal. It found, *inter alia*, that the Tribunal stood for the proposition that the “[p]lanning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances” constitutes a crime under international law. Yearbook of the International Law Commission 1950, Vol II, p. 374, delivered to the General Assembly, A/CN.4/SER.A/1950/Add. 1 (June 6, 1957), available at https://legal.un.org/ilc/publications/yearbooks/english/ilc_1950_v2.pdf.

⁵¹⁷ See, e.g., Geoffrey Robertson, *CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE*, 316-324, Penguin (2006).

⁵¹⁸ *R. v. Jones* [2006] UKHL 16 ¶ 19 (appeal taken from Court of Appeal (Crim. Div.)).

⁵¹⁹ See Antonio Cassese et al. (eds.), *CASSESE’S INTERNATIONAL CRIMINAL LAW* 142-43 (3rd ed. 2013); Constantine Antonopoulos, *Aggression in International Law*, OXFORD BIBLIOGRAPHIES (Oct. 30, 2019), available at <https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0061.xml>.

Political Landscape

As discussed, there is strong support within Europe for the creation of a Crime of Aggression Tribunal. Nevertheless, certain economic and political factors might impact efforts to establish a Crime of Aggression Tribunal. We discuss the various factors affecting the political landscape below.

Political Considerations

Significant support exists in Europe for the creation of a tribunal to prosecute the crimes committed by Russia, including the crime of aggression. Both the European Parliament⁵²⁰ and the Parliamentary Assembly of the COE called for the establishment of such a tribunal.⁵²¹

The Council of the EU has recently adopted a resolution on the fight against impunity regarding crimes committed in connection with Russia's war of aggression in Ukraine inviting the High Representative and the European Commission to explore options for ensuring accountability for crimes of aggression.⁵²²

Shortly thereafter, the European Commission expressed its support for the ICC's investigations into war crimes and crimes against humanity, but since the crime of aggression cannot be prosecuted by the ICC as Russia has not accepted the ICC's jurisdiction, the European Commission has proposed alternative solutions.⁵²³

⁵²⁰ See European Parliament, *Joint Motion for a Resolution on Human Rights Violations in the Context of the Forced Deportation of Ukrainian Civilians to and the Forced Adoption of Ukrainian Children in Russia* (2022/2825(RSP)) (Sept. 14, 2022), available at https://www.europarl.europa.eu/doceo/document/RC-9-2022-0388_EN.pdf; see also European Parliament, *Resolution of May 19, 2022 on the fight against impunity for war crimes in Ukraine* (2022/2655(RSP)), available at https://www.europarl.europa.eu/doceo/document/TA-9-2022-0218_EN.html (“Calls on the EU institutions, in particular the Commission, to support the creation without delay of an appropriate legal basis to allow for the setting up of a special international tribunal for the punishment of the crime of aggression committed against Ukraine by the political leaders and military commanders of Russia and its allies; [and] calls on the EU institutions, in particular the Commission, to seek political support from like-minded international partners and organizations, in particular the UN General Assembly, for the establishment of this tribunal [and] to provide, as soon as possible, all the necessary human and budgetary resources and administrative, investigative and logistic support for the establishment of this tribunal...”).

⁵²¹ The Parliamentary Assembly of the Council of Europe, Resolution No. 2436 (Apr. 28, 2022), available at: <https://pace.coe.int/pdf/fa02a5672334527444dc210c5dab03df71864ae0fc169d8a890d751b53efdec1/resolution%202436.pdf>.

⁵²² Council conclusions on the fight against impunity regarding crimes committed in connection with Russia's war of aggression against Ukraine, COUNCIL OF THE EUROPEAN UNION (Nov. 29, 2022), available at https://data.consilium.europa.eu/doc/document/ST-15237-2022-INIT/en/pdf?utm_source=dsms-auto&utm_medium=mail&utm_campaign=Council+adopts+conclusions+on+the+fight+against+impunity+in+Russia%e2%80%99s+war+of+aggression+against+Ukraine.

⁵²³ *Ukraine: Commission presents options to make sure that Russia pays for its crimes*, EUROPEAN COMMISSION (Nov. 30, 2022), available at https://ec.europa.eu/commission/presscorner/detail/en/IP_22_7311.

The proposals are to set up either (1) a special independent international tribunal based on a multilateral treaty or (2) a specialized hybrid court integrated into a national justice system with international judges.⁵²⁴ The President of the European Commission has stressed that Russia shall “*pay for its horrific crimes.*”⁵²⁵

On January 18, 2023, the European Parliament passed a resolution on the establishment of a tribunal on the crime of aggression against Ukraine, calling for the “*EU institutions and the Member States to work in close cooperation with Ukraine to seek and build political support in the UN General Assembly and other international forums, including the [COE], the OSCE and the G7, for creating the special tribunal for the crime of aggression against Ukraine.*”⁵²⁶ The Members of the European Parliament urged the EU to begin the preparatory works without delay.⁵²⁷ The resolution also notes that “*the establishment of the special tribunal would complement the investigative efforts of the ICC and its Prosecutor, as it would focus on alleged genocide, war crimes and crimes against humanity committed in Ukraine.*”⁵²⁸

Shortly thereafter, on January 26, 2023, the Parliamentary Assembly of the COE adopted a resolution, once again calling for the establishment of a Crime of Aggression Tribunal to prosecute “[t]he Russian and Belarusian political and military leaders who planned, prepared, initiated or executed these acts, and who were in a position to control or direct the political or military action of the State.”⁵²⁹

On February 2, 2023, at a joint press-conference with Ukrainian President Volodymyr Zelenskyy in Kyiv, European Commission President Ursula von der Leyen announced the establishment of a Hague-based International Centre for the

⁵²⁴ *Ukraine: Commission presents options to make sure that Russia pays for its crimes*, EUROPEAN COMMISSION, (Nov. 30, 2022), available at https://ec.europa.eu/commission/presscorner/detail/en/IP_22_7311.

⁵²⁵ Speech of Ursula von der Leyen, (Nov. 30 2022), available at <https://twitter.com/i/status/1597888002436796417>

⁵²⁶ European Parliament, *Resolution on the Establishment of a Tribunal on the Crime of Aggression against Ukraine* (2022/3017(RSP)) (Jan. 17, 2023), available at https://www.europarl.europa.eu/doceo/document/RC-9-2023-0063_EN.html.

⁵²⁷ European Parliament, *Resolution on the Establishment of a Tribunal on the Crime of Aggression against Ukraine* (2022/3017(RSP)) (Jan. 17, 2023), available at https://www.europarl.europa.eu/doceo/document/RC-9-2023-0063_EN.html.

⁵²⁸ European Parliament, *Resolution on the Establishment of a Tribunal on the Crime of Aggression against Ukraine* (2022/3017(RSP)) (Jan. 17, 2023), available at https://www.europarl.europa.eu/doceo/document/RC-9-2023-0063_EN.html.

⁵²⁹ The Parliamentary Assembly of the Council of Europe, Resolution No. 2482 (Jan. 23, 2023), available at <https://pace.coe.int/pdf/c7fbe351cabf5b7a5ddfaa8a1b21f06841e9128cd2da8bd1bc2211277e4e666a/resolution%202482.pdf>.

Prosecution of the Crime of Aggression in Ukraine.⁵³⁰ According to her, the Centre will be embedded in the joint investigation team, which is supported by Eurojust, and will coordinate the collection of evidence.⁵³¹ It is too soon to say for certain, but this may indicate waning support for a Crime of Aggression Tribunal created outside of the UN system.

Economic Factors and Energy Security

As of late 2022, the global economy was expected to slow due in part to inflationary pressures resulting from the desire to move away from Russian energy supplies.⁵³² Wholesale prices of electricity and gas surged 15-fold in comparison to early 2021,⁵³³ while the consumer electricity prices in the EU were 35% higher than in 2021.⁵³⁴ In May 2022, the EU unveiled a EUR 220 billion plan to free itself of dependence on Russian oil and gas.⁵³⁵ In the second half of 2022, the EU introduced a plan to gradually reduce gas demand to avoid shortages or blackouts during winter,⁵³⁶ and the EU Energy Ministers in the Council of the EU adopted an emergency regulation aimed at overcoming the energy crisis by reducing electricity use, capping the revenues of electricity producers, and redistributing windfall profits

⁵³⁰ EU: Centre for prosecution of 'aggression' crimes in Ukraine to be set up in the Hague, REUTERS, Feb. 2, 2023, available at <https://www.reuters.com/world/europe/eu-centre-prosecution-aggression-crimes-ukraine-be-set-up-hague-2023-02-02/>.

⁵³¹ European Commission to Set Up Center for Prosecution of Russia's 'Crime of Aggression,' VOICE OF AMERICA, Feb. 02, 2023, available at <https://www.voanews.com/a/european-commission-to-set-up-center-for-prosecution-of-russia-s-crime-of-aggression-/6945659.html>.

⁵³² Russia's war of aggression against Ukraine continues to create serious headwinds for global economy, OECD (Nov. 22 2022), available at <https://www.oecd.org/newsroom/russia-s-war-of-aggression-against-ukraine-continues-to-create-serious-headwinds-for-global-economy.htm>.

⁵³³ Jeromin Zettelmeyer et al., *The EU needs a grand bargain that reduces demand increases supply and keeps energy markets open* (Dec. 2022), available at <https://www.imf.org/en/Publications/fandd/issues/2022/12/ beating-the-european-energy-crisis-Zettelmeyer>.

⁵³⁴ Infographic – Energy crisis: Three EU-coordinated measures to cut down bills, COUNCIL OF THE EUROPEAN UNION, available at <https://www.consilium.europa.eu/en/infographics/eu-measures-to-cut-down-energy-bills/>.

⁵³⁵ Anna Cooban, *Europe plans to spend \$221 billion to ditch Russia's energy*, CNN BUSINESS, May 18, 2022, available at <https://edition.cnn.com/2022/05/18/energy/europe-repower-plan-russian-energy/index.html>.

⁵³⁶ Video Address of Ursula Von Der Leyen (July 20, 2022), available at <https://twitter.com/i/status/1549746723492429825>; Jorge Liboreiro, *Winter is coming: All you need to know about the EU's 15% gas reduction plan*, EURONEWS, July 27, 2022, available at <https://www.euronews.com/my-europe/2022/07/27/winter-is-coming-all-you-need-to-know-about-the-eus-15-gas-reduction-plan>;

Jennifer Rankin, *How does the EU plan to cut gas usage by 15% this winter?*, THE GUARDIAN, July 26, 2022, available at <https://www.theguardian.com/world/2022/jul/26/how-does-the-eu-plan-to-cut-gas-usage-by-15-this-winter>.

caused by high energy prices.⁵³⁷ In addition, the EU and member states worked to maximize gas storage reserves in the lead-up to winter.⁵³⁸

As of February 2023, the EU succeeded in eliminating its dependence on Russian fossil fuels almost entirely, having both secured alternative supplies of energy and banned the import of Russian diesel, gasoline, crude oil, and coal.⁵³⁹ This suggests that the EU member states' reluctance to antagonize Russia for reasons of energy security is unlikely to play an important role in hindering the EU's support for the establishment of a Crime of Aggression Tribunal.

Political Opposition within the EU and the COE

Certain states within the EU and the COE may ultimately elect not to support or to abstain from voting on measures for the establishment of a Crime of Aggression Tribunal.

For example, Hungary's actions and statements regarding the war on Ukraine have been somewhat inconsistent. In March and April 2022, Hungary voted in favor of various UNGA resolutions condemning Russian aggression and supporting Ukraine's political independence and territorial integrity.⁵⁴⁰ On the other hand, Hungary has banned weapon deliveries from crossing through Hungary,⁵⁴¹ and Prime Minister Orbán has considered lifting sanctions on Russia.⁵⁴²

⁵³⁷ *Infographic – Energy crisis: Three EU-coordinated measures to cut down bills*, COUNCIL OF EUROPEAN UNION, available at <https://www.consilium.europa.eu/en/infographics/eu-measures-to-cut-down-energy-bills/>.

⁵³⁸ *EU's underground gas storage is ready for winter*, GAS INFRASTRUCTURE EUROPE (Nov. 9, 2022), available at <https://www.gie.eu/press/eus-underground-gas-storage-is-ready-for-winter/>; *Europe's Energy Crunch*, BLOOMBERG, Jan. 13, 2023, available at <https://www.bloomberg.com/graphics/europe-energy-crisis-updates>.

⁵³⁹ *Europe Kicks Its Dependence on Russian Fossil Fuels*, BLOOMBERG, Feb. 21, 2023, available at <https://www.bloomberg.com/graphics/2023-europe-energy-crisis-updates-fossil-fuels>; *Europe Cuts Addiction to Russian Energy, Yet Fuel Scramble Continues*, WSJ, Feb. 3, 2023, available at <https://www.wsj.com/articles/europe-cuts-addiction-to-russian-energy-yet-fuel-scramble-continues-11675421544>.

⁵⁴⁰ See e.g., UNGA Resolution A/RES/ES-11/4 (Oct. 12, 2022), available at https://digitallibrary.un.org/record/3990673/files/A_RES_ES-11_4-EN.pdf?ln=en (Voting summary available at <https://digitallibrary.un.org/record/3990400?ln=en>); UNGA Resolution A/RES/ES-11/3 (Apr. 7, 2022), available at https://digitallibrary.un.org/record/3967950/files/A_RES_ES-11_3-EN.pdf?ln=en (Voting summary available at <https://digitallibrary.un.org/record/3967778?ln=en>); UNGA Resolution A/RES/ES-11/2 (Mar. 24, 2022), available at https://digitallibrary.un.org/record/3966630/files/A_RES_ES-11_2-EN.pdf?ln=en (Voting summary available at <https://digitallibrary.un.org/record/3965954?ln=en>); UNGA Resolution A/RES/68/262 (Mar. 27, 2014), available at https://digitallibrary.un.org/record/767883/files/A_RES_68_262-EN.pdf?ln=en (Voting summary available at <https://digitallibrary.un.org/record/767565?ln=en>).

⁵⁴¹ Twitter post of Foreign Minister of Hungary Péter Szijjártó (Mar. 25, 2022), available at <https://twitter.com/mhmck/status/1507749382757752837/photo/1> (“[w]e will also prevent the Hungarian people from paying the price of the war”).

⁵⁴² *Hungary's Orbán Blames EU's Russia Sanctions For Energy Crisis, Wants Them Scrapped*, RFERL (Sept. 22, 2022), available at <https://www.rferl.org/a/hungary-orban-russia-sanctions-lifted-ukraine/32046405.html>;

To take another example, the Serbian President, Aleksandar Vučić, has sought to maintain relations with Vladimir Putin’s Russia while also cultivating ties with the EU, which Serbia seeks to join.⁵⁴³ Serbia voted in favor of UNGA resolutions condemning Russian aggression and supporting Ukraine’s political independence and territorial integrity.⁵⁴⁴ But Serbian officials have refused to explicitly and publicly condemn Russia’s invasion of Ukraine.⁵⁴⁵ Serbia also notably abstained on a resolution condemning Russian annexation of Crimea in 2014.⁵⁴⁶

Armenia has long been considered a loyal ally to Russia. It has either voted against or abstained from voting on UNGA resolutions condemning Russian aggression.⁵⁴⁷ Armenia also has not joined the sanctions against Russia. In return, Russia tried to “mediate” between Azerbaijan and Armenia, in relation to the Nagorno-Karabakh conflict. However, Russia’s weakening military and economic stance after its invasion of Ukraine put Armenia in a difficult position in the face of Azerbaijani military attacks since September 2022.⁵⁴⁸ Armenia applied to the

Government Official Accuses the EU of Undermining European Economy, HUNGARY TODAY, Nov. 7, 2022, available at <https://hungarytoday.hu/government-official-accuses-the-eu-of-undermining-european-economy/>.

⁵⁴³ Una Hajdari, *Pandering to Putin comes back to bite Serbia’s Vucic*, POLITICO, Mar. 7, 2022, available at <https://www.politico.eu/article/vladimir-putin-russia-serbia-aleksandar-vucic/>.

⁵⁴⁴ See e.g., UNGA Resolution A/RES/ES-11/4 (Oct. 12, 2022), available at https://digitallibrary.un.org/record/3990673/files/A_RES_ES-11_4-EN.pdf?ln=en (Voting summary available at <https://digitallibrary.un.org/record/3990400?ln=en>); UNGA Resolution A/RES/ES-11/3 (Apr. 7, 2022), available at https://digitallibrary.un.org/record/3967950/files/A_RES_ES-11_3-EN.pdf?ln=en (Voting summary available at <https://digitallibrary.un.org/record/3967778?ln=en>); UNGA Resolution A/RES/ES-11/2 (Mar. 24, 2022), available at https://digitallibrary.un.org/record/3966630/files/A_RES_ES-11_2-EN.pdf?ln=en (Voting summary available at <https://digitallibrary.un.org/record/3965954?ln=en>); *Serbia won’t recognise results of Russia’s referendums in Ukraine – Vucic*, REUTERS, Sept. 28, 2022, available at

<https://www.reuters.com/world/europe/serbia-wont-recognise-results-russias-referendums-ukraine-vucic-2022-09-28/>.

⁵⁴⁵ *Serbia secures gas deal with Putin, as West boycotts Russia*, AL-JAZEERA, May 29, 2022, available at <https://www.aljazeera.com/news/2022/5/29/serbia-ignores-eu-sanctions-secures-gas-deal-with-putin>.

⁵⁴⁶ UNGA Resolution A/RES/68/262 (Mar. 27, 2014), available at https://digitallibrary.un.org/record/767883/files/A_RES_68_262-EN.pdf?ln=en (Voting summary available at <https://digitallibrary.un.org/record/767565?ln=en>).

⁵⁴⁷ See e.g., UNGA Resolution A/RES/ES-11/4 (Oct. 12, 2022), available at https://digitallibrary.un.org/record/3990673/files/A_RES_ES-11_4-EN.pdf?ln=en (Voting summary available at <https://digitallibrary.un.org/record/3990400?ln=en>); UNGA Resolution A/RES/ES-11/3 (Apr. 7, 2022), available at https://digitallibrary.un.org/record/3967950/files/A_RES_ES-11_3-EN.pdf?ln=en (Voting summary available at <https://digitallibrary.un.org/record/3967778?ln=en>); UNGA Resolution A/RES/ES-11/2 (Mar. 24, 2022), available at https://digitallibrary.un.org/record/3966630/files/A_RES_ES-11_2-EN.pdf?ln=en (Voting summary available at <https://digitallibrary.un.org/record/3965954?ln=en>); UNGA Resolution A/RES/68/262 (Mar. 27, 2014), available at https://digitallibrary.un.org/record/767883/files/A_RES_68_262-EN.pdf?ln=en (Voting summary available at <https://digitallibrary.un.org/record/767565?ln=en>).

⁵⁴⁸ Oliver Holmes, *About 100 troops killed in clashes between Armenia and Azerbaijan*, THE GUARDIAN, Sept. 13, 2022, available at <https://www.theguardian.com/world/2022/sep/13/deadly-clashes-erupt-in-disputed-territory-between-azerbaijan-and-armenia>; *Armenia says three soldiers killed by Azeri shelling – Tass*, REUTERS, Sept. 28, 2022, available at <https://www.reuters.com/world/armenia-azerbaijan-accuse-each-other-violating-ceasefire-2022-09-28/>.

Russia-led Collective Security Treaty Organization⁵⁴⁹ for assistance.⁵⁵⁰ But rather than providing military support, the organization decided to dispatch a fact-finding mission to Armenia to assess the situation.⁵⁵¹ Russia independently also made it clear that it was not going to take sides in the conflict.⁵⁵² The ceasefires have stopped,⁵⁵³ and the parties are yet to sign a peace agreement.⁵⁵⁴

The ICC's recent issuance of an arrest warrant against Russian President Vladimir Putin⁵⁵⁵ has the potential to further complicate these states' relations with Putin's Russia. A week after the ICC's warrant was issued, the Constitutional Court of Armenia on March 24, 2023 provided the greenlight to the ratification of the Rome Statute, a process the Armenian government had re-launched in December 2022.⁵⁵⁶ This has caused friction with Russia, which called its ally's ICC plans "unacceptable" and threatened "serious consequences," since it would legally obligate Armenia to arrest President Putin should he visit the country.⁵⁵⁷ Serbia and Hungary, as parties to the Rome Statute, are now under a similar obligation. While a deputy in Armenia's ruling party confirmed that Putin would be arrested if he

⁵⁴⁹ The Collective Security Treaty Organization (CSTO) is an intergovernmental military alliance consisting of Armenia, Belarus, Kazakhstan, Kyrgyzstan, Russia, and Tajikistan. Article 4 of the Collective Security Treaty is a key provision, similar to Article 5 of the Washington Treaty: "If one of the Member States undergoes aggression (armed attack menacing to safety, stability, territorial integrity and sovereignty), it will be considered by the Member States as aggression (armed attack menacing to safety, stability, territorial integrity and sovereignty) to all the Member States of this Treaty [...]." Collective Security Treaty, available at https://en.odkb-csto.org/documents/documents/dogovor_o_kollektivnoy_bezopasnosti/#loaded.

⁵⁵⁰ Ani Mejlumyan, *For Armenians, CSTO missing in action*, EURASIANET, Sept. 15, 2022, available at <https://eurasianet.org/for-armenians-csto-missing-in-action>.

⁵⁵¹ *CSTO Mission's Advance Team to Head to Armenia on September 15*, COLLECTIVE SECURITY TREATY ORGANIZATION (Sept. 14, 2022), available at https://odkb-csto.org/news/news_odkb/peredovaya-gruppa-missii-odkb-napravitsya-v-armeniyu-15-sentyabrya/#loaded.

⁵⁵² Mansur Mirovalev, *What role is Russia playing in the Nagorno-Karabakh conflict?*, AL-JAZEERA, Oct. 19, 2020, available at <https://www.aljazeera.com/news/2020/10/19/is-russia-reduced-to-a-secondary-role-in-nagorno-karabakh>.

⁵⁵³ *Armenia and Azerbaijan pledge 'not to use force' over Nagorno-Karabakh region*, FRANCE24, Oct. 31, 2015, available at <https://www.france24.com/en/europe/20221031-armenia-and-azerbaijan-pledge-not-to-use-force-over-nagorno-karabakh-region>.

⁵⁵⁴ *Armenia and Azerbaijan peace treaty in Tbilisi: is it possible?*, JAM NEWS, Nov. 9, 2022, available at <https://jam-news.net/armenia-and-azerbaijan-peace-treaty-in-tbilisi-is-it-possible/>.

⁵⁵⁵ International Criminal Court, *Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova* (Mar. 17, 2023), available at <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>.

⁵⁵⁶ *BREAKING: Armenia's Constitutional Court greenlights ratification of Rome Statute of the ICC*, ARMENPRESS, Mar. 24, 2023, available at <https://armenpress.am/eng/news/1107128.html>.

⁵⁵⁷ *Russia warns Armenia against joining ICC after Putin arrest warrant*, EURACTIV, Mar. 28, 2023, available at <https://www.euractiv.com/section/global-europe/news/russia-warns-armenia-against-joining-icc-after-putin-arrest-warrant/>.

visited Armenia after its ratification of the Rome Statute,⁵⁵⁸ a Hungarian official stated that Hungary would not arrest Putin if he entered that country.⁵⁵⁹

Dogmatic Opposition

While many Western powers, such as France and the United Kingdom, opposed the adoption of the Kampala Amendments, their concerns were primarily driven by the fact that their officials might face the risk of prosecution over the crime of aggression. There seems to be no dogmatic opposition to the concept of a crime of aggression tribunal as such.⁵⁶⁰

Legitimacy Considerations

The tribunal's legitimacy is an important factor to consider when taking decisions as to form and mandate. It is important from an international justice-perspective for the tribunal not only to be fair and impartial but also to be viewed as fair and impartial. An appearance of impartiality is necessary to maintain its credibility.

Domestic tribunals may be seen as less legitimate than hybrid or international tribunals, since they may be perceived as a form of "*victor's justice*."⁵⁶¹ There is also the concern that domestic courts might be influenced by political considerations or competing domestic demands, like the "*need to avoid disrupting political stability*" or post-conflict reconciliation.⁵⁶² Domestic tribunals may also be perceived as biased against foreign defendants, which perceived bias may negatively affect a tribunal's credibility and thus impact its ability to effectively prosecute and deliver justice.

⁵⁵⁸ *One of Russia's longtime allies said it will arrest Putin if he goes there, leaving him a pariah in a region where he was once dominant*, BUSINESS INSIDER, Mar. 30, 2023, available at <https://www.businessinsider.com/russia-ally-armenia-says-putin-arrested-if-he-visited-country-2023-3>.

⁵⁵⁹ *Hungary Would Not Arrest Putin, Says PM Orban's Chief of Staff*, USNEWS, Mar. 23, 2023, available at <https://www.usnews.com/news/world/articles/2023-03-23/hungary-would-not-arrest-putin-says-pm-orbans-chief-of-staff>.

⁵⁶⁰ See Report on the facilitation on the activation of the jurisdiction of the International Criminal Court over the crime of aggression, ICC-ASP/16/24 (Nov. 27, 2017), available at https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP16/ICC-ASP-16-24-ENG.pdf.

⁵⁶¹ See Carrie McDougall, *Prosecuting Putin for his Crime of Aggression Against Ukraine: Part Two*, OXFORD HUMAN RIGHTS HUB (Mar. 8, 2022), available at <https://ohrh.law.ox.ac.uk/prosecuting-putin-for-his-crime-of-aggression-against-ukraine-part-two/>.

⁵⁶² See Kathelijne Schenkel, *The Kosovo Specialist Court and Transitional Justice*, PAX AND INTEGRA, 6, 15 (2021) available at https://paxforpeace.nl/media/download/The_Kosovo_Specialist_Court_and_Transitional_Justice_PAX_Integra.pdf.

These factors suggest that hybrid or international courts may have greater legitimacy. At the same time, however, there is a risk that an international Crime of Aggression Tribunal may lose legitimacy among Ukrainians. If the court's design, set-up, jurisdiction, seat, and staff all come from "*internationals*," the court may suffer from a lack of local legitimacy, especially if the court and its particular design feel "*forced upon*" Ukraine.⁵⁶³ Proactive Ukrainian involvement in and engagement with the process of the tribunal's creation may help to ensure Ukrainians feel confident in an international tribunal's ability to deliver justice.

Scholars have stated that the creation of an *ad hoc* special tribunal to prosecute Russian crimes of aggression in Ukraine would "*send a message that the 'international community' cares about some crimes of aggression more than others.*"⁵⁶⁴ This would serve to reinforce the perception of "*selectivity of international criminal justice*," especially given that there were no calls to create a similar tribunal for the US- and UK-led invasion of Iraq, for example.⁵⁶⁵ To counter these concerns, a newly-created tribunal for the crime of aggression could be designed to be permanent and not solely deal with the Russian invasion of Ukraine, though breadth of jurisdiction risks conflict with the ICC.⁵⁶⁶

A hybrid court created with the COE or EU's help would lend legitimacy.⁵⁶⁷ Members of the COE make up more than two-thirds of the world's states that domestically criminalize aggression, signaling that "*the unacceptability of aggression is a particularly strong regional norm in Europe.*"⁵⁶⁸ Further, the direct involvement of the United States in setting up a tribunal focused on the crime of aggression could lead to damaging accusations against the tribunal's legitimacy, given the United States' 2003 invasion of Iraq, persistent opposition to ICC investigation of US persons and to ratifying the ICC's aggression amendment, and

⁵⁶³ Kathelijne Schenkel, *The Kosovo Specialist Court and Transitional Justice*, PAX AND INTEGRA, 26 (2021) (explaining that these factors have proven challenging for the KSC's social and local legitimacy in Kosovo).

⁵⁶⁴ Kevin Jon Heller, *Creating a Special Tribunal for Aggression Against Ukraine Is a Bad Idea*, OPINIOJURIS (Mar. 7, 2022), available at <http://opiniojuris.org/2022/03/07/creating-a-special-tribunal-for-aggression-against-ukraine-is-a-bad-idea/>.

⁵⁶⁵ Kevin Jon Heller, *Creating a Special Tribunal for Aggression Against Ukraine Is a Bad Idea*, OPINIOJURIS (Mar. 7, 2022), available at <http://opiniojuris.org/2022/03/07/creating-a-special-tribunal-for-aggression-against-ukraine-is-a-bad-idea/>.

⁵⁶⁶ Kevin Jon Heller, *Creating a Special Tribunal for Aggression Against Ukraine Is a Bad Idea*, OPINIOJURIS (Mar. 7, 2022), available at <http://opiniojuris.org/2022/03/07/creating-a-special-tribunal-for-aggression-against-ukraine-is-a-bad-idea/>.

⁵⁶⁷ Kevin Jon Heller, *The Best Option: An Extraordinary Ukrainian Chamber for Aggression*, OPINIOJURIS (Mar. 16, 2022), available at <https://opiniojuris.org/2022/03/16/the-best-option-an-extraordinary-ukrainian-chamber-for-aggression/>.

⁵⁶⁸ Kevin Jon Heller, *The Best Option: An Extraordinary Ukrainian Chamber for Aggression*, OPINIOJURIS (Mar. 16, 2022), available at <https://opiniojuris.org/2022/03/16/the-best-option-an-extraordinary-ukrainian-chamber-for-aggression/>.

the US's active lobbying "for the curtailment of the ICC's jurisdiction over the crime of aggression."⁵⁶⁹ In this regard, however, it must be noted that certain EU and COE members, such as France and the UK, are subject to the same criticism of "unclean hands" that may be lodged against the United States.⁵⁷⁰

Lastly, the legitimacy of any kind of tribunal, but especially a hybrid one formed under the auspices of the COE or the EU, would be "bolstered considerably" by an endorsement of the UN General Assembly (similar to the endorsement provided by the UNGA to the ECCC).⁵⁷¹ Even if the tribunal's authority would not be rooted in or derived from the General Assembly's legal authority, an endorsement by the General Assembly would be important because it would characterize the tribunal or court "as acting on behalf of the broader international community" in earnestly condemning and seeking accountability for the crime of aggression.⁵⁷²

Conclusion

Overall, the establishment of the Crime of Aggression Tribunal with the support of or through the COE or EU could have political benefits, such as the existence of widespread support across the region, and could avoid selectivity criticisms. At the same time, however, it could encounter many legal challenges related to immunity, the *Monetary Gold* principle, and Ukrainian constitutional constraints.

⁵⁶⁹ See Kevin Jon Heller, *The Best Option: An Extraordinary Ukrainian Chamber for Aggression*, OPINIOJURIS (Mar. 16, 2022), available at <https://opiniojuris.org/2022/03/16/the-best-option-an-extraordinary-ukrainian-chamber-for-aggression/>; Tom Dannenbaum, *Mechanisms for Criminal Prosecution of Russia's Aggression Against Ukraine*, JUST SECURITY (Mar. 10, 2022), available at <https://www.justsecurity.org/80626/mechanisms-for-criminal-prosecution-of-russias-aggression-against-ukraine/>.

⁵⁷⁰ Kevin Jon Heller, *The Best Option: An Extraordinary Ukrainian Chamber for Aggression*, OPINIOJURIS (Mar. 16, 2022), available at <https://opiniojuris.org/2022/03/16/the-best-option-an-extraordinary-ukrainian-chamber-for-aggression/>.

⁵⁷¹ Tom Dannenbaum, *Mechanisms for Criminal Prosecution of Russia's Aggression Against Ukraine*, JUST SECURITY (Mar. 10, 2022), available at <https://www.justsecurity.org/80626/mechanisms-for-criminal-prosecution-of-russias-aggression-against-ukraine/>.

⁵⁷² Tom Dannenbaum, *Mechanisms for Criminal Prosecution of Russia's Aggression Against Ukraine*, JUST SECURITY (Mar. 10, 2022), available at <https://www.justsecurity.org/80626/mechanisms-for-criminal-prosecution-of-russias-aggression-against-ukraine/>.