

Immunities and a Special Tribunal for the Crime of Aggression against Ukraine

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1. Introduction

Since the launch of Russia’s military invasion of Ukraine in February 2022, there have been growing calls in Ukraine and internationally for the creation of a Special Tribunal for the Crime of Aggression against Ukraine (Special Tribunal). The European Parliament¹ and the Parliamentary Assemblies of the Council of Europe,² NATO,³ and the Organization for Security and Co-operation in Europe⁴ all support the creation of a Special Tribunal.

As discussions proceed in several capitals, one important consideration is the question of immunities under international law. The Open Society Justice Initiative and the International Renaissance Foundation aim to foster informed consideration of the advantages and disadvantages of different models for a Special Tribunal and their ability to prosecute and try members of the senior Russian leadership. Jurisprudence in this area is often sparse and not settled, which has generated controversy and leaves considerable room for interpretation. Our aim is not to resolve the various gaps, conflicts and ambiguities, but rather to summarize the state of the law, and its potential implications for policymakers—and those in government and civil society advising them—seeking to ensure legal accountability for the crime of aggression.

This briefing paper provides a non-exhaustive overview of the application of immunities to prosecutions for the crime of aggression before a Special Tribunal. Special attention is given to the potential application of immunity to the Russian head of state, head of government, and minister of foreign affairs.

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- 1 European Parliament, Resolution, “The establishment of a tribunal on the crime of aggression against Ukraine”, 19 January 2023 (2022/3017[RSP]); Resolution, “The fight against impunity for war crimes in Ukraine”, 19 May 2022 (2022/2655[RSP]).
 - 2 Parliamentary Assembly of the Council of Europe, “The Russian Federation’s aggression against Ukraine: ensuring accountability for serious violations of international humanitarian law and other international crimes”, 28 April 2022, Resolution 2436 (2022).
 - 3 Parliamentary Assembly of NATO, Declaration “Standing with Ukraine”, 30 May 2022, 111 SESP 22 E rev.1.
 - 4 Parliamentary Assembly of OSCE, “The Russian Federation’s War of Aggression against Ukraine and its People, and its Threat to Security across the OSCE Region”, Resolution, 6 July 2022, AS (22) DE.

Prosecuting Russian officials outside Russia, without Russia's consent, could implicate two types of immunities under international law:

- Personal immunity (immunity *ratione personae*): immunity which applies to certain high-level State officials because of the specific office they currently hold.
- Functional immunity (immunity *ratione materiae*): immunity which attaches to State officials more generally in respect of acts performed in an official capacity.

We address how these two types of immunities could apply to different models for a Special Tribunal:

- (a) The Special Tribunal is established according to a resolution from the United Nations General Assembly (UNGA) by agreement between the UN and Ukraine or between Ukraine and a regional organization, namely the European Union (EU) and/or the Council of Europe (CoE) (**UNGA Model**).
- (b) The Special Tribunal is established by an agreement between Ukraine and the EU and/or CoE without an UNGA resolution (**Fully Regional Model**).
- (c) The Special Tribunal is established by an agreement between Ukraine and other States (**Multilateral Model**).
- (d) The Special Tribunal is established as a Ukrainian internationalized court (**Internationalized Model**).

2. Personal immunity

This section considers the application of personal immunity or immunity *ratione personae*. It discusses in turn the scope of this status-based immunity from foreign criminal jurisdiction; its non-application before international courts and tribunals; and whether personal immunity would apply to different models for a Special Tribunal.

2.1. The scope of personal immunity

Personal immunity is a status-based type of immunity from foreign criminal jurisdiction which is enjoyed by a small number of high-level State officials and provides broad protection while these officials hold a qualifying office.

2.1.1. *Troika members only*

Personal immunity applies to members of the “troika” —the head of state, head of government, and minister of foreign affairs—because of the office they occupy.⁵ The International Court of Justice (ICJ) in the *Arrest Warrant* case stated that

“certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal.”⁶

The ICJ emphasized that personal immunity is not granted to these high-level officials for their personal but “to ensure the effective performance of their functions on behalf of their respective States”⁷ and to “guarantee the proper functioning of the network of mutual inter-State relations.”⁸

⁵ International Court of Justice (ICJ), *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, 14 February 2002, para. 51; Draft Article 3 on the Immunity of State officials from foreign criminal jurisdiction, Texts and titles of the draft articles adopted by the drafting committee on first reading, 31 May 2022, A/CN.4/L.969 (73rd session of the International Law Commission [2022]).

⁶ ICJ, *Arrest Warrant* (see Fn 5), para. 51.

⁷ ICJ, *Arrest Warrant* (see Fn 5), para. 53.

⁸ ICJ, *Arrest Warrant* (see Fn 5), Judges Higgins, Kooijmans, and Buergenthal, Joint Separate Opinion, para. 75.

The conjunction “such as” suggests that other high-level officials may also enjoy personal immunity. Indeed, a few domestic authorities have found that the minister of defense also enjoys personal immunity.⁹ However, such limited State practice is likely to have been superseded by the International Law Commission (ILC)’s Draft Articles on the Immunity of State officials from foreign criminal jurisdiction which limit personal immunity to the *troika*.¹⁰

2.1.2. **Broad protection while in office including for aggression**

The ICJ in the *Arrest Warrant* case emphasized that *troika* members enjoy personal immunity before the domestic courts of any State other than the State of nationality of the official accused, but only for so long as they hold the qualifying office.¹¹ Personal immunity will not bar prosecution once the *troika* member leaves office, or where the State of the official waives the immunity.¹² While the *troika* members hold office, they enjoy the broad scope of personal immunity.

- (a) Personal immunity applies to **all acts**, whether private or official, **committed before or during the term of office** of the high-ranking official.¹³ Therefore, if a member of the senior Russian political and military leadership, who is not a *troika* member, commits a crime, and later becomes head of state, head of government or minister of foreign affairs, this person would enjoy personal immunity for so long as they

⁹ United Kingdom, *Re Mofaz*, 128 ILR 709, (2004) 75 BYIL 408–411 (Bow Street Magistrates’ Court, Judge Pratt, District Judge) regarding an application for a warrant for the arrest of the Israeli minister of defense; France, Decision from the Public Prosecutor to the Paris Court of Appeal, dated 27 February 2008, not to prosecute former United States secretary of defense Donald Rumsfeld; France, Court of Cassation, Penal chamber, 19 January 2010, 09-84.818, holding that the Senegalese minister for the armed forces enjoyed personal immunity on the basis that he exercised the functions of a minister of defense.

¹⁰ ILC Draft Article 3 on the Immunity of State officials from foreign criminal jurisdiction (see Fn 5).

¹¹ ICJ, *Arrest Warrant* (see Fn 5), para. 61.

¹² ICJ, *Arrest Warrant* (see Fn 5), para. 61; ILC Draft Article 12 on the Immunity of State officials from foreign criminal jurisdiction (see Fn 5).

¹³ ICJ, *Arrest Warrant* (see Fn 5), para. 55.

remain a *troika* member, even if they committed the crime before taking office.

- (b) Personal immunity applies to **all civil and criminal proceedings, even for international crimes**, such as aggression.¹⁴ Thus, a *troika* member who has allegedly committed the crime of aggression will enjoy personal immunity for so long as they remain a *troika* member.
- (c) Personal immunity means “**full immunity from criminal jurisdiction and inviolability**.”¹⁵ The mere **issuance of an arrest warrant** against a State official enjoying personal immunity violates that official’s personal immunity.¹⁶ Accordingly, personal immunity will not just bar a *troika* member from being compelled to stand trial for aggression; it will also prevent any arrest warrant being issued against them by a foreign national jurisdiction. Directing **other coercive measures** at the State official, such as issuing charges, summons, a detention order, or an application to extradite or surrender, may also violate their immunity,¹⁷ but this question has yet to be addressed by any court to our knowledge.
- (d) The State which is considering prosecuting a State official who may enjoy personal immunity **must consider the question of immunity early on**, before initiating criminal proceedings, and before taking coercive measures which may affect a *troika* member.¹⁸ However, personal

¹⁴ ICJ, *Arrest Warrant* (see Fn 5), para. 58.

¹⁵ ICJ, *Arrest Warrant* (see Fn 5), para. 54.

¹⁶ ICJ, *Arrest Warrant* (see Fn 5), para. 70.

¹⁷ The Second ILC Special Rapporteur on immunity of State officials from foreign criminal jurisdiction considered that “seeking to bring charges against the foreign official or to commit him or her for trial ... constitutes both a form of exercising criminal jurisdiction and a coercive act which must be covered by immunity”, ILC, Sixth report on immunity of State officials from foreign criminal jurisdiction, 12 June 2018, A/CN.4/722, para. 62, see also para. 65. ILC Draft Articles 9(2) and 14(4) on the Immunity of State officials from foreign criminal jurisdiction (see Fn 5) refer to “coercive measures that may affect the official, including those that may affect any inviolability that the official may enjoy under international law.”

¹⁸ ILC Draft Articles 9(2) and 14(4) on the Immunity of State officials from foreign criminal jurisdiction (see Fn 5) state that immunities should be considered “(a) before initiating criminal proceedings” and “(b) before taking coercive measures that may affect the official, including those that may affect any inviolability that the official may enjoy under international law.” ILC Draft Articles 9(1) on the Immunity of State officials from foreign

immunity does not prevent the law enforcement authorities of a State from **investigating a foreign State official** who enjoys personal immunity.¹⁹ Thus, short of adopting any coercive measure against this individual, a foreign State may investigate the conduct of a *troika* member suspected of having committed the crime of aggression.

2.2. Personal immunity before international courts

The practice of international courts indicates that personal immunity does not apply before international courts and tribunals. While the case law does not clearly identify the characteristics a court or tribunal must present to be deemed international, it is clear that there can be many distinct types of international courts and tribunals.

2.2.1. *Non-application before certain international courts*

The ICJ in the *Arrest Warrant* case noted that personal immunity would not prevent the prosecution of an incumbent minister for foreign affairs “before certain international courts, where they have jurisdiction.”²⁰ As examples, the ICJ cited criminal proceedings before the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, which were both established by UN Security Council resolutions, and before the International Criminal Court (ICC).

Following the *Arrest Warrant* case, the Appeals Chamber of the Special Court for Sierra Leone (SCSL) and the Appeals Chamber of the ICC have both found that the personal immunity of a head of state does not apply to the prosecution of

criminal jurisdiction (see Fn 5) specify that “When the competent authorities of the forum State become aware that an official of another State may be affected by the exercise of its criminal jurisdiction, they shall examine the question of immunity *without delay*” (emphasis added).

¹⁹ ICJ, *Arrest Warrant* (see Fn 5), Judges Higgins, Kooijmans, and Buergenthal, Joint Separate Opinion, para. 59.

²⁰ ICJ, *Arrest Warrant* (see Fn 5), para. 61.

international crimes before these international courts.²¹ The two appeals chambers each emphasized the distinction between international and domestic courts before finding that personal immunity did not prevent the prosecution of a head of state before an international court. The SCSL Appeals Chamber specifically stated that Article 6(2) of the Statute of the SCSL, providing for the non-application of immunities before the SCSL, was not in conflict with any peremptory norm of general international law and that its provisions had to be given effect.²² The ICC Appeals Chamber reasoned that there was no evidence of a customary rule of international law according to which a head of state would enjoy personal immunity before an international court.²³ In other words, according to the SCSL and ICC appeals chambers, personal immunity does not prevent the prosecution of a head of state before an international tribunal.

One should note that the finding of the SCSL and ICC appeals chambers that personal immunity does not apply before international courts is controversial. The ICC Appeals Chamber's decision, in particular, has been heavily criticized.²⁴

²¹ SCSL, Appeals Chamber, *Prosecutor v. Charles Taylor, Decision on Immunity from Jurisdiction*, 31 May 2004, paras. 49-53; ICC, Appeals Chamber, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal, 6 May 2019, paras. 110-117.

²² SCSL, Appeals Chamber, *Prosecutor v. Charles Taylor* (see Fn 21), para. 53.

²³ ICC, Appeals Chamber, *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (see Fn 21), para. 113. The argument that the immunity of a head of state has never been recognized in international law as a bar to the jurisdiction of an international court was detailed further in the Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, paras. 66–174.

²⁴ For criticisms of the ICC Appeals Chamber's decision, see e.g., D. Akande, "ICC Appeals Chamber Holds that Heads of State Have No Immunity Under Customary International Law Before International Tribunals", *Ejil:Talk*, 6 May 2019, <https://www.ejiltalk.org/icc-appeals-chamber-holds-that-heads-of-state-have-no-immunity-under-customary-international-law-before-international-tribunals/>; B. Batros, "A Confusing ICC Appeals Judgment on Head-of-State Immunity", *Just Security*, 7 May 2019, <https://www.justsecurity.org/63962/a-confusing-icc-appeals-judgment-on-head-of-state-immunity/>; D. Jacobs, "You have just entered Namia: ICC Appeals Chamber adopts the worst possible solution on immunities in the Bashir case", 6 May 2019, <https://dovjacobs.com/2019/05/06/you-have-just-entered-namia-icc-appeals-chamber-adopts-the-worst-possible-solution-on-immunities-in-the-bashir-case/>. For more tempered criticism and analysis of the decision, see Leila Nadya Sadat, "Why the ICC's Judgment in the al-Bashir Case Wasn't So Surprising," *Just Security*, 12 July

2.2.2. Key criteria of an international court

Neither the ICC Appeals Chamber nor the SCSL Appeals Chamber offered a definite list of criteria which a tribunal must present to be “international”—in the sense of an international tribunal before which personal immunity would not apply. However, the two decisions allow us to identify two key characteristics: an international court acts on behalf of the international community and exercises jurisdiction on behalf of a multiplicity of States.

2.2.2.1. Acting on behalf of the international community

The SCSL and ICC Appeals Chambers both relied on the difference between an international court and a national court to ground their reasoning that personal immunity did not bar the prosecution of a head of state before these international courts. According to these two courts, the crucial difference is that an international court acts on behalf of the international community.

The ICC Appeals Chamber reasoned that personal immunity does not apply before international courts because international courts have a “different character” compared to domestic courts:²⁵

- (a) **Domestic courts are “an expression of a State’s sovereign power,”** which is limited by the sovereign power of the other States. This reflects the principle of *par in parem non habet imperium*—one sovereign power cannot exercise jurisdiction over another sovereign power. This principle is based on the sovereign equality of States. The sovereign equality of States, enshrined in Article 2(1) of the UN Charter is “one of the fundamental principles of the international legal order.”²⁶
- (b) **International courts “act on behalf of the international community as a whole,”** they “do not act on behalf of a particular State or States.” Therefore, international courts, when adjudicating crimes on behalf of the international community at large, are not constrained by the *par in parem* principle.

2019, <https://www.justsecurity.org/64896/why-the-iccs-judgment-in-the-al-bashir-case-wasnt-so-surprising/>; Claus Kreß, “Preliminary Observations on the ICC Appeals Chamber’s Judgment of 6 May 2019 in the Jordan Referral re Al-Bashir Appeal,” TOAEP, 2019, <https://www.toaep.org/ops-pdf/8-kress>.

²⁵ ICC, Appeals Chamber, *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (see Fn 21), para. 115.

²⁶ ICJ, *Jurisdictional Immunities of the State (Germany v. Italy)*, Judgment, 3 February 2012, para. 57.

Similarly, the SCSL Appeals Chamber emphasized that “the Special Court was established to fulfil an international mandate and is part of the machinery of international justice.”²⁷ It also found that “the principle that one sovereign state does not adjudicate on the conduct of another state” was key to distinguishing the application of immunity before national courts from its non-application before international courts. According to the SCSL Appeals Chamber:

“The principle of state immunity derives from the equality of sovereign states and therefore has no relevance to international criminal tribunals which are not organs of a state but derive their mandate from the international community.”²⁸

Thus, the first criterion of an “international” court relates to how it exercises its function: an international court acts on behalf of the international community at large. However, international crimes are, by definition, “crimes of concern to the international community as a whole.”²⁹ Therefore, any court arguably acts “on behalf of the international community as a whole” when adjudicating international crimes. But a court will clearly not become international because it adjudicates international crimes. Otherwise, any domestic court prosecuting a foreign official accused of international crimes would be acting on behalf of the international community and, thus, able to deny their personal immunity. The argument that a domestic court is acting on behalf of the international community would be particularly strong where it exercises universal jurisdiction and there are no ties between the crime to this forum State. As a result, besides acting on behalf of the international community, a court must meet another or multiple other criteria to be capable not to recognize the personal immunity of *troika* members.

2.2.2.2. Exercising jurisdiction on behalf of a multiplicity of States

The second criterion of an “international” court before which personal immunity would not apply is that it exercises jurisdiction on behalf of multiple States.

An international court clearly cannot exercise jurisdiction on behalf of only one State. Thus, a single State cannot establish an international court. The SCSL Appeals Chamber emphasized this point, stressing that the “Special Court is not a national court of Sierra Leone and is not part of the judicial system of Sierra

²⁷ SCSL, Appeals Chamber, *Prosecutor v. Charles Taylor* (see Fn 21), para. 39.

²⁸ SCSL, Appeals Chamber, *Prosecutor v. Charles Taylor* (see Fn 21), para. 51.

²⁹ Preamble to the Statute of the ICC.

Leone exercising judicial powers of Sierra Leone.”³⁰ It also reasoned, as cited above, that the *par in parem* principle has “no relevance to international criminal tribunals *which are not organs of a state* but derive their mandate from the international community” (emphasis added).³¹ Thus, the fact that the SCSL was not a State organ and not exercising jurisdiction on behalf of Sierra Leone was relevant in determining that it was an international court. Judges Eboe-Osuji, Morrison, Hofmański, and Bossa in their Joint Concurring Opinion to the ICC Appeals Chamber’s decision also explicitly stated that an international criminal court is “a court that exercises no national jurisdiction.”³²

The number of States on whose behalf the international court must exercise jurisdiction is less clear. The ICC Appeals Chamber did not explain how a tribunal can be shown not to “act on behalf of a particular State or States.”³³ Judges Eboe-Osuji, Morrison, Hofmański, and Bossa noted that an international court or tribunal “is an adjudicatory body that exercises jurisdiction at the behest of two or more States.”³⁴ However, a tribunal established by only two States is unlikely to constitute the kind of international court capable of denying the personal immunity of high-ranking officials who are not nationals of either State. This tribunal would appear to act on behalf of specific States—the two enabling States—which is precisely how international courts do not act according to the ICC Appeals Chamber.

If a tribunal established by two States is not sufficiently international, this suggests that a specific number of States must be met for a court to be capable of denying the personal immunity of high-ranking foreign officials. Neither the ICC

³⁰ SCSL, Appeals Chamber, *Prosecutor v. Charles Taylor* (see Fn 21), para. 40. See also SCSL, Appeals Chamber, Decision on the Invalidity of the Agreement on the Establishment of the Special Court in the Gbao case, 25 May 2004, para. 6, stating “The judicial power exercised by the Special Court is not that of Sierra Leone, but that of the Special Court itself reflecting the interests of the international community.”

³¹ SCSL, Appeals Chamber, *Prosecutor v. Charles Taylor* (see Fn 21), para. 51.

³² ICC, Appeals Chamber, *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (see Fn 21), Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański, and Bossa, para. 61.

³³ ICC, Appeals Chamber, *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (see Fn 21), para. 115.

³⁴ ICC, Appeals Chamber, *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (see Fn 21), Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański, and Bossa, para. 56.

Appeals Chamber nor the SCSL Appeals Chamber identified this minimum threshold of enabling States. The lack of clarity in the case law on this key point raises many questions. One question is whether the threshold of enabling States may vary depending on the type of tribunal. For instance, are the same number of States required to endorse the tribunal if the tribunal is regional as opposed to a global tribunal?

2.2.3. Different types of international courts

While the ICC and SCSL appeals chambers did not provide a clear list of criteria a court must meet to be international, their decisions illustrate that there are many types of international courts.

Judges Eboe-Osuji, Morrison, Hofmański, and Bossa stated in their Joint Concurring Opinion that the “collective sovereign will of the enabling States” is the court’s source of jurisdiction and the “ultimate element of its character as an international court.”³⁵ They note that the enabling States can express their collective sovereign will in a variety of ways:

“Directly or through the legitimate exercise of mandate by an international body (such as the Security Council) or an international functionary (such as the UN Secretary-General, when properly empowered to set up a court of law).”³⁶

The SCSL Appeals Chamber relied heavily on the existence of a UN Security Council resolution to justify that the SCSL was an international court. The SCSL was not established by a UN Security Council resolution. However, the UN Security Council had recommended in Resolution 1315 (2000) that the UN Secretary-General negotiate an agreement with the Government of Sierra Leone to create an independent special court. The SCSL Appeals Chamber emphasized that the UN Security Council had called for the establishment of a tribunal and that the Security Council acts on behalf of all UN members when carrying out its duties under its responsibility to maintain international peace and security.³⁷

³⁵ ICC, Appeals Chamber, *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (see Fn 21), Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański, and Bossa, para. 58.

³⁶ ICC, Appeals Chamber, *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (see Fn 21), Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański, and Bossa, para. 58.

³⁷ SCSL, Appeals Chamber, *Prosecutor v. Charles Taylor* (see Fn 21), para. 38.

Therefore, the SCSL Appeals Chamber concluded that the agreement, which was authorized by the UN Security Council and gave rise to the SCSL, was “an agreement between *all* members of the UN and Sierra Leone” (emphasis in original). It noted that “the Special Court established in such circumstances is truly international.”

However, a UN Security Council resolution is not necessary for a court to be international. The ICC Appeals Chamber precisely did not say that a resolution from the UN Security Council was required for personal immunity not to apply in criminal proceedings before the ICC. Instead, as discussed above on pages 8-9, the ICC Appeals Chamber found that there was no customary rule of international law according to which a head of state would enjoy personal immunity before an international court. According to Judges Eboe-Osuji, Morrison, Hofmański, and Bossa, a UN Security Council resolution is just one of the ways in which enabling States can express their collective will.

Judges Eboe-Osuji, Morrison, Hofmański, and Bossa also identified certain elements which do not remove a court’s “international” character.³⁸ An international court may be regional or universal in orientation; ad hoc or permanent in duration; apply civil, criminal or both types of law; and apply public international law, private international law, national law, or any combination of these. The judges expressly stressed that an international court may apply domestic law: “an international court does not lose its character as such, merely because its work requires it to apply the domestic law of one or more States.”³⁹

2.3. Personal immunity before a Special Tribunal

Having discussed what constitutes an international court, we can consider the specific case of the Special Tribunal and whether this Special Tribunal may amount to an international court or tribunal before which personal immunity would not apply.

³⁸ ICC, Appeals Chamber, *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (see Fn 21), Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański, and Bossa, para. 57.

³⁹ ICC, Appeals Chamber, *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (see Fn 21), Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański, and Bossa, para. 57.

The first criterion is easily met, namely that the Special Tribunal must act on behalf of the international community at large according to the ICC Appeals Chambers—or fulfil an international mandate in the words of the SCSL Appeals Chamber. The crime of aggression is an international crime, one of the gravest crimes of concern to the international community. Therefore, prosecuting the crime of aggression to ensure accountability for this crime and the upholding of fundamental values in the international legal order, including respect for the prohibition on the use of force, serve the interest of the international community as a whole.

The second criterion, according to which the Special Tribunal must exercise jurisdiction on behalf of a multiplicity of States, raises more questions. The Special Tribunal cannot be established by only Ukraine or a small group of States. If it does, there will be a compelling argument that the Special Tribunal is simply an expression of one or more individual sovereign powers, necessarily limited by the sovereign power of Russia. In this instance, personal immunity will continue to apply to *troika* members. As noted above, the case law does not identify the number of States which must enable a court to be international or specify how this collective will must be expressed. In the context of the Special Tribunal, the acts of aggression have been committed by a permanent member of the UN Security Council with veto power. Therefore, the collective will of the international community will not be expressed through a UN Security Council resolution, as was the case for the SCSL.

We can now turn to the different models for a Special Tribunal and consider, in particular, the extent to which each model is likely to be deemed “international.”

2.3.1. The UNGA Model

Two types of tribunals could be established following an UNGA resolution:

- (a) First, the UNGA resolution could request that the UN Secretary-General conduct negotiations to conclude an agreement with the Government of Ukraine on behalf of the UN to establish a Special Tribunal.⁴⁰ This was the course of action followed by the UN General Assembly in Resolution 57/228, which led to the establishment of the Extraordinary Chambers in

⁴⁰ The UN Secretary-General would be required to conduct such negotiations by the application of Article 98 of the UN Charter, which specifies that the UN Secretary-General must perform any functions entrusted to the UN Secretary-General by the General Assembly.

the Courts of Cambodia. The Special Tribunal would be established as an *ad hoc* tribunal by agreement between the UN and Ukraine.

- (b) Second, the UNGA resolution could call on a regional organization, namely the EU or the CoE, and Ukraine to conclude an agreement to establish a Special Tribunal. The Special Tribunal would be established as an *ad hoc* tribunal by agreement between Ukraine and the EU or CoE with an UNGA mandate.

If the Special Tribunal follows the UNGA Model and, thus, is established following an UNGA resolution, it would have the **strongest claim to the status of being an international tribunal**. This is not because the UNGA has specific legal authority to create an international tribunal (unlike the UN Security Council), but because the UNGA with 193 UN Member States has a wide membership. A resolution passed by the UNGA would indicate that many States, across the world, support the establishment of the Special Tribunal. This endorsement would bolster the legitimacy of the Special Tribunal as an international tribunal before which *troika* members would not benefit from personal immunity. Any UNGA resolution endorsing the establishment of a Special Tribunal should include specific language stating that the Special Tribunal is established to ensure those responsible for crimes of aggression are brought to justice and that perpetrators of these crimes will not enjoy any immunity under international law in these criminal proceedings.

There is a question about the number of States which would have to support the UNGA resolution endorsing a Special Tribunal. Article 18 of the UN Charter distinguishes between “important questions” and “other questions” for voting in the UNGA. Decisions on other questions are decided by a majority of the members present and voting. Decisions on other important questions are decided by a two-thirds majority of the members present and voting. Article 18(2) includes, among others, “recommendations with respect to the maintenance of international peace and security” in the non-exhaustive list of important questions. Securing accountability for international crimes may be a component of maintaining international peace and security. If so, there may be an argument according to which any UNGA resolution endorsing the establishment of a Special Tribunal should be adopted by a two-thirds majority. In any event, the broadest possible endorsement by the UNGA membership would bolster the claim of the Special Tribunal as an international tribunal before which personal immunities do not apply.

The international character of the Special Tribunal would derive from the breadth of the UNGA’s membership voting for it. Therefore, whether the Special Tribunal’s creation following an UNGA resolution came by an agreement between the UN and Ukraine or between Ukraine and the EU or CoE would not be relevant to the question of the application of personal immunity.

2.3.2. The Fully Regional Model

In the absence of an UNGA resolution endorsing the Special Tribunal, a regional tribunal established by an agreement between Ukraine, on the one hand, and the EU and/or CoE, on the other hand, may present **some claim to the status of being an international tribunal**. A Special Tribunal established by agreement between Ukraine and the CoE would have a stronger claim to being an international tribunal given the CoE’s wide membership, including Ukraine’s ongoing and Russia’s former membership in the CoE.

The issue of personal immunity has never arisen in the context of a tribunal for international crimes established by an international organization, outside of the UN system.⁴¹ Therefore, there are no precedents to draw on to assess on what basis, if any, a regional tribunal could amount to an international court capable not to recognize personal immunity.

The Council of Europe has 46 Member States. It has an interest in securing accountability for the crime of aggression because Ukraine is a member of the CoE and its aims include the “maintenance and further realisation of human rights and fundamental freedoms” “by discussion of questions of common concern and by agreements and common action.”⁴² Russia’s aggression against Ukraine has caused widespread concern and condemnation among CoE members.⁴³ Given its

⁴¹ The Extraordinary African Chambers in the Senegalese courts were established by an agreement between the African Union and Senegal to prosecute international crimes in Chad. Chad had consented to proceedings against former president Habré and waived Habré’s immunity. As such, the question of his immunity did not arise. Of note, the 2018 Revitalized Agreement on the Resolution of the Conflict in the Republic of South Sudan mandated that the African Union Commission create a Hybrid Court for South Sudan (HCSS) and specified that immunities would not apply before the HCSS. The Agreement has not been implemented so far.

⁴² Article 1(b) of the Statute of the CoE.

⁴³ E.g., Decision of the Committee of Ministers of the Council of Europe, 15 September 2022, on the “Consequences of the aggression of the Russian Federation against

broad membership, unanimous endorsement⁴⁴ by the CoE to establish a Special Tribunal would support the claim that the Tribunal is acting on behalf not merely of the interests of Ukraine, but the interests of an entire region affected by Russia's acts of aggression in Ukraine. This would bolster the claim that the Special Tribunal is an international tribunal before which *troika* members would not enjoy personal immunity.

The doctrine of “specially affected States” may also suggest that a regional custom has emerged in Europe in favor of the prosecution of the crime of aggression.⁴⁵ References could be made to the establishment of the International Military Tribunal at Nuremberg, Germany, after World War II and the fact that the majority of States which criminalize aggression in their domestic code and/or have ratified the Kampala Amendments to the Statute of the ICC on the Crime of Aggression are members of the CoE. However, the argument that a particular custom exists in Europe, and is binding on Russia, in favor of allowing the prosecutions of high-level officials for the crime of aggression who would otherwise enjoy personal immunity would certainly be controversial.⁴⁶

The European Union has a smaller membership of 27 Member States. The EU, as a whole, may have a specific interest in prosecuting crimes of aggression committed in Ukraine, including because Ukraine is a candidate for accession to the EU. As discussed in the context of the CoE, there is no case law on the applicability of immunities to tribunals established by an international

Ukraine” stressing the urgent need to ensure a comprehensive system of accountability for serious violations of international law.

⁴⁴ Article 15 of the CoE Statute provides that the Committee of Ministers of the CoE can recommend that CoE Member States adopt a common policy to establish a tribunal for aggression. The vote would have to be unanimous per Article 20.

⁴⁵ The doctrine of “specially affected States” was articulated in International Court of Justice, *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, Judgment, 20 February 1969, para. 74.

⁴⁶ One would need to establish both that there is a general practice among all the States concerned (including Russia) and that this general rule is accepted by all of these States (again including Russia) as law among themselves, see Draft Conclusion 16(2) on the Identification of Customary International Law, text of the draft conclusions as adopted by the drafting committee on second reading, 17 May 2018, A/CN.4/L.908 (70th session of the ILC (2018)). The ICJ also stressed in *Asylum (Colombia v. Peru)*, Judgment, 20 November 1950, p. 276, that the party which relies on a regional custom “must prove that this custom is established in such a manner that it has become binding on the other Party.”

organization outside the UN and the “specially affected States” doctrine to justify the EU’s establishment of a tribunal for aggression. However, the argument may be made that 27 States are a group of States too small to qualify as an international tribunal where personal immunity would not apply.

2.3.3. The Multilateral Model

A Special Tribunal established by an agreement between Ukraine and other States would **likely present a weak claim** to the status of being an international tribunal **if endorsed by only a few States**.

If the Special Tribunal were established pursuant to a treaty signed by **Ukraine and a small number of States**, the Tribunal could be perceived as acting on behalf of this specific group of States. As noted above, the ICC Appeals Chamber stressed that international courts “do not act on behalf of a particular State or States,” but “act on behalf of the international community as a whole.”⁴⁷ Ukraine and participating States could argue that they are acting on behalf of the international community because prosecuting the crime of aggression upholds fundamental principles enshrined in the UN Charter, notably the prohibition on the use of force. The ILC has identified the prohibition of aggression as a peremptory norm of general international law (*jus cogens*) which is accepted and recognized by the international community of States as a whole.⁴⁸ However, if the Special Tribunal is perceived to act on behalf of only a small group of States, the Tribunal may appear to only express the interests and sovereign power of these States. If so, it would likely not constitute an international tribunal acting on behalf of the international community and personal immunities would continue to bar the prosecution of *troika* members.

If the Special Tribunal were established pursuant to a treaty signed by **Ukraine and many States**, one could argue that, similarly to the UNGA Model above, the endorsement of the Special Tribunal by many States shows that the Special Tribunal has an international mandate to act on behalf of the international community and that it is not merely expressing the sovereign interests of a few States. It remains that, as previously noted on pages 10 and 14 above, the case law

⁴⁷ ICC, Appeals Chamber, *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (see Fn 21), para. 115.

⁴⁸ ILC, Peremptory norms of general international (jus cogens), texts of the draft conclusions and Annex adopted by the drafting committee on second reading, Annex (a).

does not determine how many States are needed to be shown to act on behalf of the international community as a whole, and not on behalf of a particular group of States. Therefore, the question of how many States would have to ratify the treaty establishing the Special Tribunal for it to be deemed an international tribunal is moot.

The Special Tribunal would derive more political legitimacy if it were endorsed by the UNGA, than if it were established outside of the UN system, and if it were endorsed by a sizable proportion, and a geographically diverse assemblage, of the UNGA membership.

2.3.4. *The Internationalized Model*

A Special Tribunal established as a Ukrainian internationalized court without significant involvement from the international community would likely present the weakest claim to the status of being an international tribunal depending on the exact format and nature of the Special Tribunal.

There are many unknowns about what features a Special Tribunal operating as a Ukrainian internationalized court would have. Its composition could hugely vary, but it would likely integrate Ukrainian and international staff, including international judges and prosecutors. Its financing would at least in part come from international sources. Its location could be in Ukraine or relocated temporarily or permanently based on the security situation. Its procedural and substantive law could be domestic, international, or a combination of the two. The case law does not discuss whether such international involvement in a tribunal could affect its international nature. The only clue on this point is the Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański, and Bossa to the ICC Appeals Chamber's decision, which specifically notes that an international court does not lose its character because it applies the domestic law of one or more States.⁴⁹

If the Special Tribunal is not endorsed by the UNGA, a regional institution such as the CoE or the EU, or many States, the Special Tribunal would not be international in nature. Instead, the Special Tribunal would exercise national jurisdiction. It would be an expression of Ukraine's sovereign power and personal immunity would continue to apply to *troika* members. This is consistent with the

⁴⁹ ICC, Appeals Chamber, *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (see Fn 21), Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański, and Bossa, para. 57.

SCSL Appeals Chamber which found, as discussed on pages 13 and 14, that the fact the SCSL was not a national court or part of the judicial system of Sierra Leone was relevant in determining that the SCSL was an international tribunal.

Some arguments have been advanced to suggest that Ukraine may deny immunities based on the principle of the right to self-defense,⁵⁰ under international humanitarian law,⁵¹ or as a countermeasure.⁵² However, these arguments are untested and controversial. The purported denial of personal immunity would not stem from the international nature of the Special Tribunal.

2.3.5. A court which later becomes international

It is worth noting that, as discussed on page 7 above, it is lawful for a State to investigate crimes of aggression allegedly committed by foreign State officials enjoying personal immunity. Personal immunity does not prevent investigations. Instead, it prevents a State from issuing coercive measures, such as charges or summons, against these foreign officials. Thus, a Special Tribunal, which is established under the **Fully Regional Model**, the **Multilateral Model**, or the **Internationalized Model** and does not amount to an international tribunal, could initiate investigations into *troika* members. If it is subsequently endorsed by the UNGA, or otherwise later becomes an international tribunal, the Special Tribunal could then issue criminal charges and initiate criminal proceedings against the accused *troika* members.

⁵⁰ E.g., Chatham House, recordings of the launch of an expert declaration on ‘A criminal tribunal for aggression in Ukraine’, 4 March 2022, <https://www.youtube.com/watch?v=XdHGf50fCCK>, Speaker Prof. D. Akande, at 41:20.

⁵¹ E.g., T. Dannenbaum, “Mechanisms for Criminal Prosecution of Russia’s Aggression Against Ukraine,” *Just Security*, 10 March 2022, <https://www.justsecurity.org/80626/mechanisms-for-criminal-prosecution-of-russias-aggression-against-ukraine/>.

⁵² E.g., A. Moiseienko, “Russian Assets, Accountability for Ukraine, and a Plea for Short-Term Thinking,” *EJIL:Talk*, 5 March 2022, <https://www.ejiltalk.org/russian-assets-accountability-for-ukraine-and-a-plea-for-short-term-thinking/>.

3. Functional immunity

This section considers the application of functional immunity or immunity *ratione materiae*. It discusses in turn the scope of this conduct-based immunity from foreign criminal jurisdiction and whether an exception exists for international crimes, including for the crime of aggression. Finally, it discusses how functional immunity would apply to different models for a Special Tribunal.

3.1. Immunity for official acts

Functional immunity is a **conduct-based immunity**—as opposed to personal immunity, which as seen above, is a status-based type of immunity. Functional immunity applies with respect to **acts performed in an official capacity**.⁵³ Therefore, a wide range of officials may in principle enjoy functional immunity. By definition, aggression is a leadership crime under the Rome Statute. Only a narrow circle of officials, beyond the *troika*, who are members of the political and military leadership of Russia, could be liable for crimes of aggression.⁵⁴ Russia may claim that functional immunity prevents their prosecution.

Former members of the *troika* no longer enjoy personal immunity once they leave their office, but typically benefit from functional immunity for acts committed in their official capacity. Unlike personal immunity, **functional immunity is continuing**; it does not cease once the official leaves office.⁵⁵

3.2. An exception for international crimes

The Nuremberg Tribunal established the principle that a person's **official position does not exempt them from individual criminal responsibility** for international crimes, including for crimes against peace, the predecessor of the crime of

⁵³ ILC Draft Article 6(1) on the Immunity of State officials from foreign criminal jurisdiction (see Fn 5).

⁵⁴ Art. 8 bis (1) of the Statute of the International Criminal Court limits the commission of the crime of aggression to those in a position “effectively to exercise control over or direct the political or military action of a state.”

⁵⁵ ILC Draft Article 6(2) and (3) on the Immunity of State officials from foreign criminal jurisdiction (see Fn 5).

aggression.⁵⁶ National tribunals since World War II have denied functional immunity to officials accused of international crimes, including for the crime of aggression.⁵⁷ Accordingly, members of the political and military leadership of the Russian Federation would not enjoy functional immunity in criminal proceedings for the crime of aggression.

However, the existence of this exception to functional immunity for international crimes, and specifically for the crime of aggression, is not straightforward. The ILC in its Draft Article 7 on the Immunity of State officials from foreign criminal jurisdiction adopted the position that functional immunity does not bar foreign criminal jurisdiction in respect of only certain international crimes.⁵⁸ The crime of aggression was not included in this list of international crimes.

The ILC was deeply divided on this issue. The ILC, which generally works on consensus, exceptionally took a vote on Draft Article 7. This was a first in the 69-year-old history of the ILC.⁵⁹ Several ILC members, who were short of a majority, regretted the exclusion of the crime of aggression from the list, but explained that including the crime of aggression would have run the risk of Draft

⁵⁶ Article 7 of the International Military Tribunal's Statute provided that "the official position of defendants, whether as Heads of State or Responsible officials in Government Departments, shall not be considered as freeing them from responsibility;" Article 7 was codified in Principle III of the Principles of International Law Recognized in the Charter of the International Military Tribunal at Nuremberg, 1950, and in the judgments of the Tribunal, see notably *re Goering and others* (1946), 13 ILR 203, p. 221: "The principle of international law which under certain circumstances protects the representatives of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings."

⁵⁷ For an overview of national prosecutions, including the crime of aggression, see Preparatory Commission for the ICC, "Historical review of developments relating to aggression", UN Doc. PCNICC/2002/WGCA/L.1, 24 January 2002. For an account see N. Strapatsas, "Complementarity & Aggression: A Ticking Time Bomb?" in C. Stahn and H. van den Herik (eds.) *Future Perspectives on International Criminal Justice* (T.M.C. Asser Press, 2010), p. 454.

⁵⁸ ILC Draft Article 67 on the Immunity of State officials from foreign criminal jurisdiction (see Fn 5).

⁵⁹ See recorded vote, Report of the International Law Commission on the work of its sixty-ninth session, 1 May–2 June and 3 July–4 August 2017, para. 74.

Article 7 not being adopted. The logic of distinguishing between the crime of aggression and other international crimes has been questioned by some.⁶⁰

3.3. Functional immunity before a Special Tribunal

Noting this background on the existence of an exception to functional immunity for the crime of aggression, we can consider the applicability of functional immunity to different models for a Special Tribunal.

Prosecuting members of the political and military leadership of the Russian Federation who are not members of the *troika* for crimes of aggression before a Special Tribunal established under the **Multilateral Model** or the **Internationalized Model** would **reassert that the exception from functional immunity extends to the crime of aggression**. As discussed above on pages 15-19, a Special Tribunal established under either model may not necessarily constitute an international tribunal.

As the existence of the exception to functional immunity for the crime of aggression has been questioned, including at the ILC, prosecuting members of the political and military leadership of the Russian Federation before a Special Tribunal, which amounts to an international tribunal under the **UNGA Model** or the **Fully Regional Model**, as discussed on pages 15-19, may meet fewer challenges. The reasoning of the ICC Appeals Chamber on personal immunity, discussed on page 8, also applies to functional immunity: functional immunity does not apply before international courts because international courts have a distinctive character and are not constrained by the *par in parem* principle. The ICJ also noted in the *Arrest Warrant* case that prosecuting a former minister for foreign affairs, who thus no longer has personal immunity but only functional immunity, would be possible “before certain international courts, where they have

⁶⁰ Advisory Committee on Issues of Public International Law of The Netherlands, “Challenges in prosecuting the crime of aggression: jurisdiction and immunities”, Advisory report, no. 40, September 2022, p. 12, <https://www.advisorycommitteeinternationallaw.nl/publications/advisory-reports/2022/09/12/challenges-in-prosecuting-the-crime-of-aggression-jurisdiction-and-immunities>.

jurisdiction.”⁶¹ Thus, **functional immunity would not be an obstacle to prosecutions for the crime of aggression before an international tribunal.**

⁶¹ ICJ, *Arrest Warrant* (see Fn 5), para. 61. The ICC has held that a state official who was the incumbent minister of national defense and had previously held the offices of president’s special representative and minister of the interior did not enjoy functional immunity, pursuant to Article 27 of the ICC Statute, *The Prosecutor v. Abdel Raheem Muhammad Hussein*, Pre-Trial Chamber, Decision on the prosecution’s application under article 58, of 1 March 2012, para. 8.