

Considerations for the Setting up of
The Special Tribunal for Ukraine
on the Crime of Aggression



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The Ukraine Task Force of The Global Accountability Network Presents:

***Considerations for the Setting up of
The Special Tribunal for Ukraine on the Crime of Aggression***

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THE GLOBAL ACCOUNTABILITY NETWORK: UKRAINE TASK FORCE, 2022

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The Ukraine Task Force (UKTF) aims to produce non-partisan, high quality analysis of open-source materials and to catalogue that information relative to applicable bodies of law, including the Geneva Conventions, the Rome Statute of the International Criminal Court, and the Criminal Code of Ukraine.

The UKTF primarily creates documentation products in a narrative and graphical format, as well as a quarterly and annual trend analysis of ongoing crimes. Furthermore, the UKTF publishes issue-specific white papers. Its clients include Transnational NGOs, the United Nations, U.S. Department of State, and the Public Interest International Law & Policy Group (PILPG). The UKTF is working closely with Ukrainian partners, including the Ukraine Bar Association (UBA), which has graciously provided volunteers for our investigative efforts.

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TABLE OF CONTENTS

I. INTRODUCTION	1
II. JUSTICE MECHANISMS FOR UKRAINE.....	2
A. ICC	2
B. HYBRID INTERNATIONAL WAR CRIMES TRIBUNAL	3
1. <i>History</i>	3
2. <i>Piercing the veil of immunity</i>	4
C. AN EU REGIONAL COURT	6
D. DOMESTIC COURTS.....	8
1. <i>Ukraine</i>	8
2. <i>EU Member States</i>	8
III. THE INTERNATIONAL CRIMES.....	9
A. GENOCIDE	9
B. CRIMES AGAINST HUMANITY	10
C. WAR CRIMES	11
D. CRIME OF AGGRESSION	11
IV. JURISDICTIONAL ISSUES OVER THE INTERNATIONAL CRIMES.....	13
A. JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT.....	13
1. <i>ICC's Jurisdiction over War Crimes, Crimes Against Humanity, Genocide</i>	13
2. <i>Why Not the Crime of Aggression?</i>	14
B. UKRAINE'S DELEGATION OF JURISDICTION	15
C. JURISDICTION OF AN INTERNATIONAL COURT – THE SPECIAL TRIBUNAL FOR UKRAINE ...	16
D. OTHER MANDATES FOR THE INTERNATIONAL JUSTICE MECHANISMS	17
1. <i>Ukraine</i>	17
2. <i>European Union or EU Member States</i>	18
V. THE MANDATES FOR THE INTERNATIONAL JUSTICE MECHANISMS.....	19
A. “THOSE RESPONSIBLE”- ICTY & ICTR vs “GREATEST RESPONSIBILITY”- SCSL.....	19
B. A RECOMMENDATION FOR THE SPECIAL TRIBUNAL FOR UKRAINE.....	20
VI. PROSECUTING SITTING HEADS OF STATE.....	21
A. CASE STUDY - THE INDICTMENT AND PROSECUTION OF PRESIDENT CHARLES TAYLOR OF LIBERIA	22
B. PROSECUTING PRESIDENT VLADIMIR PUTIN.....	24
1. <i>The Law</i>	24
2. <i>The Political Realities: A patchwork of precedents, clock ticking</i>	25
VII. THE UNITED NATIONS AND SETTING UP OF A SPECIAL TRIBUNAL FOR UKRAINE FOR THE CRIME OF AGGRESSION	26
A. IN GENERAL	26
1. <i>The Security Council</i>	26
2. <i>The General Assembly</i>	27
3. <i>The Role of the Secretary General</i>	28
B. A SUGGESTED METHODOLOGY – A BILATERAL TREATY	28

1.	<i>The General Assembly authorizes the SG to enter into negotiations with the Republic of Ukraine to set up a Special Tribunal.....</i>	28
2.	<i>The Secretary General enters into negotiations with Ukraine – A bilateral treaty</i>	29
3.	<i>Ukraine’s role – Parliamentary approval.....</i>	29
C.	APPOINTMENT OF KEY TRIBUNAL PERSONNEL – PRACTICAL CONSIDERATIONS.....	29
1.	<i>In general: A rolling series of appointments</i>	29
2.	<i>The Prosecutor</i>	29
3.	<i>The Registrar</i>	30
4.	<i>The Judiciary</i>	30
D.	FUNDING OPTIONS.....	30
1.	<i>UN funding</i>	30
2.	<i>State party contributions</i>	30
E.	LOCATION OF THE SPECIAL TRIBUNAL FOR UKRAINE.....	31
F.	LOGISTICAL CONSIDERATIONS – FURTHER PRACTICAL CONSIDERATIONS	31
1.	<i>Personnel.....</i>	31
2.	<i>Translators and Associated Services.....</i>	31
3.	<i>Buildings.....</i>	31
4.	<i>Transportation.....</i>	32
5.	<i>Security for the tribunal.....</i>	32
G.	THE IMPORTANCE OF SETTING UP A STRATEGIC PLAN: BUILD THE PLAN AROUND THE MANDATE	32
H.	A PROSECUTION PLAN – PRACTICE TIPS	32
1.	<i>Consider not just the law, but the politics, diplomacy, practical, as well as cultural perspectives</i>	32
2.	<i>Is the justice we seek the justice they want?</i>	33
I.	OTHER CONSIDERATIONS.....	33
1.	<i>Political “buy in”</i>	33
2.	<i>Involving academia</i>	33
3.	<i>Outreach.....</i>	33
4.	<i>An advisory board?</i>	34
5.	<i>The importance of NGO’s</i>	34
6.	<i>Building a relationship with the press and other media.....</i>	34
7.	<i>Witness protection</i>	34
8.	<i>A Public Defender’s Office.....</i>	35
VIII.	CONCLUSIONS/RECOMMENDATIONS.....	35
IX.	APPENDICES	35
A.	GENERAL MILESTONES FOR THE SET UP OF THE SPECIAL TRIBUNAL FOR UKRAINE.....	35
B.	SUGGESTED STRATEGIC CONSIDERATIONS.....	36
C.	FUNDING	36
D.	ORGANIZATIONAL CHARTS	36

I. INTRODUCTION

Over many decades, the international community has experimented with various justice mechanisms to hold those who commit atrocity crimes accountable. Until the early 1990's, there were few efforts to do so. The idea grew out of a bold new step by the victorious allies at the end of World War II. The International Military Tribunals (IMT) at Nuremberg and Tokyo became the cornerstones for future efforts.

After the Cold War, the international community faced back-to-back atrocities in Yugoslavia and Rwanda. A more relevant and active United Nations Security Council (UNSC) created two ad hoc tribunals under Chapter 7 of the Charter of the United Nations (UN Charter). These two tribunals would last for twenty years and cost billions of dollars, but bringing justice for many human lives proved to be worth this cost and effort. After seeing the results of these tribunals, the international community realized that international justice could be achieved.

This was the age of accountability which saw a two-decade long development of modern international criminal law that developed the jurisprudence that allows consideration of prosecuting Vladimir Putin and the Kremlin commanders accountable for the invasion of Ukraine today. New theories and structures were created in Sierra Leone and Cambodia, with the long-held idea of a permanent court coming to fruition in 2002. The International Criminal Court (ICC) is now twenty years old and is the leading justice mechanism for Ukraine in holding perpetrators accountable for war crimes and crimes against humanity, and perhaps incitement to genocide.

The international crime of aggression, stemming from the crimes against peace theories of Nuremberg, has risen to the forefront of international concern related to the invasion of Ukraine by Russian Federation forces. The invasion is, purely and simply, an act of aggression. Aggression has not yet been prosecuted in the modern era, as the International Criminal Court currently does not have the jurisdiction to prosecute this international crime perpetrated in Ukraine as discussed in Section IV.A.2. Thus, a new justice mechanism must be created.

This white paper lays out a practical way by which the crime of aggression can be investigated and prosecuted through the establishment of an international tribunal for Ukraine just as it has been done successfully in Sierra Leone. The Special Court for Sierra Leone (SCSL) showed that the UN and a Member State can enter into a bilateral treaty to create an international court to prosecute military and political leaders for committing international crimes, including the prosecution of a sitting Head of State.

International tribunals are and will remain viable alternatives to other justice mechanisms such as the ICC, regional courts, and domestic courts. With proper planning, such tribunals have been efficient and effective in addressing atrocities. This would be a way to prosecute those who bear the greatest responsibility for the invasion of Ukraine by Russian Federation forces.

The approach of this white paper is to review the creation, set up, and subsequent operations of the first hybrid international tribunal, the Special Court for Sierra Leone, and take those successful lessons learned to map out proven methodologies for the creation of the Special Tribunal for Ukraine.

We have done this before, and we can do it again. The necessary experience, jurisprudence, and proper rules of procedure and evidence to investigate, indict, and prosecute Vladimir Putin and his commanders for the crimes of aggression in the invasion of Ukraine are readily available. The political moment is upon us, and it is time to execute.

II. JUSTICE MECHANISMS FOR UKRAINE

A. ICC

The ICC was established in 1998 by the Rome Statute.¹ It acts as a permanent international criminal tribunal under which individuals who commit or attempt to commit war crimes, crimes against humanity, genocide, or the crime of aggression, may be prosecuted and held accountable for their conduct.² Per the Rome Statute, the ICC can exercise subject matter jurisdiction when one or more of these four core international crimes are committed, and can exercise territorial jurisdiction when these crimes are committed by a State Party national, in the territory of a State Party, or in a State that has accepted jurisdiction of the ICC on an ad hoc basis.³

Alternatively, the ICC may exercise jurisdiction where the crimes were referred to the ICC Prosecutor by the UNSC pursuant to the resolution adopted in Chapter 7 of the UN Charter.⁴ The Prosecutor may begin an investigation before issuing a warrant if the crimes were referred to by the UNSC, or if a State Party requests an investigation for crimes that appear to have been committed within the jurisdiction of the ICC.⁵ Even otherwise, the Prosecutor may initiate a preliminary investigation on the basis of information on crimes within the jurisdiction of the Court, *proprio motu* (on its own initiative).⁶ The Prosecutor is expected to analyze the seriousness of the information received, and may seek additional information from States, organs of the United Nations, inter-governmental or non-governmental organizations, or other reliable sources that the Prosecutor deems appropriate.⁷ If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, the Prosecutor must seek authorization from a Pre-Trial Chamber to begin a formal investigation.⁸ If the Pre-Trial Chamber determines that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the ICC based on the criteria listed above, it shall authorize the investigation.⁹

In early March 2022, ICC Prosecutor Karim Khan announced that his office had launched investigations on “any past and present allegations of war crimes, crimes against humanity or

¹ Rome Statute of the International Criminal Court, Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9, Art. 71, available at: <https://iccforum.com/rome-statute> [hereinafter Rome Statute].

² Rome Statute, Art. 71.

³ Rome Statute, Art. 12.

⁴ Rome Statute, Art. 13.

⁵ Rome Statute, Art. 14.

⁶ Rome Statute, Art. 15.

⁷ Rome Statute, Art. 15.

⁸ Rome Statute, Art. 15.

⁹ Rome Statute, Art. 15.

genocide committed on any part of the territory of Ukraine by any person.”¹⁰ His decision was grounded in Article 14 of the Rome Statute, following State referrals from 39 State Parties.¹¹ While ICC’s jurisdiction over crimes against humanity, war crimes, and genocide, in the context of the Russian Federation’s invasion into Ukraine on 24 February 2022, is in no way questionable, the same cannot be concluded for its jurisdiction over the crime of aggression.

For the ICC to have jurisdiction over the crime of aggression, the aggressor must be a State Party to the Rome Statute.¹² Russia, the aggressor here, is not a State Party to the Rome Statute.¹³ Alternatively, the ICC could have jurisdiction if the UNSC requested the ICC to investigate the matter.¹⁴ Such a request will not be forthcoming because of Russia’s veto power.¹⁵

Thus, the ICC has no jurisdiction over the crime of aggression, and in this case, it is imperative for the international community to explore other alternatives as discussed in Section IV.A.2. An international tribunal is the most prudent path forward.

B. *Hybrid International War Crimes Tribunal*

1. *History*

The conventional understanding that national leaders could act with impunity within territories under their control had been expressed succinctly by Henry Morgenthau, the U.S. ambassador to the Ottoman Empire, in 1915.¹⁶ Writing about the United States’ role in the Armenian genocide, Morgenthau noted that “[he] had no right to interfere...the treatment of Turkish subjects by the Turkish Government was purely a domestic affair . . .”¹⁷ This historically accepted principle, however, underwent a dramatic transformation in 1945 when the Nuremberg trials took place.

Founded after deliberations in London by the victorious allies, the IMT was set up as the first international criminal body to recognize the authority to universally condemn and prosecute international crimes, setting precedence that the rest of the world must care about the human rights violations within the border of other States.¹⁸ Although Nuremberg trials did not serve as an

¹⁰ Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: “I have decided to proceed with opening an investigation”, INT’L CRIM. CT. (Feb. 28, 2022), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening>.

¹¹ *Id.*

¹² Rome Statute, Art. 15 *bis*(4).

¹³ Jaime Lopez & Brady Worthington, *The ICC Investigates the Situation in Ukraine: Jurisdiction and Potential Implications*, *Law Fare* (Mar. 10, 2022), <https://www.lawfareblog.com/icc-investigates-situation-ukraine-jurisdiction-and-potential-implications>.

¹⁴ Rome Statute, Art. 13.

¹⁵ Shelby Magid & Yulia Shalomov, *Russia’s veto makes a mockery of the United Nations Security Council*, ATLANTIC COUNCIL (Mar. 15, 2022), <https://www.atlanticcouncil.org/blogs/ukrainealert/russias-veto-makes-a-mockery-of-the-united-nations-security-council/>.

¹⁶ Henry Morgenthau, *Ambassador Morgenthau’s Story: Talaat Tells Why He “Deports” The Armenians*, 217 (1918), <https://net.lib.byu.edu/estu/wwi/comment/morgenthau/Morgen25.htm>.

¹⁷ *Id.*

¹⁸ Caitlin E. Carroll, *Hybrid Tribunals are the Most Effective Structure for Adjudicating International Crimes Occurring Within a Domestic State*, L. SCHOOL STUDENT SCHOLARSHIP 1 (2013), https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1090&context=student_scholarship.

exemplar for future tribunals due to its tainted perception of having furthered “victor’s justice,” it pioneered international humanitarian law and established helpful legal precedent.¹⁹ Since then, the world has witnessed the establishment and successes of numerous international criminal tribunals – namely, the International Criminal Tribunal for the former Yugoslavia (ICTY); the International Criminal Tribunal for Rwanda (ICTR); the Extraordinary Chambers in the Courts of Cambodia (ECCC); and the Special Court for Sierra Leone (SCSL).²⁰

The foremost strength as manifested by all these tribunals, however, was its proven ability to “pierce the veil of immunity” otherwise enjoyed by senior government officials in their respective national courts.²¹

2. *Piercing the veil of immunity*

Heads of State and senior government officials have immunity from jurisdiction of national courts of other States, under principles of customary international law.²² That decision was reaffirmed by the International Court of Justice (ICJ) in the *Yerodia* judgment, where the court held that the incumbent Minister of Foreign Affairs of Congo had jurisdictional immunity from an arrest warrant issued by a magistrate in Belgium, notwithstanding serious charges of war crimes and crimes against humanity.²³ The idea of immunity stems from the age-old conception that one sovereign state does not adjudicate on the conduct of another state.²⁴ However, the same principle of jurisdictional immunity is inapplicable for international criminal tribunals. This is partly because of the inapplicability of the principle of sovereign equality since international criminal tribunals are not organs of States and they instead derive their mandates from the international community.²⁵ In addition, the inapplicability of jurisdictional immunity has solid grounding in a bedrock of formidable legal precedence. The SCSL’s reasoning from a seminal case illustrates exactly that.²⁶

The Appeals Chambers of the SCSL ultimately held that Charles Taylor, then-incumbent President of Liberia, did not have immunity from criminal prosecution by an international criminal tribunal that stemmed from his official status as Head of State.²⁷

First, there was legal precedence of numerous instances of international criminal tribunals, distinctly noting within their statutes that the official status of defendants would not serve as impediments to the court’s personal jurisdiction over them. Examples include provisions in Article 7 of the IMT Charter also known as the Nuremburg Charter – a reformulation of which was

¹⁹ *Id.* at 3.

²⁰ *Id.*

²¹ Larry D. Johnson, *United Nations Response Options to Russia’s Aggression: Opportunities and Rabbit Holes*, JUST SECURITY (Mar. 1, 2022), <https://www.justsecurity.org/80395/united-nations-response-options-to-russias-aggression-opportunities-and-rabbit-holes/>.

²² Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3 (Feb. 14), <https://www.icj-cij.org/public/files/case-related/121/121-20020214-JUD-01-00-EN.pdf>.

²³ *Id.* at 23.

²⁴ *Id.*

²⁵ See Prosecutor v. Taylor, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction (May 31, 2004).

²⁶ *Id.*

²⁷ *Id.* at 25.

incorporated by the International Law Commission in its report and accepted by the UN General Assembly (UNGA) as early as 12 December 1950; Article 7(2) of the Statute of the ICTY; Article 6(2) of the Statute of the ICTR; Article 27(2) of the Statute of the ICC; and subsequently, Article 6(2) of the Statute of SCSL.²⁸ Article 6(2) of the Statute of the SCSL serves as a helpful illustration of the language of such incorporation into similar Statutes: “The official position of any accused persons, whether as Head of State or Government or as a responsible Government official, shall not relieve such a person of criminal responsibility nor mitigate punishment.”²⁹

The ICJ’s *Yerodia* judgment, although holding that the Congolese Minister of Foreign Affairs had immunity from a Belgium court, also significantly observed that “Ministers for Foreign Affairs may be subject to criminal proceedings before *certain international criminal courts*.”³⁰ Most pertinently, the ICJ, specifically listed the ICTY, ICTR, and the “future” ICC as examples of “certain international criminal courts,” which would have jurisdiction in such cases.³¹

The SCSL reemphasized its international character. Referencing its international mandate that stems from UNSC Resolution 1315, the SCSL pointed out its similarities in competence and jurisdiction to that of the ICTY, ICTR, and the ICC, and asserted that it shared traditional characteristics with classical international organizations, dispelling any notion that courts not established by the UNSC’s Chapter 7’s “coercive” authority was not sufficiently international.³²

A special tribunal established by bilateral agreement between the UN Secretary General and the Government of Ukraine, backed by a UNGA resolution as in the recent case of the ECCC (explained in greater detail in Sections 7.A.1 and 7.A.2), would similarly be able to pierce through this veil of immunity that protects Russian leaders from prosecution. This is especially pertinent since the crime of aggression, as defined in Article 8 *bis*, is a “leadership crime” – holding only the senior-most authorities culpable, who usually would have enjoyed immunity under customary international law.³³ Of course, among other reasons, an international tribunal would also be seen as the most legitimate, enjoying a broader international mandate due to the role of the UNGA and international support.

To avoid any constitutional concerns that may arise during *ex ante* review by the Constitutional Court of Ukraine (CCU), the agreement between Ukraine and the UN should specify that the new tribunal will be international and not domestic or hybrid (which would avoid conflict with Constitution of Ukraine’s Article 125 prohibiting any “special or extraordinary court.”)³⁴ It should

²⁸ *Id.* at 21-25.

²⁹ *Id.* at 22.

³⁰ Arrest Warrant of 11 April 2000, *supra* note 22, at 26 (emphasis added).

³¹ Arrest Warrant of 11 April 2000, *supra* note 22, at 26.

³² Prosecutor v. Taylor, *supra* note 25, at 19.

³³ *Supra* note 21. The definition in the Rome Statute is narrower than the one used in the Nuremberg trials, where a leader was considered to be one who had the “actual power to shape and influence the policy of their nation, prepare for, or lead their country into or in an aggressive war.” Nikola Hajdin, *The Nature of Leadership in the Crime of Aggression: The ICC's New Concern*, 17 INT'L CRIM. L. REV. 543 (2017).

³⁴ Alexander Komarov & Oona Hathaway, *The Best Path for Accountability for the Crime of Aggression Under Ukrainian and International Law*, JUST SECURITY (Apr. 11, 2022), <https://www.justsecurity.org/81063/the-best-path-for-accountability-for-the-crime-of-aggression-under-ukrainian-and-international-law/>.

also specify that the tribunal is auxiliary, not complementary to the domestic courts, avoiding conflict with the Constitution of Ukraine's Article 124.³⁵

However, please note that Ukraine could also cure either prohibition through an amendment of its Constitution. To amend the Constitution of Ukraine, the people must vote through a national referendum, a new and democratic process recently signed into law in 2021.³⁶ Such a referendum can be a change to an already existing amendment or an addition to the amendments.³⁷

C. *An EU regional court*

Another alternative is the establishment of a European-regional hybrid tribunal. The proposals for regional hybrid tribunals have resurfaced many times, most recently in the aftermath of the Syrian crisis. It was proposed then that Turkey, Lebanon, and Jordan in particular, could invoke protective jurisdiction given the acute destabilization in the region.³⁸ NATO or another regional organization such as the Organization of Islamic Cooperation or the Arab League could also create such a tribunal.³⁹ Although this proposal did not ultimately come into fruition, it was endorsed by many legal scholars and most notably by ICC Prosecutor Fatou Bensouda.⁴⁰

A similar proposal in the present circumstances may be considered, with the Council of Europe (CoE) as an appropriate forum. Ukraine joined the CoE on 9 November 1995.⁴¹ While it is true that the Council does not have the direct authority to establish such a tribunal, Article 15(a) of the Statute of the CoE shows an illuminating path forward.

Article 15(a) of the CoE Statute permits the Committee of Ministers to consider adopting “a common policy” to further the “aim of the Council of Europe.”⁴² Among the most prominent aims of the CoE, as manifested by its placement within the very first article in Article 1(a) of the CoE Statute, is to “achieve greater unity between its members.”⁴³ It is under this broad phrasing that the Council could decide to establish a hybrid tribunal.⁴⁴ While the exercise of such authority requires a unanimous vote of the Committee of Ministers under Article 20(a)(vi), achieving such unanimity should not be a cause for concern because of the high political will in that region.⁴⁵

³⁵ *Id.*

³⁶ Alisa Shushkovska & Harald Jepsen, *Ukraine adopts new and improved referendum law*, ATLANTIC COUNCIL (Feb. 18, 2021), <https://www.atlanticcouncil.org/blogs/ukrainealert/ukraine-adopts-new-and-improved-referendum-law/>.

³⁷ *Id.*

³⁸ Beth Van Schaack, *Options for Accountability in Syria*, JUST SECURITY (May 22, 2014), <https://www.justsecurity.org/10736/options-accountability-syria/>.

³⁹ *Id.*

⁴⁰ Al Arabiya News, *ICC's Bensouda would support Syria Special Tribunal if ICC path is blocked*, AL ARABIYA NEWS (May 20, 2020), <https://english.alarabiya.net/News/middle-east/2014/05/18/Interview-ICC-prosecutor-to-examine-alleged-British-crimes-in-Iraq-war>.

⁴¹ *Ukraine*, COUNCIL OF EUR., <https://www.coe.int/en/web/portal/ukraine> (last visited June 27, 2022).

⁴² Statute of the Council of Europe, Art. 15(a), May 5, 1949, ETS No. 001.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Kevin Jon Heller, *The Best Option: An Extraordinary Ukrainian Chamber for Aggression*, OPINIO JURIS (Mar. 16, 2022), <https://opiniojuris.org/2022/03/16/the-best-option-an-extraordinary-ukrainian-chamber-for-aggression/>.

Russia is no longer a member of the CoE, and none of the 46 Member States have publicly defended Russia's invasion of Ukraine. Moreover, the European Union Parliament, the most united it has ever been, has already adopted a resolution calling for a "special international tribunal" to investigate Russian leaders for the crime of aggression against Ukraine.⁴⁶ Most notably, however, the Parliamentary Assembly of the Council of Europe (PACE) itself, has already adopted a *unanimous* resolution, urging for the setting up of an ad hoc international criminal tribunal, with a mandate to "investigate and prosecute the crime of aggression allegedly committed by the political and military leadership of the Russian Federation."⁴⁷ Therefore, it is reasonable to assume that unanimity on such a vote is likely. Such a regionally supported hybrid tribunal could be based on the Extraordinary African Chambers that successfully prosecuted the former President of Chad, Hissène Habré.⁴⁸

For the concept of an Extraordinary Ukrainian Chamber for Aggression (EUCA), such a structure could work complementarily. A treaty creating an "Extraordinary Ukrainian Chamber for Aggression" could be adopted pursuant to normal CoE processes: the text would be negotiated within the institutional framework of the CoE; the Committee of Ministers would adopt the final text of the treaty; then, the treaty would be presented to Member States for their signature.⁴⁹ The treaty would provide, *inter alia*, that the EUCA be a part of Ukraine's judicial system, have jurisdiction over aggression, that EUCA judges and prosecutors be drawn from Ukraine and/or from various CoE Member States, and that Ukraine and CoE Member States jointly finance EUCA's work and carry out investigations on a collaborative basis.⁵⁰

The constitutionality of such a hybrid court, however, functioning within the Ukrainian judicial system, might violate the Constitution of Ukraine's Article 125. First, since EUCA will have a distinct procedure for deciding cases, and it will be created to replace other domestic courts which currently have jurisdiction over the matter, it will likely be seen as an "extraordinary court."⁵¹ Second, the process of creation of a domestic court, within the Ukrainian judicial system, may not allow for international involvement.⁵² Third, the creation of the EUCA may be seen as a challenge to the supremacy of the Supreme Court of Ukraine. Lastly, the EUCA might be determined not to fit within the "territoriality and specialization" on which the Ukrainian judiciary is based.⁵³ Therefore, it is best if a purely international tribunal is formulated rather than a hybrid one.

⁴⁶ European Parliament Press Release 20220517IPR29931, *Ukraine: MEPs want a Special International Tribunal for Crimes of Aggression* (May 19, 2022), <https://www.europarl.europa.eu/news/en/press-room/20220517IPR29931/ukraine-meps-want-a-special-international-tribunal-for-crimes-of-aggression>.

⁴⁷ Council of Europe., *PACE calls for an ad hoc international criminal tribunal to hold to account perpetrators of the crime of aggression against Ukraine*, COUNCIL OF EUR. (Apr. 28, 2022) <https://www.coe.int/en/web/portal/-/pace-calls-for-an-ad-hoc-international-criminal-tribunal-to-investigate-war-crimes-in-ukraine>.

⁴⁸ Heller, *supra* note 45.

⁴⁹ Heller, *supra* note 45.

⁵⁰ Heller, *supra* note 45.

⁵¹ Komarov & Hathaway, *supra* note 34.

⁵² Komarov & Hathaway, *supra* note 34.

⁵³ Komarov & Hathaway, *supra* note 34.

D. Domestic Courts

1. Ukraine

Prosecutions against war crimes and crimes against humanity are proceeding in the fullest vigor within the Ukrainian legal framework. While it is noteworthy that Ukraine's prosecutor general has opened over 9,000 investigations into Russian war crimes and crimes against humanity, a Ukrainian court, in lightning speed, has already convicted one Russian soldier for war crimes under its domestic war crimes statute, for the killing of a 62-year-old civilian on 28 February 2022.⁵⁴

Further prosecutions in Ukraine are in progress and may even take place under Article 437 of Ukraine,⁵⁵ criminalizing the act of aggression against Ukraine.

2. EU Member States

In March 2022, Ukraine's prosecutor formed a joint investigation team (JIT) on the aggressive war and crimes committed by the armed forces of the Russian Federation in the territory of Ukraine, within the framework of investigations initiated in Ukraine, Poland, and Lithuania.⁵⁶ As of 16 March 2022, the Polish prosecutor's office had already interviewed 300 witnesses relating to Russian war crimes, and the ICC Prosecutor had announced that he was coordinating with Polish prosecutors to ensure access to evidence for its own prosecutions.⁵⁷ While investigations on the crime of aggression are underway in Poland and Lithuania, grounded in universal jurisdiction,⁵⁸ it is important to note that universal jurisdiction is hardly an exhaustive legal basis for such investigations.⁵⁹ Instead, Ukraine's delegation of its own grounds of criminal jurisdiction (discussed further in Section IV.B), through bilateral or multilateral agreements with other EU Member States, can also most effectively serve as legal alternatives to universal jurisdiction.⁶⁰ This

⁵⁴ Peggy McGuinness & Ezra N. Rash, *Understanding International Justice for Atrocity Crimes in Ukraine*, NYSBA (June 7, 2022), <https://nysba.org/understanding-international-justice-for-atrocity-crimes-in-ukraine/>.

⁵⁵ CRIMINAL CODE OF UKRAINE, Art. 437 (Ukr.), available at, https://www.justice.gov/sites/default/files/eoir/legacy/2013/11/08/criminal_code_0.pdf.

⁵⁶ Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation, INT'L CRIM. CT. (Mar. 2, 2022), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states>.

⁵⁷ *Id.*

⁵⁸ Universal jurisdiction is where a State can prosecute those who commit the four international core crimes, even if the individual is not from the State prosecuting. *Universal Jurisdiction*, INT'L JUST. RESOURCE CTR., <https://ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/> (last visited June 27, 2022). Furthermore, *jus cogens* refers to a peremptory norm within general international law that are so morally abhorrent that universal jurisdiction arises out of the obligation to prevent and punish those who violate it. The non-exhaustive list of *jus cogens* include genocide, crimes against humanity, slavery. Int'l Law Comm'n Rep. on the Work of Its Seventy-First Session, U.N. Doc A/74/10, ¶ 56, Conclusion 23 (2019), available at <https://legal.un.org/ilc/reports/2019/english/chp5.pdf>.

⁵⁹ Diane Orentlicher, *How States can Prosecute Russia's Aggression With or Without "Universal Jurisdiction,"* JUST SECURITY (Mar. 24, 2022), <https://www.justsecurity.org/80818/how-states-can-prosecute-russias-aggression-with-or-without-universal-jurisdiction/>.

⁶⁰ *Id.*

is because the EU, similar to the role of European External Action Service during the post-conflict reconstruction of the Balkan States,⁶¹ has the infrastructure to provide judicial assistance.⁶²

III. THE INTERNATIONAL CRIMES

There are four international crimes: genocide, crimes against humanity, war crimes, and crime of aggression.⁶³ The first three developed over time from 18th century and are codified in the Rome Statute, which details each of these crimes.⁶⁴ For instance, Article 6 defines genocide, Article 7 details the scope of crimes against humanity, and Article 8 discusses war crimes. The fourth core international crime, the crime of aggression, developed in the 20th century and adopted much later in 2017.⁶⁵

A. Genocide

Article 6 of the Rome Statute explicitly states that for there to be a charge of genocide, the perpetrator must commit *any one* of the enumerated acts, with the specific “intent to destroy, in whole or part, a national, ethnical, racial or religious group.”⁶⁶ The enumerated acts include:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.⁶⁷

The ICTR has charged and tried individuals for violations of Article 6 of the Rome Statute. In *Prosecutor V. Nahimana, Barayagwiza, & Ngeze*, the Prosecutor charged the leaders of the political party in Rwanda, led by Barayagwiza, with genocide and incitement of genocide. The Coalition pour la défense de la république (CDR), the dominant political party, used a “common media front” to incite genocide against the Tutsi population.⁶⁸ In what became dubbed as “The Media Case,” the three individuals charged were convicted “of direct and public incitement to genocide, conspiracy, and instigating genocide, extermination, and persecution” in trial at the

⁶¹ Bosnia and Herzegovina.

⁶² See *EU Projects with Bosnia and Herzegovina*, EU (Aug. 5, 2021), https://www.eeas.europa.eu/bosnia-and-herzegovina/eu-projects-bosnia-herzegovina_en?s=219.

⁶³ Eur. Union Agency for Crim. Just. Coop, *Core International Crimes*, EUR. UNION AGENCY FOR CRIM. JUST. COOP., <https://www.eurojust.europa.eu/crime-types-and-cases/crime-types/core-international-crimes> (last visited June 15, 2022).

⁶⁴ *Crimes Against Humanity*, OFF. ON GENOCIDE PREVENTION & RESP. TO PROTECT, <https://www.un.org/en/genocideprevention/crimes-against-humanity.shtml> (last visited June 15, 2022).

⁶⁵ CICC, *The Crime of Aggression*, COAL. FOR THE INT’L CRIM. CT., <https://www.coalitionfortheicc.org/explore/icc-crimes/crime-aggression> (last visited June 15, 2022).

⁶⁶ ICC, *Rome Statute of the International Criminal Court*, INT’L CRIM. CT. 1, 3, <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf> (last visited June 15, 2022).

⁶⁷ *Id.*

⁶⁸ Catharine A. MacKinnon, *International Decisions*, 103 AM. J. OF INT’L L. 97-8 (Jan. 2009), <https://www.jstor.org/stable/20456724>.

ICTR.⁶⁹ The Appeals Chamber detailed that the charge of inciting genocide can be successful when noting that incitement to genocide led to an “outbreak of mass physical killing.”⁷⁰ The Appeals Chamber looked specifically at the time between the broadcast of such incitement and the killing of persons.⁷¹ The temporal jurisdiction of the ICTR was meant to also include “continuous” crimes that served to achieve the goal of genocide, i.e. planning.⁷² In this instance, the Appeals Chambers held that the start of the temporal jurisdiction was 1 January 1994, instead of 6 April 1994, the actual start of genocide.⁷³

However, all of the elements of the crime must be met during that time as well. For Ngeze, one of the defendants, the causation element was not met. The Appeals Chamber held that there was more of causal connection post 6 April 1994 compared to the connection prior that date, thus reversing the conviction of Ngeze. The Appeals Chamber could not determine if Ngeze’s actions “substantially contributed to genocide.”⁷⁴ But, in order to create preventative measures for future genocidal acts, both the Trial and Appeals Chambers held that “incitement [is] punishable whether or not the incited acts occurred.”⁷⁵

The majority consensus from both the Trial and Appeals Chamber is that media can incite genocide and be used as a tool to persecute.⁷⁶ It held that “media leaders can be held responsible for incitement through media or for acts media cause, and that this causal link need not be proven exclusive or essential.”⁷⁷

B. Crimes against humanity

Article 7⁷⁸ defines crimes against humanity as “a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”⁷⁹ This statute has a *mens rea* of “knowledge” for the Prosecutor to prove, but this element does not require that the perpetrator had actual knowledge of the attack, but rather the *intent* “to further such an attack.”⁸⁰ Furthermore, the crimes against humanity can occur either during conflict or peacetime.⁸¹

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Sophia Kagan, *The “Media case” before the Rwanda Tribunal: The Nahimana et al. Appeal Judgement*, 3 Hague Just. J. 83, 86 (2008), [http://www.haguejusticeportal.net/Docs/HJJ-JJH/Vol_3\(1\)/Media_Case_Kagan_EN.pdf](http://www.haguejusticeportal.net/Docs/HJJ-JJH/Vol_3(1)/Media_Case_Kagan_EN.pdf)

⁷³ *Id.*

⁷⁴ *Id.* at 88.

⁷⁵ MacKinnon, *supra* note 68.

⁷⁶ MacKinnon, *supra* note 68, at 99.

⁷⁷ MacKinnon, *supra* note 68, at 99.

⁷⁸ For detailed analysis of this section, please refer to Kelly Adams et al., *Russian War Crimes Against Ukraine: The Breach of International Humanitarian Law by the Russian Federation*, GLOB. ACCOUNTABILITY NETWORK 26-7 (Apr. 2022), <https://syrianaccountabilityproject.syr.edu/docs/russian-war-crimes-against-ukraine-the-global-accountability-network.pdf>.

⁷⁹ Rome Statute, Art. 7(1).

⁸⁰ ICC Elements, Art. 8(2).

⁸¹ Leila N. Sadat, *Putting Peacetime First: Crimes Against Humanity and the Civilian Population Requirement*, 31 EMORY INT’L L. REV. 197, 197 (2017), <https://scholarlycommons.law.emory.edu/eilr/vol31/iss2/1>.

Generally, the ICC has routinely held that there must be a certain level of direct control the perpetrator must have in order to be responsible for the conduct of those under the individual's command.⁸²

C. War crimes

Article 8⁸³ of the Rome Statute details the scope of what war crimes means, including war crimes that occur during international or non-international conflict.⁸⁴ The first subsection of Article 8 lists the grave breaches and the next subsection details other violations of laws of armed conflict.⁸⁵ The ICC Prosecutor need only prove that the perpetrator had the “awareness of the factual circumstances that established the existence of an armed conflict. . .”⁸⁶ Generally, the Prosecutor must prove all the elements of a crime, including that the perpetrator either “directed or participated in the conduct,” in order to convict the individual.⁸⁷

D. Crime of Aggression

The crime of aggression, a part of Article 8, has the caveat of *bis* – meaning that it was inserted by resolution RC/Res.6 in 2010 by State Parties to the Rome Statute.⁸⁸ It is a relatively new crime that has been codified as one of the core international crimes. Historically, the act of war was not seen as a violation of international law; however, after World War II, the sentiment towards aggression shifted regarding the existing territories and its political independence.⁸⁹ When first drafting the crime of aggression, the drafters noted two caveats: “individual or collective self-defence by states involving the use of force is authorized by article 51 of the Charter and...the use of force can be authorized by the UN Security Council as under article 42 of the UN Charter.”⁹⁰

For the sake of clarity, the timeline for codifying the crime of aggression is as follows:

- 24 October 1945 – The UN included “threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations” in Article 2(4) of the UN Charter.⁹¹

⁸² Prosecutor v. Jean-Pierre Bemba Gombo, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's “Judgment pursuant to Article 74 of the Statute,” ¶ 30 (ICC June 8, 2018).

⁸³ For detailed analysis of this section, please refer to Kelly Adams et al., *Russian War Crimes Against Ukraine: The Breach of International Humanitarian Law by the Russian Federation*, GLOB. ACCOUNTABILITY NETWORK 27-8 (Apr. 2022), <https://syrianaccountabilityproject.syr.edu/docs/russian-war-crimes-against-ukraine-the-global-accountability-network.pdf>.

⁸⁴ Rome Statute, Art. 8.

⁸⁵ Rome Statute, Art. 8(a-c).

⁸⁶ ICC Introduction, Art. 8(c).

⁸⁷ ICC Elements, Art. 8.

⁸⁸ Rome Statute, Art. 8 *bis*(1).

⁸⁹ Int'l Crimes Database, *Crime of Aggression*, INT'L CRIMES DATABASE, <https://www.internationalcrimesdatabase.org/Crimes/CrimeOfAggression> (last visited June 15, 2022).

⁹⁰ *Id.*

⁹¹ *The Crime of Aggression – A Brief History*, THE GLOB. CAMPAIGN FOR RATIFICATION & IMPLEMENTATION OF THE KAMPALA AMENDMENTS ON THE CRIME OF AGGRESSION, <https://crimeofaggression.info/history/> (last visited June 29, 2022).

- December 1974 – The UNGA adopted Resolution 3314(29) to define the crime of aggression in order to provide guidance to the UNSC as to what that crime would entail.⁹²
- July 1998 – While discussing what to add as crimes under the jurisdiction of the ICC, the crime of aggression was included, but the definition and jurisdiction over the crime was deferred.⁹³
- February 2009 – The Special Working Group on the Crime of Aggression “found a consensus agreement” as to how the crime of aggression can be defined.⁹⁴
- 11 June 2010 – The 2010 Kampala Review Conference integrated the definition of the crime of aggression, thus allowing State Parties to pass Resolution RC/Res.6.⁹⁵
- 2017 - The “Assembly of States Parties will have to take a further one-time decision to activate the Court’s jurisdiction, no earlier than 2017. Also, one year must have passed since the 30th ratification before the Court can exercise its jurisdiction over the crime of aggression.”⁹⁶

Article 8 *bis* of the Rome Statute dictates that “planning, preparation, initiation or execution, by a person” who has direct control over either the political or military branch of the State is a “manifest violation of the Charter of the United Nations.”⁹⁷ The perpetrator need not have made a “legal evaluation” for the purpose of using armed forces within the confines of the UN Charter’s definition.⁹⁸ The Prosecutor must construe the term “manifest” as an objective qualification.⁹⁹

It is necessary for the perpetrator to either plan, prepare, initiate, or execute the act of aggression and be in a position in which the individual has the power to exercise control over the political or military branch or direct either branch to perform the act of aggression.¹⁰⁰ Second, the act of aggression must have been committed.¹⁰¹ Third, the perpetrator must have been aware that such an act was inconsistent with the definition set forth in UN Charter.¹⁰² Fourth, the act must have constituted a manifest violation of the UN Charter.¹⁰³ Last, the “perpetrator was aware of the factual circumstances that established such a manifest violation” of the UN Charter.¹⁰⁴

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Int’l Crimes Database, *supra* note 89.

⁹⁸ ICC Introduction, Art. 8 *bis*(2).

⁹⁹ ICC Introduction, Art. 8 *bis*(3).

¹⁰⁰ ICC Elements, Art. 8 *bis*(2); more than one person may meet the requirements.

¹⁰¹ ICC Elements, Art. 8 *bis*(3).

¹⁰² ICC Elements, Art. 8 *bis*(4).

¹⁰³ ICC Elements, Art. 8 *bis*(5).

¹⁰⁴ ICC Elements, Art. 8 *bis*(6).

Article 8 *bis*'s non-exhaustive list includes “invasion or attack by the armed forces of a State” within the territory of another State, “bombardment by the armed forces, blockade of the ports . . . , an attack by the armed forces of a State against that of another State,” whether it is on land, by sea or air, and others.¹⁰⁵ This non-exhaustive list was meant to assist the UNSC in its determination as to what amounts to a crime of aggression, rather than focus solely on criminal accountability.¹⁰⁶ Once the UNSC finds that an act amounts to a crime of aggression, it is a matter of having jurisdiction over the perpetrator.

IV. JURISDICTIONAL ISSUES OVER THE INTERNATIONAL CRIMES

The Nuremberg Charter and the Tokyo Charter set up the first international tribunals that broke “the monopoly over criminal jurisdiction” on international crimes and created a jurisdictional template for future international tribunals.¹⁰⁷ The temporal, territorial, personal, and subject-matter jurisdiction of an international tribunal is a result of lobbying and negotiations, tailored to the situation within the international political comfort zone.¹⁰⁸

A. *Jurisdiction of the International Criminal Court*

The Rome Statute sets the jurisdictional framework for the ICC, permitting it to prosecute individuals for the “most serious crimes of concern to the international community as a whole” for one or more of the four core international crimes.¹⁰⁹ The ICC jurisdiction can be considered general, with the exception of the crime of aggression.¹¹⁰

In addition to the ICC and special international tribunals, States may exercise universal jurisdiction over the core international crimes under customary international law.¹¹¹ Again, as to the crime of aggression, this right is however contested as discussed below in Section IV.A.2.¹¹²

1. *ICC's Jurisdiction over War Crimes, Crimes Against Humanity, Genocide*

With regard to war crimes, crimes against humanity, and genocide, the ICC's jurisdiction begins after the Rome Statute's entry into force or with the entry into force for a State Party.¹¹³ It covers cases where one or more of the four core international crimes have been committed by a State Party national, in the territory of a State Party, in the territory of a state that has accepted the jurisdiction of the ICC, or by a national of a state that has accepted the jurisdiction of the ICC by

¹⁰⁵ Rome Statute, Art. 8 *bis*(2)(a-g).

¹⁰⁶ Int'l Crimes Database, *supra* note 89.

¹⁰⁷ Eileen Skinnider, *Experiences and Lessons from Hybrid Tribunals: Sierra Leone, East Timor, and Cambodia*, 3 APYIHL 243, 246 (2007). *See also*, Michael J. Matheson & David Scheffer, *The Creation of Tribunals*, 110 AM. J. INT'L L. 173, 182 (2016).

¹⁰⁸ *See e.g.*, Matheson & Scheffer, *supra* note 107, at 173.

¹⁰⁹ Rome Statute, Art. 5.

¹¹⁰ *See e.g.*, Michael J. Matheson & David Scheffer, *supra* note 107, at 186.

¹¹¹ Michael P. Scharf, *Universal Jurisdiction and the Crime of Aggression*, 53 HARV. INT'L L.J. 357, 388 (2012).

¹¹² Based on an “understanding” between the negotiators of the crime of aggression amendment, it was not to be interpreted as creating a right for national courts to prosecute the crime of aggression under universal jurisdiction. *Id.* at 359-360.

¹¹³ Rome Statute, Art. 11.

lodging a declaration with the Registrar of the ICC.¹¹⁴ The ICC may only prosecute natural persons who were not under the age of eighteen at the time of the alleged commission of a crime.¹¹⁵

There are three jurisdictional triggers for the ICC: (1) a referral by a State Party, (2) a referral by the UNSC, acting under Chapter 7 of the UN Charter, and (3) an investigation initiated by the ICC Prosecutor.¹¹⁶ The Prosecutor may initiate a preliminary examination *proprio motu* (on their own initiative) but must seek authorization from the Pre-Trial Chamber to begin a formal investigation *proprio motu*. If the Pre-Trial Chamber considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it authorizes the commencement of the investigation.¹¹⁷

Neither Ukraine nor Russia is a State Party to the Rome Statute, but Ukraine has officially accepted the ICC jurisdiction by submitting two declarations pursuant to Article 12(3) of the Rome Statute. The first declaration, submitted in April 2014, accepted ICC jurisdiction with respect to alleged crimes committed on Ukrainian territory from 21 November 2013 to 22 February 2014; the second, submitted in September 2015, extended this time period on an open-ended basis to encompass ongoing alleged crimes committed throughout the territory of Ukraine from 20 February 2014 onwards.¹¹⁸ With these declarations, Ukraine has accepted the ICC jurisdiction “for the purpose of identifying, prosecuting and judging the perpetrators and accomplices of acts committed in the territory of Ukraine” from 21 November 2013 onwards.

2. *Why Not the Crime of Aggression?*

The jurisdictional regime of the crime of aggression is different from that of crimes against humanity, genocide, and war crimes. While the Rome Statute, negotiated in 1998, included the definition of the other three core international crimes, it was not until 2009 that the States Parties were able to agree on the definition of the crime of aggression.¹¹⁹ The conditions for jurisdiction were established a year later,¹²⁰ and they are significantly narrower than in the other three situations. Based on the Rome Statute Articles 15 *bis* and 15 *ter*, the ICC cannot exercise its jurisdiction over crimes of aggression committed by nationals of States not party to the Rome Statute or on those States’ territories, unless the UNSC, acting under Chapter 7 of the UN Charter,

¹¹⁴ Rome Statute, Art. 12.

¹¹⁵ Rome Statute, Arts. 25-26.

¹¹⁶ Rome Statute, Art. 13.

¹¹⁷ Rome Statute, Art. 15.

¹¹⁸ *Ukraine*, INTERNATIONAL CRIMINAL COURT (June 2, 2022, 9:00 PM), <https://www.icc-cpi.int/ukraine>.

¹¹⁹ Jennifer Trahan, *Revisiting the History of the Crime of Aggression in Light of Russia’s Invasion of Ukraine*, 2 ASIL INSIGHTS 1, 1-2 (Apr. 19, 2022), https://www.asil.org/sites/default/files/ASIL_Insights_2021_V26_I2.pdf. Note that the negotiations were open to all UN Member States or members of International Atomic Energy Agency or specialized agencies. RETHINKING THE CRIME OF AGGRESSION. INTERNATIONAL AND INTERDISCIPLINARY PERSPECTIVES 257 (Stefanie Bock & Eckart Conze eds., 2020) (ebook).

¹²⁰ Jennifer Trahan, *supra* note 119, at 3.

refers the situation to the Prosecutor.¹²¹ The temporal jurisdiction of the ICC over the crime of aggression was activated as of 17 July 2018.¹²² No jurisprudence exists yet.

In principle, the triggers for ICC's exercise of jurisdiction over the crime of aggression are similar to the other core international crimes (State Party referral, Security Council referral, *proprio motu*). In practice, however, the ICC's exercise of jurisdiction over the crime of aggression is largely controlled by the UNSC. Should the Prosecutor wish to proceed with an investigation of a crime of aggression *proprio motu*, they must first verify if the UNSC has made a determination of an act of aggression committed by the state concerned and notify the Secretary-General of the United Nations of the situation before the ICC.¹²³ The Prosecutor may proceed if the UNSC has made such a determination; the Prosecutor may also proceed in the absence of such a determination within six months after the notification, only if the UNSC does not specifically request the Prosecutor to cease proceedings and the Pre-Trial Division has authorized the commencement of the investigation.¹²⁴

Since neither Russia nor Ukraine is a State Party to the ICC, the Prosecutor does not have jurisdiction over crimes of aggression committed by Russian nationals in Ukraine under Article 15 *bis*. With Russia's veto power and practice in the UNSC,¹²⁵ it is unrealistic to expect a Security Council referral under Article 15 *ter*.

However, with the conflict ongoing, the international community must look for other solutions to prosecute Russian perpetrators for the crime of aggression.

B. *Ukraine's Delegation of Jurisdiction*

There are many ways in which Ukraine could delegate its jurisdiction. First, Ukraine can delegate its territorial jurisdiction to a built-for-purpose aggression tribunal, as well as to one or more States willing to prosecute the crime of aggression.¹²⁶ Second, Ukraine can also delegate its passive personality¹²⁷ jurisdiction that enables it to punish crimes committed by foreign nationals against Ukrainian citizens.¹²⁸ Finally, Ukraine can delegate the jurisdiction pursuant to the protective principle, which enables States to prosecute "crimes committed by foreign nationals outside of their territory which threaten their vital interests."¹²⁹ "[T]he principle's rationale is . . . based on the necessity to protect vital State interests, including sovereignty, security, political

¹²¹ Interestingly, the resolution activating the jurisdiction of the Court over the crime of aggression seems to go even further, stating that the article enters into force only for those States Parties that have accepted or ratified the amendment. Assembly of State Parties to the ICC Res. ICC-ASP/16/Res.5 (Dec. 14, 2017), https://asp.icc-cpi.int/sites/asp/files/asp_docs/Resolutions/ASP16/ICC-ASP-16-Res5-ENG.pdf.

¹²² *Id.*

¹²³ Rome Statute, Art. 15 *bis*.

¹²⁴ Rome Statute, Art. 15 *bis*.

¹²⁵ On 25 February 2022, Russia vetoed a draft resolution intended to end the Russian Federation's military offensive against Ukraine. *Security Council Fails to Adopt Draft Resolution on Ending Ukraine Crisis, as Russian Federation Wields Veto*, UNITED NATIONS (Feb. 25, 2022), <https://www.un.org/press/en/2022/sc14808.doc.htm>.

¹²⁶ *Id.*

¹²⁷ The passive personality principle allows states, in limited cases, to claim jurisdiction to try a foreign national for offenses committed abroad that affect its own citizens. See Orentlicher, *supra* note 59.

¹²⁸ Orentlicher, *supra* note 59.

¹²⁹ Orentlicher, *supra* note 59.

independence and governmental functions.”¹³⁰ Since the Russian Federation’s aggression against Ukraine poses similar national security threats to the sovereignty of other similarly situated States in the region, such as Poland, the source of this jurisdiction is not just limited from the Ukrainian delegation of jurisdiction but can be exercised independently by the neighboring States as well.

Relying on Ukrainian delegations of jurisdiction has its advantages for other States. Most notably, it will allow States to bypass the prevailing debate on whether universal jurisdiction includes the crime of aggression in the first place, which would authorize their national courts to exercise jurisdiction in these circumstances. This prevailing debate is among the foremost factors for which many States are reluctant to start investigations.¹³¹ Relying on an unambiguous delegation of Ukrainian jurisdiction would help alleviate any hesitation.

However, there are two pertinent concerns with the above approach. First, the issue of immunities for government officials in national courts will remain ever more relevant in such arrangements. Second, the scheme’s compliance with the provisions of the Ukrainian Constitution is also questionable.

Article 124 of the Constitution disallows the delegation of judicial powers to other bodies.¹³² It is on this basis that the CCU had pronounced that the Rome Statute was inconsistent with the Constitution of Ukraine, since in the eyes of the CCU, the jurisdiction of the ICC was “complementary” to the jurisdiction of the Ukrainian courts and thereby, encroached upon the exclusive jurisdiction of the Ukrainian courts.¹³³ This contrasts with the CCU upholding the European Court of Human Rights (ECHR) jurisdiction over Ukraine, reasoning that the ECHR’s jurisdiction was “auxiliary,” and provided for jurisdiction only “after all domestic remedies have been exhausted,” thereby, not crossing into the exclusive functions of the Ukrainian courts.¹³⁴ While a specific amendment was passed by the Parliament to exempt the ICC from this provision, the provision remains an important detriment to the delegation of Ukrainian jurisdiction.¹³⁵

C. Jurisdiction of an International Court – The Special Tribunal for Ukraine

The elements of the jurisdiction of international tribunals are situation-specific. In the following, possible options are considered for the jurisdictional framework of a Special Tribunal for Ukraine.

First, regarding subject-matter jurisdiction, it seems widely accepted that the Special Tribunal for Ukraine should only have jurisdiction over the crime of aggression to limit the tribunal’s focus

¹³⁰ Orentlicher, *supra* note 59.

¹³¹ Alexander Komarov & Oona Hathaway, *Ukraine’s Constitutional Constraints: How to Achieve Accountability for the Crime of Aggression*, JUST SECURITY (Apr. 5, 2022), <https://www.justsecurity.org/80958/ukraines-constitutional-constraints-how-to-achieve-accountability-for-the-crime-of-aggression/>.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

and eliminate redundancy with the ICC’s efforts.¹³⁶ The Ukrainian government agrees with this method since it has expressed willingness to align the Ukrainian domestic definition of the crime of aggression to the one governed by the Rome Statute Article 8 *bis*.¹³⁷

Second, previous prominent hybrid international tribunals, the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC), have had limited personal jurisdiction over those “who bear the greatest responsibility” and “over the senior leaders of Democratic Kampuchea and those who were most responsible. . .”¹³⁸ Similarly, the Rome Statute defines the crime of aggression as a leadership offense that can only be attributed to “a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression.”¹³⁹ Thus, there is substantial precedence for narrowing the scope of the jurisdiction to political and military leaders.

Third, different options are being considered for the start of the period covered by the tribunal. The first option presented by the White Paper on the Model Special Tribunal would be to start the jurisdiction in 2014, which would allow for processing Russian acts, including cyberattacks, since the beginning of the conflict in Crimea.¹⁴⁰ The other option would be to limit the temporal jurisdiction to the most recent invasion, which commenced on 24 February 2022. Ukraine seems to favor temporal jurisdiction that starts in February 2014.¹⁴¹ Regardless of the decision, with the conflict ongoing, the temporal jurisdiction should not have an ending date.¹⁴²

Last, regarding territorial jurisdiction, there would be jurisdiction encompassing either the “aggressor state” and the “victim state,” including the role of Belarus which must be considered an aggressor state as well.¹⁴³

D. Other Mandates for the International Justice Mechanisms

1. Ukraine

For various reasons including efficiency and reconciliation, international criminal law and practice support trials close to the affected community.¹⁴⁴ Ukraine has already sentenced Russian soldiers for war crimes under Part 1 of Article 438 of the Criminal Code of Ukraine.¹⁴⁵ Chapter 20

¹³⁶ Jennifer Trahan, *White Paper on the Model Special Tribunal for the Crime of Aggression Recommended by the UNGA and negotiated by the UN and Ukraine*, 1, 2 (May 22, 2022) (unpublished memorandum) (on file with author) (hereinafter “White Paper on the Model Special Tribunal”).

¹³⁷ Dr. Anton Korynevych, Ambassador-at-large in the Ministry of Foreign Affairs of Ukraine, Address at the Public International Law and Policy Group Expert Roundtable: Putin: Pathways to Prosecution (June 3, 2022).

¹³⁸ Statute of the Special Court for Sierra Leone, Art. 1; Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Art. 2.

¹³⁹ Rome Statute, Art. 8 *bis*.

¹⁴⁰ White Paper on the Model Special Tribunal, *supra* note 136, at 3.

¹⁴¹ Dr. Anton Korynevych, *supra* note 137.

¹⁴² White Paper on the Model Special Tribunal, *supra* note 136, at 3.

¹⁴³ White Paper on the Model Special Tribunal, *supra* note 136, at 3.

¹⁴⁴ Heller, *supra* note 45.

¹⁴⁵ Rebekah Yeager-Malkin, *Russia soldiers sentenced to 11.5 years in prison for war crimes in Ukraine*, JURIST (May 31, 2022, 02:58 AM), <https://www.jurist.org/news/2022/05/russia-soldiers-sentenced-to-11-5-years-in-prison-for-war-crimes-in-ukraine/>.

of the Ukrainian Criminal Code, governing criminal offenses against peace, security of mankind and international legal order, also includes a provision on planning, preparation, and waging of an aggressive war under Article 437.¹⁴⁶ Thus, a Ukrainian domestic court could exercise jurisdiction over crimes of aggression.

2. *European Union or EU Member States*

Some have suggested a hybrid tribunal created by an agreement between Ukraine and the European Union.¹⁴⁷ The European Union does not have any jurisdiction over criminal law,¹⁴⁸ but it did establish the Special Investigative Task Force to investigate inhumane treatment of people and illicit trafficking in human organs in Kosovo in 2011, and was instrumental in the establishment of the Kosovo Specialist Chambers and Specialist Prosecutor's Office for the consequent criminal proceedings in 2015. The Specialist Chambers were established by an exchange of letters between the President of Kosovo and the EU High Representative for Foreign Affairs/Vice President of the Commission.¹⁴⁹

The Kosovo Specialist Chambers is a hybrid tribunal operating within the Kosovo justice system but with a chamber in the Netherlands, and an international staff.¹⁵⁰ It has jurisdiction over individual perpetrators of certain crimes against humanity, war crimes, and other crimes under Kosovo law, committed between 1 January 1998 and 31 December 2000.¹⁵¹ The jurisdiction encompasses natural persons of Kosovo/Federal Republic of Yugoslavia (FRY) citizenship or persons accused of committing crimes against persons of Kosovo/FRY citizenship.¹⁵² The

¹⁴⁶ An English translation of the Criminal Code of Ukraine is available on the SHERLOC portal of the United Nations Office on Drugs and Crime. Sherlock, UNODC, https://sherloc.unodc.org/cld/uploads/res/document/ukr/2001/criminal-code-of-the-republic-of-ukraine-en_html/Ukraine_Criminal_Code_as_of_2010_EN.pdf (last visited June 20, 2022). The formulation is similar to the definition of “crimes against peace” in the UN Charter establishing the Nuremberg Tribunal. Michael P. Scharf, *supra* note 111, at 369.

¹⁴⁷ Heller, *supra* note 45. Heller included an option of a hybrid tribunal created by agreement between Ukraine and the Council of Europe. Russia however ceased to be a member of the organization as of March 16, 2022, thus voiding the opportunity. Upon its withdrawal, Russia informed of its intention to denounce the European Convention on Human Rights. Comm. of Ministers, *Resolution CM/Res (2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe* (Mar. 16, 2022). The Council of Europe has since added its support to the establishment of an ad hoc international criminal tribunal for the investigation and prosecution of the crime of aggression, “on the basis of a multilateral treaty concluded by a group of States” and endorsed by the United Nations General Assembly. Eur. Parl. Ass., *Report of the Committee on Legal Affairs and Human Rights*, Doc. No. 15510 (Apr. 26, 2022).

¹⁴⁸ For a concise summary on the topic, see *Division of Competences within the European Union*, EUR-LEX, <https://eur-lex.europa.eu/EN/legal-content/summary/division-of-competences-within-the-european-union.html> (last visited June 3, 2022).

¹⁴⁹ In practice, the HR/VP committed to the extension of the mandate of the EULEX Mission in Kosovo, which had been agreed upon by the Council of the European Union in Council Joint Action 2008/124/CFSP. Law 04/L-274 on the Ratification of the International Agreement between the Republic of Kosovo and the European Union Rule of Law Mission in Kosovo, Apr. 23, 2014, https://www.scp-ks.org/sites/default/files/public/04-l-274_a.pdf.

¹⁵⁰ Nationals of the 27 EU member states and additional contributing states (Canada, Norway, Switzerland, Turkey, United States) are eligible to apply. *KSC at a Glance*, KOSOVO SPECIALIST CHAMBERS, https://www.scp-ks.org/sites/default/files/public/content/ksc_at_a_glance-en.pdf (last visited June 3, 2022).

¹⁵¹ Reported in the CoE Parliamentary Assembly Report 12462. Eur. Parl. Ass., *Report of the Committee on Legal Affairs and Human Rights*, Doc. No. 12462 (Jan. 7, 2011).

¹⁵² *KSC at a Glance*, *supra* note 150.

situation in Kosovo, which had been recognized by the UNSC in its resolution 1244, is not directly comparable to the situation in Ukraine.¹⁵³ In theory, however, a similar hybrid model might be feasible in the case of the crimes of aggression committed in Ukraine.

Thus far, the EU efforts have been focused on supporting Ukraine and the ICC in prosecutions.¹⁵⁴ In May 2022, the European Parliament adopted a resolution addressing “the fight against impunity for war crimes in Ukraine,” calling for the EU institutions to support the establishment of a “special international tribunal for the punishment of the crime of aggression committed against Ukraine by the political leaders and military commanders of Russia and its allies.”¹⁵⁵ Since the resolution refers to established multilateral forums such as the UN and the CoE,¹⁵⁶ there is no indication that the EU is looking to host the tribunal.

Several European Union Member States have opened investigations into crimes committed in Ukraine, but only few have appropriate universal jurisdiction over the crime of aggression in their criminal codes.¹⁵⁷ Three EU Member States have viable options under their respective penal codes: Estonia has universal jurisdiction over the crime of aggression; the Czech Republic over “preparation of aggressive war;” and Bulgaria over “crimes against peace.”¹⁵⁸ An uncharted option could be a coalition of the willing, built around one or more of these countries.

V. THE MANDATES FOR THE INTERNATIONAL JUSTICE MECHANISMS

A. “Those responsible”- ICTY & ICTR vs “Greatest Responsibility”- SCSL

The ICTY and ICTR, established in the aftermath of the Cold War, provided in Article 1 of their respective statutes that they “shall have the power to prosecute persons responsible for serious violations of international humanitarian law.”¹⁵⁹ Contrastingly, the SCSL Statute conferred on the tribunal “the power to prosecute persons who bear the greatest responsibility” for international humanitarian and Sierra Leonean law violations.¹⁶⁰ This shift in the mandate, pronounced by the statutes, notably within the span of only a decade, can be understood by looking at the underlying contexts of the period.

In resolutions preceding the creation of the ICTY and ICTR, the UNSC repeatedly emphasized its resolve to bring to justice all those persons responsible for the commission of international

¹⁵³ S.C. Res 1244 (June 10, 1999).

¹⁵⁴ *EU solidarity with Ukraine*, COUNCIL OF THE EUR. UNION, <https://www.consilium.europa.eu/en/policies/eu-response-ukraine-invasion/eu-solidarity-ukraine/> (last visited June 20, 2022).

¹⁵⁵ Resolution of 19 May 2022 on the fight against impunity for war crimes in Ukraine. EUR. PARL. DOC. P9 TA (2022) 0218. Art. O.

¹⁵⁶ *Id.*

¹⁵⁷ The German Code of Crimes against International Law criminalizes aggression in Section 13 of the VStGB, but the law applies only if the perpetrator is a German national or if the offense is directed against Germany. OPEN SOC’Y JUST. INITIATIVE & TRIAL INT’L, UNIV. JURISDICTION L. & PRAC. IN GER. 11-17 (Mar. 2019).

¹⁵⁸ The scope and application of the principle of universal jurisdiction. U.N. Secretary-General, *Report of the Secretary-General prepared on the basis of comments and observations of Governments*, UNGA A /65/181 29-30 (July 29, 2010).

¹⁵⁹ Charles Chernor Jalloh, *Prosecuting Those Bearing “Greatest Responsibility:” The Lessons of the Special Court for Sierra Leone*, 96 MARQ. L. REV. 863, 863 (2013).

¹⁶⁰ *Id.*

crimes.¹⁶¹ This is because the international community faced a climate of ongoing hostilities, and the immediate policy goal was to end further commission of heinous offenses.¹⁶² Resolutions, overstating the international community's abilities to bring to justice a wider set of perpetrators, were meant to be a deterrent, becoming an intrinsic part of the statutes.¹⁶³ While the tribunals enjoyed broad scopes of authority when there was a clear anticipation and support for justice, the aspirations were soon tempered by realities of "tribunal fatigue."¹⁶⁴

There were discussions among powerful countries, especially the United States, about the viability of the ad-hoc Chapter 7 tribunal model.¹⁶⁵ It was driven primarily by concerns about the slow pace of the international trials and the spiraling costs of the courts.¹⁶⁶ While the total expenditures of ICTY and the ICTR were \$1.2 billion and \$1 billion respectively,¹⁶⁷ the total expenditure of the SCSL was \$300 million.¹⁶⁸ For various pragmatic reasons, such as the need to show concrete results in the early days, those ad hocs also ended up prosecuting otherwise insignificant perpetrators, such as Duško Tadić and Jean-Paul Akayesu.¹⁶⁹ These factors led to a deliberate decision, in a move to what was perceived to be a more financially viable and a more politically acceptable model, to limit the jurisdiction of future courts, like the SCSL.¹⁷⁰ Notably, even the Rules of Procedures of the ICTY and the ICTR later went on to reflect "greatest responsibility," a sign of a wider shift in the acceptable mandates of international criminal tribunals.¹⁷¹

The UNSC's decision to limit the jurisdiction of the SCSL to those with the "greatest responsibility," therefore, was driven by pragmatic, political, economic, and other realpolitik considerations.

B. A Recommendation for the Special Tribunal for Ukraine

Because the crime of aggression, as defined in article 8 *bis*, is a "leadership crime," it is not necessary to specify that those to be prosecuted would only be those who bear "the greatest responsibility," as the SCSL's Statute did, because the definition of the crime already limits those who may be prosecuted.¹⁷²

If the scope were to be defined anyway, then limiting the scope to those with the "greatest responsibility" would be the most prudent due to the challenging political and economic realities of the world today.

¹⁶¹ Joseph Rikhof, *Who are Most Responsible in International Criminal Law?*, 3 PKI GLOB. JUST. J. 77, 77 (2019).

¹⁶² *Id.*

¹⁶³ Jalloh, *supra* note 159, at 876.

¹⁶⁴ Jalloh, *supra* note 159, at 878.

¹⁶⁵ Jalloh, *supra* note 159, at 878.

¹⁶⁶ Jalloh, *supra* note 159, at 878.

¹⁶⁷ Rupert Skilbeck, *Funding Justice: The Price of War Crimes Trials*, 3 HUM. RTS. BRIEF, 6 (2008).

¹⁶⁸ Lansana Gberie, *The Special Court for Sierra Leone rests – for good*, AFRICA RENEWAL (Apr. 2014), <https://www.un.org/africarenewal/magazine/april-2014/special-court-sierra-leone-rests-%E2%80%93-good>.

¹⁶⁹ Jalloh, *supra* note 159.

¹⁷⁰ Jalloh, *supra* note 159.

¹⁷¹ Jalloh, *supra* note 159.

¹⁷² White Paper on the Model Special Tribunal, *supra* note 136, at 5.

VI. PROSECUTING SITTING HEADS OF STATE

For the first time since the Nuremberg trials, the international community is looking to bring perpetrators of the crime of aggression to justice.

Head of State immunity from jurisdiction in other States has for centuries been considered a core principle of sovereignty,¹⁷³ recognized by the ICJ.¹⁷⁴ The sitting Heads of State enjoy immunity *ratione personae*, personal or procedural immunity, which protects them from being adjudicated by the courts of another state. Immunity *ratione materiae*, substantive or functional immunity, instead shields the acts committed as a Head of State, and it extends also to former heads of state.¹⁷⁵ Functional immunity, as explained below, has eroded in international criminal law since the Nuremberg trials.¹⁷⁶ Contemporary international criminal law recognizes that the principle is not absolute.¹⁷⁷

The Statutes of the ICTY, ICTR, the SCSL, and the ICC all include a provision stating that the official position of the accused shall not relieve them of criminal responsibility.¹⁷⁸

The ICJ elaborated on the issue of immunity in *Yerodia*. It implied that while prosecuting sitting Head of States was outside of domestic courts' jurisdiction, even when international crimes have been committed, the immunity of an incumbent Head of State could be waived by an international court.¹⁷⁹

The SCSL conviction of Charles Taylor, the former President of Liberia, stands out as the only successful case of prosecuting a former Head of State in an international court. The former Yugoslav President, tried at the ICTY, died in detention before his judgment was rendered,¹⁸⁰ and the President al-Bashir of Sudan, indicted by the ICC on 4 March 2009, is still at large.¹⁸¹

In fact, there appears to be a trend protesting international jurisdiction over Heads of State and avoiding cooperation with the ICC. Since the issuance of his arrest warrant, al-Bashir has reportedly visited several UN and ICC Member States without being turned away or arrested.¹⁸²

¹⁷³ See, e.g., Brian Man-ho Chok, *Let the Responsible be Responsible: Judicial Oversight and Over-Optimism in the Arrest Warrant Case and the Fall of the Head of State Immunity Doctrine in International and Domestic Courts*, 30 AM. U. INT'L L. REV. 489, 496 (2015).

¹⁷⁴ See, e.g., Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, 2002 I.C.J. 3, ¶ 51 (Feb. 14).

¹⁷⁵ Scharf, *supra* note 111, at 383.

¹⁷⁶ See, e.g., Leila Nadya Sadat, *Heads of state and other government officials before the International Criminal Court: the uneasy revolution continues*, ELGAR COMPANION TO THE INT'L CRIM. CT. 96, 100-101 (Margaret deGuzman & Valerie Oosterveld eds., 2020).

¹⁷⁷ See Chok, *supra* note 173, at 489.

¹⁷⁸ The ICTY Statute, Art. 7(2); The ICTR Statute, Art. 6(2); The SCSL Statute, Art. 6(2); Rome Statute, Art. 27. On the debate on the meaning of Article 27 of the Rome Statute, see Sadat, *supra* note 179.

¹⁷⁹ Arrest Warrant of 11 April 2000, *supra* note 174, at ¶ 51. See also, Scharf, *supra* note 111, at 384.

¹⁸⁰ *Indicted genocide suspect Slobodan Milosevic died of heart attack – UN*, UNITED NATIONS (Mar. 12, 2006), <https://news.un.org/en/story/2006/03/171842-indicted-genocide-suspect-slobodan-milosevic-died-heart-attack-un>.

¹⁸¹ *Al Bashir Case*, INT'L CRIM. CT. (June 11, 2022, 10:35 AM), <https://www.icc-cpi.int/darfur/albashir>.

¹⁸² *Omar al-Bashir*, COAL. FOR THE INT'L CRIM. CT., <https://www.coalitionfortheicc.org/cases/omar-albashir> (last visited June 21, 2022).

Some countries, such as the Kingdom of Jordan (Jordan), have justified their inaction by Article 98(1) of the Rome Statute, which provides that “[t]he Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.”¹⁸³ Thus, Jordan asserted that Heads of State retain their immunity under international law so long as they remain in office and refused to surrender al-Bashir to the ICC without Sudan’s consent.¹⁸⁴ However, the Appeals Chamber of the ICC concluded that there was “no immunity that Jordan would have been required to ‘disregard’ by executing the Court’s arrest warrant” and “there was no need for a waiver by Sudan of Head of State immunity.”¹⁸⁵ The ICC firmly stated that “[n]o immunities under customary international law operate in such a situation to bar an international court in its exercise of its own jurisdiction.”¹⁸⁶

The following section will briefly examine the case of Charles Taylor to understand the elements that led to its success. After that, the lessons learned are laid out for the crime of aggression committed by the Russian military forces under the command of President Putin in Ukraine.

A. Case Study - the Indictment and Prosecution of President Charles Taylor of Liberia

The indictment, prosecution, and consequent conviction of the former Liberian President, Charles Taylor, broke the shield of international impunity of Heads of State for the first time since the Nuremberg trials. The conviction Charles Taylor on 26 April 2012 by the SCSL was “a major departure from the impunity that heads of state traditionally enjoyed”¹⁸⁷ and, in the words of the SCSL itself, opened a “new era of accountability.”¹⁸⁸ The Taylor case also created a new precedent for the indictment of sitting Heads of State: President Taylor was indicted on 7 March 2003 and would not resign until five months later.¹⁸⁹

One of the keys to the success of the SCSL was its mandate¹⁹⁰ and its jurisdiction, established in the Statute of the SCSL. The SCSL had the “power to prosecute persons who [bore] the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, had threatened the establishment of and implementation of the peace process in Sierra Leone.”¹⁹¹ The Statute expressly waived the immunity of high-level officials:

¹⁸³ Rome Statute, Art. 98(1).

¹⁸⁴ Sadat, *supra* note 176, at 98.

¹⁸⁵ Prosecutor v. Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09 OA2, Judgment in the Jordan Referral re Al-Bashir Appeal, ¶ 7 (May 6, 2019).

¹⁸⁶ *Id.*, ¶ 2.

¹⁸⁷ Human Rights Watch, *Even a ‘Big Man’ Must Face Justice. Lessons from the Trial of Charles Taylor*. HUM. RTS. WATCH (July 25, 2012), <https://www.hrw.org/report/2012/07/25/even-big-man-must-face-justice/lessons-trial-charles-taylor>.

¹⁸⁸ Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-2003-01-I, Summary Judgement, ¶ 102 (Apr. 26, 2012).

¹⁸⁹ Kirsten Keith, *Blood Diamonds and War Crimes: The Case against Charles Taylor*, 15 S.CROSS U. L. REV. 99, 99 n.3 (2012).

¹⁹⁰ See David Crane, *Hybrid Tribunals - Internationalized National Prosecutions*, 25 PENN ST. INT’L L. REV. 803 (2007).

¹⁹¹ The Statute of the Special Court for Sierra Leone, Art. 1(1).

“The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.”¹⁹²

Taylor’s original indictment in March 2003 was on seventeen counts of war crimes, crimes against humanity, and other serious violations of international humanitarian law with individual criminal responsibility pursuant to Article 6(1) and with superior responsibility pursuant to Article 6(3) of the SCSL Statute.¹⁹³ Upon the SCSL Prosecutor’s request, the indictment and the arrest warrant were kept under seal.¹⁹⁴ An opportunity to serve the indictment to Taylor arose early June 2003, when the Liberian President was visiting Ghana for then-ongoing peace talks. The Prosecutor made the decision to have the indictment delivered to the Ghanaian authorities on 4 June 2003, but President Kufour, who was chairing the peace talks, refused to act on it and instead, he helped Taylor flee.¹⁹⁵ The following day, the Prosecutor published a press release announcing the indictment and declaring Taylor’s arrest warrant outstanding.¹⁹⁶

Two months later, in August 2003, arguably to escape international justice, Taylor agreed to resign his Presidency. Feeling protected by West African governments and the Security Council, he accepted an offer of safe haven in Nigeria.¹⁹⁷ Through counsel, he contested SCSL’s jurisdiction based on his functional immunity, but in May 2004, the Appeals Chamber of SCSL dismissed the challenge.¹⁹⁸ By Spring 2006, enough domestic, regional, and international momentum had been gathered for Nigeria to arrest Taylor and transfer him to Liberia, where the UN peacekeepers took him into the custody of the SCSL.¹⁹⁹

The trial before the Trial Chamber of the SCSL opened on 4 June 2007, and the process came to its conclusion on 26 September 2013, when the Appeals Chamber upheld Taylor’s conviction and sentence.²⁰⁰ The former President of Liberia was convicted as individually responsible on eleven counts for planning, aiding, abetting the commission of crimes pursuant to Article 6(1) of the SCSL Statute.²⁰¹ The Trial Chamber however found that the Prosecution failed to prove

¹⁹² *Id.* at Art. 6(2).

¹⁹³ Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-2003-01-I, Indictment (Mar. 7, 2003), <http://www.rscsl.org/Documents/Decisions/Taylor/003/SCSC-03-01-I-001.pdf>. The indictment was amended twice in the following years. The final indictment included five counts of crimes against humanity, five counts of war crimes, and one count of other serious violations of international humanitarian law. The Statute entitled the SCSL to prosecute also certain crimes under Sierra Leonean Law, but Taylor was not indicted for any such crimes. Charles Chernor Jalloh, *The Law and Politics of the Charles Taylor Case*, 43 DENV. J. INT’L L. & POL’Y 229, 248-249 (2015).

¹⁹⁴ Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-2003-01-I, Decision Approving the Indictment and Order for Non-Disclosure (Mar. 7, 2003), <http://www.rscsl.org/Documents/Decisions/Taylor/003/SCSL-03-01-I-003.pdf>.

¹⁹⁵ Jalloh, *supra* note 193, at 250-251.

¹⁹⁶ Press Release, SCSL Office of the Prosecutor, Statement of David M. Crane, Chief Prosecutor (June 5, 2003), <http://www.rscsl.org/Documents/Press/OTP/prosecutor-060503.pdf>.

¹⁹⁷ Human Rights Watch, *supra* note 187.

¹⁹⁸ Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction (Appeals Chamber), ¶ 52 (May 31, 2004).

¹⁹⁹ Jalloh, *supra* note 193, at 250-257.

²⁰⁰ Prosecutor vs. Charles Ghankay Taylor, SPECIAL COURT FOR SIERRA LEONE AND THE RESIDUAL SPECIAL COURT FOR SIERRA LEONE, <http://www.rscsl.org/Taylor.html> (last visited June 11, 2022).

²⁰¹ *Id.*

Taylor's superior responsibility under Article 6(3) beyond a reasonable doubt.²⁰² As Taylor showed no remorse, the judges adopted a punitive approach and sentenced Taylor to fifty years in prison.²⁰³

Each phase of the ten-year process was “marked by high legal and political drama,”²⁰⁴ including international debate between pragmatists and idealists of international criminal law.²⁰⁵ Regardless, the Taylor trial created important jurisprudence for cases against Heads of State, and reoriented “international criminal justice toward a punitive model in response to atrocities.”²⁰⁶ It has been considered a “testament to the potentially valuable role that international criminal tribunals can make to the enhancement of regional and global security.”²⁰⁷

B. Prosecuting President Vladimir Putin

Crimes of aggression have not been the subject of an international tribunal since the Nuremberg trials. Now, the elements of the crime of aggression are present in Russian invasion of Ukrainian territory in February 2022 – if not already in 2014 – and there appears to be no doubt about the command responsibility of President Vladimir Putin.

1. The Law

In adjudicating international criminal cases involving Heads of State, the issues of jurisdiction and immunity are inevitably linked. The jurisdiction of an international court or tribunal over the crime of aggression in Ukraine has been discussed in Section IV.A.2. It seems established that in addition to Ukraine exercising territorial jurisdiction, another domestic court could exercise universal jurisdiction over the crime of aggression, or an international tribunal could have such jurisdiction. The above brief study on the issue of immunity appears to narrow down the options for prosecuting an incumbent leader of a State to international and hybrid tribunals.

In sum, current international criminal law allows the indictment and prosecution of Heads of State by international and hybrid tribunals, whether they be of a permanent, ad hoc, or hybrid nature. The cases of Presidents Milošević, Taylor, and al-Bashir²⁰⁸ provide important jurisprudence on the sovereign equality of States not preventing an international criminal tribunal from indicting or prosecuting a Head of State over a crime within its jurisdiction.

²⁰² Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-03-01-A, Judgment (Sept. 26, 2013), <http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/1389/SCSL-03-01-A-1389.pdf>.

²⁰³ Shahram Dana, *The Sentencing Legacy of the Special Court for Sierra Leone*, 42 GA. J. INT'L & COMP. L. 615, 630 (2014).

²⁰⁴ Jalloh, *supra* note 193, at 236.

²⁰⁵ See Jalloh, *supra* note 196, at 250-54. On the peace versus justice debate; see generally, Kenneth A. Rodman, Kenneth A. Rodman, *Peace Versus Justice*, ENCYCLOPEDIA OF GLOB. JUST. 824 (Chatterjee D.K. ed., 2011).

²⁰⁶ Dana, *supra* note 203, at 686.

²⁰⁷ Jalloh, *supra* note 193, at 237.

²⁰⁸ Prosecutor v. Slobodan Milošević, Case No. IT-02-54 (Int'l Crim. Trib. for the Former Yugoslavia); Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-2003-01-I; Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09.

The question of indictment and adjudication over the crime of aggression *in absentia* must be addressed, as well. Based on the ICJ jurisprudence, cases of universal jurisdiction over the crime of aggression should never be tried without the suspect present, but investigations and indictments *in absentia* may be acceptable.²⁰⁹ Thus, it would seem that with its organic statute allowing, a special tribunal could have the jurisdiction to indict a sitting Head of State, even *in absentia*. For the prosecution to commence, however, will require the presence of the suspect.

2. *The Political Realities: A patchwork of precedents, clock ticking*

Bringing Russian military and political leadership, let alone President Putin himself, to justice over the crime of aggression is no easy feat.

First, Ukraine and its like-minded allies must find a way of establishing a special tribunal with jurisdiction over the crime of aggression and over a sitting Head of State. The SCSL was established by an agreement between the UN and the Government of Sierra Leone, pursuant to Security Council Resolution 1315 (2000) of 14 August 2000,²¹⁰ but a referral from the UNSC here is currently an unrealistic expectation. The ECCC, established with the support of General Assembly Resolution 57/2208 of 27 February 2003, could instead provide inspiration for an UN-led process.

Decisions of the General Assembly on important questions, such as recommendations with respect to the maintenance of international peace and security, shall be made by a two-thirds majority of the members present and voting.²¹¹ As only votes cast in favor or against are counted towards the total number of votes,²¹² abstentions are crucial. The UNGA Resolution on Aggression against Ukraine,²¹³ adopted on 2 March 2022, gained as many as 141 votes in favor, with 5 countries against and 35 countries abstaining.²¹⁴ It seems promising, but the outrage of the UN community, with momentum for action with it, tends to fade away quickly. On 7 April 2022, the UNGA vote on the suspension of the rights of membership of the Russian Federation in the Human Rights Council (HRC) consisted of only 93 in favor, 24 against, with 58 abstaining.²¹⁵

Looking at the geopolitical picture, the vote on suspending Russia from the HRC seems to reflect a realistic projection. Based on the global reaction on this invasion, approximately a third of the world is taking measures against Russia, a third has supported Russia's actions, and the final third struggles to stay neutral.²¹⁶ In order to get the support – or agreement to abstain from voting – of countries in the middle such as India, Brazil, or Saudi Arabia, concessions will have to be made. Recognizing the power of a precedent, guaranteeing immunity for the Heads of State may be a factor.

²⁰⁹ Scharf, *supra* note 111, at 387.

²¹⁰ Accessible at *Digital Library*, UNITED NATIONS, <https://digitallibrary.un.org/record/420605?ln=en>.

²¹¹ U.N. General Assembly Rules of Procedure, Rule 83.

²¹² *Id.* at Rule 86.

²¹³ G.A. Res. ES-11/1 (Mar. 2, 2022).

²¹⁴ Twelve countries were counted as non-voting. *Digital Library*, UNITED NATIONS, <https://digitallibrary.un.org/record/3959039?ln=en>.

²¹⁵ A.Res. ES-11/3 (Apr. 7, 2022).

²¹⁶ *Russia can count on support from many developing countries*, THE ECONOMIST (Mar. 30, 2022), <https://www.eiu.com/n/russia-can-count-on-support-from-many-developing-countries/>.

When discussing whether the UNGA must also come to an agreement on establishing a Special Tribunal with jurisdiction over the crime of aggression including the ability to indict sitting Heads of State is when another set of challenges arises. The indictment alone will be a delicate matter. Putin enjoys the support of a large part of his people,²¹⁷ and international condemnation of a lawfully elected leader of a country could further alienate the Russian people from the West. Without entering a debate on peace versus justice, the possible counterproductive effect on global stability in the longer term needs to be acknowledged. In Charles Taylor’s case, it has been suggested that the indictment by SCSL contributed to his loss of power,²¹⁸ but for the above reasons, a similar unfolding is unlikely in Russia. While the Trial Chamber of the SCSL underscored Charles Taylor’s “betrayal of public trust,”²¹⁹ the situation in Ukraine is not directly comparable to the one in Liberia and Sierra Leone.

Even if President Putin were to step down for any reason other than a coup, it is highly unlikely that the Russian government would extradite him to be prosecuted.²²⁰ The countries supporting the Russian government could equally be expected to follow the approach of Jordan or the African Union in the case of President al-Bashir of Sudan.²²¹ Even so, recognizing the odds against getting President Putin in front of a Special Tribunal, the case must be brought forward. The world needs to see the international community react to the Russian crime of aggression. For countries bordering powerful, aggressive neighbors, inaction would be a terrifying message and a possible forecast of their short-term future.

VII. THE UNITED NATIONS AND SETTING UP OF A SPECIAL TRIBUNAL FOR UKRAINE FOR THE CRIME OF AGGRESSION

A. *In general*

1. *The Security Council*

The UNSC’s authority to establish an international criminal tribunal, stems from Article 39 and Article 41 of the UN Charter, which gives it the authority to determine the existence of any threat to international peace, “recommend,” and “decide” on appropriate measures, “not involving the use of armed force.”²²² The ICTY and the ICTR were established in accordance with the exercise of these powers. However, such was not the case with the SCSL.

²¹⁷ Peter Hobson, *Putin’s approval rating soars since he sent troops into Ukraine, state pollster reports*, Reuters (April 8, 2022, 9:42 AM), <https://www.reuters.com/world/europe/putins-approval-rating-soars-since-he-sent-troops-into-ukraine-state-pollster-2022-04-08/>.

²¹⁸ Jalloh, *supra* note 193, at 229.

²¹⁹ Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-03-01-T, Summary Judgment, ¶¶ 101-103 (Apr. 26, 2012).

²²⁰ For an insightful analysis on the societal foundations of the regime, see Graeme Robertson & Samuel Greene, *The Kremlin Emboldened: How Putin Wins Support*, 28 J. DEMOCRACY, no. 4, 2017, at 86-100.

²²¹ The African Union initially adopted a joint decision not to cooperate with the ICC in executing of the arrest warrant issued against Al-Bashir. See generally, Dire Tladi, *The African Union and the International Criminal Court: The battle for the soul of international law*, 34 SAYIL 57 (2009), <https://cpb-us-e2.wpmucdn.com/sites.uci.edu/dist/9/798/files/2012/11/Tladi-AU-and-ICC.pdf>.

²²² U.N. Charter, Art. 39, 41.

While there was a Security Council resolution of 14 August 2000 (notably not invoking Chapter 7) requesting the Secretary-General to negotiate an agreement between the UN and the Government of Sierra Leone, the SCSL was *not* created by the Security Council (as the Yugoslav and Rwanda tribunals had been) but created by bilateral agreement between Sierra Leone and the UN.²²³ The establishment of the SCSL is the foremost example of the UN's authority to establish an international criminal tribunal, without the help of the UNSC's enforcement authority under Article 41 of the UN Charter.

2. *The General Assembly*

The UNGA has no direct authority to establish an international criminal tribunal.²²⁴ Under Articles 10, 11, 12 and 14 of the UN Charter, the UNGA's powers are limited to making recommendations, as confirmed by the ICJ in the *Certain Expenses* case.²²⁵ The UNGA lacks the ability to take enforcement action, which is the exclusive prerogative of the UNSC. As the ICTY Appeals Chamber made clear in the *Tadić* case, the establishment of a criminal tribunal (i.e. the creation of compulsory criminal jurisdiction) is a form of such coercive or enforcement action.²²⁶ It must be noted, however, that such direct authority to create tribunals, is not necessary in the matter of Ukraine. The GA could, instead, take steps to support an exercise of criminal jurisdiction possessed by one or more UN Member States. The foremost example is the GA's creation of the ECCC.²²⁷

In the case of the ECCC, the UNGA introduced a resolution recommending the UN Secretary General to enter into a bilateral agreement with the Government of Cambodia for establishing a criminal tribunal. The resolution establishing the ECCC was approved by the General Assembly (resolution 57/228 of May 13, 2003.).²²⁸ This recent precedence is a perfect illustration of the UNGA's ability to create such a tribunal, without the help of the UNSC.²²⁹ The only additional requirement would be the government of Ukraine's participation and consent to the agreement.²³⁰

²²³ Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-03-01-T, Summary Judgment, ¶¶ 101-103 (Apr. 26, 2012).

²²⁴ Derek Jinks, *Does the U.N. General Assembly have the authority to establish an International Criminal Tribunal for Syria?*, JUST SECURITY (May 22, 2014), <https://www.justsecurity.org/10721/u-n-general-assembly-authority-establish-international-criminal-tribunal-syria/>.

²²⁵ *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J 151, 165 (July 20).

²²⁶ Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 37-40, 44 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

²²⁷ Jennifer Trahan, *U.N. General Assembly Should Recommend Creation of Crime of Aggression Tribunal for Ukraine: Nuremberg Is Not the Model*. JUST SECURITY (Mar. 7, 2022), <https://www.justsecurity.org/80545/u-n-general-assembly-should-recommend-creation-of-crime-of-aggression-tribunal-for-ukraine-nuremberg-is-not-the-model/>.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

3. *The Role of the Secretary General*

Article 98 of the UN Charter empowers the UN Secretary General to perform “functions as are entrusted to it by the [General Assembly or the Security Council]”²³¹ When the UNGA, or the UNSC for that matter, passes a resolution recommending the Secretary General to enter into a bilateral agreement with the Government of Ukraine, the Secretary General is duty-bound to follow those instructions and finalize a bilateral agreement.²³² This was the route followed for both the creation of the SCSL and ECCC.²³³

In ordinary circumstances, the Secretary General has also used his “good offices” to mediate in an international conflict and play an integral role in global issues.²³⁴ “Good offices” refers to “steps taken publicly and in private, drawing upon [the Secretary General’s] independence, impartiality and integrity, to prevent international disputes from arising, escalating or spreading.”²³⁵ Examples of the use of such “good offices” vary from Hammarskjöld’s promotion of an armistice between Israel and Arab States, Javier Perez de Cuellar’s negotiation of a cease-fire to end the Iran-Iraq War, to the incumbent Secretary General Antonio Guterres’s role in the promotion of multilateral climate-change agreements.²³⁶ It is unlikely that such “good offices” would be of much use in the present context, considering Mr. Guterres’s vehement condemnation of Russia.

B. A Suggested Methodology – A Bilateral Treaty

1. The General Assembly authorizes the SG to enter into negotiations with the Republic of Ukraine to set up a Special Tribunal

To start the process, the Government of Ukraine could write to the Office of the UN Secretary General asking to negotiate for the creation of a tribunal.²³⁷ The UNGA could request, by the passing of a resolution by the requisite two-thirds majority, that the Secretary General enter into negotiations with Ukraine to conclude a bilateral agreement and establish a Ukrainian international tribunal for the crime of aggression. As stated before, the UNGA does not have the direct authority to create the tribunal. However, such direct authority is unnecessary as illustrated by the case of ECCC.²³⁸ The UNGA created the ECCC by passing Resolution 57/228, requesting the Secretary General to continue bilateral negotiations between the Government of Cambodia and the Secretary

²³¹ U.N. Charter, Art. 98.

²³² *Id.*

²³³ Trahan, *supra* note 227.

²³⁴ Council on Foreign Relations, *The Role of the UN Secretary-General*, COUNCIL ON FOREIGN RELS. (Oct. 5, 2021), <https://www.cfr.org/background/role-un-secretary-general>.

²³⁵ UN, *The Role of the Secretary General*, UNITED NATIONS, <https://www.un.org/sg/en/content/the-role-of-the-secretary-general#:~:text=The%20Charter%20describes%20the%20Secretary,and%20other%20United%20Nations%20organs> (last visited June 18, 2022).

²³⁶ Council on Foreign Relations, *supra* note 234.

²³⁷ White Paper on the Model Special Tribunal, *supra* note 136, at 5.

²³⁸ G.A. Res. 57/228.

General to establish an extraordinary court.²³⁹ After the end of bilateral negotiations, the UNGA passed Resolution 57/228(b), which approved the ECCC.²⁴⁰

2. *The Secretary General enters into negotiations with Ukraine – A bilateral treaty*

The UNGA's recommendation to the Secretary General will provide him with the political mandate to negotiate the creation of the tribunal and conclude a treaty between the United Nations, as an international institution with legal personality, and the Government of Ukraine.²⁴¹

3. *Ukraine's role – Parliamentary approval*

While the authority to conclude treaties are with the President of Ukraine under Article 106(3) of the Constitution, the Verkhovna Rada (Parliament) holds the ultimate authority to approve the treaties and "consent to the binding character of international treaties of Ukraine."²⁴² Such approved treaties, consented to be binding by the Verkhovna Rada, become a part of the national legislation of Ukraine under Article 9 of the Constitution.²⁴³ The CCU can also issue advisory opinions to the President and his Cabinet, on the constitutionality of the treaty, if requested by the President or his Cabinet, under Article 151 of the Constitution.²⁴⁴

C. *Appointment of Key Tribunal Personnel – Practical considerations*²⁴⁵

1. *In general: A rolling series of appointments*

Not everyone that will work for the tribunal needs to be hired all at once because that would be inefficient. Personnel should be brought on where necessary and where needed to accomplish the mandate of the tribunal. In addition, contractors can be brought on throughout the life of the tribunal as needed so that not everyone has to be an employee of the tribunal all at once. Contracting out specific and needed services will save money while maximizing effort.

2. *The Prosecutor*

A prosecutor must not only be a good lawyer but an experienced diplomat and politician in his or her own right. In addition, the Prosecutor must have international criminal law experience at the highest level. We have individuals who have been international prosecutors and have set up international courts and tribunals. There is no need to hire an individual who has little to no experience in prosecution at the international level. Moreover, selecting someone based on

²³⁹ G.A. Res. 57/228.

²⁴⁰ G.A. Res. 57/228(b).

²⁴¹ White Paper on the Model Special Tribunal, *supra* note 136, at 5.

²⁴² CONSTITUTION OF UKRAINE, June 28, 1996, Art. 106(3).

²⁴³ CONSTITUTION OF UKRAINE, Art. 9.

²⁴⁴ CONSTITUTION OF UKRAINE, Art. 151.

²⁴⁵ The remaining sections are direct reflections of the Founding Chief Prosecutor of the Special Court for Sierra Leone, Professor David M. Crane, who used these techniques, leading to the successful establishment of what was the world's first hybrid international war crimes tribunal.

geographic location or regional/international political purposes is a futile gesture and could prove to be counterproductive. Thus, experience must be the focus rather than political gestures.

3. The Registrar

Like the prosecutor, only an individual who has been an experienced registrar in an international tribunal or court should be considered. Again, there are numerous persons internationally who have that experience. The position of registrar is critical for efficient running of the tribunal. Prior experience will ensure that the tribunal will run smoothly and accomplish its mandate.

4. The Judiciary

Judges for any court or tribunal should have international judicial experience with a proven track record of judicial abilities in a court at the trial level or the appellate level. Today, there is a broad base of experience within international judicial circles and that pool of jurists must be where the judges will be appointed for this tribunal.

D. Funding Options

Funding is always a challenge. It is subject to the ebb and flow of political and diplomatic perspectives and concerns. Fortunately, there are past case studies that demonstrate how best to fund this new tribunal. The basic rule is that there cannot be any appearance of impropriety, such as using funding to influence the accomplishment of the tribunal's mandate or other outcomes.

1. UN funding

The standard methodology is to place the funding of the tribunal within the budgetary process of the UN system. Though cumbersome and slow, a UN-funded tribunal has a consistent stream of monies that the tribunal can rely on to accomplish its mandate. The oversight of the expenditures would be accomplished within the UN system as well. Also, consider a series of subvention grants as an alternative method.

2. State party contributions

Another option would be to seek voluntary contributions by any and all States Parties who have an interest in the tribunal and its mandate. The contributions would be annually based on a submitted budget by the tribunal. Oversight would be through an appointed management committee overseen by the UN Office of the Legal Advisor. This system has worked in the past with the SCSL and it has been found to be more efficient than the established UN funded procedures. The challenge is that it puts the burden for raising funds on the tribunal's senior personnel. This can be a distraction as well as potentially raising the appearance of impropriety because of its capability of influencing outcomes. Contributions can be not only in cash, but also property and the secondment of personnel.

E. Location of the Special Tribunal for Ukraine

Initial location of the tribunal would be where it is most practical and efficient. A temporary location should be considered to ensure that choosing a permanent location does not slow down the initial set up of the tribunal. The two important factors in location are both political factors and security. A possible early location could be The Hague or in Geneva via UN facilities. A permanent location should be closer to Ukraine for symbolic and political reasons, but a downside of the tribunal being in Ukraine is that it could detract from the appearance of independence and impartiality and may face a very real threat of destruction by the Russian Federation and its allies. Thus, Warsaw, Poland would be within a close proximity to Ukraine, yet allowing for securing the tribunal from outside threats.

F. Logistical Considerations – Further practical considerations

1. Personnel

The focus on hiring persons should be around the mandate of the tribunal and its mission. Personnel should have experience in operating at the international level, particularly in working with international courts and tribunals. Hiring should be done in a graduated and on a “as needed” basis. The hiring of contractors is an important consideration as opposed to career UN personnel. Since the focus will be on experience, use of UN career personnel may be appropriate and necessary. If the hiring process is within the UN administrative system, then the lack of an ability to quickly bring on needed personnel has to be factored in the initial set up of the tribunal. If the tribunal personnel hiring system is outside the UN administrative system, efficiency in bringing on personnel will increase and make it easier to hire based on need or hire contractors. Pay scales and grading of positions would be similar to the UN system for ease of personnel transition and budgeting. This method was used by the Special Court for Sierra Leone with great success.

2. Translators and Associated Services

There is a strong need for qualified interpreters and translators from the very beginning for simultaneous translation capability which will be required for defendants and victim testimony alike. The languages of immediate need would be Russian and Ukrainian. Accommodating other languages can be accomplished on a case-by-case basis.

3. Buildings

It is imperative that the buildings that house the tribunal can withstand attempts by outside forces to destroy the facilities. Hardening of the site will be very important and use of military facilities should be considered. It may not be necessary to build a tribunal facility unless procurement of buildings by other means proves futile.

4. *Transportation*

Secure vehicles will be necessary to ensure safety of tribunal personnel. Armored cars and other vehicles are a requirement due to a very real threat. These vehicles can be donated by interested States Parties to the tribunal.

5. *Security for the tribunal*

Security is going to be an expensive and constant need for personnel, property, victims/witnesses, residences, etc. The risk of destruction, harassment, and kidnapping is very real. Close protection of key tribunal personnel is paramount, including for all witnesses. Location of the tribunal will be critical and influences the risk assessments and security that is needed for protection. Again, location on a military base may be necessary, and use of a UN or domestic armed force must be considered as well.

G. *The importance of setting up a strategic plan: Build the plan around the mandate*

A strategic plan is essential for an efficient creation of an international tribunal. A suggested template can be found in the Appendix A, which provides a guide. Such a plan assists all organs of the tribunal to coordinate and build a justice mechanism that meets the mandate given to it by the international community. A plan also allows the oversight organization to understand the progress of the new tribunal in accomplishing its mandate and allow for further assist in funding and budgeting.

H. *A prosecution plan – Practice Tips*

1. *Consider not just the law, but the politics, diplomacy, practical, as well as cultural perspectives*

A prosecutor needs to create a prosecution plan that establishes culpability of potential actors based on the mandate, the facts, and the law. The creative documents will in large measure lay out the crimes over which the tribunal has the subject matter jurisdiction, as well as *in personem* and temporal jurisdiction. In this case, the crime in question is the crime of aggression, an established international crime.²⁴⁶

Along with considering the law, an experienced prosecutor should also consider the political and diplomatic setting and ramifications of charging perpetrators for international crimes. How does the investigation and indictment of various senior actors, to include a sitting Head of State, impact the region where the atrocity takes place? Ethically, a prosecutor cannot consider or consult with any outside actors related to the alleged crimes for a favor or influence, yet a prosecutor can certainly develop professional and even personal relationships with various political or diplomatic actors to maintain the practical support necessary to accomplish the tribunal's mandate. Diplomats will appreciate understanding the overall strategic plan, being briefed on the status of various

²⁴⁶ *The Crime of Aggression – A Brief History*, *supra* note 91.

actions, and being asked for their perspectives politically and practically on the overall effectiveness of the tribunal.

Practically, the prosecutor answers to many constituents locally, regionally, and internationally: UN organizations, States Parties, regional organizations, nongovernmental organizations, various elements of civil society, the press and media, and most importantly, the victims and their families. Each of these constituents has direct or indirect interest in the overall plan, the impact of the tribunal's actions on their individual missions and mandates, and in coordinating their actions with the work of the tribunal. These constituents need to be consulted and methodologies developed to work with the tribunal. All this was done with great effectiveness by the Special Court for Sierra Leone.

2. Is the justice we seek the justice they want?

The final consideration is more of a recognition of how the local and regional cultural entities view justice and what they would consider a just result to the tribunal's work. A key question to ask is: **Is the justice we (the international community) seek, the justice they (the victims) want?** At the end of the day, the only focus for any international tribunal is seeking justice for the victims. All of this is for and about the victims. Considering and factoring a type of cultural perspective into the prosecution plan will greatly assist the victims in understanding that their interest is the priority.

I. Other considerations

1. Political "buy in"

The bright red thread of the creation and sustainment of international tribunals is politics. This is not political influence, but the simple fact that these justice mechanisms are creatures of political events and political compromise. Politics are in the DNA of any tribunal or court. The efficient and successful efforts by a tribunal in achieving its mandate is through the political support of the international community. Without it, the justice mechanism will not succeed in achieving justice for the victims of an atrocity.

2. Involving academia

Academics are an important resource to assist the tribunal at many levels. This support can come in the form of research as well the provision of interns. An academic consortium made up of various universities and think tanks is a very efficient use of bona fide experts in the fields of modern international humanitarian and criminal law. Interns are an excellent source of onsite support to trial teams and other tribunal offices.

3. Outreach

This is an essential and absolute requirement. Outreach within the region and location of the atrocities establishes confidence and understanding within the locality of the crimes and with the victims. As a tribunal is for and about the victims, they need to be heard, listened to, and asked for

their perspectives. This can be done by using various media techniques. Most importantly, town-hall meetings with senior tribunal personnel are critical. Without an outreach program, the ultimate success of the tribunal will be in question. The Special Court for Sierra Leone set the standard for a successful outreach program.

4. An advisory board?

There is broad experience practically and academically within the international community related to atrocity accountability. The establishment of an advisory board to assist various organs of the tribunal may be of use and possibly ensure that various issues, concerns, and challenges are wholly and carefully considered.

5. The importance of NGOs

Nongovernmental organizations are an important resource and should be used appropriately to support the tribunal within their individual mandates. NGO's have unique perspectives and information, and drawing upon this will enhance efficiency. The establishment of an NGO or civil society advisory board has shown to be an effective way of coordination within the NGO community.

6. Building a relationship with the press and other media

The press and social media will tell the "story" of the tribunal and ensure that the efforts of the tribunal are known and highlighted in a way that assists the tribunal in ensuring political and practical buy in for the tribunal's work. Social media is also an untapped and misunderstood medium that can assist the tribunal in ensuring awareness and understanding of the actions by the tribunal. Regular meetings and conferences with the press helps build understanding and trust between the tribunal and media outlets, as well as informing the interested public.

7. Witness protection

Due to the circumstances of the conflict and the ability of the Russian Federation to reach potential witnesses, worldwide victim and witness protection is critical and will be an expensive and necessary program. Experienced witness protection personnel will have to be hired and various covered locations will need to be considered to ensure that the tribunal's witnesses are kept safe to testify at future trials.

A witness support unit should be created for witness protection within the Office of the Prosecutor. A standard practice within the United States, for example, is ensuring the safety of critical witnesses. Safety is one consideration; another is to ensure the witness is telling the truth. There is a pool of experienced witness support personnel internationally and the creation of such a unit is encouraged. This was done successfully by the Office of the Prosecutor, Special Court for Sierra Leone.

8. *A Public Defender's Office*

International tribunals need to be seen as fair and open by all participants and observers. All alleged defendants are presumed to be innocent until proven guilty beyond a reasonable doubt in an open tribunal. Fundamental fairness is key. Defense teams need to be given equal support to ensure that fairness. An office that ensures defense teams are supported shows that a tribunal is truly fair.

VIII. CONCLUSIONS/RECOMMENDATIONS

The setting up of an international war crimes tribunal to prosecute the crime of aggression perpetrated by the Russian Federation against Ukraine is very possible. The international community must take this political moment to hold Vladimir Putin and his commanders accountable for all of their crimes, including the crime of aggression. Heads of State are no longer immune for their acts while in office when they have committed international crimes.

An international tribunal created with a proper mandate of greatest responsibility, with the support of Ukraine, funded appropriately based on a sustainable budget, with a proper organization based on a realistic strategic plan and prosecution plan, will prove to be the most effective way of dealing with the crime of aggression perpetrated by the Russian Federation.

Strongmen around the world are watching and waiting to see what the international community does in response to the Russian aggression. If we do nothing or create a “half measure,” it will create a precedent, leading the world into a dark and unstable place. A Special Tribunal for Ukraine is the most efficient and effective justice mechanism to uphold the rule of law and restore international peace and security not just in the conflict zone, but around the world.

IX. APPENDICES

A. *General Milestones for the Set Up of the Special Tribunal for Ukraine*

1. Create a working group of interested States. The goal is to make a recommendation for an effective and efficient justice mechanism to hold the Russian Federation and its leadership accountable an act of aggression for the invasion of Ukraine.
2. Draft a United Nations General Assembly resolution that calls for accountability for the aggressive invasion of Ukraine by the Russian Federation, authorizing the UN Secretary General to take all necessary actions to ensure there is accountability for the Russian Federation's unlawful actions and including negotiations with Ukraine to create an international tribunal for the crime of aggression.
3. Enter into negotiations with Ukraine to create an international war crimes tribunal called the UN Special Tribunal for Ukraine.
4. Create a management committee within the Office of the Legal Advisor of the UN after agreement and signing.

5. Hold a donors' conference for interested State Parties for funding and in-kind contributions.
6. Establish the organs of the tribunal with the appointment of a Chief Prosecutor/Deputy and Registrar first.
7. Begin putting together the Office of the Prosecutor and Registry.
8. Open an initial office in New York or Geneva. Begin planning a set up of an operational location, to include a field office in Ukraine.
9. Create a Trial Chamber and an Appeals Chamber when appropriate, after full operational capacity by the Office of the Prosecutor and Registry.

B. Suggested Strategic Considerations

Mandate of the Special Tribunal: Prosecute those who bear the greatest responsibility for the crime of aggression against Ukraine by the Russian Federation and other associated international crimes.

Two possible initial location(s): New York, The Hague, Geneva.

Possible operational location(s): Warsaw, Poland; Berlin, Germany; Paris, France, along with field offices in Ukraine when and where possible/needed.

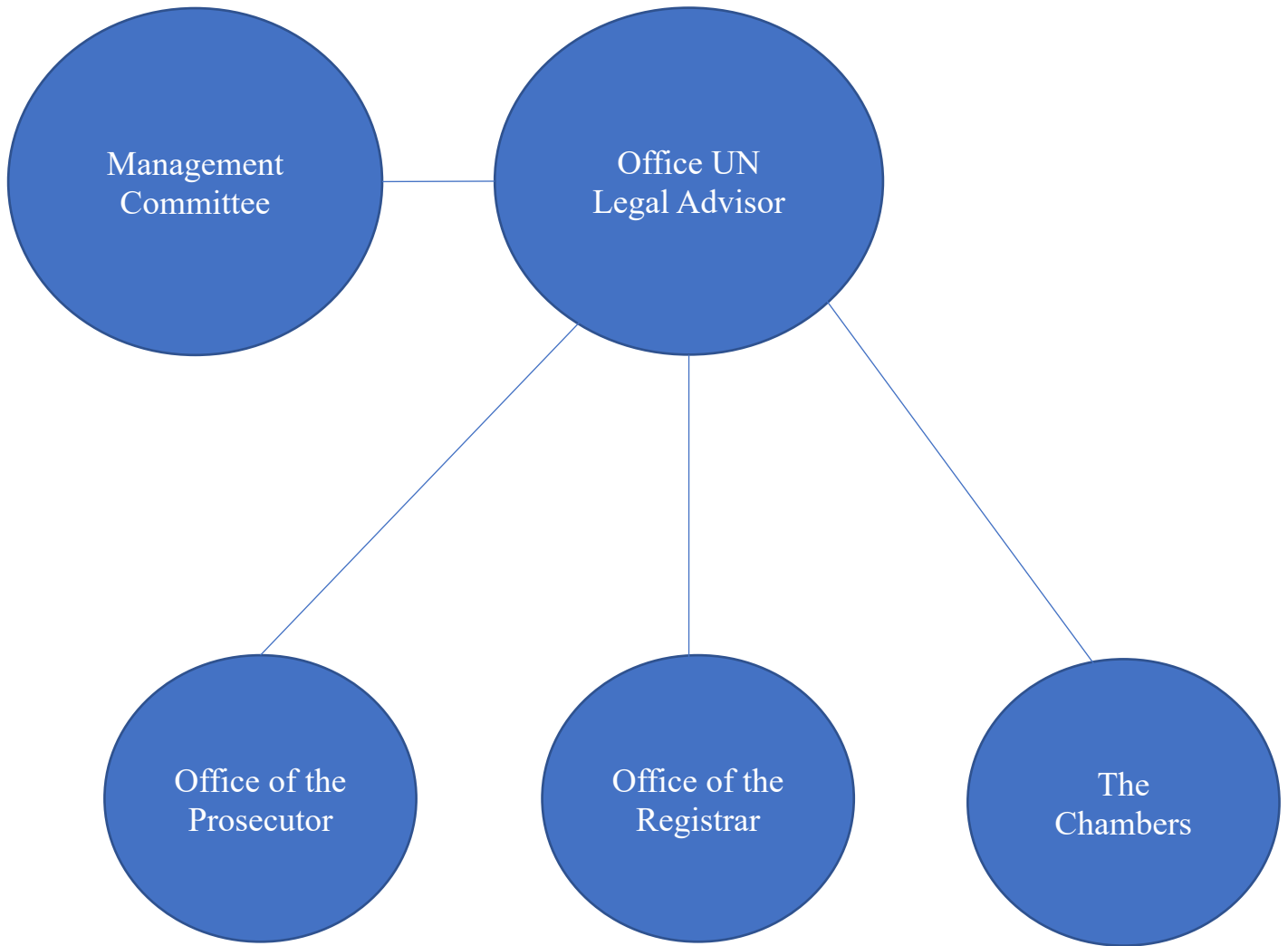
C. Funding

- Funding must be voluntary and overseen by a Management Committee within the UN Office of the Legal Advisor.
- In-kind contributions could be solicited as well as office space, furniture, information technology, vehicles, personnel secondment, security, etc.
- Estimated initial first year costs are \$25 million (based on the initial cost of the UN SCSL, 2002-03). The goal is to hold a donors' conference annually to raise those funds.

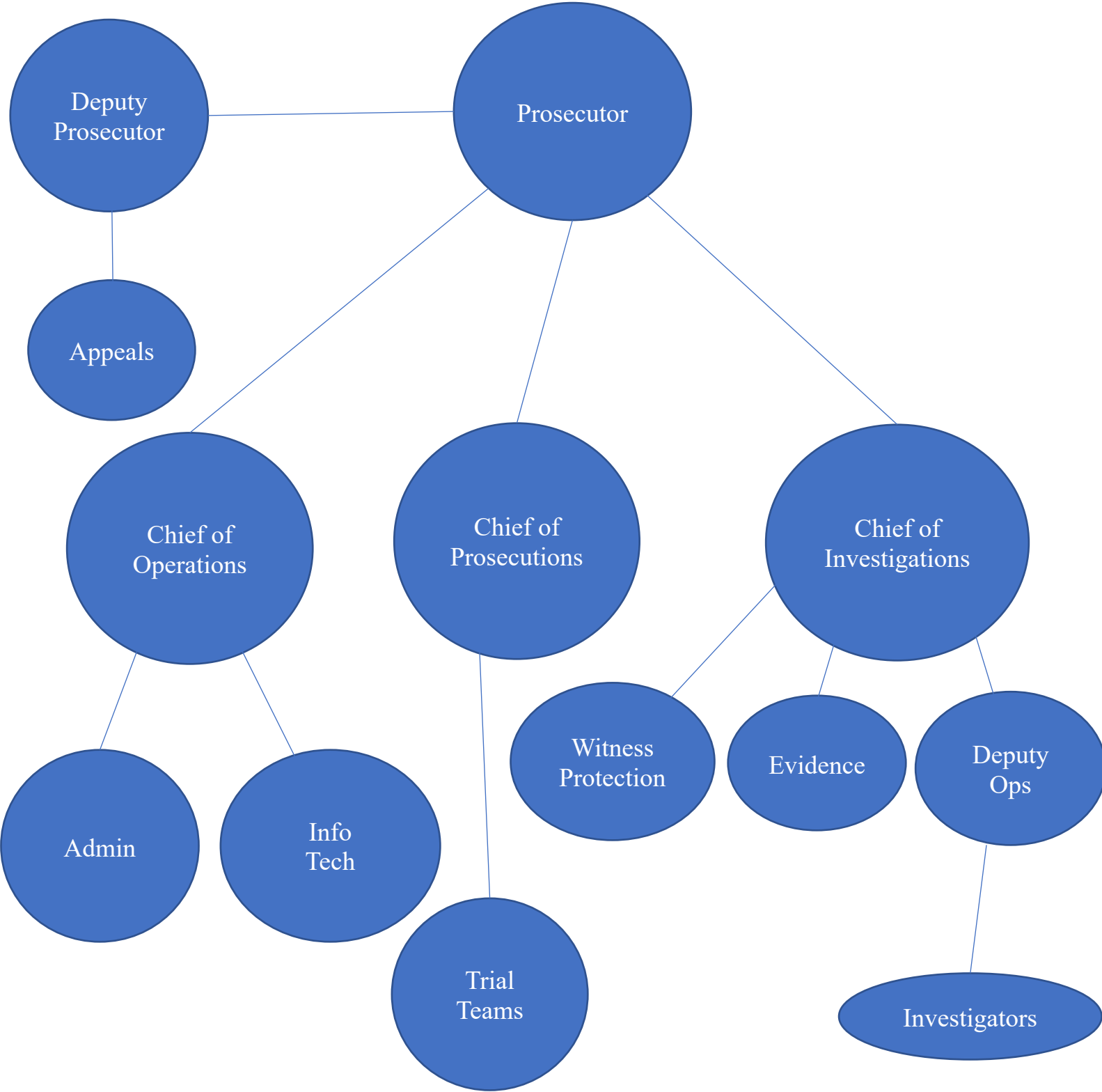
D. Organizational Charts

See next page.

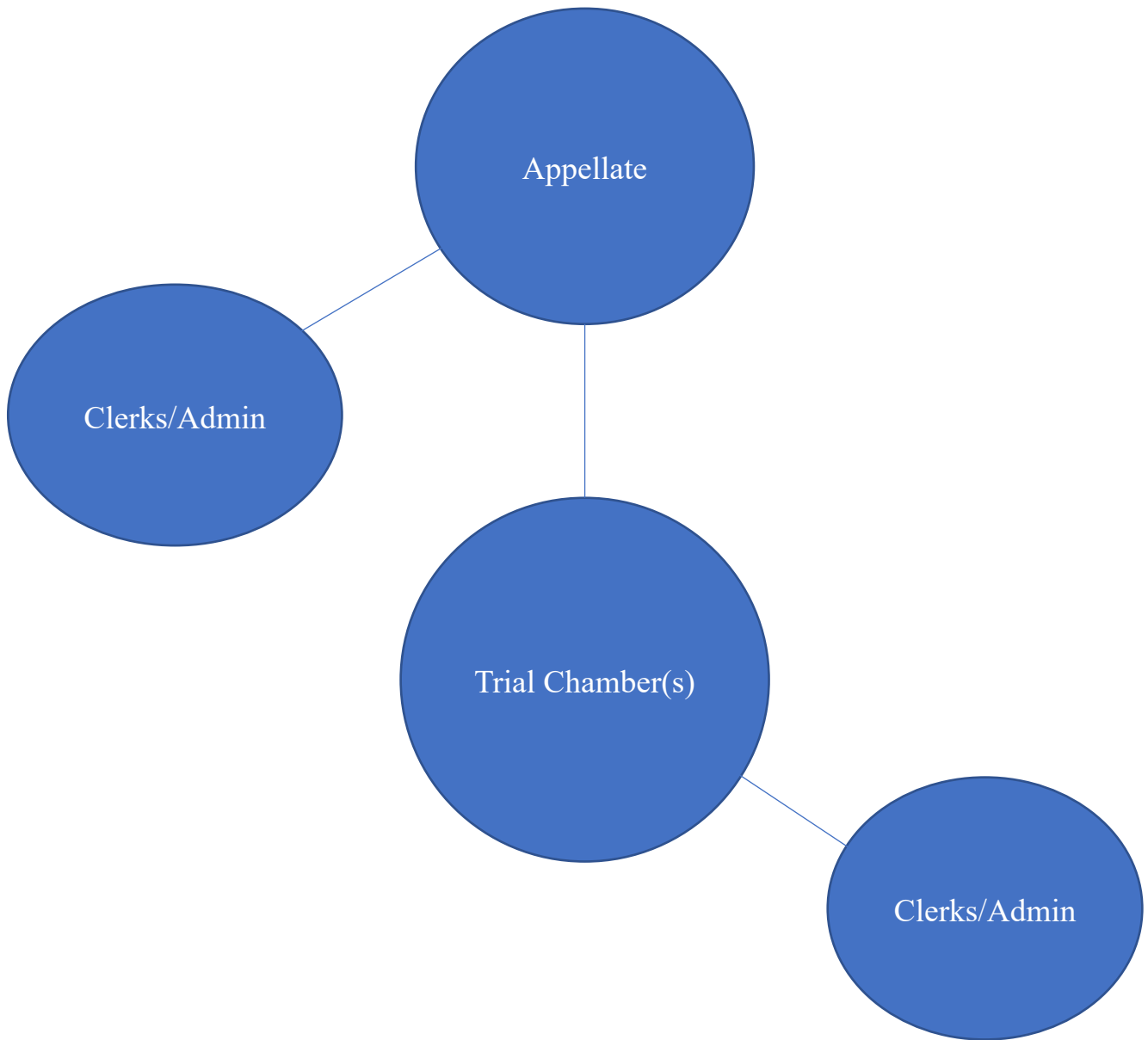
Organizational Chart - General



Office of the Prosecutor



Chambers



Office of the Registrar

