The Special Tribunal for the Crime of Aggression against Ukraine

Legal assessment and policy recommendations

June 2025

Terms of reference

This report was prepared by a consortium of experts: **Dr. Gabrielė Chlevickaitė, Dr. Kateryna Busol, Prof. Frank Hoffmeister, and Dr. Owiso Owiso** (in order of appearance in text), at the request of the Asser Institute. It contains an analysis of the international legal framework for the prosecution of the crime of aggression, and policy and legitimacy considerations. Moreover, it offers the first legal analysis of the 'Council of Europe model,' which was agreed upon by the President of Ukraine, Volodymyr Zelenskyy, and the Secretary General of the Council of Europe, Alain Berset, on 25 June 2025. The analysis is followed by lessons learnt from previous tribunals. The report concludes with recommendations for the Council of Europe when establishing the Special Tribunal for the crime of aggression against Ukraine. Each chapter was authored independently by the designated experts in their specific area of expertise. The responsibility for the content of each chapter lies solely with its author. The views and recommendations expressed throughout this report do not bind consortium partners or the Ministry of Foreign Affairs. We thank Konstantina Karagkouni for research assistance.

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The project aims at institutional strengthening and capacity development needs of the key parties in Ukraine dealing with international crimes: prosecutors, police, judges, as well as journalists and civil society organisations. We believe that with the support of the international community, Ukraine can advance accountability for these crimes.

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I. Introduction: Legal and political developments towards accountability for the crime of aggression

Russia's full-scale invasion of Ukraine has led to investigations and prosecutions of conflict-related crimes across a plethora of legal avenues nationally and internationally.[1] However, while multiple avenues for prosecuting war crimes, crimes against humanity, and genocide, are in place, none of these avenues are at the moment competent to address the responsibility of the military and political leadership figures for the overarching crime of breaching peace and invading the territory of Ukraine – the crime of aggression.

This apparent gap in the international legal architecture has sparked important discussions on the crime of aggression and whether an effective mechanism exists or could be created to prosecute those most responsible, including political and military leadership figures. Apart from the ongoing discussions on the feasibility of a tribunal prosecuting the crime of aggression, Russian aggression has been condemned across political spheres,[2] most persuasively by a United Nations General Assembly (UNGA) 2 March 2022 resolution on 'Aggression against Ukraine', qualifying Russia's actions as violations of Article 2(4) of the UN Charter.[3]

Concrete steps towards accountability were also taken. Following a UNGA Resolution on 'Furtherance of remedy and reparation for aggression against Ukraine' in November 2022,[4] the Council of Europe (CoE) established a Register of Damage for Ukraine as a first step towards an international compensation mechanism for victims of Russian aggression.[5] In February 2023, the European Union (EU) announced the setting up of the International Centre for the Prosecution of the Crime of Aggression (ICPA) against Ukraine.[6]

International discussions around the crime of aggression have also extended to the possible creation of an *ad hoc* tribunal. Since January 2023, an informal Core Group on the Special Tribunal for the crime of aggression against Ukraine ('Core Group') has been meeting to find the appropriate legal response (see Section IV below).[7] In May 2025, the work of the Core Group was declared completed, with the finalisation of the foundational legal documents of the Special Tribunal. Following an endorsement by an international coalition on 9 June in Lviv,

[1] See e.g., European Commission, Ukraine 2024 report, available at: https://neighbourhood-enlargement.ec.europa.eu/document/download/1924a044-b30f-48a2-99c1-50edeac14da1_en?filename=Ukraine%20Report%202024.pdf; Asser, MATRA-Ukraine, available at: https://www.asser.nl/matra-ukraine/ukraine-international-crimes/accountability/

[2] Government of UK, 'Russia's assault on Ukraine: Foreign Secretary's statement, February 24 2022' 24 February 2022, available at: Russia's assault on Ukraine: Foreign Secretary's statement, 24 February 2022 - GOV.UK (www.gov.uk); The White House, 'Statement by President Biden on Russia's Unprovoked and Unjustified Attack on Ukraine', 23 February 2022, available at: Statement by President Biden on Russia's Unprovoked and Unjustified Attack on Ukraine | The White House.; European Commission, 'Press Statement of President Charles Michel of the European Council and President Ursula von der Leyen <...>', 24 February 2022, available at: Joint Press Statement on Russia's aggression of Ukraine (europa.eu).

[3] The resolution was supported by 141 states, with 35 abstaining, and 5 voting against. UNGA, 'Resolution adopted by the General Assembly on 2 March 2022', A/ES-11/1, available at: https://documents.un.org/doc/undoc/gen/n22/293/36/pdf/n2229336.pdf.

[4] UNGA, 'Resolution adopted by the General Assembly on 14 November 2022', A/RES/ED-11/5, 15 November 2022, available at: https://rd4u.coe.int/documents/358068/372244/A_RES_ES-11_5.pdf/079afc90-b392-a0ab-43ad-41409c7e8aa4?t=1708702069853.

[5] Register of Damage for Ukraine, 'Council of Europe Summit creates Register of Damage for Ukraine as a first step towards an international compensation mechanism for victims of Russian aggression', 17 May 2023, available at: https://rd4u.coe.int/en/news/-/asset_publisher/QYVTGzkDB9zy/content/council-of-europe-summit-creates-register-of-damage-for-ukraine-as-first-step-towards-an-international-compensation-mechanism-for-victims-of-russian-aggression.

[6] See Eurojust, ICPA, available at: https://www.eurojust.europa.eu/international-centre-for-the-prosecution-of-the-crime-of-aggression-against-ukraine.

[7] Ministry of Foreign Affairs of the Republic of Lithuania, 'Core Group to create a special international tribunal to prosecute the crime of aggression against Ukraine meets in Vilnius', 13 May 2024, available at: https://www.urm.lt/en/news/928/core-group-to-create-a-special-international-tribunal-to-prosecute-the-crime-of-aggression-against-ukraine-meets-in-vilnius:42715.

the historical agreement on the establishment of the Special Tribunal was signed between Ukraine's President Volodymyr Zelenskyy and the Secretary General of the Council of Europe, Alain Berset, in Strasbourg on 25 June 2025.[8] The Statute of the Tribunal was also made public on the date.[9] This marks the first time in history that a dedicated tribunal is being established to investigate and prosecute the crime of aggression.

This report builds upon existing literature and advice by critically assessing the proposal for a new accountability mechanism, focusing particularly, though not solely, on a model based on an agreement between Ukraine and the CoE. To provide context to this assessment, the Report first addresses two major gaps in international legal framework for the prosecution of the crime of aggression: (1) the limited jurisdictional regime of the International Criminal Court (ICC), (2) the immunities of state officials from foreign criminal jurisdiction. Next, Section III covers legitimacy and contextual considerations, elaborating on the need for accountability for the crime of aggression (authored by Dr. Kateryna Busol). Section IV then presents the CoE-Ukraine model as a viable option to respond to this need (authored by prof. Frank Hoffmeister). Section V presents recommendations on the practical steps to be taken to increase international legitimacy of a new accountability mechanism (authored by Dr. Owiso Owiso). The report ends with key takeaways and recommendations (Section VI).

II. The international legal framework for the prosecution of the crime of aggression (by Dr. Gabriele Chlevickaite)[10]

1. The Jurisdictional Limitations of the International Criminal Court

The International Criminal Court (ICC) has jurisdiction over war crimes, crimes against humanity and genocide committed **by a national** of, **or on the territory** of, a **state party** to the Rome Statute,[11] as well as when the UN Security Council (UNSC) refers a situation to it (even if a state is **not party** to the statute). Its jurisdictional regime over the crime of aggression, however, has special limitations contained in Article 15*bis*(5), according to which the ICC cannot exercise its jurisdiction over the crime of aggression if the crime is committed by a national of or in the territory of a state not party to the Statute.[12] The jurisdictional regime of the ICC over the crime of aggression has been narrowed down further with Article 15*bis*(4), where the Court is exempted from exercising its jurisdiction over a state party, if that latter has 'opted out', i.e. has lodged a declaration with the Registrar.[13] While the UNSC retains the powers to refer a situation involving a non-state party to the ICC (Article 15*ter*), it is inconceivable with Russia's veto power.

In simple terms, for the ICC to be able to investigate and prosecute individuals for the crime of aggression both the aggressor and the victim state must have ratified the Rome Statute and

[8] https://www.coe.int/en/web/portal/-/president-zelenskyy-and-council-of-europe-secretary-general-berset-to-sign-agreement-on-special-tribunal-for-aggression-against-ukraine
[9] https://search.coe.int/cm?i=0900001680b678ca
[10] Researcher in International Criminal Law, T.M.C. Asser Institute.
[11] Article 12(2), Rome Statute.
[12] Article *15bis*, Rome Statute; *ICC* Assembly of States Parties, Resolution RC/Res.6, 'The crime of aggression', available at: https://treaties.un.org/doc/source/docs/RC-Res.6-ENG.pdf.
[13] J. Trahan, 'The Need to Reexamine the Crime of Aggression's Jurisdictional Regime', JustSecurity, 4 April, 2022, available at https://www.justsecurity.org/80951/the-need-to-reexamine-the-crime-of-aggressions-jurisdictional-regime/.

have accepted the Court's jurisdiction over the crime of aggression.[14] It is apparent that if the ICC had the same jurisdictional regime over all four crimes under the Statute, taking into account Ukraine's acceptance of the jurisdiction of the ICC,[15] 'an accountability gap' would not exist and the ICC would be able to exercise its jurisdiction over the Russian leadership for the crime of aggression.[16]

Considering that the *only* barriers to the ICC exercising jurisdiction over the crime of aggression stem from the outcomes of the Kampala negotiations restricting the application of the Statute provisions, proposals for amending the Statute have been tabled. One such proposal, supported by certain European, African and South American states, is to amend the Rome Statute and align its jurisdictional regime regarding the crime of aggression with the one applicable to the other three international crimes under its jurisdiction, or a slightly modified jurisdiction.[17] Another option consists of giving more power to the UNGA if the UNSC is paralysed. In such a case, the ICC would be able to exercise universal jurisdiction in case of a referral of the relevant situation by the UNGA.[18] In light of the obvious accountability gap created by the Kampala amendments, States Parties to the ICC should promptly reconsider its jurisdictional limitations, using the opportunity of the set review date of 2025.[19]

Any amendments now, however, will not resolve the issue of the ICC's lack of jurisdiction over the potential crime of aggression in the situation of Ukraine (as it would not apply retroactively).[20] Nonetheless, it would lessen the chance of the international community finding itself facing the same conundrum in the future.

2. Immunities

The Rome Statute defines the crime of aggression as:

> the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over 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.[21]

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[14] P. Butchard, Research Briefing, 'Conflict in Ukraine: A Special Tribunal on the Crime of Aggression', House of Commons Library, 27 August 2024, p. 10, available at https://commonslibrary.parliament.uk/research-briefings/cbp-9968/.
[15] Ukraine ratified the Rome Statute, including the Kampala Amendments, in 2024, and became a State Party on 1 January 2025. On 25 October 2024, Ukraine deposited its instrument of ratification of the Rome Statute and the Kampala Amendments which officially entered into force on 1 January 2025. See https://treaties.un.org/doc/Publication/CN/2024/CN.442.2024-Eng.pdf ; https://treaties.un.org/doc/Publication/CN/2024/CN.440.2024-Eng.pdf
[16] CAVV, 'Challenges in prosecuting the crime of aggression: jurisdiction and immunities', Advisory Report no. 40, 12 September 2022, at 4-5.
[17] C. Kress, S. Kobe and A. Nussberger, 'The Ukraine War and The Crime of Aggression: How to Fill the Gaps in the International Legal System', Just Security, 23 January 2023, available at: https://www.justsecurity.org/84783/the-ukraine-war-and-the-crime-of-aggression-how-to-fill-the-gaps-in-the-international-legal-system/; Parliamentarians for Global Action, 'Plan of Action on the Universality and Effectiveness of, and political support for, the Rome Statute system against impunity', 4-5 November 2022, National Congress of Argentina Buenos Aires, available at: https://www.pgaction.org/pdf/2022/buenos-aires-poa-2022-en.pdf; Federal Foreign Office of Germany, "Strengthening International Law in Times of Crisis' - Speech by Federal Foreign Minister Annalena Baerbock in The Hague, available at: https://www.auswaertiges-amt.de/en/newsroom/news/strengthening-international-law-in-times-of-crisis-2573492.
[18] S. Darcy, 'Aggression by P5 Security Council Members: Time for ICC Referrals by the General Assembly', Just Security, 16 March 2022, available at: https://www.justsecurity.org/80686/aggression-by-p5-security-council-members-time-for-icc-referrals-by-the-general-assembly/.
[19] Trahan, *supra* note 11.
[20] J. Trahan, 'Amending the Kampala Amendments: A Proposal to Harmonize the ICC's Jurisdiction', Opinio Juris, 2 October 2023, available at: https://opiniojuris.org/2023/10/02/amending-the-kampala-amendments-a-proposal-to-harmonize-the-iccs-jurisdiction/
[21] Article 8*bis*(1), Rome Statute.

The crime of aggression under the Rome Statute is thus defined as a 'leadership crime,' which can only be committed by individuals who have effective control/are able to direct a state's political or military apparatus. This leadership requirement sets it apart from other international crimes. However, it is not universally accepted; for instance, domestic criminal codes in, among others, Poland, Ukraine, and Lithuania do not include such a requirement in their definitions of the crime of aggression.[22] The leadership criterion was also heavily debated during the drafting of the Kampala Amendment, which codified the crime in the Rome Statute.[23] Nonetheless, there is broad agreement that, regardless of the precise definition—whether limited to those with effective control or extended to those able to 'shape or influence'[24] state actions—the primary responsibility lies with individuals at the highest levels of power, such as heads of state and military leaders. However, precisely **such individuals are (to an extent) protected by immunities under domestic and international law.** In order to appreciate the complexity of holding foreign leaders accountable for the crime of aggression, this section outlines the different (potential) prosecution avenues and immunity-related challenges therein.

Immunity of (senior) state officials is a legal privilege granted to certain individuals, such as state representatives, under national and international law.[25] It is based on the principle of sovereign equality of states, which holds that all states are equal according to international law and no state has primacy over one another.[26]

While sometimes conflated, international law sets down two distinct types of immunities, immunity ***ratione personae*** **(personal immunities) and** ***ratione materiae*** **(functional immunities)**.

- **Personal immunity** applies to a small group of high-ranking state officials, such as Heads of State, Heads of Government, and Ministers of Foreign Affairs (the so-called 'troika'). It covers all acts, official and private, performed while the official is in office, and extends to private acts committed before their time in office. This immunity is temporary and applies only while the individual holds their official position. Once they leave office, they lose personal immunity and are subject to prosecution like any other state official, except for acts covered by functional immunity.
- **Functional immunity** applies to all state officials, regardless of rank. However, its scope is narrower, as it covers only **official acts** committed during the time when the state officials are in office. Private acts are excluded from this protection. This type of immunity does not have temporal limitation, which practically means that state officials cannot be prosecuted for their official acts during the time when they are in office and after their service has expired.

Personal and functional immunities have certain limitations vis-à-vis responsibility for international crimes, **depending on the jurisdiction attempting to prosecute the said official.**

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[22] See, e.g. the Criminal Code of Ukraine, Article 437; Criminal Code of Lithuania, Article110; Criminal Code of Poland, Article117.
[23] K. J. Heller, 'Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression', 18 *European Journal of International Law* (2007) 477–497.
[24] The 'shape or influence' was the standard applied by the post-WWII tribunals. See: ibid.
[25] Other types of immunity, e.g., diplomatic immunity, are based on other legal principles. See an overview at A. Aust, *Handbook of International Law* (Cambridge: Cambridge University Press, 2005), at 117-158.
[26] UN, Charter of the United Nations, 1 UNTS XVI, 24 October 1945, article 2§1; UNGA, Resolutions adopted on the Reports of the Sixth Committee - Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations(A/8082), UN Doc A/RES2625 (XXV), 24 October 1970, p. 121. O. Corten and V. Koutroulis, 'Tribunal for the crime of aggression against Ukraine – a legal assessment', European Parliament, In-depth analysis requested by the DROI Subcommittee, December 2022, available at https://www.europarl.europa.eu/thinktank/en/document/EXPO_IDA(2022)702574, at 22.

Functional and personal immunities before foreign domestic courts

There is an **increasing acceptance that functional immunities are not applicable before foreign domestic courts when the accusations include international crimes**.[27] In 2009, the Institute of International Law adopted a Resolution according to which, with respect to international crimes, a person acting on behalf of a state does not benefit from immunity from jurisdiction before domestic courts of another state, apart from **personal immunity**.[28] The resolution defined 'international crimes' as 'serious crimes under international law such as genocide, crimes against humanity, torture and war crimes, as reflected in relevant treaties and the statutes and jurisprudence of international courts and tribunals'.[29] The International Law Commission (ILC) followed a similar approach and adopted on first reading Draft Article 7 which indicated that **functional immunities** do not apply in cases of the international crimes of genocide, crimes against humanity, war crimes, the crime of apartheid, torture and enforced disappearance.[30] There has been considerable debate and disagreement within the ILC[31] and within the Sixth Committee of the UNGA.[32] Importantly, the ILC Draft Article 7 did not include the crime of aggression to the exceptions of functional immunity. Hence, as the exact status of functional immunities for the crime of aggression is not settled, states have 'considerable leeway to apply the rule as they see fit'.[33] Functional immunities were disregarded in multiple trials of international crimes on a national level (e.g. in Germany[34] and France[35]), and the continued non-recognition of functional immunities for international crimes may be justifiable on the grounds of either being consistent with international law, or by contributing to the positive development of international law.[36] The question of whether the crime of aggression should be treated differently than the other crimes set out in the ILC Draft Article 7 remains contentious.

However, there is consensus that **personal immunities continue to apply before foreign domestic courts** for acting Heads of State, Heads of Government and Ministers of Foreign Affairs **during their time in office**.[37] In this regard, the International Court of Justice (ICJ) clearly rejected any exceptions to immunity in the *Arrest Warrant Case*, where, after it examined state practice including national legislation and decisions of national higher courts, it concluded that 'it has been unable to deduce from this practice that there exists under customary international

[27] A. 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* (2021) 1263–1281.
[28] Institute of International Law, Resolution on the Immunity from Jurisdiction of the State and of persons Who Act on behalf of the State in case of International Crimes, Napoli Session, 2009, Article III, §1-2, available at https://www.idi-iil.org/app/uploads/2017/06/2009_naples_01_en.pdf.
[29] Ibid.
[30] *Immunity of State officials from foreign criminal jurisdiction, Texts and titles of the draft articles adopted by the Drafting Committee on first reading*, UN Doc A/CN.4/L.969, 31 May 2022, available at https://documents-dds-ny.un.org/doc/UNDOC/LTD/G22/353/99/pdf/G2235399.pdf?OpenElement, at 2.
[31] *Provisional summary record of the 3378th meeting*, UN Doc A/CN.4/SR.3378, 18 August 2017, available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/218/73/pdf/G1721873.pdf?OpenElement, at 9-13.
[32] *Report of the International Law Commission on the work of its sixty-ninth session (2017) - Topical summary*, UN Doc A/CN.4/713, 26 February 2018, available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/036/48/PDF/N1803648.pdf?OpenElement, at 10-11, §§29-37.
[33] CAVV, *supra* note 14, at 11-12.
[34] Federal Court of Justice (Bundesgerichtshof), Decision AK 4/24, 21 February 2024, available at: https://www.legal-tools.org/doc/t34m0yga; see also A. Epik and J. Geneuss, 'Without a Doubt. German Federal Court Rules No Functional Immunity for Crimes Under International Law', 19 April 2024, available at https://verfassungsblog.de/without-a-doubt/.
[35] FIDH, 'The Paris Court of Appeal Rejects Functional Immunity of Former Syrian Central Bank Governor Adib Mayaleh', 6 June 2024, available at: https://www.fidh.org/en/region/north-africa-middle-east/syria/the-paris-court-of-appeal-rejects-functional-immunity-of-former.
[36] CAVV, *supra* note 14, at 12-13.
[37] *Supra* note 28, draft articles 3 and 4§1.

law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs (..)'.[38]

A landmark decision contradicting the general acceptance of personal immunities was published in France, in November 2023, when an arrest warrant was issued for Syria's President Bashar al-Assad, a sitting head of State. The Court of Appeal of Paris upheld this decision on 26 June 2024, stating that

> <....> sitting heads of state cannot be granted what many considered an 'absolute' immunity. The use of chemical weapons against a civilian population, which constitutes war crimes and crimes against humanity, cannot be considered an official act of a head of state. And a head of state cannot use the privileges granted to their function—such as the protective regime of personal immunity—to escape accountability.[39]

This is the first decision of such nature by a national court.

For the situation in Ukraine, this means that:

- The applicability of functional immunities before foreign domestic courts is not a settled legal question, but there are notable examples from national courts which have disregarded functional immunities when it comes to international crimes.
- Ukrainian courts can choose to exercise national criminal jurisdiction over crimes of aggression committed by all individuals **except for** the 'troika' protected by **personal immunities during their time in office**: foreign Heads of State, Heads of Government, and Ministers of Foreign affairs**.**
- The same restrictions would apply to other states, including states willing to conduct prosecutions based on universal jurisdiction.

Functional and personal immunities before international courts

The situation is different where the individual is **accused of international crimes by an international court**.

Regarding **personal immunities,** there is a generalised practice of their rejection before international courts. Most notably, the ICJ *Arrest Warrant Case* held that 'an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction'.[40] The ICJ identified such courts as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), both established by UNSC Resolutions under Chapter VII of the UN Charter, and the ICC, established by the Rome Statute.

This is reflected in the practice of the Special Court for Sierra Leone (SCSL), ICTY, ICTR, and the ICC. The SCSL, in the *Charles Taylor Decision on Immunity*, asserted that immunities of a head of state do not apply before an international tribunal.[41] It emphasised that it is an established principle of international law that the sovereign equality of states does not prevent

[38] Judgment of 14 February 2002, *Case concerning the Arrest warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, ICJ Reports (2002), at 24, §58.
[39] J. Sulzer and C. Witt, 'In France, it is no longer taboo to prosecute sitting heads of state like Bashar al-Assad', 4 September 2024, available at: https://www.atlanticcouncil.org/blogs/menasource/france-accountability-assad-syria-chemical-weapons/.
[40] *Supra* note 36, ICJ Judgment of 14 February 2002, at 26, §61.
[41] Decision on Immunity from Jurisdiction, *The Prosecutor v. Charles Taylor* (SCSL-2003-01-I), Appeals Chamber, 31 May 2004, §§37-54.

a sitting head of state from being prosecuted before an international criminal court or tribunal. The Court went on to argue that the SCSL is an international court by stating that it 'is not a national court of Sierra Leone and is not part of the judicial system of Sierra Leone exercising judicial powers of Sierra Leone'.[42] The ICTY was able to prosecute the former Serbian Head of State in *Prosecutor v Milošević*.[43] The ICC Appeals Chamber, following the same line of reasoning, in a judgment relating to the non–execution of the arrest warrant issued by the Court against the then President of Sudan, Al-Bashir, found that there is no rule of customary international law recognising immunities of heads of states before international criminal courts and tribunals, while they exercise their jurisdiction.[44] However, this position has faced substantial scholarly criticism, arguing that state practice and *opinio juris* do not support it.[45]

The Advisory Committee on Public International Law (CAVV) of the Netherlands has contended that **absent the waiver of the immunities by the state concerned or a decision of the UNSC acting under Chapter VII**, the international nature of the tribunal **alone** cannot override personal immunities for high-ranking officials (the 'troika').[46] This is because states cannot by treaty impose obligations on third states without the consent of the latter and cannot circumvent the immunity of third states officials when they were absent from the creation of the tribunal.[47] In support of this, draft Article 1§3 of the ILC draft Articles on immunity of State officials mentions that the consent of the state is essential to the issue of immunities before international criminal courts and tribunals.

Furthermore, the definition of what constitutes an 'international tribunal' remains unclear, complicating this issue. Some argue that for personal immunities to be inapplicable, the institutional design of the tribunal must be such that it reflects the will of the international community to enforce crimes under customary international law.[48]

Applicability of functional immunities for the crime of aggression before international courts has been questioned as well, including at the ILC. Since functional immunities are based on the nature of the conduct, with 'official acts', or 'acts performed in the course of official duties' excluded from any jurisdiction of foreign courts, the assessment rests on the determination of whether the commission of international crimes, including the crime of aggression, can be considered an 'official act'.[49] The jurisprudence of international courts and tribunals, as well as the Draft Article 7 of the ILC make it clear that the current view is that the commission of genocide, war crimes, crimes against humanity, torture, enforced disappearances, and the crime of apartheid **cannot be attributed** to official capacities of State officials, and as such, no functional immunities for such acts should be respected. The crime of aggression is not

[42] Ibid., §§37-54.
[43] Decision on Review of the Indictment and Application for Consequential Orders, *Prosecutor v Milošević (Slobodan)* (Case No IT-99-37-PT), ICL 336, 24 May 1999.
[44] Decision in the Jordan Referral re Al-Bashir Appeal, Appeals Chamber ('*Jordan Referral*'), *The Prosecutor v. Omar Hassan Ahmad Al-Bashir* (No ICC-02/05-01/09 OA2), 6 May 2019, §§100-119.
[45] See e.g., A. S. Skander Galand, 'A Hidden Reading of the ICC Appeals Chamber's Judgment in the Jordan Referral Re Al-Bashir', EJIL:Talk!, 6 June 2019, available at: https://www.ejiltalk.org/a-hidden-reading-of-the-icc-appeals-chambers-judgment-in-the-jordan-referral-re-al-bashir/.
[46] CAVV, *supra* note 14, at 13-14.
[47] Ibid.
[48] Ibid., see also E. Mullin and G. Stanton, 'Prosecuting Putin: Creation of a Special Tribunal for Russian Aggression', Opinio Juris, available at https://opiniojuris.org/2024/10/01/prosecuting-putin-creation-of-a-special-tribunal-for-russian-aggression/; *Jordan Referral*, *supra* note 42, at §115; K. Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary* (Oxford University Press, 2022), Commentary on Article 98, §123.
[49] R. van Alebeek, 'National Courts, International Crimes and the Functional Immunity of State Officials', 59 *Netherlands International Law Review* (2012) 5-41.

mentioned in this respect. However, some scholars and states argue that the exceptions to functional immunities for other international crimes apply equally to the crime of aggression, effectively extending the ILC definition of 'international crimes.'[50]

Regarding accountability for the crime of aggression in Ukraine, this means:

- **The model of establishment of a Special Tribunal/Court will matter**. If the Special Tribunal is established through a treaty ratified by a small group of states, the tribunal would be perceived as acting on behalf of this group. While Ukraine and the participating states could argue that they are acting on behalf of the international community as a whole, because the crime of aggression violates a *jus cogens* norm,[51] it is unlikely to be accepted. In such a case, the tribunal would be perceived as only representing the member states and personal immunities would continue to apply.
- For a treaty-based Tribunal, **an international mandate could potentially be inferred** from broad ratification (in numbers and geographically), and a possible endorsement by the UNGA.[52] The number of states needed to support such a Tribunal, to demonstrate that the Tribunal is acting on behalf of the international community to be able to overcome immunities, remains uncertain. This is further unpacked in Sections IV.6. and V.
- The issue of functional immunities is likewise not settled. However, if Ukraine, as a state, chooses to treat the crime of aggression on par with other international crimes—and thus considers it a legitimate ground to disregard functional immunities—then a tribunal established based on Ukraine's territorial jurisdiction, or through a joint mandate by participating states, could be empowered to do so.

III. Legitimacy considerations (by Dr. Kateryna Busol)[53]

1. Overview of legitimacy issues

The creation, modalities and the wider legacy of an accountability mechanism for Russia's aggression against Ukraine are co-shaped by legitimacy considerations. Such considerations are defined by two principal factors. First, what issues are perceived as barometers of legitimacy. Second, whose views of such barometers are considered.

None of the two factors are set in stone. Certain aspects such as the selection of judges, appeal, victim agency and possible reparations might be important legitimacy indicators for all major stakeholders. However, other issues – such as the examination of Russia's unaddressed imperial legacy, rectifying Russia's distortive narrative about World War II or ensuring that an accountability mechanism considers Russia's aggressive acts not just since the full-scale

[50] Commentary to the ILC Draft Article 7, p.239, §21, available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.
, see also Trahan, *supra* note 12.
[51] ILC, *Peremptory norms of general international (jus cogens)*, Texts of the draft conclusions and Annex adopted by the drafting committee on second reading, 11 May 2022, A/CN.4/L.967, Annex (a), available at: http://legal.un.org/docs/?symbol=A/CN.4/L.967.
[52] Open Society Justice Initiative, 'Immunities and a Special Tribunal for the Crime of Aggression against Ukraine', February 2023, available at: https://www.justiceinitiative.org/uploads/eb4acc44-b7f3-4026-8c68-3f677a2c4b24/immunities-and-a-special-tribunal-for-ukraine-en-02012023.pdf at 16.
[53] Ukrainian lawyer; Associate Professor, National University of Kyiv-Mohyla Academy, British Academy Research Fellow, British Institute of International and Comparative Law.

invasion but since 2014 – may resonate stronger with some stakeholders more than with others.

In the present context, legitimacy indicators and their perceptions vary – while sometimes intersecting – for four core categories of stakeholders. First, the Ukrainian society and especially survivors of atrocity crimes and serious violations of human rights perpetrated by Russian actors in the context of the ongoing aggression since 2014. Second, the Russian and Belarusian societies, who, to a differing extent, have contributed to the ongoing aggression and, in some cases, allege their victimhood in connection with it. Third, societies of the states that were part of the USSR and the Warsaw Pact. And fourth, the wider international community.

The next section analyses the major legitimacy considerations of a possible aggression prosecution for the key stakeholder – the affected Ukrainian society. The subsequent section raises important contextual intricacies for Ukraine, Russia, Belarus and Central and Eastern Europe. The chapter concludes that the prosecution of the Russian leadership for the ongoing aggression against Ukraine can illumine the overlooked living legacy of Russia's imperialism and should become a "transitional building block"[54] in the equalisation of the ICC's jurisdiction over future aggressions globally.

2. Legitimacy considerations for the Ukrainian society

Since the beginning of Russia's aggression in 2014, survivors have reported feeling targeted for their Ukrainian identity, presumed or actual connection with Ukraine's civic activists, local authorities or armed forces, as well as for the underlying vision of Ukraine and its future as independent from Russia.[55] This lived experience has shaped three cross-cutting justice considerations:

- **Accountability has been a strong priority for Ukraine – for the Government, human rights community and survivor groups – both for the initial eight years of the armed conflict and since the full-scale invasion**.[56] Even amid the dire periods of the all-out invasion, the public discourse in the country does not mention unconditional 'peace'. Instead, it stresses the necessity of a 'victory', followed by '*just* peace'.[57]
- All three mentioned sub-stakeholders – survivor groups, human rights community and the Ukrainian Government – emphasise the **necessity to punish both direct perpetrators and the Russian leadership**, who have enacted both the aggression itself and its conduct by means of atrocities. [58]

[54] C. Kreß, S. Hobe, A. Nußberger, ‚The Ukraine War and the Crime of Aggression: How to Fill the Gaps in the International Legal System', Just Security, 23 January 2023, available at: https://www.justsecurity.org/84783/the-ukraine-war-and-the-crime-of-aggression-how-to-fill-the-gaps-in-the-international-legal-system/.
[55] OHCHR, 'Human Rights Situation during the Russian Occupation of Territory of Ukraine and Its Aftermath, 24 February 2022-31 December 2023', 20 March 2024, § 39; OHCHR, *Conference room paper of the Independent International Commission of Inquiry on Ukraine*, A/HRC/52/CRP.4, 29 August 2023, §§ 524-525.
[56] ZMINA, 'The Attitudes of Ukrainians to Transitional Justice - a Sociological Survey', 17 March 2021, available at https://zmina.info/articles/doslidnyky-rozpovily-pro-stavlennya-ukrayincziv-do-perehidnogo-pravosuddya/; President Zelenskyy Peace Formula, 'Ukraine's Peace Formula Philosophy', available at https://www.president.gov.ua/storage/j-files-storage/01/19/53/32af8d644e6cae41791548fc82ae2d8e_1691483767.pdf, §7 'Restoration of justice' at 5.
[57] Center for Civil Liberties, ‚Nobel Lecture 2022, p. 5, available at: https://www.nobelprize.org/uploads/2022/12/center-for-civil-liberties-lecture.pdf; 'Survey shows most Ukrainian believe justice unattainable without trials for occupiers', *Ukrainska Pravda*, 20 March 2024, available at: https://www.pravda.com.ua/eng/news/2024/03/20/7447327/.
[58] Recent sociological polls indicate that 76% of Ukrainians believe that justice cannot be reached without the accountability of those who designed that attack on Ukraine and perpetrated ensuing conflict-related crimes. Rating Group, 'Justice in the Context of Russian Armed Aggression', 13 August 2024, available at https://ratinggroup.ua/en/research/ukraine/justice-context-russian-armed-aggression.html.

- **Reparations** – interstate reparations and direct reparations to survivors – are an intrinsic part of the domestic justice vision. Individual reparations to atrocity survivors are also a recommendation from international bodies and a practical necessity, which Ukraine is gradually addressing already amid the ongoing warfare.[59]

Given the above, several considerations will co-shape the perception of the legitimacy of a potential tribunal by the Ukrainian society:

- **Consideration of Russia's acts of aggression since 2014 and not just since the full-scale invasion**. The temporal jurisdiction of a tribunal should cover the full scope of Russia's aggression since 2014. This will solidify the full nuanced vision of the armed conflict, its antecedents and failures to address them and, possibly, prevent escalation. It will also be in line with the rulings of the European Court of Human Rights (ECtHR) and the District Court of The Hague in the MH17 case, both of which have confirmed Russia's presence in Ukraine since 2014 and were celebrated by the Ukrainian public.[60] The ICC Office of the Prosecutor (OTP) also views 2014 as the starting point of Russia's aggression.[61] Crucially, the consideration of the Crimea and Donbas invasions will bring back into the picture the stories of victims and survivors, who have been largely neglected internationally. A tribunal's authoritative scoping of aggression could catalyse the rethinking of the timeframes of existing or future reparations mechanisms, thus ensuring support to more survivors.[62] Crucially, addressing the full scope of Russia's aggression will help avoid or at least narrow the room for 'victimhood competition' between those affected in 2014-2021 and since the full-scale invasion. This is particularly important for the nation's social cohesion.
- **Russian leadership, especially the *Troika*, must be prosecuted**. The Ukrainian society, especially survivors, feel the double-targeting: by immediate perpetrators who loot, kill and rape, and, fundamentally, by President Putin and his closest circle who legitimise, enable and maintain the ongoing aggression. However horrendous war crimes and other atrocities on the ground are, they do not encompass the Kremlin's overarching denial of Ukrainians' right to exist as an independent sovereign nation. The Russian leadership weaponises

[59] *Conference room paper of the Independent International Commission of Inquiry on Ukraine*, A/HRC/52/CRP.4, 29 August 2023, at §92; Government portal, 'Olha Stefanishyna: Providing urgent interim reparations today should become an important element of achieving justice in the future', 4 March 2024, available at https://www.kmu.gov.ua/en/news/olha-stefanishyna-zabezpechennia-nevidkladnykh-promizhnykh-reparatsii-vzhe-sohodni-maie-staty-vahomym-elementom-dosiahnennia-pravosuddia-u-maibutnomu; Draft Law on the Register of Persons, Whose Life and Health Have Been Affected as a Result of Armed Aggression of the Russian Federation against Ukraine № 10256 (adopted 20 November 2024) available at https://itd.rada.gov.ua/billInfo/Bills/Card/43188; Draft Law on the Status of Persons Affected by Sexual Violence in Connection with the Armed Aggression of the Russian Federation against Ukraine and Urgent Interim Reparations № 10132 (adopted 20 November 2024) available at https://itd.rada.gov.ua/billInfo/Bills/Card/42862; Global Survivors Fund, *Ukraine Study on the Status of and Opportunities for Reparations for Survivors of Conflict-Related Sexual Violence* (2022), available at https://www.globalsurvivorsfund.org/fileadmin/uploads/gsf/Documents/Resources/Global_Reparation_Studies/GSF_Report_Ukraine_EN_June2022_WEB.pdf.

[60] District Court of The Hague, *Ukraine and The Netherlands v. Russia,* Applications №8019/16, 43800/14 and 28525/20, 20 November 2022, Case 09-748006/19, available at https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:RBDHA:2022:12219, at § 695; ECtHR, *Ukraine and The Netherlands v. Russia,* Applications №8019/16, 43800/14 and 28525/20, Decision, 20 November 2022, para 695.

[61] 'In our application for these warrants, my Office again underlines that these acts were carried out in the context of the acts of aggression committed by Russian military forces against the sovereignty and territorial integrity of Ukraine which began in 2014', Statement by Prosecutor Karim A.A. Khan KC on the issuance of arrest warrants in the Situation in Ukraine, 25 June 2024, available at https://www.icc-cpi.int/news/statement-prosecutor-karim-aa-khan-kc-issuance-arrest-warrants-situation-ukraine-0.

[62] For instance, as of January 2025, the Council of Europe's Register of Damage accepts claims of harms caused since 2022 but not since 2014. See Register of Damage for Ukraine, 'Mandate and Functions', available at https://rd4u.coe.int/en/mandate-and-functions.

atrocities to implement its master plan: to subjugate Ukrainians physically and metaphysically and supress any manifestations of their distinct identity.[63] A failure to consider the masterminding role of Russia's top leadership, including the *Troika*, will detrimentally misread the aims and nature of the ongoing aggression and irreparably undermine the legitimacy of a tribunal.

- **Victim participation**. Survivors' recognition of and meaningful contribution to a tribunal would further inform societal perceptions of its legitimacy. The positioning of individuals before tribunals adjudicating atrocity crimes has evolved considerably from the 'mere' victims/witness statement provision in Nuremberg to the more full-fledged procedural standing before the ICC, which includes a possibility of reparations.

Victim participation in a future tribunal should be based on two core premises. First, it should aim to represent the whole spectrum of persons affected by Russia's aggression. The difficult task of selecting survivors should at all times be informed by inherent gendered and intersectional lenses. This would demonstrate the varied distortive impacts of Russia's aggression on individual lives based on sex, gender, age, sexual orientation, religion, civic activism, social background, caring obligations and other factors. Perspectives of those who stayed in their homes, including under occupation, relocated within Ukraine, fled abroad and, perhaps, even those who were living abroad at the moment of the full-scale invasion and were shattered about the threat to lives of their loved ones in Ukraine should be presented.

The above will solidify the **second** premise – enhancing the positioning of *individuals* as victims of the crime of aggression.[64] Aggression has historically been viewed as an encroachment of a state against a state. A tribunal's human-centric interpretation of aggression's particular harms will reflect the realities of Russia's devastation, reverberate with the Ukrainian people and solidify an important advancement in understanding the impact of aggression on individual human lives.

Informed by the more expansive interpretation of victimhood and the growing environmental concerns in peacetime and war, the tribunal could also consider the aggression's devastation of Ukraine's pivotal institutions and the natural environment.[65]

- **More nuanced view of aggression-caused harms, including gender-based and environmental harms, and their consideration in reparations frameworks**. This argument flows from the previous one. If individuals get stronger standing as victims of aggression, the perspectives derived from the lived experiences of Ukrainians will inform and sensitise the view of harms caused by Russia's aggression. The consideration of historically neglected harms such as sexual, reproductive and other gender-based harms, the spoliation of Ukraine's environment, loss of livelihood, clean water and employment, undermined

[63] Y. Ioffe, 'Forcibly Transferring Ukrainian Children to the Russian Federation: A Genocide?', 25 *Journal of Genocide Research* (2023) 315-351, at 315, 345-346; I. Marchuk, A. Wanigasuriya, 'Beyond the False Claim of Genocide: Preliminary Reflections on Ukraine's Prospects in Its Pursuit of Justice at the ICJ', 25 *Journal of Genocide Research* (2023) 256-278, at 263-265.
[64] The Human Rights Committee (HRC) has found that an aggressive act causing the deprivation of life *ipso facto* violates the right to life under the International Covenant on Civil and Political Rights (ICCPR), HRC, *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, CCPR/GC/36, 30 October 2018, at §70; E. Pobjie, 'Victims of the Crime of Aggression', in C. Kreß and S. Barriga (eds), *The Crime of Aggression: A Commentary* (Cambridge: Cambridge University Press, 2016) 816-860, at 852-853; S. Darcy, 'Accident and Design: Recognizing Victims of Aggression in International Law', 70(1) *International and Comparative Law Quarterly* (2021), 103-132, at 131.
[65] See e.g. ICC OTP, 'Draft policy on environmental crimes under the Rome Statute' (2024), available at https://www.icc-cpi.int/sites/default/files/2024-12/2024-12-18-OTP-Policy-Environmental-Crime.pdf; M. Gillett, *Prosecuting Environmental Harm before the International Criminal Court* (Cambridge University Press: 2022) 53-133.

farming, forced relocation and their connection with the wider biodiversity degradation and food insecurity globally will paint a more human-centric picture of Russia-caused evils.[66]

Such consideration should further inform reparations frameworks and the repurposing of Russia's assets to fund them. Many harms are aggression-specific and would not be covered by reparations available for war crimes, crimes against humanity, genocide or other serious human rights violations. For instance, rebuilding hospitals to renew access to reproductive healthcare across war-affected Ukraine would be an important measure redressing wider reproductive harms of the crime of aggression. These harms would not be addressed by reparations for victims of more 'narrow' reproductive crimes such as castration or forced pregnancy.[67] This example alone paints how pervasively far-reaching aggression-caused harms are – and how substantiated, causation-, needs- and ethics-wise Ukrainians' demand is to use Russia's frozen assets to redress them.

Reparations assigned by a tribunal or emanating from other frameworks impacted by a ruling should redress harms caused by Russia's aggression since 2014.

- **Possible consideration of Russians' or Belarusians' alleged victimhood.**

This issue will be among the most testing for the way Ukrainians will perceive a tribunal's legitimacy.

Aggression can affect not only the society of an invaded, occupied or bombarded nation, but also the people of an aggressor state.[68] While combatants' deaths in battles conducted pursuant to the rules of international humanitarian law (IHL) would obviously not breach IHL, they would most likely constitute an avoidable harm of the underlying crime of aggression. The scoping of potential victimhood for the four international crimes, indeed, differs. However, any such differences should be assessed in the realities of a particular context.

The vast majority of the Russian population has supported the occupation of Crimea, hostilities in Eastern Ukraine and the all-out invasion.[69] Since 2022, the rating of President Putin has been reaching historical highs. Considerable numbers of the Russian population endorse their government's policies by relocating to the temporarily occupied Ukrainian territories, overtaking Ukrainians' property and otherwise benefitting from preferential business and employment opportunities there.[70] Russia's atrocities on the ground in Ukraine are well-documented, and so is the vast dehumanising rhetoric against Ukrainians. The predominant concern for many Russians is the anguish not about daily innocent deaths in Ukraine, but about the impact of sanctions, domestic instability and the comfort of living abroad.

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[66] The ICC OTP recognises that the crime of aggression can be gendered in its commission and results, see ICC Office of the Prosecutor, *Policy on Gender-Based Crimes* (2023), § 47; ICC OTP, 'The Office of the Prosecutor launches public consultation on a new policy initiative to advance accountability for environmental crimes under the Rome Statute', 16 February 2024, available at https://www.icc-cpi.int/news/office-prosecutor-launches-public-consultation-new-policy-initiative-advance-accountability-0#:~:text=The%20policy%20paper%20on%20environmental,other%20international%20and%20national%20courts.

[67] K. Busol, 'Beyond Sexual: Reproductive and Obstetric Violence in Russia's Aggression against Ukraine', Opinio Juris, 7 June 2024, available at https://opiniojuris.org/2024/06/07/symposium-on-reproductive-violence-in-international-law-beyond-sexual-reproductive-and-obstetric-violence-in-russias-aggression-against-ukraine/.

[68] F. Mégret, 'What is the Specific Evil of Aggression?', in C. Kreß and S. Barriga (eds), *The Crime of Aggression*: *A Commentary* (Cambridge: Cambridge University Press, 2016), 1398-1453, at 1442-1443.

[69] S. Medvedev, *A War Made in Russia* (Polity Press, 2023), at 107, 141.

[70] ICC OTP, 'Report on Preliminary Examination Activities' (2019), at § 272; International Partnership for Human Rights, 'Thieves in Law: Russian Pillage in Occupied Ukraine' (2024), available at https://static1.squarespace.com/static/655bc89ec57c8676f191667a/t/66fa9d543579050f1c67a3cf/1727700312575/pillage-report-public-24.09.pdf.

Crucially, Russia does not have general conscription, especially in the wealthy and more educated regions.[71] It engages numerous boots on the Ukrainian soil by offering contractual military service and good benefits in case of injury or death.[72] Convicts for the most heinous crimes join the war in exchange for amnesty.[73] Recent UN reporting discusses how Russia has been distributing to servicepersons free land plots in Crimea, to offer more incentives to its citizens to join the war effort against Ukraine.[74] Russian men may leave the country, to avoid the threat of being drafted, and many have availed of this opportunity. Those Russians who made it abroad have not organised a concerted public anti-war (or, at least, pro-democracy) movement internationally – in a stark contrast to Belarusians, whose civil society has been more united and proactive in its opposition to the Lukashenka regime, especially after the 2020 protests. In sum, this is an example not of slaughtered misinformed conscripts, but of numerous individuals who consciously signed a contract to kill.[75] Independent Russian media report that, amid President Putin's most recent ambitious call-up,[76] the number of those willing to join the contractual army, because of financial reasons or revenge, has been increasing even in the elite Moscow region.[77]

A tribunal may and, probably, should discuss the precursors of the ongoing aggression in and its effect on Russian and Belarusian societies. However, such discussion should be critical and not exculpatory. It should recognise civic initiatives assisting Ukrainians who ended up in Russia or helping find deported Ukrainian children – but also note that such initiatives are not representative of the larger societal picture. The analysis of the gradual erosion of the civic space in Russia should also mention the predominant lack of societal recognition of and reckoning with Russia's imperial past; disinterest in demanding redress even for Russian victims of the Soviet-era crimes (in stark contrast with other ex-Soviet nations, including the Baltics and Ukraine); profiting from the regime, thus solidifying its state capture; and other challenges with growing and maintaining a sustainable, proactive civil society (in contrast, for instance, to neighbouring Belarusians, whose civic stance culminated in the resilient protests against forged elections in 2020, followed by widespread enforced disappearances, unlawful detention and torture).

- **A Russian or Belarusian judge**. Not having a German judge on the bench has been one of the central points of victors' justice criticism of the Nuremberg trials. Arguments could be made about pre-empting the Nuremberg-like accusations of selective justice and validating

[71] Medvedev, *supra* note 66, at 139-140.
[72] Bloomberg, 'Russia to Hire Contract Soldiers in Bid to Avoid Unpopular Draft', 18 April 2024, available at https://www.bloomberg.com/news/articles/2024-04-18/war-in-ukraine-russia-to-enlist-more-hired-soldiers-to-avoid-conscription.
[73] The New York Times, 'Man Convicted in Russian Journalist's Murder Is Pardoned After Serving in Ukraine', 14 November 2023, available at https://www.nytimes.com/2023/11/14/world/europe/russia-pardon-anna-politkovskaya-ukraine.html.
[74] OHCHR, 'Treatment of Prisoners of War and Update on the Human Rights Situation in Ukraine (1 June 2024 – 31 August 2024)', at § 94, available at https://ukraine.ohchr.org/en/Treatment-of-prisoners-of-war-and-Update-on-the-human-rights-situation-1-June-to-31-August-2024.
[75] Except for the instances when Russia misleads foreign citizens by engaging them in hostilities, and when it forces Ukrainians from the temporary occupied territories to fight again their own country. The Guardian, '"He had no idea he was being sent to a war zone": the Indian and Nepali men on frontlines in Ukraine', 7 March 2024, available at https://www.theguardian.com/world/2024/mar/07/he-had-no-idea-he-was-being-sent-to-a-war-zone-the-indian-and-nepalese-men-on-frontlines-in-ukraine; Human Rights Watch, 'Russia Forced Ukrainians in Occupied Areas into Military', 20 December 2023, available at https://www.hrw.org/news/2023/12/20/russia-forces-ukrainians-occupied-areas-military.
[76] P. Kirby, 'Putin begins biggest Russian military call-up in years', *BBC*, 1 April 2025, available at: https://www.bbc.com/news/articles/c36718p52eyo.
[77] '"It Seems We Will Be Fighting for Ages": The Number of Those Willing to Sign a Contract with the Ministry of Defence in Moscow Has Drastically Increased', *Verstka*, 11 April 2025, available at: https://verstka.media/v-moskve-rezko-vyroslo-chislo-zhelayushhih-podpisat-kontrakt-s-minoborony.

the stature and legacy of a tribunal for the Russian and Belarusian societies and the international community. However, the immediate reaction of the Ukrainian society to a Russian/Belarusian judge would most likely be negative. With the unaddressed and largely unacknowledged legacy of Russia's pre- and post-Soviet imperialism, it would be hard to convince Ukrainians as to why yet another narrative – and such a crucial one – has to be co-shaped by the oppressor.

The mentioned goal to validate the stature and legacy of a tribunal for the Russian and Belarusian societies, however, would not necessarily be reached by simply including a Russian/Belarusian judge. The mere Russian/Belarusian origin of a judge (who would most likely be living abroad) would not validate a tribunal for and within those countries, as long as their societies and authorities deny their responsibility for this aggression and/or claim a victim status. There is also no guarantee that such a judge would not try, consciously or subconsciously, to turn some processes of a tribunal into an exculpatory truth-seeking mechanism for her/his society.

Among numerous options, the detailed discussion of which is fit for another paper, the most balanced one could be having a quota for a judge from Eastern and Central Europe. This will create the space for engaging professionals for an informed and context-specific discussion of Russia's imperial and neo-imperial policies and their manifestation in the ongoing aggression. If a tribunal does not have *ad hoc* positions for a Ukrainian and Russian/Belarusian judge, professionals from these countries could apply for a judicial position within the Eastern and Central European quota.

- **The role of propaganda and the church**. The Kremlin has weaponised different media outlets to spread its aggression messaging and dehumanising rhetoric, some of which may amount to direct and public incitement to genocide.[78] The Russian Orthodox Church has also built a strong alliance with the state, declaring the ongoing aggression to be a 'holy war' and spreading the ideology of the Russian World.[79] Considering the fuelling role of the media and the church in the encroachment on Ukraine is important. Even if no direct charges against respective propaganda or church figures are brought in this proceeding, a tribunal must discuss the state-funded infrastructure of propaganda and the Kremlin's mutually supportive partnership with church leaders.
- **Unpacking Russia's unaddressed imperial legacy and reclaiming the legacy of Nuremberg**. Russia has distorted and appropriated the Soviet role in World War II and the Nuremberg

[78] *Conference room paper of the Independent International Commission of Inquiry on Ukraine,* A/HRC/52/CRP.4, 29 August 2023, §774; *Report of the Independent International Commission of Inquiry on Ukraine,* A/HRC/55/66, 5 March 2024, §98; PACE, *Legal and human rights aspects of the Russian Federation's aggression against Ukraine,* Resolution 2482, 26 January 2023, §12; PACE, *Legal and human rights aspects of the Russian Federation's aggression against Ukraine*, Resolution 2556, 26 June 2024, §5; C. Apt, 'Russia's Eliminationist Rhetoric Against Ukraine: A Collection', Just Security, 26 August 2024, available at https://www.justsecurity.org/81789/russias-eliminationist-rhetoric-against-ukraine-a-collection/.

[79] "The Assembly draws attention to the "Russkiy mir" (that is, "Russian world") ideology that has taken hold in the Russian Federation and has become a State ideology, which the Kremlin has turned into a tool for promoting war. This ideology is being used to destroy the remnants of civil democracy, to bring up new militarised generations in the Russian Federation and to justify its external aggression.", PACE, Resolution 2436 (2022) 'The Russia Federation's aggression against Ukraine: ensuring accountability for serious violations of international humanitarian law and other international crimes', available at: https://pace.coe.int/en/files/30024/html; Institute for the Study of War, 'The Russian Orthodox Church Declares "Holy War" against Ukraine and Articulates Tenets of Russia's Emerging Official Nationalist Ideology', 30 March 2024, available at https://www.understandingwar.org/backgrounder/russian-orthodox-church-declares-%E2%80%9Choly-war%E2%80%9D-against-ukraine-and-articulates-tenets.

Trial.[80] It has claimed the almost exclusive victimhood from Nazi Germany compared to other Soviet nations such as Ukrainian or Belarusian Soviet Socialist Republics, which were affected by hostilities and Nazi occupation more.[81] Soviet and contemporary Russia has also one-dimensionalised its liberating role during World War II, diluting the contributions of other Soviet republics and the Western Front.[82] Finally, Russia has operationalised the Nuremberg Trial, infusing it with false narratives (for instance, some indications of affected 'Sothern Russia' or 'Sothern Russians' in the main Nuremberg judgment should refer to 'Ukraine' and 'Ukrainians' instead). All three narratives have been backed with rigid memory politics and criminalisation of any 'deviating' interpretations. By associating Ukrainians with the Nazis and claiming the exclusive role of a liberator, during World War II and nowadays,[83] Russia asserts that it can never be a perpetrator.

A proposed tribunal will not be a truth commission. However, it can and should contribute to some essential truth-seeking and narratives-expansion.[84] By discussing the unaddressed legacy of Russia's imperialism and its weaponisation of World War II and Nuremberg, a tribunal will paint a crucial background for assessing the antecedents, aims and means of the ongoing aggression.

- **Gender considerations for prosecution, bench and wider staffing policies of a tribunal**. Russia cultivates traditional gender roles. It has endorsed a list of the so-called traditional values, decriminalised domestic violence despite its pervasiveness and persecutes LGBTQI+ persons. Russia's aggression against Ukraine is also inherently gendered: while President Putin makes rapes jokes, his troops perpetrate horrendous sexual violence on the ground. Ukraine's responses to the invasion are also gendered. Women increasingly join the army, LGBTQI+ contribution to the military catalyses an overdue legislative action on civil partnerships, and the multiplicity of harms emanating from conflict-related crimes has activated the search for gender-competent responses.

The amplification of gender prejudices, harms but also opportunities for change in conflict should be considered in the workings of a tribunal. Both the Ukrainian, Russian and Belarusian societies will benefit from seeing highly competent women and professionals from other historically underrepresented and/or persecuted groups leading the work of a tribunal at all stages. Female leadership at top prosecutorial and judicial positions is particularly relevant, given the lingering male dominance in positions of power domestically. Victims and witnesses should have a choice of a male or female professional they would like to engage with in the proceedings. All tribunal's staff should undergo training on gender-competence and intersectionality.

The above may not be an immediate legitimacy barometer for all the Ukrainian people. However, gender-competent staffing of a tribunal has a unique potential to ensure the

[80] K. Busol, 'Russia's Aggression against Ukraine and the Idealised Legacy of Nuremberg' EJIL: Talk!, 16 June 2022, available at https://www.ejiltalk.org/21022-2/; A. Vorobiova, 'The "Lessons of Nuremberg": Their Use and Abuse in the Current Russia-Ukraine War', *XLII Polish Yearbook of International Law* (2022), at 55, 58.
[81] T. Snyder, Bloodlands, Random House (2011).
[82] Medvedev, *supra* note 69, at 21-22; G. Bogush and I. Nuzov, 'Russia's Supreme Court Rewrites History of the Second World War', EJIL: Talk!, 28 October 2016, available at https://www.ejiltalk.org/russias-supreme-court-rewrites-history-of-the-second-world-war/.
[83] Atlantic Council, 'Our experts decode the Putin speech that launched Russia's invasion of Ukraine', 22 February 2023, available at: https://www.atlanticcouncil.org/blogs/new-atlanticist/markup/putin-speech-ukraine-war/.
[84] M. Hirsch, 'The Role of International Tribunals in the Development of Historical Narratives', *20 Journal of the History of International Law 4* (2019), pp. 391-428, available at: https://brill.com/view/journals/jhil/20/4/article-p391_1.xml.

gendered examination of aggression-caused harms, solidify important shifts regarding gender roles, which are already underway in the Ukrainian society, – and catalyse them for the Russian and Belarusian people.

- ***In absentia* proceedings**. Much public imagery and discussions in Ukraine picture President Putin in the dock in The Hague. It is greatly important for the society and especially for immediate survivors to see justice served directly and in full, in The Hague or elsewhere, regarding those most responsible. Regarding the mode of proceedings, there are two parallel but related processes. On the one hand, the vast majority of domestic war-crime trials in Ukraine are conducted *in absentia*. This is known widely, and, with all valid concerns, the society is used to it. On the other hand, the possible *in absentia* elements for an aggression tribunal are hardly discussed publicly. This should change: to safeguard the legitimacy of a tribunal, an engaged public outreach on the scope of potential *in absentia* dimensions and the opportunities and pitfalls they pose is needed in Ukraine. If *in absentia* elements are introduced for the tribunal, an outreach campaign will pre-empt societal disappointment if people see an empty dock and explain the expressive and other value of such a trial. If the apprehension of suspects is the goal, public outreach will help manage societal expectations about the length of proceedings.
- **Appeal**. The Ukrainian society is largely unaware that the absence of appeal has been one of the strong points of criticisms of the Nuremberg and Tokyo tribunals. Nor does the Ukrainian public have a strong demand for – or even a position on – an appeal for a potential tribunal on Russia's aggression. The public outreach around a tribunal should necessarily explain why an appellate procedure is necessary – not just for the legitimisation of a tribunal's judgment and legacy but also for the solidification of Ukraine's very own rule of law, with respect for due process and fair trial guarantees.

3. Important contextual considerations & a remark on selectivity

Ukraine

Ukraine has been both affected by selectivity and has benefitted from it. The initial years of Russia's aggression – 2014-2021 – went in many ways unnoticed for the international community. Viable allegations of war crimes, crimes against humanity and other serious human rights violations were recorded by the ICC OTP, the UN and numerous human rights NGOs.[85] However, this prompted little political, military, legal or even scholarly engagement globally. The ICC OTP never opened an investigation into the Maidan, Crimea or Donbas events. Ukraine was being pushed into purposefully stillborn Minsk Agreements, which diluted Russia's

[85] OHCHR, *Conflict-Related Sexual Violence in Ukraine, 14 March 2014 to 31 January 2017*, A/HRC/34/CRP.4, 16 March 2017; OHCHR, *Arbitrary detention, torture and ill-treatment in the context of armed conflict in eastern Ukraine, 2014-2021*, available at https://ukraine.ohchr.org/en/arbitrary-detention-torture-and-ill-treatment-context-armed-conflict-EN; ICC OTP, *Report on Preliminary Examination Activities* (2016) at §174, §183, available at https://www.icc-cpi.int/sites/default/files/iccdocs/otp/161114-otp-rep-PE_ENG.pdf; ICC OTP, *Report on Preliminary Examination Activities*, (2017), §109, available at https://www.icc-cpi.int/news/report-preliminary-examination-activities-2017; ICC OTP, *Report on Preliminary Examination Activities*, (2018), at §76, §92, available at https://www.icc-cpi.int/sites/default/files/itemsDocuments/181205-rep-otp-PE-ENG.pdf; ICC OTP, *Report on Preliminary Examination Activities*, (2019), at §279, available at https://www.icc-cpi.int/sites/default/files/itemsDocuments/191205-rep-otp-PE.pdf; ICC OTP, *Report on Preliminary Examination Activities*, (2020), at §280, available at https://www.icc-cpi.int/sites/default/files/itemsDocuments/2020-PE/2020-pe-report-eng.pdf; Eastern-Ukrainian Centre for Civic Initiatives, *War without Rules: Gender-Based Violence in the Context of the Armed Conflict in Eastern Ukraine* (2017), available at https://totalaction.org.ua/public/upload/book/1522852942_gon_eng_web.pdf.

role in the armed conflict and were to *de facto* freeze Ukraine's eastern territories under Russia's occupation.[86]

Ukraine's Government and civil society saw these limitations in the world's (lack of) readiness to confront Russia's encroachment – and were realistic in their justice aspirations. Notably, even though Russia's initial invasion and occupation of parts of Ukrainian territories amounted to aggression as defined in international law and recognised in the Ukrainian context as such by the ICC Prosecutor,[87] Ukraine did not call for aggression prosecution in 2014-2021. This happened not because Ukrainians did not feel attacked or endangered (in fact, Ukraine qualified Russia's actions as aggression in its domestic legislation back in 2014).[88] This happened because the geopolitical limitations were so rooted, that they hardly allowed Ukrainians the luxury of thinking about prosecuting aggression.

The scope of the harm and the thinking – of Ukraine and globally – about the need to address and redress its triggering 'supreme international crime' have changed with the full-scale invasion. President Putin's clearly stated conquest plans[89] and the proliferation and gravity of related atrocity crimes have left little room for misinterpreting or turning a blind eye to the Kremlin's aims and means. It is in this context, nine years into an aggressive war, that Ukraine's Government initiated the discussion about prosecuting Russia's leadership responsible for it.

Therefore, while the predominant international solidarity with Ukraine since 2022 has in many ways been unparalleled, it is not without nuances. One of such nuances is the inaction of the international community (and of the potentially available international justice mechanisms such as the ICC) on Russia's atrocities in Ukraine in 2014-2021. As the UN Commission of Inquiry on Ukraine has rightly noted, this impunity is rooted in the legacy of the Kremlin's lawlessness in the Chechen wars, Moldova, Georgia, Syria and other contexts.[90]

Any justice debates, including those on selectivity, regarding Ukraine should recognise the exceptional global responses since the all-out invasion. But also – such responses' belated nature and the scope of harm they have failed to address and prevent, in and beyond Ukraine. These debates should move on from self-seclusion in Ukraine and see how the prosecution of Russia's aggression will both bring redress to Ukrainians and equalise justice for the crime of aggression globally.

Russian & Belarusian societies

Democratic transformations and wider transitional justice in Russia and Belarus are possible only if the ongoing aggression is defeated and accounted for. The prosecution of aggression masterminds will expose the neo-imperial criminal plan to subjugate a sovereign nation – and will also reveal persecutorial practices of the Putin and Lukashenka regimes domestically.

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[86] D. Allan and K. Wolczuk, 'Why Minsk-2 cannot solve the Ukraine crisis,' Chatham House, 16 February 2022, available at https://www.chathamhouse.org/2022/02/why-minsk-2-cannot-solve-ukraine-crisis.

[87] 'In our application for these warrants, my Office again underlined that these acts were carried out in the contexts of the acts of aggression committed by Russian military forces against sovereignty and territorial integrity of Ukraine which began in 2014', 'Statement by Prosecutor Karim A.A. Khan KC on the issuance of arrest warrants in the Situation in Ukraine', 25 June 2024, available at https://www.icc-cpi.int/news/statement-prosecutor-karim-aa-khan-kc-issuance-arrest-warrants-situation-ukraine-0.

[88] The Law of Ukraine on Ensuring Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine (2014) available at https://zakon.rada.gov.ua/laws/show/1207-18#Text, at Art. 2.

[89] Atlantic Council, 'Our experts decode the Putin speech that launched Russia's invasion of Ukraine', 22 February 2023, available at https://www.atlanticcouncil.org/blogs/new-atlanticist/markup/putin-speech-ukraine-war/.

[90] *Conference room paper of the Independent International Commission of Inquiry on Ukraine*, A/HRC/52/CRP.4, 29 August 2023, §§42, 46-47.

As mentioned above in the sections on a possible Russian/Belarusian judge and possible consideration of Russian/Belarusian alleged victimhood, as of June 2025, it is unlikely that these or other factors will legitimise a tribunal for Russia's and Belarus' current political leadership and the wider public. This does not make a tribunal redundant for the two nations. Complementing other domestic and international justice initiatives, a tribunal can build a substantiated narrative about the thinking and practices of Russia's 'supreme international crime'. These impartial factual and legal findings will be there for the Russian society to face and engage with, as it becomes ready. The exposure of the Kremlin's and Lukashenka's state capture and patterns of criminality internationally and domestically will eventually catalyse transitional justice initiatives in the two countries. An independent, impartial and competent prosecution of the crime of aggression will catalyse that.

Other former Soviet and Warsaw Pact nations

Various layers of imperial dominance in Central and Eastern Europe have been underexplored or misunderstood. The formation of the USSR might have eliminated the institute of Russian emperors in form – however, it did not eliminate Russia's imperial thinking in essence. In many ways, at its core and in its practices, Soviet and contemporary Russia have remained an empire.[91] An imperial ethos has guided the occupation of the Baltics, an invasion of Czechoslovakia and an imposition of the Kremlin rule further across Central and Eastern Europe and Central Asia.[92] These processes were accompanied with pervasive surveillance, persecutorial practices and forgeries of history such as an attempted misattribution of the Soviet massacre of the Polish military intelligentsia in Katyn. After the dissolution of the USSR, Russia has tried to retain its control over the former Soviet republics and vigorously opposed their democratisation.

Elements of Russia's overdue accountability for the above can take different forms. For instance, the announcement of the first ICC arrest warrants in the Ukraine situation – including the one against President Putin – by a Polish judge has been greatly symbolic. Similarly, by referring the situation in Belarus to the ICC, Lithuania is supporting justice for victims of the Soviet-like Lukashenka regime.[93] And the principled standing of many Central and Eastern European states – 'small nations'[94] – in backing a tribunal to try the Russian leadership reverberates well beyond the ongoing aggression against Ukraine. This stance embodies the regained agency and strength to face the serial abuser and, through an examination of its most recent assault, expose the legacy of unaddressed decades-long oppression. The expressive and symbolic value of the *process* of *standing* and *standing up for* the abused by those who have been historically assaulted by the abuser should not be underestimated. A tribunal's discussion of historical antecedents of Russia's now peaking neo-imperialism and a just conviction will be

[91] P. I. Labuda, 'Accountability for Russian Imperialism in the "Global East"', Just Security, 21 August 2023, available at: https://www.justsecurity.org/87666/accountability-for-russian-imperialism-in-the-global-east/.
[92] S. Lebedev, 'The USSR occupied eastern Europe, calling it 'liberation' – Russia is repeating the crime in Ukraine', The Guardian, 19 May 2025, available at: https://www.theguardian.com/commentisfree/2025/may/19/russia-illegal-occupation-eastern-europe-ukraine-post-soviet.
[93] The Ministry of Justice of the Republic of Lithuania, 'Lithuania refers the Situation in Belarus to the Prosecutor of the ICC to investigate the crimes against humanity committed by the authoritarian regime of Lukashenko', 30 September 2024, available at https://tm.lrv.lt/en/news/lithuania-refers-the-situation-in-belarus-to-the-prosecutor-of-the-international-criminal-court-to-investigate-the-crimes-against-humanity-committed-by-the-authoritarian-regime-of-lukashenko/.
[94] Faber, 'Extract: A Kidnapped West by Milan Kundera', 12 April 2023, available at https://www.faber.co.uk/journal/extract-a-kidnapped-west-by-milan-kundera/; A. Stefan, 'Review: Rediscovering Milan Kundera's European tragedy', Chatham House, 22 November 2023, available at https://www.chathamhouse.org/publications/the-world-today/2023-04/review-rediscovering-milan-kunderas-european-tragedy.

an important belated satisfaction for the 'small [Central and Eastern European] nations'. The fairness of such process and its ruling will also be inspiring for other post-Soviet nations, especially those constrained by Russia's vested interests or otherwise affected by the reach of the 'Russian World'.

Wider international community & standing the test of the future

A map of our world is, in many ways, a map of blind spots, chosen or unintended. The suffering in one's native context, the misrepresentation of history and many other factors have shaped the way of seeing the world as an incoherent patchwork rather than as an interconnected whole. Such age-long lacunae and traumas cannot be remedied swiftly – they require layered and respectful uncovering. The proper characterisation of Russia's conduct as aggression since 2014 should be weaved into the wider discussion of Russia's subjugating practices in the region during the imperial and Soviet times and their worldwide reverberations nowadays.[95] The visualisation of complicated and often unknown histories of Central and Eastern European nations and indigenous peoples across Russia will add nuance to the global picture of historic injustices and inspire a more inclusive and human-centric thinking about addressing their remaining asymmetries.

In its calls for Russia's accountability, Ukraine should become a leading voice for the equalisation of justice for the 'supreme international crime' globally. Now that Ukraine has finally ratified the ICC's Rome Statute, it should collaborate with like-minded states, civil society organisations and survivor groups and catalyse the reform of the ICC regime on aggression. This discussion is already ongoing – Ukraine should join and co-lead it. While this is the route supported by Ukrainian human rights organisations, it has not got the clear backing of the Government yet. The two-pronged approach of establishing a tribunal but also advocating for the Rome Statute amendments on aggression is morally and strategically correct. It is supported by leading professionals[96] and is the most viable way to address the double standards concerns and engage "a sufficient number of regionally dispersed States"[97] to support a proposed tribunal.

4. Conclusion

Many pivotal global shifts sprang from *ad hoc* initiatives. The soft law principles on atrocity prosecution shaped by the Nuremberg and Tokyo trials have found their hard law shape in the Rome Statute. The *ad hoc* Yugoslav and Rwandan criminal tribunals have emphasised the need for the permanent International Criminal Court – and intensified its creation. Ukraine can continue these dynamics: by seeking redress for a very specific tangible evil it is fighting, it can catalyse larger transformation.

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[95] N. Sabanadze, 'Russia is using the Soviet playbook in the Global South to challenge the West – and it is working', Chatham House, 16 May 2024, available at: https://www.chathamhouse.org/2024/05/russia-using-soviet-playbook-global-south-challenge-west-and-it-working.

[96] C. Kreß, S. Hobe, A. Nußberger, ‚The Ukraine War and the Crime of Aggression: How to Fill the Gaps in the International Legal System', Just Security, 23 January 2023, available at: https://www.justsecurity.org/84783/the-ukraine-war-and-the-crime-of-aggression-how-to-fill-the-gaps-in-the-international-legal-system/; A. R. Coracini, 'Is Amending the Rome Statute the Panacea Against Perceived Selectivity and Impunity for the Crime of Aggression Committed Against Ukraine?', Just Security, 21 March 2023, available at: https://www.justsecurity.org/85593/is-amending-the-rome-statute-the-panacea-against-perceived-selectivity-and-impunity-for-the-crime-of-aggression-committed-against-ukraine/.

[97] *Conference room paper of the Independent International Commission of Inquiry on Ukraine*, A/HRC/52/CRP.4, 29 August 2023, at §941.

The unavailability of the ICC to prosecute Russia's aggression, and the number of months it has taken Ukraine to advance the progress with a special tribunal are a testament to how much a systemwide reform is needed. Ukraine should be its leading voice – parallel to advocating for a tribunal. A fully-fledged special prosecution of Russia's top officials, including *the Troika*, the recognition of individual victims of the crime of aggression and the gender-competent reparations award will highlight how inactionable the Rome Statute aggression regime is – and how it must change. Ukraine's leadership in these processes has a potential not only to bring redress to millions of its citizens but also advance the human-centricity of the international criminal justice system and, at least in some ways, bridge the lingering Global East-South-North divides.

IV. The Council of Europe model (by Prof. Frank Hoffmeister[98])

1. Introduction

Since its first meeting in Prague in January 2023, the aforementioned Core Group discussed various models for establishing the Special Tribunal for the Crime of Aggression against Ukraine. While Ukraine and a number of Eastern European states, Belgium, Luxemburg, Liechtenstein and Switzerland favoured an international tribunal established by an agreement between the UN and Ukraine (like the Special Court for Sierra Leone), the G7 states favoured an internationalised model, in which the Tribunal would be created under Ukrainian legislation but complemented with international elements (like the Extraordinary Chambers in the Courts of Cambodia or the Kosovo Specialist Chambers).[99] Both approaches faced some challenges. The proponents of the international model had to reply to questions whether the United Nations General Assembly (UNGA) had the legal power and political majorities to replace the United Nations Security Council (UNSC), whose permanent member Russia would block any Chapter VII resolution to establish a UN tribunal. The supporters of the internationalised tribunal were faced with the obstacle that the Ukrainian Constitution does not provide for creating domestic special courts and the appointment of foreign judges.[100] Moreover, amendments to the Constitution are impossible during martial law.

When the discussions in the Core Group reached an impasse in September 2023, the European External Action Service and the services of the European Commission (DG Justice and Legal Service) floated the idea of a third model. According to their approach, recorded in textual proposals to the Core Group since then, the Tribunal should be set up by a multilateral agreement between the Core Group-participating states and receive international legal personality. At the same time, the Tribunal's independent prosecutor should only investigate cases if the Prosecutor-General of Ukraine transfers relevant Ukrainian criminal proceedings to the Tribunal. This third option allowed the Core Group process to move forward, but many delegations felt that negotiating a multilateral treaty between 40 states would be too cumbersome. Inspired by the helpful role played by the Council of Europe (CoE) in the setting

[98] Professor at the Brussels School of Governance and Head of the Legal Department of the European External Action Service. The views are strictly personal.
[99] See K. J. Heller, The Best Option: An Extraordinary Ukrainian Chamber for Aggression, 16 March 2022, available at: https://opiniojuris.org/2022/03/16/the-best-option-an-extraordinary-ukrainian-chamber-for-aggression/.
[100] For more details on Art. 125 of the Ukrainian Constitution, see A. Komarov and O. A. Hathaway, 'Ukraine´s Constitutional Constraints: How to Achieve Accountability for the Crime of Aggression', April 5, 2022, available at: https://www.justsecurity.org/80958/ukraines-constitutional-constraints-how-to-achieve-accountability-for-the-crime-of-aggression/.

up of the Register of Damage, some Core Group states then asked for a stronger role of the Strasbourg-based organisation in establishing the Tribunal.

On 30 April 2024, the CoE Committee of Ministers gave a mandate to the Secretary-General to prepare any necessary documents to contribute to consultations within the Core Group on a draft agreement between Ukraine and the CoE, including a draft statute and a possible draft enlarged partial agreement governing the modalities of support to such a tribunal, its financing and other administrative matters.[101] Since then, the 'CoE option' has been discussed in the Core Group on the basis of text proposals from the CoE Legal Service (DLAPIL) containing several alternative options to specific provisions on sensitive issues, compared to the draft text from the EU services. The CoE Parliamentary Assembly (PACE) supported the process with resolution 2556 of 26 June 2024. It stated, *inter alia*, that 'there cannot be peace without accountability' and recalled the mandate of the CoE to pursue 'peace based upon justice and international co-operation.'[102] It also deemed the CoE option the 'best feasible option, in terms of legal basis and political legitimacy', stating that it would 'clearly fall within the mandate of the Council of Europe.'[103] During their informal meeting in Vilnius in the beginning of September 2024, the CoE Ministers of Justice asked the Core Group to work further on this option.[104]

Importantly, participants of the Core Group meeting of Vienna of 17 September 2024 concurred that the Special Tribunal should be established by an agreement between Ukraine and the CoE. For the first time, the Presidential Office of Ukraine went public to report about this breakthrough.[105] The group itself announced further progress after the Riga meeting in November 2024[106] under the able leadership of the head of the Core Group, the Ukrainian Ambassador-at-Large, Anton Korynevych. A breakthrough occurred at the 13th meeting in Brussels early February 2025, in particular on jurisdiction and applicable law. After the finalisation of the process at the level of the Legal Advisors in Strasburg (19-21 March 2025), the Foreign Ministers of the Core Group states endorsed the three draft legal texts with a political statement in Lviv on 9 May 2025.[107] The choice of the location was no coincidence. It not only contains an 'homage' to Rafael Lemkin (the father of the UN Genocide Convention 1948) and Hersch Lauterpacht (who developed the legal concept of crimes for the Nuremberg Charter 1945), both of which had taught at Lviv University's Law Faculty before the Second World War. It also indirectly paid tribute to Philippe Sands, a contemporary law professor from London who had written about his two former fellow academics in his outstanding novel 'East-

[101] CoE News, 'Meeting of the Ministers' Deputies on 30 April 2024', 30 April 2024, available at https://www.coe.int/en/web/cm/-/meeting-of-the-ministers-deputies-on-30-april-2024.
[102] PACE, *Legal and human rights aspects of the Russian Federation's aggression against Ukraine*, Resolution 2556, 26 June 2024, at §8.
[103] Ibid.
[104] *Declaration of the Ministers of Justice of the Council of Europe, Vilnius*, 5 September 2024, at §5, available at https://rm.coe.int/final-vilnius-declaration-en-eu-note/1680b17523.
[105] President of Ukraine, 'We Have Made an Important Step Towards the Creation of a Special Tribunal for the Crime of Aggression – Iryna Mudra', 18 September 2024, available at https://www.president.gov.ua/en/news/mi-zrobili-vazhlivij-krok-na-shlyahu-do-stvorennya-spectribu-93337 .
[106] See Vienna-Riga Statement of the Core Group on the Establishment of the Special Tribunal for the Crime of Aggression Against Ukraine, 22 November 2024, available at: https://mfa.gov.ua/en/news/videnska-rizka-zayava-koaliciyi-derzhav-core-group-zi-stvorennya-specialnogo-tribunalu-shchodo-zlochinu-agresiyi-proti-ukrayini.
[107] See Joint Statement of the Foreign Ministers Meeting on the conclusion of the work of the Core Group on the Establishment of a Special Tribunal for the Crime of Aggression against Ukraine, Lviv, 9 May 2025. https://webgate.ec.europa.eu/circabc-ewpp/d/d/workspace/SpacesStore/b6c0568c-5fbe-4dbb-9507-2ae71384c5be/file.bin

West Street'. Sands was the first to propose the establishment of a Special Tribunal in the Financial Times back in March 2022. At this occasion, the Foreign Ministers:

> 4. express(ed) gratitude to all those who have actively contributed to the preparatory work on the draft legal instruments necessary for the establishment of the Special Tribunal, in particular the legal advisers participating in the Core Group.

They also:

> 5. underlin(ed) the central role of the Council of Europe in establishing the Special Tribunal and acknowledge(d) the significant contribution of the European Commission and the European External Action Service, including their work on the draft Agreement between Ukraine and the Council of Europe on the establishment of the Special Tribunal, the draft Statute of the Special Tribunal, and the draft Enlarged Partial Agreement outlining the modalities of support for the Special Tribunal, including its funding and other administrative aspects.

During the CoE Ministerial meeting in Luxembourg on 14 May, Ukraine forwarded the draft texts to the CoE in a solemn ceremony, attended by the Deputy Head of the Presidential Office of Ukraine, Iryna Mudra, the Foreign Minister of Luxembourg, Xavier Bettel, and the Secretary-General of the Council of Europe, Alain Berset. The CoE Ministers:

> 5. welcomed the finalisation, within the Core Group, of the draft legal instruments required to establish a Special Tribunal for the Crime of Aggression against Ukraine within the framework of the Council of Europe consisting of an agreement between Ukraine and the Council of Europe, a Statute of such a Tribunal and an Enlarged Partial Agreement governing the modalities of support to such a Tribunal, its financing and other administrative aspects;
>
> 6. confirmed the receipt of a letter from Ukraine requesting the establishment of a Special Tribunal for the Crime of Aggression against Ukraine within the framework of the Council of Europe, on the basis of the abovementioned draft legal instruments;
>
> 7. acknowledged that the establishment of a Special Tribunal for the Crime of Aggression against Ukraine within the framework of the Council of Europe is a priority issue for the Committee of Ministers and the whole Council of Europe. In this context, invited the Secretary General of the Council of Europe to steer the process for the establishment of a Special Tribunal for the Crime of Aggression against Ukraine within the Council of Europe.[108]

Against this historical background, this Chapter will review the CoE model more closely. After having examined the legal basis (Section 2), we will set out the main features of the draft Statute as agreed in the Core Group (Section 3), followed by some thoughts on international legitimacy (Section 4).

2. Legal Basis

As to the legal basis, the PACE aired the idea of establishing a special tribunal by an agreement between the CoE and Ukraine, potentially supported by an enlarged partial agreement open to non-member states and other international organisations.[109] The Core Group followed this approach. Both instruments merit some legal comment.

[108] CM/Del/Dec(2025)134/2a – 134th Sessions of the Committee of Ministers (Luxemburg, 14 May 2025).
[109] PACE Resolution 2556, *supra* note 102, §11.

a) The agreement between Ukraine and the Council of Europe

At the outset, the question arises if a bilateral agreement between Ukraine and a regional international organisation such as the CoE can provide the legal basis to establish an independent and impartial tribunal for a criminal prosecution of perpetrators of aggression against Ukraine. This principle of legality is a requirement under international human rights law, according to which every person facing criminal charges has 'the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.[110]

The term 'law' in Articles 6 European Convention on Human Rights (ECHR) and 9 International Covenant on Civil and Political Rights (ICCPR) should be interpreted broadly as covering both domestic and international law.[111] The SCSL, based on an agreement between Sierra Leone and the UN,[112] serves as a precedent for a special tribunal to be established by an international agreement between a state and an international organisation. Similarly, **a bilateral treaty between Ukraine and the CoE can satisfy the criterion of legality under international human rights law,** provided that the subject matter is covered by the treaty-making power of the two parties.

With respect to Ukraine, the situation is clear: the crime of aggression is committed on the territory of both the aggressor and the victim state.[113] Ukraine can therefore exercise jurisdiction on the basis of the territoriality principle and actually does so by investigating several hundreds of suspects and by cooperating within the framework of the International Centre for the Prosecution of the Crime of Aggression against Ukraine (ICPA), set up under the auspices of Eurojust in The Hague. Hence, subject to its constitutional rules, Ukraine can also conclude international treaties, under which it delegates its jurisdiction over the crime of aggression to a newly established tribunal.

When it comes to the CoE, the starting point is different. Like many other founding instruments of international organisations at the time, its 1949 Statute does not expressly confer international legal personality to the organisation. However, applying the ICJ criteria flowing from the *Reparation for Injuries Suffered in the Service of the United Nations* Advisory Opinion,[114] the CoE exercises and enjoys functions and rights in accordance with its purpose, which must necessarily imply the capacity to act on the international plane. The CoE therefore enjoys international legal personality to carry out its functions.[115]

An international legal person also enjoys treaty-making powers. However, such powers are not unfettered. Rather, under Article 6 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (VCLT II) (1986) 'the

[110] Art. 6 ECHR, Art. 9 UN ICCPR.
[111] O. Corten and V. Koutroulis, 'Tribunal for the crime of aggression against Ukraine – a legal assessment', European Parliament, In-depth analysis requested by the DROI Subcommittee, December 2022, available at https://www.europarl.europa.eu/thinktank/en/document/EXPO_IDA(2022)702574, at 14.
[112] Agreement of 16 January 2002 between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, based on the request of the UN Security Council in UNSC Resolution 1315 of 14 August 2000 ('UN-Sierra Leone Agreement'), No.38342, available at https://treaties.un.org/pages/showDetails.aspx?objid=08000002800860ff.
[113] C. McDougall, The Imperative of Prosecuting Crimes of Aggression Committed against Ukraine', 28 *Journal of Conflict & Security Law* (2023), 203-230, at 219.
[114] Advisory Opinion, Reparation for injuries suffered in the service of the United Nations, ICJ Reports (1949), at 179.
[115] A. Peters, 'Implied powers under the Council of Europe Statute, Seminar on the Special Tribunal for the Crime of Aggression against Ukraine – what role for regional organisations such as the Council of Europe?', 10 April 2024, available at: https://www.coe.int/en/web/cahdi/seminar-on-the-special-tribunal-for-the-crime-of-aggression-against-ukraine,

capacity of an international organisation to conclude treaties is governed by the rules of that organization'. Hence, the CoE only enjoys this treaty-making capacity to the extent that is covered by its rules. Those are mainly defined by its member states in the statute of the CoE but can evolve within the limits of interpretation of the statute.[116]

According to Article 1 of the CoE Statute, the organisation is supposed to safeguard the common ideals and principles of the member states (lit. a), including 'the maintenance and further realisation of human rights and fundamental freedoms' (lit. b). Pursuant to Article 15(a) of the CoE Statute, the Committee of Ministers is empowered to 'consider the action required to further the aim of the Council of Europe, including the conclusion of conventions or agreements.'

The established CoE method to implement these provisions in the area of human rights, democracy or the rule of law is the adoption of multilateral conventions, whose ratification is recommended to its Member States and, depending on the final clauses, also to non-CoE states. Any of those instruments only enters into force when a sufficient number of states have ratified it. The CoE itself is usually not party to such instruments. However, in exceptional cases, it may accede as an international organisation to one of its 'own' Conventions.[117]

Moreover, the CoE is signatory to the VCLT II (1986) and has concluded numerous bilateral agreements.[118] Against that background, the conclusion of a bilateral treaty with Ukraine would not be something entirely new, even though the organisation has never established a criminal tribunal.

According to Owiso, Articles 1 and 15(a) of the CoE Statute empower the CoE to conclude such a treaty to respond to the threat to human rights and fundamental freedoms not only in Ukraine but also in the CoE region in general.[119] Such a broad understanding could be further sustained by a contextual interpretation, which may include the preamble of CoE Statute.[120] The latter explains that the CoE´s mandate is 'the pursuit of peace based upon justice', and to safeguard the 'rule of law'. The pursuit of accountability for the crime of aggression, formerly called crime against peace, which is not only a crime against Ukraine but a breach of the prohibition on the use of force as one of the cornerstones[121] of the contemporary international legal order, falls within the scope of this mandate.[122] **Accordingly, the CoE has the power to conclude an agreement with Ukraine to establish the special tribunal to punish the perpetrators of the crime of aggression against Ukraine.**

A final question relates to the scope of such CoE treaty-making power. Only very few international organisations have the capacity to create legally binding rules addressed to Member States to fulfil the assigned function of the organisation in line with their constituent instruments. Among those exceptions figure the UN, whose Security Council may adopt

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[116] Ibid.
[117] E.g. *CoE Convention on Access to Official Documents*, Council of Europe Treaty Series No. 205 (2009), Article 17(1).
[118] See the overview available at the CoE's treaty office website: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806bdce0.
[119] O. Owiso, 'An Aggression Chamber for Ukraine Supported by the Council of Europe', Opinio Juris, 30 March 2022, available at: http://opiniojuris.org/2022/03/30/an-aggression-chamber-for-ukraine-supported-by-the-council-of-europe/.
[120] Article 31(2), Vienna Convention on the Law of Treaties, reads: '2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (…)'.
[121] C. Kreß, Keynote Speech, 'Seminar on the Special Tribunal for the Crime of Aggression against Ukraine – what role for regional organisations such as the Council of Europe?', 10 April 2024, available at: https://www.coe.int/en/web/cahdi/seminar-on-the-special-tribunal-for-the-crime-of-aggression-against-ukraine, at 3.
[122] Peters, *supra* note 115, at 3-4.

binding decisions under Article 25 of the UN Charter. The EU can adopt internal legal acts and conclude treaties with third parties that are binding on its Member States (see Article 216(2) Treaty on the Functioning of the European Union (TFEU)) – yet the majority of international organisations can only adopt non-binding resolutions, declarations, recommendations or standards.[123]

While the UNSC had the power under Article 41 of the UN-Charter[124] to establish the ICTY[125] and the ICTR,[126] the CoE does not have such attributed powers. **The treaty-making power of the CoE is thus restricted to assisting Ukraine in the process and to establish and operate such a tribunal, which derives its jurisdiction from the territorial jurisdiction of Ukraine**.[127]

The Core Group instruments record this understanding in very clear terms. First, recital 14 to the draft agreement and Article 1, second sentence of the draft Statute state that 'the jurisdiction of the Special Tribunal shall be based on the territorial jurisdiction of Ukraine'. Second, recitals 17-22 of the draft agreement refer to the objectives and tasks of the CoE and its treaty-making power as a means to further the aims of the Council.

b) The enlarged partial agreement to administer and finance the Tribunal

While the agreement between Ukraine and the CoE, including the annexed Statute of the Special Tribunal, constitutes the cornerstone of the CoE model, it has to be complemented by another legal text. In order to organise the administration and financing of the Tribunal, the Core Group also drafted an 'Enlarged Partial Agreement' on the Management Committee of the Special Tribunal (EPA).[128] Such instrument is to be distinguished from the Conventions of the CoE, which constitute international treaties within the meaning of Article 2 VCLT II. In turn, the partial agreements are 'merely a particular form of co-operation within the Organisation', 'an activity of the Organisation in the same way as other programme activities, except that a partial agreement has its own budget and working methods which are determined solely by the members of the agreement.'[129] An EPA is therefore primarily an administrative and financial tool to carry out activities of the organisation in which not all member states want to participate. It would be for all EPA members to decide under their own constitutional systems whether domestic parliamentary approval is necessary for taking long-standing and financially relevant commitments under the EPA.

The EPA will allow all CoE and certain non-CoE states to become part of the Management Committee of the Tribunal, comparable to the Assembly of States Parties to the ICC or the Bureau thereof. Draft Article 2 lists the functions of the Management Committee. It mainly carries out administrative tasks but also has a role in deciding over the budget. In order to enhance the international legitimacy of the tribunal, Article 3 of the draft EPA envisages not only EPA membership of CoE members, non-CoE states and international organisations,[130] but also association status, like in the Register of Damage for Ukraine. Importantly, each Member

[123] K. Schmalenbach, Max Planck Encyclopedia of Public International Law, International Organizations or Institutions, 2020, MN 74.
[124] Decision on the defence motion for interlocutory appeal on jurisdiction, *Prosecutor v. Tadic*, Appeals Chamber, 2 October 1995, available at https://www.icty.org/x/cases/tadic/acdec/en/51002.htm.
[125] UNSC Resolution 827 of 25 May 1993, establishing the ICTY.
[126] UNSC Resolution 955 of 8 November 1994, establishing the ICTR.
[127] Owiso, *supra* note 119.
[128] PACE Resolution 2556, *supra* note 102, at §13.1.
[129] See explanation of the CoE Treaty Office, available at https://www.coe.int/en/web/conventions/about-partial-agreements; J. Polakiewicz, *Treaty-making in the Council of Europe* (Council of Europe Publishing, 1999), at 12-13.
[130] PACE Resolution 2556, *supra* note 102, at §11.

and Associate Member shall be represented of not more than two representatives, who shall meet at least once a year (Articles 4 and 5). It adopts its decisions by a two-thirds majority (Article 5(3)) of the Members, whereas Associate Members may participate in the meetings without the right to vote. In turn, their contributions to the Tribunal are not fixed, but rest on voluntary contributions (Article 5(5)). The Management Committee will also be assisted by a Secretariat (Article 6). By becoming a Member or an Associate Member, a state also commits to 'seek cooperation' with the Tribunal under the terms of Draft Article 9. The cautious wording is explained by a preference of participating states not to enact hard law obligations, which can only be taken by an ordinary international agreement.

c) The cooperation agreements

Similarly, as the CoE lacks the power to create legally binding obligations on its members by virtue of a bilateral agreement with Ukraine, the Statute of the Special Tribunal cannot include a general provision, according to which all CoE states are *ipso facto* obliged to cooperate with the Tribunal. Yet, cooperation with the Tribunal is essential in all phases of a case: states are needed to support the investigation, providing evidence or witnesses, they need to carry out arrest warrants and at least one volunteering state needs to execute the sentence on its territory. Therefore, the Core Group also worked on a 'template cooperation agreement', which constitutes a third layer next to the bilateral establishment agreement between Ukraine and the CoE and the multilateral EPA. Under this approach, each EPA state could choose from the template text a set of cooperation obligations, suiting its needs and respecting its constitutional framework. The chosen parts would then constitute the bilateral agreement which would be concluded between the respective state and the Special Tribunal itself. According to Article 9(4) of the Draft EPA, the host state agreement between the Netherlands and the Tribunal would only enter into force upon the conclusion of a minimum number of such cooperation agreements with a minimum number of commitments relating to cooperation in the areas of (a) witness protection and relocation; (b) execution of sentences; and (c) release, including interim release.

3. The main features of the Draft Statute

Turning to the Statute of the Tribunal, the CoE model faces the same sensitive issues as all other models. As a matter of policy, PACE called for 'features that would make it (the Tribunal) as international as possible (…)'. In particular, it argued in favour of limiting the jurisdictional scope of the tribunal on the crime of aggression, a definition of the crime of aggression in line with Article 8*bis* of the ICC Statute and the non-application of personal as well as functional immunities.[131] More cautiously, the CoE Ministers of Justice reaffirmed the necessity of establishing an effective Special Tribunal, which is 'capable of delivering justice by holding accountable those who bear the greatest responsibility. The establishment of a Special Tribunal should respect international law and enjoy broad cross-regional support to guarantee its legitimacy.'[132] Against this background, we will now examine the main features of the Special Tribunal chapter by chapter, as agreed by the Core Group after 14 rounds of intensive negotiations.

[131] Ibid., at §13.9.
[132] *Declaration of the Ministers of Justice of the Council of Europe* ('Vilnius Declaration'), 5 September 2024, available at https://rm.coe.int/final-vilnius-declaration-en-eu-note/1680b17523, at §3.

a) Chapter I: Jurisdiction and Applicable Law

According to Article 1, **the jurisdiction** *ratione materiae* is limited to the crime of aggression committed against Ukraine. Unlike Article 1 of the UN-Sierra Leone agreement on the SCSL,[133] there is no specific temporal limitation. The Tribunal is therefore empowered to decide itself about its jurisdiction *ratione temporis* provided that the acts in question qualify as aggression under Article 2. In that respect, it is noteworthy that Article 2(3) directs the Tribunal to take into account relevant UNGA resolutions quoted in the preamble of the Draft Agreement. Importantly, recitals 1-4 include resolutions which pre-date the fully-fledged invasion of February 2022, and recital 5 recalls the UNGA resolution of March 2022 which condemns the latter.[134] Finally, echoing the observation of the Ministers of Justice in the Vilnius Declaration, the jurisdiction *ratione personae* in Article 1 is limited to those who bear the greatest responsibility for the crime of aggression.

Less straightforward was the question of the **applicable law.** During the negotiations, two schools of thought emerged.

According to the proponents of the international model, Article 8*bis* of the Rome Statute should constitute the appropriate applicable law. Adopted at the Kampala conference in 2010, it constitutes the most up-to-date definition of aggression from their point of view. Not transposing it into the Statute of the Special Tribunal would undermine the solidification of international criminal law in that respect. The opposite view argued that Ukraine is investigating the crime of aggression under Article 437 of its Criminal Code. In August 2024, the Verkhovna Rada adopted a ratification law for the Rome Statute and the Kampala agreement.[135] However, in its implementation law, Ukraine consciously did not transpose Article 8*bis* of the Rome Statute into its national legislation but only increased the applicable penalty for the crime of aggression in its current formulation. Respecting such sovereign choice of Ukraine, the Tribunal should apply Ukrainian criminal law and bring the most important cases to the international level.

On the one hand, the wide scope of Article 437 of the Criminal Code of Ukraine (CCU), is problematic. It criminalises the planning, preparation or initiation of an aggressive war or an armed conflict, conspiring for any such purpose or waging of an aggressive war or aggressive hostilities, i.e. potentially covering a large number of suspects and not only the 'leaders' as under Article 8*bis* of the Rome Statute. Aware of this weakness, the Supreme Court of Ukraine substantially reduced the scope *ratione personae* in its decision of 28 February 2024.[136] It clarified that the crime of aggression can be only committed by persons who are 'able to exercise effective control over political or military actions of a state and/or significantly influence political, military, economic, financial, information and other processes in their own

[133] Article 1(1) of the UN-Sierra Leone Agreement (*supra* note 98) reads: 'There is hereby established a Special Court for Sierra Leone to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law committed in the territory of Sierra Leone since 30 November 1996'.
[134] UNGA Resolution RES/ES-11/1, OP 2: 'Deplores in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the Charter: Recital 13: "Recognizing that the military operations of the Russian Federation inside the sovereign territory of Ukraine are on a scale that the international community has not seen in Europe in decades and that urgent action is needed to save this generation from the scourge of war."'
[135] C. Kmiotek, 'Ukraine ratifies Rome Statute but must address concerns over ICC jurisdiction', Atlantic Council, 27 August 2024, available at: https://www.atlanticcouncil.org/blogs/ukrainealert/ukraine-ratifies-rome-statute-but-must-address-concerns-over-icc-jurisdiction/.
[136] Decision of the Supreme Court of Ukraine, Case No.415/2182/20, proc. No. 13-15x22, 28 February 2024, with a discussion by S. Masol, 'Are You a Leader? Ukraine's Supreme Court Clarifies the Definition of the Crime of Aggression', EJIL Talk, 22 April 2024, https://www.ejiltalk.org/are-you-a-leader-ukraines-supreme-court-clarifies-the-definition-of-the-crime-of-aggression/.

state or outside its borders, and/or manage specific directions of political or military actions.' The Court further stated that such persons could be Heads of State and Government, members of parliament, leaders of political parties, diplomats, heads of special services, military commanders, or heads of state bodies. Thereby, the Court effectively introduced the leadership criterion, inspired by Article 8*bis* of the Rome Statute, into domestic law. [137] While the Supreme Court hence reduced the discrepancy between the two norms, it could not correct the second inconsistency, namely that Article 437 CCU does not contain the threshold criterion included in Article 8*bis* of the ICC Statute, according to which aggression must also constitute a manifest violation of the UN Charter.

On the other hand, the introduction of Article 8*bis* into the Statute could create other problems. It is written in an open manner, making it applicable to all sorts of hypothetical future situations, whereas the jurisdiction of the Tribunal should be limited to the aggression against Ukraine. Moreover, some delegations argued that the Tribunal should only punish the 'war of aggression', but not 'acts of aggression' which could unduly broaden the jurisdiction of the Tribunal.

At the Brussels Core Group meeting, the Gordian knot was cut by a new ingenious formula. In the definition of the crime of aggression, Articles 2(1) and (2) faithfully introduce the Kampala language from the Rome Statute, which is also recalled as an important reference point in recital 11 of the draft agreement. However, the Article deliberately omits the 'catalogue' of examples contained in Article *8bis* (2) of the Rome Statute. Instead, it contextualises the definition. According to Article 2(3) the Special Tribunal shall not only take into account UNGA Resolution 3314(XXIX) but also all relevant UNGA resolutions with respect to Ukraine, including those recited in the Preamble of the Agreement between the CoE and Ukraine when determining whether an act of aggression, by its character, gravity and scale constitutes a manifest violation of the UN Charter. By prescribing this interpretative guidance, the Tribunal will apply the most modern definition of the crime of aggression to the situation of Ukraine in line with the findings of the UNGA.

Article 2(4) also makes it clear that an act of aggression, which is so determined by the Tribunal as constituting a manifest violation of the UN Charter, shall also be deemed to constitute a war of aggression. This formulation is another guarantee for the respect of the important threshold criterion and would make it easier for those states who wish to support the Tribunal, without compromising their (critical) legal position on the Kampala amendment as such.

Article 3 complements Article 2 on the definition with a more general clause on the applicable law. The Tribunal shall not only apply the Statute and the Rules of Procedure and Evidence, but also applicable treaties, customary international law and general principles of law 'when necessary to ensure compliance with accepted standards of international law' (Article 3(b)). This will be important when the Tribunal will have to deal with modes of criminal liability and criminal intent. In case no suitable international source can be identified, there is always the possibility to fall back on the substantive criminal law of Ukraine relating to the prosecution and punishment of the crime of aggression (Article 3(c)).

[137] T. Leshkovych and P. Labuda, 'Prosecuting the Crime of Aggression in Ukraine and Beyond: Seizing Opportunities, Confronting Challenges and Avoiding False Dilemmas', 2 April 2024, JustSecurity, available at: https://www.justsecurity.org/94104/prosecuting-aggression-ukraine-and-beyond/.

Article 4 contains **three more important well-established principles of international criminal law**. The Statute deals exclusively with the criminal responsibility of individuals, who are not shielded by their official position or any amnesty granted by their state of nationality. Finally, Article 5 mirrors Article 10 of the Rome Statute. Hence, nothing in the Statute shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law, which gave comfort to many states who held conflicting views on the state of international law with respect to personal immunity of Heads of State and Government. As an improvement over the 'anonymous' Article 10 of the Rome Statute, the Core Group states managed to agree on a title for Article 5, calling it the 'non-prejudice clause.'

b) Chapter Two: Organisation and Administration of the Special Tribunal

The governance of the Tribunal under the CoE model follows established paths. Mindful of efficiency and limited financial means, it has a slim structure with three bodies, namely the Chambers, the Office of the Prosecutor and the Registry (Article 6).

The judges may take on several functions (single pre-trial judge, Trial Chamber of three judges, Appeals Chamber of five judges). Inspired by the Kosovo model, the Statute foresees a roster of judges, which can be activated depending on the needs of the Tribunal (Article 7(4)). The Office of the Prosecutor shall be an independent organ of the Special Tribunal. Learning from other Courts, the Prosecutor shall be assisted by at least one Deputy Prosecutor (Article 9(2)). The Registrar would be responsible for the administration and the servicing of the Tribunal. Next to the Victims and Witness Unit and a Detention Unit, he/she shall establish a separate Defence Unit which shall be independent (Article 11(3)(c)).

All organs of the Tribunal should be able to draw on international staff, which may also be seconded by EPA members. The nomination of the judges and the prosecutor should be prepared by an independent expert panel, who should be able to receive applications from nationals of all EPA members. One important question related to the regime of languages, which may constitute an important cost factor. Under Article 14(1) the working language of the Special Tribunal shall be English. However, the Tribunal shall determine in its Rules of Procedure and Evidence in what circumstances and under which conditions other languages may be used (in particular, Russian and Ukrainian), taking into account the official languages of the CoE (which are English and French).

The quest for efficiency also guided the Core Group in its Strasbourg meeting in drafting Article 15 on the Rules of Procedure and Evidence. Instead of entrusting this task to the Management Committee (which could trigger a political and difficult process), a two-thirds majority of the judges shall adopt them. The Management Committee has an oversight role, as the Rules can only enter into force upon conclusion of the next Management Committee, provided that the latter does not object (Article 15(1)). In that case, the Tribunal would have to revisit the draft and submit an improved version to the Management Committee for non-objection.

c) Chapter III: Investigation, Prosecution, Pre-Trial, Trial and Appeal Proceedings

Chapter III is largely modelled along international precedent, but also contains a number of important novelties, connected with the special nature of the crime of aggression.

Section 1 on general principles enshrines the canon of international human rights. The right to fair trial (Article 16), *ne bis in idem* (Article 17) and the presumption of innocence (Article 18)

are specially mentioned. In addition, the principle of *nullum crimen sine lege* is recalled as an underlying concept in recital 15 of the draft agreement. Articles 19-21 deal with the rights of a person during investigation, the rights of the accused and the protection of witnesses.

Article 22 on 'representation of victims in the proceedings' charters new territory. On the one hand, many delegates during the Kampala Review conference took the position that the main purpose of punishing aggression is to protect state sovereignty.[138] Accordingly, unlike the other crimes within the ICC's jurisdiction (genocide, crimes against humanity and war crimes), the victims of aggression would not be individuals, but states.[139] From that perspective, there would also be no need to provide for victim participation before the Special Tribunal. On the other hand, every aggression also results in individual suffering. In its General Comment No. 36 on Article 6 of the ICCPR (right to life), the Human Rights Committee explains that 'States parties engaged in acts of aggression as defined in international law, resulting in deprivation of life, violate ipso facto article 6 of the Covenant.'[140] Moreover, under Rule 85(a) of the ICC Rules of Procedures and Evidence, the notion of 'victim' encompasses natural persons who have suffered harm as a result of the commission of *any* crime within the jurisdiction of the Court, which includes the crime of aggression.[141]

Against the background of these conflicting approaches, the Core Group steered a middle ground. It accepted the need to provide for victim participation but also laid down safeguards to avoid that potentially the entire population of Ukraine could claim participation rights. First, Article 22 requires that 'groups of victims are identified by the Special Tribunal as specially affected by the conduct which formed the basis of the crime as specified in the indictment'. This means that only those groups could participate, who are specially affected by the facts described in the indictment. For example, after having described in detail the internal German preparations for attacking Poland, the Nuremberg Tribunal concluded:

> The Tribunal is fully satisfied by the evidence that the war initiated by Germany against Poland on 1 September 1939 was most plainly an aggressive war, which was to develop in due course into a war which embraced almost the whole world, and resulted in the commission of countless crimes, both against the laws and customs of war, and against humanity.[142]

While the Nuremberg Tribunal used the expression of 'resulting in the commission of **countless** crimes,' it is also possible that the Prosecutor of the Special Tribunal would identify in his/her indictment specific conduct as being the result of the crime of aggression (e.g. the battle of Hostomel airport). The groups of victims of such conduct would then have a claim to participate in the proceedings. Second, these groups must be 'collectively represented by legal counsel.' And third, the Tribunal can always reject the participation of victim groups if such were to

[138] This view was expressed in the proposal submitted by Germany to the Preparatory Commission for the International Criminal Court as follows: "We share the view expressed by many delegations that the armed attack on the territorial integrity of another State without any justification represents indeed the very essence of the crime of aggression. While criminal norms concerning genocide, war crimes and crimes against humanity aim at protecting human life or physical integrity, a provision on the crime of aggression protects basically the territorial integrity of states from flagrant and wilfull [sic] violations through means of war (...)". Proposal Submitted by Germany: Definition of the Crime of Aggression, 30 July 1999, UN Doc. PCNICC/1999/DP.13.
[139] Pobjie, in: Kreß/Barriga (eds.), The Crime of Aggression, 816, 822; see also Darcy, 70 ICLQ (2021), 103, 112.
[140] Human Rights Committee, General comment No. 36, 3 September 2019, UN Doc. CCPR/C/GC/36, para 70. This view is supported by Dannenbaum 126 Yale Journal of International Law (2017), 1242, and Darey, 70 ICLQ (2021), 103, 119-128.
[141] Pobjie, in: Kreß/Barriga (eds.), The Crime of Aggression, 816, 826-837 (subject to the causation requirement); Darcy, 70 ICLQ (2021), 103, 114, 115-116.
[142] International Military Tribunal (Nuremberg), Judgment and Sentences of 1 October 1946, AJIL 1947, 172-333, at p. 203

endanger the rights of the accused, a fair and impartial trial and an efficient conduct of the proceeding.

Section 2 on investigation, Prosecution and Pre-Trial Procedure deals with the important question of how a case can be initiated before the Tribunal. During the negotiations, the Core Group agreed to make full use of the ICPA and to provide for an efficient connection between its investigative work and the tribunal.

In that respect, the question arose whether the relationship between national proceedings and the tribunal could be based on a system of 'transfer of criminal proceedings', inspired by the CoE Convention on transfer of proceedings in criminal cases.[143] Under that approach, the Ukrainian Prosecutor-General would request the transfer of those case files to the tribunal's prosecutor for further investigation and prosecution, which fall under the jurisdiction of the Tribunal. The transfer would have the effect that Ukraine's prosecution comes to an end (*ne bis in idem*) and that the tribunal takes on the case under its own rules and procedures. Contrary to the opinion of the Rapporteur of the Committee on Legal Affairs and Human Rights, Davo Stier (Croatia, EPP) in his report to PACE,[144] this option does not mean that a 'Ukrainian court is sitting in another country, for instance in the Netherlands.' Rather, the transfer of criminal proceedings approach was based on the assumption that the Ukrainian Prosecutor-General transfers specific proceedings concerning certain suspects to the Special Tribunal, which enjoys international legal personality on its own and does not form part of Ukraine's judicial system. When Ukraine 'transfers' a criminal proceeding to the tribunal, this would be similar to a transfer under the CoE Convention from one state to another state. Such a transfer shifts the proceeding from the authority of the sending state to the full judicial responsibility of the receiving state. Similarly, the Tribunal could receive such criminal proceedings, if provided by the rules of the Statute.

A possible set-back of a strict 'transfer of proceedings' model is that it ties the hands of the Prosecutor of the Special Tribunal to a certain degree. While he/she has the power to 'build on' the cases received by the Prosecutor-General of Ukraine, he/she may not open new cases against other suspects without an additional transfer from Ukraine. This may become a handicap for the efficiency of the tribunal. Moreover, the option requires that the Ukrainian Prosecutor-General has already opened a proceeding against one or several particular suspects and selects this ongoing proceeding for such a transfer ('case-by-case transfer'). Persons who are not or cannot be indicted by Ukraine would then escape the jurisdiction of the Tribunal.

In order to respond to these inconveniences, the Core Group has modified the approach. Under Article 23(1), the Prosecutor-General of Ukraine does not 'transfer proceedings', but – more broadly – 'refers criminal proceedings, information or evidence' related to a crime within the jurisdiction of the Tribunal to the Prosecutor of the Tribunal. The latter can then decide whom to investigate – in other words, he/she can go beyond the circle of persons specifically contained in the referred material from Ukraine. Importantly, the Special Tribunal can also receive specific material from ICPA, which works under the auspices of Eurojust (Article 31).

[143] European Convention on the Transfer of Proceedings in Criminal Matters (ETS No. 73), 15 May 1972, available at https://rm.coe.int/1680072d42.
[144] D. I. Stier, *Legal and human rights aspects of the Russian Federation´s aggression against Ukraine*, Report, Doc. 15998, 7 June 2024, available at https://rm.coe.int/legal-and-human-rights-aspects-of-the-russian-federation-s-aggression-/1680afc380, at §9.

Article 23 contains two more important decisions. According to Article 23(4), functional immunity does not apply before the Special Tribunal. This responds to one of the first major agreements in the group, spearheaded by a consensus within the participating states from the European Union and then accepted around the table. Moreover, Article 23(5) contains a finely crafted procedural device with respect to the personal immunity of the 'Troika'. Where an indictment of the Prosecutor of the Tribunal concerns a Head of State, Head of Government or Minister of Foreign Affairs, the Pre-Trial judge shall not confirm the indictment but shall instead order the proceedings be suspended until that person no longer holds office or an appropriate waiver has been presented to the Special Tribunal. This solution was found in the aftermath of a US-German paper circulated in the Core Group meeting of Riga and then put into legal language after further discussions in Brussels and Strasbourg. A similar provision is contained in Article 24 on the powers of the prosecutor during investigation, in so far as he/she may not take measures of constraint against the sitting member of the 'Troika' (Article 24(4)).

Section 3 on Trial contains the usual provisions on the powers of the chambers and commencement of proceedings (Articles 26 and 27) as well as decision-making within the trial chambers (Article 35). It also lays down another important choice of the Core Group. Upon firm request by Ukraine, Article 28 allows trials in the absence of the accused under strict conditions. First, the defendant must have been properly notified and be represented by legal counsel. In case he/she does not appoint a lawyer, the Special Tribunal shall assign the defence counsel (Article 28(2)). Importantly, once convicted *in absentia*, the person can demand a full retrial unless he/she has waived this right or accepted judgment (Article 28(3)). This right of a full retrial also necessitated special attention to the winding-down mechanism and residual functions of the Tribunal. The rules on evidence follow accepted principles (Article 30), complemented by a provision on the transfer of evidence collected prior to the establishment of the Tribunal. As mentioned above, this provision was necessary to allow transfer of ICPA material, which is already now contained in the Core International Crimes Evidence Database (CICED) of Eurojust.

Another important provision of this section relates to offences against the administration of justice of the Tribunal. Being aware of cyber-attacks against the ICC, the Core Group enlarged the group of such offences in Article 32. Point (g) thereof criminalises 'seriously obstructing the proceedings of the Special Tribunal,' and the chapeau of the provision makes clear that such obstruction can be done 'by whatever means, including electronic means.' The Core Group found this innovative solution upon proposal from Slovenia in the last meeting in Strasbourg. Finally, Article 33 on the protection of national security and Article 34 on third party information or documents prescribe the rules for handling specific pieces of sensitive evidence.

Section 4 on Penalties deals with the different forms of penalties. According to Article 36(1), the Trial Chamber may impose imprisonment for up to 30 years, or a life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person. This frame goes beyond the level of penalties under Article 437 of the CCU, as it stood in 2014 or in 2022. This difference in penalties between domestic law and the Statute may raise the question of compliance with the principle of *nullum crimen, nulla poena sine lege* under Article 7 of the ECHR, which expressly prohibits under paragraph 1, second sentence, to impose a 'heavier penalty than the one that was applicable at the time when the criminal

offence was committed'. However, as observed above, the Tribunal will apply the Statute and customary international law under Article 3 as primary sources and not Article 437 of the CCU. As the ECtHR has clarified in *Kononov v. Latvia*,[145] customary international law falls under the notion of 'law' within the meaning of Article 7(1) ECHR. Aggression is punishable under international criminal law. While the Nuremberg Charter of 1945 even foresaw the death penalty,[146] Protocol No. 6 of the ECHR and the Second Optional Protocol to the ICCPR have outlawed this form of criminal sentence. Also, the Rome Statute has not incorporated that form of penalty anymore. However, Article 77 thereof accepts life imprisonment as an appropriate sentence, including for the crime of aggression. Allowing for life imprisonment in cases of extreme gravity of the crime before the Special Tribunal under Article 36(1) of the Statute does therefore not constitute a prohibited 'heavier' penalty within the meaning of Article 7(1), second sentence ECHR.

Article 36(2) empowers the Trial Chamber to also order fines and the confiscation of instrumentalities, proceeds, property and assets derived directly or indirectly from the crime of aggression. Article 37 provides a link with the future compensation mechanism established in accordance with UNGA Resolution of 14 November 2022 for reparation for damage, loss or injury arising from Russian attacks against Ukraine. Most likely, this will be an international claims commission, based on the Register of Damage already established under the auspices of the CoE. The idea in the Core Group was to make sure that any future compensation fund, out of which the rulings of the Commission will be paid, should be fed also by the fines from the Special Tribunal. This is a much more efficient solution to provide for accountability than setting up a fund of the Special Tribunal itself.

Article 38 defines five years' imprisonment as a maximum punishment for offences against the administration of justice and allows for sanctions against misconduct. Article 39 directs the Trial Chamber to take into account aggravating and mitigating factors, 'as well as international human rights law.'

Section 5 on Appeal largely follows the system of the Rome Statute. The Appeals Chamber (of five judges) will have the same powers as the Trial Chamber but may reverse the conviction or the sentence on grounds of procedural errors, errors of fact, errors of law, or any other ground that affects the fairness and reliability of the proceedings or decision (Article 40). There is also a limited possibility for revision (Article 43) if new evidence has been discovered.

d) Chapter IV: International Co-operation and mutual legal assistance

With respect to international cooperation, Article 46 defines the relationship with the ICC. As it is currently backed by 125 State Parties from all regions, including Ukraine, the Special Tribunal should not act as a competitor, but only as a temporary mechanism to overcome the jurisdictional limits on the crime of aggression in the Rome Statute. Accordingly, proceedings before the Special Tribunal should not affect the proceedings before the ICC when they have a real prospect to prosper. At the same time, the ICC should not be able to block the Special Tribunal by merely lodging cases for war crimes, crimes against humanity, or genocide against the same defendants.

[145] ECtHR, Koronov v. Latvia (GC), Application No. 36376/04, Judgment of 17 May 2010, paras. 205-213.
[146] Article 27 of the Charter of the International Military Tribunal.

Following this logic, the Statute lays down three guiding principles. First, Article 46(1) obliges the Special Tribunal to cooperate with the ICC 'on all matters of mutual concern'. It may even conclude agreements or practical arrangements with the ICC with a view to ensuring the effective exercise of their respective jurisdictions. Second, the State Parties to the ICC should not use their cooperation with the Special Tribunal as a pretext not to fulfil their obligations towards the ICC (Article 46(2), first sentence). Third, the Tribunal must give priority to the ICC only when a person subject to an arrest warrant by the ICC is actually detained in the detention facilities of the ICC. In all other cases, the Special Tribunal may also go ahead with its cases, even when a case against the same defendant for a crime falling under ICC jurisdiction is under investigation by the ICC.

Article 47 empowers the Tribunal to request the United Nations, Eurojust or any other relevant organisation or body for cooperation. The cooperation between the Tribunal and states is laid down in Article 48. Importantly, Ukraine is under an obligation of full cooperation with the Tribunal, safeguarding the latter's efficiency also in the case of possible governmental changes. In addition, Article 48(2) allows the Special Tribunal to use bilateral assistance mechanisms from Ukraine to direct requests to third states. Whether or not such third states are then obliged to respond positively to such 'indirect' requests, would depend on the wording of the instrument in question and the decision of the third state. Members and Associate Members of the Management Committee are also asked to cooperate under Article 48(2) and (3), *inter alia* by concluding cooperation agreements. As observed above, a model template cooperation agreement will be provided by the CoE.

e) Chapter V: Enforcement

The enforcement of sentences is a delicate issue. Under Article 49(1) and (2) a sentence of imprisonment shall be served in a state that has offered such a possibility in its cooperation agreement with the Tribunal. If there are several states, the President of the Tribunal shall designate the enforcing state after consultation with all states concerned. If no such offer has come forward, though, Article 49(3) contains the default rule to turn to Ukraine. The wording 'may' indicates that the President shall designate Ukraine, unless there are serious legal concerns to the contrary. It is therefore in the interest of Ukraine to ensure compliance with international human rights law with respect to prison conditions in order to ensure that convicted persons will actually serve their sentence. Article 50 adds the possibility of reduction of sentences. Any decision of the Tribunal will have to be followed by the enforcing state.

f) Chapter VI: Final Clauses

Taking into account the fact that the Tribunal is a joint venture between Ukraine and the CoE, Article 51 makes the rules and regulations of the CoE applicable to the Special Tribunal. However, that does not mean that the Tribunal becomes a CoE organ. The second sentence of this provision also allows derogations, if so decided by the Committee of Ministers, and Article 52 contains rules about annual reporting and audit.

The setting up of a Tribunal is split into two phases. Article 53(1)(a) describes the first phase as the setting up of the administrative structure and the appointment of judges to the roster. Ukraine announced the ambitious time plan that this phase should start in 2026. The second phase is contingent upon the entry into force of the Host Agreement, which itself requires the prior conclusion of a sufficient number of cooperation agreements.

The reverse situation is dealt with in Article 54, namely the dissolution of the Tribunal upon fulfilment of its mandate. Here, the President issues a report to the Management Committee which can then recommend to the Parties to dissolve the Tribunal. Importantly, it may also recommend establishing a residual mechanism. Article 54(2) requires the Parties to follow suit 'within a reasonable time' thereafter. A residual mechanism is necessary to ensure the proper winding down of the prosecutorial and judicial functions, including retrials in accordance with Article 28(3). In other words: if a convicted person appears before the Tribunal and demands a retrial after the dissolution of the Tribunal, the case would have to be handled by the residual mechanism.

4. International Legitimacy

As eloquently stated by Claus Kreß, legitimacy is the 'key currency' in international criminal law.[147] Dapo Akande made the valid point that the question of legitimacy of a special tribunal is ultimately not a legal one.[148] Referring to the Extraordinary African Chambers (EAC) and the proposals for a tribunal to be established by ECOWAS with The Gambia as precedents for regional tribunals, he argues that regional tribunals should not necessarily be seen as less legitimate regarding the pursuit of accountability for international crimes connected to that specific region.

While concurring with both experts, the legitimacy of the tribunal could further be increased by political means. An obvious avenue is to increase the membership of the Core Group and to seek broad cross-regional support for the future EPA. In addition, Ukraine and its allies may consider seeking a positive reference to the tribunal in a future resolution of the UNGA, as a suitable means to secure accountability for the crime of aggression committed against Ukraine. Such a reference could be introduced, for example, in a broader resolution related to the consequences of Russia's aggression against Ukraine. This would add another UN element to the statute, which already refers to UNGA resolutions as a means to define aggression in Article 2(3).

At the same time, a UNGA endorsement does not automatically mean that the CoE 'places itself at the service of the international community as a whole', as argued by the PACE.[149] The CoE could only act on behalf of the UN if properly mandated to do so under Chapter VIII of the Charter. For enforcement action with the power to override other principles of international law, a decision of the UNSC under Article 53 of the Charter would be necessary. A mere UNGA endorsement could not substitute itself for such a decision, not even as a reaction of a failure of the UNSC to exercise its primary responsibility for the maintenance of international peace and security because of a lack of unanimity of the permanent members. Under the 'Uniting for Peace' Resolution 377(V), UNGA empowers itself only to making 'appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression' (our underlining). Such power does not include mandating the CoE to act on behalf of the UN to take enforcement action against Russia's top leadership by establishing a Special Tribunal for the Crime of Aggression.

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[147] C. Kreß, 'Germany and International Criminal Law: Reflections in Light of Current Developments', EJIL Talk, 12 March 2024, available at https://www.ejiltalk.org/germany-and-international-criminal-law-reflections-in-light-of-current-developments/.
[148] D. Akande, Introductory remarks, 'Seminar on the Special Tribunal for the Crime of Aggression against Ukraine – what role for regional organisations such as the Council of Europe?', 10 April 2024, available at: https://www.coe.int/en/web/cahdi/seminar-on-the-special-tribunal-for-the-crime-of-aggression-against-ukraine.
[149] PACE Resolution 2556, *supra* note 102, at 13.6, §11.

In any case, this debate has lost much of its significance under the final outcome of the CoE model. As described above, the Core Group has laid down specific procedural rules which will be applied in the context of the Russian aggression against Ukraine, including Articles 23(4) and (5), and Article 24 (4) of the Draft Statute. Accordingly, it does not have to be decided whether the Tribunal could speak in the name of the international community to overcome 'troika' immunity or not, since the rules in the Statute decide that question in a procedural way. At the same time, it is superfluous to ask whether these procedural rules are reflecting or influencing customary international law, as the non-prejudice clause in Article 5 preserves the status of customary international law at it stands (and Core Group states may continue to hold different views about this point).

In sum, the statute enjoys a high level of legitimacy, supported by at least 40 states and the oldest human rights institution in Europe, on how to ensure criminal accountability for the crime of aggression against Ukraine. It therefore also constitutes an excellent offer to other states, in other regions of the world, to join the Enlarged Partial Agreement in order to provide international justice against the perpetrators of aggression for the first time since Nuremberg.

V. Lessons learnt and a practical approach to legitimacy (by Dr. Owiso Owiso)[150]

Some lessons on legitimacy for a new special tribunal for the crime of aggression against Ukraine can be learnt from the experience of other courts/tribunals, past and present. For instance, the Kosovo Specialist Chambers (KSC), only the second criminal accountability mechanism to be established through a regional initiative,[151] has suffered a significant legitimacy crisis. Established by treaty between the European Union (EU) and Kosovo as a court within the legal system of Kosovo, The KSC is widely considered a foreign creation (by the EU and the United States [US]) which is Kosovar in name only.[152] Hence it suffers from a serious sociological legitimacy deficit, i.e. it is perceived as not serving the interests of the audiences that it is established to serve.[153] This is partly because of the design of the KSC, which has given the EU (and the US) exclusive power as regards nationality and appointment of judges,

[150] Independent international law scholar.
[151] Letter by President Atifete Jahjaga to the High Representative of the Union for Foreign Affairs and Security Policy (14 April 2014); Letter by High Representative of the Union for Foreign Affairs and Security Policy to President Atifete Jahjaga (14 April 2014, transmitted on 17 April 2014); Law No. 04/L-274 on Ratification of the International Agreement between the Republic of Kosovo and the European Union on the European Union Rule of Law Mission in Kosovo (23 April 2014); Council Decision 2014/685/CFSP of 29 September 2014 Amending Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo, 57 Official Journal of the European Union, L 284/51 (30 September 2014); Amendment to the Constitution of the Republic of Kosovo, Amendment No. 24, Decision of the Assembly of the Republic of Kosovo No. 05-D-139 (adopted 03 August 2015); Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office (03 August 2015). The first such mechanism was the *Chambres Africaines Extraordinaires au Sénégal* established by the African Union to prosecute former President of Chad Hissène Habré for international crimes committed in Chad between 1982–1990). *See* Decision on the Hissène Habré Case and the African Union (Doc. Assembly/AU/8 (VI) Add.9), Assembly/AU/Dec.103 (VI), Assembly of the African Union 6th Ordinary Session, 23–24 January 2006; Report of the Committee of Eminent African Jurists on the Case of Hissène Habré (2006); Decision on the Hissène Habré Case and the African Union (Doc. Assembly/AU/3 (VII), Assembly/AU/ Dec.127(VII), Assembly of the African Union 7th Ordinary Session,1–2 July 2006.
[152] *See* A. Hehir, 'Lessons Learned? The Kosovo Specialist Chambers' Lack of Local Legitimacy and Its Implications', 20 Human Rights Review (2019) 267-287; A. Mucaj, 'The Kosovo Specialist Chambers and Specialist Prosecutor's Office Paradox', 21 I*nternational Criminal Law Review* (2021) 367-389; See O. Owiso, 'A Cosmopolitan International Law: The Authority of Regional Inter-Governmental Organisations to Establish International Criminal Accountability Mechanisms' (Doctoral thesis, University of Luxembourg 2022) 139–162.
[153] *See* H. Hobbs, 'Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy', 16 Chicago Journal of International Law' (2016) 482-522; A. Kiyani, 'Legitimacy, Legality, and the Possibility of a Pluralist International Criminal Law' in N. Hayashi and C. M. Bailliet (eds), *The Legitimacy of International Criminal Tribunals* (Cambridge University Press 2017) 108–113.

the prosecutor and staff; the KSC does not have a single judge from Kosovo, and staff are predominantly foreigners.

While the ICTR and the ICTY served a very important role in ensuring criminal accountability and developing international criminal law, they nonetheless fell short as regards victim participation. These tribunals operated based on the traditional adversarial criminal law model whereby the role of victims/survivors was limited to participating as witnesses. Consequently, the affected communities had difficulties accessing and/or relating with these tribunals. Describing these tribunals' relationship with affected communities, Mutua argues that they 'orbited in space, suspended from political reality and removed from both the individual and the national psyches of the victims'.[154]

More recently, the Special Tribunal for Lebanon may serve as a worrying example for sociological illegitimacy as well. Inaugurated in 2009 without the full consent of Lebanon,[155] the tribunal only managed, 14 years and almost a billion US Dollars later, to complete one substantive *in absentia* trial before it shut down in December 2023.[156] The tribunal suffered from financial difficulties, in part because Lebanon failed to always pick up its share of the tab, and also had difficulties securing the necessary cooperation from Lebanon. While the tribunal's dismal performance can be attributed to multiple factors, it is certainly the case that lack of full buy-in by the entirety of the Lebanese government and general lack of trust among the Lebanese public[157] contributed, in no small measure, to this fate. Similarly, the International Criminal Court (ICC) has consistently been criticised for its perceived bias and its seeming detachment from the aspirations of survivors of atrocity crimes.[158]

In light of these experiences, taking certain practical steps and considerations in designing the special tribunal for the crime of aggression against Ukraine are recommended. First, the legal authority under which it is established must be unimpeachable, and it must possess sociological legitimacy.[159] The crime of aggression represents a violation of humanity's most fundamental values and interests. This essential nature gives the crime a complex identity with multiple audiences (as detailed in depth by Busol above), and requires additional considerations. To

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[154] M. Mutua, 'What Is the Future of Transitional Justice?', 9 *International Journal of Transitional Justice* (2015) 1-9, at 1, 6.
[155] The applicable law was never ratified by Lebanon's Parliament after the Speaker refused to convene parliament. *See* Letter dated 14 May 2007 from the Prime Minister of Lebanon, Fouad Siniora, to the UN Secretary-General (as annex to the letter dated 15 May 2007 from the Secretary-General to the President of the Security Council (S/2007/281).
[156] *See* J. H. Anderson, 'The Inglorious End of the Lebanon Tribunal', *JusticeInfo*, 4 June 2021, available at https://www.justiceinfo.net/en/78159-inglorious-end-lebanon-tribunal.html; N. Blanford and others, 'The Special Tribunal for Lebanon: What Does its Closure Mean for Lebanon', 13 July 2021, available at https://www.atlanticcouncil.org/blogs/menasource/the-special-tribunal-for-lebanon-what-does-its-closure-mean-for-lebanon/; J. H. Anderson, 'The Lebanon Tribunal's Back from the Dead – for a Moment', *JusticeInfo*, 24 September 2021, available at https://www.justiceinfo.net/en/82475-lebanon-tribunals-back-from-the-dead-for-a-moment.html accessed 20 September 2024.
[157] Jurdi, for instance, argues that 'While the STL had a highly qualified outreach and communications staff … the STL failed to counterbalance effectively, and mitigate, some of the delegitimization campaigns that targeted the Tribunal and ultimately eroded the essential foundational trust for its legitimacy … The Lebanese public opinion, including some of the victims, eventually fell to the anti-STL campaign.' See N. N. Jurdi, 'The Special Tribunal for Lebanon: Lessons from a Missed Legacy', 21 Journal of International Criminal Justice (2023) 755-773, at 765.
[158] *See for example* F. Mégret, 'In whose name? The ICC and the Search for Constituency' in C. de Vos, S. Kendall and C. Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press 2015); K. M. Clarke, *Affective justice: The International Criminal Court and the Pan-Africanist Pushback* (Duke University Press 2019); M. M. de Guzman, 'Mission Uncertain: What Communities Does the ICC Serve?' in M. M. deGuzman and V. Oosterveld (eds), *The Elgar companion to the International Criminal Court* (Edward Elgar 2020); O. Ba, *States of justice: The politics of the International Criminal Court* (CUP 2020); O. Ba, 'International Criminal Justice: The Future is the Past', *Journal of International Criminal Justice* (2024) 1.
[159] *See* H. Hobbs, 'Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy', 16 Chicago Journal of International Law' (2016) 482-522; A. Kiyani, 'Legitimacy, Legality, and the Possibility of a Pluralist International Criminal Law' in N. Hayashi and C. M. Bailliet (eds), *The Legitimacy of International Criminal Tribunals* (Cambridge University Press 2017) 108–113.

ensure that the tribunal reflects its multiple identities, a deliberate balance must be struck through, among others, i) the states participating in its establishment, ii) the composition of the tribunal's bench, iii) the provisions on victim participation, and iv) the tribunal's approach to reparations.

1. Wide membership and political support

As highlighted above, the tribunal would neither be a domestic mechanism *stricto sensu*, nor would it be purely international. The tribunal's identity traverses the domestic, regional and global.

To secure the tribunal's regional and global identities, State parties to the treaty establishing it necessarily ought to be drawn from across the globe. So far, the membership of the so-called Core Group consists primarily of European States, Australia and the United States of America, with minimal, if any, involvement by States from South America, Africa, Middle East and Asia. It would be a fundamental error to proceed to establish the tribunal with such limited membership; this would severely dent the sociological legitimacy of the tribunal even before it commences its work. International law-making and international institution-building have historically been exclusionary processes whereby the global majority have been systematically sidelined from law-making and instead been regarded merely as recipients and objects thereof.[160] Consequently, international law and international institutions have suffered a legitimacy deficit. As regards the reaction to the aggression against Ukraine, Traoré has captured the general sentiment thus:

> 'There is a vast feeling– especially in public opinions and ordinary citizens – around the duplicity of western states when it comes to respecting international law. The perception is that the western zealotry over Ukraine – and not for other situations of blatant violation of international law – is troubling, shocking and nothing short of hypocrisy and double standards in international politics … [T]he assertion that selective condemnation, selective indignation, and different treatments of similar violations profoundly affect the legitimacy of international law is beyond dispute.'[161]

The tribunal would be only the third in human history – after the Nuremberg and Tokyo tribunals – to prosecute aggression. This is therefore a watershed moment in which the entirety of humanity (or at least the most representative form of it) must be persuaded and enabled to participate. As Odinkalu and Nakandha have warned, 'Ukraine offers the reality check that when and how international law and its institutions respond to emerging global crises will for the most part depend on whose interests are served at a given time.'[162] The point being emphasised here is that if the invasion of Ukraine is to be regarded as a violation of humanity's most fundamental values and interests, which it indeed is and not merely as a parochial issue,

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[160] See for example B. S. Chimni, 'International Institutions Today: An Imperial Global State', 15 *European Journal of International Law* (2004) 1; A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004); B. S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches*, 2nd ed. (Cambridge University Press, 2017); N. Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press, 2020).

[161] S. B. Traoré, 'Making Sense of Africa's Massive Abstentions during the Adoption of the UNGA Resolution on the Aggression against Ukraine' *AfricLaw*, 21 April 2022, available at https://africlaw.com/2022/04/21/making-sense-of-africas-massive-abstentions-during-the-adoption-of-the-unga-resolution-on-the-aggression-against-ukraine/.

[162] C. A. Odinkalu and S. Nakandha, 'Putin Arrest Warrant: International Law and Perceptions of Double Standards', *OpinioJuris* 27 March 2023, available at https://opiniojuris.org/2023/03/27/putin-arrest-warrant-international-law-and-perceptions-of-double-standards/. *See also* A. Tartir, 'How the Russia-Ukraine War Exposed European Hypocrisy over Palestine', *Middle East Eye*, 9 March 2022, available at https://www.middleeasteye.net/opinion/russia-ukraine-war-european-hypocrisy-palestine-exposed accessed 19 September 2024.

then the identities of those spearheading the accountability charge must necessarily reflect humanity as a whole.

Consequently, concerted effort must be made to get as many states as possible, being representative of all regions and peoples of the world, to become party to the tribunal's constitutive treaty. While a tribunal established by treaty solely or primarily between Ukraine and European and North American states would be legally legitimate, it certainly would not be sociologically legitimate for its lack of global representativeness. A tribunal established supposedly to validate and vindicate one of humanity's most fundamental values without the participation of the majority world – South America, Africa, Middle East and Asia – would be a sociologically illegitimate mechanism.

Political support from a wide array of states would also facilitate enforcement of the tribunal's decisions. Political support is *sine qua non* of effective international(ised) judicial mechanisms. Without such support, these mechanisms' dictates would be merely hortatory. This is because such mechanisms do not have an independent police force of their own; the enforcement of their decisions therefore depends on cooperation of states who enforce these decisions on behalf of the mechanisms. The buy-in of a majority of world states is therefore likely to increase the possibility of the tribunal's decisions being enforced.

2. Judges and their appointment

In addition to state parties to the tribunal's constitutive treaty, one of the clearest indicators of a tribunal's identity is the composition of its bench. The composition ought to reflect the tribunal's multiple identities in order to emphasise its national, regional and global character and enhance its sociological legitimacy, while ensuring impartiality, objectivity and judicial independence. The temptation to draw exclusively from the Core Group when appointing judges must be resisted. The bench should reflect the face of the human family, not just a section thereof. A body constituted by states parties to the tribunal's constitutive treaty should appoint the judges, who should be drawn from all geographical regions of the world regardless of whether or not their State of nationality is a party to the treaty.

To promote the tribunal's national identity, it should have Ukrainian judges (in all its chambers). The number of Ukrainian judges on the bench should be a minority, with at least one Ukrainian judge per chamber, while the majority would be nationals of other states representing the diversity of the international community. Besides ensuring that the tribunal benefits from the expertise of a judge who is intimately familiar with the context, the presence of a Ukrainian judge (or judges) on the tribunal would also emphasise the Ukrainian identity of the tribunal and facilitate genuine buy-in by Ukrainians in the work of the tribunal such that it is not perceived as a foreign intervention.

Ideally, the tribunal should also include at least one judge of Russian nationality. Admittedly, this may be a difficult proposal to countenance considering that Ukraine is the victim of unprovoked aggression by Russia. However, sentimentalities aside, it is trite that the international criminal justice project has historically and in its current form suffered from a 'victors' justice' malaise.[163] To avoid feeding into and perpetuating perceptions of one-sided

[163] The 1919 Treaty of Peace with Germany ('Treaty of Versailles') of 28 June 1919 provided at article 227 for the establishment of a tribunal comprising judges from the victorious Allied and Associated Powers to prosecute Germany's ex-Kaiser, Wilhelm II.

justice (by Ukraine's allies) and perceived double standards, real or imagined, effort should be made to have a judge of Russian nationality on the tribunal's bench. Besides the expertise and contextual understanding that the Russian judge would bring to the tribunal, their presence would also likely dispel perceptions that the tribunal is merely another international law institution designed by Russia's ideological opponents to settle political scores.

Most of the judges should, however, hail from other states and reflect, to the greatest extent possible, the diversity of the international community in terms of geography, nationality, legal cultures, race, and gender, among others. Their nationality should not be restricted to the state parties to the tribunal's treaty. The emphasis here is that all attempts should be made to shore up the tribunal as a legitimate institution for validating and vindicating humanity's fundamental values, hence bolstering its legitimacy.

3. Victim participation

Traditionally, international criminal law proceeded based on an adversarial approach (influenced by common law traditions) in which the role of victims, if at all, was restricted to that of witnesses. Today, however, full participation by victims/survivors and affected communities in accountability processes is considered as one of the defining features of accountability and non-impunity.[164] The ICC's Revised Strategy in Relation to Victims, for example, asserts that, 'Victims play an important role as active participants in the quest for justice and should be valued in that way by the justice process … [as this] contributes to closing the impunity gap.'[165] A victim-sensitive approach demands that victim/survivor participation is not merely cosmetic, but is effective and meaningful. Legally speaking, the victim of aggression is the state, in this case, Ukraine. However, in practical terms, it is primarily the human population that bears the brunt of the destruction and suffering that result from the aggression, hence the emphasis on a human victim-sensitive approach.

Contemporary international criminal justice has fashioned a robust place for victims in the judicial process, and victims today are entitled and enabled to access and actively participate in the trial process with all attendant rights such as examining and/or cross-examining witnesses and presenting evidence, as well as during the reparations stage. This is facilitated in some contemporary courts/tribunals by dedicated offices whose primary responsibility is to 'assist victims in making their applications to the chamber, maintain contact and share information with victims throughout the proceedings, and assist victims in the choice/facilitation of their legal representation in court'.[166]

The 1920 Treaty of Peace Between the Allied & Associated Powers and Turkey ('Treaty of Sèvres') of 10 August 1920 also envisioned at article 230 the prosecution of nationals of the Turkish Empire by the victorious Allied Powers. Similarly, the International Military Tribunal (Nuremberg Tribunal), established through the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal of 8 August 1945 and comprising only judges from the victorious Allied Powers and their Allies only prosecuted war criminals of Nazi Germany. Nuremberg's 'sister tribunal', International Military Tribunal for the Far East (Tokyo Tribunal) established by the 1946 Special Proclamation by the Supreme Commander for the Allied Powers and the Charter of the International Military Tribunal for the Far East (IMTFE Charter) comprised majority judges from the victorious Allied Powers and only one other judge from (Justice Radha Binod Pal from India), and also only prosecuted Japanese nationals. The ICC is itself no stranger to accusations of double standards, in part for its predominant focus on prosecuting the 'losing side', in particular non-State actors. For a discussion of the ICC's perceived bias or double standards, *see* O. Ba, *States of Justice: The Politics of the International Criminal Court* (Cambridge University Press 2020).

[164] African Union Commission on Human and Peoples' Rights, 'Study on Transitional Justice and Human and Peoples' Rights in Africa' (2019), available at achprtransitionaljusticeeng.pdf, at §105.

[165] ICC, 'Court's Revised Strategy in Relation to Victims', ICC-ASP/11/38 (05 November 2012), at §10.

[166] K. Ainley and M. Kersten, *Dakar Guidelines on the Establishment of Hybrid Courts* (LSE and Wayamo 2019), at 40. For example, both the International Criminal Court and the Kosovo Specialist Chambers have such dedicated offices.

It is therefore imperative that the tribunal's legal framework provides for a robust victim participation structure that assures victims of recognition, access to information, transparency, participation at all stages of the judicial process (pre-trial, trial, appeal and reparations), and legal representation.[167] Ideally, therefore, the tribunal should have a dedicated and independent victims' support office, including assistance with legal representation, while also leaving open the possibility for victims who want to be represented by their own independently-retained legal representatives to do so. In this regard, inspiration may be drawn from the ICC's model whereby the Court's Office of Public Counsel for Victims operates alongside independent counsel retained by some victims. This would enable victims/survivors to participate in and feel part of the processes of the tribunal, thereby enhancing ownership and legitimacy of the tribunal.

4. The tribunal's approach to reparations

The 'right to reparations' is considered to stem from the right to an effective remedy which is enshrined in nearly all international human rights instruments.[168] In General Comment 31[80], the Human Rights Committee interpreted the right to an effective remedy (in article 2(3) of the ICCPR) to include the availability of reparations to victims as a fundamental component of this right.[169] The most prominent 'soft-law' instrument on remedies for international crimes, the 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, has since reflected this understanding, asserting that reparation is a fundamental component of a victims' right to a remedy.[170] These principles are considered by (some) commentators as indicative of the formation of international consensus on reparations as a basic feature of accountability for international crimes.[171] Unlike in earlier days of the international criminal justice project,[172] contemporary practice has also since embraced reparative justice as a fundamental aspect of accountability. It is now routine for legal instruments of international criminal courts/tribunals to expressly empower the tribunals to order reparations upon conviction.[173]

The tribunal's legal framework should therefore expressly provide for reparations. The provisions should be carefully thought out to ensure that reparations are meaningful and attainable. In this regard, the possibility of using seized Russian assets to affect the tribunal's reparation orders can be explored. While this approach may be problematic as it raises complex international law questions of state responsibility while the tribunal would be focused on

[167] *See for example* the principles underpinning the ICC's victim strategy. ICC, 'Court's Revised Strategy in Relation to Victims', ICC-ASP/11/38, 5 November 2012, at §15.
[168] ICCPR, art 2(3); Protocol to the African Charter on Human and People's Rights on the Establishment of the African Court on Human and Peoples' Rights (1998), art 27(1); American Convention on Human Rights (1969), art 63(1); European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), art 41.
[169] General Comment 31[80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), at 16.
[170] Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/Res/60/147, 15 December 2005, principle VII. See also Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, E/CN.4/2005/102/Add.1, 8 February 2005, principles 31–34.
[171] See for example C, Sperfeldt, 'Rome's Legacy: Negotiating the Reparations Mandate of the International Criminal Court', 17 *International Criminal Law Review* (2017) 351-377.
[172] Earlier international criminal mechanisms such as the Nuremberg and Tokyo Tribunals and the ICTY and the ICTR had no reparative mandates (though the latter two had the power to – albeit never exercised –to order return of property and proceeds of crime).
[173] See, e.g., Art 75, the Rome Statute; Art. 44(6), Law No.05/L-053 on (Kosovo) Specialist Chambers and Specialist Prosecutor's Office; Draft Statute of the Hybrid Court for South Sudan (version 10 August 2017, on file with author), arts 27(4) and 29.

individual responsibility,[174] this may be approached from the understanding that aggression is essentially a 'state crime'.

VI. Conclusions and Policy Recommendations

- The Russian aggression against Ukraine has been condemned across political spheres, including the UNGA, European Commission, Council of Europe, and numerous individual states. However, currently there is no feasible legal avenue for prosecuting Russia's political and military leadership figures for the crime of aggression: the ICC is blocked by the stringent jurisdictional regime over the crime of aggression, while national courts' jurisdictions are restricted by immunities enjoyed by state officials.
- At the same time, Ukrainian survivor groups, its human rights community and the Ukrainian Government emphasise the necessity to punish both direct perpetrators and the Russian leadership, who have enacted both the aggression itself and its conduct by means of atrocities.
- The international legal vacuum around the avenues to prosecute Russia's aggression highlights the need to develop a new mechanism to hold those responsible for the crime of aggression accountable, in parallel to advocating for a systemwide reform, including a reform of the Rome Statute.

Key legitimacy considerations

- From the legitimacy perspective, in the development of the new accountability mechanism, it is important to consider:
    - **The scope of acts under the jurisdiction**. Russian officials and military commenced their crimes of aggression in 2014 and escalated them with the full-scale invasion of 2022.
    - **The responsibility of the Russian leadership**, especially the 'troika.' Any accountability mechanism must be able to prosecute those most responsible for the crimes.
    - **Victim participation.** Survivors' recognition as victims of the crime of aggression and their meaningful contribution to a tribunal would further inform societal perception of its legitimacy and serve the intended purpose of accountability for the crime of aggression. Recognising individuals as victims of the crime of aggression will be enormously impactful way beyond Ukraine. The 'individualisation' of the crime of aggression as opposed to its historical perception as an encroachment solely on states will further the truly human-centric development of international law and inform the ICC's reading of the crime whenever the first case thereon comes before it.
    - If ***in absentia*** proceedings shall be a feature of a new mechanism, it is important to conduct a multi-faceted early outreach, in Ukraine and internationally. This will pre-empt societal disappointment at seeing an empty dock and explain the expressive and other values of a trial. If the apprehension of suspects is the goal, public outreach will help manage societal expectations about the length of proceedings.
    - **Reparations**. The tribunal's legal framework should expressly provide for reparations. In this regard, the possibility of using seized Russian assets to effect the tribunal's reparation orders should be explored.

[174] *See* F. Paddeu, 'Transferring Russian Assets to Compensate Ukraine: Some Reflections on Countermeasures' *Just Security*, 1 March 2024, available at https://www.justsecurity.org/92816/transferring-russian-assets-to-compensate-ukraine-some-reflections-on-countermeasures/.

The CoE model

- Since January 2023, an informal Core Group on the Establishment of a Special Tribunal for the Crime of Aggression against Ukraine ('Core Group') has been meeting to find the appropriate legal response. After 14 rounds at the level of legal advisors, the Foreign Ministers endorsed three legal texts at their meeting on Europe Day in Lviv (9 May 2025). The Ministerial Meeting of the Council of Europe of 14 May 2025 received these texts, and the Secretary-General of the Council of Europe will steer the next phase within the organisation.
- **Legal basis.** The primary basis will be an agreement between the CoE and Ukraine, potentially supported by an enlarged partial agreement open to non-member states and other international organisations. While the CoE has the mandate to conclude such agreement, it does not have treaty-making power comparable to the UN or the EU and hence is restricted to assisting Ukraine in the process and to establish and operate such a tribunal, which derives its jurisdiction from the territorial jurisdiction of Ukraine.
- **Jurisdiction**: The Tribunal will have jurisdiction to prosecute persons who bear the greatest responsibility for the crime of aggression committed against Ukraine. The jurisdiction *ratione temporis* will depend on a determination of the future Tribunal, taking into account relevant UNGA resolutions since 2014.
- **Applicable law:** the definition of a crime of aggression follows Article 8*bis* of the Rome Statute. The Special Tribunal will take into account UNGA resolutions on Ukraine as relevant context to define whether certain acts qualify as manifest violations of the UN Charter. The Tribunal will apply the Statute, international law, and, as a fall-back when the other two sources do not provide for the applicable law, substantive Ukrainian law.
- The **relationship between national proceedings and the Tribunal** is best defined as 'referral', to make it clear that the jurisdiction of the Special Tribunal flows from international law and is only rooted in the territorial jurisdiction of Ukraine, which is assisted by the CoE in the establishment and operation of the Tribunal. The Prosecutor of the Tribunal can go beyond the proceedings, material and information delivered by Ukraine to build the cases before the Tribunal.
- The Prosecutor of the Special Tribunal may investigate **troika members** (without applying measures of constraint) and indict them. However, the tribunal will not act upon the indictment as long as they are in office. Once they leave office, the Trial Chamber may resume its work immediately.
- The Tribunal has the power to conduct **trials in absentia**, subject to rule of law guarantees, including the right of a re-trial.
- **Groups of victims can participate** in the proceedings, provided they are specifically identified in the indictment, are represented by a lawyer and their participation is line with the efficient conduct of proceedings.
- The Special Tribunal will **cooperate with the ICC**. Cases pending in the ICC have priority over the Special Tribunal when a suspect is in physical custody in the ICC premises.

Policy recommendations

- To secure the tribunal's regional and global identities, **States parties** to the CoE Enlarged Partial Agreement supporting the Tribunal **ought to be drawn from across the globe**.
- Similarly, the **Tribunal's staff should reflect**, to the greatest extent possible, **the diversity of the international community** in terms of geography, nationality, legal cultures, race, and

gender, among others. The nationality of judges, prosecutors, and other staff should not be restricted to the States parties to the tribunal's treaty. The emphasis here is that all attempts should be made to shore up the tribunal as a legitimate institution for validating and vindicating humanity's fundamental values, hence bolstering its legitimacy.

- I**nternational legitimacy** would further be bolstered by a positive reference to the tribunal in a **future resolution of the UNGA**. However, this would not resolve the discussion of whether a CoE Tribunal would qualify as an 'international tribunal' that could override the personal immunity of the Russian 'troika'. The Tribunal would continue to represent the will of the CoE states and the non-CoE EPA states, but not the will of the international community as a whole. However, that discussion lost its policy relevance, as specific procedural rules in the Statute apply irrespective of any policy qualification of the Tribunal. These rules are without prejudice to the state and development of customary international law.