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DOMESTIC AND INTERNATIONAL CRIMINAL JURISDICTION IN THE CONTEXT OF THE INITIATIVE FOR A SPECIAL TRIBUNAL FOR THE CRIME OF AGGRESSION

Abstract: *Russia's aggression against Ukraine and the efforts to prosecute the perpetrators have renewed the debate regarding domestic and international criminal jurisdiction over the crime of aggression. Given the inter-state nature of this crime and its link to an act of aggression, the existence of which can be determined by the Security Council, the International Law Commission's (ILC) relatively restrictive approach to the exercise of criminal jurisdiction prevailed, at least until 2022. Against this background, the discussion regarding the establishment of a Special Tribunal for the crime of aggression against Ukraine has significantly influenced the trajectory of the understanding of general international law concerning individual criminal responsibility for the crime of aggression. The interpretative paths adopted in the mid-1990s are gradually being abandoned. At the same time, an intense ongoing debate concerning the understanding of the phrase "international criminal courts, where they have jurisdiction" has not led to any conclusive arrangements. Still, what is known is that there is a certain group of states for which such courts can be created through bilateral agreement between the state concerned and the United Nations, on the recommendation of the UN General Assembly.*

Keywords: : crime of aggression, criminal jurisdiction, special tribunal, Ukraine

1. INTRODUCTION

Russia's aggression against Ukraine and the efforts to prosecute its perpetrators renewed the debate regarding domestic and international criminal jurisdiction over

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the crime of aggression. Given the inter-state nature of this crime and its link to an act of aggression, the existence of which can be determined by the Security Council according to the UN Charter, the International Law Commission's (ILC) relatively restrictive approach to the exercise of criminal jurisdiction prevailed at least until 2022. The discussion initiated in March 2022 regarding the establishment of a Special Tribunal for the crime of aggression against Ukraine, supported in principle by dozens of states, has necessitated a revision of the existing imperatives. Although the process of reinterpreting international law in this field is still ongoing, some essential elements of it can nonetheless be discerned.

The article consists of three parts. The first part briefly outlines the traditional view of the limited jurisdiction over the crime of aggression. The second part discusses the significance of the conflict in Ukraine on the shift in practice of states concerning domestic jurisdiction over the crime of aggression. Finally, the last section addresses the possibility of exercising international jurisdiction over the crime of aggression against Ukraine.

The article leaves aside the issue of immunities of state representatives before a domestic criminal jurisdiction. The link between the issues of jurisdiction and immunity is of fundamental importance and is currently also being debated in the context of the crime of aggression by the ILC, among others. The limitation is merely a consequence of the intended length of this article. For the same reason, the article does not concern the applicable procedure before the future special tribunal, in particular the question of suitability of in absentia trials.

1. DOMESTIC JURISDICTION FOR THE CRIME OF AGGRESSION

For some time the view existed that domestic jurisdiction for the crime of aggression could only be applied to state nationals. Such a solution removed the question of potential immunity for nationals of other States – perpetrators of the crime in question. This position was presented by the ILC in 1996 and since then has constituted an influential point of reference. The Commission stated in the commentary to its Draft Code of Crimes against the Peace and Security of Mankind that

> [a] court cannot determine the individual criminal responsibility for this crime without considering as a preliminary matter the question of aggression by a State. The determination by a national court of one State of the question whether another State has committed aggression would be contrary to the fundamental principle of international law *par in parem imperium non habet* (equals do not have authority over each other). Moreover, the exercise of jurisdiction by the national court of a State which entails

> consideration of the commission by another State would have serious implications for international relations and international peace and security.[1]

This idea has previously appeared in the works of the ILC's Working Group on the question of an international criminal jurisdiction, chaired by Abdul Koroma. Its 1992 report identified, inter alia, that

> it may be very difficult for a national court, which may be a court of a party to the conflict in question, to determine in an impartial manner whether particular conduct constituted aggression, for example. The State against which that charge is made would not itself be a State party to the proceedings, so that the trial of an individual accused could become a surrogate for a broader range of issues arising at the international level. Such circumstances are not conducive to the proper administration of the criminal law.[2]

One of the working group's key members, in the view of its chairman, was James Crawford.[3] In the ILC's discussion he labelled aggression a crime that has never been subjected to a national jurisdiction.[4] Such an approach disregarded the practice of Eastern European states.[5] Still, the conclusion of the Commission significantly influenced the subsequent developments despite the critics.[6] Echoes of this perspective were voiced during the Review Conference of the Rome Statute of the International Criminal Court (ICC) in Kampala in 2010.[7] Finally, it was repeated in 2022 by the

[1] Draft Code of Crimes Against the Peace and Security of Mankind, Art. 8, Commentary, p. 30, available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_4_1996.pdf (accessed 30 August 2024).

[2] *Report of the working group on the question of an international criminal jurisdiction*, 2(2) Yearbook of the International Law Commission 58 (1992), paras. 89–90; *see also* Y. Dinstein, *War Aggression and Self-Defence,* Cambridge University Press, Cambridge: 2005, p. 145.

[3] ILC, Draft code of crimes against the peace and security of mankind (Part II) – including the draft statute for an international criminal court, 14 July 1992, A/CN.4/SR.2284.

[4] *Ibidem*. This assertion was criticised as not being based on existing State practice. According to Pal Wrange, "the ILC was in this particular instance involved in progressive (or perhaps retrogressive) development rather than codification of positive international law" (P. Wrange, *The Crime of Aggression, Domestic Prosecutions and Complementarity*, in: C. Kreß, S. Barriga (eds.), *The Crime of Aggression: A Commentary*, Cambridge University Press, Cambridge: 2016, p. 716). A different track was also proposed by the authors of The Princeton Principles on Universal Jurisdiction (S. Macedo (ed.), *The Princeton Principles on Universal Jurisdiction*, Program in Law and Public Affairs, Princeton University, Princeton, New Jersey: 2001, available at: https://tinyurl.com/jc7yy8m5 (accessed 30 August 2024)), according to which the jurisdictional regime concerning a "crime against peace" is identical to the regime for other fundamental international crimes.

[5] P. Grzebyk, *Crime of Aggression Against Ukraine: The Role of Regional Customary Law*, (21)3 Journal of International Criminal Justice 435 (2023).

[6] N. Strapatsas, *Complementarity and Aggression: A Ticking Time Bomb?*, in: C. Stahn, L. van den Herik (eds.), *Future Perspectives on International Criminal Justice*, TMC Asser Press, Leiden: 2010, p. 454; A. Reisinger Coracini, *Evaluating Domestic Legislation on the Customary Crime of Aggression under the Rome Statute's Complementarity Regime*, in: C. Stahn, G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff, Leiden: 2009, p. 731.

[7] Annex III, Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression: "5. It is understood that the amendments shall not be interpreted as creating the

ILC in its Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction, adopted in a first reading, as well as, inter alia, in the opinion of the Dutch Advisory Committee on Issues of Public International Law.[8]

As mentioned above, this approach took as its basic premises the need to protect the powers of the Security Council on the one hand and the principle of the sovereign equality of states as a source for immunities of state officials on the other hand.[9] The result, however, was that the basic idea of criminalising aggression, protecting the peace, was lost in practice. "Proper administration of the criminal law" – to use the ILC's terminology – overshadowed the idea of combating impunity for the international crime in question. In consequence, the adopted interpretations of law privileged potential aggressors over their potential victims. As Japan pointed out in the final part of the negotiations in Kampala, such a jurisdictional regime where a State party is surrounded by non-states parties "unjustifiably solidifies blanket and automatic impunity of nationals of non-State Parties."[10]

Furthermore, such an approach did not distinguish between political and legal implications. Similarly, as in the case of crimes against humanity or genocide, there is no doubt that a determination of the crime of aggression can have important political repercussions for specific inter-state relations. Despite the fact that the findings of criminal courts, whether national or international, may have some evidentiary significance, they do not prejudge the international legal position of States.[11] Determining individual criminal responsibility does not have direct automatic legal bearing on State responsibility.[12]

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right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State." Still taking into account the complementarity principle, Nidal Nabil Jurdi argues that the Kampala Amendments can be interpreted in favour of selective domestic jurisdiction of the crime of aggression (N.N. Jurdi, *The Domestic Prosecution of the Crime of Aggression After the International Criminal Court Review Conference: Possibilities and Alternatives*, 14(2) Melbourne Journal of International Law 1 (2014), pp. 15–19); *see also* C. Kress, L. von Holtzendorff, *The Kampala Compromise on the Crime of Aggression*, 8(5) Journal of International Criminal Justice 1179 (2010), pp. 1216–1217; C. McDougall, *The Crime of Aggression Under the Rome Statute of the International Criminal Court*, Cambridge University Press, Cambridge: 2021, pp. 377–378.

[8] *Challenges in Prosecuting the Crime of Aggression: Jurisdiction and Immunities*, The Advisory Committee on Issues of Public International Law, Hague: 2022.

[9] This argument was favoured particularly by US advisors and officials: *e.g.* B. Van Schaack, *Par in Parem Imperium Non Habet Complementarity and the Crime of Aggression*, 10 Journal of International Criminal Justice 133 (2012), pp. 149–150; H. Hongju Koh, T. Buchwald, *The Crime of Aggression: The United States Perspective*, 109 American Journal of International Law 257 (2015), pp. 274–276.

[10] P. Grzebyk, *Criminal Responsibility for the Crime of Aggression*, Routledge, Oxon: 2014, p. 127.

[11] *Challenges in Prosecuting the Crime...*, *supra* note 8, p. 16. Contra Dapo Akande, who distinguishes the crime of aggression from the crime of genocide and crime against humanity (D. Akande, *The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits*, 3 Journal of International Criminal Justice 618 (2003), p. 637).

[12] McDougall, *supra* note 7, pp. 392–393; Wrange, *supra* note 4, pp. 713–714.

2. WAR IN UKRAINE AND A CHANGE OF PARADIGM FOR DOMESTIC PROSECUTION FOR THE CRIME OF AGGRESSION

Against this background, the intense discussion on the criminal responsibility of the perpetrators of crimes of aggression against Ukraine and the practice of the ICC have brought at least two new elements that are worthy of wider reflection. Firstly, there is emerging support among States of the view that domestic jurisdiction may also be exercised over nationals of the aggressor State, including its State representatives, albeit excluding the troika. This position was expressed by States during the discussions in the Sixth Committee of the United Nations General Assembly (UNGA) in 2022 and 2023. One can expect an in-depth discussion on this issue both in the Commission itself and in the Sixth Committee in 2024. This has found been expressed in both individual and multilateral statements from States. On 18 April 2023, the G7 States declared: "We support exploring the creation of an internationalized tribunal based in Ukraine's judicial system to prosecute the crime of aggression against Ukraine."[13] The reference to "Ukraine's judicial system" unequivocally supports the idea of trying the crime of aggression before domestic courts. This position was also presented in a more detailed manner in national statements of, inter alia, the United States,[14] Germany[15] and the United Kingdom.[16]

[13] *G7 Japan 2023 Foreign Ministers' Communiqué*, U.S. Department of State, 18 April 2023, available at: https://www.state.gov/g7-japan-2023-foreign-ministers-communique/ (accessed 30 August 2024).

[14] "United States supports the development of an internationalized tribunal dedicated to prosecuting the crime of aggression against Ukraine. Although a number of models have been under consideration, and these have been analyzed closely, we believe an internationalized court that is rooted in Ukraine's judicial system, but that also includes international elements, will provide the clearest path to establishing a new Tribunal and maximizing our chances of achieving meaningful accountability. We envision such a court having significant international elements – in the form of substantive law, personnel, information sources, and structure" (*Ambassador Van Schaack's Remarks on the U.S. Proposal to Prosecute Russian Crimes of Aggression*, U.S. Department of State, 27 March 2023, available at: https://www.state.gov/ambassador-van-schaacks-remarks/ (accessed 30 August 2024)).

[15] "Our idea, with a number of partners, is therefore that there is a way to strengthen the International Criminal Court rather than weakening it, in the form of a court that derives its jurisdiction from Ukrainian criminal law. What would be important for me and, I believe, for many others would be for this court to be supplemented by an international component. Of course there cannot be a special procedure for one aggressor – what we establish must be supported by as many as possible of the world's states. It is therefore important to us to have an international component, for example with a location outside Ukraine, with financial support from partners and with international prosecutors and judges, to reinforce the impartiality and the legitimacy of this court" (*"Strengthening International Law in Times of Crisis" – Speech by Federal Foreign Minister Annalena Baerbock in The Hague*, Federal Foreign Office, 16 January 2023, available at: https://www.auswaertiges-amt.de/en/newsroom/news/strengthening-international-law-in-times-of-crisis/2573492?view (accessed 30 August 2024)).

[16] "The UK would be willing to explore a 'hybrid' tribunal (a specialised court integrated into Ukraine's national justice system with international elements). Any new tribunal would also need sufficient international support and must not undermine the existing accountability mechanisms" (*UK joins core group dedicated to achieving accountability for Russia's aggression against Ukraine*, Gov.uk, 20 January 2023, available at: https://tinyurl.com/58663e2k (accessed 30 August 2024)).

In addition, Heads of State and Government of the Council of Europe in the Reykjavík Declaration of 17 May 2023 welcomed "international efforts to hold to account the political and military leadership of the Russian Federation for its war of aggression against Ukraine (...). We call on all member States to ensure that perpetrators within their jurisdiction can be tried."[17] The last sentence reflects the support of 46 Council of Europe Member States for judging crimes of aggression based on national jurisdiction. Furthermore, in its Conclusion of 29–30 June 2023, the European Council welcomed "the fact that the International Centre for the Prosecution of the Crime of Aggression against Ukraine (ICPA) is ready to start its support operations."[18] The ICPA's purpose is to support national investigations into the crime of aggression.[19] Finally, the Convention on International Cooperation in the Investigation and Prosecution of Genocide, Crimes against Humanity, War Crimes and other International Crimes, adopted by consensus in Ljubljana on 26 May 2023, provides in its Art. 6 that the Convention can be applied to the crime of aggression.[20] The objective of the Convention is to ensure effective investigation and prosecution of international crimes at the national level by enhancing international cooperation.[21] Fifty-three states took part in the negotiations for the Convention, with another 15 participating as observers.[22]

None of these documents referring to national prosecution of perpetrators of crimes of aggression or criminal cooperation in this regard provide for any exception for exercising domestic jurisdiction by states. Nor do they contain any clause stipulating that only nationals of those states can be subjected to domestic prosecution. On the contrary, as most of them relate to Russia's aggression, they unequivocally stipulate the right to prosecute non-nationals. Thus, they constitute significant evidence supporting the prosecution of the perpetrators of the crime of aggression before domestic courts.[23]

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[17] United around our values – Reykjavik declaration, Council of Europe, London: 2023, p. 5, available at: https://tinyurl.com/57z5a2vb (accessed 30 August 2024).

[18] European Council meeting (29 and 30 June 2023) – Conclusions, EUCO 7/23, 30 June 2023, para. 7, available at: https://data.consilium.europa.eu/doc/document/ST-7-2023-INIT/en/pdf (accessed 30 August 2024).

[19] *See International Centre for the Prosecution of the Crime of Aggression against Ukraine*, EuroJust, available at: https://tinyurl.com/4uzh8tm3 (accessed 30 August 2024).

[20] Ljubljana – The Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes Against Humanity, War Crimes and Other International Crimes (signed 26 May 2023), 2024 Tractatenblad 120.

[21] *Ibidem*, Preamble, Art. 1.

[22] List of Participants, MLA Diplomatic Conference, MLA/INF.1, 26 May 2023, MLA/INF.1, available at: https://www.gov.si/assets/ministrstva/MZEZ/projekti/MLA-pobuda/List-of-Participants.pdf (accessed 30 August 2024).

[23] *Challenges in Prosecuting the Crime...*, *supra* note 8, p. 8.

The above-mentioned development does not go against the United Nations Charter or the principle of sovereign equality of states. After the proposed Security Council resolution concerning aggression against Ukraine was vetoed by Russia, the UNGA properly took up the issue on its agenda and on 2 March 2022 endorsed the resolution by 141 votes, confirming the fact of Russia's aggression against Ukraine.[24] In accordance with the United Nations Charter, the General Assembly may discuss any questions relating to the maintenance of international peace and security and may make recommendations concerning any such questions (Art. 11).[25]

3. INTERNATIONAL JURISDICTION AND THE CRIME OF AGGRESSION

Theoretical limitations of domestic jurisdiction for the crime of aggression and a lack of political will for a long time also influenced the international jurisdiction. In particular, the precise competence of the ICC for prosecuting the crime of aggression was not established until 22 years after the adoption of its Statute and it has not yet been supported by the majority of States Parties to the Rome Statue yet.[26] Furthermore, the ICC jurisdiction has been limited, in contrast to the other crimes covered by the Statue. In particular, this was expressed in the assumption that the ICC could only try the perpetrator of a crime of aggression if they were a national of a State Party to the Kampala Amendments. To this extent, therefore, the ICC's competence to try crimes of aggression seemed to be consistent with the theory that criminal courts created under international agreements implement the domestic jurisdiction conferred on them by the States Parties.[27] This position could have been influenced by the passage from the Nuremberg Tribunal, in which it was stated that the signatory powers by creating the Tribunal "have done together what any one of them might have done singly."[28] In such a perspective, the scope

[24] "Deplores in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the Charter" (UNGA resolution of 18 March 2022, *Aggression against Ukraine*, Doc. A/RES/ES-11/1, para. 2).

[25] *Cf.* ICJ, *Certain Expenses of the United Nations*, Advisory Opinion, 20 July 1962, ICJ Rep 1962, p. 163; ICJ, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Judgment, 26 November 1984, ICJ Rep 1984, p. 434; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep 2004, p. 148.

[26] Forty-five States have ratified the Kampala Amendments.

[27] As stated by the Dutch Advisory Committee (*Challenges in Prosecuting the Crime…*, *supra* note 8, p. 6): "An international tribunal can acquire jurisdiction either pursuant to a UN Security Council resolution establishing the tribunal or on the basis of a convention under which the States Parties delegate their jurisdiction to the tribunal."

[28] "The signatory powers created this Tribunal, defined the law it was to administer and made regulations for the proper conduct of the trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law" (*Nazi Conspiracy and Aggression, Opinion and Judgment*, United States Government Printing Office. Washington: 1947, p. 48).

of the court's jurisdiction corresponds to that of the sum of the domestic criminal jurisdictions recognised under international law.[29]

Against this background, the issuance of an arrest warrant for the President of the Russian Federation by the ICC in March 2023[30] called into question the theory of delegating jurisdiction. Indeed, this theory does not explain the legal basis for this arrest warrant, as no State Party, in principle, had individual jurisdiction to try President Putin – much less to transfer such jurisdiction to the ICC.[31] Nonetheless, the issuance of the arrest warrant was met without protest from the States Parties to the Statute, rather with approval or silence. Significantly, it also found some support from the United States,[32] a non-State Party, which had previously appeared not to recognise even the scope of the ICC's jurisdiction under the concept of transferring competences.[33]

In the opinion of former ICC President Judge Eboe-Osuji, the competence of international criminal tribunals should rather be assessed from the perspective of the theory of international organisations, according to which the organisation is independent of the Member States and the latter "do not act through the international organizations that they establish."[34] A similar position is advocated by Leila Sadat, who recognises that

> States 'confer upon' or 'accept' the jurisdiction of international courts and tribunals not because they are thereby transmitting to those institutions some part of their own sovereignty (...), but precisely because they need and want those courts and tribunals to do things that they cannot do in their national systems.[35]

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[29] Akande, *supra* note 11, p. 637; D. Akande, *International Law Immunities and the International Criminal Court*, 98 American Journal of International Law 407 (2004), p. 417.

[30] *Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova*, International Criminal Court, 17 March 2023, available at: https://tinyurl.com/4ct3y63j (accessed 30 August 2024).

[31] Another example of such an exercise of jurisdiction over leaders of a non-State Party is the International Criminal Tribunals for the Former Yugoslavia (ICTY) towards nationals of the Federal Republic of Yugoslavia, which was only admitted to the UN in 2000 because it was not considered by UN organs to be a continuation of the Socialist Federal Republic of Yugoslavia, which ceased to exist in 1992 (Akande, *supra* note 11, p. 637).

[32] E. Graham-Harrison, P. Sauer, *Joe Biden Hails Decision to Issue ICC Arrest Warrant Against Vladimir Putin*, The Guardian, 18 March 2023, available at: https://tinyurl.com/pj66a8ad (accessed 30 August 2024).

[33] The US Department of Justice signed a Memorandum of Understanding with the Joint Investigation Team on alleged core international crimes committed in Ukraine. The USA is also contributing evidence to the Core International Crimes Evidence Database (CICED), and they have delegated a Special Prosecutor for the Crime of Aggression, who supports the operation of the International Centre for the Prosecution of the Crime of Aggression against Ukraine.

[34] C. Eboe-Osuji, *The Absolute Clarity of International Legal Practice's Rejection of Immunity Before International Criminal Courts*, Just Security, 8 December 2022, available at: https://tinyurl.com/44en7j3d (accessed 30 August 2024).

[35] L.N. Sadat, *The Conferred Jurisdiction of the International Criminal Court*, 99(2) Notre Dame Law Review 549 (2024), p. 553.

President Putin's arrest warrant appears to have been based on the assumption that the jurisdiction of an international criminal court is not merely the sum of delegated national jurisdictions. The ICC has been able to support such an approach with its existing jurisprudence – most fully expressed in the Jordanian appeal judgment in the Al-Bashir case of 2019[36] and especially in the Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa. It must first be assessed "whether an international court may properly exercise jurisdiction."[37] This would be in line with the ICJ *Arrest Warrant* decision that "an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction."[38] In view of the concurring opinion of the ICC judges, an affirmative answer on jurisdiction leads to the need to evaluate immunities. In this respect, the ICC holds the unequivocal position that "there is neither State practice nor *opinio juris* that would support the existence of Head of State immunity under customary international law vis-à-vis an international court."[39] Such a position was in line with the idea of the functioning the Nuremberg Tribunal, among others. In the discussion on its creation, the non-applicability of immunities of State representatives was explained by its international character and the gravity of the crimes rather than the implicit acceptance by the German State.[40]

Against this background the question – particularly relevant in the context of the initiative to create a Special Tribunal for the Crime of Aggression – emerged as to what criteria a judicial body should meet to be qualified as an international criminal court. Some guidance in this regard is undoubtedly provided by the 2001 judgment of the ICJ in the *Arrest Warrant* case. However, it does not explain which other bodies apart from the examples explicitly mentioned (i.e. tribunals established by the Security Council and the ICC) can be considered an international criminal court before which immunities do not apply. This issue could be crucial in defining the rules of operation of the future Special Tribunal for the Crime of Aggression

[36] ICC, *Jordan Referral v. Al-Bashir*, ICC-02/05-01/09-397, 6 May 2019.

[37] Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa to ICC, *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, ICC-02/05-01/09-397-Corr, 6 May 2019, para. 447. *See also* Eboe-Osuji, *supra* note 34.

[38] "Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention" (ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, 14 February 2002, ICJ Rep 2002, para. 61).

[39] ICC, *Jordan Referral v. Al-Bashir*, ICC-02/05-01/09-397, 6 May 2019, para. 113.

[40] Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa to ICC, *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, ICC-02/05-01/09-397-Corr, 6 May 2019, paras. 125–133.

against Ukraine. At the same time, as the positions of States have so far shown, there are divergent views in this regard. The restrictive approach is based on the assumption that an international criminal court should be defined as only the ICC or a body established by a Security Council resolution; it therefore assumes that the examples provided by the ICJ in the *Arrest Warrant* judgment are exhaustive. Still, such an approach is very formalistic, and in principle it restricts the possibility of creating new international criminal courts through means other than those based on Security Council Chapter VII resolutions. As was eloquently stated by Clauss Kress, there can be international criminal courts, which "transcends the delegation of national criminal jurisdiction by a group of States and can instead be convincingly characterized as the direct embodiment of the international community for the purpose of enforcing its *ius puniendi*."[41]

The practice of states after the aggression against Ukraine went in this direction. The above-mentioned Reykjavík Declaration welcomed "international efforts to hold to account the political and military leadership of the Russian Federation for its war of aggression against Ukraine and the progress towards the establishment of a special tribunal for the crime of aggression."[42] More than 30 States supported the Bucha Declaration of 31 March 2023,[43] declaring "that those responsible for planning, masterminding and committing the crime of aggression against Ukraine must not go unpunished."[44] Finally, in its Conclusion of 26–27 October 2023, the European Council stated that

> Russia and its leadership must be held fully accountable for waging a war of aggression against Ukraine (...). The European Council calls for work to continue, including in the Core Group, on efforts to establish a tribunal for the prosecution of the crime of aggression against Ukraine that would enjoy the broadest cross-regional support and legitimacy.[45]

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[41] Written observations of Professor Claus Kreß as amicus curiae, with the assistance of Ms Erin Pobjie, on the merits of the legal questions presented in the Hashemite Kingdom of Jordan's appeal against the Decision under Article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir, ICC-02/05-01/09-326, 11 December 2017, para. 14.

[42] *United around our values...*, *supra* note 17, p. 5.

[43] *Full Accountability is What Teaches an Aggressor to Live in Peace – Volodymyr Zelenskyy During the Bucha Summit*, President of Ukraine, 31 March 2023, available at: https://tinyurl.com/ycymf98d (accessed 30 August 2024).

[44] *Bucha Declaration on Accountability for the Most Serious Crimes Under International Law Committed on the Territory of Ukraine*, President of Ukraine, 31 March 2023, available at: https://tinyurl.com/4bc7azpc (accessed 30 August 2024).

[45] European Council meeting (29 and 30 June 2023) – Conclusions, EUCO 7/23, 30 June 2023, para. 7, available at: https://data.consilium.europa.eu/doc/document/ST-7-2023-INIT/en/pdf (accessed 30 August 2024).

The above views seem to be based on the assumption that individual criminal responsibility of the perpetrators of the crime of aggression against Ukraine needs to be guaranteed, although it is clear that the ICC has no jurisdiction in this regard, just as it is impossible for the Security Council, due to the Russian veto, to establish a tribunal of this type.

Thus, in the search for broader criteria for the recognition of a judicial body as an international body, a point of reference may be considered the position of the Sierra Leone Tribunal. The Tribunal, when identifying itself as an international court, drew attention to three elements: the lack of a link with the judicial system of Sierra Leone; functioning on the basis of a treaty and having the characteristics associated with international organisations; and the fact that the competence and jurisdiction are broadly similar to those of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda and the ICC.[46]

However, the issues are certainly not clear-cut. Indeed, the question arises as to what criteria should be applied to the prerequisite of a link with the judicial system of a given State. For example, with respect to the Kosovo Specialist Chambers – *prima facie* considered to be closely connected with the Kosovo judicial system – it is emphasised that it functions beyond the sovereign control of Kosovo.[47] In particular, the Kosovo Specialist Chambers can autonomously engage in international arrangements, its budget is not controlled by Kosovo, it enjoys inviolability and immunity even vis-à-vis Kosovo authorities and termination of its functioning is beyond the Kosovo government decision.[48]

Furthermore, it is emphasised in the context of the discussion on the Special Tribunal for the Crime of Aggression that the international court should act on behalf of the international community and should exercise jurisdiction on behalf of multiple States.[49] This position is in line with ICC Al-Bashir's judgement.[50] As

[46] SCSL, *Prosecutor v. Charles Taylor Decision on Immunity from Jurisdiction*, SCSL-2003-01-I, 31 May 2004, para. 41.

[47] A. Puka, F. Korenica, *The Struggle to Dissolve the Kosovo Specialist Chambers in The Hague: Stuck Between Constitutional Text and Mission to Pursue Justice*, 20 The Law and Practice of International, Courts and Tribunals, 548 (2021), p. 573.

[48] R. Muharremi, *The Kosovo Specialist Chambers and Specialist Prosecutor's Office*, 76 Die Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 967 (2016).

[49] J.A. Goldston, A. Khalfaoui, *In Evaluating Immunities Before a Special Tribunal for Aggression Against Ukraine, the Type of Tribunal Matters*, Just Security, 1 February 2023, available at: https://tinyurl.com/mpmdehkb (accessed 30 August 2024).

[50] "The Appeals Chamber considers that the absence of a rule of customary international law recognising Head of State immunity vis-à-vis an international court is also explained by the different character of international courts when compared with domestic jurisdiction. While the latter are essentially an expression of a State's sovereign power, which is necessarily limited by the sovereign power of the other States, the former, when adjudicating international crimes, do not act on behalf of a particular State or States. Rather,

Astrid Coracini and Jennifer Trahan put it, "the international court or tribunal should be sufficiently detached from national jurisdictions and sufficiently reflect the will of the international community to collectively enforce crimes against customary international law."[51] In opposition, Andre de Hoogh presents the view that a

> special tribunal created by a coalition of the willing will not act on behalf of the international community as a whole, but will in fact be acting on behalf of Ukraine with other (particular) States acting in concert. Such a tribunal will undeniably not qualify as a "truly international" tribunal.[52]

As to what measure would ensure that the court is reflecting the will of the international community, it is considered that this premise could be fulfilled when the special court is created through an agreement between the UN Secretary-General and Ukraine based on a recommendation of the UNGA[53] or of the UN Security Council adopted under Chapter VI of the Charter. Still, additional questions arise in this respect. Would the resolutions of the UN organ also have had a similar effect if they had been enacted after the establishment of the Tribunal? Would the sole enactment of the UNGA resolution be sufficient, or are there any specific numbers of supporting States necessary? If approval by 60 States was required for the entry into force of the ICC Statute – should we consider this criterion a sufficient threshold for identifying a "direct embodiment of the international community"?[54]

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international courts act on behalf of the international community as a whole" (ICC, *Jordan Referral v. Al-Bashir*, ICC-02/05-01/09-397, 6 May 2019, para. 115); *cf.* "The more important consideration remains the seising of the jurisdiction upon an international court, for purposes of greater perceptions of objectivity" (Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa to ICC, *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, ICC-02/05-01/09-397-Corr, 6 May 2019, para. 63).

[51] A. Reisinger Coracini, J. Trahan, *The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine (Part VI): On the Non-Applicability of Personal Immunities*, Just Security, 8 November 2022, available at: https://tinyurl.com/4xf9vjdv (accessed 30 August 2024). *See also* J. Trahan, *The Role of the UN Security Council & General Assembly In Responding to the Invasion of Ukraine*, 12(2) Polish Review of International and European Law 23 (2024).

[52] A. de Hoogh, *Personal Immunities Redux Before a Special Tribunal for Prosecuting Russian Crimes of Aggression: Resistance is Futile!*, EJIL: Talk!, 5 January 2024, available at: https://tinyurl.com/y5apej2a (accessed 30 August 2024); *See also* R. O'Keefe, *Taking Putin to Court?*, Bocconi, 21 December 2023, available at: https://tinyurl.com/5t27vwrb (accessed 30 August 2024).

[53] J. Trahan, *U.N. General Assembly Should Recommend Creation of Crime of Aggression Tribunal for Ukraine: Nuremberg is Not the Model*, Just Security, 7 March 2022, available at: https://tinyurl.com/38t3w8u6 (accessed 30 August 2024); 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://tinyurl.com/26hdw6e2 (accessed 30 August 2024); O.A. Hathaway, M. Mills, H. Zimmerman, *The Legal Authority to Create a Special Tribunal to Try the Crime of Aggression Upon the Request of the UN General Assembly*, Just Security, 5 May 2023, available at: https://tinyurl.com/ycy85psp (accessed 30 August 2024).

[54] According to Andre de Hoogh, even the ICC cannot be considered to represent the international community (de Hoogh, *supra* note 51). Carrie McDougall differentiates between a "broad cross-regional

Would a reflection of the will of the international community also be guaranteed if the agreement was between Ukraine and a regional organisation?[55]

CONCLUSIONS

The discussion regarding the establishment of a Special Tribunal for the Crime of Aggression against Ukraine has significantly influenced the trajectory of the understanding of general international law concerning individual criminal responsibility for the crime of aggression. The interpretative paths adopted in the mid-1990s concerning national jurisdiction over the crime of aggression are gradually being abandoned. Such a shift is certainly warranted from the systemic perspective when also taking into account the norms of *ius ad bellum* and *ius in bello*.

At the same time, an intense ongoing debate concerning the understanding of the term "international criminal courts, where they have jurisdiction" has not led to any conclusive arrangements. What is known is that there is a certain group of States for which such courts can be created through a bilateral agreement between the State concerned and the United Nations, on the recommendation of the UNGA.[56]

group of States" which would suffice with a "small group of States" (C. McDougall, *The Imperative of Prosecuting Crimes of Aggression Committed against Ukraine*, 28(2) Journal of Conflict & Security Law 203 (2023), p. 220).

[55] *Cf.* O. Owiso, *An Aggression Chamber for Ukraine Supported by the Council of Europe*, OpinioJuris, 30 March 2022, available at https://tinyurl.com/5bz5vmeu (accessed 30 August 2024).

[56] *FAQs on A Special Tribunal for the Crime of Aggression against Ukraine*, Permanent Mission of Estonia to the UN, 20 January 2023, available at: https://un.mfa.ee/faqs-on-a-special-tribunal-for-the-crime-of-aggression-against-ukraine/ (accessed 30 August 2024).